

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.

RECORD ON APPEAL

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CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

James Robert Malloy,

Plaintiff,

vs.

Case No.: 2010-CP-04-1845

Swain N. Thompson, Jr.,

Defendant.

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COMMON PLEAS AND
GENERAL SESSIONS

In the Matter of:
Estate of Robert L. Chamblee

Case No.: 2012-CP-04-1433

James Robert Malloy,

Plaintiff,

vs.

ORDER ON MOTION TO AMEND,
MOTION TO CONSOLIDATE,
MOTION TO DISMISS, AND
MOTION TO COMPEL
ARBITRATION

Swain N. Thompson, Jr., Merrill Lynch,
Pierce, Fenner & Smith, Inc., Joseph T.
Argo, and Greene and Company, L.L.P.,

Defendants.

In the Matter of:
Estate of Robert L. Chamblee

Before this court are a Motion to Amend the Complaint in case number 2010-CP-04-1845 in which the Plaintiff seeks to add additional Defendants; Plaintiff's Motion to Consolidate case number 2010-CP-04-1845 with case number 2012-CP-04-1433; Defendant Thompson's Motion to Dismiss case number 2012-CP-04-1433; and Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc.'s ("Merrill Lynch") Motion to Dismiss and Compel Arbitration in case number 2012-CP-04-1433.

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The Plaintiff originally filed this action in Anderson County Probate Court against Defendant Thompson concerning various causes related to an alleged incompetency of the decedent Robert L. Chamblee ("Decedent"). The causes of action include claims to set aside Decedent's last will and revocable trust and other claims related to allegations of tortious interference with expected inheritance and gifts. The probate action was subsequently removed to this court upon Plaintiff's motion and the Order of Removal signed by the Anderson County Probate Court filed May 18, 2010.

On October 6, 2011, Plaintiff filed a Motion to Amend Plaintiff's Complaint to add Defendants Merrill Lynch, Joseph T. Argo ("Argo"), and Greene and Company, L.L.P. ("Greene and Company"). The proposed Amended Complaint asserts two causes of action against the new defendants for aiding and abetting tortious interference with expected inheritance and gifts and conspiracy. The latter cause of action was also asserted against Defendant Thompson.

Defendant Thompson opposed the Motion to Amend on the grounds that the circuit court, on removal from probate court, lacks subject matter jurisdiction beyond the causes of action to set aside the will and trust of Decedent. Plaintiff's Motion to Amend was argued before this court on March 12, 2012, and this court took the matter under advisement.

On April 16, 2012, Plaintiff filed a new action in case number 2012-CP-04-1433 which was nearly identical to Plaintiff's proposed Amended Complaint in 2010-CP-04-1845 except that it did not contain the causes of action for setting aside Decedent's will. Simultaneous with the filing of the new action, Plaintiff also filed a Motion for Consolidation of both cases. All Defendants in case number 2012-CP-04-1433 were

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served and responded. Merrill Lynch filed a Motion to Dismiss and Compel Arbitration, and Defendant Thompson filed a Motion to Dismiss 2012-CP-04-1433 and opposed the Plaintiff's Motion to Consolidate. Defendants Argo and Greene and Company filed responsive pleadings.

For the reasons stated below, the Court (1) grants Plaintiff's Motion to Amend the Complaint to add additional parties in case number 2010-CP-04-1845 as provided in Plaintiff's proposed Amended Complaint attached to its motion; (2) grants Plaintiff's Motion to Consolidate case number 2010-CP-04-1845 with case number 2012-CP-04-1433; (3) denies Defendant Thompson's Motion to Dismiss case number 2012-CP-04-1433, and (4) denies the motion of Merrill Lynch to dismiss and compel arbitration in case number 2012-CP-04-1433.

I. Motion to Amend Complaint in Case Number 2010-CP-04-1845.

Defendant Thompson argued that a removal to circuit court of Plaintiff's petition to set aside the will and trust of Decedent and remove Thompson as personal representative is effectively an appeal of the probate court orders admitting the will to probate and appointing Thompson as personal representative. The circuit court then would apply the standards for appellate review in deciding Plaintiff's claim to set aside the will. Thompson further argues that the appellate rules and standards differ significantly from the procedures for trying new matters and therefore the causes of action for setting aside the will and trust should not be heard at the same time as the remaining causes of action. Thompson further argued that some of Plaintiff's causes of action sound in equity and that the probate court is a court of law which would make equitable and legal proceedings incompatible.

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The removal statute in S.C. Code Ann. § 62-1-302(d) provides that the circuit court in cases removed from probate court "shall proceed upon the matter de novo."

Under the South Carolina Probate Code, an admission of a will to probate and the appointment of a personal representative through the informal probate procedures are not adjudicated actions but instead are *ex parte* administrative statements. See S.C. Code Ann. § 62-3-302 ("upon receipt of an application requesting informal probate of a will, the court, upon making the findings required by § 62-3-303, shall issue a written statement of informal probate.") *cf.* § 62-3-309 ("a declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings."). With the removed case being heard *de novo*, the circuit court procedures for determining the tort claims are not incompatible with those for setting aside the will and trust. See S.C. Code Ann. § 62-1-304 (providing that generally the Rules of Civil Procedure adopted for the probate court and in their absence those adopted for the circuit court govern formal proceedings); see also S.C. Code Ann. § 62-1-103 (specifying that principles of both law and equity supplement the provisions of the probate code).

South Carolina Code § 62-1-302 sets forth the subject matter jurisdiction of South Carolina courts regarding decedents' estates. Subsection (a) states the general rule that "the probate court has exclusive original jurisdiction over all subject matter related to estates of decedents." S.C. Code § 62-1-302(a)(1). Matters related to "estates of decedents" include the ability of a court to determine the property that belongs to a decedent's estate. See S.C. Code Ann. § 62-3-706 (requiring personal representative to file inventory and appraisal with probate court detailing assets of decedent's estate). Since the probate court is empowered to determine the assets that comprise a decedent's

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estate, the removal subsection transfers that same power to the circuit court. Section 62-1-302(d) grants the circuit court jurisdiction over actions to try title. S.C. Code § 62-1-302(d)(3). This removal provision directs the circuit court to hear matters related to determining the probate assets of a decedent and who owns title to property. An action to try title would include a determination of the proper titleholder of assets transferred through an invalid *inter vivos* conveyance when the assets would otherwise belong to the decedent's estate. See Ex parte Cannon, 385 S.C. 343, 685, S.E. 2d 814 (Ct. App. 2009) (holding court of common pleas had subject matter jurisdiction on probate court removal to hear matters pertaining to claims of misappropriation of potential estate assets by a trustee).

The probate code also gives this court subject matter jurisdiction by conferring authority to handle matters concerning powers of attorney under S.C. Code § 62-5-503. Plaintiff's proposed Amended Complaint alleges that Defendant Thompson, with the assistance of the remaining Defendants, used two invalid powers of attorney to remove assets from Decedent's estate. (see *e.g.*, Prop. Amend. Compl. ¶¶ 27, 28, 36, 40, 41, 44-46, 50, 103, 111, and 119). South Carolina Code § 62-5-503 provides "The probate court has concurrent jurisdiction with the circuit courts of this state over all subject matter related to the creation, exercise, and termination of powers of attorney governed by the provisions of this part . . ." S.C. Code Ann. § 62-5-503 (2009).

The gravamen of Plaintiff's claims in his original and proposed Amended Complaint involve allegedly improper transfers by Defendants of Decedent's property into an invalid revocable trust, with Defendant Thompson as remainder beneficiary, created while Decedent was incompetent and subject to undue influence. These

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purportedly void conveyances from Decedent removed property from Decedent's estate. Plaintiff is seeking a determination of the proper title holder to these allegedly wrongfully conveyed assets. Thus these claims are within the subject matter jurisdiction of the probate court. See Judy v. Judy, 393 S.C. 160, 169, 712 S.E.2d 408, 412 (2011) (emphasizing "the broad wording of [§§ 62-1-302(a)(1) and 62-1-201(4)], particularly the phrase 'all subject matter related to estates of decedents,' " allowed probate court to rule on a tort claim for waste).

In addition to the probate code's grant of subject matter jurisdiction related to matters determining the probate estate of decedents and the creation and exercise of powers of attorney, the probate code also provides concurrent jurisdiction between the probate and circuit courts regarding external trust affairs. S. C. Code Ann. §62-7-201(c). South Carolina Code § 62-1-302(d)(4) provides that the circuit court on removal has jurisdiction to proceed *de novo* upon matters related to trusts. In addition to causes of action for setting aside the purported revocable trust of Decedent, Plaintiff has alleged that Defendants used the purported trust to divert assets away from Decedent's probate estate and that Decedent's trust was the vehicle for tortiously interfering with Plaintiff's expected inheritance and gifts. (see e.g., Prop. Amend. Compl. ¶¶ 27, 28, 36, 40, 41, 44-46, 50, 103, 111, and 119).

The Plaintiff's claims set forth in paragraph 35 of the proposed Amended Complaint are in excess of \$5,000. Plaintiff also alleges that Defendants wrongfully transferred other assets of Decedent that would potentially comprise estate assets if Plaintiff's claims are proven. See e.g., Prop. Amend. Compl. ¶ 47). Plaintiff has sought

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damages in his prayer for relief for tortious interference with inheritance, aiding and abetting the same and conspiracy. Prop. Amend. Compl., Prayer ¶¶ D and E.

The Probate Code grants the circuit court subject matter jurisdiction over "actions in which a party has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value..." S.C. Code Ann. § 62-1-302(d)(4). Plaintiff's claim of tortious interference with inheritance and gifts in connection with these assets constitutes a jury claim meeting the statutory amount. See Bateman v. Rouse, 358 S.C. 667, 673, 596 S.E.2d 386, 389 (Ct. App. 2004) (holding right to jury trial preserved for legal actions and that action for damages is an action at law); see also Nat'l Bank of S.C., 283 S.C. 438, 440, 322 S.E.2d 689, 690 (1984) (whether party is entitled to jury trial is determined by the pleadings); see also In Re Estate of Russell, 311 S.W.3d 528 (Tex. App. 2009) (upholding jury's verdict for tortious interference with inheritance).

The Court of Common Pleas has subject matter jurisdiction to hear Plaintiff's claims through both case numbers 2010-CP-04-1845 and 2012-CP-04-1433. Based on the broad wording of S.C. Code § 62-1-302(a)(1) and (d), the court has subject matter jurisdiction upon removal to hear all of Plaintiff's claims in case number 2010-CP-04-1845. In case number 2012-CP-04-1433 the court has subject matter jurisdiction under S.C. Code §§ 62-7-201 and 62-5-503 because the causes of action all relate to the external affairs of the trust and the creation and exercise of Decedent's power of attorney.

II. Motion for Consolidation.

The two cases filed by Plaintiff contain identical allegations and duplicated causes of action except that case number 2012-CP-04-1433 does not contain the three claims to set aside the will of Decedent for lack of mental capacity, undue influence and mistake

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contained in case number 2010-CP-04-1845. These two actions therefore contain common questions of law and fact. At the time this matter was heard on September 20, 2012, the additional Defendants Merrill Lynch, Argo, and Greene and Company had been served with the Summons and Complaint in case number 2012-CP-04-1433. Since an order on the Motion to Amend had not yet been issued, the new Defendants have not yet been served with the pleadings in case number 2010-CP-04-1845. If the court were to dismiss case number 2012-CP-04-1433, Defendants Merrill Lynch, Argo, and Greene and Company would have to be served and the case started anew before Merrill Lynch's Motion to Compel could be heard. At this stage, Merrill Lynch has already filed a Motion to Dismiss and Compel Arbitration in case number 2012-CP-04-1433 in which the parties and the Court are prepared to entertain. A dismissal of case number 2012-CP-04-1433 would cause a further delay in this action which the Court wishes to avoid. Therefore a just, speedy, and inexpensive determination of this action would be best served by a consolidation of the two actions in order to allow the claims and defenses to proceed. See Rule 1, SCRCP.

III. Defendant Thompson's Motion to Dismiss.

Defendant Thompson filed a Motion to Dismiss case number 2012-CP-04-1433 on the basis that Plaintiff is not the real party in interest to bring his claims and lacks standing to prosecute the causes of action except for the setting aside of the will and trust.¹ Thompson submits that because he is the appointed personal representative, he is the only person with standing to bring claims of fraud, breach of fiduciary duty, and

¹ Defendant Thompson also moved to dismiss on the basis of the lack of subject matter jurisdiction which this court denies pursuant to the reasons stated in section I.

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related claims. Plaintiff countered that as the sole beneficiary of Decedent's prior will of 1999 and the primary beneficiary of Decedent's prior estate plan, he has standing to bring his claims as the real party in interest. The South Carolina Supreme Court has recognized the principle that a trust beneficiary may bring a derivative claim on behalf of the trust where the trustee or third persons join in the wrong and receive a benefit therefrom. See Neal v. Bleckley, 51 S.C. 506, 29 S.E. 249, 257 (1898). The South Carolina Supreme Court stated:

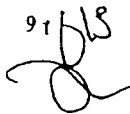
If a trustee refuse, after demand, to bring action on behalf of the trust estate or the beneficiaries thereof, or if he has an adverse interest or has conspired to defeat the trust, the beneficiary may himself bring the action against the third person, joining the trustee as a defendant. In doing so, the beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust.

Bailes v. Southern Ry. Co., 227 S.C. 176, 182-83, 87 S.E.2d 481, 484 (1955); see also Restatement (Second) of Trusts §282 (1959) ("If the trustee improperly refuses or neglects to bring an action against the third person, the beneficiary can maintain a suit in equity against the trustee and the third person."); see also Pillsbury v. Karmgard, 27 Cal.Rptr.2d 491, 22 Cal. App.4th 743, 756 (1994) (recognizing that California's "real party in interest" statute has not modified common law of beneficiary standing under Restatement (Second) of Trusts § 282).

Since Plaintiff as the beneficiary under Decedent's prior estate plan may derivatively bring an action on behalf of the trust, he is a real party in interest under Rule 17(a), SCRCP.

IV. Motion of Defendant Merrill Lynch to Dismiss and Compel Arbitration.

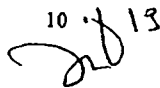
Plaintiff has asserted two causes of action against Merrill Lynch – for tortious

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interference with inheritance and gifts and for conspiracy. Merrill Lynch filed a motion to compel arbitration based on two Client Relationship Agreements that Decedent purportedly executed, one individually and one as trustee of the Robert L. Chamblee Trust. The Client Relationship Agreements included arbitration agreements between Decedent and Merrill Lynch. Merrill Lynch acknowledges that Plaintiff did not sign the Client Relationship Agreements containing the arbitration clauses. However, it contends that as a nonsignatory, Plaintiff should be estopped from denying the arbitration clauses since it claims Plaintiff is a third-party beneficiary of the accounts and that Plaintiff's lawsuit has a substantial relationship to the accounts.

Plaintiff's Complaint and proposed Amended Complaint both seek to set aside the December 11, 2002 revocable trust allegedly executed by mistake or while Decedent was incompetent or under undue influence. See Compl. 2012-CP-04-1433, ¶¶ 58-66. Plaintiff contends the trust is void *ab initio* and in the fourth cause of action seeks to set aside transfers to the trust. See *Id.* at ¶¶ 67-69. Plaintiff is not seeking benefits from the trust but instead seeks to annul the transfers to the trust held in accounts with Merrill Lynch. Plaintiff's claims, therefore, do not pertain to the relationship between Merrill Lynch and Decedent.

The United States Supreme Court has held under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steel Workers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 (1960); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 591, 553 S.E.2d 110, 116 (2001) ("the FAA does not require parties to arbitrate when they have not agreed to do so...").

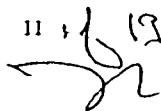
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In proper cases, courts applying the FAA have required nonsignatories to arbitrate disputes pursuant to an arbitration provision within a contract executed by other parties. See Int'l Paper Co. v Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000)(holding that nonsignatory could be estopped from disclaiming arbitration agreement when it seeks benefits under the contract).

The Second Circuit Court of Appeals recognized five theories "aris[ing] out of common law principles of contract and agency law" that could provide a basis "for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel." Thomson-CSF, S.A. v. Arn. Arbitration Ass'n, 64 F.3d 773, 776 (2nd Cir. 1995). A review of the pleadings and the documents submitted with the Motion to Compel Arbitration by Merrill Lynch show that none of the above-stated factors apply to Plaintiff in this action.

This Court has also reviewed other case law submitted by Merrill Lynch in its motion in addition to consideration of oral arguments of counsel. This Court finds that there are absolutely no good grounds on which to base an order to compel arbitration in this case. The motion of Merrill Lynch to compel arbitration is therefore denied.

Plaintiff responded in its brief that it would be moving for sanctions against Merrill Lynch under the South Carolina Frivolous Civil Proceedings Act for making the motion to compel arbitration. At the hearing Plaintiff's counsel said it was not asking for sanctions at this time. While the Court finds that there are absolutely no good grounds for making the motion to compel arbitration, any award for sanctions under the Frivolous

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Civil Proceedings Act is not appropriate at this stage of the case.² Whether sanctions are appropriate should be determined by the trial judge at the termination of proceedings upon motion properly made at that time.

CONCLUSION

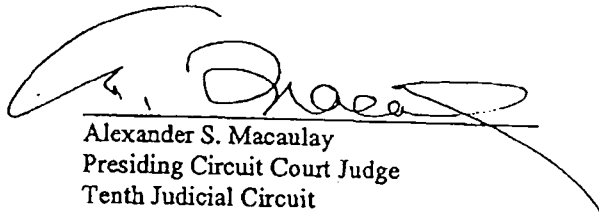
The Court hereby grants Plaintiff's Motion to Amend Plaintiff's Complaint in case number 2010-CP-04-1845 in the form of the proposed Amended Complaint submitted with the Motion to Amend. The Court denies Defendant Thompson's Motion to Dismiss for lack of subject matter jurisdiction and standing in case number 2012-CP-04-1433. The Court grants Plaintiff's Motion to Consolidate case numbers 2010-CP-04-1433 and 2012-CP-04-1433. The Court denies the Motion to Dismiss and Compel Arbitration of Defendant Merrill Lynch.

IT IS SO ORDERED.

[SIGNATURE ON NEXT PAGE]

² S.C. Code Ann. § 15-36-30 provides that any award of sanctions "must be determined by the trial judge at the conclusion of a trial..."(emphasis added). See also S.C. Code. 15-36-10(2)(requiring that "the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.")(emphasis added). The Act does not authorize sanctions during pre-trial proceedings prior to conclusion of the action.

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Alexander S. Macaulay
Presiding Circuit Court Judge
Tenth Judicial Circuit

Dated: October 12, 2012
Walhalla, South Carolina.

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GENERAL SESSIONS

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STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

James Robert Malloy,

Plaintiff,

vs.

Swain N. Thompson, Jr., Merrill Lynch,
Pierce, Fenner & Smith, Inc., Joseph T. Argo,
and Greene and Company, L.L.P.,

Defendants.

In the Matter of:

Estate of Robert L. Chamblee

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

2012-CP-04-01433

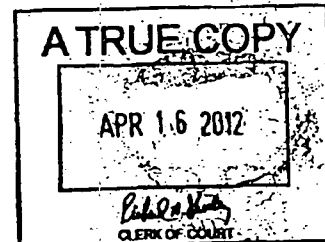
SUMMONS

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint, in this action, a copy of which is served upon you herewith, and to serve a copy of your answer to the said Complaint on the subscribers at their office located at 110 Lavinia Avenue (zip 29601), P.O. Box 2147, Greenville, South Carolina 29602, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

THE GILREATH LAW FIRM, P.A.

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ATTORNEYS FOR PETITIONER

Dated: April 13, 2012
Greenville, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

James Robert Malloy,

Plaintiff,

vs.

Swain N. Thompson, Jr., Merrill Lynch,
Pierce, Fenner & Smith, Inc., Joseph T.
Argo, and Greene and Company, L.L.P.,

Defendants.

In the Matter of:

Estate of Robert L. Chamblee

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

2012-CP-04-01433

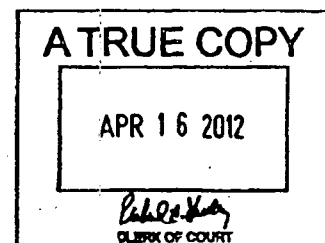
COMPLAINT

(Jury Trial Demanded)

The Plaintiff would respectfully show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Defendant Swain N. Thompson, Jr. ("Thompson") is a resident of Anderson County, South Carolina and the nephew of decedent Robert L. Chamblee ("Decedent").
2. Plaintiff James Robert Malloy ("Malloy") is a resident of Huntington, New York and the godson of Decedent.
3. Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), upon information and belief, is a Delaware corporation that is registered to do business in the state of South Carolina and regularly transacts business in South Carolina.
4. The Defendant Greene and Company, L.L.P. ("Greene") is a South Carolina limited liability partnership with its headquarters located in Anderson County, South Carolina.



5. Defendant Joseph T. Argo ("Argo") is a certified public accountant licensed in the state of South Carolina and is a citizen and resident of Anderson County, South Carolina. Argo is an agent and principal in Greene.

6. Personal jurisdiction is proper over Defendants Thompson and Argo pursuant to S.C. Code Ann. §§ 36-2-802 and -803 as said Defendants are domiciled in this State, among other factors.

7. Personal jurisdiction over Merrill Lynch is proper pursuant to S.C. Code Ann. §§ 36-2-802 and -803 in that Merrill Lynch and/or its agents have been doing business in the state, transacted business in the state, contracted to supply services in this state, and committed tortious acts in whole or in part in the state, among other factors, conferring personal jurisdiction over said Defendant.

8. Personal jurisdiction is proper over Defendant Greene pursuant to S.C. Code Ann. §§ 36-2-802 and -803 as said Defendant is organized under the laws of this State. It also is doing business and maintains its principal place of business in this State, among other factors.

9. This action is related to the case of *Malloy v. Thompson*, 2010-CP-04-1845 currently pending before this Court after its removal from Anderson County Probate Court ("Removal Action"). In the Removal Action, Defendant Thompson has not contested this Court's jurisdiction or authority to adjudicate Malloy's claims to set aside the purported will and trust of Decedent on the grounds of lack of mental capacity, undue influence and mistake. Whether through this action or by way of the Removal Action, this Court has the authority and jurisdiction to determine the validity of the alleged will and trust as well as any purported *inter vivos* transfer by Thompson of Decedent's assets,

to determine the validity of the informal appointment of Thompson as personal representative, to determine that Thompson has breached his fiduciary duty and converted Decedent's assets, to determine that Defendants tortiously interfered with Malloy's inheritance and gift expectancy and conspired to injure Malloy, to remove Thompson as personal representative and trustee, and to grant appropriate relief therefore from all Defendants pursuant to S.C. Const. art. V, § 11 and S.C. Code Ann. §§ 62-5-503 and 62-7-201(c).

10. Venue is proper in this Court pursuant to S.C. Code Ann. §§ 15-7-30 and 62-7-204.

GENERAL ALLEGATIONS

11. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

12. Robert L. Chamblee died in Anderson County on September 8, 2009, at the age of 86.

13. On September 16, 2009, Thompson applied for an informal probate of Decedent's alleged will dated December 11, 2002 and for an informal appointment of Thompson as personal representative of Decedent's estate.

14. On September 16, 2009, the Anderson County Probate Court admitted the alleged will to informal probate and granted Thompson's application for informal appointment; the estate is currently being administered in Anderson County Probate Court.

15. Decedent allegedly signed a document on December 11, 2002, that purports to be a trust agreement appointing Decedent and Thompson as co-trustees.

16. On information and belief, while Decedent was alive Thompson began attempting to transfer Decedent's assets to Thompson and others.

17. Malloy enjoyed a close relationship with Decedent who was his godfather. From 1983 on, Decedent effectively treated Malloy as his son and in the presence of others referred to Malloy as his son; they spoke often and spent much time together.

18. In or around 2001, when Decedent was in his late seventies, the faculty and students at Baruch College in New York, where Decedent was a long-time professor, began to notice that Decedent's behavior was changing: they noticed and complained about Decedent's lack of memory, strange and unprofessional behavior, and inability to teach his classes. The professor chairing the department where Decedent taught for 30 years observed in May 2002 that Decedent could no longer function in a reasonable capacity.

19. Because of these expressed concerns about Decedent's behavior, Baruch College commenced an internal investigation and was proceeding to have Decedent removed or terminated due to mental incompetence.

20. Malloy was working to help Decedent with the proceedings at Baruch College and to obtain medical help, which Decedent resisted.

21. On or about July 30, 2002, Decedent went to St. Luke's Roosevelt Hospital seeking medical care because he thought he was having a heart attack.

22. Malloy spoke with Decedent's doctors, who confirmed that Decedent was suffering from short-term memory loss and Alzheimer's disease.

23. On August 1, 2002, two days after Decedent had been admitted to St. Luke's Roosevelt Hospital, Dr. Henry Greenberg, his treating physician at the hospital, stated in the hospital records that "Pt [patient] is not competent & will need placement."

24. Consequent to the Alzheimer's diagnosis, the doctors retained Decedent in the hospital against his will for three weeks because they thought his condition was so severe that he was a danger to himself and others.

25. On the advice of counsel, Malloy did not seek to commence a conservatorship action on Decedent's behalf; instead, he requested that Thompson come to New York and remove Decedent from the hospital so that he would no longer have to endure the torture of being restrained in a hospital against his will.

26. With Malloy, Thompson met with doctors at the hospital and officials at Baruch College. Thompson was well aware of the mental infirmities and incapacity of Decedent. Thompson then returned to Anderson, SC to make arrangements for Decedent to reside at The Garden House – an assisted living facility specializing in care for senior citizens with mental infirmities such as Alzheimer's disease. Because the hospital would not release Decedent on his own, Thompson returned to New York and brought Decedent back to The Garden House.

27. Before Thompson took Decedent from St. Luke's Roosevelt Hospital to The Garden House, Dr. Amy Sanders, who had also been treating Decedent since his hospital admission on July 30, 2002, completed a functional assessment of Decedent for The Garden House in a report dated August 14, 2002 with a fax date to The Garden House of August 15, 2002. In the report she diagnosed Decedent as suffering from Alzheimer's disease. She stated Decedent suffered from memory loss, confusion,

forgetfulness and impaired decision-making ability. She also assessed Decedent's ability in handling money as dependent on others. She concluded Decedent was a candidate for residence in a "Memory Impaired Apartment".

28. Prior to leaving New York with Decedent, Thompson changed the locks on Decedent's apartment, upon information and belief, in order to cease Malloy's access to Decedent's property despite Decedent's long-time permission to Malloy to enter Decedent's home.

29. From 1984 to 1999, Decedent, with the assistance of New York counsel, executed several wills naming Malloy as primary beneficiary and a health care proxy naming Malloy as his agent; none of the wills named Thompson as primary beneficiary. During this period, Decedent did not execute any trust or property power of attorney.

30. On July 30, 1999 Decedent executed in New York a will prepared by Decedent's long-time New York counsel which is the valid last will and testament of Decedent; the original is in the possession of Malloy and a copy of said will is attached hereto.

31. Within days after Thompson removed Decedent from the hospital in New York and brought him to Anderson, he took Decedent to Thompson's attorneys and coerced Decedent into signing on September 16, 2002 a document purporting to be a property power of attorney under South Carolina law appointing Thompson as attorney-in-fact. On September 18, 2002 Thompson again took Decedent to Thompson's attorneys and coerced Decedent into signing a New York statutory short form durable power of attorney, again appointing Thompson as attorney-in-fact. The September 16, 2002 power of attorney stated that it was Decedent's intention that the power of attorney

not be used to disrupt the Decedent's estate plan and prohibited Thompson as agent from appointing, assigning or designating any assets, directly or indirectly, to Thompson. The September 18, 2002 power of attorney executed under the laws of the state of New York also specifically rejected the power of Thompson as agent to make gifts and did not include a statutory gifts rider. Nor did Decedent execute a separate non-statutory power of attorney under New York law.

32. A few months after the powers of attorney were signed, Thompson took Decedent to Thompson's attorneys and coerced Decedent into signing documents purporting to be a will and an *inter vivos* trust, leaving all of his assets to Thompson. The purported will and trust were executed on December 11, 2002.

33. When Thompson coerced Decedent into signing the purported December 11, 2002 will and trust, Thompson knew Decedent had an existing will that devised and bequeathed assets of Decedent to Malloy. Malloy is informed and believes that prior to Thompson bringing Decedent to South Carolina, Decedent inherited interests in family land in which Thompson and/or his family and/or relatives also owned an interest or desired to own. Thompson was highly concerned that Decedent would devise his interests to Malloy as Decedent had informed Thompson that Malloy was a beneficiary of his estate.

34. Shortly after Thompson moved Decedent to South Carolina, Thompson implied in a telephone conversation with Malloy that he knew Malloy was the sole beneficiary of Decedent's will. In that conversation, around September 2002, Thompson told Malloy "I know there's a will and that's fine."

35. During the time between Decedent leaving the New York hospital and the alleged execution of the documents purporting to be his will and trust, Decedent was under constant supervision, and eventually lockdown, at Garden House and, despite Decedent's requests, was not allowed to return to New York or his professorship at Baruch College.

36. During the time between Decedent leaving the New York hospital and the alleged execution of the documents purporting to be his will and trust, Decedent did not attempt to contact his New York counsel of many years, nor did Decedent attempt to bring any action against the New York hospital and Baruch College, both of which determined that he was incompetent and treated him accordingly.

37. Demonstrative of their close relationship, prior to Decedent's August 2002 admission in the New York hospital, Malloy was Decedent's first call, at Decedent's instructions, when a problem arose or Decedent needed help. People in close contact with Decedent, including co-workers and faculty members at Baruch College, believed Malloy to be Decedent's son.

38. Although Malloy frequently called Decedent at Garden House after Thompson moved Decedent to South Carolina, Decedent never called Malloy and never told him he had made a new will, trust, and power of attorney. When Malloy visited Decedent in the summer of 2003, Decedent did not even recognize him and introduced him to a staff member as one of his students.

39. While Decedent was competent, he placed Malloy's name on many of his assets, such as insurance, bank accounts, and safe deposit boxes. These assets include but are not limited to the following:

- Life insurance policy with the Veterans Administration with benefits paid to Thompson in the amount of \$96,972.43. Malloy was named as 75% beneficiary prior to beneficiary change to Thompson on January 6, 2003 as witnessed by Argo;
- Annuity with Nationwide Life Insurance Company surrendered to the 2002 trust on 2/26/03 for \$67,094.74 containing a death benefit significantly greater than the surrender value with Malloy named as death beneficiary;
- Banco Popular account established in trust for Malloy liquidated and distributed to the Merrill Lynch account for the 2002 trust on or about March 20, 2003 for \$146,571.11;
- Teachers' Retirement System of the City of New York Qualified Pension Plan and Tax-Deferred Annuity Program containing as of October 2002 \$ 643,199.06 with Malloy as designated beneficiary for 50% of the death benefits. In 2003 at least \$500,236.79 was rolled over or distributed to accounts at Merrill Lynch established under the direction of Thompson with the aid and assistance of the remaining defendants.

40. Using his alleged power of attorney, Decedent's mental incompetence and/or undue influence, Thompson eventually removed Malloy's name from these assets and the health care proxy. Thompson also changed Decedent's reported address with the various financial institutions to 1206 Briarwood St., Anderson, SC 29621. This address, though, was the residence of Thompson's sister Barbara T. Craft. Decedent did not live at that address. Thompson made the address and beneficiary changes either by completing and signing the change-of-address forms himself through the invalid powers of attorney or by Decedent's signatures on such forms, both procured through Decedent's mental incapacity and/or Thompson's undue influence. Indicative of his lack of mental competency, Decedent signed at least nine different forms with his address listed as 1206 Briarwood St., Anderson, SC 29621 – the address of Thompson's sister from October 4 through December 18, 2002. The above-referenced change-of-address forms often listed Thompson's phone number as that of Decedent.

41. In 2006, Thompson moved Decedent from Garden House to NHC Healthcare in Anderson.

42. While Decedent was at Garden House, its staff refused to recognize Malloy's health care proxy and refused to provide him with pertinent information; a staff member at NHC Healthcare told Malloy that Thompson was Decedent's health care attorney-in-fact.

43. Malloy did not learn about the alleged 2002 powers of attorney until he complained to the S.C. Elder Care Office in 2006, when he was informed by a staff member from the Ombudsman's office. Malloy did not have notice of the existence of the purported will and trust prepared by Thompson's attorney for Decedent until the will was filed after Decedent's death.

44. Malloy had an expectancy under the will of Decedent—i.e., to inherit his entire estate. Malloy also had an expectancy to receive various gifts from Decedent—i.e., Malloy was named as a beneficiary under various annuities, a life insurance policy, and as beneficiary of an *inter vivos* trust all established by the Decedent. Merrill Lynch, Greene and Argo intentionally interfered with that expectancy through their tortious conduct that included using invalid powers of attorney and Decedent's signature both obtained as a result of Decedent's mental incompetence and/or through Thompson's undue influence.

45. After Decedent executed the powers of attorney in September 2002 at Thompson's instigation, Merrill Lynch acted as the investment advisor and asset manager of all the funds held in the name of the December 11, 2002 trust. Merrill Lynch worked closely with Thompson as the purported trustee and with Argo and Greene as Thompson

and the 2002 trust's accountant. Malloy is informed and believes Merrill Lynch was highly knowledgeable about the intricacies of the 2002 trust and Decedent's assets and knew or should have known Thompson was the sole beneficiary of the 2002 trust upon Decedent's death. In fact, according to an e-mail of Heather Sandler, Registered Client Associate and financial advisor of Merrill Lynch working out of the Columbia, SC office, to Argo of May 1, 2003, the account for Decedent set up by Defendants was initially titled as a joint account in the name of both Robert Chamblee and Swain N. Thompson. The joint account was later closed out into "the new Trust for Estate Planning purposes."

46. After Decedent executed the powers of attorney in September 2002 at Thompson's instigation, Argo and Greene acted as the accountant for the 2002 trust, the Decedent and Thompson. Argo and Greene prepared the tax returns for Decedent, the 2002 trust and Thompson. Malloy is informed and believes Greene and Argo were highly knowledgeable about the intricacies of the 2002 trust and Decedent's assets, possessed copies of the 2002 trust, and knew or should have known Thompson was the sole beneficiary of the 2002 trust upon Decedent's death.

47. On information and belief, all Defendants including Merrill Lynch, Greene and Argo knew of Malloy's expectancy under the Decedent's will, trust, and annuities. For instance, Decedent established a fund held by Banco Popular in New York, New York containing approximately \$145,000 in trust for Malloy in account number 090-000078545 and titled "Chamblee, Robert I.T.F. James R. Malloy". As another example, Sandler of Merrill Lynch informed Argo and Greene prior to the transfer of funds to Merrill Lynch that Decedent owned an annuity contract through Nationwide Life Insurance with Malloy as the named death beneficiary. The Teacher's

Retirement System of the City of New York also sponsored a significant and sizable retirement fund for Decedent where Malloy was named as a beneficiary of the death benefits under the plans.

48. Merrill Lynch, Argo, and Greene worked together and with Thompson to divert those funds and many other funds to the December 11, 2002 trust wherein Thompson was named as the sole beneficiary upon Decedent's death or to a newly established IRA at Merrill Lynch in which Thompson was named as the beneficiary. For instance, said Defendants and Thompson coordinated their efforts to convince Banco Popular to release Decedent's account titled in trust for Malloy to the Merrill Lynch account for the 2002 trust. After repeated requests for the funds, Heather Sendler of Merrill Lynch ascertained from Banco Popular the particular documents Banco Popular needed for the funds to be transferred. Said Defendants then obtained a misleading statement from Thompson's long-time attorney Edward A. Spitz implying Decedent was competent to execute the powers of attorney and from The Garden House of Anderson, SC without revealing Decedent was residing in its Alzheimer's unit. Argo, Greene and Sendler then submitted the documents to Banco Popular with a cover letter omitting that the attorney letter was from Thompson's own attorney and the true nature of Decedent's residence in a facility for dementia. Malloy is informed and believes all such facts were known to said Defendants at that time.

49. As another example of all Defendants conspiring to tortiously interfere with Malloy's expected inheritance and gifts, Thompson submitted the invalid New York power of attorney on October 4, 2002 to Citibank to begin acting as agent on all of Decedent's accounts associated with Citibank including the Nationwide Life Insurance

Company annuity (marketed under the name of "The Best of America"). Thompson's letter also instructed Citibank to send all future mailings to Decedent's South Carolina address but then gave the address for Thompson's sister at 1206 Briarwood Ct., Anderson, SC 29621 instead of Decedent's actual address at The Garden House assisted-living facility. On February 10, 2003 Sendler e-mailed Argo an update on the status of their efforts to divert Decedent's assets to the 2002 trust. Sendler informed Argo "I spoke with Best of America (they were VERY helpful) Anyway the value is \$63,000+-, there is no penalty to surrender and the beneficiary is James Malloy I have the withdrawal form that needs to be signed if we decide to and they will also accept a fax of it Let me know what we want to do on these". After the Defendants decided to surrender the policy, Sendler faxed to Nationwide on February 13, 2003 a total withdrawal request signed by Thompson as attorney-in-fact. On February 26, 2003 the Nationwide annuity contract was terminated, and a check for the surrender value of \$67,094.74 was mailed to Merrill Lynch for the 2002 trust account. On the day the Nationwide annuity was surrendered, the policy had a death benefit payable 100% to Malloy in the amount of \$108,644.64 – a 62% increase over the surrender value obtained by Defendants. On March 4, 2003 Sendler deposited the surrender proceeds into the Merrill Lynch account for the 2002 trust in which Thompson was the sole surviving beneficiary.

50. Merrill Lynch, Greene, and Argo played a highly significant and substantial role in helping Thompson corral the various assets of Decedent from numerous institutions into the 2002 trust for the benefit of Thompson. The activities of Merrill Lynch, Greene and Argo included obtaining and completing all necessary forms and document requests to the various institutions holding funds of Decedent with the

requests containing a false address of Decedent of 1206 Briarwood St., Anderson, SC 29621 which was actually the address of Thompson's sister Barbara T. Craft. Said Defendants also submitted invalid powers of attorney to the various third party institutions to convince them to submit funds to the trust accounts for the 2002 trust. For example on or about October 22, 2002 Argo directed the preparation of a letter under the name of Thompson to GE Capital Life Assurance Company of New York ("GE") to change Decedent's address for his annuity with GE to the address for Thompson's sister and included the invalid New York statutory short form durable power of attorney. On January 8, 2003 Sendler of Merrill Lynch received from GE its forms for requesting a full surrender of Decedent's annuity. On January 21, 2003 Argo "For Heather Sendler" faxed the annuity surrender forms to GE which forms provided that the funds be mailed to the attention to Sendler at Merrill Lynch. The forms were signed by Thompson as attorney-in-fact for Decedent.

51. Personnel from the Merrill Lynch office in Columbia, South Carolina also provided signature guarantees/Medallion guarantees for documents purporting to be signed by Robert Chamblee, even though such documents were not executed in the presence of the Merrill Lynch guarantor. Letters to HSBC Bank, JP Morgan/Chase Bank, Banco Popular and Apple Bank directing that funds be wired to the 2002 trust account at Merrill Lynch to the attention of Sendler were purportedly signed by Decedent on December 18, 2002 with no Medallion signature guarantee in the files of Greene and Argo. That same day the letters were FedExed out to Sendler at Merrill Lynch in Columbia, SC. The files of Merrill Lynch subsequently contain the same letters but with the Medallion signature guarantees on all the letters. Malloy is informed and believes

that this procedure violated the rules of Merrill Lynch in its Medallion/signature guarantee program. Such documents containing Merrill Lynch's Medallion signature guaranty were disseminated by Merrill Lynch, Argo and Greene to convince financial institutions to transfer Decedent's funds to the Merrill Lynch account for the 2002 trust set up by Thompson.

52. All funds rounded up with assistance of Greene, Argo and Merrill Lynch, through its agent Sendler, were transferred and held by Merrill Lynch for the 2002 trust.

53. Merrill Lynch, through its agent Sendler, Greene and Argo held many telephone conferences and on occasions in person conferences with various institutions to assist Thompson in convincing the various institutions to release Decedent's assets to the Merrill Lynch accounts in the name of the 2002 trust. These contacts by Sendler of Merrill Lynch include calls to David with Banco Popular on or before March 4, 2003 and March 5, 2003; telephone conference with GE on or before February 10, 2003; telephone conference with Citibank on or before February 10, 2003; and telephone conference with Nationwide Life on or before February 10, 2003. Contacts by Argo of Greene include calls to Clarissa Weiss of Teachers' Retirement System ("TRS") on December 5, 2002, calls to the Teachers' Retirement System on or before March 4, 2003, and conference scheduled for December 13, 2003 with TRS personnel; calls to David and/or Mabel Ortiz of Banco Popular on March 5, 2003 and on or after March 11, 2003; phone calls to Rena Mivakakis of Bank of New York on or about September 25, 2002 and with Scott Barry on or before April 24, 2003; and in-person conference among Thompson, Argo and Sandi Sculac of Citicorp Investment Services on or before December 18, 2002.

54. On or about November 20, 2002, Defendants Greene and Argo provided Merrill Lynch with copies of the powers of attorney Thompson coerced Decedent into signing on September 16, 2002 and September 18, 2002. The September 16, 2002 power of attorney stated that it was Decedent's intention that the power of attorney not be used to disrupt the Decedent's estate plan. The September 18, 2002 power of attorney executed under the laws of the state of New York also specifically rejected the power of Thompson as agent to make gifts. Merrill Lynch, Greene, and Argo assisted Thompson and in many cases undertook all the actions to submit the powers of attorney to collect assets into the 2002 trust for the benefit of Thompson.

55. Merrill Lynch, Greene, and Argo not only provided substantial administrative assistance in collecting Decedent's assets for Thompson, they also originated ideas to perform difficult and significant rollovers of tax qualified retirement assets into the Merrill Lynch account for the benefit of Thompson and to Malloy's detriment. This includes, but is not limited to, effecting rollovers from Citibank IRA account, the New York Teacher's Retirement Fund accounts, and other IRAs in which Malloy was named as the death beneficiary to a Merrill Lynch IRA that eliminated Malloy as a beneficiary.

56. The participation of Merrill Lynch, Greene, and Argo was done knowingly with the intent to funnel the assets of Decedent into the trust wherein Thompson was the known beneficiary to the complete exclusion of Malloy.

57. As a result of the substantial participation of Merrill Lynch, Greene, and Argo undertaken knowingly, Malloy was deprived of his expectant inheritance interest and gifts to be received from the Decedent. As a result of the conspiracy and tortious

interference with Malloy's expected inheritance and gifts from Decedent as committed by Merrill Lynch, Greene, and Argo, Malloy is entitled to judgment against said Defendants for the amounts diverted away from Malloy, plus punitive damages and attorney fees.

FOR A FIRST CAUSE OF ACTION

(Action to Set Aside Purported *Inter Vivos* Trust for Lack of Mental Capacity)

58. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

59. Upon information and belief, at the time of the purported execution of the alleged 2002 trust by Decedent, Decedent was mentally incompetent and suffering from Alzheimer's disease and/or other dementia and lacked the requisite mental capacity to make a valid trust.

60. Therefore, the alleged 2002 trust is invalid and of no legal force and effect.

FOR A SECOND CAUSE OF ACTION

(Action to Set Aside Purported *Inter Vivos* Trust Due to Undue Influence)

61. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

62. On information and belief, Thompson exercised undue influence on Decedent, to wit: Decedent was in a weakened mental state and susceptible to influence; Decedent was subject to Thompson's control; Thompson took Decedent to Thompson's attorneys for execution of the alleged trust; Thompson did not communicate with Decedent's own attorneys or with Malloy; and Thompson was never the primary beneficiary of any previous valid trust or will of Decedent and the alleged 2002 trust purports to name Thompson as sole beneficiary.

63. Therefore, the alleged 2002 trust is invalid and of no legal force and effect.

FOR A THIRD CAUSE OF ACTION

(Action to Set Aside Purported *Inter Vivos* Trust Due to Mistake)

64. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

65. On information and belief, Decedent would not have executed the alleged 2002 trust unless he was mistaken about its contents or even that it was a trust because it completely and suddenly changed his dispositive intent as demonstrated by his prior valid wills, for no reason.

66. Therefore, the alleged 2002 trust is invalid and of no legal force and effect.

FOR A FOURTH CAUSE OF ACTION

(Action to Set Aside Putative Transfer of Real and Personal Property to Purported *Inter Vivos* Trust, Thompson, and/or Others)

67. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim:

68. At the time Decedent purportedly executed documents, either directly or through his putative agent, attempting to deliver property to the alleged trust, he was mentally incompetent and suffering from Alzheimer's disease and/or other dementia and lacked the requisite mental capacity to validly execute and deliver such instruments of transfer; moreover, on information and belief, Decedent was unduly influenced and/or suffering from mistake.

69. All instruments of transfer to the trusts allegedly created by the *inter vivos* trust documents are therefore invalid and of no legal force and effect.

FOR A FIFTH CAUSE OF ACTION

(Fraud as to Defendant Thompson)

70. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

71. Malloy is informed and believes that Thompson, or someone on his behalf and under his control, made false representations to Decedent about the content and effect of the alleged 2002 will and trust in the name of the Decedent. The false representations were material as they induced Decedent to sign the alleged 2002 will and trust which completely altered Decedent's long-time estate plans.

72. Malloy is informed and believes that Thompson, who in December 2002 had control and influence over Decedent, had knowledge about the falsity of the representations made to Decedent about the 2002 will and trust or either had a reckless disregard of their truth or falsity. Malloy is further informed and believes that Thompson intended for Decedent to act upon Thompson's representations about the content and/or effect of the 2002 will and trust by inducing Decedent to execute such documents.

73. Malloy is informed and believes that due to Decedent's mental incompetency, Decedent was ignorant of the falsity of Thompson's representations. Because of Decedent's Alzheimer's disease and/or dementia, Decedent rightfully relied on the substance of Thompson's representations.

74. Malloy and Decedent were proximately injured by Thompson's representations that prevented Decedent from exercising his own judgment and free choice to dispose of his property as he desired.

75. Upon information and belief, Thompson's actions constitute fraud, and all instruments of transfer to the trusts allegedly created by the *inter vivos* trust documents

are therefore invalid and of no legal force and effect; the alleged will is therefore invalid and of no legal force and effect; any transfer caused by Thompson from Decedent or his estate to Thompson and/or others is therefore invalid and of no legal force and effect; and Thompson should be assessed with actual damages, punitive damages, costs, and attorneys' fees.

FOR A SIXTH CAUSE OF ACTION
(Conversion as to Defendant Thompson)

76. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

77. Upon information and belief, Thompson has wrongfully taken property from Decedent and converted it to his own use, all to the damage of Decedent and Malloy.

78. Malloy is further informed and believe that he is entitled to an award of punitive damages as a result of said conversion by Thompson.

FOR A SEVENTH CAUSE OF ACTION
(Quantum Meruit/Unjust enrichment as to Defendant Thompson)

79. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

80. Plaintiff will show that Thompson has realized a non-gratuitous benefit by his appropriation of Decedent's assets and that it is inequitable for Thompson to retain such assets without paying for their value.

81. By virtue of Thompson's conduct, Thompson has been unjustly enriched to the detriment of Decedent and Malloy.

82. As a result of Thompson's unjust enrichment, a constructive trust should be imposed on any and all property interests distributed from Decedent or his estate to Thompson and/or others.

FOR AN EIGHTH CAUSE OF ACTION
(Constructive Trust as to Defendant Thompson)

83. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

84. A constructive trust should be imposed on Thompson and/or others for all misappropriated property and any benefit therefrom.

FOR A NINTH CAUSE OF ACTION
(Resulting Trust as to Defendant Thompson)

85. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

86. A resulting trust should be imposed on Thompson and/or others for all misappropriated property and any benefit therefrom.

FOR A TENTH CAUSE OF ACTION
(Breach of Fiduciary Duty; Failure to Marshal Assets; Removal as to Defendant Thompson)

87. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

88. In August 2002 Thompson made two trips to New York to secure the release of the Decedent from St. Luke's Hospital. The trips were necessary because of the mental health of Decedent and the Decedent's need for supervision with day-to-day assistance due to his failed mental capacity.

89. Thompson was well aware of Decedent's mental deterioration from his interaction with the staff at St. Luke's Hospital and with Decedent. Thompson further knew that Decedent was a vulnerable adult due to Decedent's substantially impaired mental condition from Alzheimer's disease.

90. Thompson voluntarily assumed the responsibility for the oversight, care and protection of Decedent by offering to take control of Decedent to secure his release from St. Luke's Hospital. Thompson accepted and induced the Decedent to place confidence in him.

91. Thompson entered into a fiduciary relationship with Decedent and assumed the special obligations a fiduciary owes the other party such as Decedent. Thompson exploited this fiduciary relationship and his role as caregiver to improperly and unlawfully gain control of Decedent's assets for himself, thereby causing damages to the estate of Decedent and to the Plaintiff.

92. As fiduciary of Decedent's estate, Thompson is required to collect and marshal the assets of the estate, which duties include (1) the investigation of the validity of transfers purportedly made during Decedent's lifetime that may be invalid for such reasons as fraud, undue influence, mistake, conversion, and/or lack of mental capacity, and (2) attempt to bring into the estate any alleged *inter vivos* transfers which are defective for any such reason.

93. Upon information and belief, as the perpetrator of the delicts cited in the causes of action set forth above, Thompson obviously cannot conduct a fair investigation of himself; consequently, he should be removed as personal representative to allow the appointment of an unbiased fiduciary.

94. The failure of the personal representative to perform his duties constitutes a breach of fiduciary duty.

95. The Plaintiff is informed and believes that such actions described in this Complaint constitute a breach of fiduciary duties that Thompson owed Decedent, his estate and the Plaintiff. The Plaintiff is therefore entitled to compensatory damages (with pre-judgment interest) and punitive damages from Thompson for his breach of fiduciary duties in an amount to be determined by the trier of fact.

FOR AN ELEVENTH CAUSE OF ACTION

(Tortious Interference with Inheritance and Gifts as to Defendant Thompson)

96. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

97. Malloy had an expectancy under the will of Decedent — i.e., to inherit his entire estate. Malloy also had an expectancy to receive various gifts from the Decedent including but not limited to life insurance policy benefits upon the death of the Decedent, death benefits under various annuities owned by the Decedent wherein Malloy was named as the beneficiary, and non-probate retirement accounts including individual retirement accounts and retirement annuities wherein Malloy was named as the beneficiary upon the death of the decedent. These accounts include but are not limited to the Veterans Administration life insurance policy, annuities with Nationwide Life Insurance Company, account with Banco Popular in trust for Malloy, and Decedent's retirement plans with the Teachers' Retirement System for Baruch College as described in paragraph 39 above.

98. On information and belief, Thompson knew of Malloy's expectancy under Decedent's will and non-probate assets such as life insurance policies, annuities, and

IRAs. Thompson intentionally interfered with that expectancy through his tortious conduct that included using invalid powers of attorney and Decedent's signatures both procured through Decedent's incompetence and/or through Thompson's undue influence. To cover up his tortious conduct, Thompson changed Decedent's address with all the various financial institutions to the address of his sister Barbara T. Craft of 1206 Briarwood St., Anderson, SC 29621. Decedent never lived at such address.

99. But for Thompson's tortious interference with Malloy's inheritance, Malloy would have inherited all of Decedent's estate, including those assets transferred through Thompson's actions during Decedent's lifetime. Consequently, Malloy has been damaged by Thompson's tortious conduct in that he would be denied his inheritance of the entire estate, to which he was entitled.

100. But for Thompson's tortious interference with the gifts the Decedent planned and designated for Malloy, Malloy would have received such gifts from the Decedent upon his death, including assets wherein Malloy was designated as the death beneficiary but transferred to Thompson through Thompson's actions during Decedent's lifetime. Consequently, Malloy has been damaged by Thompson's tortious conduct in that he has been denied the gifts the Decedent established for Malloy, to which he was entitled.

101. As a result of Thompson's tortious interference with Malloy's inheritance and gifts, Malloy is entitled to a judgment against Thompson imposing a constructive trust on any and all property interests distributed from Decedent and/or Decedent's estate and from Decedent's non-probate assets and contracts to Thompson and/or others, plus damages, punitive damages, and attorneys' fees.

FOR A TWELFTH CAUSE OF ACTION

(Attorneys' Fees and Costs)

102. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

103. Because of the actions of Thompson, Malloy has been forced to obtain the services of an attorney and others to defend himself from the actions of Thompson.

104. Consequently, Malloy is entitled to an Order from this Court commanding Thompson to pay for the costs and attorneys' fees he has incurred due to the actions of Thompson.

FOR A THIRTEENTH CAUSE OF ACTION

(Tortious Interference with Inheritance and Gifts and Aiding and Abetting as to Defendants Merrill Lynch, Greene and Argo)

105. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

106. Malloy had an expectancy under the will of Decedent—i.e., to inherit his entire estate. Malloy also had an expectancy to receive various gifts from Decedent—i.e., Malloy was named as a beneficiary under various annuities, a life insurance policy, and as beneficiary of an *inter vivos* trust all established by the Decedent. Merrill Lynch, Greene and Argo intentionally interfered with that expectancy through their tortious conduct that included using invalid powers of attorney and Decedent's signature both obtained as a result of Decedent's mental incompetence and/or through Thompson's undue influence.

107. After Decedent executed the powers of attorney in September 2002 at Thompson's instigation, Merrill Lynch acted as the investment advisor and asset manager of all the funds held in the name of the December 11, 2002 trust. Merrill Lynch worked

closely with Thompson as the purported trustee and with Argo and Greene as Thompson and the 2002 trust's accountant. Malloy is informed and believes Merrill Lynch was highly knowledgeable about the intricacies of the 2002 trust and Decedent's assets and knew or should have known Thompson was the sole beneficiary of the 2002 trust upon Decedent's death.

108. After Decedent executed the powers of attorney in September 2002 at Thompson's instigation, Argo and Greene acted as the accountant for the 2002 trust, the Decedent and Thompson. Argo and Greene prepared the tax returns for Decedent, the 2002 trust and Thompson. Malloy is informed and believes Greene and Argo were highly knowledgeable about the intricacies of the 2002 trust and Decedent's assets, possessed copies of the 2002 trust, and knew or should have known Thompson was the sole beneficiary of the 2002 trust upon Decedent's death.

109. On information and belief, all Defendants including Merrill Lynch, Greene and Argo knew of Malloy's expectancy under the Decedent's will, trust, and annuities as set forth in paragraph 47 above.

110. Merrill Lynch, Argo, and Greene worked together and with Thompson to intentionally interfere with Malloy's expectancy by diverting those funds and many other funds to the December 11, 2002 trust wherein Thompson was named as the sole beneficiary upon Decedent's death, as set forth in paragraphs 48 and 49 above.

111. Merrill Lynch, Greene, and Argo played a highly significant and substantial role in helping Thompson corral the various assets of Decedent from numerous institutions into the 2002 trust for the benefit of Thompson as set forth in paragraphs 50 and 51 above.

112. All funds rounded up with assistance of Greene, Argo and Merrill Lynch, through its agent Sendler, were transferred and held by Merrill Lynch for the 2002 trust.

113. Merrill Lynch, through its agent Sendler, Greene and Argo held many telephone conferences and on occasions in person conferences with various institutions to assist Thompson in convincing the various institutions to release Decedent's assets to the Merrill Lynch accounts in the name of the 2002 trust, as set forth in paragraph 53 above.

114. On or about November 20, 2002, Defendants Greene and Argo provided Merrill Lynch with copies of the powers of attorney Thompson coerced Decedent into signing on September 16, 2002 and September 18, 2002. The September 16, 2002 power of attorney stated that it was Decedent's intention that the power of attorney not be used to disrupt the Decedent's estate plan. The September 18, 2002 power of attorney executed under the laws of the state of New York also specifically rejected the power of Thompson as agent to make gifts. Merrill Lynch, Greene, and Argo assisted Thompson and in many cases undertook all the actions to submit the powers of attorney to collect assets into the 2002 trust for the benefit of Thompson.

115. Merrill Lynch, Greene, and Argo not only provided substantial administrative assistance in collecting Decedent's assets for Thompson, they also originated ideas to perform difficult and significant rollovers of tax qualified retirement assets into the Merrill Lynch account for the benefit of Thompson and to Malloy's detriment, as set forth in paragraph 55 above.

116. The participation of Merrill Lynch, Greene, and Argo was done knowingly with the intent to funnel the assets of Decedent into the trust wherein Thompson was the known beneficiary to the complete exclusion of Malloy.

117. As a result of the substantial participation of Merrill Lynch, Greene, and Argo undertaken knowingly and intentionally, Malloy was deprived of his expectant inheritance interest and gifts to be received from the Decedent. Since Decedent named Malloy as beneficiary of his will prior to December 2002, beneficiary under his life insurance, annuities, qualified retirement plans and IRAs, it is reasonably certain that Malloy's expectancy would have been realized but for the interference of Merrill Lynch, Greene, and Argo. As a result of the tortious interference with Malloy's expected inheritance and gifts from Decedent as committed by Merrill Lynch, Greene, and Argo, Malloy has been damaged by the loss of the expected substantial benefits he never received from Decedent and retained by Thompson. Malloy is therefore entitled to judgment against said Defendants for the amounts diverted away from Malloy, plus punitive damages and attorney fees.

FOR A FOURTEENTH CAUSE OF ACTION
(Civil Conspiracy as to All Defendants)

118. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

119. Thompson, Argo, various agents or representatives of defendant Greene, including, but not limited to Argo, and various agents or representatives of defendant Merrill Lynch, including, but not limited to Sendler, conspired among themselves for the purpose of injuring Malloy.

120. As a direct and proximate result of the actions and conduct of all defendants, Malloy, directly or indirectly, suffered special damages as set forth herein, including, but not limited to, the loss of the expected inheritance and gifts from Decedent as desired by Decedent.

121. Malloy is informed and believes he is entitled to recover compensation from all Defendants jointly and severally for his actual damages and losses, and he is entitled to recover punitive damages from each defendant in an amount to be determined by a jury.

WHEREFORE, Malloy prays that he be granted judgment for the first through seventeenth causes of action, including but not limited to the following:

- A. For an order setting aside the alleged trust purportedly signed by Decedent dated December 11, 2002;
- B. For an order declaring the transfers to the alleged trust of December 11, 2002 invalid and of no legal effect thereby setting aside all transfers of any property to the purported trust;
- C. For actual and punitive damages, costs and attorney fees against Thompson for fraud, conversion, breach of trust, and tortious interference with Malloy's inheritance;
- D. For actual and punitive damages, costs and attorney fees against Merrill Lynch, Greene, and Argo for tortious interference with inheritance and gifts and aiding and abetting the same and for civil conspiracy;
- E. For a constructive trust to be imposed on any and all property interests distributed from Decedent or his estate to Thompson and others;
- F. For a resulting trust to be imposed on Thompson and/or others for all misappropriated property and any benefit therefrom;
- G. For removal of Thompson as personal representative of the estate of Robert L. Chamblee and as trustee of the alleged December 11, 2002 trust;

- H. For attorney fees and costs;
- I. For such other relief as the Court deems just and proper.

PLAINTIFF DEMANDS TRIAL BY JURY.

THE GILREATH LAW FIRM, P.A.

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James R. Gilreath (S.C. Bar #2133)
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and

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1713 Phelps Street
Columbia, SC 29205
Telephone: (803) 777-7465
Fax: (803) 777-7465

ATTORNEYS FOR PLAINTIFF

Dated: April 13, 2012
Greenville, South Carolina.

LAST WILL AND TESTAMENT

of

ROBERT LIVINGSTON CHAMBLEE

I, ROBERT LIVINGSTON CHAMBLEE residing at, 152 West 58th Street, Apartment 2C, New York City, State of New York, which I hereby declare to be my domicile, do hereby make, publish and declare this to be my Last Will and Testament.

FIRST: I revoke all Wills and Codicils at any time heretofore made by me.

SECOND: I direct that all my just debts and funeral expenses be paid out of my estate as soon after my death as may be practicable.

THIRD: All the rest, residue and remainder of the property both real, personal and mixed and wheresoever situate which I may own or be entitled to at the time of my death, I give, devise and bequeath to JAMES ROBERT MALLOY residing at, 268 Community Drive, Smithtown, New York, if he shall survive me. If he shall not survive me, then I give, devise and bequeath my residuary estate to MARGARET C. EVANS residing at, 72 Lebkamp Avenue, Huntington, New York, if she shall survive me. If she shall not survive me, then I give, devise and bequeath my residuary estate to those persons to whom and in those proportions in which the same would have been distributable if I had then died the owner thereof, intestate, and a resident of the State of New York.

FOURTH: I hereby appoint JAMES ROBERT MALLOY to be the Executor of this my Last Will and Testament. In the event my said Executor shall predecease me, fail to qualify, or having qualified thereafter dies, resigns, is removed from office or for any reason ceases to act as Executor, I hereby appoint MARGARET C. EVANS as Executor of this my Last Will and Testament.

I direct that none of my Executors shall be required to give any bond or other security for the faithful performance of their respective duties in any jurisdiction whatsoever, or if any bond is required, no surety shall be required thereon. No fiduciary at any time acting hereunder shall be required to file periodic accountings in the Court in which this Will shall be admitted to probate unless such fiduciary shall elect to do so. To the extent that any of my Executors shall exercise discretion hereunder and make payment and/or application of assets as herein provided they shall be relieved of any and all responsibility and liability with respect to the same.

FIFTH: My Executor shall have discretion to make payment or distribution of any principal and/or income vesting in and payable to any minor in any one or more of the following ways:

(a) paying the same to the parent, guardian or other person having the care and control of such minor and the receipt by such payee shall be full acquiescence to my Executor,

(b) paying the same to any relative of the minor as custodian for the minor under any applicable Gifts to Minors Act, or

(c) deferring payment or distribution of any part or all thereof until the minor comes of age, meanwhile applying to such minor's use so much principal and income therefrom, and at such time or times as my Executor may deem advisable. Any income not expended by my Executor shall be added to principal and my Executor

DMAN, KRAMER
: MONACO, P.C.
Attorneys At Law
Meridian Motor Parkway
Sage, New York 11788

shall pay over and disburse the principal to the minor upon such minor attaining the age of eighteen (18) years or to the estate of such minor if the minor dies under the age of eighteen (18) years.

SIXTH: My Executor shall have all the powers and authority which are now conferred upon fiduciaries (expressly including, but not limited to, those powers enumerated in the Fiduciaries Powers Act, Section 11-1.1 of the New York Estates Powers and Trusts Law) or which may hereafter be conferred by law upon Executors. In addition to the foregoing powers and authority, I fully authorize and empower my Executor to retain any and all property, and also, to invest any and all property, real or personal, which at any time may constitute part of my estate, in any stock, bonds, common trust funds, securities of investment companies or other securities regardless of any rule regarding diversity of trust investments.

SEVENTH: I direct that all inheritance, estate, transfer, succession and death taxes or duties (including any interest thereon) imposed by any jurisdiction whatsoever by reason of my death upon or in relation to any property includable in my estate for the purposes of any such taxes or duties, whether such property passes under the provisions of this Will, or outside the provisions of this Will, be paid out of my general estate without proration or apportionment.

EIGHTH: Every heir, legatee, devisee, or beneficiary, under this Will and the trusts herein created or intended to be created, who shall contest in any court any provision of this instrument, except as may be permitted by the provisions of Section 3-3.5 of the Estates, Powers and Trusts Law, shall not be entitled to any devise, legacies or benefits under this Will or any codicil hereto or any trust created hereby and any and all devise, legacies and portions of the income or corpus of my estate otherwise provided to be paid to such person, shall lapse and shall be paid, distributed prior to my death leaving no living lawful descendants. My Executor and/or Trustee herein named are specifically authorize to defend, at the expense of my estate, any contest or attack of any nature upon this Will or any codicil hereto or upon any paragraph or provision thereof.

NINTH: Wherever the terms "Executor" or "Executors" are employed herein, the same shall be deemed to include the terms "Executrix" or "Executrices" or their alternates or successors, male pronouns shall be deemed to include the female and neuter gender as the case may be, and the singular shall include the plural.

IN WITNESS WHEREOF, I hereby sign, seal, publish and declare this to be my Last Will and Testament and initial each page, in the presence of the persons witnessing it at my request this 30th day of July, in the year One Thousand Nine Hundred Ninety-Nine.

Robert Chumley L.S.

The foregoing was on said date subscribed, sealed, published and declared by the Testator, as his Last Will and Testament, in our presence and we at his request, and in his presence and in the presence of each other, subscribed our names as witnesses (the final sentence of the Will beginning with the words "IN WITNESS WHEREOF" having been read aloud in his and our presence), all of us, including the Testator being present throughout the execution and attestation of this Will.

Lee Skellie residing at 40-16 171st Street, Flushing, N.Y. 11357
Lucy O'Grady residing at 36-19 167th Street, Flushing, N.Y. 11358

MAN. KRAMER
MONACO, P.C.
attorneys at Law
4810 Motor Parkway
Long Beach, New York 11764

AFFIDAVIT OF SUBSCRIBING WITNESS

STATE OF NEW YORK)
COUNTY OF Queens)ss.:

Michael Malloy and Lucy O'Gorman, each of the undersigned, individually and severally, being duly sworn, depose and say:

The within Will was subscribed in our presence and sight at the end thereof by Robert Livingston Chamberlee, the within named Testator(rix), on the 30th day of JULY, 1999, at Queens, New York.

Said Testator(rix), at the time of making such subscription, declared the instrument to be his/her Last Will and Testament.

Each of the undersigned thereupon signed his/her name as a witness at the end of said Will, at the request of said Testator(rix), and in his/her presence and in the presence and sight of each other.

Said Testator(rix), was, at the time of so executing the said Will, over the age of eighteen (18) years and, in the respective opinions of the undersigned, of sound mind, memory, and understanding and not under any restraint or in any respect incompetent to make a Will.

Said Testator(rix), in the respective opinions of the undersigned, could read, write and converse in the English language and was suffering from no defect of sight, hearing or speech, or from any other physical or mental impairment which would affect his/her capacity to make a valid Will. This Will was executed as a single, original instrument and was not executed in counterparts.

Each of the undersigned was acquainted with said Testator(rix) at such time and makes this affidavit at his/her request.

Michael Malloy
Lucy O'Gorman

Severally subscribed and sworn
to before me this 30th day of
JULY, 1999.

Rhea O'Gorman

RHEA O'GORMAN
Notary Public, State of New York
No. 41-488029
Qualified in Queens County
Commission Expires December 31, 2000

FELDMAN, KRAMER
& MONACO, P.C.
Attorneys At Law
30 Vanderbilt Motor Parkway
Longmeadow, New York 11763

MOTION FEE PAID

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

James Robert Malloy,

Plaintiff,

vs.

Swain N. Thompson, Jr., Merrill Lynch,
Pierce, Fenner & Smith, Inc., Joseph T. Argo,
and Greene and Company, L.L.P.,

Defendants.

In the Matter of:

Estate of Robert L. Chamblee

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

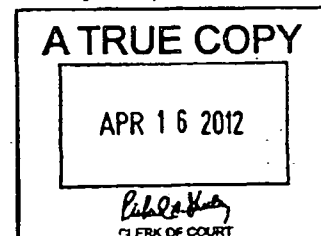
2012-CP-04- 01433

**MOTION FOR
CONSOLIDATION
OF ACTIONS
UNDER RULE 42(a)**

**TO: HAROLD THRELKELD AND JOHN O'ROURKE, ATTORNEYS FOR
DEFENDANT SWAIN N. THOMPSON, MERRILL LYNCH, PIERCE, FENNER
& SMITH, INC., JOSEPH T. ARGO, AND GREENE AND COMPANY, L.L.P.:**

The Plaintiff, James Robert Malloy, moves the Court, pursuant to Rule 42(a) of the South Carolina Rules of Civil Procedure to order the consolidation of this case and the case styled as James Robert Malloy v. Swain N. Thompson, Jr., bearing Civil Action No. 2010-CP-04-1845 filed in Anderson County, South Carolina, pursuant to the Plaintiff's removal petition from Anderson County Probate Court. In support of this motion, the Plaintiff shows the following to the Court:

1. The Plaintiff filed a Complaint in the Anderson County Probate Court in the Estate of Robert L. Chamblee on May 14, 2010 (Exhibit A -Complaint). On May 18, 2010, the Plaintiff's Complaint was removed to this Court upon motion of the Plaintiff and is now pending before this Court in Civil Action No. 2010-CP-04-1845 (hereafter "Removed Complaint").



2. The Removed Complaint asserted claims against Defendant Swain N. Thompson, Jr. to set-aside the simultaneously executed will and *inter vivos* trust of Robert L. Chamblee ("Decedent") on the grounds of lack of mental capacity, undue influence and mistake. The Removed Complaint also contained causes of action for setting aside transfers to trust, fraud, conversion, quantum meruit, constructive and resulting trusts, breach of fiduciary duty and tortious interference with inheritance and gifts.

3. The Removed Complaint arose out of events in which Defendant Thompson in 2002 and 2003 altered and disrupted the estate plan of his uncle Robert L. Chamblee. Prior to 2002 the Decedent set up his estate plan so that the Plaintiff was the primary beneficiary. Through undue influence and decedent's incompetency, Thompson was able to alter and disrupt the Decedent's estate plan to make himself the sole beneficiary of Decedent's estate by use of powers of attorney, will, and revocable trust.

4. The Plaintiff filed a Complaint in this matter, a copy of which is attached as Exhibit B, asserting the same claims of setting aside the trust, setting aside transfers to trust, fraud, conversion, quantum meruit, constructive and resulting trusts, tortious interference with inheritance and gifts, and breach of fiduciary duty against Defendant Thompson as in the original Complaint. This current action also includes a similar cause of action for tortious interference with inheritance and gifts against Defendants Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), Joseph T. Argo ("Argo"), and Greene and Company, L.L.P. ("Greene") and for aiding and abetting the same. It also adds a conspiracy cause of action for claims arising out of the same events.

5. In James Robert Malloy v. Swain N. Thompson, Jr., 2010-CP-04-1845, Defendant Thompson has asserted, and Plaintiff has contested, that this Court has subject matter jurisdiction

on removal to hear only "the direct attack on the validity of the Will and the Trust Agreement." Memo. in Opposition to Pltf's Motion to Amend dated March 8, 2012, ¶ 7.2. He has claimed this Court lacks subject matter jurisdiction over the causes of action for setting aside transfers to trust, fraud, conversion, quantum meruit, constructive and resulting trusts, breach of fiduciary duty and tortious interference with inheritance and gifts.

6. The two cases involve common questions of law and fact.

7. The common questions of law are the causes of action for setting aside the trust, setting aside transfers to trust, fraud, conversion, quantum meruit, constructive trust, resulting trust, breach of fiduciary duty, and tortious interference with inheritance and gifts. The Complaint in this case protects and insures this Court's subject matter jurisdiction over the causes of action for setting aside transfers to trust, fraud, conversion, quantum meruit, constructive and resulting trusts, breach of fiduciary duty, tortious interference with inheritance and gifts, and conspiracy. This Court therefore has subject matter jurisdiction over these causes of action through its original jurisdiction under S.C. Const. art. V, § 11 and through S.C. Code Ann. §§ 62-1-302(d), 62-5-503 and 62-7-201(c).

8. The common questions of fact are:

- The mental competency of Decedent at the time of the execution of the powers of attorney, will, and trust in 2002.
- The undue influence exerted upon Decedent by Defendant Thompson.
- The validity of the purported transfers of Decedent's assets to the revocable trust set up in Decedent's name in December 2002.
- The actions of all Defendants in carrying out the plan to radically alter and disrupt the Decedent's estate plan that existed prior to September 2002.

- The circumstances surrounding the creation and exercise of the purported powers of attorney of Decedent by all of the Defendants in order to transfer Decedent's assets for the benefit of Defendant Thompson.

9. The Plaintiff would state that, through discovery in the case of Malloy v. Thompson, 2010-CP-04-1845, it uncovered evidence necessitating the filing of the claims against Defendants Merrill Lynch, Greene and Argo.

10. The proposed consolidation will avoid unnecessary costs and will further judicial economy. Agents of Defendants Merrill Lynch and Greene and Defendant Argo will be vital witnesses in both cases necessitating their presence in both actions. Consolidation will therefore save the Defendants and the Court from having to hear from the same parties and witnesses twice regarding the events surrounding the alteration of decedent's estate plan in 2002 and 2003. It would also prevent the possibility of inconsistent verdicts.

11. The undersigned counsel would show that consultation with all parties would not be possible with this motion since three of the parties, Merrill Lynch, Greene and Argo, have not yet been served and/or filed an appearance in this action.

WHEREFORE, the Plaintiff moves that the Court consolidate this case with the case styled as Malloy v. Thompson, bearing Civil Action No. 2010-CP-04-1845 in Anderson County, South Carolina, and provide such further relief in favor of the Plaintiff as the Court deems just and proper.

Respectfully submitted,

THE GILREATH LAW FIRM, P.A.

By: William M. Hogan
James R. Gilreath (SC Bar #2133)
William M. Hogan (SC Bar #65272)

110 Lavinia Avenue (zip 29601)
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and

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ATTORNEYS FOR PLAINTIFF

Dated: April 13, 2012
Greenville, South Carolina.

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

James Robert Malloy,

Petitioner,

vs.

Swain N. Thompson, Jr.,

Respondent.

In the Matter of:

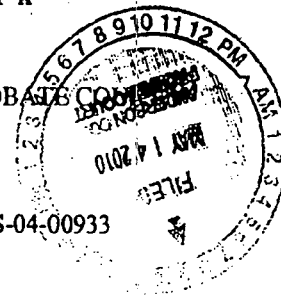
Estate of Robert L. Chamblee

IN THE PROBATE COURT

2009-ES-04-00933

COMPLAINT

JURY TRIAL DEMANDED



The Petitioner would respectfully show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Swain N. Thompson, Jr. ("Thompson") is a resident of Anderson County, South Carolina and the nephew of decedent Robert L. Chamblee ("Decedent").
2. James Robert Malloy ("Malloy") is a resident of Smithtown, New York and the godson of Decedent.
3. Robert L. Chamblee died in Anderson County on September 8, 2009, at the age of 86.
4. On September 16, 2009, Thompson applied for an informal probate of Decedent's alleged will dated December 11, 2002 and for an informal appointment of Thompson as personal representative of Decedent's estate.
5. On September 16, 2009, the Anderson County Probate Court admitted the alleged will to informal probate and granted Thompson's application for informal appointment; the estate is currently being administered in Anderson County Probate Court.

6. Decedent allegedly signed a document on December 11, 2002, that purports to be a trust agreement appointing Decedent and Thompson as co-trustees.
7. On information and belief, while Decedent was alive Thompson began attempting to transfer Decedent's assets to Thompson and others.
8. This Court has the authority and jurisdiction to determine the validity of the alleged will and trust as well as any purported *inter vivos* transfer by Thompson of Decedent's assets, to determine the validity of the informal appointment of Thompson as personal representative, to determine that Thompson has breached his fiduciary duty, converted Decedent's assets, and tortiously interfered with Malloy's inheritance, to remove Thompson as personal representative and trustee, and to grant appropriate relief therefore.

GENERAL ALLEGATIONS

9. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.
10. Malloy enjoyed a close relationship with Decedent who was his godfather. From 1983 on, Decedent effectively treated Malloy as his son and in the presence of others referred to Malloy as his son; they spoke often and spent much time together.
11. In or around 2001, when Decedent was in his late seventies, the faculty and students at Baruch College in New York, where Decedent was a long-time professor, began to notice that Decedent's behavior was changing: they noticed and complained about Decedent's lack of memory, strange and unprofessional behavior, and inability to teach his classes. The professor chairing the department where Decedent taught for 30 years observed in May 2002 that Decedent could no longer function in a reasonable capacity.

12. Because of these expressed concerns about Decedent's behavior, Baruch College commenced an internal investigation and was proceeding to have Decedent removed or terminated due to incompetence.

13. Malloy was working to help Decedent with the proceedings at Baruch College and to obtain medical help, which Decedent resisted.

14. On or about July 30, 2002, Decedent went to St. Luke's Roosevelt Hospital seeking medical care because he thought he was having a heart attack.

15. Malloy spoke with Decedent's doctors, who confirmed that Decedent was suffering from short-term memory loss and Alzheimer's disease.

16. Consequent to the Alzheimer's diagnosis, the doctors retained Decedent in the hospital against his will for three weeks because they thought his condition was so severe that he was a danger to himself and others.

17. On the advice of counsel, Malloy did not seek to commence a conservatorship action on Decedent's behalf; instead, he requested that Thompson come to New York and remove Decedent from the hospital so that he would no longer have to endure the torture of being restrained in a hospital against his will.

18. With Malloy, Thompson met with doctors at the hospital and officials at Baruch College. Thompson then returned to Anderson to make arrangements for Decedent to reside at Garden House in Anderson. Because the hospital would not release Decedent on his own, Thompson returned to New York and brought Decedent back to Garden House. Before leaving New York with Decedent, Thompson changed the locks on Decedent's apartment, upon

information and belief, in order to cease Malloy's access to Decedent's property despite Decedent's long-time permission to Malloy to enter Decedent's home.

19. From 1984 to 1999, Decedent, with the assistance of New York counsel, executed several wills naming Malloy as primary beneficiary and a health care proxy naming Malloy as his agent; none of the wills named Thompson as primary beneficiary. During this period, Decedent did not execute any trust or property power of attorney.

20. On July 30, 1999 Decedent executed in New York a will prepared by Decedent's long-time New York counsel which is the valid last will and testament of Decedent; the original is in the possession of Malloy and a copy of said will is attached hereto.

21. Within days after Thompson removed Decedent from the hospital in New York and brought him to Anderson, he took Decedent to Thompson's attorneys and coerced Decedent into signing a document purporting to be a property power of attorney on September 16, 2002; a few weeks later, Thompson took Decedent to Thompson's attorneys and coerced Decedent into signing documents purporting to be a will and an *inter vivos* trust, leaving all of his assets to Thompson. The purported will and trust were executed on December 11, 2002.

22. When Thompson coerced Decedent into signing the purported December 11, 2002 will and trust, Thompson knew Decedent had an existing will that devised and bequeathed assets of Decedent to Malloy. Malloy is informed and believes that prior to Thompson bringing Decedent to South Carolina, Decedent inherited interests in family land in which Thompson and/or his family and/or relatives also owned an interest or desired to own. Thompson was highly concerned that Decedent would devise his interests to Malloy as Decedent had informed Thompson that Malloy was a beneficiary of his estate.



23. Shortly after Thompson moved Decedent to South Carolina, Thompson implied in a telephone conversation with Malloy that he knew Malloy was the sole beneficiary of Decedent's will. In that conversation, around September 2002, Thompson told Malloy "I know there's a will and that's fine."

24. During the time between Decedent leaving the New York hospital and the alleged execution of the documents purporting to be his will and trust, Decedent was under constant supervision, and eventually lockdown, at Garden House and, despite Decedent's requests, was not allowed to return to New York or his professorship at Baruch College.

25. During the time between Decedent leaving the New York hospital and the alleged execution of the documents purporting to be his will and trust, Decedent did not attempt to contact his New York counsel of many years, nor did Decedent attempt to bring any action against the New York hospital and Baruch College, both of which determined that he was incompetent and treated him accordingly.

26. Demonstrative of their close relationship, prior to Decedent's August 2002 admission in the New York Hospital, Malloy was Decedent's first call, at Decedent's instructions, when a problem arose or Decedent needed help. People in close contact with Decedent, including co-workers and faculty members at Baruch College, believed Malloy to be Decedent's son.

27. Although Malloy frequently called Decedent at Garden House after Thompson moved Decedent to South Carolina, Decedent never called Malloy and never told him he had made a new will, trust, and power of attorney. When Malloy visited Decedent in the summer of

2003, Decedent did not even recognize him and introduced him to a staff member as one of his students.

28. While Decedent was competent, he placed Malloy's name on many of his assets, such as insurance, bank accounts, and safe deposit boxes; using his alleged power of attorney, Thompson eventually removed Malloy's name from these assets and the health care proxy.

29. In 2006, Thompson moved Decedent from Garden House to NHC Healthcare in Anderson.

30. While Decedent was at Garden House, its staff refused to recognize Malloy's health care proxy and refused to provide him with pertinent information; a staff member at NHC Healthcare told Malloy that Thompson was Decedent's health care attorney-in-fact.

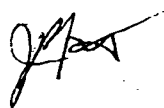
31. Malloy did not learn about the alleged 2002 power of attorney until he complained to the S.C. Elder Care Office in 2006, when he was informed by a staff member from the Ombudsman's office. Malloy did not have notice of the existence of the purported will and trust prepared by Thompson's attorney for Decedent until the will was filed after Decedent's death.

FOR A FIRST CAUSE OF ACTION
(Action to Set Aside Will For Lack of Mental Capacity)

32. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

33. Upon information and belief, at the time of the purported execution of the alleged 2002 will by Decedent, Decedent was mentally incompetent and suffering from Alzheimer's disease and/or other dementia and lacked the requisite mental capacity to make a valid will.

34. Therefore, the alleged 2002 will is invalid and of no legal force and effect.



FOR A SECOND CAUSE OF ACTION
(Action to Set Aside Will Due to Undue Influence)

35. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

36. On information and belief, Thompson exercised undue influence on Decedent, to wit: Decedent was in a weakened mental state and susceptible to influence; Decedent was subject to Thompson's control; Thompson took Decedent to Thompson's attorneys for execution of the alleged will; Thompson did not communicate with Decedent's own attorneys or with Malloy; and Thompson was never the primary beneficiary of any previous valid will of Decedent and the alleged 2002 will purports to name Thompson as sole beneficiary.

37. Therefore, the alleged 2002 will is invalid and of no legal force and effect.

FOR A THIRD CAUSE OF ACTION
(Action to Set Aside Will Due to Mistake)

38. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

39. On information and belief, Decedent would not have executed the alleged 2002 will unless he was mistaken about its contents or even that it was a will because it completely and suddenly changed his dispositive intent as demonstrated by his prior valid wills, for no reason.

40. Therefore, the alleged 2002 will is invalid and of no legal force and effect.



FOR A FOURTH CAUSE OF ACTION

(Action to Set Aside Purported *Inter Vivos* Trust for Lack of Mental Capacity)

41. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

42. Upon information and belief, at the time of the purported execution of the alleged 2002 trust by Decedent, Decedent was mentally incompetent and suffering from Alzheimer's disease and/or other dementia and lacked the requisite mental capacity to make a valid trust.

43. Therefore, the alleged 2002 trust is invalid and of no legal force and effect.

FOR A FIFTH CAUSE OF ACTION

(Action to Set Aside Purported *Inter Vivos* Trust Due to Undue Influence)

44. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

45. On information and belief, Thompson exercised undue influence on Decedent, to wit: Decedent was in a weakened mental state and susceptible to influence; Decedent was subject to Thompson's control; Thompson took Decedent to Thompson's attorneys for execution of the alleged trust; Thompson did not communicate with Decedent's own attorneys or with Malloy; and Thompson was never the primary beneficiary of any previous valid trust or will of Decedent and the alleged 2002 trust purports to name Thompson as sole beneficiary.

46. Therefore, the alleged 2002 trust is invalid and of no legal force and effect.

FOR A SIXTH CAUSE OF ACTION

(Action to Set Aside Purported *Inter Vivos* Trust Due to Mistake)

47. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.



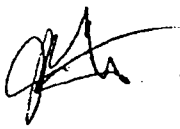
alleged 2002 will and trust in the name of the Decedent. The false representations were material as they induced Decedent to sign the alleged 2002 will and trust which completely altered Decedent's long-time estate plans.

55. Malloy is informed and believes that Thompson, who in December 2002 had control and influence over Decedent, had knowledge about the falsity of the representations made to Decedent about the 2002 will and trust or either had a reckless disregard of their truth or falsity. Malloy is further informed and believes that Thompson intended for Decedent to act upon Thompson's representations about the content and/or effect of the 2002 will and trust by inducing Decedent to execute such documents.

56. Malloy is informed and believes that due to Decedent's mental incompetency, Decedent was ignorant of the falsity of Thompson's representations. Because of Decedent's Alzheimer's disease and/or dementia, Decedent rightfully relied on the substance of Thompson's representations.

57. Malloy and Decedent were proximately injured by Thompson's representations that prevented Decedent from exercising his own judgment and free choice to dispose of his property as he desired.

58. Upon information and belief, Thompson's actions constitute fraud, and all instruments of transfer to the trusts allegedly created by the *inter vivos* trust documents are therefore invalid and of no legal force and effect; the alleged will is therefore invalid and of no legal force and effect; any transfer caused by Thompson from Decedent or his estate to Thompson and/or others is therefore invalid and of no legal force and effect; and Thompson should be assessed with actual damages, punitive damages, costs, and attorneys' fees.



FOR A NINTH CAUSE OF ACTION
(Conversion)

59. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

60. Upon information and belief, Thompson has wrongfully taken property from Decedent and converted it to his own use, all to the damage of Decedent and Malloy.

61. Malloy is further informed and believe that he is entitled to an award of punitive damages as a result of said conversion by Thompson.

FOR A TENTH CAUSE OF ACTION
(Quantum Meruit/Unjust enrichment)

62. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

63. Plaintiff will show that Thompson has realized a non-gratuitous benefit by his appropriation of Decedent's assets and that it is inequitable for Thompson to retain such assets without paying for their value.

64. By virtue of Thompson's conduct, Thompson has been unjustly enriched to the detriment of Decedent and Malloy.

65. As a result of Thompson's unjust enrichment, a constructive trust should be imposed on any and all property interests distributed from Decedent or his estate to Thompson and/or others.



FOR AN ELEVENTH CAUSE OF ACTION
(Constructive Trust)

66. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

67. A constructive trust should be imposed on Thompson and/or others for all misappropriated property and any benefit therefrom.

FOR A TWELFTH CAUSE OF ACTION
(Resulting Trust)

68. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

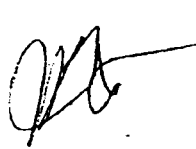
69. A resulting trust should be imposed on Thompson and/or others for all misappropriated property and any benefit therefrom.

FOR A THIRTEENTH CAUSE OF ACTION
(Breach of Fiduciary Duty; Failure to Marshal Assets; Removal)

70. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

71. In August 2002 Thompson made two trips to New York to secure the release of the Decedent from St. Luke's hospital. The trips were necessary because of the mental health of Decedent and the Decedent's need for supervision with day-to-day assistance due to his failed mental capacity.

72. Thompson was well aware of Decedent's mental deterioration from his interaction with the staff at St. Luke's hospital and with Decedent. Thompson further knew that Decedent



was a vulnerable adult due to Decedent's substantially impaired mental condition from Alzheimer's disease.

73. Thompson voluntarily assumed the responsibility for the oversight, care and protection of Decedent by offering to take control of Decedent to secure his release from St. Luke's Hospital. Thompson accepted and induced the Decedent to place confidence in him.

74. Thompson entered into a fiduciary relationship with Decedent and assumed the special obligations a fiduciary owes the other party such as Decedent. Thompson exploited this fiduciary relationship and his role as caregiver to improperly and unlawfully gain control of Decedent's assets for himself, thereby causing damages to the estate of Decedent and to the Plaintiff.

75. As fiduciary of Decedent's estate, Thompson is required to collect and marshal the assets of the estate, which duties include (1) the investigation of the validity of transfers purportedly made during Decedent's lifetime that may be invalid for such reasons as fraud, undue influence, mistake, conversion, and/or lack of mental capacity, and (2) attempt to bring into the estate any alleged *inter vivos* transfers which are defective for any such reason.

76. Upon information and belief, as the perpetrator of the delicts cited in the causes of action set forth above, Thompson obviously cannot conduct a fair investigation of himself; consequently, he should be removed as personal representative to allow the appointment of an unbiased fiduciary.

77. The failure of the personal representative to perform his duties constitutes a breach of fiduciary duty.



78. The Plaintiff is informed and believes that such actions described in this Complaint constitute a breach of fiduciary duties that Thompson owed Decedent, his estate and the Plaintiff. The Plaintiff is therefore entitled to compensatory damages (with pre-judgment interest) and punitive damages from Thompson for his breach of fiduciary duties in an amount to be determined by the trier of fact.

FOR A FOURTEENTH CAUSE OF ACTION
(Tortious Interference With Inheritance)

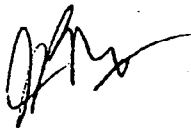
79. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

80. Malloy had an expectancy under the will of Decedent — i.e., to inherit his entire estate.

81. On information and belief, Thompson knew of Malloy's expectancy under Decedent's will and intentionally interfered with that expectancy through his tortious conduct.

82. But for Thompson's tortious interference with Malloy's inheritance, Malloy would have inherited all of Decedent's estate, including those assets transferred through Thompson's actions during Decedent's lifetime. Consequently, Malloy has been damaged by Thompson's tortious conduct in that he would be denied his inheritance of the entire estate, to which he was entitled.

83. As a result of Thompson's tortious interference with Malloy's inheritance, Malloy is entitled to a judgment against Thompson imposing a constructive trust on any and all property interests distributed from Decedent and/or Decedent's estate to Thompson and/or others, plus damages, punitive damages, and attorneys' fees.



FOR A FIFTEENTH CAUSE OF ACTION

(Attorneys' Fees and Costs)

84. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

85. Because of the actions of Thompson, Malloy has been forced to obtain the services of an attorney and others to defend himself from the actions of Thompson.

86. Consequently, Malloy is entitled to an Order from this Court commanding Thompson to pay for the costs and attorneys' fees he has incurred due to the actions of Thompson.

WHEREFORE, Malloy prays that he be granted judgment for the first through fifteenth causes of action, including but not limited to the following:

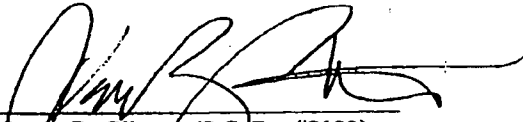
- A. For an order setting aside the alleged will dated December 11, 2002 previously admitted to probate;
- B. For an order setting aside the alleged trust purportedly signed by Decedent dated December 11, 2002;
- C. For an order declaring the transfers to the alleged trust of December 11, 2002 invalid and of no legal effect thereby setting aside all transfers of any property to the purported trust;
- D. For actual and punitive damages, costs and attorney fees against Thompson for fraud, conversion, breach of trust, and tortious interference with Malloy's inheritance;



- E. For a constructive trust to be imposed on any and all property interests distributed from Decedent or his estate to Thompson and others;
- F. For a resulting trust to be imposed on Thompson and/or others for all misappropriated property and any benefit therefrom;
- G. For attorney fees and costs;
- H. For such other relief as the Court deems just and proper.

PETITIONER DEMANDS TRIAL BY JURY.

THE GILREATH LAW FIRM, P.A.

By: 

James R. Gilreath (S.C. Bar #2133)
William M. Hogan (S.C. Bar #65272)
110 Lavinia Avenue (zip 29601)
P. O. Box 2147
Greenville, SC 29602
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and

S. Alan Medlin (SC Bar #3924)
1713 Phelps Street
Columbia, SC 29205
Telephone: (803) 777-7465
Fax: (803) 777-7465

ATTORNEYS FOR PETITIONER

Dated: May 13, 2010
Greenville, South Carolina.

LAST WILL AND TESTAMENT

of

ROBERT LIVINGSTON CHAMBLEE

I, ROBERT LIVINGSTON CHAMBLEE residing at, 152 West 58th Street, Apartment 2C, New York City, State of New York, which I hereby declare to be my domicile, do hereby make, publish and declare this to be my Last Will and Testament.

FIRST: I revoke all Wills and Codicils at any time heretofore made by me.

SECOND: I direct that all my just debts and funeral expenses be paid out of my estate as soon after my death as may be practicable.

THIRD: All the rest, residue and remainder of the property both real, personal and mixed and wheresoever situate which I may own or be entitled to at the time of my death, I give, devise and bequeath to JAMES ROBERT MALLOY residing at, 268 Community Drive, Smithtown, New York, if he shall survive me. If he shall not survive me, then I give, devise and bequeath my residuary estate to MARGARET C. EVANS residing at, 72 Lebkamp Avenue, Huntington, New York, if she shall survive me. If she shall not survive me, then I give, devise and bequeath my residuary estate to those persons to whom and in those proportions in which the same would have been distributable if I had then died the owner thereof, intestate, and a resident of the State of New York.

FOURTH: I hereby appoint JAMES ROBERT MALLOY to be the Executor of this my Last Will and Testament. In the event my said Executor shall predecease me, fail to qualify, or having qualified thereafter dies, resigns, is removed from office or for any reason ceases to act as Executor, I hereby appoint MARGARET C. EVANS as Executor of this my Last Will and Testament.

I direct that none of my Executors shall be required to give any bond or other security for the faithful performance of their respective duties in any jurisdiction whatsoever, or if any bond is required, no surety shall be required thereon. No fiduciary at any time acting hereunder shall be required to file periodic accountings in the Court in which this Will shall be admitted to probate unless such fiduciary shall elect to do so. To the extent that any of my Executors shall exercise discretion hereunder and make payment and/or application of assets as herein provided they shall be relieved of any and all responsibility and liability with respect to the same.

FIFTH: My Executor shall have discretion to make payment or distribution of any principal and/or income vesting in and payable to any minor in any one or more of the following ways:

(a) paying the same to the parent, guardian or other person having the care and control of such minor and the receipt by such payee shall be full acquiescence to my Executor,

(b) paying the same to any relative of the minor as custodian for the minor under any applicable Gifts to Minors Act, or

(c) deferring payment or distribution of any part or all thereof until the minor comes of age, meanwhile applying to such minor's use so much principal and income therefrom, and at such time or times as my Executor may deem advisable. Any income not expended by my Executor shall be added to principal and my Executor

shall pay over and disburse the principal to the minor upon such minor attaining the age of eighteen (18) years or to the estate of such minor if the minor dies under the age of eighteen (18) years.

SIXTH: My Executor shall have all the powers and authority which are now conferred upon fiduciaries (expressly including, but not limited to, those powers enumerated in the Fiduciaries Powers Act, Section 11-1.1 of the New York Estates Powers and Trusts Law) or which may hereafter be conferred by law upon Executors. In addition to the foregoing powers and authority, I fully authorize and empower my Executor to retain any and all property, and also, to invest any and all property, real or personal, which at any time may constitute part of my estate, in any stock, bonds, common trust funds, securities of investment companies or other securities regardless of any rule regarding diversity of trust investments.

SEVENTH: I direct that all inheritance, estate, transfer, succession and death taxes or duties (including any interest thereon) imposed by any jurisdiction whatsoever by reason of my death upon or in relation to any property includable in my estate for the purposes of any such taxes or duties, whether such property passes under the provisions of this Will, or outside the provisions of this Will, be paid out of my general estate without proration or apportionment.

EIGHTH: Every heir, legatee, devisee, or beneficiary, under this Will and the trusts herein created or intended to be created, who shall contest in any court any provision of this instrument, except as may be permitted by the provisions of Section 3-3.5 of the Estates, Powers and Trusts Law, shall not be entitled to any devises, legacies or benefits under this Will or any codicil hereto or any trust created hereby and any and all devises, legacies and portions of the income or corpus of my estate otherwise provided to be paid to such person, shall lapse and shall be paid, distributed prior to my death leaving no living lawful descendants. My Executor and/or Trustee herein named are specifically authorize to defend, at the expense of my estate, any contest or attack of any nature upon this Will or any codicil hereto or upon any paragraph or provision thereof.

NINTH: Wherever the terms "Executor" or "Executors" are employed herein, the same shall be deemed to include the terms "Executrix" or "Executrices" or their alternates or successors, male pronouns shall be deemed to include the female and neuter gender as the case may be, and the singular shall include the plural.

IN WITNESS WHEREOF, I hereby sign, seal, publish and declare this to be my Last Will and Testament and initial each page, in the presence of the persons witnessing it at my request this 10th day of July, in the year One Thousand Nine Hundred Ninety-Nine.

Robert J. DeMille L.S.

The foregoing was on said date subscribed, sealed, published and declared by the Testator, as his Last Will and Testament, in our presence and we at his request, and in his presence and in the presence of each other, subscribed our names as witnesses (the final sentence of the Will beginning with the words "IN WITNESS WHEREOF" having been read aloud in his and our presence), all of us, including the Testator being present throughout the execution and attestation of this Will.

Michael J. Kelly residing at 40-16 171st Street, Flushing, N.Y. 11357
Lucy D. Gorman residing at 36-19 167 St. Flushing, N.Y. 11358

AFFIDAVIT OF SUBSCRIBING WITNESS

STATE OF NEW YORK)
COUNTY OF Queens)ss.:

Michael Mallory and Lucy O'Gorman, each of the undersigned, individually and severally, being duly sworn, depose and say:

The within Will was subscribed in our presence and sight at the end thereof by Robert Livingston Chamberlee, the within named Testator(rix), on the 30th day of July, 1999, at Queens, New York.

Said Testator(rix), at the time of making such subscription, declared the instrument to be his/her Last Will and Testament.

Each of the undersigned thereupon signed his/her name as a witness at the end of said Will, at the request of said Testator(rix), and in his/her presence and in the presence and sight of each other.

Said Testator(rix), was, at the time of so executing the said Will, over the age of eighteen (18) years and, in the respective opinions of the undersigned, of sound mind, memory, and understanding and not under any restraint or in any respect incompetent to make a Will.

Said Testator(rix), in the respective opinions of the undersigned, could read, write and converse in the English language and was suffering from no defect of sight, hearing or speech, or from any other physical or mental impairment which would affect his/her capacity to make a valid Will. This Will was executed as a single, original instrument and was not executed in counterparts.

Each of the undersigned was acquainted with said Testator(rix) at such time and makes this affidavit at his/her request.

Michael Mallory
Lucy O'Gorman

Severally subscribed and sworn
to before me this 30th day of
JULY, 1999.

Rhea O'Gorman
Notary Public

RHEA O'GORMAN
Notary Public, State of New York
No. 41-4818029
Qualified in Queens County
Qualified in Kings County
Commission Expires December 31, 2000

FELDMAN, KRAMER
& MONACO, P.C.
Attorneys At Law
10 Vanderbilt Motor Parkway
Longmeadow, New York 11764

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

James Robert Malloy,

Plaintiff,

vs.

Swain N. Thompson, Jr., Merrill Lynch,
Pierce, Fenner & Smith, Inc., Joseph T.
Argo, and Greene and Company, L.L.P.,

Defendants.

In the Matter of:

Estate of Robert L. Chamblee

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

2012-CP-04- 01433

COMPLAINT

(Jury Trial Demanded)

The Plaintiff would respectfully show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Defendant Swain N. Thompson, Jr. ("Thompson") is a resident of Anderson County, South Carolina and the nephew of decedent Robert L. Chamblee ("Decedent").
2. Plaintiff James Robert Malloy ("Malloy") is a resident of Huntington, New York and the godson of Decedent.
3. Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), upon information and belief, is a Delaware corporation that is registered to do business in the state of South Carolina and regularly transacts business in South Carolina.
4. The Defendant Greene and Company, L.L.P. ("Greene") is a South Carolina limited liability partnership with its headquarters located in Anderson County, South Carolina.

5. Defendant Joseph T. Argo ("Argo") is a certified public accountant licensed in the state of South Carolina and is a citizen and resident of Anderson County, South Carolina. Argo is an agent and principal in Greene.

6. Personal jurisdiction is proper over Defendants Thompson and Argo pursuant to S.C. Code Ann. §§ 36-2-802 and -803 as said Defendants are domiciled in this State, among other factors.

7. Personal jurisdiction over Merrill Lynch is proper pursuant to S.C. Code Ann. §§ 36-2-802 and -803 in that Merrill Lynch and/or its agents have been doing business in the state, transacted business in the state, contracted to supply services in this state, and committed tortious acts in whole or in part in the state, among other factors, conferring personal jurisdiction over said Defendant.

8. Personal jurisdiction is proper over Defendant Greene pursuant to S.C. Code Ann. §§ 36-2-802 and -803 as said Defendant is organized under the laws of this State. It also is doing business and maintains its principal place of business in this State, among other factors.

9. This action is related to the case of *Malloy v. Thompson*, 2010-CP-04-1845 currently pending before this Court after its removal from Anderson County Probate Court ("Removal Action"). In the Removal Action, Defendant Thompson has not contested this Court's jurisdiction or authority to adjudicate Malloy's claims to set aside the purported will and trust of Decedent on the grounds of lack of mental capacity, undue influence and mistake. Whether through this action or by way of the Removal Action, this Court has the authority and jurisdiction to determine the validity of the alleged will and trust as well as any purported *inter vivos* transfer by Thompson of Decedent's assets,

to determine the validity of the informal appointment of Thompson as personal representative, to determine that Thompson has breached his fiduciary duty and converted Decedent's assets, to determine that Defendants tortiously interfered with Malloy's inheritance and gift expectancy and conspired to injure Malloy, to remove Thompson as personal representative and trustee, and to grant appropriate relief therefore from all Defendants pursuant to S.C. Const. art. V, § 11 and S.C. Code Ann. §§ 62-5-503 and 62-7-201(c).

10. Venue is proper in this Court pursuant to S.C. Code Ann. §§ 15-7-30 and 62-7-204.

GENERAL ALLEGATIONS

11. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

12. Robert L. Chamblee died in Anderson County on September 8, 2009, at the age of 86.

13. On September 16, 2009, Thompson applied for an informal probate of Decedent's alleged will dated December 11, 2002 and for an informal appointment of Thompson as personal representative of Decedent's estate.

14. On September 16, 2009, the Anderson County Probate Court admitted the alleged will to informal probate and granted Thompson's application for informal appointment; the estate is currently being administered in Anderson County Probate Court.

15. Decedent allegedly signed a document on December 11, 2002, that purports to be a trust agreement appointing Decedent and Thompson as co-trustees.

16. On information and belief, while Decedent was alive Thompson began attempting to transfer Decedent's assets to Thompson and others.

17. Malloy enjoyed a close relationship with Decedent who was his godfather. From 1983 on, Decedent effectively treated Malloy as his son and in the presence of others referred to Malloy as his son; they spoke often and spent much time together.

18. In or around 2001, when Decedent was in his late seventies, the faculty and students at Baruch College in New York, where Decedent was a long-time professor, began to notice that Decedent's behavior was changing: they noticed and complained about Decedent's lack of memory, strange and unprofessional behavior, and inability to teach his classes. The professor chairing the department where Decedent taught for 30 years observed in May 2002 that Decedent could no longer function in a reasonable capacity.

19. Because of these expressed concerns about Decedent's behavior, Baruch College commenced an internal investigation and was proceeding to have Decedent removed or terminated due to mental incompetence.

20. Malloy was working to help Decedent with the proceedings at Baruch College and to obtain medical help, which Decedent resisted.

21. On or about July 30, 2002, Decedent went to St. Luke's Roosevelt Hospital seeking medical care because he thought he was having a heart attack.

22. Malloy spoke with Decedent's doctors, who confirmed that Decedent was suffering from short-term memory loss and Alzheimer's disease.

23. On August 1, 2002, two days after Decedent had been admitted to St. Luke's Roosevelt Hospital, Dr. Henry Greenberg, his treating physician at the hospital, stated in the hospital records that "Pt [patient] is not competent & will need placement."

24. Consequent to the Alzheimer's diagnosis, the doctors retained Decedent in the hospital against his will for three weeks because they thought his condition was so severe that he was a danger to himself and others.

25. On the advice of counsel, Malloy did not seek to commence a conservatorship action on Decedent's behalf; instead, he requested that Thompson come to New York and remove Decedent from the hospital so that he would no longer have to endure the torture of being restrained in a hospital against his will.

26. With Malloy, Thompson met with doctors at the hospital and officials at Baruch College. Thompson was well aware of the mental infirmities and incapacity of Decedent. Thompson then returned to Anderson, SC to make arrangements for Decedent to reside at The Garden House – an assisted living facility specializing in care for senior citizens with mental infirmities such as Alzheimer's disease. Because the hospital would not release Decedent on his own, Thompson returned to New York and brought Decedent back to The Garden House.

27. Before Thompson took Decedent from St. Luke's Roosevelt Hospital to The Garden House, Dr. Amy Sanders, who had also been treating Decedent since his hospital admission on July 30, 2002, completed a functional assessment of Decedent for The Garden House in a report dated August 14, 2002 with a fax date to The Garden House of August 15, 2002. In the report she diagnosed Decedent as suffering from Alzheimer's disease. She stated Decedent suffered from memory loss, confusion,

forgetfulness and impaired decision-making ability. She also assessed Decedent's ability in handling money as dependent on others. She concluded Decedent was a candidate for residence in a "Memory Impaired Apartment".

28. Prior to leaving New York with Decedent, Thompson changed the locks on Decedent's apartment, upon information and belief, in order to cease Malloy's access to Decedent's property despite Decedent's long-time permission to Malloy to enter Decedent's home.

29. From 1984 to 1999, Decedent, with the assistance of New York counsel, executed several wills naming Malloy as primary beneficiary and a health care proxy naming Malloy as his agent; none of the wills named Thompson as primary beneficiary. During this period, Decedent did not execute any trust or property power of attorney.

30. On July 30, 1999 Decedent executed in New York a will prepared by Decedent's long-time New York counsel which is the valid last will and testament of Decedent; the original is in the possession of Malloy and a copy of said will is attached hereto.

31. Within days after Thompson removed Decedent from the hospital in New York and brought him to Anderson, he took Decedent to Thompson's attorneys and coerced Decedent into signing on September 16, 2002 a document purporting to be a property power of attorney under South Carolina law appointing Thompson as attorney-in-fact. On September 18, 2002 Thompson again took Decedent to Thompson's attorneys and coerced Decedent into signing a New York statutory short form durable power of attorney, again appointing Thompson as attorney-in-fact. The September 16, 2002 power of attorney stated that it was Decedent's intention that the power of attorney

not be used to disrupt the Decedent's estate plan and prohibited Thompson as agent from appointing, assigning or designating any assets, directly or indirectly, to Thompson. The September 18, 2002 power of attorney executed under the laws of the state of New York also specifically rejected the power of Thompson as agent to make gifts and did not include a statutory gifts rider. Nor did Decedent execute a separate non-statutory power of attorney under New York law.

32. A few months after the powers of attorney were signed, Thompson took Decedent to Thompson's attorneys and coerced Decedent into signing documents purporting to be a will and an *inter vivos* trust, leaving all of his assets to Thompson. The purported will and trust were executed on December 11, 2002.

33. When Thompson coerced Decedent into signing the purported December 11, 2002 will and trust, Thompson knew Decedent had an existing will that devised and bequeathed assets of Decedent to Malloy. Malloy is informed and believes that prior to Thompson bringing Decedent to South Carolina, Decedent inherited interests in family land in which Thompson and/or his family and/or relatives also owned an interest or desired to own. Thompson was highly concerned that Decedent would devise his interests to Malloy as Decedent had informed Thompson that Malloy was a beneficiary of his estate.

34. Shortly after Thompson moved Decedent to South Carolina, Thompson implied in a telephone conversation with Malloy that he knew Malloy was the sole beneficiary of Decedent's will. In that conversation, around September 2002, Thompson told Malloy "I know there's a will and that's fine."

35. During the time between Decedent leaving the New York hospital and the alleged execution of the documents purporting to be his will and trust, Decedent was under constant supervision, and eventually lockdown, at Garden House and, despite Decedent's requests, was not allowed to return to New York or his professorship at Baruch College.

36. During the time between Decedent leaving the New York hospital and the alleged execution of the documents purporting to be his will and trust, Decedent did not attempt to contact his New York counsel of many years, nor did Decedent attempt to bring any action against the New York hospital and Baruch College, both of which determined that he was incompetent and treated him accordingly.

37. Demonstrative of their close relationship, prior to Decedent's August 2002 admission in the New York hospital, Malloy was Decedent's first call, at Decedent's instructions, when a problem arose or Decedent needed help. People in close contact with Decedent, including co-workers and faculty members at Baruch College, believed Malloy to be Decedent's son.

38. Although Malloy frequently called Decedent at Garden House after Thompson moved Decedent to South Carolina, Decedent never called Malloy and never told him he had made a new will, trust, and power of attorney. When Malloy visited Decedent in the summer of 2003, Decedent did not even recognize him and introduced him to a staff member as one of his students.

39. While Decedent was competent, he placed Malloy's name on many of his assets, such as insurance, bank accounts, and safe deposit boxes. These assets include but are not limited to the following:

- Life insurance policy with the Veterans Administration with benefits paid to Thompson in the amount of \$96,972.43. Malloy was named as 75% beneficiary prior to beneficiary change to Thompson on January 6, 2003 as witnessed by Argo;
- Annuity with Nationwide Life Insurance Company surrendered to the 2002 trust on 2/26/03 for \$67,094.74 containing a death benefit significantly greater than the surrender value with Malloy named as death beneficiary;
- Banco Popular account established in trust for Malloy liquidated and distributed to the Merrill Lynch account for the 2002 trust on or about March 20, 2003 for \$146,571.11;
- Teachers' Retirement System of the City of New York Qualified Pension Plan and Tax-Deferred Annuity Program containing as of October 2002 \$ 643,199.06 with Malloy as designated beneficiary for 50% of the death benefits. In 2003 at least \$500,236.79 was rolled over or distributed to accounts at Merrill Lynch established under the direction of Thompson with the aid and assistance of the remaining defendants.

40. Using his alleged power of attorney, Decedent's mental incompetence and/or undue influence, Thompson eventually removed Malloy's name from these assets and the health care proxy. Thompson also changed Decedent's reported address with the various financial institutions to 1206 Briarwood St., Anderson, SC 29621. This address, though, was the residence of Thompson's sister Barbara T. Craft. Decedent did not live at that address. Thompson made the address and beneficiary changes either by completing and signing the change-of-address forms himself through the invalid powers of attorney or by Decedent's signatures on such forms, both procured through Decedent's mental incapacity and/or Thompson's undue influence. Indicative of his lack of mental competency, Decedent signed at least nine different forms with his address listed as 1206 Briarwood St., Anderson, SC 29621 – the address of Thompson's sister from October 4 through December 18, 2002. The above-referenced change-of-address forms often listed Thompson's phone number as that of Decedent.

41. In 2006, Thompson moved Decedent from Garden House to NHC Healthcare in Anderson.

42. While Decedent was at Garden House, its staff refused to recognize Malloy's health care proxy and refused to provide him with pertinent information; a staff member at NHC Healthcare told Malloy that Thompson was Decedent's health care attorney-in-fact.

43. Malloy did not learn about the alleged 2002 powers of attorney until he complained to the S.C. Elder Care Office in 2006, when he was informed by a staff member from the Ombudsman's office. Malloy did not have notice of the existence of the purported will and trust prepared by Thompson's attorney for Decedent until the will was filed after Decedent's death.

44. Malloy had an expectancy under the will of Decedent—i.e., to inherit his entire estate. Malloy also had an expectancy to receive various gifts from Decedent—i.e., Malloy was named as a beneficiary under various annuities, a life insurance policy, and as beneficiary of an *inter vivos* trust all established by the Decedent. Merrill Lynch, Greene and Argo intentionally interfered with that expectancy through their tortious conduct that included using invalid powers of attorney and Decedent's signature both obtained as a result of Decedent's mental incompetence and/or through Thompson's undue influence.

45. After Decedent executed the powers of attorney in September 2002 at Thompson's instigation, Merrill Lynch acted as the investment advisor and asset manager of all the funds held in the name of the December 11, 2002 trust. Merrill Lynch worked closely with Thompson as the purported trustee and with Argo and Greene as Thompson

and the 2002 trust's accountant. Malloy is informed and believes Merrill Lynch was highly knowledgeable about the intricacies of the 2002 trust and Decedent's assets and knew or should have known Thompson was the sole beneficiary of the 2002 trust upon Decedent's death. In fact, according to an e-mail of Heather Sendler, Registered Client Associate and financial advisor of Merrill Lynch working out of the Columbia, SC office, to Argo of May 1, 2003, the account for Decedent set up by Defendants was initially titled as a joint account in the name of both Robert Chamblee and Swain N. Thompson. The joint account was later closed out into "the new Trust for Estate Planning purposes."

46. After Decedent executed the powers of attorney in September 2002 at Thompson's instigation, Argo and Greene acted as the accountant for the 2002 trust, the Decedent and Thompson. Argo and Greene prepared the tax returns for Decedent, the 2002 trust and Thompson. Malloy is informed and believes Greene and Argo were highly knowledgeable about the intricacies of the 2002 trust and Decedent's assets, possessed copies of the 2002 trust, and knew or should have known Thompson was the sole beneficiary of the 2002 trust upon Decedent's death.

47. On information and belief, all Defendants including Merrill Lynch, Greene and Argo knew of Malloy's expectancy under the Decedent's will, trust, and annuities. For instance, Decedent established a fund held by Banco Popular in New York, New York containing approximately \$145,000 in trust for Malloy in account number 090-000078545 and titled "Chamblee, Robert I.T.F. James R. Malloy". As another example, Sendler of Merrill Lynch informed Argo and Greene prior to the transfer of funds to Merrill Lynch that Decedent owned an annuity contract through Nationwide Life Insurance with Malloy as the named death beneficiary. The Teacher's

Retirement System of the City of New York also sponsored a significant and sizable retirement fund for Decedent where Malloy was named as a beneficiary of the death benefits under the plans.

48. Merrill Lynch, Argo, and Greene worked together and with Thompson to divert those funds and many other funds to the December 11, 2002 trust wherein Thompson was named as the sole beneficiary upon Decedent's death or to a newly established IRA at Merrill Lynch in which Thompson was named as the beneficiary. For instance, said Defendants and Thompson coordinated their efforts to convince Banco Popular to release Decedent's account titled in trust for Malloy to the Merrill Lynch account for the 2002 trust. After repeated requests for the funds, Heather Sendler of Merrill Lynch ascertained from Banco Popular the particular documents Banco Popular needed for the funds to be transferred. Said Defendants then obtained a misleading statement from Thompson's long-time attorney Edward A. Spitz implying Decedent was competent to execute the powers of attorney and from The Garden House of Anderson, SC without revealing Decedent was residing in its Alzheimer's unit. Argo, Greene and Sendler then submitted the documents to Banco Popular with a cover letter omitting that the attorney letter was from Thompson's own attorney and the true nature of Decedent's residence in a facility for dementia. Malloy is informed and believes all such facts were known to said Defendants at that time.

49. As another example of all Defendants conspiring to tortiously interfere with Malloy's expected inheritance and gifts, Thompson submitted the invalid New York power of attorney on October 4, 2002 to Citibank to begin acting as agent on all of Decedent's accounts associated with Citibank including the Nationwide Life Insurance

Company annuity (marketed under the name of "The Best of America"). Thompson's letter also instructed Citibank to send all future mailings to Decedent's South Carolina address but then gave the address for Thompson's sister at 1206 Briarwood Ct., Anderson, SC 29621 instead of Decedent's actual address at The Garden House assisted-living facility. On February 10, 2003 Sandler e-mailed Argo an update on the status of their efforts to divert Decedent's assets to the 2002 trust. Sandler informed Argo "I spoke with Best of America (they were VERY helpful) Anyway the value is \$63,000+-, there is no penalty to surrender and the beneficiary is James Malloy I have the withdrawal form that needs to be signed if we decide to and they will also accept a fax of it Let me know what we want to do on these". After the Defendants decided to surrender the policy, Sandler faxed to Nationwide on February 13, 2003 a total withdrawal request signed by Thompson as attorney-in-fact. On February 26, 2003 the Nationwide annuity contract was terminated, and a check for the surrender value of \$67,094.74 was mailed to Merrill Lynch for the 2002 trust account. On the day the Nationwide annuity was surrendered, the policy had a death benefit payable 100% to Malloy in the amount of \$108,644.64 – a 62% increase over the surrender value obtained by Defendants. On March 4, 2003 Sandler deposited the surrender proceeds into the Merrill Lynch account for the 2002 trust in which Thompson was the sole surviving beneficiary.

50. Merrill Lynch, Greene, and Argo played a highly significant and substantial role in helping Thompson corral the various assets of Decedent from numerous institutions into the 2002 trust for the benefit of Thompson. The activities of Merrill Lynch, Greene and Argo included obtaining and completing all necessary forms and document requests to the various institutions holding funds of Decedent with the

requests containing a false address of Decedent of 1206 Briarwood St., Anderson, SC 29621 which was actually the address of Thompson's sister Barbara T. Craft. Said Defendants also submitted invalid powers of attorney to the various third party institutions to convince them to submit funds to the trust accounts for the 2002 trust. For example on or about October 22, 2002 Argo directed the preparation of a letter under the name of Thompson to GE Capital Life Assurance Company of New York ("GE") to change Decedent's address for his annuity with GE to the address for Thompson's sister and included the invalid New York statutory short form durable power of attorney. On January 8, 2003 Sendler of Merrill Lynch received from GE its forms for requesting a full surrender of Decedent's annuity. On January 21, 2003 Argo "For Heather Sendler" faxed the annuity surrender forms to GE which forms provided that the funds be mailed to the attention to Sendler at Merrill Lynch. The forms were signed by Thompson as attorney-in-fact for Decedent.

51. Personnel from the Merrill Lynch office in Columbia, South Carolina also provided signature guarantees/Medallion guarantees for documents purporting to be signed by Robert Chamblee, even though such documents were not executed in the presence of the Merrill Lynch guarantor. Letters to HSBC Bank, JP Morgan/Chase Bank, Banco Popular and Apple Bank directing that funds be wired to the 2002 trust account at Merrill Lynch to the attention of Sendler were purportedly signed by Decedent on December 18, 2002 with no Medallion signature guarantee in the files of Greene and Argo. That same day the letters were FedExed out to Sendler at Merrill Lynch in Columbia, SC. The files of Merrill Lynch subsequently contain the same letters but with the Medallion signature guarantees on all the letters. Malloy is informed and believes

that this procedure violated the rules of Merrill Lynch in its Medallion/signature guarantee program. Such documents containing Merrill Lynch's Medallion signature guaranty were disseminated by Merrill Lynch, Argo and Greene to convince financial institutions to transfer Decedent's funds to the Merrill Lynch account for the 2002 trust set up by Thompson.

52. All funds rounded up with assistance of Greene, Argo and Merrill Lynch, through its agent Sendler, were transferred and held by Merrill Lynch for the 2002 trust.

53. Merrill Lynch, through its agent Sendler, Greene and Argo held many telephone conferences and on occasions in person conferences with various institutions to assist Thompson in convincing the various institutions to release Decedent's assets to the Merrill Lynch accounts in the name of the 2002 trust. These contacts by Sendler of Merrill Lynch include calls to David with Banco Popular on or before March 4, 2003 and March 5, 2003; telephone conference with GE on or before February 10, 2003; telephone conference with Citibank on or before February 10, 2003; and telephone conference with Nationwide Life on or before February 10, 2003. Contacts by Argo of Greene include calls to Clarissa Weiss of Teachers' Retirement System ("TRS") on December 5, 2002, calls to the Teachers' Retirement System on or before March 4, 2003, and conference scheduled for December 13, 2003 with TRS personnel; calls to David and/or Mabel Ortiz of Banco Popular on March 5, 2003 and on or after March 11, 2003; phone calls to Rena Mivakakis of Bank of New York on or about September 25, 2002 and with Scott Barry on or before April 24, 2003; and in-person conference among Thompson, Argo and Sandi Sculac of Citicorp Investment Services on or before December 18, 2002.

54. On or about November 20, 2002, Defendants Greene and Argo provided Merrill Lynch with copies of the powers of attorney Thompson coerced Decedent into signing on September 16, 2002 and September 18, 2002. The September 16, 2002 power of attorney stated that it was Decedent's intention that the power of attorney not be used to disrupt the Decedent's estate plan. The September 18, 2002 power of attorney executed under the laws of the state of New York also specifically rejected the power of Thompson as agent to make gifts. Merrill Lynch, Greene, and Argo assisted Thompson and in many cases undertook all the actions to submit the powers of attorney to collect assets into the 2002 trust for the benefit of Thompson.

55. Merrill Lynch, Greene, and Argo not only provided substantial administrative assistance in collecting Decedent's assets for Thompson, they also originated ideas to perform difficult and significant rollovers of tax qualified retirement assets into the Merrill Lynch account for the benefit of Thompson and to Malloy's detriment. This includes, but is not limited to, effecting rollovers from Citibank IRA account, the New York Teacher's Retirement Fund accounts, and other IRAs in which Malloy was named as the death beneficiary to a Merrill Lynch IRA that eliminated Malloy as a beneficiary.

56. The participation of Merrill Lynch, Greene, and Argo was done knowingly with the intent to funnel the assets of Decedent into the trust wherein Thompson was the known beneficiary to the complete exclusion of Malloy.

57. As a result of the substantial participation of Merrill Lynch, Greene, and Argo undertaken knowingly, Malloy was deprived of his expectant inheritance interest and gifts to be received from the Decedent. As a result of the conspiracy and tortious

interference with Malloy's expected inheritance and gifts from Decedent as committed by Merrill Lynch, Greene, and Argo, Malloy is entitled to judgment against said Defendants for the amounts diverted away from Malloy, plus punitive damages and attorney fees.

FOR A FIRST CAUSE OF ACTION

(Action to Set Aside Purported *Inter Vivos* Trust for Lack of Mental Capacity)

58. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

59. Upon information and belief, at the time of the purported execution of the alleged 2002 trust by Decedent, Decedent was mentally incompetent and suffering from Alzheimer's disease and/or other dementia and lacked the requisite mental capacity to make a valid trust.

60. Therefore, the alleged 2002 trust is invalid and of no legal force and effect.

FOR A SECOND CAUSE OF ACTION

(Action to Set Aside Purported *Inter Vivos* Trust Due to Undue Influence)

61. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

62. On information and belief, Thompson exercised undue influence on Decedent, to wit: Decedent was in a weakened mental state and susceptible to influence; Decedent was subject to Thompson's control; Thompson took Decedent to Thompson's attorneys for execution of the alleged trust; Thompson did not communicate with Decedent's own attorneys or with Malloy; and Thompson was never the primary beneficiary of any previous valid trust or will of Decedent and the alleged 2002 trust purports to name Thompson as sole beneficiary.

63. Therefore, the alleged 2002 trust is invalid and of no legal force and effect.

FOR A THIRD CAUSE OF ACTION

(Action to Set Aside Purported *Inter Vivos* Trust Due to Mistake)

64. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

65. On information and belief, Decedent would not have executed the alleged 2002 trust unless he was mistaken about its contents or even that it was a trust because it completely and suddenly changed his dispositive intent as demonstrated by his prior valid wills, for no reason.

66. Therefore, the alleged 2002 trust is invalid and of no legal force and effect.

FOR A FOURTH CAUSE OF ACTION

(Action to Set Aside Putative Transfer of Real and Personal Property to Purported *Inter Vivos* Trust, Thompson, and/or Others)

67. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

68. At the time Decedent purportedly executed documents, either directly or through his putative agent, attempting to deliver property to the alleged trust, he was mentally incompetent and suffering from Alzheimer's disease and/or other dementia and lacked the requisite mental capacity to validly execute and deliver such instruments of transfer; moreover, on information and belief, Decedent was unduly influenced and/or suffering from mistake.

69. All instruments of transfer to the trusts allegedly created by the *inter vivos* trust documents are therefore invalid and of no legal force and effect.

FOR A FIFTH CAUSE OF ACTION
(Fraud as to Defendant Thompson)

70. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

71. Malloy is informed and believes that Thompson, or someone on his behalf and under his control, made false representations to Decedent about the content and effect of the alleged 2002 will and trust in the name of the Decedent. The false representations were material as they induced Decedent to sign the alleged 2002 will and trust which completely altered Decedent's long-time estate plans.

72. Malloy is informed and believes that Thompson, who in December 2002 had control and influence over Decedent, had knowledge about the falsity of the representations made to Decedent about the 2002 will and trust or either had a reckless disregard of their truth or falsity. Malloy is further informed and believes that Thompson intended for Decedent to act upon Thompson's representations about the content and/or effect of the 2002 will and trust by inducing Decedent to execute such documents.

73. Malloy is informed and believes that due to Decedent's mental incompetency, Decedent was ignorant of the falsity of Thompson's representations. Because of Decedent's Alzheimer's disease and/or dementia, Decedent rightfully relied on the substance of Thompson's representations.

74. Malloy and Decedent were proximately injured by Thompson's representations that prevented Decedent from exercising his own judgment and free choice to dispose of his property as he desired.

75. Upon information and belief, Thompson's actions constitute fraud, and all instruments of transfer to the trusts allegedly created by the *inter vivos* trust documents

are therefore invalid and of no legal force and effect; the alleged will is therefore invalid and of no legal force and effect; any transfer caused by Thompson from Decedent or his estate to Thompson and/or others is therefore invalid and of no legal force and effect; and Thompson should be assessed with actual damages, punitive damages, costs, and attorneys' fees.

FOR A SIXTH CAUSE OF ACTION
(Conversion as to Defendant Thompson)

76. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

77. Upon information and belief, Thompson has wrongfully taken property from Decedent and converted it to his own use, all to the damage of Decedent and Malloy.

78. Malloy is further informed and believe that he is entitled to an award of punitive damages as a result of said conversion by Thompson.

FOR A SEVENTH CAUSE OF ACTION
(Quantum Meruit/Unjust enrichment as to Defendant Thompson)

79. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

80. Plaintiff will show that Thompson has realized a non-gratuitous benefit by his appropriation of Decedent's assets and that it is inequitable for Thompson to retain such assets without paying for their value.

81. By virtue of Thompson's conduct, Thompson has been unjustly enriched to the detriment of Decedent and Malloy.

82. As a result of Thompson's unjust enrichment, a constructive trust should be imposed on any and all property interests distributed from Decedent or his estate to Thompson and/or others.

FOR AN EIGHTH CAUSE OF ACTION
(Constructive Trust as to Defendant Thompson)

83. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

84. A constructive trust should be imposed on Thompson and/or others for all misappropriated property and any benefit therefrom.

FOR A NINTH CAUSE OF ACTION
(Resulting Trust as to Defendant Thompson)

85. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

86. A resulting trust should be imposed on Thompson and/or others for all misappropriated property and any benefit therefrom.

FOR A TENTH CAUSE OF ACTION
(Breach of Fiduciary Duty; Failure to Marshal Assets; Removal as to Defendant Thompson)

87. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

88. In August 2002 Thompson made two trips to New York to secure the release of the Decedent from St. Luke's Hospital. The trips were necessary because of the mental health of Decedent and the Decedent's need for supervision with day-to-day assistance due to his failed mental capacity.

89. Thompson was well aware of Decedent's mental deterioration from his interaction with the staff at St. Luke's Hospital and with Decedent. Thompson further knew that Decedent was a vulnerable adult due to Decedent's substantially impaired mental condition from Alzheimer's disease.

90. Thompson voluntarily assumed the responsibility for the oversight, care and protection of Decedent by offering to take control of Decedent to secure his release from St. Luke's Hospital. Thompson accepted and induced the Decedent to place confidence in him.

91. Thompson entered into a fiduciary relationship with Decedent and assumed the special obligations a fiduciary owes the other party such as Decedent. Thompson exploited this fiduciary relationship and his role as caregiver to improperly and unlawfully gain control of Decedent's assets for himself, thereby causing damages to the estate of Decedent and to the Plaintiff.

92. As fiduciary of Decedent's estate, Thompson is required to collect and marshal the assets of the estate, which duties include (1) the investigation of the validity of transfers purportedly made during Decedent's lifetime that may be invalid for such reasons as fraud, undue influence, mistake, conversion, and/or lack of mental capacity, and (2) attempt to bring into the estate any alleged *inter vivos* transfers which are defective for any such reason.

93. Upon information and belief, as the perpetrator of the delicts cited in the causes of action set forth above, Thompson obviously cannot conduct a fair investigation of himself; consequently, he should be removed as personal representative to allow the appointment of an unbiased fiduciary.

94. The failure of the personal representative to perform his duties constitutes a breach of fiduciary duty.

95. The Plaintiff is informed and believes that such actions described in this Complaint constitute a breach of fiduciary duties that Thompson owed Decedent, his estate and the Plaintiff. The Plaintiff is therefore entitled to compensatory damages (with pre-judgment interest) and punitive damages from Thompson for his breach of fiduciary duties in an amount to be determined by the trier of fact.

FOR AN ELEVENTH CAUSE OF ACTION

(Tortious Interference with Inheritance and Gifts as to Defendant Thompson)

96. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

97. Malloy had an expectancy under the will of Decedent — i.e., to inherit his entire estate. Malloy also had an expectancy to receive various gifts from the Decedent including but not limited to life insurance policy benefits upon the death of the Decedent, death benefits under various annuities owned by the Decedent wherein Malloy was named as the beneficiary, and non-probate retirement accounts including individual retirement accounts and retirement annuities wherein Malloy was named as the beneficiary upon the death of the decedent. These accounts include but are not limited to the Veterans Administration life insurance policy, annuities with Nationwide Life Insurance Company, account with Banco Popular in trust for Malloy, and Decedent's retirement plans with the Teachers' Retirement System for Baruch College as described in paragraph 39 above.

98. On information and belief, Thompson knew of Malloy's expectancy under Decedent's will and non-probate assets such as life insurance policies, annuities, and

IRAs. Thompson intentionally interfered with that expectancy through his tortious conduct that included using invalid powers of attorney and Decedent's signatures both procured through Decedent's incompetence and/or through Thompson's undue influence. To cover up his tortious conduct, Thompson changed Decedent's address with all the various financial institutions to the address of his sister Barbara T. Craft of 1206 Briarwood St., Anderson, SC 29621. Decedent never lived at such address.

99. But for Thompson's tortious interference with Malloy's inheritance, Malloy would have inherited all of Decedent's estate, including those assets transferred through Thompson's actions during Decedent's lifetime. Consequently, Malloy has been damaged by Thompson's tortious conduct in that he would be denied his inheritance of the entire estate, to which he was entitled.

100. But for Thompson's tortious interference with the gifts the Decedent planned and designated for Malloy, Malloy would have received such gifts from the Decedent upon his death, including assets wherein Malloy was designated as the death beneficiary but transferred to Thompson through Thompson's actions during Decedent's lifetime. Consequently, Malloy has been damaged by Thompson's tortious conduct in that he has been denied the gifts the Decedent established for Malloy, to which he was entitled.

101. As a result of Thompson's tortious interference with Malloy's inheritance and gifts, Malloy is entitled to a judgment against Thompson imposing a constructive trust on any and all property interests distributed from Decedent and/or Decedent's estate and from Decedent's non-probate assets and contracts to Thompson and/or others, plus damages, punitive damages, and attorneys' fees.

FOR A TWELFTH CAUSE OF ACTION

(Attorneys' Fees and Costs)

102. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

103. Because of the actions of Thompson, Malloy has been forced to obtain the services of an attorney and others to defend himself from the actions of Thompson.

104. Consequently, Malloy is entitled to an Order from this Court commanding Thompson to pay for the costs and attorneys' fees he has incurred due to the actions of Thompson.

FOR A THIRTEENTH CAUSE OF ACTION

(Tortious Interference with Inheritance and Gifts and Aiding and Abetting as to Defendants Merrill Lynch, Greene and Argo)

105. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

106. Malloy had an expectancy under the will of Decedent—i.e., to inherit his entire estate. Malloy also had an expectancy to receive various gifts from Decedent—i.e., Malloy was named as a beneficiary under various annuities, a life insurance policy, and as beneficiary of an *inter vivos* trust all established by the Decedent. Merrill Lynch, Greene and Argo intentionally interfered with that expectancy through their tortious conduct that included using invalid powers of attorney and Decedent's signature both obtained as a result of Decedent's mental incompetence and/or through Thompson's undue influence.

107. After Decedent executed the powers of attorney in September 2002 at Thompson's instigation, Merrill Lynch acted as the investment advisor and asset manager of all the funds held in the name of the December 11, 2002 trust. Merrill Lynch worked

closely with Thompson as the purported trustee and with Argo and Greene as Thompson and the 2002 trust's accountant. Malloy is informed and believes Merrill Lynch was highly knowledgeable about the intricacies of the 2002 trust and Decedent's assets and knew or should have known Thompson was the sole beneficiary of the 2002 trust upon Decedent's death.

108. After Decedent executed the powers of attorney in September 2002 at Thompson's instigation, Argo and Greene acted as the accountant for the 2002 trust, the Decedent and Thompson. Argo and Greene prepared the tax returns for Decedent, the 2002 trust and Thompson. Malloy is informed and believes Greene and Argo were highly knowledgeable about the intricacies of the 2002 trust and Decedent's assets, possessed copies of the 2002 trust, and knew or should have known Thompson was the sole beneficiary of the 2002 trust upon Decedent's death.

109. On information and belief, all Defendants including Merrill Lynch, Greene and Argo knew of Malloy's expectancy under the Decedent's will, trust, and annuities as set forth in paragraph 47 above.

110. Merrill Lynch, Argo, and Greene worked together and with Thompson to intentionally interfere with Malloy's expectancy by diverting those funds and many other funds to the December 11, 2002 trust wherein Thompson was named as the sole beneficiary upon Decedent's death, as set forth in paragraphs 48 and 49 above.

111. Merrill Lynch, Greene, and Argo played a highly significant and substantial role in helping Thompson corral the various assets of Decedent from numerous institutions into the 2002 trust for the benefit of Thompson as set forth in paragraphs 50 and 51 above.

112. All funds rounded up with assistance of Greene, Argo and Merrill Lynch, through its agent Sendler, were transferred and held by Merrill Lynch for the 2002 trust.

113. Merrill Lynch, through its agent Sendler, Greene and Argo held many telephone conferences and on occasions in person conferences with various institutions to assist Thompson in convincing the various institutions to release Decedent's assets to the Merrill Lynch accounts in the name of the 2002 trust, as set forth in paragraph 53 above.

114. On or about November 20, 2002, Defendants Greene and Argo provided Merrill Lynch with copies of the powers of attorney Thompson coerced Decedent into signing on September 16, 2002 and September 18, 2002. The September 16, 2002 power of attorney stated that it was Decedent's intention that the power of attorney not be used to disrupt the Decedent's estate plan. The September 18, 2002 power of attorney executed under the laws of the state of New York also specifically rejected the power of Thompson as agent to make gifts. Merrill Lynch, Greene, and Argo assisted Thompson and in many cases undertook all the actions to submit the powers of attorney to collect assets into the 2002 trust for the benefit of Thompson.

115. Merrill Lynch, Greene, and Argo not only provided substantial administrative assistance in collecting Decedent's assets for Thompson, they also originated ideas to perform difficult and significant rollovers of tax qualified retirement assets into the Merrill Lynch account for the benefit of Thompson and to Malloy's detriment, as set forth in paragraph 55 above.

116. The participation of Merrill Lynch, Greene, and Argo was done knowingly with the intent to funnel the assets of Decedent into the trust wherein Thompson was the known beneficiary to the complete exclusion of Malloy.

117. As a result of the substantial participation of Merrill Lynch, Greene, and Argo undertaken knowingly and intentionally, Malloy was deprived of his expectant inheritance interest and gifts to be received from the Decedent. Since Decedent named Malloy as beneficiary of his will prior to December 2002, beneficiary under his life insurance, annuities, qualified retirement plans and IRAs, it is reasonably certain that Malloy's expectancy would have been realized but for the interference of Merrill Lynch, Greene, and Argo. As a result of the tortious interference with Malloy's expected inheritance and gifts from Decedent as committed by Merrill Lynch, Greene, and Argo, Malloy has been damaged by the loss of the expected substantial benefits he never received from Decedent and retained by Thompson. Malloy is therefore entitled to judgment against said Defendants for the amounts diverted away from Malloy, plus punitive damages and attorney fees.

FOR A FOURTEENTH CAUSE OF ACTION
(Civil Conspiracy as to All Defendants)

118. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

119. Thompson, Argo, various agents or representatives of defendant Greene, including, but not limited to Argo, and various agents or representatives of defendant Merrill Lynch, including, but not limited to Sandler, conspired among themselves for the purpose of injuring Malloy.

120. As a direct and proximate result of the actions and conduct of all defendants, Malloy, directly or indirectly, suffered special damages as set forth herein, including, but not limited to, the loss of the expected inheritance and gifts from Decedent as desired by Decedent.

121. Malloy is informed and believes he is entitled to recover compensation from all Defendants jointly and severally for his actual damages and losses, and he is entitled to recover punitive damages from each defendant in an amount to be determined by a jury.

WHEREFORE, Malloy prays that he be granted judgment for the first through seventeenth causes of action, including but not limited to the following:

- A. For an order setting aside the alleged trust purportedly signed by Decedent dated December 11, 2002;
- B. For an order declaring the transfers to the alleged trust of December 11, 2002 invalid and of no legal effect thereby setting aside all transfers of any property to the purported trust;
- C. For actual and punitive damages, costs and attorney fees against Thompson for fraud, conversion, breach of trust, and tortious interference with Malloy's inheritance;
- D. For actual and punitive damages, costs and attorney fees against Merrill Lynch, Greene, and Argo for tortious interference with inheritance and gifts and aiding and abetting the same and for civil conspiracy;
- E. For a constructive trust to be imposed on any and all property interests distributed from Decedent or his estate to Thompson and others;
- F. For a resulting trust to be imposed on Thompson and/or others for all misappropriated property and any benefit therefrom;
- G. For removal of Thompson as personal representative of the estate of Robert L. Chamblee and as trustee of the alleged December 11, 2002 trust;

- H. For attorney fees and costs;
- I. For such other relief as the Court deems just and proper.

PLAINTIFF DEMANDS TRIAL BY JURY.

THE GILREATH LAW FIRM, P.A.

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ATTORNEYS FOR PLAINTIFF

Dated: April 13, 2012
Greenville, South Carolina.

LAST WILL AND TESTAMENT

of

ROBERT LIVINGSTON CHAMBLEE

I, ROBERT LIVINGSTON CHAMBLEE residing at, 152 West 58th Street, Apartment 2C, New York City, State of New York, which I hereby declare to be my domicile, do hereby make, publish and declare this to be my Last Will and Testament.

FIRST: I revoke all Wills and Codicils at any time heretofore made by me.

SECOND: I direct that all my just debts and funeral expenses be paid out of my estate as soon after my death as may be practicable.

THIRD: All the rest, residue and remainder of the property both real, personal and mixed and wheresoever situate which I may own or be entitled to at the time of my death, I give, devise and bequeath to JAMES ROBERT MALLOY residing at, 268 Community Drive, Smithtown, New York, if he shall survive me. If he shall not survive me, then I give, devise and bequeath my residuary estate to MARGARET C. EVANS residing at, 72 Lebkamp Avenue, Huntington, New York, if she shall survive me. If she shall not survive me, then I give, devise and bequeath my residuary estate to those persons to whom and in those proportions in which the same would have been distributable if I had then died the owner thereof, intestate, and a resident of the State of New York.

FOURTH: I hereby appoint JAMES ROBERT MALLOY to be the Executor of this my Last Will and Testament. In the event my said Executor shall predecease me, fail to qualify, or having qualified thereafter dies, resigns, is removed from office or for any reason ceases to act as Executor, I hereby appoint MARGARET C. EVANS as Executor of this my Last Will and Testament.

I direct that none of my Executors shall be required to give any bond or other security for the faithful performance of their respective duties in any jurisdiction whatsoever, or if any bond is required, no surety shall be required thereon. No fiduciary at any time acting hereunder shall be required to file periodic accountings in the Court in which this Will shall be admitted to probate unless such fiduciary shall elect to do so. To the extent that any of my Executors shall exercise discretion hereunder and make payment and/or application of assets as herein provided they shall be relieved of any and all responsibility and liability with respect to the same.

FIFTH: My Executor shall have discretion to make payment or distribution of any principal and/or income vesting in and payable to any minor in any one or more of the following ways:

(a) paying the same to the parent, guardian or other person having the care and control of such minor and the receipt by such payee shall be full acquiescence to my Executor,

(b) paying the same to any relative of the minor as custodian for the minor under any applicable Gifts to Minors Act, or

(c) deferring payment or distribution of any part or all thereof until the minor comes of age, meanwhile applying to such minor's use so much principal and income therefrom, and at such time or times as my Executor may deem advisable. Any income not expended by my Executor shall be added to principal and my Executor

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& MONACO, P.C.
Attorneys At Law
10 Vanderbilt Motor Parkway
Isipouage, New York 11788

shall pay over and disburse the principal to the minor upon such minor attaining the age of eighteen (18) years or to the estate of such minor if the minor dies under the age of eighteen (18) years.

SIXTH: My Executor shall have all the powers and authority which are now conferred upon fiduciaries (expressly including, but not limited to, those powers enumerated in the Fiduciaries Powers Act, Section 11-1.1 of the New York Estates Powers and Trusts Law) or which may hereafter be conferred by law upon Executors. In addition to the foregoing powers and authority, I fully authorize and empower my Executor to retain any and all property, and also, to invest any and all property, real or personal, which at any time may constitute part of my estate, in any stock, bonds, common trust funds, securities of investment companies or other securities regardless of any rule regarding diversity of trust investments.

SEVENTH: I direct that all inheritance, estate, transfer, succession and death taxes or duties (including any interest thereon) imposed by any jurisdiction whatsoever by reason of my death upon or in relation to any property includable in my estate for the purposes of any such taxes or duties, whether such property passes under the provisions of this Will, or outside the provisions of this Will, be paid out of my general estate without proration or apportionment.

EIGHTH: Every heir, legatee, devisee, or beneficiary, under this Will and the trusts herein created or intended to be created, who shall contest in any court any provision of this instrument, except as may be permitted by the provisions of Section 3-3.5 of the Estates, Powers and Trusts Law, shall not be entitled to any devises, legacies or benefits under this Will or any codicil hereto or any trust created hereby and any and all devises, legacies and portions of the income or corpus of my estate otherwise provided to be paid to such person, shall lapse and shall be paid, distributed prior to my death leaving no living lawful descendants. My Executor and/or Trustee herein named are specifically authorize to defend, at the expense of my estate, any contest or attack of any nature upon this Will or any codicil hereto or upon any paragraph or provision thereof.

NINTH: Wherever the terms "Executor" or "Executors" are employed herein, the same shall be deemed to include the terms "Executrix" or "Executrices" or their alternates or successors, male pronouns shall be deemed to include the female and neuter gender as the case may be, and the singular shall include the plural.

IN WITNESS WHEREOF, I hereby sign, seal, publish and declare this to be my Last Will and Testament and initial each page, in the presence of the persons witnessing it at my request this 20th day of July, in the year One Thousand Nine Hundred Nineteen.

Robert C. [Signature] L.S.

The foregoing was on said date subscribed, sealed, published and declared by the Testator, as his Last Will and Testament, in our presence and we at his request, and in his presence and in the presence of each other, subscribed our names as witnesses (the final sentence of the Will beginning with the words "IN WITNESS WHEREOF" having been read aloud in his and our presence), all of us, including the Testator being present throughout the execution and attestation of this Will.

Neil S. [Signature] residing at 40-16 171st Street, Flushing, N.Y. 11357

Lucy O'Gorman residing at 36-19 167th St. Flushing, N.Y. 11358

AFFIDAVIT OF SUBSCRIBING WITNESS

STATE OF NEW YORK)
COUNTY OF Queens)ss.:

Michael Malloy and Lucy O'Gorman, each of the undersigned, individually and severally, being duly sworn, depose and say:

The within Will was subscribed in our presence and sight at the end thereof by Robert Livingston Chumblee, the within named Testator(rix), on the 30th day of July, 1999, at Queens, New York.

Said Testator(rix), at the time of making such subscription, declared the instrument to be his/her Last Will and Testament.

Each of the undersigned thereupon signed his/her name as a witness at the end of said Will, at the request of said Testator(rix), and in his/her presence and in the presence and sight of each other.

Said Testator(rix), was, at the time of so executing the said Will, over the age of eighteen (18) years and, in the respective opinions of the undersigned, of sound mind, memory, and understanding and not under any restraint or in any respect incompetent to make a Will.

Said Testator(rix), in the respective opinions of the undersigned, could read, write and converse in the English language and was suffering from no defect of sight, hearing or speech, or from any other physical or mental impairment which would affect his/her capacity to make a valid Will. This Will was executed as a single, original instrument and was not executed in counterparts.

Each of the undersigned was acquainted with said Testator(rix) at such time and makes this affidavit at his/her request.

Michael Malloy
Lucy O'Gorman

Severally subscribed and sworn
to before me this 30th day of
JULY, 1999.

Rhea O'Gorman
Notary Public

RHEA O'GORMAN
Notary Public, State of New York
No. 41-4818029
Qualified in Queens County
Commission Expires December 31, 2000

FELDMAN, KRAMER
& MONACO, P.C.
Attorneys At Law
10 Vanderbilt Motor Parkway
Jamaica, New York 11788

MOTION FEE PAID

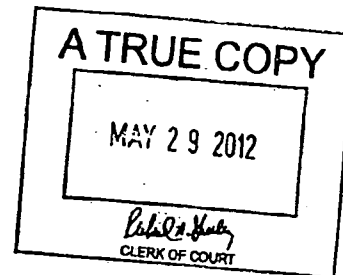
STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 2012-CP-04-1433

James Robert Malloy,)
Plaintiff,)
v.)

Swain N. Thompson, Jr., Merrill Lynch,)
Pierce, Fenner & Smith, Inc., Joseph T.)
Argo, and Greene and Company, L.L.P.,)
Defendants.)

In the Matter of:)
Estate of Robert L. Chamblee)



DEFENDANT MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.'S
MOTION TO DISMISS AND COMPEL ARBITRATION

Pursuant to Rules 12(b)(1) & (6) of the South Carolina Rules of Civil Procedure, Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") moves to dismiss Plaintiff's claims against Merrill Lynch and compel arbitration of all claims asserted by Plaintiff against Merrill Lynch. Plaintiff's claims against Merrill Lynch arise from a contractual relationship between Robert L. Chamblee ("Chamblee") and Merrill Lynch, in which Chamblee and Merrill Lynch agreed to arbitrate all controversies involving any transactions in any of Chamblee's accounts with Merrill Lynch. Plaintiff's Complaint asserts claims against Merrill Lynch relating to transactions in Chamblee's accounts and for assets held by Merrill Lynch in the accounts created by Chamblee, and thus, he seeks the benefits of the contract between Chamblee and Merrill Lynch, which contract includes the obligation to arbitrate all controversies. Accordingly, Plaintiff's claims against Merrill Lynch are inextricably intertwined

with the contract between Chamblee and Merrill Lynch, and Plaintiff cannot avoid the obligation to arbitrate in such contract despite his status as a non-signatory to that contract. *See Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000).

Merrill Lynch will supplement this motion with a supporting affidavit, memorandum, legal authorities, and other materials prior to the hearing on this Motion.

Respectfully submitted,



Christopher A. Ogiba (S.C. Bar No. 70666)
E. Brandon Gaskins (S.C. Bar No. 73274)
MOORE & VAN ALLEN, PLLC
40 Calhoun Street, Suite 300
Post Office Box 22828
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brandongaskins@mvalaw.com

MAY 17, 2012
CHARLESTON, SC

ATTORNEYS FOR DEFENDANT MERRILL
LYNCH, PIERCE, FENNER & SMITH INC.

CERTIFICATE OF SERVICE

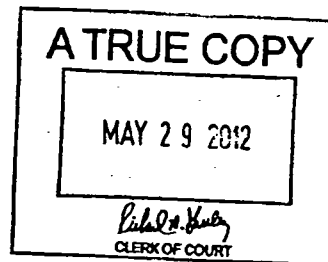
This is to certify that I, the undersigned employee of Moore & Van Allen, PLLC, have this 21st day of May, 2012 served counsel for the Plaintiffs in the foregoing matter with a copy of **DEFENDANT MERRILL LYNCH, PIERCE FENNER & SMITH, INC.'S MOTION TO DISMISS AND COMPEL ARBITRATION** by regular U.S. mail, with sufficient postage affixed thereon and addressed as follows:

James R. Gilreath, Esquire
William M. Hogan, Esquire
110 Lavinia Avenue
P.O. box 2147
Greenville, SC 29602

and

S. Alan Medlin, Esquire
1713 Phelps Street
Columbia, SC 29205
Attorney for the Plaintiffs

Harold P. Threlkeld, Esquire
John O'Rourke, Esquire
213 East Calhoun Street
Anderson, SC 29622-1385
Attorneys for Defendants



MOORE & VAN ALLEN, PLLC.

Wendy S. Stockhausen
Wendy S. Stockhausen

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
C.A. NO. 2012-CP-04-01433

James Robert Malloy,
Plaintiff,

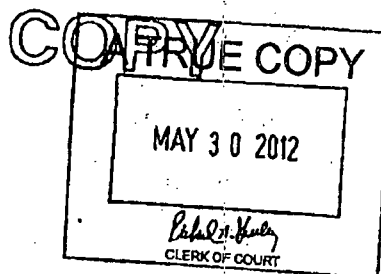
vs.

Swain N. Thompson, Jr.;
Merrill Lynch; Pierce, Fenner &
Smith, Inc.; Joseph T. Argo and
Greene and Company, L.L.P.,

Defendants.

In the matter of:
Estate of Robert L. Chamblee
Probate Case No.: 2009-ES-04-0933

ANSWER OF
THE DEFENDANT,
SWAIN N. THOMPSON, JR.



The Defendant, Swain N. Thompson, Jr. (sometimes hereinafter referred to as "Thompson"), reserving all rights under his Motion to Dismiss made simultaneously herewith, through counsel, hereby answers/responds to the Complaint ("Complaint") of the Plaintiff, James Robert Malloy ("Plaintiff") and alleges as follows:

FOR A FIRST DEFENSE

1. The Defendant Thompson denies each and every allegation contained in the Complaint which is/are not hereinafter specifically admitted and demands strict proof thereof.
2. Defendant Thompson admits the allegations of paragraph 1 of the Complaint.
3. Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the allegations of paragraph 2 of the Complaint, therefore denies the same and demands strict proof thereof.
4. Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the

allegations of paragraph 3 of the Complaint, therefore denies the same and demands strict proof thereof.

5. Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the allegations of paragraph 4 of the Complaint, therefore denies the same and demands strict proof thereof.

6. Defendant Thompson admits so much of the allegations of paragraph 5 of the Complaint as alleges the Defendant, Joseph T. Argo, is a certified public accountant, licensed in the State of South Carolina and is a citizen and resident of the County of Anderson, State of South Carolina. The Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the remaining allegations of paragraph 5 of the Complaint, therefore denies the same and demands strict proof thereof.

7. Defendant Thompson denies the allegations of paragraph 6 of the Complaint and demands strict proof thereof.

8. Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the allegations of paragraph 7 of the Complaint, therefore denies the same and demands strict proof thereof.

9. Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the allegations of paragraph 8 of the Complaint, therefore denies the same.

10. Defendant Thompson denies the allegations of paragraph 9 of the Complaint and demands strict proof thereof.

11. Defendant Thompson admits so much of the allegations of paragraph 10 of the Complaint as alleges the Court of Common Pleas for Anderson County is proper venue for an action properly brought against the Defendant Thompson, but denies the remaining allegations of paragraph 10 and demands strict proof thereof.

12. Defendant Thompson denies the allegations of paragraph 11 of the Complaint and demands strict proof thereof.

13. Defendant Thompson admits the allegations of paragraph 12 of the Complaint.

14. Defendant Thompson admits the allegations of paragraph 13 of the Complaint.

15. Defendant Thompson admits the allegations of paragraph 14 of the Complaint.

16. Defendant Thompson admits the allegations of paragraph 15 of the Complaint.

17. Defendant Thompson admits so much of the allegations of paragraph 16 of the Complaint as alleges that the co-trustees of the Trust actively administered the Trust for the benefit of the beneficiaries. The remaining allegations of paragraph 16 are denied and strict proof thereof is demanded.

18. Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the allegations of paragraph 17 of the Complaint, therefore denies the same and demands strict proof thereof.

19. Defendant Thompson admits so much of the allegations of paragraph 18 of the Complaint as alleges that in or around 2001, the Decedent was in his late seventies and was on the faculty of Baruch College in New York where he had been a longtime professor. The remaining allegations of paragraph 18 are denied and strict proof thereof is demanded.

20. Defendant Thompson denies the allegations of paragraph 19 of the Complaint and demands strict proof thereof.

21. Defendant Thompson denies the allegations of paragraph 20 of the Complaint and demands strict proof thereof.

22. Defendant Thompson admits so much of the allegations of paragraph 21 of the Complaint as alleges that near the end of July in 2002 the Decedent went to St. Luke's Roosevelt Hospital seeking medical care. The remaining allegations of paragraph 21 are denied.

23. Defendant Thompson denies the allegations of paragraph 22 of the Complaint and demands strict proof thereof.

24. Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the allegations of paragraph 23 of the Complaint, therefore denies the same and demands strict proof thereof.

25. Defendant Thompson denies the allegations of paragraph 24 of the Complaint and demands strict proof thereof.

26. Defendant Thompson admits so much of the allegations of paragraph 25 of the Complaint as alleges that the Plaintiff requested him to come to New York and remove the Decedent from the hospital and care for him. The remaining allegations of paragraph 25 are denied and strict proof thereof is demanded.

27. Defendant Thompson admits so much of the allegations of paragraph 26 of the Complaint as alleges that arrangements were made for the Decedent to reside at The Garden House in Anderson, South Carolina. The remaining allegations of paragraph 26 of the Complaint are denied and strict proof thereof is demanded.

28. Defendant Thompson denies each and every allegation of paragraph 27 of the Complaint and demands strict proof thereof.

29. Defendant Thompson admits so much of the allegations of paragraph 28 of the Complaint as alleges he caused the locks on Decedent's apartment to be changed. The remaining allegations of paragraph 28 are denied and strict proof thereof is demanded.

30. Defendant Thompson denies the allegations of paragraph 29 of the Complaint and demands strict proof thereof.

31. Defendant Thompson denies the allegations of paragraph 30 of the Complaint and demands strict proof thereof.

32. Defendant Thompson denies the allegations of paragraph 31 of the Complaint and demands strict proof thereof.

33. Defendant Thompson admits so much of the allegations of paragraph 32 as alleges that on December 11th, 2002, the Decedent made and executed a Will and Revocable Trust Agreement. The remaining allegations of paragraph 32 are denied and strict proof thereof is demanded.

34. Defendant Thompson denies the allegations of paragraph 33 of the Complaint and demands strict proof thereof.

35. Defendant Thompson denies the allegations of paragraph 34 of the Complaint and demands strict proof thereof.

36. Defendant Thompson admits so much of the allegations of paragraph 35 of the Complaint as alleges that Decedent resided in the independent living section of The Garden House until several years later when he was moved to the nursing home. The remaining allegations of paragraph 35 are denied.

37. Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the allegations of paragraph 36 of the Complaint and demands strict proof thereof.

38. Defendant Thompson denies the allegations of paragraph 37 of the Complaint and demands strict proof thereof.

39. Defendant Thompson admits so much of the allegations of paragraph 38 of the Complaint as alleges that the Decedent never called the Plaintiff and never told him about the Wills, Trust Agreements and Powers of Attorney made in 2002 or at later days. The remaining allegations of paragraph 38 are denied and strict proof thereof is demanded.

40. Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the allegations of paragraph 39 of the Complaint, therefore denies the same and demands strict proof thereof.

41. Defendant Thompson denies each and every allegation of paragraph 40 of the Complaint and demands strict proof thereof.

42. Defendant Thompson admits so much of the allegations of paragraph 41 of the Complaint as alleges the Decedent moved from The Garden House to NHC Healthcare in Anderson. The remaining allegations of paragraph 41 are denied and strict proof thereof is demanded.

43. Defendant Thompson admits so much of the allegations of paragraph 42 of the Complaint as alleges the Decedent granted to Defendant Thompson a health care power of attorney which was used by the Defendant Thompson as needed to assist in health care delivery to the Decedent. The remaining allegations of paragraph 42 are denied and strict proof thereof is demanded.

44. Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of so much of the allegations of paragraph 43 of the Complaint as alleges Plaintiff did not know of the Decedent's Will until the same was filed, therefore denies said allegations and demands strict proof thereof. The remaining allegations of paragraph 43 are denied and strict proof thereof is demanded.

45. Defendant Thompson denies each and every allegation of paragraph 44 of the Complaint and demands strict proof thereof.

46. Defendant Thompson admits so much of the allegations of paragraph 45 of the Complaint as alleges that the Defendant, Merrill Lynch, acted as

investment advisor and asset manager for the trustees of the Trust and provided the trustees with periodic reports on the status of the investment account. The remaining allegations of paragraph 45 are denied and strict proof thereof is demanded.

47. Defendant Thompson admits so much of the allegations of paragraph 46 of the Complaint as alleges that Argo and Greene served as accountants for the Trust, for the Decedent, and also for the Defendant Thompson, and that Argo and Greene prepared tax returns for the Trust, the Decedent and the Defendant Thompson. Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the remaining allegations of paragraph 46, therefore denies the same.

48. Defendant Thompson denies the allegations of paragraph 47 of the Complaint and demands strict proof thereof.

49. Defendant Thompson denies the allegations of paragraph 48 of the Complaint and demands strict proof thereof.

50. Defendant Thompson denies the allegations of paragraph 49 of the Complaint and demands strict proof thereof.

51. Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the allegations of paragraph 50 of the Complaint, therefore denies the same.

52. Defendant Thompson admits so much of the allegations of paragraph 51 of the Complaint as alleges that the Defendant, Merrill Lynch, acted as investment advisor and asset manager for the Trustees of the Trust and provided the Trustees with periodic reports on the status of the investment account. The remaining allegations of paragraph 51 of the Complaint are denied and strict proof thereof is demanded.

53. Defendant Thompson admits so much of the allegations of paragraph 52 of the Complaint as alleges that Argo and Greene served as accountants for the Trust, for the Decedent, and also for the Defendant Thompson, and that Argo and Greene prepared tax returns for the Trust, the Decedent and the Defendant Thompson and that the Defendant, Merrill Lynch, acted as investment advisor and asset manager for the Trustees of the Trust and provided the Trustees with periodic reports on the status of the investment account. The remaining allegations of paragraph 52 are denied.

54. Defendant Thompson admits so much of the allegations of paragraph 53 of the Complaint of the Complaint as alleges that the Defendant, Merrill Lynch, acted as investment advisor and asset manager for the Trustees of the Trust and

provided the Trustees with periodic reports on the status of the investment account, and that the Defendants, Argo and Greene, served as accountants for the Trust, for the Decedent, and also for the Defendant Thompson and that Argo and Greene prepared tax returns for the Trust, the Decedent and the Defendant Thompson. The Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the remaining allegations of paragraph 53, therefore denies the same.

55. Defendant Thompson admits so much of the allegations of paragraph 54 of the Complaint as alleges that the Defendant, Merrill Lynch, acted as investment advisor and asset manager for the Trustees of the Trust and provided the Trustees with periodic reports on the status of the investment account and that the Defendants, Argo and Greene, served as accountants for the Trust, for the Decedent, and also for the Defendant, Thompson, and that the Defendants, Argo and Greene, prepared tax returns for the Trust, the Decedent and the Defendant Thompson. The Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the remaining allegations of paragraph 54, therefore denies the same.

56. Defendant Thompson admits so much of the allegations of paragraph 55 of the Complaint as alleges that the Defendant, Merrill Lynch, acted as investment advisor and asset manager for the Trustees of the Trust and provided the Trustees with periodic reports on the status of the investment account, and that the Defendants, Argo and Greene, served as accounts for the Trust, for the Decedent, and also for the Defendant Thompson, and that the Defendants, Argo and Greene, prepared tax returns for the Trust, the Decedent and the Defendant Thompson. The Defendant Thompson lacks sufficient knowledge and information with which to form an opinion or belief concerning the truth or accuracy of the remaining allegations of paragraph 46, therefore denies the same.

57. Defendant Thompson denies the allegations of paragraph 56 of the Complaint.

58. Defendant Thompson denies the allegations of paragraph 57 of the Complaint and demands strict proof thereof.

59. Defendant Thompson denies the allegations of paragraph 58 of the First Cause of Action of the Complaint and demands strict proof thereof.

60. Defendant Thompson denies the allegations of paragraph 59 of the First Cause of Action of the Complaint and demands strict proof thereof.

61. Defendant Thompson denies the allegations of paragraph 60 of the First Cause of Action of the Complaint and demands strict proof thereof.

62. Defendant Thompson denies the allegations of paragraph 61 of the Second Cause of Action of the Complaint and demands strict proof thereof.
63. Defendant Thompson denies the allegations of paragraph 62 of the Second Cause of Action of the Complaint and demands strict proof thereof.
64. Defendant Thompson denies the allegations of paragraph 63 of the Second Cause of Action of the Complaint and demands strict proof thereof.
65. Defendant Thompson denies the allegations of paragraph 64 of the Third Cause of Action of the Complaint and demands strict proof thereof.
66. Defendant Thompson denies the allegations of paragraph 65 of the Third Cause of Action of the Complaint and demands strict proof thereof.
67. Defendant Thompson denies the allegations of paragraph 66 of the Third Cause of Action of the Complaint and demands strict proof thereof.
68. Defendant Thompson denies the allegations of paragraph 67 of the Fourth Cause of Action of the Complaint and demands strict proof thereof.
69. Defendant Thompson denies the allegations of paragraph 68 of the Fourth Cause of Action of the Complaint and demands strict proof thereof.
70. Defendant Thompson denies the allegations of paragraph 69 of the Fourth Cause of Action of the Complaint and demands strict proof thereof.
71. Defendant Thompson denies the allegations of paragraph 70 of the Fifth Cause of Action of the Complaint and demands strict proof thereof.
72. Defendant Thompson denies each and every allegation of paragraph 71 of the Fifth Cause of Action of the Complaint and demands strict proof thereof.
73. Defendant Thompson denies each and every allegation of paragraph 72 of the Fifth Cause of Action of the Complaint and demands strict proof thereof.
74. Defendant Thompson denies each and every allegation of paragraph 73 of the Fifth Cause of Action of the Complaint and demands strict proof thereof.
75. Defendant Thompson denies each and every allegation of paragraph 74 of the Fifth Cause of Action of the Complaint and demands strict proof thereof.

76. Defendant Thompson denies each and every allegation of paragraph 75 of the Fifth Cause of Action of the Complaint and demands strict proof thereof.

77. Defendant Thompson denies each and every allegation of paragraph 76 of the Sixth Cause of Action of the Complaint and demands strict proof thereof.

78. Defendant Thompson denies each and every allegation of paragraph 77 of the Sixth Cause of Action of the Complaint and demands strict proof thereof.

79. Defendant Thompson denies each and every allegation of paragraph 78 of the Sixth Cause of Action of the Complaint and demands strict proof thereof.

80. Defendant Thompson denies each and every allegation of paragraph 79 of the Seventh Cause of Action of the Complaint and demands strict proof thereof.

81. Defendant Thompson denies each and every allegation of paragraph 80 of the Seventh Cause of Action of the Complaint and demands strict proof thereof.

82. Defendant Thompson denies each and every allegation of paragraph 81 of the Seventh Cause of Action of the Complaint and demands strict proof thereof.

83. Defendant Thompson denies each and every allegation of paragraph 82 of the Seventh Cause of Action of the Complaint and demands strict proof thereof.

84. Defendant Thompson denies each and every allegation of paragraph 83 of the Eighth Cause of Action of the Complaint and demands strict proof thereof.

85. Defendant Thompson denies each and every allegation of paragraph 84 of the Eighth Cause of Action of the Complaint and demands strict proof thereof.

86. Defendant Thompson denies each and every allegation of paragraph 85 of the Ninth Cause of Action of the Complaint and demands strict proof thereof.

87. Defendant Thompson denies each and every allegation of paragraph 86 of the Ninth Cause of Action of the Complaint and demands strict proof thereof.

88. Defendant Thompson denies each and every allegation of paragraph 87 of the Tenth Cause of Action of the Complaint and demands strict proof thereof.

89. Defendant Thompson denies each and every allegation of paragraph 88 of the Tenth Cause of Action of the Complaint and demands strict proof thereof.

90. Defendant Thompson denies each and every allegation of paragraph 89 of the Tenth Cause of Action of the Complaint and demands strict proof thereof.

91. Defendant Thompson denies each and every allegation of paragraph 90 of the Tenth Cause of Action of the Complaint and demands strict proof thereof.

92. Defendant Thompson denies each and every allegation of paragraph 91 of the Tenth Cause of Action of the Complaint and demands strict proof thereof.

93. Defendant Thompson denies each and every allegation of paragraph 92 of the Tenth Cause of Action of the Complaint and demands strict proof thereof.

94. Defendant Thompson denies each and every allegation of paragraph 93 of the Tenth Cause of Action of the Complaint and demands strict proof thereof.

95. Defendant Thompson denies each and every allegation of paragraph 94 of the Tenth Cause of Action of the Complaint and demands strict proof thereof.

96. Defendant Thompson denies each and every allegation of paragraph 95 of the Tenth Cause of Action of the Complaint and demands strict proof thereof.

97. Defendant Thompson denies each and every allegation of paragraph 96 of the Eleventh Cause of Action of the Complaint and demands strict proof thereof.

98. Defendant Thompson denies each and every allegation of paragraph 97 of the Eleventh Cause of Action of the Complaint and demands strict proof thereof.

99. Defendant Thompson denies each and every allegation of paragraph 98 of the Eleventh Cause of Action of the Complaint and demands strict proof thereof.

100. Defendant Thompson denies each and every allegation of paragraph 99 of the Eleventh Cause of Action of the Complaint and demands strict proof thereof.

101. Defendant Thompson denies each and every allegation of paragraph 100 of the Eleventh Cause of Action of the Complaint and demands strict proof thereof.

102. Defendant Thompson denies each and every allegation of paragraph 101 of the Eleventh Cause of Action of the Complaint and demands strict proof thereof.

103. Defendant Thompson denies each and every allegation of paragraph 102 of the Twelfth Cause of Action of the Complaint and demands strict proof thereof.

104. Defendant Thompson denies each and every allegation of paragraph 103 of the Twelfth Cause of Action of the Complaint and demands strict proof thereof.

105. Defendant Thompson denies each and every allegation of paragraph 104 of the Twelfth Cause of Action of the Complaint and demands strict proof thereof.

106. Defendant Thompson denies each and every allegation of paragraph 105 of the Thirteenth Cause of Action of the Complaint and demands strict proof thereof.

107. Defendant Thompson denies each and every allegation of paragraph 106 of the Thirteenth Cause of Action of the Complaint and demands strict proof thereof.

108. Defendant Thompson denies each and every allegation of paragraph 107 of the Thirteenth Cause of Action of the Complaint and demands strict proof thereof.

109. Defendant Thompson denies each and every allegation of paragraph 108 of the Thirteenth Cause of Action of the Complaint and demands strict proof thereof.

110. Defendant Thompson denies each and every allegation of paragraph 109 of the Thirteenth Cause of Action of the Complaint and demands strict proof thereof.

111. Defendant Thompson denies each and every allegation of paragraph 110 of the Thirteenth Cause of Action of the Complaint and demands strict proof thereof.

112. Defendant Thompson denies each and every allegation of paragraph 111 of the Thirteenth Cause of Action of the Complaint and demands strict proof thereof.

113. Defendant Thompson denies each and every allegation of paragraph 112 of the Thirteenth Cause of Action of the Complaint and demands strict proof thereof.

114. Defendant Thompson denies each and every allegation of paragraph 113 of the Thirteenth Cause of Action of the Complaint and demands strict proof thereof.

115. Defendant Thompson denies each and every allegation of paragraph 114 of the Thirteenth Cause of Action of the Complaint and demands strict proof thereof.

116. Defendant Thompson denies each and every allegation of paragraph 115 of the Thirteenth Cause of Action of the Complaint and demands strict proof thereof.

117. Defendant Thompson denies each and every allegation of paragraph 116 of the Thirteenth Cause of Action of the Complaint and demands strict proof thereof.

118. Defendant Thompson denies each and every allegation of paragraph 117 of the Thirteenth Cause of Action of the Complaint and demands strict proof thereof.

119. Defendant Thompson denies each and every allegation of paragraph 118 of the Fourteenth Cause of Action of the Complaint and demands strict proof thereof.

120. Defendant Thompson denies each and every allegation of paragraph 119 of the Fourteenth Cause of Action of the Complaint and demands strict proof thereof.

121. Defendant Thompson denies each and every allegation of paragraph 120 of the Fourteenth Cause of Action of the Complaint and demands strict proof thereof.

FOR A SECOND DEFENSE

122. Defendant Thompson adopts and realleges each and every allegation set forth above and not inconsistent herewith, as if fully and completely repeated herein.

123. The allegations of paragraphs 58-60 of the First Cause of the Action of the Complaint allege, at most, a cause of action to invalidate an *inter vivos* trust on the grounds the Settlor lacked requisite mental capacity to execute such Trust.

124. S.C. Code Ann. §62-1-302(a)(3) vests in the Probate Court exclusive original jurisdiction over all subject matter related to determining the validity or invalidity of trusts.

125. The Circuit Courts of South Carolina lack the subject matter jurisdiction of the matters alleged in the First Cause of Action.

126. The Defendant Thompson is entitled to an Order of this Court pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure dismissing the

First Cause of Action of the Complaint for lack of subject matter jurisdiction of the Circuit Court.

FOR A THIRD DEFENSE

127. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

128. The allegations of paragraphs 61-63 of the Second Cause of Action of the Complaint allege, at most, a cause of action to invalidate an *inter vivos* trust on the grounds undue influence was exerted upon the Settlor.

129. S.C. Code Ann. §62-1-302(a)(3) vests in the Probate Court exclusive subject matter jurisdiction to determine the validity or invalidity of trusts.

130. The Circuit Court lacks subject matter jurisdiction over the matters alleged in the Second Cause of Action.

131. Defendant Thompson is entitled to an Order pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure, dismissing the Second Cause of Action of the Complaint for lack of subject matter jurisdiction by the Circuit Court.

FOR A FOURTH DEFENSE

132. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

133. Paragraphs 64-66 of the Third Cause of Action of the Complaint alleges, at most, an action to invalidate an *inter vivos* trust due to mistake of the Settlor. S.C. Code Ann. §62-1-302(a)(3), vests in the Probate Court exclusive subject matter jurisdiction to determine the validity or invalidity of legal trusts.

134. Defendant Thompson is entitled to an Order pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure dismissing the Third Cause of Action of the Complaint for lack of subject matter jurisdiction by the Circuit Court.

FOR A FIFTH DEFENSE

135. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

136. The allegations of paragraphs 67-69 of the Fourth Cause of Action, at most, alleges a cause of action to determine whether property of a decedent is included in an inter vivos trust created by the Decedent or in the estate of the Decedent.

137. S.C. Code Ann. §62-1-302(a)(1) and (3) vests in the Probate Court exclusive subject matter jurisdiction to determine the property rights of either an inter vivos trust or a Decedent's estate.

138. The Circuit Court lacks subject matter jurisdiction of the matters alleged in the Fourth Cause of Action of the Complaint.

139. The Defendant Thompson is entitled to Order pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure dismissing the Fourth Cause of Action of the Complaint for lack of subject matter jurisdiction by the Circuit Court.

FOR A SIXTH DEFENSE

140. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

141. The allegations of paragraphs 87-95 of the Tenth Cause of Action of the Complaint, at most, alleges a cause or causes of action for removal of a fiduciary of an estate for violation of duties imposed on the fiduciary by probate law.

142. S.C. Code Ann. §62-1-302(a)(1) and (3) vests in the Probate Court exclusive subject matter jurisdiction to remove a trustee or personal representative for breach of fiduciary duty and to determine the breach or breaches of fiduciary duty and of failure to marshal assets.

143. The Circuit Court lacks subject matter jurisdiction of the matters alleged in the Tenth Cause of Action.

144. The Defendant Thompson is entitled to an Order pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure dismissing the Tenth Cause of Action of the Complaint for lack of subject matter jurisdiction by the Probate Court.

FOR A SEVENTH DEFENSE

145. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

146. The allegations of paragraphs 70-75 of the Fifth Cause of Action allege, at most, a cause of action to invalidate a Will and Trust executed by the Decedent on the grounds that such documents were executed by the testator and the settlor based upon fraudulent representations made by the Defendant Thompson to the testator and settlor.

147. S.C. Code Ann. §62-1-302(a)(1) and (3) vests in the Probate Court exclusive subject matter jurisdiction to determine the validity or invalidity of Wills and Trusts based upon fraudulent representations or misrepresentations by third parties.

148. The Circuit Court lacks subject matter jurisdiction of the matters alleged in the Fifth Cause of Action of the Complaint.

149. Defendant Thompson is entitled to an Order pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure dismissing the Fifth Cause of Action for lack of subject matter jurisdiction by the Circuit Court.

FOR AN EIGHTH DEFENSE

150. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

151. The allegations paragraphs 76-78 of the Sixth Cause of Action of the Complaint allege, at most, a cause of action to recover assets of a decedent's estate or a decedent's trust allegedly converted by the Defendant Thompson.

152. S.C. Code Ann. §62-1-302(a)(1)(3) vests in the Probate Court exclusive subject matter jurisdiction to determine and recover property of the Decedent's estate or of a Decedent's trust.

153. The Circuit Court lacks subject matter jurisdiction of the matters alleged in the Sixth Cause of Action.

154. The Defendant Thompson is entitled to an Order pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure dismissing the Sixth Cause of Action of the Complaint for lack of subject matter jurisdiction by the Circuit Court.

FOR A NINTH DEFENSE

155. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

156. The allegations of paragraphs 79-81 of the Seventh Cause of Action of the Complaint allege, at most, a cause or causes of action for an estate or trust to recover property or assets belonging to said estate or trust allegedly misappropriated by the Defendant Thompson. S.C. Code Ann. §62-1-302(a)(1)(3) vests in the Probate Court exclusive subject matter jurisdiction to determine assets of an estate or trust and to order recovery of the same.

157. The Circuit Court lacks subject matter jurisdiction of the matters alleged in the Seventh Cause of Action of the Complaint.

158. The Defendant Thompson is entitled to an Order pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure dismissing the Seventh Cause of Action of the Complaint for lack of subject matter jurisdiction by the Probate Court.

FOR A TENTH DEFENSE

159. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

160. The causes of action alleged in paragraphs 83 and 84 of the Eighth Cause of Action of the Complaint allege, at most, a cause of action for recovery by the estate of the decedent or the trust of the decedent assets allegedly misappropriated by the Defendant Thompson and/or others.

161. S.C. Code Ann. §62-1-302(a)(1)(3) vests in the Probate Court exclusive subject matter jurisdiction to determine an Order of Recovery of property of an estate or trust misappropriated by a fiduciary or third party.

162. The Circuit Court lacks subject matter jurisdiction of the matters alleged in the Eighth Cause of Action.

163. The Defendant Thompson is entitled to an Order pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure dismissing the Eighth Cause of Action of the Complaint for lack of subject matter jurisdiction by the Circuit Court.

FOR AN ELEVENTH DEFENSE

164. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

165. The allegations of paragraphs 85 and 86 of the Ninth Cause of Action of the Complaint, at most, alleges a cause of action for recovery of assets by the estate of the decedent or the trust of the decedent that were allegedly wrongfully taken or misappropriated by the Defendant Thompson and/or others.

166. S.C. Code Ann. §62-1-302(a)(1)(3) vests in the Probate Court exclusive subject matter jurisdiction to determine the assets of or property of an estate or trust and to order recovery of the same misappropriated by the fiduciary or any third party.

167. The Circuit Court lacks subject matter jurisdiction of the matters alleged in the Ninth Cause of Action of the Complaint.

168. Defendant Thompson is entitled to an Order pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure, dismissing the Ninth Cause of Action for lack of subject matter jurisdiction by the Probate Court.

FOR A TWELFTH DEFENSE

169. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

170. The allegations of paragraphs 96-101 of the Eleventh Cause of Action allege, at most, a cause or causes of action allegedly sustained because the Defendant Thompson unduly influenced the Decedent to make a Power of Attorney, Will and Trust at the time the decedent was allegedly mentally incapacitated.

171. On September 16th, 2009, the Probate Court of Anderson County, South Carolina admitted the Decedent's Will to Informal Probate in case number 2009-ES-04-0933.

172. The Plaintiff brought an action in the Probate Court for Anderson County, South Carolina on May 14th, 2010 seeking to invalidate the Order of Informal Probate entered in the foregoing case.

173. The action of the Plaintiff against this Defendant and against the Decedent's estate to invalidate the Order of Informal Probate was removed to the Circuit Court and is now pending as case number 2010-CP-04-1845.

174. In the action pending in the Circuit Court, designated case number 2010-CP-04-1845 to determine the validity of the Decedent's Will, the Plaintiff makes a direct attack upon the Order of Informal Probate entered by the Probate Court on September 16th, 2009.

175. The Plaintiff, by the Complaint, and particularly by the Eleventh Cause of Action, the Thirteenth Cause of Action and the Fourteenth Cause of Action thereof, seeks to make an indirect or collateral attack upon the Order of the Probate Court dated September 16th, 2009 admitting the Decedent's Will to Informal Probate.

176. Inasmuch as an action for direct attack upon the Informal Probate Order is pending in the Court of Common Pleas, the Plaintiff cannot maintain an action for indirect or collateral attack upon the Order of Informal Probate until the action for Formal Probate has been adjudicated.

177. The Defendant is entitled to an Order of this Court dismissing the Eleventh, Thirteenth and Fourteenth Causes of Action until such time as the action pending as case number 2010-CP-04-1845 directly attacking the Order of Informal Probate has been adjudicated.

FOR A THIRTEENTH DEFENSE

178. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

179. Rule 17, South Carolina Rules of Civil Procedure, requires that actions be prosecuted in the name of the real party in interest.

180. Even if the material allegations of the Complaint are true, which is admitted only for purposes of this defense and otherwise denied, the estate of the Decedent owns or would own all of the property, property rights and assets of the Decedent.

181. Under Rule 17(a), South Carolina Rules of Civil Procedure, the Plaintiff has no standing to maintain all or any one of the causes of action that does not directly relate to the invalidation of the Order of the Probate Court admitting the Will to Informal Probate dated September 16th, 2009.

FOR A FOURTEENTH DEFENSE

182. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

183. On May 14th, 2010, the Plaintiff filed an action in the Probate Court seeking to invalidate the Order of Informal Probate entered by the Probate Court on September 16th, 2009 (the "Wills Contest").

184. Pursuant to S.C. Code Ann. §62-1-302(d)(1) and (5), the Wills Contest action was removed to the Circuit Court under case number 2010-CP-04-1845. The above-captioned action was commenced for the same purpose as the purpose of the action pending as case number 2010-CP-04-1845.

185. The Plaintiff is not entitled to maintain two causes of action seeking the same relief.

FOR A FIFTEENTH DEFENSE

186. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

187. In that all or one or more of the causes of action alleged in the Complaint may be barred by Statute of Frauds codified in S.C. Code Ann. §32-3-10 *et seq.*, the same is hereby pled as an affirmative defense.

FOR A SIXTEENTH DEFENSE

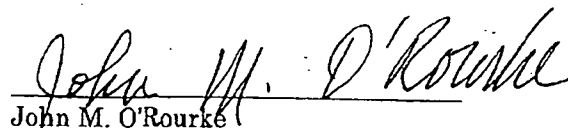
188. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

189. In that all or one or more of the causes of action alleged in the Complaint may be barred by the Statute of Frauds codified in S.C. Code Ann. §62-2-701 (1986, as amended), the same is hereby pled as an affirmative defense.

FOR A SEVENTEENTH DEFENSE

190. Defendant Thompson adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully and completely repeated herein.

191. The claims asserted in the Complaint are barred by applicable Statutes of Limitation.



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Anderson, SC 29622-1190

Telephone No.: 864.225.1086

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Attorneys for Respondents, Swain N.
Thompson, Jr., individually and as
Personal Representative of the Estate
of Robert L. Chamblee, Deceased

Anderson, South Carolina
Date: May 25 2012

MOTION FEE PAID

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON) C.A. NO. 2012-CP-04-01433

James Robert Malloy,)
Plaintiff,)

vs.)

Swain N. Thompson, Jr.;)
Merrill Lynch; Pierce, Fenner &)
Smith, Inc.; Joseph T. Argo and)
Greene and Company, L.L.P.,)

Defendants.)

In the matter of:)
Estate of Robert L. Chamblee)
Probate Case No.: 2009-ES-04-0933)

MOTION TO DISMISS BY
THE DEFENDANT,
SWAIN N. THOMPSON, JR.

FILED-CLERK'S OFFICE
ANDERSON SC
2012 MAY 30 P 3:38
COMMON PLEAS AND
GENERAL SESSIONS

TO: James R. Gilreath, Esquire & William M. Hogan, Esquire, The Gilreath Law Firm, P.A., P. O. Box 2147, Greenville, SC 29602 and S. Alan Medlin, Esquire, 1713 Phelps Street, Columbia, SC 29205, Attorneys for Petitioner

YOU WILL PLEASE TAKE NOTICE that the Defendant, Swain N. Thompson, Jr., by and through his undersigned attorneys, will move before the Court at a date, time and place to be set (notice of which will be given to you) as follows:

(a) The Defendant Thompson will move pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure, for an Order dismissing the First Cause of Action contained in the Complaint, embodied in paragraphs 58 - 60 of the Complaint thereof on the grounds this Court lacks jurisdiction of the subject matter thereof because exclusive jurisdiction of the subject matter thereof is vested exclusively in the Probate Court for Anderson County, South Carolina pursuant to the provisions of S.C. Code Ann. §62-1-302(a)(1) and (3) and §62-7-201;

(b) The Defendant Thompson will move immediately thereafter pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure, to dismiss the Second Cause of Action embodied in paragraphs 61-63 of the Complaint on the grounds this Court lacks jurisdiction of the subject matter thereof because exclusive jurisdiction of the subject matter thereof is vested exclusively in the Probate Court for Anderson

County, South Carolina pursuant to the provisions of S.C. Code Ann. §62-1-302(a)(1) and (3) and §62-7-201;

(c) The Defendant Thompson will immediately move thereafter pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure, to dismiss the Third Cause of Action embodied in paragraphs 64-66 of the Complaint on the grounds this Court lacks jurisdiction of the subject matter thereof because exclusive jurisdiction of the subject matter thereof is vested exclusively in the Probate Court for Anderson County, South Carolina pursuant to the provisions of S.C. Code Ann. §62-1-302(a)(1) and (3) and §62-7-201;

(d) The Defendant Thompson will immediately move thereafter pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure, to dismiss the Fourth Cause of Action embodied in paragraphs 67-69 of the Complaint on the grounds this Court lacks jurisdiction of the subject matter thereof because exclusive jurisdiction of the subject matter thereof is vested exclusively in the Probate Court for Anderson County, South Carolina pursuant to the provisions of S.C. Code Ann. §62-1-302(a)(1) and (3) and §62-7-201;

(e) The Defendant Thompson will immediately move thereafter pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure, to dismiss the Fifth Cause of Action embodied in paragraphs 70-75 of the Complaint on the grounds this Court lacks jurisdiction of the subject matter thereof because exclusive jurisdiction of the subject matter thereof is vested exclusively in the Probate Court for Anderson County, South Carolina pursuant to the provisions of S.C. Code Ann. §62-1-302(a)(1) and (3) and §62-7-201;

(f) The Defendant Thompson will immediately move thereafter in the alternative pursuant to Rule 17(a), South Carolina Rules of Civil Procedure, to dismiss the Fifth Cause of Action embodied in paragraphs 70-75 of the Complaint on the grounds that the Plaintiff does not own any alleged cause of action, is not the real party in interest and lacks standing to prosecute any such cause of action.

(g) The Defendant Thompson will immediately move thereafter pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure, to dismiss the Sixth Cause of Action embodied in paragraphs 76-78 of the Complaint on the grounds this Court lacks jurisdiction of the subject matter thereof because exclusive jurisdiction of the subject matter thereof is vested exclusively in the Probate Court for Anderson County, South Carolina pursuant to the provisions of S.C. Code Ann. §62-1-302(a)(1) and (3) and §62-7-201;

(h) The Defendant Thompson will immediately move thereafter in the alternative pursuant to Rule 17(a), South Carolina Rules of Civil Procedure, to dismiss the Sixth Cause of Action embodied in paragraphs 76-78 of the Complaint

on the grounds that the Plaintiff does not own any alleged cause of action, is not the real party in interest and lacks standing to prosecute any such cause of action.

(i) The Defendant Thompson will immediately move thereafter pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure, to dismiss the Seventh Cause of Action embodied in paragraphs 79-81 of the Complaint on the grounds this Court lacks jurisdiction of the subject matter thereof because exclusive jurisdiction of the subject matter thereof is vested exclusively in the Probate Court for Anderson County, South Carolina pursuant to the provisions of S.C. Code Ann. §62-1-302(a)(1) and (3) and §62-7-201;

(j) The Defendant Thompson will immediately move thereafter in the alternative pursuant to Rule 17(a), South Carolina Rules of Civil Procedure, to dismiss the Seventh Cause of Action embodied in paragraphs 79-81 of the Complaint on the grounds that the Plaintiff does not own any alleged cause of action, is not the real party in interest and lacks standing to prosecute any such cause of action.

(k) The Defendant Thompson will immediately move thereafter pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure, to dismiss the Eighth Cause of Action embodied in paragraphs 82-84 of the Complaint on the grounds this Court lacks jurisdiction of the subject matter thereof because exclusive jurisdiction of the subject matter thereof is vested exclusively in the Probate Court for Anderson County, South Carolina pursuant to the provisions of S.C. Code Ann. §62-1-302(a)(1) and (3) and §62-7-201;

(l) The Defendant Thompson will immediately move thereafter in the alternative pursuant to Rule 17(a), South Carolina Rules of Civil Procedure, to dismiss the Eighth Cause of Action embodied in paragraphs 82-84 of the Complaint on the grounds that the Plaintiff does not own any alleged cause of action, is not the real party in interest and lacks standing to prosecute any such cause of action.

(m) The Defendant Thompson will immediately move thereafter pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure, to dismiss the Ninth Cause of Action embodied in paragraphs 85-86 of the Complaint on the grounds this Court lacks jurisdiction of the subject matter thereof because exclusive jurisdiction of the subject matter thereof is vested exclusively in the Probate Court for Anderson County, South Carolina pursuant to the provisions of S.C. Code Ann. §62-1-302(a)(1) and (3) and §62-7-201;

(n) The Defendant Thompson will immediately move thereafter in the alternative pursuant to Rule 17(a), South Carolina Rules of Civil Procedure, to dismiss the Ninth Cause of Action embodied in paragraphs 85-86 of the Complaint

on the grounds that the Plaintiff does not own any alleged cause of action, is not the real party in interest and lacks standing to prosecute any such cause of action.

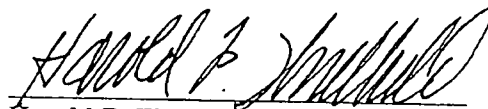
(o) The Defendant Thompson will immediately move thereafter pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure, to dismiss the Tenth Cause of Action embodied in paragraphs 87-95 of the Complaint on the grounds this Court lacks jurisdiction of the subject matter thereof because exclusive jurisdiction of the subject matter thereof is vested exclusively in the Probate Court for Anderson County, South Carolina pursuant to the provisions of S.C. Code Ann. §62-1-302(a)(1) and (3) and §62-7-201.

(p) The Defendant Thompson will immediately move thereafter in the alternative pursuant to Rule 17(a), South Carolina Rules of Civil Procedure, to dismiss the Tenth Cause of Action embodied in paragraphs 87-95 of the Complaint on the grounds that the Plaintiff does not own any alleged cause of action, is not the real party in interest and lacks standing to prosecute any such cause of action.

YOU WILL PLEASE TAKE FURTHER NOTICE that the Defendant Thompson through his undersigned attorneys will move before the Court immediately thereafter pursuant to Rule 12(b)(8), South Carolina Rules of Civil Procedure, to dismiss the Complaint in its entirety because a prior action was filed by the Plaintiff against this Defendant in the Probate Court for Anderson County, South Carolina and removed to this Court as case number 2010-CP-04-1845 between the same parties involving the same issues.

YOU WILL PLEASE TAKE FURTHER NOTICE that the Defendant Thompson through his undersigned attorneys will move before the Court immediately thereafter pursuant to Rule 17(a), South Carolina Rules of Civil Procedure, for an Order to dismiss the Complaint because the causes of action alleged by the Plaintiff, if any, are owned by the estate of the Decedent and not by the Plaintiff.

The foregoing motions will be based upon the pleadings in this action, and affidavits and memoranda as have been or may be served upon you prior to the hearing.



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Attorneys for Respondents, Swain N.

Thompson, Jr., individually and as

Personal Representative of the Estate

of Robert L. Chamblee, Deceased

Anderson, South Carolina

Date: May 22, 2012

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

James Robert Malloy,

Plaintiff,

v.

Swain N. Thompson, Jr. Merrill
Lynch, Pierce, Fenner & Smith,
Inc., Joseph T. Argo, and Greene
And Company, L.L.P.,

Defendants.

In the matter of:

Estate of Robert Chamblee

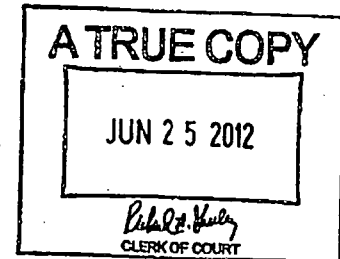
Probate Case No. 2009-ES-04-0933

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-04-01433

ANSWER OF JOSEPH T. ARGO AND
GREENE AND COMPANY, L.L.P.



The Defendants, Joseph T. Argo and Greene and Company, L.L.P., answering the Complaint of the Plaintiff would respectfully show unto the Court and allege that:

FOR A FIRST DEFENSE

1. These Defendants, Joseph T. Argo (hereinafter referred to as "Argo") and Greene and Company, L.L.P. deny each and every allegation of the Complaint not hereinafter admitted, explained, or modified.

2. These Defendants admit, upon information and belief, the allegations contained in Paragraph 1 of the Plaintiff's Complaint.

3. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 2 of the Plaintiff's Complaint and, therefore, deny the same.

4. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 3 of the Plaintiff's Complaint and, therefore, deny the same.

5. These Defendants admit the allegations contained in Paragraph 4 of the Plaintiff's Complaint.

6. These Defendants admit the allegations contained in Paragraph 5 of the Plaintiff's Complaint.

7. These Defendants deny the allegations contained in Paragraph 6 of the Plaintiff's Complaint.

8. The allegations contained in Paragraph 7 of the Plaintiff's Complaint are directed towards another party and therefore no response is required from these Defendants. To the extent that a response is required from these Defendants, the allegations contained in Paragraph 7 are denied.

9. These Defendants deny the allegations contained in Paragraph 8 of the Plaintiff's Complaint.

10. These Defendants admit so much of the allegations contained in Paragraph 9 of the Plaintiff's Complaint as allege that the instant matter is related to the case of *Malloy v. Thompson*, 2010-CP-04-1845. These Defendants deny the remaining allegations contained in Paragraph 9 of the Plaintiff's Complaint.

11. These Defendants deny the allegations contained in Paragraph 10 of the Plaintiff's Complaint.

12. In response to the allegations contained in Paragraph 11 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 11 above as set forth in their entirety herein.

13. These Defendants admit, upon information and belief, the allegations contained in Paragraph 12 of the Plaintiff's Complaint.

14. In response to the allegations contained in Paragraph 13 of the Plaintiff's Complaint, these Defendants admit, upon information and belief, that Swain Thompson applied for an informal probate of Robert L. Chamblee's Will (hereinafter referred to as "Chamblee") dated December 11, 2002 and for an informal appointment as personal representative of Chamblee's estate. The remaining allegations contained in Paragraph 13 of the Plaintiff's Complaint are denied.

15. These Defendants admit, upon information and belief, so much of the allegations contained in Paragraph 14 of the Plaintiff's Complaint as allege that the Anderson County Probate Court admitted Chamblee's Will to informal probate and granted Swain Thompson's application for informal appointment. These Defendants further admit, upon information and belief, that Chamblee's estate is currently being administered in Anderson County Probate Court. These Defendants deny the remaining allegations contained in Paragraph 14 of the Plaintiff's Complaint.

16. These Defendants admit, upon information and belief, the allegations contained in Paragraph 15 of the Plaintiff's Complaint as allege that Chamblee executed a trust agreement appointing himself and Swain Thompson as co-trustees. These Defendants deny the remaining allegations contained in Paragraph 15 of the Plaintiff's Complaint.

17. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 16 of the Plaintiff's Complaint and, therefore, deny the same.

18. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 17 of the Plaintiff's Complaint and, therefore, deny the same.

19. These Defendants admit so much of the allegations contained in Paragraph 18 of the Plaintiff's Complaint as allege that Robert Chamblee was a professor at Baruch College in New York. These Defendants lack sufficient information to form a belief as to the truth of the remaining allegations contained in Paragraph 18 and, therefore, deny the same.

20. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of the Plaintiff's Complaint and, therefore, deny the same.

21. These Defendants deny the allegations contained in Paragraph 30 of the Plaintiff's Complaint.

22. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, and 43 of the Plaintiff's Complaint and, therefore, deny the same.

23. These Defendants deny the allegations contained in Paragraph 44 of the Plaintiff's Complaint.

24. These Defendants admit, upon information and belief, so much of the allegations contained in Paragraph 45 of the Plaintiff's Complaint as allege that Merrill Lynch acted as investment advisor and asset manager in connection with the 2002 trust. These Defendants lack sufficient information to form a belief as to the truth of the remaining allegations contained in Paragraph 45 and, therefore, deny the same.

25. These Defendants admit so much of the allegations contained in Paragraph 46 of the Plaintiff's Complaint as allege that Argo and Greene and Company acted as accountants for the 2002 trust and prepared tax returns for the 2002 trust, Robert Chamblee, and Swain Thompson. These Defendants further admit that they possess

copies of the 2002 trust which speaks for itself. These Defendants deny the remaining allegations contained in Paragraph 46 of the Plaintiff's Complaint.

26. These Defendants deny the allegations contained in Paragraph 47 of the Plaintiff's Complaint.

27. These Defendants deny the allegations contained in Paragraph 48 of the Plaintiff's Complaint.

28. These Defendants deny the allegations contained in Paragraph 49 of the Plaintiff's Complaint.

29. These Defendants admit so much of the allegations contained in Paragraph 50 of the Plaintiff's Complaint as allege that they were administratively involved in the funding of the 2002 trust in their role as accountants. These Defendants deny the remaining allegations contained in Paragraph 50 of the Plaintiff's Complaint.

30. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 51 of the Plaintiff's Complaint pertaining to Merrill Lynch. These Defendants deny the remaining allegations contained in Paragraph 51 of the Plaintiff's Complaint.

31. These Defendants admit so much of the allegations contained in Paragraph 52 of the Plaintiff's Complaint as allege that they were administratively involved in the funding of the 2002 trust in their role as accountants. These Defendants deny the remaining allegations contained in Paragraph 52 of the Plaintiff's Complaint.

32. These Defendants admit so much of the allegations contained in Paragraph 53 of the Plaintiff's Complaint as allege that in their role as 2002 trust accountant that they contacted telephonically and in person various individuals concerning the funding of the 2002 trust. These Defendants lack sufficient information to form a belief as to the trust

of the remaining allegations contained in Paragraph 53 of the Plaintiff's Complaint and, therefore, deny the same.

33. These Defendants admit so much of the allegations contained in Paragraph 54 of the Plaintiff's Complaint as allege that Merrill Lynch was provided copies of various powers of attorney which speak for themselves. These Defendants deny the remaining allegations contained in Paragraph 54 of the Plaintiff's Complaint.

34. These Defendants admit so much of the allegations contained in Paragraph 55 of the Plaintiff's Complaint as allege that they provided administrative and accounting assistance in connection with Mr. Chamblee's assets and estate. These Defendants deny the remaining allegations contained in Paragraph 55 of the Plaintiff's Complaint.

35. These Defendants deny the allegations contained Paragraphs 56 and 57 of the Plaintiff's Complaint.

36. In responding to the allegations contained in Paragraph 58 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 35 above as set forth in their entirety herein.

37. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 59 and 60 of the Plaintiff's Complaint and, therefore, deny the same.

38. In responding to the allegations contained in Paragraph 61 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 37 above as set forth in their entirety herein.

39. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 62 and 63 of the Plaintiff's Complaint and, therefore, deny the same.

40. In responding to the allegations contained in Paragraph 64 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 39 above as set forth in their entirety herein.

41. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 65 and 66 of the Plaintiff's Complaint and, therefore, deny the same.

42. In responding to the allegations contained in Paragraph 67 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 41 above as set forth in their entirety herein.

43. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 68 and 69 of the Plaintiff's Complaint and, therefore, deny the same.

44. In responding to the allegations contained in Paragraph 70 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 43 above as set forth in their entirety herein.

45. The allegations contained in Paragraph 71 through Paragraph 75 of the Plaintiff's Complaint are directed to Defendant Swain Thompson and, therefore, no response is required from these Defendants. To the extent a response is required, however, these Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 71 through Paragraph 75 of the Plaintiff's Complaint and, therefore, deny the same.

46. In responding to the allegations contained in Paragraph 76 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 45 above as set forth in their entirety herein.

47. The allegations contained in Paragraph 77 and Paragraph 78 of the Plaintiff's Complaint are directed to Defendant Swain Thompson and, therefore, no response is required from these Defendants. To the extent a response is required, however, these Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 77 and 78 of the Plaintiff's Complaint and, therefore, deny the same.

48. In responding to the allegations contained in Paragraph 79 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 47 above as set forth in their entirety herein.

49. The allegations contained in Paragraph 80 through Paragraph 82 of the Plaintiff's Complaint are directed to Defendant Swain Thompson and, therefore, no response is required from these Defendants. To the extent a response is required, however, these Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 80 through Paragraph 82 of the Plaintiff's Complaint and, therefore, deny the same.

50. In responding to the allegations contained in Paragraph 83 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 49 above as set forth in their entirety herein.

51. The allegations contained in Paragraph 84 of the Plaintiff's Complaint are directed to Defendant Swain Thompson and, therefore, no response is required from these Defendants. To the extent a response is required, however, these Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 84 of the Plaintiff's Complaint and, therefore, deny the same.

52. In responding to the allegations contained in Paragraph 85 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 51 above as set forth in their entirety herein.

53. The allegations contained in Paragraph 86 of the Plaintiff's Complaint are directed to Defendant Swain Thompson and, therefore, no response is required from these Defendants. To the extent a response is required, however, these Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 86 of the Plaintiff's Complaint and, therefore, deny the same.

54. In responding to the allegations contained in Paragraph 87 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 53 above as set forth in their entirety herein.

55. The allegations contained in Paragraph 88 through Paragraph 95 are directed to Defendant Swain Thompson and, therefore, no response is required from these Defendants. To the extent a response is required, however, these Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 88 through Paragraph 95 and, therefore, deny the same.

56. In responding to the allegations contained in Paragraph 96 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 55 above as set forth in their entirety herein.

57. The allegations contained in Paragraph 97 through Paragraph 101 are directed to Defendant Swain Thompson and, therefore, no response is required from these Defendants. To the extent a response is required, however, these Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 97 through Paragraph 101 and, therefore, deny the same.

58. In responding to the allegations contained in Paragraph 102 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 57 above as set forth in their entirety herein.

59. The allegations contained in Paragraph 103 and Paragraph 104 are directed to Defendant Swain Thompson and, therefore, no response is required from these Defendants. To the extent a response is required, however, these Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 103 and Paragraph 104 and, therefore, deny the same.

60. In responding to the allegations contained in Paragraph 105 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 59 above as set forth in their entirety herein.

61. These Defendants deny the allegations contained in Paragraph 106 of the Plaintiff's Complaint.

62. These Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 107 of the Plaintiff's Complaint and, therefore, deny the same.

63. These Defendants admit so much of the allegations contained in Paragraph 108 of the Plaintiff's Complaint as allege that they served as accountants for the 2002 trust, Robert Chamblee and Swain Thompson. These Defendants further admit that they prepared tax returns for Robert Chamblee, the 2002 trust and Swain Thompson. The Defendants further admit that they possessed copies of the 2002 trust which speaks for itself. These Defendants deny the remaining allegations contained in Paragraph 108 of the Plaintiff's Complaint.

64. These Defendants deny the allegations contained in Paragraph 109 of the Plaintiff's Complaint.

65. These Defendants deny the allegations contained in Paragraph 110 of the Plaintiff's Complaint.

66. These Defendants deny the allegations contained in Paragraph 111 of the Plaintiff's Complaint.

67. These Defendants deny the allegations contained in Paragraph 112 of the Plaintiff's Complaint.

68. These Defendants deny the allegations contained in Paragraph 113 of the Plaintiff's Complaint.

69. These Defendants deny the allegations contained in Paragraph 114 of the Plaintiff's Complaint.

70. These Defendants deny the allegations contained in Paragraph 115 of the Plaintiff's Complaint.

71. These Defendants deny the allegations contained in Paragraph 116 of the Plaintiff's Complaint.

72. These Defendants deny the allegations contained in Paragraph 117 of the Plaintiff's Complaint.

73. In responding to the allegations contained in Paragraph 118 of the Plaintiff's Complaint, these Defendants repeat and re-allege all of the allegations set forth in Paragraphs 1 through 72 above as set forth in their entirety herein.

74. These Defendants deny the allegations contained in Paragraphs 119, 120 and 121 of the Plaintiff's Complaint.

FOR A SECOND DEFENSE

75. These Defendants adopt and re-allege each and every allegation set forth above and not inconsistent herewith, as to fully and completely repeated herein.

76. These Defendants allege that the Probate Court has exclusive jurisdiction to determine the issues raised in the Plaintiff's Complaint including but not limited to the validity of trusts, wills, the mental capacity of the decedent and whether the assets of an estate have been misappropriated. Accordingly, this Court lacks jurisdiction and the related causes of action should be dismissed.

FOR A THIRD DEFENSE

77. These Defendants adopt and re-allege each and every allegation set forth above and not consistent herewith, as if fully and completely repeated herein.

78. The Defendants allege that this action constitutes a collateral attack upon the Order of the Probate Court dated September 16, 2009 and the instant matter should be dismissed.

FOR A FOURTH DEFENSE

79. These Defendants adopt and re-allege each and every allegation set forth above and not inconsistent herewith, as if fully and completely repeated herein.

80. These Defendants allege that another action has been instituted by the Plaintiff against Defendant Swain Thompson in this Court (Civil Action No. 2010-CP-04-1845) containing the same allegations. In the 2010 action, the Plaintiff has filed a Motion to Add Defendants Argo and Greene and Company, L.L.P. as Defendants. Upon information and belief, this Motion is currently pending and/or under consideration by the Court.

81. The Plaintiff is not entitled to maintain the instant lawsuit based on the prior filing of the 2010 action and related motions.

FOR A FIFTH DEFENSE

82. These Defendants adopt and re-allege each and every allegation set forth above and not inconsistent herewith, as if fully and completely repeated herein.

83. These Defendants allege that the Statute of Frauds bars the Plaintiff's Complaint.

FOR A SIXTH DEFENSE

84. These Defendants adopt and re-allege each and every allegation set forth above and not inconsistent herewith, as if fully and completely repeated herein.

85. These Defendants allege that the Plaintiff's Complaint is barred by the applicable Statute of Limitations.

FOR A SEVENTH DEFENSE

86. These Defendants adopt and re-allege each and every allegation set forth above and not inconsistent herewith, as if fully and completely repeated herein.

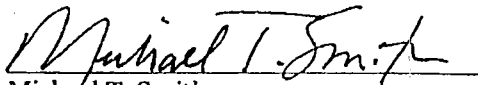
87. These Defendants allege that the Plaintiff's Complaint is barred by the doctrines of waiver, estoppel, and/or laches.

FOR A EIGHTH DEFENSE

88. These Defendants adopt and re-allege each and every allegation set forth above and not inconsistent herewith, as if fully and completely repeated herein.

89. These Defendants allege that the Plaintiff's Complaint fails to state facts upon which relief can be granted against these Defendants.

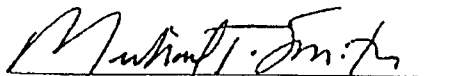
WHEREFORE, having fully answered the Complaint of the Plaintiff herein, the Defendants pray that same be dismissed with prejudice and for such other and further relief as this Court deems just and proper.



Michael T. Smith
LOGAN, JOLLY & SMITH, LLP
1805 North Boulevard
Post Office Box 259
Anderson, SC 29622
864-226-1910 (phone)
864-226-1931 (facsimile)
Attorney for Joseph T. Argo and Greene and
Company, L.L.P.

Anderson, South Carolina
Dated: June 25, 2012.

Defendants hereby demand a trial by jury.


Michael T. Smith

6/25/12
Date

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CIVIL ACTION NO: 2012-CP-04-1433
James Robert Malloy,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
	)	
Swain N. Thompson, Jr., Merrill Lynch,	)	
Pierce, Fenner & Smith, Inc., Joseph T.	)	
Argo, and Greene and Company, L.L.P.,	)	
	)	
Defendants.	)	
	)	
In the Matter of:	)	
	)	
Estate of Robert L. Chamblee	)	
	)	

DEFENDANT MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.'S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
AND COMPEL ARBITRATION

Defendant Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") submits this Memorandum with the attached affidavit and exhibits in support of its Motion to Dismiss and Compel Arbitration as to Merrill Lynch.

INTRODUCTION

Plaintiff is a disappointed "god son" of the deceased who claims ten years after the fact that he was entitled to an inheritance. The Complaint alleges that Plaintiff is seeking to set aside the will and trust of the Decedent, Robert L. Chamblee. The allegations are that the late Chamblee had accounts at Merrill Lynch and that he was incompetent at the time he authorized others to act on his behalf through a power of attorney and through a living trust. However, as admitted in the Complaint, when opening the Merrill Lynch

account(s), Chamblee had not been adjudicated incompetent. He signed Client Relationship Agreements ("CRA") with Merrill Lynch, one individually and one as trustee of his living trust. Both CRAs contain mandatory arbitration provisions. Plaintiff's claim against Merrill Lynch asserts an interest in the account(s) created under such contract(s). Plaintiff cannot seek the benefit of the contract(s) that created the account(s) and avoid the obligation to arbitrate all claims.

Attached as Exhibit 1 is the Affidavit of Corporate Designee Regarding Records of Merrill Lynch. The Affiant endorsed true and correct copies of the Client Relationship Agreements executed by the deceased and the deceased's representative operating under a witnessed, notarized, and publicly filed Power of Attorney, and the deceased's living trust, supported by an attested Trustee Certification. (Affidavit Exhibits A -F.)

Merrill Lynch relied upon these documents because of the affirmations of the signatories, the witnesses, and the notaries. Merrill Lynch was entitled to rely upon these documents because there was no reasonable way in which Merrill Lynch could have known about the alleged private opinion of a physician, as alleged by Plaintiff in the Complaint, that the deceased was incompetent. Merrill Lynch could not have known whether the physician's entry in the medical chart was an opinion that would have been stated by the physician to be true beyond the date it was allegedly recorded in the medical chart, or whether it was true only on that day. Because the deceased had not been adjudicated incompetent at the time the documents were signed, by Plaintiff's own judicial admission, Merrill Lynch would not have been empowered or required to take note of the medical chart entry, even if it had been known.

Plaintiff's burden, because there was no adjudication of incompetence, would be to

demonstrate that (1) the deceased was legally incompetent, (2) at the date and time of each signature, (3) that each signatory, each witness and each notary knew it, and (4) that from them Merrill Lynch knew it. See *Macaulay v Wachovia Bank of South Carolina NA*, 351 S.C. 287, 569 S.E.2d 371 (Ct.App. 2002). The extensive factual inquiry necessary to determine these facts should be left to the discovery process in arbitration.

STATEMENT OF FACTS

The CRA signed by Chamblee in 2002 acknowledged that:

I agree that all controversies that may arise between us shall be determined by arbitration. Such controversies include, but are not limited to, those involving any transaction in any of my accounts with you, or the construction, performance or breach of any agreement between us, whether entered into or occurring prior, on or subsequent to the date hereof. ...

CRA, Affiant's Exhibit "C," (100296RR-0901) ¶11.

Section 6 of the CRA signed by the trustees of the living trust, which included the deceased, contained an arbitration provision, which provided:

...You agree that all controversies that may arise between us shall be determined by arbitration. Such controversies include, but are not limited to, those involving any transaction in any of your accounts with Merrill Lynch, or the construction, performance or breach of any agreement between us, whether entered into or occurring prior, on or subsequent to the date hereof. ...

CRA, Affiant's Exhibit "D," (100296RR-1102) ¶6.

Additionally, both CRA signature pages (Affiant's Exhibits "A" and "B"), expressly referred to the arbitration clause in a sentence directly above the signature lines.

Thus, in clear and easy to understand terms, each CRA specifically provided for mandatory arbitration of the claims asserted in Plaintiff's Complaint. The claims asserted by Plaintiff undeniably arise out of the CRAs because he claims that the

accounts created pursuant to the CRAs were used to collect and hold the assets Plaintiff now seeks. (Compl. ¶115.)

ARGUMENT AND AUTHORITIES

1. The Law Compels Arbitration of Plaintiff's Claims Against Merrill Lynch

A court must order arbitration on the application of any party showing an agreement of the type described in S.C. Code Ann. §15-48-10. 2 SC Jur. Arbitration §9. "The policy of the United States and of South Carolina is to favor arbitration of disputes. Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered." *Partain v Upstate Automotive Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603-4 (2010). See also *Grant v Magnolia Manor – Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009).

The law is well settled that arbitration agreements are valid and enforceable. See 9 U.S.C. § 2. Indeed, courts routinely uphold agreements to arbitrate securities disputes. See e.g., *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Adams v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 888 F.2d 696 (10th Cir. 1989).

Arbitration clauses, such as the ones at issue here, are to be broadly construed and any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration. See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927 (1983); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332 (1987).

For purposes of this Motion, the only issue is whether Plaintiff is making a claim to

the account that was created under a contract that required arbitration of claims against Merrill Lynch. It is indisputable that Plaintiff is making a claim to account(s) created under such contract(s). Plaintiff cannot seek the benefit of the contract that created the account and avoid the obligation to arbitrate all claims. *South Carolina Public Service Authority v Great Western Coal*, 312 S.C. 559, 437 S.E.2d 22 (1993) (naming non-signatory parties in the complaint does not nullify the obligation to arbitrate). "Moreover, '[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.'" *McCutcheon v. THI of SC at Charleston, LLC*, CIA No. 2:11-CV-02861, 2011 U.S. Dist. Lexis 144288 at 3 (D.S.C. December 15, 2011) (Slip Op.), quoting, *Int'l Paper Co. v Schwabedissen Maschinen & Anlagen GMBH*, 206 F. 3d 411, 418 (4th Cir., 2000) ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.").

2. **Plaintiff's Allegation that He is a Third Party Beneficiary to the CRAs Compels Arbitration of the Claims Against Merrill Lynch**

Under South Carolina law, the determination of whether certain factual allegations fall within the scope of an arbitration agreement must be made "regardless of the label assigned to the claim." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (S.C. 2001). A determinative factor in this analysis is whether the contract provides part of the "factual foundation" for the claims asserted. See *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000). Clearly the phrase "all controversies that may arise between us" is sufficiently broad to reach Plaintiff's allegations which share an obvious factual foundation with the Agreement. See

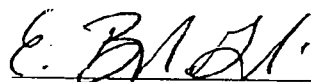
Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc., 356 S.C. 202, 208-09, 588 S.E.2d 136, 139 (Ct. App. 2003).

Indeed, Plaintiff's Complaint itself makes it clear that the underlying CRAs form the factual basis for all of Plaintiff's claims against Merrill Lynch. Plaintiff's Complaint specifically references the Merrill Lynch accounts as the vehicle through which the "conspiracy" to gather assets was completed. (Compl. ¶115.) 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.

CONCLUSION

In light of the unequivocal mandatory arbitration obligations in the contracts under which Plaintiff seeks relief, the claims asserted against Merrill Lynch in the Complaint in this action must be dismissed and the Plaintiff compelled to submit all claims to arbitration.

Respectfully submitted,



Christopher A. Ogiba (S.C. Bar No. 70666)
E. Brandon Gaskins (S.C. Bar No. 73274)
MOORE & VAN ALLEN, PLLC
40 Calhoun Street, Suite 300
Post Office Box 22828
Charleston, SC 29413-2828
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brandongaskins@mvalaw.com

SEPTEMBER 10, 2012
CHARLESTON, SC

ATTORNEYS FOR DEFENDANT
MERRILL LYNCH, PIERCE, FENNER &
SMITH INC.

EXHIBIT 1

JAMES ROBERT MALLOY

Plaintiff,

V.

No. 2012 CP 04-01433

SWAIN N. THOMPSON, JR.,
MERRILL LYNCH PIERCE FENNER &
SMITH, INC., JOSEPH T. ARGO,
and GREENE AND COMPANY, LLP,

Defendants.

STATE OF CALIFORNIA
COUNTY OF ORANGE

SS:

1, Denise Glasgow being first duly cautioned and sworn, states as follows:

1. I am of lawful age, and am a paralegal for Defendant, Merrill, Lynch, Pierce, Fenner & Smith, Incorporated ("Merrill Lynch").

2. I have made myself familiar with the Client Relationship Agreements signed by Robert L. Chamblee on November 25, 2002, appended hereto as Exhibit "A," and the Client Relationship Agreement signed by the Trustee of the Robert Chamblee Trust on January 24, 2003, appended hereto as Exhibit "B."

3. The Client Relationship Agreements immediately above the signature line stated that "in accordance with paragraph 11 of the client relationship agreement I am agreeing in advance to arbitrate any controversies that may arise with you;..." The Client Relationship

Agreement forms in effect at the time, attached hereto as Exhibit "C" and Exhibit "D" contain blank signature pages as well as paragraphs 11 and 6, respectively.

4. The Client Relationship Agreements included a mandatory arbitration clause in paragraph 11, Exhibit "C," which provides in pertinent part as follows:

I agree that all controversies that may arise between us shall be determined by arbitration. Such controversies include, but are not limited to, those involving any transaction in any of my accounts with you, or the construction, performance or breach of any agreement between us, whether entered into or occurring prior, on or subsequent to the date hereof. ...

Client Relationship Agreement, Exhibit "C," (100296RR-0901) ¶11. The mandatory arbitration clause in Exhibit "D" at ¶6 was worded differently, but to the same effect:

...You agree that all controversies that may arise between us shall be determined by arbitration. Such controversies include, but are not limited to, those involving any transaction in any of your accounts with Merrill Lynch, or the construction, performance or breach of any agreement between us, whether entered into or occurring prior, on or subsequent to the date hereof. ...

Client Relationship Agreement, Exhibit "D," (100296RR-1102) ¶6.

5. The Robert Chamblee Living Trust signed an attested Trustee Certification Form dated December 11, 2002 reciting that the Trustees were Swain Thompson and Robert Chamblee.

6. Additional documents provided to Merrill Lynch that attested that the Client Relationship Agreements were signed by persons with authority included:

- A. A Durable Power of Attorney dated September 16, 2002, attested, and apparently filed of record with the Register of Deeds, Anderson County, SC, according to the stamp on the last page, appointing Swain N. Thompson, Jr. as the appointed agent of Mr. Chamblee, attached hereto as Exhibit "E;" and

- B. A Durable Power of Attorney dated November 25, 2002, attested, appointing Swain Thompson as attorney in fact for Mr. Chamblee, attached hereto as Exhibit "F."

7. The documents attached as Exhibits "A" through "F" are true and correct copies of the documents in the possession of Merrill Lynch.

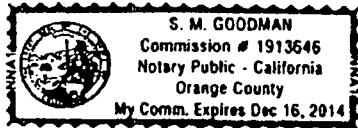
FURTHER AFFIANT SAYETH NOT.



Subscribed and sworn to before me this 9th day of May, 2012.

Notary Public

My commission expires:



State of California County of Orange
Subscribed and sworn to (or affirmed)
before me on this 9th day of May, 2012, by
DENISE ~~FEI~~ GLASGOW AS
proved to me on the basis of satisfactory evidence
to be the person(s) who appeared before me.
Signature S. M. Goodman
(Not)

Exhibit "A"

72610A28, R

[illegible]

NOTE: * p < .05; ** p < .01; *** p < .001. The data in this table are based on the results of the first 1000 cases of the study.

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DATE: 10/10/2001 TIME: 10:10:10 AM FROM: [REDACTED] TO: [REDACTED]

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Public Health and Safety Code Act				
What's New	What's New, Significant Message	Amendment Number	Effective Date	Effective Date
First Amendment to the Act				
Second Amendment to the Act				
Third Amendment to the Act				

Business: If you are opening a Retirement account own, please complete this section.

The following is a list of the names of the persons who have been identified as having been involved in the activities of the group, and the dates of their involvement.

Name	Date	Location	Activity
John Doe	1968	San Francisco	Meeting
Jane Smith	1969	New York	Meeting
Robert Johnson	1970	Los Angeles	Meeting
William Brown	1971	Chicago	Meeting
Elizabeth White	1972	San Francisco	Meeting
Michael Green	1973	New York	Meeting
Susan Black	1974	Los Angeles	Meeting
David Gray	1975	Chicago	Meeting
Patricia Blue	1976	San Francisco	Meeting
Christopher Red	1977	New York	Meeting
Stephanie Purple	1978	Los Angeles	Meeting
Jonathan Yellow	1979	Chicago	Meeting
Michelle Orange	1980	San Francisco	Meeting
Kevin Pink	1981	New York	Meeting
Rebecca Brown	1982	Los Angeles	Meeting
Gregory Green	1983	Chicago	Meeting
Deborah White	1984	San Francisco	Meeting
Timothy Black	1985	New York	Meeting
Christina Blue	1986	Los Angeles	Meeting
Andrew Gray	1987	Chicago	Meeting
Heather Red	1988	San Francisco	Meeting
Benjamin Purple	1989	New York	Meeting
Sarah Yellow	1990	Los Angeles	Meeting
Eric Orange	1991	Chicago	Meeting
Kimberly Pink	1992	San Francisco	Meeting
Robert Brown	1993	New York	Meeting
Michelle Green	1994	Los Angeles	Meeting
Christopher White	1995	Chicago	Meeting
Stephanie Black	1996	San Francisco	Meeting
Jonathan Blue	1997	New York	Meeting
Michelle Gray	1998	Los Angeles	Meeting
Kevin Red	1999	Chicago	Meeting
Rebecca Purple	2000	San Francisco	Meeting
Gregory Yellow	2001	New York	Meeting
Deborah Orange	2002	Los Angeles	Meeting
Timothy Pink	2003	Chicago	Meeting
Christina Brown	2004	San Francisco	Meeting
Andrew Green	2005	New York	Meeting
Heather White	2006	Los Angeles	Meeting
Benjamin Black	2007	Chicago	Meeting
Sarah Blue	2008	San Francisco	Meeting
Eric Gray	2009	New York	Meeting
Kimberly Red	2010	Los Angeles	Meeting
Robert Purple	2011	Chicago	Meeting
Michelle Yellow	2012	San Francisco	Meeting
Christopher Orange	2013	New York	Meeting
Stephanie Pink	2014	Los Angeles	Meeting
Jonathan Brown	2015	Chicago	Meeting
Michelle Green	2016	San Francisco	Meeting
Kevin White	2017	New York	Meeting
Rebecca Black	2018	Los Angeles	Meeting
Gregory Blue	2019	Chicago	Meeting
Deborah Gray	2020	San Francisco	Meeting
Timothy Red	2021	New York	Meeting
Christina Purple	2022	Los Angeles	Meeting
Andrew Yellow	2023	Chicago	Meeting
Heather Orange	2024	San Francisco	Meeting
Benjamin Pink	2025	New York	Meeting
Sarah Brown	2026	Los Angeles	Meeting
Eric Green	2027	Chicago	Meeting
Kimberly White	2028	San Francisco	Meeting
Robert Black	2029	New York	Meeting
Michelle Blue	2030	Los Angeles	Meeting
Christopher Gray	2031	Chicago	Meeting
Stephanie Red	2032	San Francisco	Meeting
Jonathan Purple	2033	New York	Meeting
Michelle Yellow	2034	Los Angeles	Meeting
Kevin Orange	2035	Chicago	Meeting
Rebecca Pink	2036	San Francisco	Meeting
Gregory Brown	2037	New York	Meeting
Deborah Green	2038	Los Angeles	Meeting
Timothy White	2039	Chicago	Meeting
Christina Black	2040	San Francisco	Meeting
Andrew Blue	2041	New York	Meeting
Heather Gray	2042	Los Angeles	Meeting
Benjamin Red	2043	Chicago	Meeting
Sarah Purple	2044	San Francisco	Meeting
Eric Yellow	2045	New York	Meeting
Kimberly Orange	2046	Los Angeles	Meeting
Robert Pink	2047	Chicago	Meeting
Michelle Brown	2048	San Francisco	Meeting
Christopher Green	2049	New York	Meeting
Stephanie White	2050	Los Angeles	Meeting
Jonathan Black	2051	Chicago	Meeting
Michelle Blue	2052	San Francisco	Meeting
Kevin Gray	2053	New York	Meeting
Rebecca Red	2054	Los Angeles	Meeting
Gregory Purple	2055	Chicago	Meeting
Deborah Yellow	2056	San Francisco	Meeting
Timothy Orange	2057	New York	Meeting
Christina Pink	2058	Los Angeles	Meeting
Andrew Brown	2059	Chicago	Meeting
Heather Green	2060	San Francisco	Meeting
Benjamin White	2061	New York	Meeting
Sarah Black	2062	Los Angeles	Meeting
Eric Blue	2063	Chicago	Meeting
Kimberly Gray	2064	San Francisco	Meeting
Robert Red	2065	New York	Meeting
Michelle Purple	2066	Los Angeles	Meeting
Christopher Yellow	2067	Chicago	Meeting

Client: **DISPENSARIES** For a background record

Personnel Requirements (Please check appropriate box)					
	Classroom Teacher	Special Education Teacher	Paraprofessional	Other Support Staff	Total
1. Classroom Teacher	☐	☐	☐	☐	
2. Special Education Teacher	☐	☐	☐	☐	
3. Paraprofessional	☐	☐	☐	☐	
4. Other Support Staff	☐	☐	☐	☐	
5. Total	☐	☐	☐	☐	

Order 1 **RECEIVED** **for a Retirement account**

Person's Name		Relationship	Address	City	State	Zip	Phone	Notes
1	John Doe	Uncle	123 Main St	Anytown	CA	90210	(555) 123-4567	
2	Jane Doe	Aunt	456 Elm St	Anytown	CA	90210	(555) 234-5678	
3	Bob Doe	Cousin	789 Oak St	Anytown	CA	90210	(555) 345-6789	
4	Carol Doe	Sister	101 Pine St	Anytown	CA	90210	(555) 456-7890	
5	David Doe	Brother	202 Birch St	Anytown	CA	90210	(555) 567-8901	
6	Eve Doe	Sister	303 Cedar St	Anytown	CA	90210	(555) 678-9012	
7	Frank Doe	Uncle	404 Maple St	Anytown	CA	90210	(555) 789-0123	
8	Grace Doe	Aunt	505 Spruce St	Anytown	CA	90210	(555) 890-1234	
9	Henry Doe	Cousin	606 Willow St	Anytown	CA	90210	(555) 901-2345	
10	Ivy Doe	Sister	707 Ash St	Anytown	CA	90210	(555) 012-3456	
11	Jack Doe	Brother	808 Hickory St	Anytown	CA	90210	(555) 123-4567	
12	Karen Doe	Sister	909 Poplar St	Anytown	CA	90210	(555) 234-5678	
13	Leo Doe	Uncle	1010 Sycamore St	Anytown	CA	90210	(555) 345-6789	
14	Mia Doe	Aunt	1111 Walnut St	Anytown	CA	90210	(555) 456-7890	
15	Noah Doe	Cousin	1212 Chestnut St	Anytown	CA	90210	(555) 567-8901	
16	Olivia Doe	Sister	1313 Elm St	Anytown	CA	90210	(555) 678-9012	
17	Peter Doe	Brother	1414 Oak St	Anytown	CA	90210	(555) 789-0123	
18	Quinn Doe	Sister	1515 Pine St	Anytown	CA	90210	(555) 890-1234	
19	Rachel Doe	Uncle	1616 Birch St	Anytown	CA	90210	(555) 901-2345	
20	Samuel Doe	Aunt	1717 Cedar St	Anytown	CA	90210	(555) 012-3456	
21	Tina Doe	Cousin	1818 Maple St	Anytown	CA	90210	(555) 123-4567	
22	Uma Doe	Sister	1919 Spruce St	Anytown	CA	90210	(555) 234-5678	
23	Victor Doe	Brother	2020 Willow St	Anytown	CA	90210	(555) 345-6789	
24	Wendy Doe	Sister	2121 Ash St	Anytown	CA	90210	(555) 456-7890	
25	Xavier Doe	Uncle	2222 Hickory St	Anytown	CA	90210	(555) 567-8901	
26	Yara Doe	Aunt	2323 Poplar St	Anytown	CA	90210	(555) 678-9012	
27	Zoe Doe	Cousin	2424 Sycamore St	Anytown	CA	90210	(555) 789-0123	
28	Adam Doe	Sister	2525 Walnut St	Anytown	CA	90210	(555) 890-1234	
29	Bella Doe	Brother	2626 Chestnut St	Anytown	CA	90210	(555) 901-2345	
30	Charlie Doe	Sister	2727 Elm St	Anytown	CA	90210	(555) 012-3456	
31	Diana Doe	Uncle	2828 Oak St	Anytown	CA	90210	(555) 123-4567	
32	Ethan Doe	Aunt	2929 Pine St	Anytown	CA	90210	(555) 234-5678	
33	Fiona Doe	Cousin	3030 Birch St	Anytown	CA	90210	(555) 345-6789	
34	George Doe	Sister	3131 Cedar St	Anytown	CA	90210	(555) 456-7890	
35	Hannah Doe	Brother	3232 Maple St	Anytown	CA	90210	(555) 567-8901	
36	Ian Doe	Sister	3333 Spruce St	Anytown	CA	90210	(555) 678-9012	
37	Julia Doe	Uncle	3434 Willow St	Anytown	CA	90210	(555) 789-0123	
38	Kyle Doe	Aunt	3535 Ash St	Anytown	CA	90210	(555) 890-1234	
39	Liam Doe	Cousin	3636 Hickory St	Anytown	CA	90210	(555) 901-2345	
40	Mia Doe	Sister	3737 Poplar St	Anytown	CA	90210	(555) 012-3456	
41	Noah Doe	Brother	3838 Sycamore St	Anytown	CA	90210	(555) 123-4567	
42	Olivia Doe	Sister	3939 Walnut St	Anytown	CA	90210	(555) 234-5678	
43	Peter Doe	Uncle	4040 Chestnut St	Anytown	CA	90210	(555) 345-6789	
44	Quinn Doe	Aunt						

THE CENTRAL BANK AND AGRICULTURE

[illegible][illegible]

THE PAYMENT REVENUE IS MADE ONLY BY DEPOSIT OF CHECKS TO ANY PROVISION OF THIS REGULATION OTHER THAN THE CONTINGENT FUND WHICH IS TO BE MADE AVAILABLE

① Robert L. Grammer 11-25-02
 Name 11-25-02 11-25-02
 Date 11-25-02 11-25-02
 Signature Robert L. Grammer 11-25-02
 Date 11-25-02 11-25-02
 Date 11-25-02 11-25-02

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Order 1007348-0001

Merrill Lynch Client Relationship Agreement

Merrill Lynch Relationship Number

72610604 + R726-10607

Client		Client 2 Name	
Client 1 Name <u>Robert Chamberlain Trust</u>	Client 1 Name <u>Robert Chamberlain Trust</u>	Client 2 Name <u>Robert Chamberlain Trust</u>	Client 2 Name <u>Robert Chamberlain Trust</u>
Social Security Number <u>51-6195663</u>	Social Security Number <u>51-6195663</u>	Social Security Number <u>51-6195663</u>	Social Security Number <u>51-6195663</u>
Mailing Address <u>PO Box 100</u>	Mailing Address <u>PO Box 100</u>	Mailing Address <u>PO Box 100</u>	Mailing Address <u>PO Box 100</u>
City, State, ZIP Code <u>Anderson SC 29605</u>	City, State, ZIP Code <u>Anderson SC 29605</u>	City, State, ZIP Code <u>Anderson SC 29605</u>	City, State, ZIP Code <u>Anderson SC 29605</u>

Notes: If you are subject to backup withholding due to notification by the IRS, you must check the portion of the Tax Certification section below as instructed.
 This Check One box is the Taxpayer Identification Number is NOT a Social Security Number.

Accounts: CMAA, Bureau Banking, CMA Subaccounts, or HQ - Please check the appropriate box and enter account, fund, or investment name in the space below.

PLEASE CHECK IF ACCOUNT HAS:	FORM 1 PLEASE CHECK:	ACCOUNT NUMBER (Other One Only):
FDIC Insurance	☒ Trust	<u>72610604</u>
Securities Account	☒ Trust	<u>72610607</u>
Other Account		

If the "Other" box is checked, please enter the account and the Bureau Banking account. Please enter the account ID to the right of the account name.

UTSIA OR UGMA		PLEASE CHECK IF ACCOUNT HAS:
Parent UTSIA or UGMA Account	Parent UTSIA or UGMA Account	☐
Parent UTSIA or UGMA Account	Parent UTSIA or UGMA Account	☐
Parent UTSIA or UGMA Account	Parent UTSIA or UGMA Account	☐

IRRADIANT		PLEASE CHECK IF ACCOUNT HAS:
Parent IRRADIANT Account	Parent IRRADIANT Account	☐
Parent IRRADIANT Account	Parent IRRADIANT Account	☐
Parent IRRADIANT Account	Parent IRRADIANT Account	☐

Client 1 Beneficiaries		PLEASE CHECK IF ACCOUNT HAS:
Primary Beneficiary	Primary Beneficiary	☐
Primary Beneficiary	Primary Beneficiary	☐
Primary Beneficiary	Primary Beneficiary	☐

Client 2 Beneficiaries		PLEASE CHECK IF ACCOUNT HAS:
Primary Beneficiary	Primary Beneficiary	☐
Primary Beneficiary	Primary Beneficiary	☐
Primary Beneficiary	Primary Beneficiary	☐

Tax Certification and Acknowledgments

Check one of the following: I certify that the taxpayer identification number I have entered on this form is the correct taxpayer identification number (or I am making this a request to be issued to me) and I have not been notified by the IRS that I am subject to backup withholding because (a) I am exempt from backup withholding, or (b) I have not been notified by the IRS that I am subject to backup withholding because I have failed to report all interest and dividends as my tax return.

I, the undersigned, certify that I am a U.S. person (as defined in U.S. Internal Revenue Code) and I have not been notified by the IRS that I am subject to backup withholding because I have failed to report all interest and dividends as my tax return.

Signature	Date	Signature	Date
<u>Robert Chamberlain</u>	<u>1-24-03</u>	<u>Robert Chamberlain</u>	<u>1-24-03</u>
Signature	Date	Signature	Date
<u>Robert Chamberlain</u>	<u>1-24-03</u>	<u>Robert Chamberlain</u>	<u>1-24-03</u>

Exhibit "B"

Merrill Lynch & You

Merrill Lynch Client Relationship Agreement

To simplify the documentation of your household's relationship with Merrill Lynch and to help you understand the nature of the agreements underlying many of our accounts and services, we have prepared a Client Relationship Agreement. This Agreement details the nature of our mutual obligations for the financial services you are about to use and those you may choose to use in the future. If you are currently a client of Merrill Lynch, filling out the relevant portions of this Agreement will complete your enrollment in a new account or service and extend the documentation of your relationship with us.

As you work with your Merrill Lynch Financial Advisor to achieve your unique goals, this trained professional can help you select among a broad network of accounts, retirement plans, pricing alternatives, cash access services, payment services, and credit facilities that address a range of financial needs and objectives. While the specific capabilities of these value-added resources differ, the legal, regulatory and procedural terms and conditions that apply to virtually all of these services are contained in this Agreement.

Once the adult members of your household have completed the Client Relationship Agreement, you will be able to add capabilities to your Merrill Lynch relationship by indicating your choices to your Financial Advisor. You will, as appropriate, receive additional materials that document the specifics of the particular service(s) you choose. In most cases, however, you won't have to sign additional forms or keep track of repetitive documents. We will update our records with the information relevant to any new service and avoid duplicative paperwork.

Merrill Lynch is built on the philosophy of our founder, Charles E. Merrill, that "the interests of our clients must come first." This principle stands at the core of our tenets: to understand our clients' financial needs, inform them of the capabilities and service options available to them, and provide the trained Financial Advisors and specialists who can help them make educated financial decisions in pursuit of their household's life goals. This Agreement is designed to facilitate your access to the choices you make.

Be sure to retain your copy of the Agreement with your permanent financial records.

We look forward to serving your evolving financial needs.



Code 100296RR-0901

Instructions

Client

Please print the names of the adult members of the household who are parties to this agreement. The term Client 1 identifies the Social Security/Employer Identification Number that will be used for tax reporting of joint accounts, as well as for accounts held in that name. Mailings for joint accounts are sent to the address of Client 1. Please enter the appropriate Social Security Number or Employer Identification Number for each party and check the box if this number is an EIN. If you are not a U.S. citizen, a U.S. resident for tax purposes or other U.S. person, you must certify your foreign status on a Form W-8.

Special Requirements for fiduciary accounts (trusts, estates, guardianships and conservatorships):

1. Please print the name and title of the fiduciary on the Client 1 name line. For example: John Doe, Guardian, Mary Smith, Executor or Bob Jones and Sue Brown, Co-trustees. Note: If there are multiple fiduciaries, all must sign the Client Relationship Agreement.
2. Please consult with your attorney or tax advisor if you are uncertain as to the appropriate Social Security or Employer Identification Number to enter.
3. Check the EIN box if the number entered is an Employer Identification Number.
4. The Client Relationship Agreement must be signed by fiduciaries in their proper capacity, such as "John Doe, Guardian".

CMA® or IRA

If you are opening one or more accounts at this time, please check the appropriate box to designate the holder of each account; check BOTH Client 1 and Client 2 for joint ownership. The most common types of joint ownership forms are listed on the form and in the chart to the right.

Joint ownership of property is an important element of estate planning and entails important legal and tax consequences. Please consult with your attorney if you have any questions regarding joint ownership.

Investor CreditLine® Service

Allows suitable investors to borrow against the value of eligible securities (margin). Your CMA Account will be established with the Investor CreditLine service unless you check the decline box.

CUSTODIAN

If you are opening one or more Uniform Gift to Minor Accounts (UGMAs) or Uniform Transfer to Minor Accounts (UTMAs), please enter the minor's Social Security Number, name, and indicate which client is to be the custodian. There can only be one custodian per UGMA/UTMA (except in Tennessee).

RETIREMENT

If you are opening one or more retirement accounts at this time, please check the appropriate box to designate the type of retirement account and holder for each retirement account to be opened. If you are an employee opening a SEP or SIMPLE IRA, your account must be linked to an employer/plan administrator account. Employer/plan administrator SEP or SIMPLE IRAs are linked to themselves. See your Financial Advisor for details.

If you are opening retirement account(s), you can name one or more primary and contingent beneficiaries by completing the Beneficiaries section for each retirement account. Designating a beneficiary has important tax consequences. We urge you to consult with your attorney or tax advisor before completing this section. If the beneficiary is a trust, provide the names of the trustees, the date of the trust, and the trust's tax identification number. Any balance left in your account at your death will be paid to the primary beneficiaries in accordance with the share percentages you designate. If you designate multiple beneficiaries, please be sure to designate the percentage each is to receive and be sure that the percentage totals 100%. If a primary beneficiary should predecease you, and there are other primary beneficiaries who are still living, the deceased beneficiary's share will be distributed to the remaining primary beneficiary, or the remaining primary beneficiaries in proportion to their payment percentages. If no primary beneficiary is living at the time of your death, the balance will be distributed to your contingent beneficiaries under the same rules. If no primary or contingent beneficiaries survives you, or if no beneficiary designation is in effect at your death, the balance will be paid to your spouse. If you are not survived by a spouse, we will pay the balance to your estate.

You can change your beneficiary designation at any time and as often as you wish. Such designations must be in writing and are not effective unless and until we receive them. Please ask your Financial Advisor for the appropriate document (code 1217).

You may open an inherited IRA if the original IRA owner is deceased.

- If you are a nonspousal beneficiary, or
- If you are a spousal beneficiary and are electing not to treat this IRA as your own:
Check the box that indicates this is either an "Inherited IRA" or an "Inherited Roth IRA."
- If you are a spousal beneficiary and are electing to treat the IRA as your own:
Check the box that indicates this is either an "IRA" or "Roth IRA." Do not indicate that this is an inherited IRA, if as a surviving spouse, you are electing to treat the IRA as your own.

If you maintain an inherited IRA, you may, depending on the state in which you reside, name one or more beneficiaries by completing the Beneficiaries section. We urge you to consult with your attorney or tax advisor before completing this section.

TAX CERTIFICATION AND ACKNOWLEDGEMENTS

Note to Trustees and other Fiduciaries:

If you select the Merrill Lynch Banking Advantage™ Program, all beneficiaries must be individuals or not-for-profit organizations.

Please be sure to sign and date this document after reading the Tax Certification and Acknowledgements.

KEY TO JOINT OWNERSHIP DESIGNATIONS

JTWROS:

Joint Tenants With Right of Survivorship

TEN:

Joint Tenants Without Right of Survivorship.
Also known as Tenants in Common

ATBE:

As Tenants By Entirety (for married persons,
only in states where applicable)

COMMPROP:

Community Property (for married persons,
only in states where applicable)

OTHER:

Other joint ownership designations, which
you must specify.

Address: 1, rue de la République, 93000, Paris, France

Client 1 Name	_____	Client 2 Name	_____
Social Security Number	_____-_____-_____ First - MI - Last ☐	Social Security Number	_____-_____-_____ First - MI - Last ☐
Mailing Address	_____ _____	Mailing Address	_____ _____
City, State, Zip Code	_____ _____	City, State, Zip Code	_____ _____

— If you are opening a CMA[®] account or an old account now, please contact this section.

[illegible]

Note: The cards are available with a CNA account. Please refer to paragraph 10 for annual fee information.

If you are opening a UGMA/UTMA account on behalf of a minor now, please complete this section.

PLEASE CHECK ONE CUSTOMER ONLY

	Miner's Name	Miner's Social Security Number	Given	Count	Account Number (Once Use Only)
First Custodial Account			☐	☐	
Second Custodial Account			☐	☐	
Third Custodial Account			☐	☐	

If you are opening a Retirement account now, please complete this section.

For SEP/SAMPLE Ack. Only
 Date of Birth:

[illegible]

for a Retirement account

Primary Beneficiary(ies) I hereby designate the person(s) named below as primary beneficiary(ies) to receive payment of the balance of my account upon my death.

	Date of Birth	Social Security # or Employer Identification #	Relationship	Share %
1	_____	_____	Check # EIM ☐	_____
2	_____	_____	Check # EIM ☐	_____
3	_____	_____	Check # EIM ☐	_____

Contingent Beneficiary(ies) If there is no primary beneficiary living at the time of death, I hereby specify that the balance is to be distributed to my contingent beneficiary(ies) listed below:

1	_____	_____	Check # EIM ☐	_____
2	_____	_____	Check # EIM ☐	_____
3	_____	_____	Check # EIM ☐	_____

for a Retirement account

Primary Beneficiary(ies) I hereby designate the person(s) named below as primary beneficiary(ies) to receive payment of the balance of my account upon my death.

	Date of Birth	Social Security # or Employer Identification #	Relationship	Share %
1			Other = EIN ☐	
2			Other = EIN ☐	
3			Other = EIN ☐	

Contingent Beneficiary(ies) If there is no primary beneficiary living at the time of death, I hereby specify that the balance is to be distributed to my contingent beneficiary(ies) listed below:

1			Other = EIN ☐	
2			Other = EIN ☐	
3			Other = EIN ☐	

Under penalties of perjury, I certify: 1. that the taxpayer identification number I have shown on this form is my correct taxpayer identification number and 2. that I am not subject to backup withholding because (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest and dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and 3. that I am a U.S. person (including a U.S. resident alien). I understand that I must report on item (2) above if I have been notified by the IRS that I am subject to backup withholding because I have failed to report all interest and dividends on my tax return.

BY SIGNING BELOW, I AGREE TO THE TERMS OF THE MERRILL LYNCH CLIENT RELATIONSHIP AGREEMENT ON THE REVERSE SIDE AND:

1. THAT, IF ANY SECURITIES ACCOUNT IS ESTABLISHED WITH THE INVITOR CREDITLINE (WARNING SERVICE, PURSUANT TO PARAGRAPH 5 OF THE CLIENT RELATIONSHIP AGREEMENT AND THE APPLICABLE PARAGRAPH OF THE SECURITIES ACCOUNT AGREEMENT, CERTAIN OF MY SECURITIES MAY BE LOANED TO YOU OR LOANED OUT TO OTHERS

2. THAT IN ACCORDANCE WITH PARAGRAPH 13 OF THE CLIENT RELATIONSHIP AGREEMENT I AM AGREEING IN ADVANCE TO ARBITRATE ANY CONTROVERSY THAT MAY ARISE WITH YOU; AND

3. THAT, IF I AM A TRUSTEE OR OTHER FIDUCIARY, THE TRUST OR ESTATE IS ELIGIBLE FOR THE MERRILL LYNCH BANKING ADVANTAGE PROGRAM (IF APPLICABLE)

THE INTERNAL REVENUE SERVICE DOES NOT REQUIRE MY CONSENT TO ANY PROVISION OF THIS DOCUMENT OTHER THAN THE CERTIFICATIONS REQUIRED TO AVOID BACKUP

(Office Use Only)		
Signature _____	Date _____	Title (for Special Accounts, e.g., Trustees) _____
Signature _____	Date _____	Title (for Special Accounts, e.g., Contingents) _____

CLIENT ACCOUNT SERVICES COPY Attach and refer to Maria Lopez

Code 100796PB.0001

15

NOTE: If you are subject to backup withholding due to notification by the IRS, you must cross out the portion of the Tax Certification section below as instructed.

Note: Visa cards are available with a CMA account. Please refer to paragraph 10 for annual fee information.

RETIREMENT If you are opening a Retirement account now, please complete this section.

CONFIDENTIAL

CUSTOMER SERVICE: 1-800-4-A-RENTAL • 1-800-427-7262 • 24 HOURS A DAY • 7 DAYS A WEEK • 100% SATISFACTION GUARANTEE
 © 2001 RENT-A-CENTER, INC. ALL RIGHTS RESERVED. RENT-A-CENTER, INC. IS AN EQUAL OPPORTUNITY EMPLOYER.

Get Confirmation and Account Statements

[illegible]

Code 10029618-0901

Merrill Lynch Client

As used below, "I", "my", and "me" mean any person signing below. "You", "your", and "Merrill Lynch" mean Merrill Lynch, Pierce, Fenner & Smith Incorporated.

1. Agreement, Assurances and Acknowledgments

I agree that this Merrill Lynch Client Relationship Agreement and the terms and conditions of the applicable account agreement or custodial agreement (each, an "Agreement") will govern all of my accounts with you - whether opened in a single capacity, joint capacity, as trustee, personal representative, executor, guardian, other fiduciary, or as custodian for a minor - including (i) all transactions in my accounts, (ii) all transfers between the accounts and any other accounts that I consent to be linked together, and (iii) any optional services to which I also may subscribe to or apply for, now or in the future.

The applicable Agreement is hereby incorporated herein by reference. For example, Agreement for a Cash Management Account ("CMA" Account) means the Cash Management Account Agreement. I acknowledge that I have received from you, or for future accounts, will receive from you, a program description and/or other documents containing additional terms and conditions regarding the pricing, features and/or services to be provided with each account (collectively the "Documents") and will retain my copies for my records. I acknowledge that there may be applicable fees for each account.

I agree that the Merrill Lynch Client Relationship Agreement pertains to the brokerage services you provide to me. I understand that if I elect to enroll in an investment advisory service, whether discretionary or non-discretionary, I must execute additional agreements. I agree to pay your account fees, service and other fees, and securities brokerage fees as they may apply to my accounts from time to time. I understand that such securities brokerage fees may be charged per transaction (such as commissions or markups/markdowns) or be asset-based (where an annual fee covers transactions in eligible securities), as I may agree with you from time to time.

I agree that the terms and conditions of the Agreement and Documents will control in the event of any inconsistencies with the terms and conditions of this Client Relationship Agreement.

I agree that you shall have the right to amend the Merrill Lynch Client Relationship Agreement, each Agreement or the Documents by supplementing, modifying or rescinding any existing provisions or by adding new provisions, at any time, by sending notice of the amendment to me. Any such amendment shall be effective as of a date to be established by you, subject to applicable law.

2. Brochure Summary Acknowledgment, Assure Your Proper Decision, and Election Prior to Account Opening

I understand that future accounts may be opened upon my direction as single, joint, trustee, or other fiduciary representative, or custodian for minor accounts, and which you will confirm in writing to me. If in the future I open any accounts with you, add features/services to an account, and/or elect a brokerage-pricing alternative, I understand that:

- I will be bound by the terms and conditions of the new accounts, features/services, and/or pricing as set forth in the Agreement and Documents provided to me at that time;
- the Agreement and Documents provided to me at that time will be deemed to be incorporated into my existing agreement(s) I have with you as though they were fully set out in such agreement(s); and
- my depositing of cash or securities in any new account, my payment of any fee, and/or my use of any added or different feature will, each individually or collectively, constitute my acceptance of the terms and conditions of the account(s), features/services, and/or change in pricing as set forth in the Agreement and Documents provided to me in the future.

I understand that accounts and new features/services may include, but are not limited to, the following: additional Merrill Lynch Cash Management AccountsSM and CMASM SubaccountsSM; traditional or Roth Individual Retirement AccountsSM; the Merrill Lynch OnlineSM and Client Order Entry services; the Funds Transfer Service; electronic bill payment services; retirement accounts; the Investor CreditLineSM service; checks and VisaSM cards (for eligible accounts); the Investor CreditLineSM (margin) service; and the Merrill Lynch Unlimited Advantage (which offers an asset-based fee arrangement in lieu of transaction-based (per trade) pricing).

3. Electronic Services Acknowledgment

I may elect certain optional electronic services that are available for my account(s). I understand that separate agreements govern these services and that by enrolling in one or more of these services I am agreeing to the terms of those agreements. I acknowledge that such services and the agreements governing those services include:

- account access (governed by the Merrill Lynch Online Terms and Conditions and/or the Merrill Lynch Direct Terms of Service, as applicable);
- client order entry capabilities (governed by the Merrill Lynch Client Order Entry Terms and Conditions and/or the Merrill Lynch Direct Terms of Service, as applicable);
- electronic funds transfers (governed by terms of the Funds Transfer Service Agreement), and
- bill payment services (governed by the applicable bill payment agreement).

4. Testamentary Account Acknowledgment

If I subsequently establish an individual retirement account with you, I acknowledge that my signature (which may be electronic), will be required to designate beneficiaries to receive the balance of my account upon my death. In the absence of my signature, such balance will be paid to my spouse, if he or she survives me, or, if not, to my estate.

5. Joint Accounts

I understand that all joint accounts are subject to specific provisions in the applicable Agreement. If I am opening an account at the time I enter into this Merrill Lynch Client Relationship Agreement, I will designate the legal ownership of the account at that time. If such account is a joint account, I agree that all subsequent joint accounts I open with you (provided that all accountholders are the same) shall have the same legal ownership unless I otherwise notify you in writing. For example, if the initial account is opened as a joint tenancy with right of survivorship, all subsequent joint accounts with the same parties shall be designated as joint tenancies with rights of survivorship, unless I notify you in writing or electronically to the contrary.

Relationship Agreement

6. Important Considerations (Please Read Before Signing)

If any securities account is established with the Investor CreditLine (margin) service, I understand and agree that (i) I may borrow money from you secured by a pledge of my eligible securities and other property in my securities account, (ii) I will be charged interest on debit balances at a rate permitted by the laws of the state of New York, (iii) certain of my securities may be loaned to you or loaned out to others, and (iv) I am bound by the terms of the Agreement relating to the Investor CreditLine (margin) service.

All of my securities and other property in any securities account in which I have an interest or which at any time are in your possession or under your control, shall be subject to a lien for the discharge of any and all indebtedness or any other obligations I may have to you. All of my securities and other property shall be held by you as security for the payment of any such obligations or indebtedness to you in any securities account in which I have an interest. You, subject to applicable laws, may at any time and without giving me prior notice, use and/or transfer any of all securities and other property in any securities account in which I have an interest, without regard to you having made any advances in connection with such securities and other property and without regard to the number of securities accounts I may have with you. In enforcing the lien, you at your sole discretion may determine which securities and other property are to be sold or which contracts are to be closed.

7. Representations

I represent that no one except me has an interest in my securities accounts with you. If a natural person, I represent that I am of full age, am not an employee of any exchange, nor of any corporation of which any exchange owns a majority of the capital stock, nor of a member of any exchange, nor of a member firm or member corporation registered on any exchange, nor of a bank, trust company, insurance company, or any corporation, firm or individual engaged in the business of dealing either as broker or as principal in securities, bids of exchange, acceptances or other forms of commercial paper, if any of the foregoing representations is inaccurate or becomes inaccurate, I will promptly so advise you in writing.

8. Disclosure Services

a. Fees

I agree to pay your account fees, service fees, and fees for the transactions and other brokerage services I receive.

I understand that I may pay for each securities transaction on a per trade basis (transaction-based pricing) on which I am charged a commission or other compensation for each transaction to purchase or sell securities. I understand that, for certain accounts, you offer alternatives to transaction-based pricing, such as asset-based pricing. Under asset-based pricing, including, for example, the Merrill Lynch Unlimited Advantage Service, I will pay a fee based on my relationship with you in lieu of paying traditional commissions and service fees. Annual fees are based on eligible assets in my household's eligible accounts, and, in Unlimited Advantage, I will receive access to brokerage services, as well as access to other financial products and services, certain of which are also included as part of the brokerage services available under transaction-based pricing.

I understand that both transaction-based pricing and asset-based pricing are brokerage pricing alternatives, and that neither alternative is an investment advisory service.

In all cases, I understand that the above fees will be charged to my securities accounts for the financial services provided to me.

b) Merrill Lynch Unlimited Advantage Participants: Special Considerations

If I choose to enroll in the Merrill Lynch Unlimited Advantage brokerage service now or in the future, I understand that:

- Unlimited Advantage is designed for investors who are primarily interested in purchasing and reinvesting in a portfolio of investments or securities other than mutual funds or underwritten offerings. It is not for day trading or other extreme trading activity, including excessive options trading or trading in mutual funds based on market timing. We may terminate the Unlimited Advantage Agreement and impose a closing fee, if appropriate, and/or impose a surcharge, without being subject to the Attachment Paragraph of the Unlimited Advantage Agreement, if trading exceeds certain restrictions.

- Clients are responsible for determining whether Unlimited Advantage is appropriate for the enrolled account based on relevant factors, including past and anticipated investment activity. Certain types of accounts, such as IRAs, will not be able to use certain non-transaction services. Eligible assets generally may be transferred to accounts that are not enrolled in Unlimited Advantage under certain limited circumstances.

- Annual fees are based on the amount of eligible assets in each of three asset categories held by the account. The Unlimited Advantage fee does not include brokerage and other transaction-related charges related to eligible assets. Fees and charges payable to Merrill Lynch on certain eligible assets, fees required by law, or fees for products and services that are not included. There is a \$1500 minimum annual fee (\$375 per quarter), and a closing fee may apply if you or I decide that the account should no longer participate in Unlimited Advantage. Certain types of accounts owned by members of the same household may aggregate assets for purposes of determining the rate of annual fees. Accounts will pay a share of the annual fees regardless of how much they use trades or other products or services.

- Annual fees are charged on cash and cash equivalent positions, as well as on load and load-related fund shares, although those fees may not apply to these assets if acquired or disposed of outside Unlimited Advantage through transaction-based pricing. Under certain circumstances, I will pay additional fees and Merrill Lynch and its Financial Advisors may receive additional compensation. For example, securities underwritten, including equity, debt and market-linked investments created by Merrill Lynch, generally must be purchased at the public offering price, which includes compensation to Merrill Lynch and its Financial Advisors, which is in addition to annual fees; for principal transactions, Merrill Lynch may also receive compensation in addition to annual fees; investors will bear indirectly all mutual fund related fees and expenses and Merrill Lynch and its affiliates may receive fees in connection with mutual funds held by clients in Unlimited Advantage; and the annual Unlimited Advantage fee will be applied to the full value of any securities purchased on margin or other extensions of credit by us or its affiliates and will therefore result in higher annual fee to Merrill Lynch.

- Merrill Lynch can restrict the purchase or retention of mutual fund shares in Unlimited Advantage if it exceeds certain amounts. Only certain classes of fund shares may be purchased.

* Please see the Unlimited Advantage Client Agreement and the Education Guide for Clients for additional information on these and other important topics.

9. Transfer or Portability Rights

Available free credit balances in my central asset or retirement accounts will be automatically invested or deposited in a Money Account, which may be a money market mutual fund, FDIC insured bank deposit (which may be with a bank affiliated with Merrill Lynch), or such other accounts or arrangements as you may make available for a particular account. I agree that you may, at your discretion and from time to time, change the Money Account for any of my accounts. Except as provided in the next two paragraphs, you will notify me in advance of such change to my Money Account. In the event you elect to so change a Money Account, I further authorize you to redeem and/or withdraw any shares or funds held in the prior Money Account and to reinvest them in the new Money Account.

Different Money Accounts may be offered by you in connection with various services or programs. If I elect to (i) enroll an account in a new service with different Money Accounts, (ii) enroll an account in an asset-based pricing alternative (such as Unlimited Advantage) with different Money Accounts, or (iii) enroll an account in an investment advisory program (such as Merrill Lynch Consult) with different Money Accounts, then I authorize you to redeem and/or withdraw any shares or funds held in the prior Money Account and to reinvest them in the new Money Account. You may take these actions without providing any notice to me.

If my participation in a particular service, and asset-based pricing alternative or investment advisory program ends, then I authorize you to redeem and/or withdraw any shares or funds held in a Money Account and to reinvest them in a Money Account available for an account that is not enrolled in such service, asset-based pricing alternative or investment advisory program. You may take these actions without providing any notice to me.

10. Disclaimers - Please Disclose Service and Your Costs

If I maintain more than one account with you with the same ownership type, I authorize you to accept my telephonic or electronic instructions for transfers to and from each account through your Funds Transfer Service. If I open any account in trustee capacity for a grantor revocable living trust, I represent and warrant to you (i) that the trust permits the funds transfers I am authorizing or (ii) if applicable, such funds transfers represent valid partial or total revocations by me and (iii) you may conclusively rely on this representation.

I authorize you to issue the Visa card that I have requested for use with eligible accounts and I understand that a credit report may be obtained by you or an affiliate in connection with my request.

Annual Fees	
CMAA® Visa® Gold Card	\$25
CMAA® Visa® Signature® Card	\$95

The information about the annual fee is accurate as of October 2001. This information may change after that date. Please call 1-800-MERRILL (637-7455) to find out what may have changed.

11. Agreement to Arbitrate Disputes with You

I agree that all controversies that may arise between us shall be determined by arbitration. Such controversies include, but are not limited to, those involving any transaction in any of my accounts with you, or the construction, performance or breach of any agreement between us, whether entered into or occurring prior, on or subsequent to the date hereof.

This agreement to arbitrate all controversies does not constitute an agreement to arbitrate the arbitrability of any controversy between us, unless otherwise clearly and unmistakably required by the arbitration rules of the forum selected, as set forth below.

- Arbitration is final and binding on the parties.
- The parties are waiving their right to seek remedies in court, including the right to jury trial.
- Pre-arbitration discovery is generally more limited than and different from court proceedings.
- The arbitrators' award is not required to include factual findings or legal reasoning, and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.
- The panel of arbitrators will typically include a majority of arbitrators who were or are affiliated with the securities industry.

Any arbitration pursuant to this provision shall be conducted only before the New York Stock Exchange, Inc., an arbitration facility provided by any other exchange of which you are a member, or the National Association of Securities Dealers, Inc., and in accordance with its arbitration rules then in effect. I may elect in the first instance whether arbitration shall be conducted before the New York Stock Exchange, Inc., other exchanges of which you are a member, or the National Association of Securities Dealers, Inc., but if I fail to make such election by registered letter or telegram addressed to you at the office where I maintain my account before the expiration of five days after receipt of a written request from you to make such election, then you may make such election. Judgment upon the award of arbitrators may be entered in any court, state or federal, having jurisdiction.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action or who is a member of a putative class who has not opted out of the class with respect to any claim encompassed by the putative class action until: (i) the class certification is denied; (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this Agreement except to the extent stated herein.

12. Governing Law

Unless otherwise specified, my agreements with you will be governed by and interpreted under the laws of the state of New York.

Code 100796RR-0901



The Merrill Lynch Privacy Pledge

Our Pledge

At Merrill Lynch, the interests of our clients always come first. As part of our firm's long tradition of trust, the confidentiality of client information has been, and will continue to be, paramount. We maintain high standards to safeguard your personal financial information at all times, and we will remain vigilant in protecting that information.

We collect personal financial information to operate prudently and to meet legal and regulatory requirements. We never rent or sell your name or other personal financial information. We will only share certain information with companies not in our corporate family ("nonaffiliated third parties") as permitted by law for the purpose of serving your financial needs. The recipients of that information are required to protect the confidentiality and security of that information and may not reuse it for any other purpose.

Questions and Answers About Merrill Lynch's Privacy Practices

How do we protect the confidentiality and security of your information?

- People. We restrict access to your personal financial information to personnel who need that information to provide you with our products and services. Our employee communications also reinforce our privacy policies.
- Policies and procedures. We maintain and monitor our physical, electronic and procedural safeguards, updating them as needed so that we may guard your personal information.
- Security. We use leading security and encryption methods to help us identify and prevent data breaches and unauthorized disclosure of your personal financial information.

What information do we collect from and about you?

Depending on the nature of your relationship with us, we must obtain certain information to meet legal and regulatory requirements. In all cases, we collect only personal financial information that is either required or necessary to provide personalized financial services to you.

- We obtain information about you such as name, address, Social Security number, telephone number and income.
- We collect information about your financial transactions, such as securities bought and sold, Visa® and checking transactions, and fund transfers, with companies in our corporate family ("affiliates").
- We may obtain information about you from third parties, such as a consumer report from a consumer reporting agency.
- We may verify income, identity or asset information about you.

What information do we disclose to affiliates about you?

We may disclose some or all of your personal information to our corporate affiliates, including transfer agents, banks, insurance companies and agencies, trust companies, mortgage bankers, securities broker-dealers, and investment advisers. We do this in order to offer you a broad range of products and services (such as our Cash Management Account® financial service, mortgages, trust services, and insurance), and to comply with applicable regulations.

If you apply for a loan with certain Merrill Lynch lenders, such as Merrill Lynch Bank USA or Merrill Lynch Credit Corporation, you may elect to instruct them not to share certain information with any of our corporate affiliates in accordance with procedures required by applicable law.

What information do we disclose to nonaffiliated third parties about you?

Merrill Lynch will, as necessary, use various services from nonaffiliated third parties. We use these external service providers for the purpose of supporting the financial products and services we provide to you. For example, we provide information to external service providers so that your account statements can be printed and mailed. These parties must agree to comply with stringent security and privacy policies and procedures. Their ability to protect the personal financial information of our clients is an important consideration in our relationship with them.

If you have credit cards or other loan accounts with us, we may disclose information to consumer reporting agencies with respect to the performance of your loan.

We may also disclose information to government agencies and regulatory organizations when permitted or required by law.

What information do we disclose about former clients and to whom?

We may disclose some or all of a former client's personal information to government agencies and self-regulatory organizations when permitted or required by law, such as when required to file abandoned property reports and to comply with subpoenas and other official governmental requests.

If a former client had a loan with us, we may report the performance of that loan to consumer reporting agencies.

Our Corporate Affiliates Include:

Asset Management Private Equity, L.P.
Broadcorn Capital Corporation
FAM Distributors, Inc.
Financial Data Services, Inc.
Fund Asset Management, L.P.
Herzog, Haine & Geduld, Inc.
Mercury Advisors Family of Funds
Merrill Lynch Bank USA
Merrill Lynch Bank & Trust Company
Merrill Lynch Credit Corporation
Merrill Lynch Family of Funds
Merrill Lynch Investment Managers International Limited
Merrill Lynch Investment Managers, L.P.
Merrill Lynch Investment Partners, L.P.
Merrill Lynch Life Insurance Company
Merrill Lynch, Pierce, Fenner & Smith Incorporated
Merrill Lynch Private Finance Inc.
Merrill Lynch Trust Company (Florida)
Merrill Lynch Trust Company, FSB
Merrill Lynch Trust Company (New Jersey)
Merrill Lynch Trust Company of New York
Merrill Lynch Trust Company of Texas
Mt. Life Insurance Company of New York
Princeton Administrators, L.P.
QA Advisors, LLC

For questions concerning Merrill Lynch's Privacy Pledge, please contact (877) 222-7954, or visit our Web site at askmerrill.ml.com.



Merrill Lynch

Cash Management Account is a registered service mark of Merrill Lynch & Co., Inc.

Cash Management Account is covered by U.S. Patent Numbers 4,348,442; 4,376,978; 4,597,046 and 4,774,663. Additional patents pending.

Visa is a registered trademark of Visa International.

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Code 1/00296RR-0901

Exhibit "C"

Merrill Lynch & You

Merrill Lynch Client Relationship Agreement

To simplify the documentation of your household's relationship with Merrill Lynch and to help you understand the nature of the agreements underlying many of our accounts and services, we have prepared a Client Relationship Agreement. This Agreement details the nature of our mutual obligations for the financial services you are about to use and those you may choose to use in the future. If you are currently a client of Merrill Lynch, filling out the relevant portions of this Agreement will complete your enrollment in a new account or service and extend the documentation of your relationship with us.

Working with your Merrill Lynch Financial Advisor or Financial Advisory Center team, to achieve your unique goals, you can select from a broad network of accounts, retirement plans, pricing alternatives, cash access services, payment services and credit facilities that address a range of financial needs and objectives. While the specific capabilities of these value-added resources differ, the legal, regulatory and procedural terms and conditions that apply to virtually all of these services are contained in this Agreement.

Once the adult members of your household have completed the Client Relationship Agreement, you will be able to add capabilities to your Merrill Lynch relationship by indicating your choices to your Financial Advisor or Financial Advisory Center team. You will, as appropriate, receive additional materials that document the specifics of the particular service(s) you choose. In most cases, however, you won't have to sign additional forms or keep track of repetitive documents. We will update our records with the information relevant to any new service and avoid duplicative paperwork.

Merrill Lynch is built on the philosophy of our founder, Charles E. Merrill, that "the interests of our clients must come first." This principle stands at the core of our tenets: to understand our clients' financial needs, inform them of the capabilities and service options available to them, and provide the trained Financial Advisors and specialists who can help them make educated financial decisions in pursuit of their household's life goals. This Agreement is designed to facilitate your access to the choices you make.

Be sure to retain your copy of the Agreement with your permanent financial records.



Code 100296RR-1102

Instructions

CUDR

Please print the names of the adult members of the household who are parties to this agreement. The term Client 1 identifies the Social Security/Taxpayer Identification Number that will be used for tax reporting of joint accounts, as well as for accounts held in that name. Mailings for joint accounts are sent to the address of Client 1. Please enter the appropriate Social Security Number or Taxpayer Identification Number for each party and check the box if this number is an TIN. If you are not a U.S. citizen, a U.S. resident for tax purposes or other U.S. person, you must certify your foreign status on a Form W-8.

Special requirements for fiduciary accounts (trusts, estates, guardianships and conservatorships):

1. Please print the name and title of the fiduciary on the Client 1 name line. For example: John Doe, Guardian, Mary Smith, Executor, or Bob Jones and Sue Brown, Co-trustees. Note: If there are multiple fiduciaries, all must sign the Client Relationship Agreement.
2. Please consult your attorney or tax advisor if you are uncertain as to the appropriate Social Security or Taxpayer Identification Number to enter.
3. Check the TIN box if the number entered is a Taxpayer Identification Number.
4. The Client Relationship Agreement must be signed by fiduciaries in their proper capacity, such as "John Doe, Guardian."

ACCOUNTS: CMA[®], BEYOND BANKING[™], CMA SUBACCOUNT[™], OR INDIVIDUAL INVESTOR ACCOUNT[™] (IIA)

If you are opening one or more accounts at this time, please check the appropriate box to designate the holder of each account: check BOTH Client 1 and Client 2 for joint ownership. The most common types of joint ownership forms are listed on the form and in the chart to the right.

Joint ownership of property is an important element of estate planning and entails important legal and tax consequences. Please consult your attorney if you have any questions regarding joint ownership.

Margin Lending Program

This service allows investors to borrow against the value of eligible securities (margin). Your CMA account or IIA account will be established with the margin lending program unless you check the decline box in the Accounts section.

This service is not offered with the Beyond Banking[™] account.

UTMA OR UGMA

If you are opening one or more Uniform Transfer to Minor Accounts (UTMAs) or Uniform Gift to Minor Accounts (UGMAs), please enter the minor's Social Security Number and name, and indicate which client is to be the custodian. There can be only one custodian per UTMA or UGMA (except in Tennessee).

RETIREMENT

If you are opening one or more retirement accounts at this time, please check the appropriate box to designate the type of retirement account and holder for each retirement account to be opened. If you are an employee opening a SEP or SIMPLE IRA, your account must be linked to an employer/plan administrator account. Employer/plan administrator SEP or SIMPLE IRAs are linked to themselves. See your Financial Advisor for details.

If you are opening retirement account(s), you can name one or more primary and contingent beneficiaries by completing the Beneficiaries section for each retirement account. Designating a beneficiary has important tax consequences. We urge you to consult your attorney or tax advisor before completing this section. If the beneficiary is a trust, provide the names of the trustees, the date of the trust and the trust's tax identification number. Any balance left in your account at your death will be paid to the primary beneficiaries in accordance with the share percentages you designate. If you designate multiple beneficiaries, please be sure to designate the percentage each is to receive and be sure that the percentage totals 100%. If a primary beneficiary should predecease you, and there are other primary beneficiaries who are still living, the deceased beneficiary's share will be distributed to the remaining primary beneficiary or the remaining primary beneficiaries in proportion to their payment percentages. If no primary beneficiary is living at the time of your death, the balance will be distributed to your contingent beneficiaries under the same rules. If no primary or contingent beneficiaries survive you, or if no beneficiary designation is in effect at your death, the balance will be paid to your spouse. If you are not survived by a spouse, we will pay the balance to your estate.

You can change your beneficiary designation at any time and as often as you wish. Such designations must be in writing and are not effective unless and until we receive them. Please ask your Financial Advisor for the appropriate document (code 1217).

You may open an inherited IRA if the original IRA owner is deceased.

- If you are a nonspousal beneficiary, or
- If you are a spousal beneficiary and are electing not to treat this IRA as your own:
Check the box that indicates this is either an "Inherited IRA" or an "Inherited Roth IRA."
- If you are a spousal beneficiary and are electing to treat the IRA as your own:
Check the box that indicates this is either an "IRA" or "Roth IRA." Do not indicate that this is an inherited IRA. If, as a surviving spouse, you are electing to treat the IRA as your own.

If you maintain an inherited IRA, you may, depending on the state in which you reside, name one or more beneficiaries by completing the Beneficiaries section. We urge you to consult your attorney or tax advisor before completing this section.

TAX CERTIFICATION AND ACKNOWLEDGMENTS

Note to trustees and other fiduciaries:

If you select the Merrill Lynch bank deposit program, all beneficiaries must be individuals or not-for-profit organizations.

Please be sure to sign and date this document after reading the Tax Certification and Acknowledgments.

KEY TO JOINT OWNERSHIP DESIGNATIONS

- JTWROS:
Joint Tenants With Right of Survivorship.
- TIC:
Tenants In Common Without Right of Survivorship, also known as Tenants in Common.
- ATBE:
As Tenants By Entirety (for married persons, only in states where applicable).
- COMMPROP:
Community Property (for married persons, only in states where applicable).
- OTHER:
Other joint ownership arrangements, which you must specify.

Merrill Lynch Client Relationship Agreement

Merrill Lynch Client Relationship Agreement

R

CLIENT

Client 1 Name	_____	Client 2 Name	_____
Social Security Number	_____	Check # TIN ☐	Social Security Number
Mailing Address	_____	Mailing Address	_____
City, State, ZIP Code	_____	City, State, ZIP Code	_____

Note: If you are subject to backup withholding due to notification by the IRS, you must cross out the portion of the Tax Certification section below as instructed.

TIN: Check this box if the Taxpayer Identification Number is NOT a Social Security Number.

ACCOUNTS: CMA, BEYOND BANKING, CMA SUBACCOUNT, OR IIA If you are opening a CMA account, a Beyond Banking account, CMA Subaccount, or an IIA account now, please complete this section.

PLEASE CHECK ONE ACCOUNT FOR:	IN CMA	IN BANKING	IN CMA SUBACCOUNT	IN IIA	IF OTHER, PLEASE SPECIFY	DECLINE MARGIN LOANS PROGRAM	ACCOUNT NUMBER (OFFICE USE ONLY)
First Account	☐	☐	☐	☐	_____	☐	_____
Second Account	☐	☐	☐	☐	_____	☐	_____
Third Account	☐	☐	☐	☐	_____	☐	_____

Note: Visa* cards are available with the CMA account and the Beyond Banking account. Please refer to paragraph 10 for annual fee information.

UTMA OR UGMA If you are opening a UTMA or UGMA account on behalf of a minor now, please complete this section.

PLEASE CHECK ONE CUSTOMER ONLY:	IN CMA	IN BANKING	IN CMA SUBACCOUNT	IN IIA	ACCOUNT NUMBER (OFFICE USE ONLY)
Minor's Name	_____	Minor's Social Security Number	_____	☐	_____
First UTMA or UGMA Account	☐	☐	☐	☐	_____
Second UTMA or UGMA Account	☐	☐	☐	☐	_____
Third UTMA or UGMA Account	☐	☐	☐	☐	_____

RETIREMENT	If you are opening a Retirement account now, please complete this section.
PLEASE CHECK ONE ACCOUNT TYPE:	FOR SEP/SIMPLE ACCOUNT ONLY
IRA	CHECK # EMPLOYER ☐
401(k)	ACCOUNT NUMBER (OFFICE USE ONLY)
403(b)	EMPLOYER LINE TO ACT NO.
457(b)	FOR AN INHERITED IRA, INDICATE THE ORIGINAL, NOW DECEASED ACCOUNT OWNER.
Roll-over IRA	_____
Other	_____
Retirement Account For Client 1	☐
Retirement Account For Client 2	☐

CLIENT 1 BENEFICIARIES for a Retirement account	
Primary Beneficiary(ies) I hereby designate the person(s) named below as primary beneficiary(ies) to receive payment of the balance of my account upon my death.	
1	Date of Birth _____ Social Security No. or Taxpayer Identification No. _____ Relationship _____ Share % _____
2	_____ Check # TIN ☐ _____
3	_____ Check # TIN ☐ _____
Contingent Beneficiary(ies) If there is no primary beneficiary living at the time of death, I hereby specify that the balance is to be distributed to my contingent beneficiary(ies) listed below:	
1	_____ Check # TIN ☐ _____
2	_____ Check # TIN ☐ _____
3	_____ Check # TIN ☐ _____
CLIENT 2 BENEFICIARIES for a Retirement account	
Primary Beneficiary(ies) I hereby designate the person(s) named below as primary beneficiary(ies) to receive payment of the balance of my account upon my death.	
1	Date of Birth _____ Social Security No. or Taxpayer Identification No. _____ Relationship _____ Share % _____
2	_____ Check # TIN ☐ _____
3	_____ Check # TIN ☐ _____
Contingent Beneficiary(ies) If there is no primary beneficiary living at the time of death, I hereby specify that the balance is to be distributed to my contingent beneficiary(ies) listed below:	
1	_____ Check # TIN ☐ _____
2	_____ Check # TIN ☐ _____
3	_____ Check # TIN ☐ _____

TAX CERTIFICATION AND ACKNOWLEDGMENTS

Under penalties of perjury, I certify: 1. that the taxpayer identification number I have shown on this form is the correct taxpayer identification number for I am waiting for a number to be issued to me; and 2. that I am not subject to backup withholding because (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest and dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and 3. that I am a U.S. person (including a U.S. resident alien). I understand that I must cross out item (2.) above if I have been notified by the IRS that I am subject to backup withholding because I have failed to report all interest and dividends on my tax return.

BY SIGNING BELOW, I AGREE TO THE TERMS OF THE MERRILL LYNCH CLIENT RELATIONSHIP AGREEMENT ON THE REVERSE SIDE AND:

1. THAT, UNLESS I HAVE CHECKED "DECLINE MARGIN LOANS" IN THE "ACCOUNTS" SECTION ABOVE, MARGIN LOANS MAY BE EXTENDED TO ME FROM TIME TO TIME, AND CERTAIN OF MY SECURITIES MAY BE LOANED TO YOU OR LOANED OUT TO OTHERS, PURSUANT TO SECTION 2, PAGE 1 OF THE CLIENT RELATIONSHIP AGREEMENT AND THE APPLICABLE PARAGRAPH OF THE SECURITIES ACCOUNT AGREEMENT;

2. THAT, IN ACCORDANCE WITH SECTION 8, PAGE 1 OF THE CLIENT RELATIONSHIP AGREEMENT, I AM AGREEING IN ADVANCE TO ARBITRATE ANY CONTROVERSIES THAT MAY ARISE WITH TOLL AND

3. THAT, IF I AM A TRUSTEE OR OTHER FIDUCIARY, THE TRUST OR ESTATE IS ELIGIBLE FOR THE MERRILL LYNCH BANKING ADVANTAGE PROGRAM (IF APPLICABLE)

THE INTERNAL REVENUE SERVICE DOES NOT REQUIRE MY CONSENT TO ANY PROVISION OF THIS DOCUMENT OTHER THAN THE CERTIFICATIONS REQUIRED TO AVOID BACKUP WITHHOLDING.

Signature	Date	Title (for Special Accounts, e.g., Trustee)	NOTES (Use Only)
_____	_____	_____	_____
Signature	Date	Title (for Special Accounts, e.g., Co-trustee)	_____
_____	_____	_____	_____

CLIENT COPY Do not return to Merrill Lynch. Retain for your records.

Code 100296RR-1102

Merrill Lynch Client Relationship Agreement

Merrill Lynch is not a bank.

R

CLIENT

Client 1 Name Client 2 Name
 Social Security Number Check # TIN ☐ Social Security Number Check # TIN ☐
 Mailing Address Mailing Address
 City, State, ZIP Code City, State, ZIP Code

Note: If you are subject to backup withholding due to notification by the IRS, you must cross out the portion of the Tax Certification section below as instructed.
 TIN: Check this box if the Taxpayer Identification Number is NOT a Social Security Number.

ACCOUNTS: CMA, BEYOND BANKING, CMA SUBACCOUNT, OR IIA. If you are opening a CMA account, a Beyond Banking account, CMA Subaccount, or IIA account, please complete this section.

PLEASE CHECK ONE ACCOUNT FOR:

	Client 1	Client 2	Joint Account Only	IR	ATM	Other	Other, Please Specify	Default Margin Loan Program	Account Number (Office Use Only)
First Account	☐	☐	☐	☐	☐	☐		☐	
Second Account	☐	☐	☐	☐	☐	☐		☐	
Third Account	☐	☐	☐	☐	☐	☐		☐	

Note: VISA® cards are available with the CMA account and the Beyond Banking account. Please refer to paragraph 10 for annual fee information.

UTMA OR UGMA. If you are opening a UTMA or UGMA account on behalf of a minor, please complete this section.

PLEASE CHECK ONE CUSTOMER ONLY:

	Client 1	Client 2	Account Number (Office Use Only)
First UTMA or UGMA Account	☐	☐	
Second UTMA or UGMA Account	☐	☐	
Third UTMA or UGMA Account	☐	☐	

RETIREMENT. If you are opening a Retirement account now, please complete this section.

PLEASE CHECK ONE ACCOUNT TYPE:

	IR	IRA	Other	For SEP/SIMPLE ACCOUNT ONLY	Check if Employee	Check if Employer	Employer Plan to Act No.	Account Number (Office Use Only)
Retirement Account for Client 1	☐	☐	☐	☐	☐	☐		
Retirement Account for Client 2	☐	☐	☐	☐	☐	☐		

CLIENT 1 BENEFICIARIES for a Retirement account

Primary Beneficiary(ies). I hereby designate the person(s) named below as primary beneficiary(ies) to receive payment of the balance of my account upon my death.

	Date of Birth	Social Security No. or Taxpayer Identification No.	Relationship	Share %
1				
2				
3				

Contingent Beneficiary(ies). If there is no primary beneficiary living at the time of death, I hereby specify that the balance is to be distributed to my contingent beneficiary(ies) listed below:

	Date of Birth	Social Security No. or Taxpayer Identification No.	Relationship	Share %
1				
2				
3				

CLIENT 2 BENEFICIARIES for a Retirement account

Primary Beneficiary(ies). I hereby designate the person(s) named below as primary beneficiary(ies) to receive payment of the balance of my account upon my death.

	Date of Birth	Social Security No. or Taxpayer Identification No.	Relationship	Share %
1				
2				
3				

Contingent Beneficiary(ies). If there is no primary beneficiary living at the time of death, I hereby specify that the balance is to be distributed to my contingent beneficiary(ies) listed below:

	Date of Birth	Social Security No. or Taxpayer Identification No.	Relationship	Share %
1				
2				
3				

TAX CERTIFICATION AND ACKNOWLEDGMENTS

Under penalties of perjury, I certify: 1. that the taxpayer identification number I have shown on this form is the correct taxpayer identification number (or I am waiting for a number to be issued to me) and 2. that I am not subject to backup withholding because (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest and dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and 3. that I am a U.S. person (including a U.S. resident alien). I understand that I must cross out item (2) above if I have been notified by the IRS that I am subject to backup withholding because I have failed to report all interest and dividends on my tax return.

By signing below, I agree to the terms of the Merrill Lynch Client Relationship Agreement on the reverse side and:
 1. THAT, UNLESS I HAVE CHECKED "DECLINE MARGIN LENDING" IN THE "ACCOUNTS" SECTION ABOVE, MARGIN LOANS MAY BE EXTENDED TO ME FROM TIME TO TIME, AND CERTAIN OF MY SECURITIES MAY BE LOANED TO YOU OR LOANED OUT TO OTHERS, PURSUANT TO SECTION 3, PAGE 3 OF THE CLIENT RELATIONSHIP AGREEMENT AND THE APPLICABLE PARAGRAPH OF THE SECURITIES ACCOUNT AGREEMENT;
 2. THAT, IN ACCORDANCE WITH SECTION 8, PAGE 3 OF THE CLIENT RELATIONSHIP AGREEMENT, I AM AGREEING IN ADVANCE TO ARBITRATE ANY CONTROVERSIES THAT MAY ARISE WITH YOU; AND
 3. THAT, IF I AM A TRUSTEE OR OTHER FIDUCIARY, THE TRUST OR ESTATE IS ELIGIBLE FOR THE MERRILL LYNCH BANKING ADVANTAGE PROGRAM (IF APPLICABLE).

THE INTERNAL REVENUE SERVICE DOES NOT REQUIRE MY CONSENT TO ANY PROVISION OF THIS DOCUMENT OTHER THAN THE CERTIFICATIONS REQUIRED TO AVOID BACKUP WITHHOLDING.

Signature Date Title (for Special Accounts, e.g., Trustee)
 Signature Date Title (for Special Accounts, e.g., Co-trustee)

R

Client 1 Name	_____	Client 2 Name	_____
Social Security Number	_____ ☐ Check # TIN	Social Security Number	_____ ☐ Check # TIN
Mailing Address	_____	Mailing Address	_____
City, State, ZIP Code	_____	City, State, ZIP Code	_____

Notes: If you are subject to backup withholding due to notification by the IRS, you must cross out the portion of the Tax Certification section below as instructed.

TIN: Check this box if the Taxpayer Identification Number is NOT a Social Security Number.

ACCOUNTS: CMA[®], BEYOND BANKINGSM, CMA SUBACCOUNTSM, OR IIA If you are opening a CMA account, a Beyond Banking account, CMA Subaccount or an IIA account now, please complete this section.

[illegible]

Note: Visa® cards are available with the CMA account and the Beyond Banking account. Please refer to paragraph 10 for annual fee information.

If you are opening a UGMA or UTMA account on behalf of a minor non, please complete this section.

PLEASE CHECK ONE CUSTODIAN ONLY:		Class 1	Class 2	Account Number (Once Use Only)
Minor's Name	Minor's Social Security Number			
First UTMA or UGMA Account		☐	☐	
Second UTMA or UGMA Account		☐	☐	
Third UTMA or UGMA Account		☐	☐	

If you are opening a Retirement account now, please complete this section.

[illegible]

CLIENT & BENEFICIARIES for a Retirement account

Primary Beneficiary(ies) I hereby designate the person(s) named below as primary beneficiary(ies) to receive payment of the balance of my account upon my death.

	DATE OF BIRTH	SOCIAL SECURITY NO. OR TAXPAYER IDENTIFICATION NO.	RELATIONSHIP	SHARE
1			CHECK IF TIN ☐	
2			CHECK IF TIN ☐	
3			CHECK IF TIN ☐	

COMMITTEE BENEFICIARY(40) If there is no primary beneficiary living at the time of death, I hereby specify that the balance is to be distributed to my contingent beneficiary(ies) listed below.

1. _____ CHECK # TINY ☐

2. _____ CHECK # TINY ☐

3. _____ CHECK # TINY ☐

CLIENT 2 BENEFICIARIES *for a Retirement account*

PRIMARY BENEFICIARY(IES) I hereby designate the person(s) named below as primary beneficiary(ies) to receive payment of the balance of my account upon my death.

	DATE OF BIRTH	SOCIAL SECURITY NO. OR TEACHER IDENTIFICATION NO.	RELATIONSHIP	SIGNATURE
1	_____	_____ CHECK # TIM ☐	_____	_____
2	_____	_____ CHECK # TIM ☐	_____	_____
3	_____	_____ CHECK # TIM ☐	_____	_____

• 100%

Continuation: Beneficiary(ies) If there is no primary beneficiary living at the time of death, I hereby specify that the balance is to be distributed to my contingent beneficiary(ies) listed below:

1		Contingent # ☐
2		Contingent # ☐
3		Contingent # ☐

Tax Certification and Acknowledgments

Under penalty of perjury, I certify: 1. that the taxpayer identification number I have shown on this form is the correct taxpayer identification number (or I am waiting for a number to be issued to me) and 2. that I am not subject to backup withholding because (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest and dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding; and 3. that I am a U.S. person (including a U.S. resident alien). I understand that I must cross out item (2.) above if I have been notified by the IRS that I am subject to backup withholding because I have failed to report all interest and dividends on my tax return.

BY SIGNING BELOW, I AGREE TO THE TERMS OF THE MERRILL LYNCH CLIENT RELATIONSHIP AGREEMENT ON THE REVERSE SIDE AND:

1. THAT, UNLESS I HAVE CHECKED "DECLINE MARGIN LENDING" IN THE "ACCOUNTS" SECTION ABOVE, MARGIN LOANS MAY BE EXTENDED TO ME FROM TIME TO TIME, AND CERTAIN OF MY SECURITIES MAY BE LOANED TO YOU OR LOANED OUT TO OTHERS, PURSUANT TO SECTION 2, PAGE 1 OF THE CLIENT RELATIONSHIP AGREEMENT AND THE APPLICABLE PARAGRAPH OF THE SECURITIES ACCOUNT AGREEMENT;
2. THAT, IN ACCORDANCE WITH SECTION 6, PAGE 1 OF THE CLIENT RELATIONSHIP AGREEMENT, I AM AGREEING IN ADVANCE TO ARBITRATE ANY CONTROVERSIES THAT MAY ARISE WITH YOU; AND
3. THAT, IF I AM A TRUSTEE OR OTHER FIDUCIARY, THE TRUST OR ESTATE IS ELIGIBLE FOR THE MERRILL LYNCH BONDING ADVANTAGE PROGRAM (IF APPLICABLE).

THE INTERNAL REVENUE SERVICE DOES NOT REQUIRE MY CONSENT TO ANY PROVISION OF THIS DOCUMENT OTHER THAN THE CERTIFICATIONS REQUIRED TO AVOID BACKUP WITHHOLDING.

Signature	Date	Title (for Special Accounts, e.g., Trustees)	P. HENRIKSEN ADVISOR 80-100000 (Please Use Only)
Signature	Date	Title (for Special Accounts, e.g., Co-trustees)	

Terms and Conditions

DEFINITIONS

ACCOUNT

Any securities account you open with Merrill Lynch.

MERRILL LYNCH

"Merrill Lynch," "we" or "our" means Merrill Lynch, Pierce, Fenner & Smith Incorporated.

YOU

"You" or "your" means each person who has agreed to the terms of this Client Relationship Agreement.

SECURITIES AND OTHER PROPERTY

For purposes of Margin Lending and Uens below, "securities and other properties" means, without limitation, money, securities, financial instruments and commodities of every kind and nature and related contracts and options.

This definition includes securities or other property held, carried or maintained by Merrill Lynch or any of its affiliates, in Merrill Lynch's or any of its affiliates' possession and control, for any purpose, in any of your accounts, including any account in which you may have an interest.

1. THE CLIENT RELATIONSHIP AGREEMENT

The Client Relationship Agreement is intended to simplify your relationship with Merrill Lynch. When you agree to the terms of this agreement, you are agreeing that its terms will apply to all your accounts, transactions and services while you are our client.

In particular, you are agreeing:

- To arbitrate all controversies that arise between us;
- That certain securities in your account may be loaned to Merrill Lynch or loaned to others if you are enrolled in the Margin Lending service;
- That Merrill Lynch has a lien on your accounts and assets in those accounts for any payment obligations that you have with Merrill Lynch; and
- That New York law governs your agreements and transactions unless we indicate otherwise.

The specific provisions on these topics are set forth in detail below.

a) New accounts and services

When you open a new account or enroll in a service, we will provide you with the agreement and any disclosures for that account or service and confirm your enrollment in that account or service in writing. Those agreements and disclosures are incorporated by reference. This means that your initial signature acts as your agreement to the terms of the new account or service. As a result, in many cases, you will not need to sign an additional account agreement or other form.

For example, if you enroll in the Cash Management Account® (CMA® account) financial service, the disclosures and account agreement for that service are incorporated in this agreement. We will provide those documents to you when you enroll.

The terms governing a specific account or service will control if there are any inconsistencies with the terms of this Client Relationship Agreement.

b) Additional Signatures

You may need to sign more than one Client Relationship Agreement. This will be required if you want to open an account in a capacity other than as an "individual," including as a:

- Trustee of a trust;
- Personal representative or executor of an estate; or
- Guardian.

We may also require you to sign additional agreements or other documents for certain services or instructions, including:

- Selecting beneficiaries for an individual retirement account;
- Selecting the ownership of a joint account;
- Selecting beneficiaries of an account with the transfer on death service;
- Options trading;
- Financial planning;
- Managed money services; and
- Services involving the transfers of money or securities.

c) Amendments

You agree that Merrill Lynch has the right to amend this Client Relationship Agreement at any time by sending notice of the amendment to you. The amendment will be effective on the date contained in the notice.

2. MARGIN LENDING

If any account is established with the margin lending program, you understand and agree that:

- You may borrow money from Merrill Lynch secured by a pledge of your eligible securities and other property in your account;
- You will be charged interest on debit balances at a rate permitted by the laws of the state of New York;
- Certain of your securities may be loaned to Merrill Lynch or loaned out to others; and
- You are bound by the terms of the agreement for the Margin Lending service.

3. LIENS

All of your securities and other property in any account — margin or cash — in which you have an interest, or which at any time are in your possession or under your control, shall be subject to a lien for the discharge of any and all indebtedness or any other obligations you may have to Merrill Lynch.

You agree that Merrill Lynch holds all of your securities and other property as security for the payment of any such obligations or indebtedness to Merrill Lynch in any account in which you have an interest.

Merrill Lynch, subject to applicable laws, may at any time and without giving you prior notice, use and/or transfer any or all securities and other property in any account in which you have an interest, without regard to Merrill Lynch having made any advances in connection with such securities and other property and without regard to the number of accounts you may have with Merrill Lynch. In enforcing the lien, Merrill Lynch, at its sole discretion, may determine which securities and other property are to be sold or which contracts are to be closed.

4. GOVERNING LAW

Unless otherwise specified, your agreements and transactions with Merrill Lynch will be governed by and interpreted under the laws of the state of New York.

5. FEES

You agree to pay your account fees, service fees, processing and others fees for the transactions and other services you receive from Merrill Lynch. You understand that these fees will be charged to your accounts.

You agree that Merrill Lynch may satisfy any amounts you owe to Merrill Lynch from available free credit balances and assets in your account. If necessary, Merrill Lynch is permitted to sell assets in your accounts to pay those amounts due.

a) Securities transactions

When you purchase or sell securities, you may pay for each securities transaction on a per trade basis. This is called transaction-based pricing. Under this type of pricing, you are charged a commission or other compensation for each transaction. This compensation varies based on a number of factors, such as the type and number of securities purchased or sold.

Merrill Lynch offers alternatives to transaction-based pricing, such as asset-based pricing. Under this type of pricing, you pay a fee based on your eligible assets with Merrill Lynch in lieu of paying traditional commissions and service fees.

b) Visa cards

The annual fees for our Visa cards are:

Annual Fees	
Merrill Lynch Visa® Gold Card	\$25
Merrill Lynch Visa® Signature™ Card	\$95

The information about the annual fees is accurate as of December 2002. This information may change after that date. You may call (800) MERRILL (637-7455) to verify current fees.

You authorize Merrill Lynch to issue the Visa card that you have requested for use with eligible accounts, and you understand that Merrill Lynch or an affiliate may obtain a credit report in connection with your request.

6. AGREEMENT TO ARBITRATE CONTROVERSIES

Arbitration is final and binding on you and Merrill Lynch.

Merrill Lynch and you are waiving the right to seek remedies in court, including the right to jury trial.

Pre-arbitration discovery is generally more limited than and different from court proceedings.

The arbitrators' award is not required to include factual findings or legal reasoning, and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.

The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

You agree that all controversies that may arise between us shall be determined by arbitration. Such controversies include, but are not limited to, those involving any transaction in any of your accounts with Merrill Lynch, or the construction, performance or breach of any agreement between us, whether entered into or occurring prior, on or subsequent to the date hereof. This agreement to arbitrate all controversies does not constitute an agreement to arbitrate the arbitrability of any controversy between us, unless otherwise clearly and unmistakably required by the arbitration rules of the forum selected, as set forth below.

Any arbitration pursuant to this provision shall be conducted only before the New York Stock Exchange, Inc., an arbitration facility provided by any other exchange of which Merrill Lynch is a member, or the National Association of Securities Dealers, Inc., and in accordance with its arbitration rules then in effect.

You may elect in the first instance whether arbitration shall be conducted before the New York Stock Exchange, Inc., other exchanges of which Merrill Lynch is a member, or the National Association of Securities Dealers, Inc.,

Relationship Agreement

but if you fail to make such election by registered letter or telegram addressed to Merrill Lynch at the office where you maintain your account before the expiration of five days after receipt of a written request from Merrill Lynch to make such election, then Merrill Lynch may make such election.

Judgment upon the award of arbitrators may be entered in any court, state or federal, having jurisdiction.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this Agreement except to the extent stated herein.

7. IMPORTANT DISCLOSURES

a) Retirement account beneficiaries

Your signature is required to designate or change beneficiaries to receive the balance of your account upon your death. If you do not do so, your account balance will be paid to your spouse, if he or she survives or, if not, to your estate.

b) Unlimited Advantage™

If you choose to enroll in the Unlimited Advantage™ brokerage service now or in the future, you understand that:

- Unlimited Advantage is designed for investors who are primarily interested in purchasing and reinvesting in a portfolio of investments or securities other than mutual funds or underwritten offerings.

It is not for day trading or other extreme trading activity, including excessive options trading or trading in mutual funds based on market timing. If trading exceeds certain thresholds, we will impose a trading surcharge without being subject to the Amendments Paragraph of the Unlimited Advantage Agreement.

All trades by accounts participating on a combined basis will be aggregated for the purposes of determining whether a trading surcharge applies. Trading by one account can cause the trading surcharge to be imposed on trading by another account. We may also terminate the Unlimited Advantage Agreement (and impose a "Closing Fee," if applicable) and/or increase or change the trading surcharge, without being subject to the Amendments Paragraph, if trading exceeds certain thresholds. The annual asset-based fee will continue to apply on all eligible assets.

- Clients are responsible for determining whether Unlimited Advantage is appropriate for the enrolled account based on relevant factors, including past and anticipated investment activity. Certain types of accounts, such as IRAs, will not be able to use certain non-transaction services. Eligible assets generally may be transferred to accounts that are not enrolled in Unlimited Advantage under certain limited circumstances.

- The annual fee is based on the amount of eligible assets in each of three asset categories held by the account.

The annual fee does not include brokerage and other transaction-related charges related to ineligible assets, surcharges, fees and charges or any indirect costs payable to Merrill Lynch or others on certain eligible assets, fees required by law, or fees for products and services that are not included.

There is a \$1,500 minimum annual fee (\$375 per quarter), and a Closing Fee may apply if you or we decide that the account should no longer participate in Unlimited Advantage. Certain types of accounts owned by members of the same household may aggregate assets for purposes of determining the rate of the annual fee. Accounts will pay a share of the annual fee regardless of how much they use trades or other products or services.

- The annual fee is charged on cash and cash equivalent positions, as well as no-load and load-waived fund shares, although the annual fee may not apply to these assets if acquired or disposed of outside Unlimited Advantage through transaction-based pricing.

Under certain circumstances, you will pay additional fees, and Merrill Lynch and its Financial Advisors may receive additional compensation. For example: Securities underwritings, including equity, debt and market-linked investments created by Merrill Lynch, generally must be purchased at the public offering price, which includes compensation to Merrill Lynch and its Financial Advisors, which is in addition to the annual fee.

For principal transactions, Merrill Lynch may also receive compensation in addition to the annual fee; investors will bear indirectly all mutual fund-related fees and expenses and Merrill Lynch and its affiliates may receive fees in connection with mutual funds held by clients in Unlimited Advantage; and the annual fee will be applied to the full value of any eligible assets purchased on margin or other extensions of credit by us or its affiliates and will therefore result in a higher annual fee to Merrill Lynch.

- Merrill Lynch can restrict the purchase or retention of mutual fund shares in Unlimited Advantage if it exceeds certain amounts. Only certain classes of fund shares may be purchased.

Please see the Unlimited Advantage Agreement and the Unlimited Advantage Education Guide, which is available from your Financial Advisor, for additional information on these and other important topics.

8. SWEEP OF CASH BALANCES

Available cash balances in your central asset account (such as the CMA account) or retirement accounts will be automatically invested into your choice of available short-term investments. Generally, these choices will include one or more money market mutual funds or FDIC-insured bank deposit accounts.

Merrill Lynch reserves the right to offer different "sweep" arrangements for different accounts or clients. You agree that Merrill Lynch may, at its discretion and from time to time, change the sweep arrangement upon prior notice.

9. ELECTRONIC FUND TRANSFERS

If you maintain more than one account with Merrill Lynch with the same ownership type, you may transfer funds to and from each account through Merrill Lynch's electronic funds transfer services.

You authorize Merrill Lynch to accept your telephonic or electronic instructions for those transfers.

If you open any account as the trustee for a grantor revocable living trust, you represent and warrant to Merrill Lynch that:

- The trust permits the funds transfers you are authorizing; or
- If applicable, such funds transfers represent valid partial or total revocations by you and Merrill Lynch may conclusively rely on this representation.



The Merrill Lynch Privacy Pledge

Our Pledge

At Merrill Lynch, the interests of our clients always come first. As part of our firm's long tradition of trust, the confidentiality of client information has been, and will continue to be, paramount. We maintain high standards to safeguard your personal financial information, and we will remain vigilant in protecting that information.

We collect personal financial information to operate prudently and to meet legal and regulatory requirements. In the ordinary course of our business, we do not rent or sell your name or other personal financial information. We will share only certain information with companies not in our corporate family ("nonaffiliated third parties") as set forth in this Privacy Pledge or as otherwise permitted by law. The recipients of that information are required to protect the confidentiality and security of that information and may use it only for the purposes agreed.

QUESTIONS AND ANSWERS ABOUT MERRILL LYNCH'S PRIVACY PRACTICES

How do we protect the confidentiality and security of your information?

- **People.** We restrict access to your personal financial information to personnel who need that information to provide you with our products and services. Our employee communications also reinforce our privacy policies.
- **Policies and procedures.** We maintain and monitor our physical, electronic and procedural safeguards to comply with applicable regulations, updating them as needed so that we may guard your personal information.
- **Security.** We use leading security methods to help us identify and prevent data breaches and unauthorized disclosure of your personal financial information.

What information do we collect from and about you?

Depending on the nature of your relationship with us, we must obtain certain information to meet legal and regulatory requirements. In all cases, we collect only personal financial information that is necessary to provide personalized financial services to you.

- We obtain information about you such as name, address, Social Security number, telephone number and income.
- We collect information about your financial transactions with companies in our corporate family ("affiliates"), such as securities bought and sold, Visa® and checking transactions, and fund transfers.
- We may obtain information about you from third parties, such as a consumer report from a consumer reporting agency or, in the case of an application for insurance, we may obtain motor vehicle reports or medical information.
- We may verify income, identity or asset and obligation information about you.

What information do we disclose to affiliates about you?

We may disclose some or all of your personal information to our corporate affiliates, including transfer agents, banks, insurance companies and agencies, trust companies, mortgage bankers, securities broker-dealers, and investment advisors. We do this in order to offer you a broad range of products and services (such as our Cash Management Account® financial service, mortgages, trust services and insurance), and to comply with applicable regulations.

If you apply for a loan with certain Merrill Lynch lenders, such as Merrill Lynch Bank USA or Merrill Lynch Credit Corporation, you may elect to instruct them not to share certain information with any of our corporate affiliates in accordance with procedures required by applicable law.

What information do we disclose to nonaffiliated third parties about you?

Merrill Lynch will, as necessary, use various services from nonaffiliated third parties. We use these external service providers for the purpose of supporting the financial products and services we provide to you. For example, we provide information to external service providers so that your account statements can be printed and mailed. These parties must agree to comply with stringent security and privacy policies and procedures. Their ability to protect the personal financial information of our clients is an important consideration in our relationship with them.

If you have credit cards or other loan accounts with us, we may disclose information to consumer reporting agencies with respect to the performance of your loan.

We may also disclose information to government agencies, stock exchanges and regulatory organizations when permitted or required by law.

What information do we disclose about former clients, and to whom?

We may disclose some or all of a former client's personal information to government agencies and self-regulatory organizations when permitted or required by law, such as when required to file abandoned property reports and to comply with subpoenas and other official governmental requests.

If a former client had a loan with us, we may report the performance of that loan to consumer reporting agencies.

Our corporate affiliates include:

Asset Management Private Equity, L.P.

Broadcourt Capital Corp.

FAM Distributors, Inc.

Financial Data Services, Inc.

Fund Asset Management, L.P.

Harzog, Heine & Geduld, LLC

Mercury Advisors Family of Funds

Merrill Lynch Alternative Strategies, LLC

Merrill Lynch Bank USA

Merrill Lynch Bank & Trust Company

Merrill Lynch Credit Corporation

Merrill Lynch Family of Funds

Merrill Lynch Investment Managers International Limited

Merrill Lynch Investment Managers, L.P.

Merrill Lynch Life Agency Inc.

Merrill Lynch Life Insurance Company

Merrill Lynch, Pierce, Fenner & Smith Incorporated

Merrill Lynch Private Finance Inc.

Merrill Lynch Trust Company, FSB

ML Life Insurance Company of New York

Princeton Administrators, L.P.

QA Advisors, LLC

For questions concerning Merrill Lynch's Privacy Pledge, please contact (877) 222-7954, or visit our Web site at www.asimerrill.ml.com.



Cash Management Account, CMA, Merrill Lynch Consults are registered service marks of Merrill Lynch & Co., Inc.

Cash Management Account (CMA) is covered by U.S. patent numbers 4,597,048; 4,774,663 and 5,940,809.

CMA SubAccounts, Individual Investor, Merrill Lynch Online and Unlimited Advantage are service marks of Merrill Lynch & Co., Inc.

Visa is a registered trademark of Visa International.

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Printed in the U.S.A. Member, Securities Investor Protection Corporation (SIPC).

Code 100296RR-1102

Exhibit "D"

DURABLE GENERAL POWER OF ATTORNEY

NEW YORK STATUTORY SHORT FORM

THE POWERS YOU GRANT BELOW CONTINUE TO BE EFFECTIVE
SHOULD YOU BECOME DISABLED OR INCOMPETENT

Caution: This is an important document. It gives the person whom you designate (your "Agent") broad powers to handle your property during your lifetime, which may include powers to mortgage, sell, or otherwise dispose of any real or personal property without advance notice to you or approval by you. These powers will continue to exist even after you become disabled or incompetent. These powers are explained more fully in New York General Obligations Law, Article 5, Title 15, Sections 5-1502A through 5-1503, which expressly permit the use of any other or different form of power of attorney.

This document does not authorize anyone to make medical or other health care decisions. You may execute a health care proxy to do this.

If there is anything about this form that you do not understand, you should ask a lawyer to explain it to you.

THIS is intended to constitute a DURABLE GENERAL POWER OF ATTORNEY pursuant to Article 5, Title 15 of the New York General Obligations Law:

I, Robert L. Chamblee (see address below) do hereby appoint:

(Insert your name and address)

Swain N. Thompson, Jr., 120 Briarwood Lane, Anderson, SC 29621

(If one person is to be appointed agent, insert the name and address of your agent above)

(If two or more persons are to be appointed agents by you, insert their name and addresses above)

my attorney(s)-in-fact TO ACT

(If more than one agent is designated, CHOOSE ONE of the following two choices by putting your initials in ONE of the blank spaces to the left of your choice.)

- ☐ Each agent may SEPARATELY act.
☐ All agents must act TOGETHER.

(If neither blank space is initialed, the agents will be required to act TOGETHER.)

IN MY NAME, PLACE AND STEAD, in any way which I myself could do, if I were personally present, with respect to the following matters as each of them is defined in Title 15 of Article 5 of the New York General Obligations Law to the extent that I am permitted by law to act through an agent:

DIRECTIONS: Initial in the blank space to the left of your choice any one or more of the following lettered subdivisions as to which you WANT to give your agent authority. If the blank space to the left of any particular lettered subdivision is NOT initialed, NO

Robert L. Chamblee NY Address: 152 West 58th St., Apartment 2C, NY, NY 10019
SC Address: 1206 Briarwood St., Anderson, SC 29621

A True Copy:
Shawell Ayres
SC Attorney and Notary
Sept. 18, 2002

COPY

AUTHORITY WILL BE GRANTED for matters that are included in that subdivision. Alternatively, the letter corresponding to each power you wish to grant may be written or typed on the blank line in subdivision "(Q)", and you may then put your initials in the blank space to the left of subdivision "(Q)" in order to grant each of the powers so indicated.)

☐ (A) real estate transactions;	☐ (K) records, reports and statements;
☐ (B) chattel and goods transactions;	☐ (L) retirement benefit transactions;
☐ (C) bond, share and commodity transactions;	☐ (M) making gifts to my spouse, children and more remote descendants, and parents, not to exceed in the aggregate \$10,000 to each of such persons in any year;
☐ (D) banking transactions;	☐ (N) tax matters;
☐ (E) business operating transactions;	☐ (O) all other matters;
☐ (F) insurance transactions;	☐ (P) full and unqualified authority to my attorney(s)-in-fact to delegate any or all of the foregoing powers to any person or persons whom my attorney(s)-in-fact shall select;
☐ (G) estate transactions;	
☐ (H) claims and litigation;	
☐ (I) personal relationships and affairs;	
☐ (J) benefits from military service;	

(R) (Q) each of the above matters identified by the following letters:
 A. B. C. D. E. F. G. H. I. J.
 K. L. M. N. O. P.

COPY

A True Copy:

SC Attorney and Notary
 Sept. 18, 2002

(Special provisions and limitations may be included in the statutory short form durable power of attorney only if they conform to the requirements of §-1503 of the New York General Obligations Law.)

I hereby revoke any New York Statutory Short Form or other Power of Attorney which named anyone as my Agent, other than Swain N. Thompson, Jr.

This Durable Power of Attorney shall not be affected by my subsequent disability or incompetence.

If every agent named above is unable, or unwilling to serve, I appoint (insert name and address of successor) to be my agent for all purposes hereunder

To induce any third party to act hereunder, I hereby agree that any third party receiving a duly executed copy or facsimile of this instrument may act hereunder, and that revocation or termination hereof shall be ineffective as to such third party unless and until actual notice or knowledge of such revocation or termination shall have been received by such third party, and I for myself and for my heirs, executors, legal representatives and assigns, hereby agree to indemnify and hold harmless any such third party from and against any and all claims that may arise against such third party by reason of such third

party having relied on the provisions of this instrument.

This Durable General Power of Attorney may be revoked by me at any time.

In Witness Whereof, I have hereunto signed my name this 18th day of September, 2002.

(YOU SIGN HERE) →

Robert L. Chonko
(Signature of Principal)

ACKNOWLEDGMENT
(for use within the State of New York)

STATE OF NEW YORK, COUNTY OF

ss.:

On the day of in the year before me, the undersigned, a Notary Public in and for said State, personally appeared

personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

COPY

Notary Public: State of New York

ACKNOWLEDGMENT
(for use outside the State of New York)

**RAISED
SEAL**

STATE OF SC, COUNTY OF Anderson

ss.:

On the 18th day of September in the year 2002 before me, the undersigned, a Notary Public in and for said State, personally appeared Robert L. Chonko

personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument, and that such individual made such appearance before the undersigned in

(Insert city or political subdivision and state or country or other place acknowledgment taken).

David A. Smith
(Signature and office of individual taking acknowledgment)

Notary Public
for SC
Commission Expires
2/2/2004

12/12/2000

A True Copy:

Attest: David A. Smith
SC Attorney and Notary
Sept. 19, 2002

Re-record to correct name of Agent.

020033597 09/16/2002 8 4941 P 13Y

GENERAL DURABLE POWER OF ATTORNEY
GIVEN BY ROBERT L. CHAMBLEE, AS PRINCIPAL

COPY

I, Robert L. Chamblee, currently residing in the County of Anderson, State of South Carolina, as principal (the "Principal"), hereby appoint ~~Swain M. Thompson~~ to serve as my agent to exercise the powers set forth below.

I also have a residence in 152 West 58th Street
Apartment 2C
New York, NY 10019

fixed
020033597 10/01/2002 11:00:38AM
FILED. RECORDED. INDEXED
Bk:04991 Pg:00182 Pages:8
Rec Fee:19.00 St Fee:0.00
Co Fee:0.00
REGISTER OF DEEDS, ANDERSON CO., SC
Shirley McElhannon

ARTICLE I

My agent is authorized in my Agent's sole and absolute discretion from time to time and at any time, with respect to any and all of my property and interests in property, real, personal, intangible and mixed, and in addition to any other rights, powers and authorities as follows:

1. To demand, sue for, collect, receive and give discharges for all moneys, and other personal property which now belongs or shall hereafter belong to me.
2. To commence, prosecute, and defend all actions, suits, and other proceedings touching my estate and property.
3. To settle, compromise, or submit to arbitration all claims, demands, accounts, disputes, or differences between me and any other person or persons.
4. To receive any and every sum of money which now is or hereafter shall be due or belonging to me upon the security or by virtue of any mortgage or other pledge and to execute a good and sufficient release, satisfaction, or other discharge of such mortgage or other pledge by deed or otherwise.
5. To sell, either at public or private sale, or exchange any part or all of my real or personal property for such consideration and upon such terms as my agent shall think fit and to execute and deliver good and sufficient deeds or other instruments for the conveyance or transfer thereof, with such covenants of warranty or otherwise as my agent shall see fit.
6. To deposit my moneys, checks, and other credits that may come into my Agent's hands for my account with any depository institution. Any money which I now am or hereafter may be entitled to which now is or shall be so deposited, my agent may withdraw and either 1) employ as my agent shall think fit in the payment of any debts or other obligations owing by me or otherwise for my use and benefit, including my support, maintenance care, and well being; or 2) invest and/or reinvest in my name in any stock, shares, bonds, securities, or other property, real or personal, as my agent may think proper.

7. To withdraw any money that I now or hereafter may have on deposit to my credit and to have access to any safe deposit box(es) I may have.

8. To redeem, withdraw, or otherwise convert into cash any and all bonds and shares of stock that I now or shall hereafter own or have in my name.

9. To exercise my right to vote in any corporation, or otherwise to act as my attorney or proxy, in respect to any stocks, or other interests now or hereafter held by me therein.

10. To enter for any purpose into a lease as Lessor or Lessee with or without option to purchase or renew for such terms, conditions, and consideration as my agent shall think fit.

11. To borrow any sum or sums of money on such terms and with such security, whether real or personal property, as my agent shall think fit.

12. To sign, seal, execute, and deliver any and all contracts, agreements, deeds, and other instruments whatsoever, and acknowledge the same, and to make, draw, sign, endorse, accept, discount, and otherwise deal with, checks, notes, bills, drafts, and other commercial paper, in execution of any and all powers hereby conferred.

13. To contract with any institution for the maintenance of a safe deposit box in my name; to have access to all authorized signatory, whether or not the contract for such safe deposit box was executed by me, (either alone or jointly with others) or by my Agent in my name; to add to and remove from the contents of any such safe deposit box and to terminate any and all contracts for such boxes; to have access at any time or times to any safe deposit box rented by me, wherever located, in order to remove my original durable power of attorney; and any institution in which any such safe deposit box may be located is not required to make any inquiry, and shall not incur any liability to me or my estate as a result of permitting my appointee or appointees in my original durable power of attorney to exercise this power. This power is exercisable without: (i) any contract with or notice to me, my spouse, and/or any interested persons to my estate, (ii) any prior court order or authorization; (iii) any knowledge of or any prior determination as to my mental or physical capacity or incapacity; (iv) any knowledge as to my whereabouts regardless whether my whereabouts are known or unknown; or (v) any inquiry.

14. To represent me in all tax matters; to prepare, sign and file federal, state, and/or local income, gift and other tax returns of all kinds, including, where appropriate, joint returns, FICA returns, payroll tax returns, claims for refunds, requests for extensions of time to file returns and/or pay taxes, extensions and waivers of applicable periods of limitation, protests and petitions to administrative agencies or courts, including the tax court, regarding tax matters, and any and all other tax related documents, including but not limited to consents and agreements under Section 2032a of the Internal Revenue Code or any successor section thereto and consents to split gifts, closing agreements, and any power of attorney form required by the Internal Revenue Service and/or any state and/or local taxing authority with respect to any tax year; to pay taxes due, collect

and make such disposition of refunds as my Agent shall deem appropriate, post bonds, receive confidential information and contest deficiencies determined by the Internal Revenue Service and/or any state and/or local taxing authority; to exercise any elections I may have under federal, state or local tax law; to allocate any generation-skipping tax exemption to which I am entitled; and generally to represent me or obtain professional representation for me in all tax matters and proceedings of all kinds and for all periods before all officers of the Internal Revenue Service and state and local authorities and in any and all courts; to engage, compensate and discharge attorneys, accountants and other tax and financial advisers and consultants to represent and/or assist me in connection with any and all tax matters involving or in any way related to me or any property in which I have or may have an interest or responsibility; and on my behalf to execute IRS Form 2848 and appoint my Agent or any suitable person selected by my Agent as my representative before the Internal Revenue Service.

15. To transfer from time to time and at any time to the trustee or trustees of any revocable trust agreement created by me before or after the execution of this instrument, as to which I am, during my lifetime a primary income and principal beneficiary, any and all of my assets or interests in property, including any rights to receive income from any source.

16. My Agent shall have the power to establish one or more "individual retirement accounts" or other retirement plans or arrangements in my name.

In connection with any pension, profit sharing or stock bonus plan, individual retirement arrangement, Roth IRA, § 403(b) annuity or account, § 457 plan, or any other retirement plan, arrangement or annuity in which I am a participant or of which I am a beneficiary (whether established by my Agent or otherwise) (each of which is hereinafter referred to as "such Plan"), my Agent shall have the following powers, in addition to all other applicable powers granted by this instrument:

a. To make contributions (including "rollover" contributions) or cause contributions to be made to such Plan with my funds or otherwise on my behalf

b. To receive and endorse checks or other distributions to me from such Plan, or to arrange for the direct deposit of the same in any account in my name or in the name of any revocable trust that I have created.

c. To elect a form of payment of benefits from such Plan, to withdraw benefits from such Plan, to make contributions to such Plan and to make, exercise, waive or consent to any and all elections and/or options that I may have regarding the contributions to, investments or administration of, or distribution or form of benefits under, such Plan, including without limiting the generality of this power, the power to waive rights of a non-employee spouse under state or federal law.

CONV

d. To designate one or more beneficiaries or contingent beneficiaries for any benefits payable under such Plan on account of my death, and to change any such prior designation of beneficiary made by me or by my Agent.

17. To do in general and without exception, limitation, qualification or restriction any and all other deeds, acts, and things whatsoever in or about my estate, property, and affairs and to concur with any other person or persons jointly interested with me therein in doing any and all such deeds, acts, and things as fully and as effectually to all intents and purposes as I, myself, in my own proper person could personally do.

ARTICLE II

My Agent is authorized in my Agent's sole and absolute discretion from time to time and at any time, with respect to the control and management of my person, and in addition to any other rights, powers and authorities as follows:

To do all acts necessary for maintaining my customary standard of living, to provide living quarters by purchase, lease or other arrangement, and if necessary to make all arrangements, for me at any hospital, nursing home, or similar establishment, and if in the judgment of my Agent I will never be able to return to my living quarters from such an establishment, to lease, sublease or assign my interest as lessee in any lease or protect or sell or otherwise dispose of my living quarters and my tangible personal property therein (investing the proceeds of any such sale as my Agent deems appropriate) for such price and upon such terms, conditions and security, if any, as my Agent shall deem appropriate; and as an alternative to such storage and safeguarding, to transfer custody and possession (but not title) for such storage and safe keeping of any such tangible personal property of mine to the person, if any, named in my will as the recipient of such property.

ARTICLE III

In connection with the exercise of the powers herein described, my Agent is fully authorized and empowered to perform any acts and things and to execute and deliver any documents, instruments, and papers necessary, appropriate, incident or convenient to such exercise or exercises, including without limitation the following:

1. To employ, compensate and discharge such domestic, medical and professional personnel as my Agent deems appropriate.

To open, read, respond to and redirect my mail; to represent me before the U.S. Postal Service in all matters relating to mail service; and to establish, cancel, continue or initiate my membership in organizations and associations of all kinds, to take and give or deny custody of all of my important documents, and to disclose or refuse to disclose such documents.

COPY

ARTICLE IV

For the purpose of inducing all persons, organizations, corporations and entities, to act in accordance with the instructions of my Agent given in this instrument, I hereby represent, warrant and agree that:

1. If this instrument is revoked or amended for any reason, I, my estate, my heirs, successors and assigns will hold any person, organization, corporation or entity (hereinafter referred to in the aggregate as "Person") harmless from any loss suffered, or liability incurred by such Person in acting in accordance with the instructions of my Agent acting under this instrument prior to the receipt by such Person of actual notice of any such revocation or amendment.

2. The powers conferred on my Agent by this instrument may be exercised by my Agent alone and my Agent's signature or act under the authority granted in this instrument may be accepted by Persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. Consequently, all acts lawfully done by my Agent hereunder are done with my consent and shall have the same validity and effect as if I were personally present and personally exercised the powers myself, and shall inure to the benefit of and bind me and my heirs, assigns and personal representatives.

3. No person who acts in reliance upon any representations my Agent may make as to (a) the fact that my Agent's powers are then in effect, (b) the scope of my Agent's authority granted under this instrument, (c) my competency at the time this instrument is executed, (d) the fact that this instrument has not been revoked, or (e) the fact that my Agent continues to serve as my Agent shall incur any liability to me, my estate, my heirs or assigns for permitting my Agent to exercise my such authority, nor shall any Person who deals with my Agent be responsible to determine or insure the proper application of funds or property.

ARTICLE V

This power of attorney shall not be affected by physical disability or mental incompetence of the principal which renders the principal incapable of managing principal's own estate.

ARTICLE VI

Notwithstanding any provision herein to the contrary, my Agent:

1. Shall have no power or authority whatsoever with respect to any interest in or incidents of ownership in any policy of insurance I may own on the life of my Agent.

2. Shall have no power or authority whatsoever with respect to (a) any irrevocable trust created by my Agent as to which I am a trustee or a beneficiary or (b) any asset given to me by my Agent.

COPY

3. Shall be prohibited, except as specifically authorized in this instrument, from (a) appointing, assigning or designating any of my assets, interests or rights directly or indirectly to my Agent, my Agent's estate, my Agent's creditors, or the creditors of my Agent's estate, (b) exercising any power of appointment I may hold in favor of my Agent, my Agent's estate, my Agent's creditors, or the creditors of my Agent's estate, (c) disclaiming assets to which I would otherwise be entitled if the effect of such disclaimer is to pass assets directly or indirectly to my Agent or his or her estate, or (d) using my assets to discharge any of my Agent's legal obligations, including any obligation of support which my Agent may owe to others, excluding those whom I am legally obligated to support.

4. Shall be prohibited from exercising any discretionary fiduciary powers that I now hold or may hereafter acquire.

5. If it becomes necessary for my Agent to liquidate my assets to provide support for me, or if liquidation or conversion of assets becomes necessary for any other reason, whether specified in this instrument or otherwise, or such liquidation is deemed by my Agent to be appropriate or convenient, I direct that my Agent, to the extent reasonably possible, avoid disrupting the dispositive provisions of any estate plan of mine known to my Agent, whether or not such estate plan is embodied in a will, a trust, non-probate property, or otherwise. If it is necessary to disrupt the dispositive provisions of such plan, then my Agent is directed to use my Agent's best efforts to restore the dispositive provisions of such plan as and when the opportunity to do so is available to my Agent. My Agent shall make reasonable efforts to obtain and review my estate plan and any person having knowledge thereof or possession of any documents implementing such estate plan is authorized to make disclosure thereof to my Agent, and to furnish my Agent with copies of such documents.

ARTICLE VII

The following provisions shall apply:

1. My Agent shall be entitled to reimbursement for all reasonable costs and expenses actually incurred and paid by my Agent on my behalf under any provision of this instrument.

2. My Agent and my Agent's heirs, successors and assigns are hereby released and forever discharged from any and all liability upon any claim or demand of any nature whatsoever by me, my heirs and assigns, arising out of the acts or omissions of my Agent, except for willful misconduct or gross negligence. My Agent shall have no responsibility to make my property productive of income, to increase the value of my estate or to diversify my investments. My Agent shall have no liability for entering into transactions authorized by this instrument with my Agent in my Agent's individual capacity so long as my Agent believes in good faith that such transactions are in my best interests or the best interests of my estate and those persons interested in my estate.

3. If any part of any provision of this instrument shall be invalid or unenforceable under applicable law, such part shall be ineffective to the extent of such invalidity only, without in

COPY

any way affecting the remaining parts of such provision or the remaining provisions of this instrument.

4. This instrument shall be governed by the laws of the State of South Carolina in all respects.

5. Whenever the word "Agent" or any modifying or equivalent word or substituted pronoun therefor is used in this instrument, such word or words shall be held and taken to include both the singular and the plural, the masculine, feminine and neuter gender thereof.

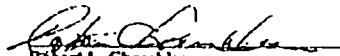
6. This instrument may be amended or revoked by me, and my Agent and any alternate agent may be removed by me at any time by the execution by me of a written instrument of revocation, amendment or removal delivered to my Agent and to all alternate agents. If this instrument has been recorded in the public records, then the instrument of revocation, amendment or removal shall be filed or recorded in the same public records. My Agent and any alternate agent may resign by the execution of a written resignation delivered to me or, if I am mentally incapacitated, by delivery to any person with whom I am residing or who has the care and custody of me or in the case of an alternate agent, by delivery to my Agent.

7. My Agent is authorized to make photocopies of this instrument as recorded with the recording data reflected thereon, as frequently and in such quantity as my Agent shall deem appropriate. All such photocopies shall have the same force and effect as my original.

ARTICLE VIII

I hereby revoke any and all Powers of Attorney heretofore granted by me, except for any Health Care Power of Attorney of even date.

IN WITNESS WHEREOF, as Principal, I have executed this Power of Attorney as of this 16th day of September, 2002.


Robert L. Chamberlee

COPY

The foregoing Durable Power of Attorney consisting of (8) typewritten pages, this included, was this 11th day of September, 2002, signed, sealed, published and declared by the Principal, by signature on page (7) hereof, in our presence, and we, at Principal's request and in Principal's presence and in the presence of each other have hereunto subscribed our names as witnesses on the above date.

[Signature] at Anderson, South Carolina
[Signature] at Anderson, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)

PERSONALLY appeared before me deponent and made oath that deponent saw the within named Robert L. Chambliss sign, seal, and as the Principal's net and deed, deliver the within written Durable Power of Attorney, and deponent with the other witness whose name is subscribed above, witnessed the execution thereof.

[Signature]
 Witness

SUBSCRIBED AND SWORN TO BEFORE ME
 this 16th day of September, 2002.

[Signature]
 NOTARY PUBLIC FOR SOUTH CAROLINA
 My commission expires: 2/2/2004

NO
 RAISED
 SEAL
 C-1

NOTARY PUBLIC FOR SOUTH CAROLINA

020033597 09/16/2002 03:23:50pm
 FILED, RECORDED, INDEXED
 06101961 P010139 Pages: 8
 Rec Fee: 19.00 St Fee: 0.60
 Co Fee: 0.00
 REGISTER OF DEEDS-ANDERSON CO., SC
 Shirley McElhannon

Exhibit "E"



DURABLE POWER OF ATTORNEY

(This Power of Attorney does not pertain to or provide any authority to your agent or attorney-in-fact to deal with your retirement accounts for which MLPF&S is a custodian.)

TO: Merrill Lynch, Pierce, Fenner & Smith Incorporated (MLPF&S) and, if applicable, Merrill Lynch Life Insurance Company (MLLIC) and ML Life Insurance Company of New York (MLLCNY)

RE: MLPF&S Account Number(s) 726-10A28
MLLIC Contract and/or Policy Number(s) _____
MLLCNY Contract and/or Policy Number(s) _____

NOTE: When used in this document, the words "I", "me" or "my" refer to any client/principal, whether an individual or an entity, that executes this Durable Power of Attorney.

I hereby constitute and appoint Shirley Thompson (whose signature appears below), as my agent and attorney-in-fact, with power and authority to act for me and on my behalf in connection with my account(s) with MLPF&S and my MLLIC and MLLCNY annuity contract(s) and life insurance policy(ies), however designated, and whether presently open or hereafter opened, specifically conferring upon my agent and attorney-in-fact those powers which I have designated below by initialing the corresponding space provided to the left of each power that I wish to confer.

PART I: If the agent and attorney-in-fact is a registered Investment Adviser, choose from the powers listed below in this Part I:

INITIAL ONLY THOSE POWERS YOU WANT YOUR INVESTMENT ADVISER TO EXERCISE

Initial here (Do not make a mark):

..... (a) (PURCHASES AND SALES) to effect purchases and sales (including short sales), to subscribe for and to trade in all types of securities and certain investments, including, but not limited to, stocks, bonds, options, limited partnership interests, trust units, physical commodities and options thereon, on margin or otherwise, provided such transactions are permissible under the terms of the account agreement governing the above-referenced MLPF&S account(s), whether such securities or investments are in negotiable form, issued or unissued, or are traded on a foreign exchange (including any foreign currency transactions necessary to effect the trade), to sell, assign, endorse and transfer all types of securities and certain investments, including but not limited to stocks, bonds, options, certificates of indebtedness, or certificates which evidence other securities of any nature, at any time standing in my name and to execute any documents necessary to effectuate the foregoing, to receive statements of transactions made for my account(s); to approve and confirm the same, to receive any and all notices, calls for margin, or other demands with reference to my account(s), to exercise employee stock options and to effect sales of employer stock acquired pursuant to such option exercising; and to direct payment to other broker/dealers, banks and other financial service providers for purchases or trades made at such other firms, for my account or accounts at MLPF&S, whether presently open or hereafter opened.

..... (b) (PROXY) to receive proxy soliciting materials, annual reports and other related materials and to vote proxies on my behalf (or respond to requests for voting instructions) with respect to all securities and other assets held in my account(s) at MLPF&S. If this power is initiated, the undersigned client/principal hereby represents the following to MLPF&S: that the investment adviser designated above is registered under the Investment Advisers Act of 1940 and that such adviser exercises investment discretion over my account(s) at MLPF&S pursuant to an advisory contract.

NOTE: You may revoke this power at any time by providing MLPF&S with written notice that all proxy soliciting materials, annual reports and other related materials are to be sent directly to you and are no longer to be sent to your investment adviser.

..... (c) (FEES) MLPF&S is hereby authorized, upon receipt of invoices or statements from the investment adviser named above, to pay such amounts in connection with the above account(s) to:

Name of Investment Adviser _____

Address of Investment Adviser _____

Circle 1180 (Rev. 10-1)

In connection with the above direction, I agree that the investment adviser's fees shall be paid first (a) from free credit balances, if any, in my account(s); and second, (b) from the liquidation or withdrawal (which the client/principal hereby authorizes by his/her signature below) by MLPF&S of my share of any money market funds or balances in my account(s) at MLPF&S. I further agree that MLPF&S shall be under no other duty or obligation to pay the investment adviser's fee, that I shall be solely responsible for verifying the accuracy or calculation of fees submitted for such payment, and that the investment adviser named above has been directed to submit an invoice or statement for each payment of fees to me and to MLPF&S, stating the client's name, which MLPF&S account number the fee is to be paid from, and the amount to be paid. This fee payment authorization shall remain in full force and effect until terminated by one of the parties hereto, and such termination shall be effective upon receipt of written notice by MLPF&S. MLPF&S may terminate this fee payment arrangement at any time.

NOTE: If this paragraph (c) (FEES) has been initialed by the client/principal, the investment adviser/agent, by signing below, makes the following representations to MLPF&S: That I/we have entered into an agreement with the client/principal for investment advisory services which authorizes me/us to receive direct payment from the client's/principal's account(s) at MLPF&S upon presentation of my/our invoice or statement to MLPF&S. I/We acknowledge and agree to all of the foregoing terms and conditions of my/our client's above authorization to MLPF&S, and I/we agree to hold MLPF&S harmless for amounts paid to me/us upon receipt of my/our invoice or statement.

(d) (DURABILITY) APPLICABLE ONLY TO U.S. RESIDENT CLIENTS (INCLUDING U.S. RESIDENT ALIENS). (INITIAL ONLY IF YOU WANT YOUR AGENT TO CONTINUE TO ACT ON YOUR ACCOUNT(S) IF YOU BECOME MENTALLY INCAPACITATED.) This Durable Power of Attorney shall not be affected by the subsequent disability, incompetence or incapacity of the principal or by any lapse of time. (Maine residents see Statements below.) Also, see below for additional execution requirements for durability.

NOTE: ADDITIONAL EXECUTION REQUIREMENTS FOR DURABLE POWERS OF ATTORNEY EXIST FOR CLIENTS RESIDING IN CERTAIN STATES. THESE ADDITIONAL EXECUTION REQUIREMENTS ARE SET FORTH IN DETAIL AT THE TOP OF PAGE 6 OF THIS POWER OF ATTORNEY. IF THE CLIENT'S STATE OF RESIDENCE CHANGES AFTER THE CLIENT HAS EXECUTED THIS DURABLE POWER OF ATTORNEY, THE CLIENT SHOULD CONSULT WITH HIS OR HER OWN LEGAL COUNSEL TO DETERMINE IF THIS DURABLE POWER OF ATTORNEY SHOULD BE RE-EXECUTED.

PART II: If the agent and attorney-in-fact is not a registered Investment Adviser, choose from the powers listed below in this Part II:

INITIAL ONLY THOSE POWERS YOU WANT YOUR AGENT AND ATTORNEY-IN-FACT TO EXERCISE

(Initial here (Do not make a mark):

* *JS* (a) (PURCHASES AND SALES) to effect purchases and sales (including short sales), to subscribe for and to trade in all types of securities and certain investments, including, but not limited to, stocks, bonds, options, limited partnership interests, trust units, physical commodities and options thereon, on margin or otherwise, provided such transactions are permissible under the terms of the account agreement governing the above-referenced MLPF&S account(s), whether such securities or investments are in negotiable form, issued or unissued, or are traded on a foreign exchange (including any foreign currency transactions necessary to effect the trade), and to sell, assign, endorse and transfer all types of securities and certain investments, including but not limited to stocks, bonds, options, certificates of indebtedness, or certificates which evidence other securities of any nature, at any time standing in my name and to execute any documents necessary to effectuate the foregoing, to receive statements of transactions made for my account(s); to approve and confirm the same, to receive any and all notices, calls for margin, or other demands with reference to my account(s), to exercise employee stock options and to effect sales of employer stock acquired pursuant to such option exercising, and to direct payment to other broker-dealers, banks and other financial service providers for purchases or trades made at such other firms, for my account or accounts at MLPF&S, whether presently open or hereafter opened.

* *JS* (b) (WITHDRAWAL OF FUNDS AND SECURITIES) to instruct MLPF&S to make payment of moneys and/or securities from my account(s) at MLPF&S, and to receive and direct payments therefrom payable to me or for my benefit.

* *JS* (c) (TRANSFERS; GIFTING AUTHORITY - TO 3rd PARTIES) to make transfers and gifts of money, stocks, bonds, options, limited partnership interests, trust units, or other securities, or any other property or investments, from my account(s) at MLPF&S or of my MLIC or MLICNY annuity contract(s) or life insurance policy(ies), or of loan, with-

drawal or surrender values of those annuity contract(s) or life insurance policy(ies), on my behalf to any third party, including, but not limited to, individuals, entities, trusts or charitable organizations, provided however, that any such gift shall not discharge an obligation of support of my agent and attorney-in-fact (such determination shall not be made by MLPF&S);

* *RE* (d) (TRANSFERS; GIFTING AUTHORITY - TO AGENT) to make transfers and gifts of money, stocks, bonds, options, limited partnership interests, trust units, or other securities, or any other property or investments, from my account(s) at MLPF&S or of my MLUC or MLLICNY annuity contract(s) or life insurance policy(ies), or of loan, withdrawal or surrender values of those annuity contract(s) or life insurance policy(ies), on my behalf to my agent and attorney-in-fact, provided however, that such gifts are for my agent and attorney-in-fact's health, education, support or maintenance (such determination shall not be made by MLPF&S);

NOTE: If you have initialed paragraph (c) or (d) in this Part II of the Power of Attorney, you have given your agent and attorney-in-fact the authority to give away your assets to third parties or to your agent and attorney-in-fact. If you do not want your agent and attorney-in-fact to have this authority, do not initial paragraph (c) or (d) or this Part II of the Power of Attorney. If there is anything about this Power of Attorney that you do not understand, you should consult your own attorney.

* *RE* (e) (CHECK WRITING) to make and draw checks;

* *RE* (f) (TAX DOCUMENTS) to execute tax forms related to my account(s) at MLPF&S, including, but not limited to, forms which certify my taxpayer identification number, backup withholding status, foreign status and/or tax residency.

* *RE* (g) (LIFE INSURANCE POLICIES) to exercise all available ownership rights on my MLUC and MLLICNY policy(ies), including, but not limited to, the right to cancel or exchange the policy(ies) and receive the net cash surrender value or to choose one or more income plans on canceling the policy(ies), to apply for and receive policy loans, to collaterally assign the policy(ies), to change the allocation between and among the investment divisions of the Variable Account and, if applicable, the General Account of the company in which the policy(ies) are funded, to change the beneficiary and ownership designations of the policy(ies) and to make inquiries and receive information as to the cash value and death benefit of the policy(ies);

* *RE* (h) (ANNUITIES) to exercise all available ownership rights under my MLUC or MLLICNY contract(s), including, but not limited to, the right to select or change an annuitant, the annuity date, the annuity option or the allocation between and among the available investment options, to cancel or exchange the contract(s) and receive the net value, to make withdrawals from the contract(s), to collaterally assign the contract(s), to change the beneficiary designations or ownership designations of the contract(s) and to make inquiries and receive information as to the cash value and death benefit of the contract(s);

RE (i) (DURABILITY) APPLICABLE ONLY TO U.S. RESIDENT CLIENTS (INCLUDING U.S. RESIDENT ALIENS). (INITIAL ONLY IF YOU WANT YOUR AGENT TO CONTINUE TO ACT ON YOUR ACCOUNT(S) IF YOU BECOME MENTALLY INCAPACITATED.) This Durable Power of Attorney shall not be affected by the subsequent disability, incompetence or incapacity of the principal or by any lapse of time. (Maine residents see Statements below.) Also, see below for additional execution requirements for durability.

NOTE: ADDITIONAL EXECUTION REQUIREMENTS FOR DURABLE POWERS OF ATTORNEY EXIST FOR CLIENTS RESIDING IN CERTAIN STATES. THESE ADDITIONAL EXECUTION REQUIREMENTS ARE SET FORTH IN DETAIL AT THE TOP OF PAGE 8 OF THIS POWER OF ATTORNEY. IF THE CLIENT'S STATE OF RESIDENCE CHANGES AFTER THE CLIENT HAS EXECUTED THIS DURABLE POWER OF ATTORNEY, THE CLIENT SHOULD CONSULT WITH HIS OR HER OWN LEGAL COUNSEL TO DETERMINE IF THIS DURABLE POWER OF ATTORNEY SHOULD BE RE-EXECUTED.

I have inquired as to whether or not my agent and attorney-in-fact is registered (or is otherwise exempt from registration) with the Securities and Exchange Commission under the Investment Advisers Act of 1940 and with the appropriate state

authority of my state of residence, where such registration would be required. In addition, I have investigated the business experience, qualifications and reputation of my agent and attorney-in-fact and am satisfied with the experience, qualifications and reputation of my agent and attorney-in-fact.

If I have appointed two or more agents and attorneys-in-fact, I hereby authorize them to act alone and without the consent of the other agent or agents, with respect to the powers granted above. In addition, I hereby authorize MLPF&S, MLLIC and MLLICNY to restrict my account(s), annuity contract(s) and life insurance policy(ies) from further activity in the event the agents enter conflicting or inconsistent instructions. I understand that my account(s), annuity contract(s) and life insurance policy(ies) may remain restricted until written instructions are received from me, the principal, or until joint written instructions are submitted by all of my agents.

MLPF&S, MLLIC and MLLICNY accordingly are authorized and empowered to follow the instructions of my said agent and attorney-in-fact with respect to the powers set forth and initialed above with respect to my account(s) at MLPF&S and my MLLIC and MLLICNY annuity contract(s) and life insurance policy(ies), provided such instructions and transactions are permissible under the terms of my applicable account agreement(s) with MLPF&S and my MLLIC and MLLICNY annuity contract(s) and life insurance policy(ies), and I hereby ratify and confirm any and all transactions, trades or dealings effected in and for my MLPF&S account(s) and with regard to my MLLIC and MLLICNY annuity contract(s) and life insurance policy(ies) by my agent and attorney-in-fact, and agree to indemnify MLPF&S, MLLIC and MLLICNY, their affiliates, officers, agents and employees of MLPF&S, MLLIC, MLLICNY and their affiliates and hold them free and harmless from any loss, liability, or damage by reason of any such transaction, trade or dealing, or by reason of any other matter or thing done by MLPF&S, MLLIC and MLLICNY, their affiliates, officers, agents and employees of MLPF&S, MLLIC, MLLICNY and their affiliates in and for my account(s) at MLPF&S and with regard to my MLLIC and MLLICNY annuity contract(s) and life insurance policy(ies) pursuant to instructions received from my agent and attorney-in-fact.

This power of attorney, authorization and indemnity is in addition to (and in no way limits or restricts) any and all rights which MLPF&S, MLLIC and MLLICNY may have under any other agreement or agreements between MLPF&S, MLLIC and MLLICNY and me, and shall inure and continue in favor of MLPF&S, MLLIC and MLLICNY, their successors (by merger, consolidation or otherwise) and assigns.

This power of attorney, authorization and indemnity shall not be affected by lapse of time. It shall continue in full force and effect, and MLPF&S, MLLIC and MLLICNY, and their successors and assigns shall be indemnified in relying thereon, until MLPF&S, MLLIC and MLLICNY shall receive written notice of revocation thereof, signed by me; or in the event of the termination thereof by my death, or my mental incapacity (if I have not elected to make this Power of Attorney durable), until MLPF&S, MLLIC and MLLICNY shall have received actual notice thereof, and such revocation or termination shall in no way affect the validity of this Power of Attorney and my liability under the indemnity herein contained, with reference to any transaction initiated by my agent and attorney-in-fact, prior to the actual receipt by MLPF&S, MLLIC and MLLICNY of notice of such revocation or termination, as above provided.

To induce any transfer agent or other third party to act, I hereby agree that any transfer agent or other third party receiving a duly executed copy or facsimile of this Power of Attorney may act upon it, and that revocation or termination hereof shall be ineffective as to such transfer agent or other third party, unless and until actual notice or knowledge of such revocation or termination shall have been received by such transfer agent or other third party, and I for myself and for my heirs, executors, legal representatives and assigns, hereby agree to indemnify and hold harmless any such transfer agent or other third party from and against any and all claims that may arise against such transfer agent or other third party by reason of such transfer agent or third party having relied on this Power of Attorney.

I have read carefully the provisions of this Power of Attorney and understand that it authorizes my agent and attorney-in-fact, herein named, to exercise all rights and powers set forth and initialed above with respect to my account(s) with MLPF&S and my MLLIC and MLLICNY annuity contract(s) and life insurance policy(ies), and I understand that anything my agent may do in the exercise of such rights and powers is fully binding upon me.

I understand that MLPF&S, MLLIC and MLLICNY have not provided any advice that this Power of Attorney satisfies the requirements under the laws of the state in which it is to be effective, and if there is anything about this Power of Attorney that I do not understand, I should consult with my attorney for an explanation.

NOTICE:

This is an important legal document. Before executing this Power of Attorney you should know these important facts:

1. Depending on the powers you have authorized for your agent and attorney-in-fact, this document may provide the person you designated as your agent and attorney-in-fact with broad powers including, but not limited to, the management, transfer, withdrawal, gifting or sale of the assets in your MLPF&S account and of your MLLIC and MLLICNY annuity contract(s) and life insurance policy(ies).
2. If you have selected durability (paragraph (d) under Part I or paragraph (i) under Part II), your agent's and attorney-in-fact's authority will continue notwithstanding your subsequent mental disability or incapacity.
3. You have the right to revoke or terminate this Power of Attorney at any time and any such revocation or termination shall be effective upon receipt of written notice by MLPF&S, MLLIC and MLLICNY.
4. If there is anything about this Power of Attorney you do not understand, you should consult with your own attorney.

Dated this 25 day of November, 2002

WITNESSES* (one witness is always required, see below to determine if an additional witness is necessary):

Robert A. Chambliss
Signature of Client/Principal Robert A. Chambliss

(1) Robert A. Chambliss
(2) Wanda Bailey

Title (e.g., Trustee, President, etc.) - IF APPLICABLE

CERTIFICATE OF ACKNOWLEDGEMENT OF NOTARY PUBLIC
*(see below to determine if notarization is required)

STATE OF S.C.
COUNTY OF Richland } SS.

On this, the 25 day of November, 2002, before me, Heather Sandle,
a Notary Public in and for said County and State, personally appeared Robert A. Chambliss
(name of client/principal)

☒ Personally known to me or ☐ proven to me on the basis of satisfactory evidence to be the person whose
name is subscribed to the within instrument and who acknowledged to me that s/he executed the same.

(SEAL)

My Commission Expires January 25, 2006

WITNESS my hand and official seal.

Heather Sandle
Notary Public

I hereby represent that I am familiar with and have reviewed the investment goals, guidelines and objectives of the client, and that I will invest consistently with his or her stated goals, guidelines and objectives.

Sam Thompson
Signature of Agent Sam Thompson
Sam Thompson
Name of Agent's Employer, if any
Prudential SEC
Agent's Address

Agent's Social Security or Tax ID Number
Business Owner
Agent's Occupation
726-22028
Agent's Account Number(s), if MLPF&S, if any

***STATE SPECIFIC EXECUTION REQUIREMENTS FOR DURABLE POWERS OF ATTORNEY**

IF THE CLIENT/PRINCIPAL IS A RESIDENT OF:

ARIZONA: This Power of Attorney form may not be used by Arizona residents. Use the Code 1298, Arizona Durable Power of Attorney.

CALIFORNIA: This Power of Attorney form may not be used by California residents. Use the Code 6990, California Durable Power of Attorney.

CONNECTICUT: This Power of Attorney must be witnessed by two individuals.

FLORIDA: This Power of Attorney must be witnessed by two individuals.

INDIANA: This Power of Attorney must be notarized.

MAINE: This Power of Attorney must be notarized.

MISSOURI: This Power of Attorney must be notarized.

NEW HAMPSHIRE: This Power of Attorney must be notarized.

NEW JERSEY: This Power of Attorney must be notarized.

NORTH CAROLINA: The client must register this Power of Attorney in the office of the Register of Deeds in a county within the state, in order of preference, where (1) the client/principal has legal residence, (2) the client/principal owns property, or (3) the agent resides.

PENNSYLVANIA: This Power of Attorney form may not be used by Pennsylvania residents. Use the Code 0484, Pennsylvania Durable Power of Attorney.

TEXAS: This Power of Attorney does not require a witness's signature; however, it must be notarized.

SOUTH CAROLINA: This Power of Attorney must be witnessed by two individuals. Also, the client must record this Power of Attorney in the county where the client/principal resides at the time the instrument is recorded. In addition, the following probate clause must be completed by one of the above witnesses and notarized accordingly.

STATE OF SOUTH CAROLINA

COUNTY OF

Richland

PROBATE

PERSONALLY appeared before me the undersigned witness who, being duly sworn, says that she/he saw the above-named Principal sign, seal, execute, and deliver as his/her act and deed the foregoing Durable Power of Attorney for the purposes and uses herein described, and that she/he with the other witness above, at the request of the Principal and in the presence of each other, witnessed the execution thereof and subscribed their names as witnesses thereon.

Amanda Bailey
Witness

SWORN TO before me this 25th
date of Nov, 20 02

Heather Sander
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires January 25, 2008
My Commission Expires: _____

NOTE TO ALL MAINE RESIDENTS: Maine Law requires that this Durable Power of Attorney contain the following statements; however, certain sections of these statements may be inapplicable to this Durable Power of Attorney. If there is anything about this Durable Power of Attorney that you do not understand, you should consult with your own attorney.

**FOR ALL CLIENTS WHO ARE MAINE RESIDENTS, PLEASE READ THE
FOLLOWING STATEMENTS WHICH ARE REQUIRED BY MAINE REVISED
STATUTES, TITLE 18-A § 5-603(d)**

Notice to the Principal: As the "Principal", you are using this Durable Power of Attorney to grant power to another person (called the "Agent" or "Attorney-in-fact") to make decisions about your money, property or both and to use your money, property or both on your behalf. If this written Durable Power of Attorney does not limit the powers that you give your Agent, your Agent will have broad and sweeping powers to sell or otherwise dispose of your property and spend your money without advance notice to you or approval by you. Under this document, your Agent will continue to have these powers after you become incapacitated, and you may also choose to authorize your Agent to use these powers before you become incapacitated. The powers that you give your Agent are explained more fully in the Maine Revised Statutes, Title 18-A, sections 5-501 to 5-508 and in Maine case law. You have the right to revoke or take back this Durable Power of Attorney at any time as long as you are of sound mind. If there is anything about this Durable Power of Attorney that you do not understand, you should ask a lawyer to explain it to you.

Notice to the Agent: As the "Agent" or "Attorney-in-fact", you are given power under this Durable Power of Attorney to make decisions about the money, property or both belonging to the Principal and to spend the Principal's money, property or both on that person's behalf in accordance with the terms of this Durable Power of Attorney. This Durable Power of Attorney is valid only if the Principal is of sound mind when the Principal signs it. As the Agent, you are under a duty (called a "fiduciary duty") to observe the standards observed by a prudent person dealing with the property of another. The duty is explained more fully in Maine Revised Statutes, Title 18-A, sections 5-501 to 5-508 and 7-302 and in Maine case law. As the Agent, you are not entitled to use the money or property for your own benefit or to make gifts to yourself or others unless the Durable Power of Attorney specifically gives you the authority to do so. As the Agent, your authority under this Durable Power of Attorney will end when the Principal dies and you will not have the authority to administer the estate unless you are authorized to do so in accordance with the Maine Probate Code. If you violate your fiduciary duty under this Durable Power of Attorney, you may be liable for damages and may be subject to criminal prosecution. If there is anything about this Durable Power of Attorney or your duties under it that you do not understand, you should ask a lawyer to explain it to you.

Exhibit "F"



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TRUSTEE CERTIFICATION FORM
for the CMAA Account for Trusts and Individual Investor Account for Trusts

ACCOUNT #1 72610804 ACCOUNT #2 726-10807 ACCOUNT #3 _____

TO: MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, AND AFFILIATED COMPANIES

In consideration of your opening and maintaining one or more accounts for the trust named below, the undersigned trustee(s) certify, represent and warrant to you that the trust is in full force and effect, and that the following information is true and complete (Please see instructions for completing this form on the reverse side.):

1. Trust title: Robert Chamberling Trust
2. The trust is governed by the law of the state (or U.S. jurisdiction) of: SC
3. A. If a living trust, by agreement dated: 12-11-02

grantor name _____ date of birth _____

grantor name _____ date of birth _____

B. If a testamentary trust, name of decedent: _____

4. The trust is: ☒ Revocable and Amendable, or ☐ Irrevocable (Please check as applicable.)

5. The names of all current trustees are:

A. Swain Thompson
B. Robert Chamberling

C. _____
(Please note that the names of all current trustees are required in this space; in the spaces provided below, please provide the names, addresses and telephone numbers of two individuals to contact in the event a trustee resigns, dies or becomes incapacitated.)

Contact the following in the event a trustee resigns, dies or becomes incapacitated:

(name) _____ (address) _____ (telephone number) _____

(name) _____ (address) _____ (telephone number) _____

6. If a Merrill Lynch trust institution is named as successor trustee, please check ☐.

7. The trust or applicable law authorizes the trustee(s) and any authorized agent(s) to make distributions or transfers of trust funds, securities or other assets by check, debit card, credit card, or other means (including account-to-account transfers) to beneficiaries and others.

Specify any limitations: _____

(Please note that checking, debit cards and credit cards may not be available to accounts using certain services.)

8. The trust or applicable law authorizes the trustee(s) and any authorized agent(s) (i) to enter into cash transactions for the purchase and sale of securities of all types (including buying and writing covered equity put/call options and buying index put/call options) and other investments available through you, and (ii) to purchase and own life insurance and annuity contract(s) and to exercise all rights associated with the ownership of life insurance and annuity contract(s), including but not limited to, surrendering the contract, withdrawing available contract values, borrowing against contract values and otherwise encumbering the contract, assigning the contract and making designations of beneficiaries.

Specify any limitations: _____

9. For Grantor Revocable Living Trusts ONLY, the trust authorizes the following activities in addition to the distribution/transfer and investment powers in paragraphs 7 and 8 above (All current trustees, please initial those that apply.):

_____ A. Margin transactions (including short sales).

_____ B. Uncovered put/call options, spreads, straddles and combinations, whether index or equity
(Note: these services may be provided in a margin account only; see 9. A., above)

_____ C. Futures and options on futures

Specify any limitations: _____

10. The trust or applicable law authorizes the trustee(s) to delegate the performance of discretionary investment management duties to an investment adviser (or advisers) or other agent(s), as provided under any applicable investment management contract(s) or power(s) of attorney, and where applicable, to charge the compensation of such adviser(s) or other agent(s) against the trust, including any other related expenses. Where required under applicable law, the trustee(s) has filed necessary statements or elections with governmental authorities, and has provided timely written notice to all beneficiaries eligible to receive income from the trust of this delegation to an investment adviser (or advisers) or other agent(s). No person other than the trustee(s) has any investment authority over the trust's assets. The consent of no party other than the trustee(s) is required to vest investment discretion in an investment adviser (or advisers) or other agent(s) engaged by the trustee(s). All current trustees, please initial those that apply, and if applicable, attach investment management contract(s) or power(s) of attorney.

937711

COMPLETE AND RETURN TO MERRILL LYNCH
CLIENT ACCOUNT SERVICES COPY

03 JAN 29 PM 11:18:55

INSTRUCTIONS

This Trustee Certification Form is for use by trustees of any domestic living or testamentary trust to maintain one or more cash securities accounts and for trustees of grantor revocable trusts to maintain a margin account or engage in other investment activity described in paragraph 9. It is not to be used by employee benefit trusts, nominees or business trusts, any trust governed under the laws of any foreign jurisdiction, nor for any trust for which the beneficiaries are business organizations operating for profit such as corporations, partnerships, limited liability companies, associations or business trusts.

The Trustee Certification Form is also for use by trustees of living trusts or testamentary trusts for which the trustees delegate the performance of their discretionary duties to an investment adviser(s) or other agent(s) pursuant to the authority described in paragraph 10.

TRUST TITLE

The trust title should be in the form required for the registration of securities. The following are typical examples:

Testamentary Trust

John B. Smith TTEE U/W Mary T. Smith

Living Trust

John B. Smith TTEE U/A 7/15/78 by Mary T. Smith

Living Trust with Multiple Trustees

ABC Trust Co. TTEE, John B. Smith TTEE and Mary T. Smith TTEE U/A 8/15/88 by David W. Smith

Grantor Revocable Living Trust

John B. Smith TTEE U/A 10/3/90 by John B. Smith

NAMES OF TRUSTEES

The names of all current trustees must be included. If only one trustee is named, it shall be a representation that the trust has a single trustee. If a change of trustees occurs by death or otherwise, a new Trustee Certification Form must be provided. If there are more than three trustees, use an additional form.

POWER TO MAKE DISTRIBUTIONS/TRANSFERS

The authority of the trustees (and if applicable, the authority of any authorized agents) to make distributions/transfers shall be understood to include the power for the trustees and any authorized agents to draw upon the funds, securities or other assets in the account of the trust by check, debit card, credit card, or other means (including account-to-account transfers). If the trustees apply to participate in Merrill Lynch programs or services that include extensions of credit to the trust, the trustees hereby represent that the trust or applicable law authorizes the trustees to incur indebtedness to the extent required to qualify for such programs or services.

INVESTMENT POWERS

The authority of the trustees of any trust to purchase and sell securities and other investments including options to the extent described in paragraph 8 shall be understood to be unrestricted unless any limitations provided in the trust instrument are specified herein. The authority of the trustees of a grantor revocable living trust to maintain a margin account and to engage in other activities described in paragraph 9 shall be understood to be unrestricted unless any limitations provided in the trust instrument are specified herein. Merrill Lynch shall be entitled to assume the existence of trust power and the proper exercise of trust power by any trustee (and by any investment adviser or agent appointed by the trustees for the trust) without inquiry. Merrill Lynch shall have no responsibility to assure the proper application of trust funds, securities or other assets by any trustee (or by an agent appointed by the trustees for the trust).

GRANTOR REVOCABLE LIVING TRUSTS

A grantor revocable living trust is defined, for purposes of this Trustee Certification Form, as a trust where the grantor(s) named in paragraph 3 and at least one of the trustee(s) named in paragraph 5 are the same and all the trust's assets are in the United States. By signing this certification, the grantor(s)/trustee(s) of a grantor revocable living trust represent and warrant that they have full power and authority to invade the principal of the trust, to direct the distribution/transfer of trust assets, and to revoke and amend the trust.

INVESTMENT ADVISERS AND AGENTS

If the trustees have designated an investment adviser(s) or other agent outside of Merrill Lynch's programs or services with discretionary authority over the trust's funds, securities or other assets, a copy of the investment management contract(s) or power(s) of attorney signed by all of the trustees must also be provided (refer to paragraph 10).

SIGNATURES OF TRUSTEES

All trustees must sign this Trustee Certification Form. If there are more than three trustees, use an additional form. If only one trustee signs, it shall be a representation that the trust has a single trustee. Where initials are required in paragraphs 9 and 10, all trustees must initial. In addition, all trustees are required to sign any account opening documents.

NOTARIZATION

Notarization of all trustees' signatures by a notary public is required.

Merrill Lynch reserves the right to request a complete copy of the trust agreement or will at any time. Merrill Lynch may require written authorization of all co-trustees in some circumstances even though the trust instrument may allow a trustee to act individually and without the consent of other co-trustees for all purposes.

A. An investment adviser(s) has been engaged through Merrill Lynch's programs and services.

(All current trustees, if applicable, please initial.)

B. An investment adviser(s) or other agent(s) not affiliated with Merrill Lynch's programs or services has been granted discretionary authority over the trust. You are authorized to act upon the instructions of any such investment adviser(s) or other agent(s) for the following (All current trustees, please initial those that apply, and if applicable, attach investment management contract(s) or power(s) of attorney):

I. _____ For the purchase and sale of securities.

II. _____ For distributions or transfers of trust funds, securities or other assets by check, debit card, credit card or other means (including account-to-account transfers) to beneficiaries and others.

11. The trustee(s) represents, warrants and agrees that Merrill Lynch is authorized for all purposes regarding the trust's account(s) to follow the instructions of any one trustee. If authorized by the trustee(s), Merrill Lynch may also follow the instructions of any investment adviser(s) or any other agent(s). If there is more than one trustee, the trustee(s) agree that Merrill Lynch is entitled to conclusively presume that any one trustee who provides instructions to Merrill Lynch has obtained the agreement of the other trustees required by the trust instrument or applicable law. If there is more than one trustee, the trustee(s) further agree that it is the responsibility of the trustee(s) to agree among themselves before giving any instructions to Merrill Lynch for the trust's account(s). Merrill Lynch shall be entitled to assume the existence of trust power and the proper exercise of trust power by any trustee without inquiry. Merrill Lynch shall have no responsibility to assure the proper application of trust funds, securities or other assets by any trustee.
12. The trustee(s) represents and warrants that none of the beneficiaries of the trust are business organizations operating for profit such as corporations, partnerships, limited liability companies, associations or business trusts.
13. The trustee(s) agrees jointly and severally to indemnify Merrill Lynch and hold it harmless from any liabilities and expenses that arise from following the instructions of any trustee(s), or of any authorized investment adviser(s) or agent(s), or that otherwise arise from Merrill Lynch's reliance on the representations, warranties and agreements included in this certification which prove to be inaccurate, incomplete or untrue. The trustee(s) also agrees to provide a new Trustee Certification Form to Merrill Lynch in the event that any of these representations, warranties, agreements, or certifications change, or if they may no longer be relied upon by Merrill Lynch, and that this agreement to indemnify Merrill Lynch shall survive termination of the trust or of the account(s).
14. The trustee(s) agrees that you may rely upon this certification (and any copies thereof) until you and any investment adviser(s) or other agent(s) receive a new certification notifying you of any changes involving the trust. The trustee(s) also agrees that this certification supercedes any prior certifications, documents, or information provided to you regarding the trust, and that the INSTRUCTIONS printed on the reverse side are an integral part of this Trustee Certification Form, and are specifically incorporated herein.

SIGNATURES OF TRUSTEES

Agreed and Certified to this 29 day of February year of 2003

NOTARIZATION

State of SC County of Richland On 1-29-03

before me, Heather Semler, personally appeared, John A. Thomas personally known to me - OR -

☐ proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person or entity upon which the person acted, executed the instrument.

WITNESS my hand and official seal.

Heather Semler

My Commission Expires January 2, 2009

(signature of notary)

State of _____ County of _____ On _____

before me, _____ personally appeared, _____ ☐ personally known to me - OR -

☐ proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person or entity upon which the person acted, executed the instrument.

WITNESS my hand and official seal.

(signature of notary)

State of _____ County of _____ On _____

before me, _____ personally appeared, _____ ☐ personally known to me - OR -

☐ proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person or entity upon which the person acted, executed the instrument.

WITNESS my hand and official seal.

(signature of notary)

ACCOUNT #1 _____ ACCOUNT #2 _____ ACCOUNT #3 _____

937711

COMPLETE AND RETURN TO MERRILL LYNCH
CLIENT ACCOUNT SERVICES COPY

Code# 16013-0900

**RAISED
SEAL**

Merrill Lynch Client Relationship Agreement

MERRILL LYNCH RETIREMENT PLAN

32610804 + R726-10607

CLIENT

Client Name: Robert Chamberlain Trust Client ID Number: _____
 Social Security Number: 576195663 Date of Birth: 1/1/1943 Social Security Number: _____
 Mailing Address: PO Box 700 Mailing Address: Robert Chamberlain - Trust
 City, State, ZIP Code: Anderson, SC 29602 City, State, ZIP Code: _____

NOTE: If you are subject to backup withholding due to notification by the IRS, you must cross out the portion of the Tax Certification section below as instructed.
 This check of a box is the taxpayer identification number is NOT a Social Security Number.

ACCOUNTS: CMAA, CMAA BANKING, CMAA SUBACCOUNT, OR IRA. Please indicate the account type by checking the appropriate box.

PLEASE CHECK IF APPLICABLE:

First Account: ☒ CMAA ☐ CMAA BANKING ☐ CMAA SUBACCOUNT ☐ IRA ☐ OTHER ☐ TRUST
 Second Account: ☒ CMAA ☐ CMAA BANKING ☐ CMAA SUBACCOUNT ☐ IRA ☐ OTHER ☐ TRUST
 Third Account: ☐ CMAA ☐ CMAA BANKING ☐ CMAA SUBACCOUNT ☐ IRA ☐ OTHER ☐ _____

NOTE: If you are opening a CMAA account and the Second Banking account, please refer to paragraph 10 for annual fee information.

UTMA OR UGMA (If you are opening a UTMA or UGMA account, please complete this section.)

UTMA OR UGMA

First UTMA or UGMA Account: _____
 Second UTMA or UGMA Account: _____
 Third UTMA or UGMA Account: _____

RETIREMENT (If you are opening a Retirement account now, please complete this section.)

First Retirement Account: ☐ CMAA ☐ CMAA BANKING ☐ CMAA SUBACCOUNT ☐ IRA ☐ OTHER ☐ _____
 Second Retirement Account: ☐ CMAA ☐ CMAA BANKING ☐ CMAA SUBACCOUNT ☐ IRA ☐ OTHER ☐ _____

CLIENT 1 BENEFICIARIES for a Retirement account

Primary Beneficiary(ies): I hereby designate the person(s) named below as primary beneficiary(ies) to receive payment of the balance of my account upon my death.

Order	Name	Date of Birth	Social Security No. or Taxpayer Identification No.	Percentage
1	_____	_____	_____	_____
2	_____	_____	_____	_____
3	_____	_____	_____	_____

Contingent Beneficiary(ies): If there is no primary beneficiary living at the time of death, I hereby specify that the balance is to be distributed to my contingent beneficiary(ies) named below:

Order	Name	Date of Birth	Social Security No. or Taxpayer Identification No.	Percentage
1	_____	_____	_____	_____
2	_____	_____	_____	_____
3	_____	_____	_____	_____

CLIENT 2 BENEFICIARIES for a Retirement account

Primary Beneficiary(ies): I hereby designate the person(s) named below as primary beneficiary(ies) to receive payment of the balance of my account upon my death.

Order	Name	Date of Birth	Social Security No. or Taxpayer Identification No.	Percentage
1	_____	_____	_____	_____
2	_____	_____	_____	_____
3	_____	_____	_____	_____

Contingent Beneficiary(ies): If there is no primary beneficiary living at the time of death, I hereby specify that the balance is to be distributed to my contingent beneficiary(ies) named below:

Order	Name	Date of Birth	Social Security No. or Taxpayer Identification No.	Percentage
1	_____	_____	_____	_____
2	_____	_____	_____	_____
3	_____	_____	_____	_____

Tax Certification and Acknowledgments

Under penalty of perjury, I certify that the taxpayer identification number(s) I have shown on this form is the correct taxpayer identification number for the account(s) to be opened for me and that I am not subject to backup withholding because (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all income and the amount, or (c) the IRS has notified me that I am no longer subject to backup withholding, and (2) that I am a U.S. person (including a U.S. resident alien), understand that I must report all items (a) above if I have been notified by the IRS that I am subject to backup withholding because I have failed to report all income and the amount, or (b) above if I have been notified by the IRS that I am subject to backup withholding.

BY SIGNING BELOW, I AGREE TO THE TERMS OF THE MERRILL LYNCH CLIENT RELATIONSHIP AGREEMENT ON THE REVERSE SIDE AND:

1. THAT UNLESS I HAVE CHECKED "DECLINE MARGIN LENDING" IN THE "ACCOUNTS" SECTION ABOVE, MARGIN LOAN MAY BE OFFERED TO ME FROM TIME TO TIME, AND CERTAIN OF MY SECURITIES MAY BE LOANED TO YOU OR LOANED OUT TO OTHERS, PURSUANT TO SECTION 2, PAGE 2 OF THE CLIENT RELATIONSHIP AGREEMENT AND THE APPLICABLE PARAGRAPHS OF THE SECURITIES ACCOUNT AGREEMENT.

2. THAT, IN ACCORDANCE WITH SECTION 8, PAGE 8 OF THE CLIENT RELATIONSHIP AGREEMENT, I AM AGREEING IN ADVANCE TO ARBITRATE ANY CONTROVERSIALS THAT MAY ARISE WITH YOU, AND

3. THAT, IF I AM A TRUSTEE OR OTHER PRINCIPAL, THE TRUST OR ESTATE IS ELIGIBLE FOR THE MERRILL LYNCH BANKING ADOPTIVE PROGRAM (IF APPLICABLE).

THE INTERNAL REVENUE SERVICE DOES NOT REQUIRE MY CONSENT TO ANY PROVISION OF THIS DOCUMENT OTHER THAN THE CERTIFICATIONS REQUIRED TO AVOID BACKUP WITHHOLDING.

Signature: Robert Chamberlain Trust Date: 1-24-03 Title: Trustee
 Signature: James J. Trust Date: 1-24-03 Title: Trustee
 Signature: Thompson Date: 1-24-03 Title: Trustee

Client Name: Do not return to Merrill Lynch. Retain for your records.

Code 10095004-1107

UNPUBLISHED OPINION



1 of 1 DOCUMENT

ELIJAH R. MCCUTCHEON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CARMELA MCCUTCHEON, Plaintiff, vs. THI OF S.C. AT CHARLESTON, LLC, d/b/a DRIFTWOOD REHABILITATION AND NURSING CENTER, n/k/a RIVERSIDE HEALTH AND REHAB, Defendant.

No. 2:11-CV-02861

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

2011 U.S. Dist. LEXIS 144288

**December 15, 2011, Decided
December 15, 2011, Filed**

COUNSEL: [*1] For Elijah R McCutcheon, Individually and as Personal Representative of the Estate of Carmela McCutcheon, Plaintiff: Christopher J McCool, Melissa Ashley Fried, Joye Law Firm, Charleston, SC.

For Thi of SC at Charleston LLC, doing business as Driftwood Rehabilitation and Nursing Center, now known as Riverside Health and Rehab, Defendant: Donald Jay Davis, Jr, James Edward Scott, IV, William Leroy Howard, Sr, Young Clement Rivers and Tisdale, Charleston, SC; Robert Buchanan Hawk, Young Clement Rivers, LLP, Charleston, SC.

JUDGES: DAVID C. NORTON, CHIEF UNITED STATES DISTRICT JUDGE.

OPINION BY: DAVID C. NORTON

OPINION

ORDER

This matter is before the court on a motion to dismiss and to compel arbitration brought by defendant THI of South Carolina at Charleston, LLC, d/b/a Driftwood Rehabilitation and Nursing Center, n/k/a Riverside Health and Rehab ("Driftwood"). For the reasons set forth below, the court grants defendant's motion.

I. BACKGROUND

Elijah R. McCutcheon, individually and as personal representative of the estate of Carmela B. McCutcheon, originally filed suit on September 15, 2011, in the South Carolina Court of Common Pleas for the Ninth Judicial District. Driftwood filed a notice of removal in federal court [*2] on October 20, 2011, asserting diversity jurisdiction under 28 U.S.C. § 1332. Driftwood then answered the complaint on October 24, 2011. On November 1, 2011, Driftwood filed a motion to dismiss and to compel arbitration. On November 30, 2011, McCutcheon filed a response in opposition. Driftwood filed a reply on December 6, 2011.

Plaintiff brings this action against Driftwood for: negligence; negligence per se; breach of contract; fraud and misrepresentation; violation of the South Carolina Unfair Trade Practices Act; negligence - wrongful death; and negligence - survivorship. The dispute arises from Carmela McCutcheon's care while residing at the Driftwood Rehabilitation and Nursing Center in Charleston.

Upon her admittance into the facility, Carmela McCutcheon and Driftwood entered into an Admissions Agreement and an Arbitration Agreement. Def.'s Mot. 2. These documents were signed by Elijah McCutcheon, Carmela McCutcheon's husband, as Carmela's "'Durable Power of Attorney for Health Care' / 'Legal Guardian' / 'Responsible Party.'" See id. Ex. A. The Arbitration Agreement provided in part,

[I]n the event of any controversy or dispute between the parties arising out

of or relating to [*3] Health Care Center's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Health Care Center, or to the provisions of care or services to Resident, included but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Media Rules.

...

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

....

By his/her signature below, the executing party represents that he/she has the authority to sign [*4] on the Resident's behalf so as to bind the Resident as well as the Representative.

Id. (emphasis added).

II. DISCUSSION

Driftwood moves to compel arbitration under Section 4 of the Federal Arbitration Act ("FAA"), which provides in part that a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . [A]ny doubts concerning the scope of arbitrable issues should be resolved in favor

of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 23-24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). Section 2 of the FAA states that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

A court shall compel arbitration pursuant to the FAA if a party demonstrates:

(1) the existence of a dispute between the parties, (2) a written agreement that [*5] includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute.

Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005) (internal quotation marks omitted). Plaintiff only contests the second and third elements of the four-part test, arguing that the dispute is not arbitrable because there is no valid and enforceable arbitration agreement, and that the FAA does not apply because the transaction does not "in fact" involve interstate or foreign commerce. While federal law governs the arbitrability of disputes, state law governs issues regarding contract formation. *Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005). Because this case involves the question of whether the Arbitration Agreement was a valid contract, the court looks to South Carolina law, as the agreement was entered into in South Carolina and contemplated services to be rendered in South Carolina.

A. Existence of Enforceable Arbitration Agreement

Driftwood argues plaintiff should be equitably estopped [*6] from denying the validity of the Arbitration Agreement, and that Carmela McCutcheon is bound to the agreement as a third party beneficiary. Plaintiff responds that the arbitration agreement is not enforceable.

1. Equitable Estoppel

First, Driftwood argues plaintiff should be equitably estopped from denying that Elijah McCutcheon had authority to bind Carmela McCutcheon. "[T]he doctrine of estoppel is equitable in nature." *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54, 58 (S.C. 2011). "Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do." *Parker v. Parker*, 313 S.C. 482, 443 S.E.2d 388, 391 (S.C. 1994). "[N]o party suing

on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein." *United States v. Bankers Ins. Co.*, 245 F.3d 315, 323 (4th Cir. 2001); see *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene [*7] the purposes underlying enactment of the Arbitration Act.").

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, they constitute the entire agreement between the parties. See *Kluttz Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 232 S.E.2d 20, 24 (S.C. 1977) ("The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together. The theory is that the instruments are effectively one instrument or contract."). Plaintiff attempts to hold Driftwood liable for alleged breach of certain contractual terms while simultaneously denying the enforceability of other terms. Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, plaintiff still takes inconsistent positions regarding these contracts, which were executed by the same parties under the same purported authority. It would be inequitable, for example, to allow [*8] plaintiff to assert that Elijah McCutcheon had authority to sign the Admissions Agreement on behalf of Carmela McCutcheon, but lacked such authority to sign the Arbitration Agreement. For these reasons, the court finds that plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

2. Third Party Beneficiary

Alternatively, Driftwood argues Carmela McCutcheon is an intended third party beneficiary and is therefore bound by the Arbitration Agreement. "A third party beneficiary is a party that the contracting parties intend to directly benefit." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485, 488 (S.C. 2005). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." *Bob Hammond Const. Co. v. Banks Constr. Co.*, 312 S.C. 422, 440 S.E.2d 890, 891 (S.C. Ct. App. 1994). Moreover, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be

bound by, an arbitration provision within a contract executed by other parties." *Int'l Paper Co.*, 206 F.3d at 416-17 (emphasis [*9] added).

Carmela McCutcheon's care was the essential purpose of the agreement, as she is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Carmela McCutcheon as resident of the facility, and Driftwood as the caregiver. As such, Carmela McCutcheon was an intended beneficiary to the contract, and the court finds that the arbitration provision was binding on her and remains binding on her estate. See *THI of S.C. at Columbia, LLC v. Wiggins*, No 11-888, 2011 U.S. Dist. LEXIS 103638, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011) ("Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate."); *Cook v. GGNCS Ripley, LLC*, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

3. Unconscionability

Plaintiff [*10] argues the arbitration contract is unconscionable and should not be enforced. "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242, 245 (S.C. 1996).

In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 669 (S.C. 2007) (citation omitted).

Plaintiff argues the Arbitration Agreement is unconscionable because: it is not "geared towards achieving an unbiased decision by a neutral decision-maker"; Elijah McCutcheon was disadvantaged in terms of bargaining power and sophistication; [*11] and the clause stating that the agreement is governed by interstate commerce is inconspicuous and constitutes an element of surprise. Pl.'s Resp. 10-11. First, the law does not require that an arbitration agreement specifically state that the arbitrator will be neutral. Even though the Arbitration Agreement does not contain the terms "neutral" or "unbiased," it provides that, in the event the parties fail to agree on an arbitrator, the court will select one. See Def.'s Mot. Ex. A. In addition, the Arbitration Agreement here does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Driftwood alone. Cf. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999). Next, any lack of sophistication on the part of Elijah McCutcheon does not overcome the fairness of the terms in the agreement itself. See *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360, 365 n.5 (S.C. 2001) ("[I]nequality of bargaining power alone will not invalidate an arbitration agreement."). Finally, the clause stating that the agreement is governed by interstate commerce was set in normal text, rather than obscured in smaller text [*12] or in a footnote. See Def.'s Mot. Ex. A. "[A] person who can read is bound to read an agreement before signing it," *Munoz*, 542 S.E.2d at 365, and the law generally presumes that a party to a contract has read and understood the contract's terms. *Simpson*, 644 S.E.2d at 670. The clause relating to interstate commerce did not constitute an unfair surprise. For these reasons, the court finds that the Arbitration Agreement was not unconscionable.¹

1 Plaintiff also argues that an enforceable arbitration agreement does not exist because Elijah McCutcheon had neither apparent agency authority nor statutory authority to bind Carmela McCutcheon under the contract. Because the court holds that plaintiff is equitably estopped from denying the validity of the Arbitration Agreement, and that Carmela McCutcheon was a third party beneficiary and the Arbitration Agreement remains binding on her estate, the court need not reach plaintiff's additional arguments.

B. Applicability of Federal Arbitration Act

Plaintiff argues that even if the Arbitration Agreement is enforceable, the FAA does not apply because the transaction between McCutcheon and Driftwood does not "in fact" involve interstate or foreign commerce. [*13] For an arbitration agreement to be subject to the

FAA, it must involve interstate commerce. 9 U.S.C. § 2. "The FAA has an expansive reach, similar to that of the *Commerce Clause*, such that an arbitration clause merely 'affecting' interstate commerce would be covered by the statute." *Wiggins*, No. 11-888, 2011 U.S. Dist. LEXIS 103638, 2011 WL 4089435, at *1 n.3 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995)). "Congress' *Commerce Clause* power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that "the services and reimbursement thereof effects a transaction that involves interstate commerce." Def.'s Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate commerce. *Wood*, 429 F.3d at 87 (emphasis added) (noting that courts must consider "the relationship of the transaction, which is evidenced by the agreement, to [*14] interstate or foreign commerce"). Even without this stipulation in the Arbitration Agreement, the FAA still applies because the type of nursing home care involved here affects interstate commerce. Driftwood's Administrator, Jim Thomas, submitted an affidavit wherein he attested that food is supplied to Driftwood, located in South Carolina, by Sysco Corporation, which is headquartered in Texas. Def.'s Mot. Ex. E, ¶ 6. Thomas further stated that supplies used at Driftwood are purchased from manufacturers in California, Colorado, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, and Wisconsin. *Id.* at ¶¶ 7-13. These supplies must be shipped across state lines to reach Driftwood's facility. Finally, Driftwood participates in the federal Medicare and Medicaid programs. *Id.* at ¶ 14. The court finds this evidence sufficient to fulfill the interstate commerce requirement.

Plaintiff cites to *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (S.C. 1993), as support for his argument that the transaction at issue does not involve interstate commerce. In *Timms*, the South Carolina Supreme Court found that an affidavit from the administrator of a health care center, in which the administrator averred that [*15] the center engaged in interstate commerce, was "insufficient to form the basis of the contract between the parties." *Id.* at 644. *Timms* is distinguishable from the present case, because the Arbitration Agreement signed by plaintiff specifically stated that the underlying transaction involves interstate commerce. Thus, the Arbitration Agreement "on its face evidences commerce." *Id.* The court finds that the FAA applies in this case.

III. CONCLUSION

For the foregoing reasons, the court **GRANTS** defendant's motion to compel arbitration.

The court dismisses this matter, but retains jurisdiction to select an arbitrator in the event that the parties cannot reach a mutual decision.

AND IT IS SO ORDERED.

/s/ David C. Norton

DAVID C. NORTON

CHIEF UNITED STATES DISTRICT JUDGE

December 15, 2011

Charleston, South Carolina

CERTIFICATE OF SERVICE

This is to certify that I, the undersigned employee of Moore & Van Allen, PLLC, have this 10th day of September, 2012 served counsel of record in the foregoing matter with a copy of DEFENDANT MERRILL LYNCH, PIERCE FENNER & SMITH, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND COMPEL ARBITRATION by regular U.S. mail, with sufficient postage affixed thereon and addressed as follows:

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and

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STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

James Robert Malloy,

Plaintiff,

vs.

Swain N. Thompson, Jr., Merrill Lynch,
Pierce, Fenner & Smith, Inc., Joseph T. Argo,
and Greene and Company, L.L.P.,

Defendants.

In the Matter of:

Estate of Robert L. Chamblee

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

2012-CP-04-01433

**PLAINTIFF'S CONSOLIDATED
MEMORANDUM IN OPPOSITION TO
SWAIN N. THOMPSON, JR.'S MOTION
TO DISMISS**

and

**REPLY TO SWAIN N. THOMPSON, JR.'S
RETURN TO PLAINTIFF'S MOTION
FOR CONSOLIDATION OF ACTION
UNDER RULE 42(A)**

This action arises out of Defendant Thompson's misappropriation, with the assistance of the other named defendants, of the assets of Robert L. Chamblee ("Decedent") to a trust with Thompson as trustee and remainder beneficiary while Decedent was incompetent. The Complaint alleges fourteen (14) causes of action as follows:

1. Action to set aside trust due to lack of mental capacity;
2. Action to set aside trust due to undue influence;
3. Action to set aside trust due to mistake;
4. Action to set aside transfers to trust;
5. Fraud (against Thompson);
6. Conversion (against Thompson);
7. Quantum meruit (against Thompson);
8. Constructive trust (against Thompson);
9. Resulting trust (against Thompson);
10. Breach of fiduciary duty (against Thompson);
11. Tortious interference with expected inheritance and gifts (against Thompson);
12. Attorney fees and costs (against Thompson);
13. Aiding and abetting tortious interference with expected inheritance and gifts (against Merrill Lynch, Greene and Company, and Argo); and
14. Conspiracy (against all defendants).

In 2010 the Plaintiff, James Robert Malloy, filed an initial action against Defendant Swain N. Thompson, Jr., in the Probate Court of Anderson County asserting counts 1—12 above and also three causes of action to set aside Decedent's will due to incompetency, undue influence and mistake. The Plaintiff thereafter duly petitioned to have the actions removed to circuit court pursuant to S.C. Code Ann. § 62-1-302. Defendant Thompson answered the Complaint and moved this Court claiming it lacked subject matter jurisdiction to hear all the causes of actions, except for the setting aside of the will and trust, on the basis that such actions should be heard by the Circuit Court in its original jurisdiction. The Plaintiff subsequently moved before this Court in the initial action to amend the Complaint to add three party defendants – Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), Greene & Company, LLP ("Greene"), and Joseph T. Argo ("Argo") – and to add two additional causes of action for aiding and abetting tortious interference with expected inheritance and gifts and conspiracy.

Defendant Thompson contested the amendment of the Complaint on the basis that this Court somehow lacked subject matter jurisdiction to hear causes of action 4 through 14 above in a removal petition from Probate Court. Defendant Thompson argued that counts 4 – 14 must be filed in this court's original jurisdiction in order for this court to be able to adjudicate those claims. The Plaintiff's Motion to Amend was argued before this Court on March 12, 2012 and its disposition is pending at this time.

On April 16, 2012, the Plaintiff filed the present action which included the above-listed 14 causes of action contained in the proposed Amended Complaint in the first case.¹ Defendant Thompson has again moved to dismiss the first ten causes of action in this case claiming the Court of Common Pleas lacks subject matter jurisdiction over these claims even when filed in

¹ Counts 1 – 3 of the first suit, to set aside the decedent's purported last will, are not included in this second action since exclusive jurisdiction originates in probate court and comes to the circuit court only on removal. S.C. Code Ann. § 62-1-302.

this court's original jurisdiction.

1. This Court has subject matter jurisdiction over all causes of action.

Defendant Thompson complains that this Court lacks jurisdiction to hear the first four causes of action for setting aside the subject trust and asset transfers thereto based on S.C. Code Ann. §§ 62-1-302(a)(1) and (3) and 62-7-201. While S.C. Code Ann. § 62-7-201(a) grants the probate court exclusive jurisdiction of proceedings concerning the *internal* affairs of trusts, S.C. Code Ann. § 62-7-201(c) provides concurrent jurisdiction between the probate and circuit courts regarding external trust affairs. This action does not concern the internal affairs of the purported trust but instead concerns whether the trust itself is void *ab initio*. The reporter's comments to § 62-7-201 explain that proceedings concerning the internal affairs of trusts "are matters of dispute primarily between and among the trustees and the beneficiaries of the trust, i.e., matters internal to trust administration . . ." S.C. Code Ann. § 62-7-201, *comm*. The purported trust of Decedent designates Defendant Thompson as both co-trustee and beneficiary. Clearly this suit is not one between Defendant Thompson as trustee and himself as beneficiary. This is an action by the Plaintiff James Malloy, a complete stranger to the trust, contesting the validity of the trust set up by Defendant Thompson, the use of the trust as a vehicle to interfere with Plaintiff's expected inheritance and gifts, and the aiding and abetting of the same by Defendants Merrill Lynch, Greene, and Argo.

In contrast to subsection (a) of S.C. Code § 62-7-201, subsection (c) of § 62-7-201 provides that the Circuit Court has concurrent jurisdiction with the probate court over external affairs of trusts as follows:

The probate court has concurrent jurisdiction with the circuit courts of this State of actions and proceedings concerning the external affairs of trusts. These include, but are not limited to, the following proceedings:

- (1) determine the existence or nonexistence of trusts created other than by will; . . .
- (3) other actions and proceedings involving trustees and third parties.

S. C. Code Ann. § 62-7-201(c)(1) & (3).

Plaintiff in this case challenges the existence of the December 11, 2002 trust as a legitimate trust. Moreover, the Trust was created *inter vivos* and not under Decedent's will. This action fits the definitions of proceedings in §62-7-201(c)(1). Furthermore, this case is a dispute between the purported trustee Thompson and Plaintiff, who, being neither a trustee, beneficiary nor settlor, is a third party to the trust. The suit thus also meets the criteria of external trust affairs of §62-7-201(c)(3). Therefore, this Court has subject matter jurisdiction to hear the actions to set aside the Trust of Robert L. Chamblee as stated in counts 1 – 4.

On counts 5 – 10 for the causes of action for fraud, conversion, quantum meruit, constructive trust, resulting trust and breach of fiduciary duty, Defendant Thompson has moved for dismissal claiming again a lack of subject matter by this court and that Plaintiff is not the real party in interest under SCRCP Rule 17(a). Defendant Thompson previously asserted this Court lacks subject matter jurisdiction to hear those causes of action on removal from Probate Court. He argued instead that this Court must hear those actions pursuant to an original filing in this Court.² That is what the Plaintiff has done. The Defendant cannot seriously argue that this Court does not have subject matter jurisdiction over these causes of action as this Court is a court of general jurisdiction. See, S.C. Const. art. V, § 11 (“The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive

² See Defendant's Return in Opposition to Plaintiff's Motion to Amend Plaintiff's Complaint, filed Oct. 26, 2011, pgs. 2-4 (“...clearly these causes of action [for fraud, conversion, *quantum meruit*/unjust enrichment, constructive trust, resulting trust, tortious interference with inheritance and breach of fiduciary duty] could not have been asserted in the Probate Court because Probate Court has no subject matter jurisdiction....[I]n the event formal testacy and/or appointment are denied and the trust agreement is invalidated, the Plaintiff may maintain such action in the Court of Common Pleas as may be needed to address any alleged wrongdoing...All other issues that may exist between or among the parties in question must be decided in some other forum under different circumstances depending on the outcome of the pending action.”)

jurisdiction shall be given to inferior courts . . ."). Defendant Thompson is claiming that this court does not have jurisdiction to hear such matters on removal from Probate Court or in its original jurisdiction. Clearly, this Court has the authority to hear such claims through one or the other avenues to the Circuit Court (removal or original filing) or through both avenues.

2. Plaintiff is the real party in interest to bring his claims.

Malloy was named as the sole beneficiary of Decedent's 1999 will -- the last will Decedent executed prior to his diagnosis of Alzheimer's disease -- and was the primary beneficiary of Decedent's preceding wills. Compl. ¶¶ 29-30. Plaintiff has alleged that Defendant Thompson fraudulently induced Decedent to set up and transfer funds into a trust for Defendant Thompson's benefit. Compl. ¶¶ 71-75. The will and trust completely and radically altered Decedent's long-time estate plan. Compl. ¶71. As both trustee and beneficiary, Thompson cannot conduct a fair and unbiased investigation of himself. See Compl. ¶ 93. It would be unreasonable to expect him to bring an action against himself.

If a trustee refuses or fails to initiate a meritorious lawsuit against a tortfeasor, the beneficiary may file a cause of action to protect the beneficiary's own interests. See 76 Am.Jur.2d Trusts § 612. South Carolina has long recognized this principle that a trust beneficiary may bring a derivative claim on behalf of the trust where the trustee or third persons join in the wrong and receive a benefit therefrom. See Neal v. Bleckley, 51 S.C. 506, 29 S.E. 249, 257 (1898). In reiterating a beneficiary's right to bring a derivative claim, the South Carolina Supreme Court stated:

If a trustee refuse, after demand, to bring action in behalf of the trust estate or the beneficiaries thereof, or if he has an adverse interest or has conspired to defeat the trust, the beneficiary may himself bring the action against the third person, joining the trustee as a defendant. In so doing, the beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust.

Bailes v. S. Ry. Co., 227 S.C. 176, 182-83, 87 S.E.2d 481, 484 (1955); see also Restatement (Second) of Trusts §282 (1959) (“If the trustee improperly refuses or neglects to bring an action against the third person, the beneficiary can maintain a suit in equity against the trustee and the third person.”); see also Pillsbury v. Karmgard, 27 Cal.Rptr.2d 491, 22 Cal.App.4th 743, 756 (1994) (recognizing that California’s “real party in interest” statute has not modified common law of beneficiary standing under Restatement (Second) of Trusts § 282).

Since Plaintiff as beneficiary under Decedent’s estate plan may derivatively bring an action on behalf of the trust, he is a real party in interest under Rule 17(a).

3. All Plaintiff’s claims are related to Decedent’s estate and should be consolidated.

Defendant Thompson previously pointed out that all other issues among the parties are “depend[ent] on the outcome of the pending action.” Return in Opposition to Plaintiff’s Motion to Amend Plaintiff’s Complaint, p. 4. With the outcome of Plaintiff’s various claims being dependent on each other and on the will contest in Decedent’s estate, all the claims are clearly related to the estate of the Decedent. See S.C. Code Ann. § 62-1-302(a)(1) (“probate court has exclusive original jurisdiction over all subject matter related to...estates of decedents...”). Section 62-7-302(d)(1), (3) and (5) then provides that these related jury-triable causes of action may be removed to circuit court. Since all of the Plaintiff’s claims in case number 2010-CP-04-1845 and this action are clearly related to Decedent’s estate, they should be consolidated.

Defendant Thompson moved under SCRCP Rule 12(b)(8) to dismiss the Complaint in its entirety because the causes of action in case number 2010-CP-04-1845 involve the same issues. As explained above, Defendant Thompson has contested this court’s subject matter jurisdiction to hear these same issues as part of a removal action. The Complaint in this filing simply protects and insures this court’s subject matter jurisdiction over all the causes of action herein. To the

extent there is any overlap of subject matter jurisdiction between the two cases, the most logical remedy is to consolidate the two actions under Rule 42(a) as Plaintiff has moved. Dismissal under Rule 12(b)(8) is a drastic remedy requiring that the Rule should be interpreted narrowly. See Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 322, 701 S.E.2d 39, 45 (Ct. App. 2010) (“Accordingly, we interpret the rule narrowly such that *the claim must be precisely or substantially the same in both proceedings* in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8).”) (quoting Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 105-106, 674 S.E.2d 524, 531-532 (Ct.App. 2009)(emphasis in original). Here, the claims before the circuit court arrived by two different methods – in one case by removal from probate court and the other by filing in this court’s original jurisdiction – and thus are not precisely the same.

Defendant Thompson argues that he should be able to commit undue influence and set up a will and trust for an incompetent testator/settlor which result *inter alia* in his being named personal representative and trustee, while no one can seek a remedy against him and/or protect the decedent and his estate. Thompson will not protect Decedent’s estate. If an aggrieved beneficiary cannot do so, then Thompson, and others in his position, can get away with any acts of malfeasance and no one can protect the decedent and his estate – i.e., an absurd position that no one has standing to sue Thompson but Thompson himself.

The South Carolina Rules of Civil Procedure “shall be construed to secure the just, speedy and inexpensive determination of every action”³ and “all pleadings shall be so construed as to do substantial justice to all parties.”⁴ It would work a substantial injustice to the Plaintiff to take the drastic remedy of dismissing the Plaintiff’s claims in this action under Rule 12(b)(8) and then allow the Defendant an opportunity to seek dismissal of Plaintiff’s claims in the prior suit

³ SCRCP Rule 1.

⁴ SCRCP Rule 8(f)

on the basis of lack of subject matter jurisdiction on removal, especially since a party may raise the matter at any time in the future, including on appeal.⁵ Significantly, Defendant Thompson has not shown any prejudice that would result from a consolidation of the two cases to protect this court's jurisdiction. See Pool v. Pool, 329 S.C. 324, 494 S.E.2d 820 (1998) (no prejudice when opposing party had notice of issues to be tried and opportunity to maintain defense on the merits). Accordingly, substantial justice consistent with the Rules of Civil Procedure calls for a consolidation of Plaintiff's two suits and denial of Defendant Thompson's motion to dismiss.

Defendant Thompson in his opposition to Plaintiff's motion for consolidation under Rule 42(a) asserts "[t]he Circuit Court does not have subject matter jurisdiction to consolidate cases over which it has limited or derivative jurisdiction with cases over which it has original jurisdiction." Return to Plaintiff's Motion for Consolidation of Action Under Rule 42(a), p.5. Thompson provides no authority for that assertion. Denying consolidation of all the causes of action would require the same issues of incompetency and undue influence to be tried multiple times leading to a much slower and expensive judicial resolution of the issues and possibly an unjust resolution if inconsistent verdicts occurred. The procedure advanced by Thompson would be completely at odds with the duty to "secure the just, speedy and inexpensive determination of every action" under Rule 1, SCRPC.

Finally, Defendant Thompson proposes in opposition to consolidation that the Formal Probate procedures in S.C. Code Ann. §§ 62-3-404 and -407 are "fundamentally different" and incompatible with "the customary civil procedure used by the Circuit Court for trial". Return to Plaintiff's Motion for Consolidation of Action Under Rule 42(a), p.5. An examination of § 62-3-

⁵ Plaintiff does not concede that this Court lacks subject matter jurisdiction over Plaintiff's claims in the prior action, and stands by its arguments made in opposition to Defendant Thompson's claims of lack of subject matter jurisdiction on removal, but brings up this possibility since Defendant Thompson's subject matter jurisdiction argument has not been finally ruled on as the law of the case in case number 2010-CP-04-1845.

407 shows only one sentence applicable to this case, that being: "[c]ontestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity." S.C. Code Ann. § 62-3-407. There is nothing in that statutory directive that is incompatible with the Rules of Civil Procedure since plaintiffs have long held the burden of proof.

CONCLUSION

This Court has subject matter jurisdiction over all the causes of action in this Complaint pursuant to S.C. Const. art. V, § 11 and S.C. Code Ann. § 62-7-201(c). It also has jurisdiction over the will contest pursuant to S.C. Code Ann. § 62-1-302(d)(1) for the removal of formal proceeding for the probate of wills. The court further has jurisdiction under S.C. Code Ann. § 62-1-302(d)(5) of controversies of at least five thousand dollars on matters involving a right to trial by jury. These controversies include all the causes of action in both 2010-CP-04-1845 and 2012-CP-04-1433 since they all concern "subject matter related to ... estates of decedents..." S.C. Code Ann. § 62-1-302(a)(1). With Plaintiff being the real party in interest as the proper beneficiary of Decedent's estate, he has standing to bring this action. Consolidation therefore of all the Plaintiff's causes of action into one trial best secures the just, speedy and inexpensive determination of this action.

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ATTORNEYS FOR PLAINTIFF

Dated: September 18, 2012
Greenville, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

James Robert Malloy,
Plaintiff,
vs.

Swain N. Thompson, Jr., Merrill Lynch,
Pierce, Fenner & Smith, Inc., Joseph T. Argo,
and Greene and Company, L.L.P.,
Defendants.

In the Matter of:
Estate of Robert L. Chamblee

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

2012-CP-04-01433

**CERTIFICATE OF
SERVICE**

The undersigned secretary for the attorney for the Plaintiff certifies that she served a copy of
**PLAINTIFF'S CONSOLIDATED MEMORANDUM IN OPPOSITION TO SWAIN N.
THOMPSON, JR.'S MOTION TO DISMISS and REPLY TO SWAIN N. THOMPSON, JR.'S
RETURN TO PLAINTIFF'S MOTION FOR CONSOLIDATION OF ACTION UNDER RULE
42(A)** by the by the following means:

☐ Hand Delivery	☐ Facsimile
☐ United States Mail	☐ Overnight Delivery
☒ Other: Electronic mail	

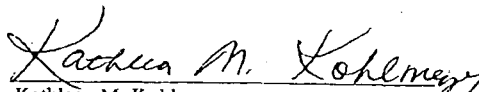
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September 18, 2012
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STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

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Defendants.

In the Matter of:

Estate of Robert L. Chamblee

IN THE COURT OF COMMON PLEAS
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2012-CP-04-01433

**PLAINTIFF'S RESPONSE
TO DEFENDANT MERRILL LYNCH,
PIERCE, FENNER & SMITH, INC.'S
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS AND
COMPEL ARBITRATION**

The Plaintiff submits this Memorandum in response to Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc.'s ("Merrill Lynch") Memorandum in Support of its Motion to Dismiss the Complaint and Compel Arbitration.

Merrill Lynch, in its Introduction, claims (1) that it had no knowledge that Robert L. Chamblee, as a signatory of the Robert L. Chamblee Revocable Trust of December 11, 2002 ("Trust") was incompetent and (2) that Robert L. Chamblee ("Decedent") was not adjudicated incompetent at the time he executed the Trust. Merrill Lynch, citing Macaulay v. Wachovia Bank of South Carolina, N.A., 351 S.C. 287, 569 S.E.2d 371 (Ct. App. 2002), states that Plaintiff to prevail must demonstrate four factors: (1) that the deceased was legally incompetent, (2) at the date and time of each signature, (3) that each signatory, each witness and each notary knew it, and (4) that from them Merrill Lynch knew it. However, the cited case does not set out those elements as part of a tortious interference with inheritance claim or any other cause of action nor does the case even mention tortious interference with inheritance or conspiracy.

Merrill Lynch also states in the Introduction that it relied on notarized and recorded

documents and that it had no knowledge of any physician's opinions that Decedent was incompetent. However, a claim of tortious interference with inheritance and gifts does not require that the settlor/testator be incompetent. The Court of Appeals noted that courts adopting the tort of intentional interference with inheritance have required the plaintiff to prove the following elements: (1) the existence of an expectancy; (2) an intentional interference with that expectancy through tortious conduct; (3) a reasonable certainty that the expectancy would have been realized but for the interference; and (4) damages. Douglass Ex Rel. Louthian v. Boyce, 344 S.C. 5, 9, 542 S.E.2d 715, 717 n.4 (Ct. App. 2001). The Court of Appeals also cited the Restatement of Torts which states "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 inheritance or gift." Restatement (Second) of Torts § 774B (1979). Again, nowhere in the Restatement definition of the tort is incompetence of the settlor a requirement. While a settlor's incompetence may certainly make it easier for a tortfeasor to pull off a scheme of tortious interference with inheritance, the Plaintiff is not required to show that a defendant charged with aiding and abetting tortious interference with expected inheritance must have knowledge of the settlor's incompetency.

1. Plaintiff never agreed to arbitration with Merrill Lynch.

In Merrill Lynch's Statement of Facts, it references Client Relationship Agreements it claims *Decedent* executed on November 25, 2002 and January 24, 2003 which incorporate a mandatory arbitration clause. Most important and fatal for Merrill Lynch's arbitration argument, Plaintiff never signed any of these documents. Further, the Affidavit of Denise Glasgow of Merrill Lynch does not mention any contact with Plaintiff Malloy at all. Further, there is no

allegation in the Complaint, any of the Answers, or Merrill Lynch's supporting documents for its Motion that Plaintiff had any involvement with documents that required arbitration of disputes against Merrill Lynch. The obvious reason there is no such reference to any involvement by Plaintiff is because Plaintiff had no dealings whatsoever with Merrill Lynch concerning the accounts of Decedent.

The United States Supreme Court has long held under the Federal Arbitration Act that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steel Workers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 (1960); see also, Zabinski v. Bright Acres Assocs., 346 S.C. 580, 591, 553 S.E.2d 110, 116 (2001) ("the FAA does not require parties to arbitrate when they have not agreed to do so . . .").

It is undisputed Plaintiff never signed an arbitration agreement with Merrill Lynch; therefore, under the Federal Arbitration Act and fundamental contract principles, Plaintiff cannot be required to arbitrate his claim for aiding and abetting tortious interference with inheritance against Merrill Lynch.

2. Plaintiff is not vicariously subject to arbitration under an agreement he did not sign.

In the cases cited by Merrill Lynch where a plaintiff did not directly sign an arbitration agreement with the defendant, the plaintiff either signed the arbitration agreement as an attorney-in-fact and beneficiary or was suing as a third-party beneficiary under a contract containing an arbitration agreement. See, Int'l Paper Co. v Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000) (holding that a plaintiff suing as a third-party beneficiary under a contract containing arbitration is bound to accept both the benefits and burdens of the contract including the arbitration clause.); see also, McCutcheon v. THI of SC at Charleston, LLC, 2011 U.S. Dist.

Lexis 144288 (D.S.C. December 15, 2011) (unpublished)¹ (holding that personal representative and attorney-in-fact who signed arbitration agreement on behalf of spouse was required to arbitrate wrongful death claim against defendant nursing home.)

This case is a far cry from the facts in Int'l Paper Co. and McCutcheon. Plaintiff was certainly not a beneficiary of the contracts signed by Decedent with Merrill Lynch. In fact, the accounts set up in the name of the Decedent for the Trust were used to totally cut out Plaintiff as a beneficiary of Decedent's estate and other assets. Therefore, there is no arguable claim at all that Plaintiff is a third-party beneficiary of the Client Relationship Agreements signed in November 2002 and January 2003. The Defendants transferred Decedent's assets into the Merrill Lynch accounts with Thompson being the sole remainder beneficiary to the complete exclusion of Plaintiff. See Prop. Am. Compl., ¶ 48.

In the case of McCutcheon v. THI of SC at Charleston, LLC, the estate of the decedent claimed it was not bound by an arbitration agreement that was part of the decedent's admission agreement into the defendant nursing home. In that case, the plaintiff who was the decedent's surviving husband and personal representative of her estate actually signed the arbitration agreement as an attorney-in-fact for his wife. The court held that the decedent was the intended third-party beneficiary of the arbitration agreement signed by the plaintiff. With the decedent's estate being the successor in interest to the decedent, the arbitration agreement which was binding on the decedent remained binding on her estate. Further, the plaintiff as attorney-in-fact signing the arbitration agreement was equitably estopped from later denying his authority under the power of attorney.

In complete contrast to the McCutcheon case, Plaintiff James Malloy had no relationship

¹ McCutcheon v. THI of SC at Charleston, LLC, 2011 U.S. Dist. Lexis 144288 (D.S.C. December 15, 2011) is attached to Merrill Lynch's Memorandum as an Unpublished Opinion.

with Merrill Lynch at all. He was not an agent of Decedent signing the account agreements on Decedent's behalf. Most important, he is not suing on behalf of Decedent's estate but instead is suing Merrill Lynch for its acts committed against him directly by its aiding and abetting the tortious interference with inheritance. He was not in any way an intended beneficiary of the Client Relationship Agreements between Merrill Lynch and Decedent, thus the holding in McCutcheon that the estate was a third-party beneficiary has no application here.

The principle of equitable estoppel to bind a non-signatory to the arbitration agreement is not applicable either. Plaintiff is not invoking any rights of Decedent under the contracts with Merrill Lynch. Cf. United States v. Bankers. Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001) (applying equitable estoppel to require nonsignatory to arbitrate where nonsignatory sued "to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein."). In addition, Plaintiff has not received nor is he seeking any direct benefit under the Merrill Lynch Client Relationship Agreements which is the type of benefit envisioned under the principle of equitable estoppel. See Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir.1995) (holding receipt by nonsignatory of indirect benefit from contract insufficient to estop nonsignatory from avoiding arbitration since direct benefit required).

The Second Circuit Court of Appeals recognized five theories "aris[ing] out of common law principles of contract and agency law" that could provide a basis "for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel." Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d at 776; see also Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d at 417. None of those theories have any relevance to Plaintiff's claim against Merrill Lynch for

aiding and abetting tortious interference with inheritance and gifts.²

3. Decedent's arbitration agreements with Merrill Lynch were invalid since he was incompetent when he signed agreements.

As alleged in the Complaint and proposed Amended Complaint, the Decedent was held in St. Luke's Roosevelt Hospital from July 30 through August 20, 2002 against his will because of his mental inability to care for himself. (Prop. Am. Compl. ¶¶ 23-24). When he was discharged from St. Luke's Roosevelt Hospital in New York, Thompson took physical custody of Decedent and admitted him to an Alzheimer's care unit the following day on August 21, 2002 in Anderson County. (Prop. Am. Compl. ¶¶ 25-26). Decedent remained in institutional care with treatment for Alzheimer's disease until his death in 2009. *Id.* and ¶ 41. Even if it were somehow shown that Plaintiff was a third-party beneficiary under the Client Relationship Agreements signed by Decedent, Merrill Lynch has not established or provided sufficient proof that Decedent was competent when he signed the agreements in November 2002 and January 2003. The party moving for arbitration has the burden of proving the existence of a valid contract containing an arbitration clause. If the party moving to compel arbitration fails to make such a showing, the motion should be denied. Ex parte Greenstreet, Inc., 806 So.2d 1203, 1207 (Ala. 2001). While the Decedent was not yet adjudicated incompetent at the time the Client Relationship Agreements were signed,³ he had ceased being allowed to live on his own and was restricted to

² The Second Circuit defined "incorporation by reference" as when a party seeking to enforce arbitration entered into a separate contractual relationship with the nonsignatory incorporating the existing arbitration clause. "Assumption" applies to hold that in the absence of a signature, a nonsignatory party may be bound by an arbitration clause if its subsequent conduct indicates it is assuming the obligation to arbitrate. Agency applies when traditional agency law principles may bind a nonsignatory to an arbitration agreement. Veil piercing/alter ego applies when nonsignatory and signatory corporate parties have a relationship justifying piercing the corporate veil and holding the nonsignatory corporate entity subject to the arbitration agreement. Thomson-CSF, S.A., supra, 64 F.3d at 777.

³ The Anderson County Probate Court adjudicated the Decedent incompetent in 2007 in a conservatorship action filed by Defendant Thompson, in case number 2007-GC-04-0028 in order for Thompson to make substantial present interest gifts of Decedent's assets to Thompson's family members and relatives to exclusion of Plaintiff.

living at facilities that could provide appropriate Alzheimer's care such as St. Luke's Roosevelt Hospital in New York, the Alzheimer's unit at The Garden House, and later NHC Healthcare in Anderson. Based on the record in this court, Merrill Lynch, as the moving party, has not met its burden of proof of showing a valid arbitration agreement.

4. Motion For Attorney Fees and Costs under the South Carolina Frivolous Civil Proceedings Sanctions Act and Rule 11

As pointed out above, there is no reasonable and good faith argument that Plaintiff ever signed an agreement with Merrill Lynch, and he was not a beneficiary of the agreements signed by Decedent and Merrill Lynch. There is no way he could be required to arbitrate this dispute under any interpretation of the Federal Arbitration Act or the South Carolina Uniform Arbitration Act.

Under the South Carolina Frivolous Civil Proceedings Sanctions Act, a party who initiates a defense of civil proceedings without any reasonable belief that under those facts his claim may be valid under the existing or developing law or has sought such defense in bad faith is subject to sanctions under the Act. See S.C. Code Ann. § 15-36-20. In the Affidavit of Merrill Lynch attached to the Motion, the affiant makes absolutely no mention of any agreement with Plaintiff. Further, absolutely no mention is made of any basis that would show that Plaintiff was an intended beneficiary of the Client Relationship Agreements signed by Decedent. In essence, Merrill Lynch has made no attempt whatsoever to show that Plaintiff had any involvement with the arbitration clauses in Merrill Lynch's Client Relationship Agreements or was an intended third-party beneficiary. As a consequence, Defendant Merrill Lynch should be subject to sanctions for the time and delay imposed upon Plaintiff and his counsel in defending this baseless motion.

At the termination of the proceedings regarding Merrill Lynch's Motion to Compel,

Plaintiff intends to move in open court for sanctions under the Frivolous Civil Proceedings Sanctions Act. See S.C. Code Ann. § 15-36-30 ("...The entitlement of the aggrieved person must be determined by the trial judge at the conclusion of a trial *upon motion* of the aggrieved party stating the manner in which the other party is alleged to have acted in violation of this statute.") (emphasis added).

In addition, Rule 11 of the South Carolina Rules of Civil Procedure requires that an attorney filing a motion in bad faith may have imposed upon him an appropriate sanction which may include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper including a reasonable attorneys' fee. SCRCP 11(a). The signing of a motion by an attorney is supposed to certify that there are good grounds to support the motion and that it is not interposed for delay.

As can be seen from the nature of this Motion to Compel Arbitration, there are no good grounds to support it. In the event the court finds that Merrill Lynch relied upon the good faith advice of its attorneys of record, this court should find that attorneys should be subject to Rule 11 sanctions for the filing of this groundless motion.

CONCLUSION

As the Fourth Circuit Court of Appeals stated, well-established common law principles dictate that, in an appropriate case, a non-signatory can be bound by an arbitration provision within a contract executed by the parties where the plaintiff claims the benefits of the contract but simultaneously seeks to avoid its arbitration requirement. Here however, it is uncontested that Plaintiff is not a signatory to the contracts, and it is clear that the Client Relationship Agreements signed by Decedent were not for the benefit of Plaintiff. Moreover, Plaintiff does not claim the benefits of the Client Relationship Agreements with Merrill Lynch but seeks to

hold Merrill Lynch accountable for its aiding and abetting the tortious interference with Plaintiff's expected inheritance. There is absolutely no basis for submitting this matter to arbitration, and attorney fees and costs should be awarded to Plaintiff for the defense of this motion.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

Dated: September 18, 2012
Greenville, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

James Robert Malloy,
Plaintiff,
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In the Matter of:
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IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

2012-CP-04-01433

**CERTIFICATE OF
SERVICE**

The undersigned secretary for the attorney for the Plaintiff certifies that she served a copy of
**PLAINTIFF'S RESPONSE TO DEFENDANT MERRILL LYNCH, PIERCE, FENNER &
SMITH, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND COMPEL
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☐ Hand Delivery	☐ Facsimile
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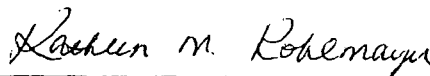
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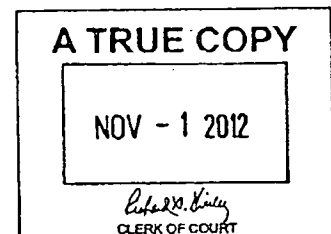
2010-CP-04-1845

AMENDED
COMPLAINT

The Plaintiff would respectfully show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Swain N. Thompson, Jr. ("Thompson") is a resident of Anderson County, South Carolina and the nephew of decedent Robert L. Chamblee ("Decedent").
2. James Robert Malloy ("Malloy") is a resident of Huntington, New York and the godson of Decedent.
3. Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), upon information and belief, is a Delaware corporation that is registered to do business in the state of South Carolina and regularly transacts business in South Carolina.
4. The Defendant Greene and Company, L.L.P. ("Greene") is a South Carolina limited liability partnership with its headquarters located in Anderson County, South Carolina.



5. Defendant Joseph T. Argo ("Argo") is a certified public accountant licensed in the state of South Carolina and is a citizen and resident of Anderson County, South Carolina. Argo is an agent and principal in Greene.

6. Robert L. Chamblee died in Anderson County on September 8, 2009, at the age of 86.

7. On September 16, 2009, Thompson applied for an informal probate of Decedent's alleged will dated December 11, 2002 and for an informal appointment of himself as personal representative of Decedent's estate.

8. On September 16, 2009, the Anderson County Probate Court admitted the alleged will to informal probate and granted Thompson's application for informal appointment; the estate is currently being administered in Anderson County Probate Court.

9. Decedent allegedly signed a document on December 11, 2002 that purports to be a trust agreement appointing Decedent and Thompson as co-trustees.

10. On information and belief, while Decedent was alive Thompson began attempting to transfer Decedent's assets to himself and others.

11. This Court has the authority and jurisdiction to determine the validity of the alleged will and trust as well as any purported *inter vivos* transfer by Thompson of Decedent's assets, to determine the validity of the informal appointment of Thompson as personal representative, to determine that Thompson has breached his fiduciary duty and converted Decedent's assets, to determine that Defendants tortiously interfered with Malloy's inheritance and gift expectancy and conspired to injure Malloy, to remove

Thompson as personal representative and trustee, and to grant appropriate relief therefore from all Defendants.

GENERAL ALLEGATIONS

12. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

13. Malloy enjoyed a close relationship with Decedent who was his godfather. From 1983 on, Decedent effectively treated Malloy as his son and in the presence of others referred to Malloy as his son; they spoke often and spent much time together.

14. In or around 2001, when Decedent was in his late seventies, the faculty and students at Baruch College in New York, where Decedent was a long-time professor, began to notice that Decedent's behavior was changing: they noticed and complained about Decedent's lack of memory, strange and unprofessional behavior, and inability to teach his classes. The professor chairing the department where Decedent taught for 30 years observed in May 2002 that Decedent could no longer function in a reasonable capacity.

15. Because of these expressed concerns about Decedent's behavior, Baruch College commenced an internal investigation and was proceeding to have Decedent removed or terminated due to mental incompetence.

16. Malloy was working to help Decedent with the proceedings at Baruch College and to obtain medical help, which Decedent resisted.

17. On or about July 30, 2002, Decedent went to St. Luke's Roosevelt Hospital seeking medical care because he thought he was having a heart attack.

18. Malloy spoke with Decedent's doctors, who confirmed that Decedent was suffering from short-term memory loss and Alzheimer's disease.

19. On August 1, 2002, two days after Decedent had been admitted to St. Luke's Roosevelt Hospital, Dr. Henry Greenberg, his treating physician at the hospital, stated in the hospital records that "Pt [patient] is not competent & will need placement."

20. Consequent to the Alzheimer's diagnosis, the doctors retained Decedent in the hospital against his will for three weeks because they thought his condition was so severe that he was a danger to himself and others.

21. On the advice of counsel, Malloy did not seek to commence a conservatorship action on Decedent's behalf; instead, he requested that Thompson come to New York and remove Decedent from the hospital so that he would no longer have to endure the torture of being restrained in a hospital against his will.

22. With Malloy, Thompson met with doctors at the hospital and officials at Baruch College. Thompson was well aware of the mental infirmities and incapacity of Decedent. Thompson then returned to Anderson, SC to make arrangements for Decedent to reside at The Garden House — an assisted living facility specializing in care for senior citizens with mental infirmities such as Alzheimer's disease. Because the hospital would not release Decedent on his own, Thompson returned to New York and brought Decedent back to The Garden House.

23. Before Thompson took Decedent from St. Luke's Roosevelt Hospital to The Garden House, Dr. Amy Sanders, who had also been treating Decedent since his hospital admission on July 30, 2002, completed a functional assessment of Decedent for The Garden House in a report dated August 14, 2002 with a fax date to The Garden

House of August 15, 2002. In the report she diagnosed Decedent as suffering from Alzheimer's disease. She stated Decedent suffered from memory loss, confusion, forgetfulness and impaired decision-making ability. She also assessed Decedent's ability in handling money as dependent on others. She concluded Decedent was a candidate for residence in a "Memory Impaired Apartment".

24. Prior to leaving New York with Decedent, Thompson changed the locks on Decedent's apartment, upon information and belief, in order to cease Malloy's access to Decedent's property despite Decedent's long-time permission to Malloy to enter Decedent's home.

25. From 1984 to 1999, Decedent, with the assistance of New York counsel, executed several wills naming Malloy as primary beneficiary and a health care proxy naming Malloy as his agent; none of the wills named Thompson as primary beneficiary. During this period, Decedent did not execute any trust or property power of attorney.

26. On July 30, 1999 Decedent executed in New York a will prepared by Decedent's long-time New York counsel which is the valid last will and testament of Decedent; the original is in the possession of Malloy and a copy of said will is attached hereto.

27. Within days after Thompson removed Decedent from the hospital in New York and brought him to Anderson, he took Decedent to Thompson's attorneys and coerced Decedent into signing on September 16, 2002 a document purporting to be a property power of attorney under South Carolina law appointing Thompson as attorney-in-fact. On September 18, 2002 Thompson again took Decedent to Thompson's attorneys and coerced Decedent into signing a New York statutory short form durable

power of attorney, again appointing Thompson as attorney-in-fact. The September 16, 2002 power of attorney stated that it was Decedent's intention that the power of attorney not be used to disrupt the Decedent's estate plan and prohibited Thompson as agent from appointing, assigning or designating any assets, directly or indirectly, to Thompson. The September 18, 2002 power of attorney executed under the laws of the state of New York also specifically rejected the power of Thompson as agent to make gifts and did not include a statutory gifts rider. Nor did Decedent execute a separate non-statutory power of attorney under New York law.

28. A few months after the powers of attorney were signed, Thompson took Decedent to Thompson's attorneys and coerced Decedent into signing documents purporting to be a will and an *inter vivos* trust, leaving all of his assets to Thompson. The purported will and trust were executed on December 11, 2002.

29. When Thompson coerced Decedent into signing the purported December 11, 2002 will and trust, Thompson knew Decedent had an existing will that devised and bequeathed assets of Decedent to Malloy. Malloy is informed and believes that prior to Thompson bringing Decedent to South Carolina, Decedent inherited interests in family land in which Thompson and/or his family and/or relatives also owned an interest or desired to own. Thompson was highly concerned that Decedent would devise his interests to Malloy as Decedent had informed Thompson that Malloy was a beneficiary of his estate.

30. Shortly after Thompson moved Decedent to South Carolina, Thompson implied in a telephone conversation with Malloy that he knew Malloy was the sole

beneficiary of Decedent's will. In that conversation, around September 2002, Thompson told Malloy "I know there's a will and that's fine."

31. During the time between Decedent leaving the New York hospital and the alleged execution of the documents purporting to be his will and trust, Decedent was under constant supervision, and eventually lockdown, at Garden House and, despite Decedent's requests, was not allowed to return to New York or his professorship at Baruch College.

32. During the time between Decedent leaving the New York hospital and the alleged execution of the documents purporting to be his will and trust, Decedent did not attempt to contact his New York counsel of many years, nor did Decedent attempt to bring any action against the New York hospital and Baruch College, both of which determined that he was incompetent and treated him accordingly.

33. Demonstrative of their close relationship, prior to Decedent's August 2002 admission in the New York hospital, Malloy was Decedent's first call, at Decedent's instructions, when a problem arose or Decedent needed help. People in close contact with Decedent, including co-workers and faculty members at Baruch College, believed Malloy to be Decedent's son.

34. Although Malloy frequently called Decedent at Garden House after Thompson moved Decedent to South Carolina, Decedent never called Malloy and never told him he had made a new will, trust, and power of attorney. When Malloy visited Decedent in the summer of 2003, Decedent did not even recognize him and introduced him to a staff member as one of his students.

35. While Decedent was competent, he placed Malloy's name on many of his assets, such as insurance, bank accounts, and safe deposit boxes. These assets include but are not limited to the following:

- Life insurance policy with the Veterans Administration with benefits paid to Thompson in the amount of \$96,972.43. Malloy was named as 75% beneficiary prior to beneficiary change to Thompson on January 6, 2003 as witnessed by Argo;
- Annuity with Nationwide Life Insurance Company surrendered to the 2002 trust on 2/26/03 for \$67,094.74 containing a death benefit significantly greater than the surrender value with Malloy named as death beneficiary;
- Banco Popular account established in trust for Malloy liquidated and distributed to the Merrill Lynch account for the 2002 trust on or about March 20, 2003 for \$146,571.11;
- Teachers' Retirement System of the City of New York Qualified Pension Plan and Tax-Deferred Annuity Program containing as of October 2002 \$ 643,199.06 with Malloy as designated beneficiary for 50% of the death benefits. In 2003 at least \$500,236.79 was rolled over or distributed to accounts at Merrill Lynch established under the direction of Thompson with the aid and assistance of the remaining defendants.

36. Using his alleged power of attorney, Decedent's mental incompetence and/or undue influence, Thompson eventually removed Malloy's name from these assets and the health care proxy. Thompson also changed Decedent's reported address with the various financial institutions to 1206 Briarwood St., Anderson, SC 29621. This address, though, was the residence of Thompson's sister Barbara T. Craft. Decedent did not live at that address. Thompson made the address and beneficiary changes either by completing and signing the change-of-address forms himself through the invalid powers of attorney or by Decedent's signatures on such forms, both procured through Decedent's mental incapacity and/or Thompson's undue influence. Indicative of his lack of mental competency, Decedent signed at least nine different forms with his address listed as 1206

Briarwood St., Anderson, SC 29621 – the address of Thompson’s sister from October 4 through December 18, 2002. The above-referenced change-of-address forms often listed Thompson’s phone number as that of Decedent.

37. In 2006, Thompson moved Decedent from Garden House to NHC Healthcare in Anderson.

38. While Decedent was at Garden House, its staff refused to recognize Malloy’s health care proxy and refused to provide him with pertinent information; a staff member at NHC Healthcare told Malloy that Thompson was Decedent’s health care attorney-in-fact.

39. Malloy did not learn about the alleged 2002 powers of attorney until he complained to the S.C. Elder Care Office in 2006, when he was informed by a staff member from the Ombudsman’s office. Malloy did not have notice of the existence of the purported will and trust prepared by Thompson’s attorney for Decedent until the will was filed after Decedent’s death.

40. Malloy had an expectancy under the will of Decedent—i.e., to inherit his entire estate. Malloy also had an expectancy to receive various gifts from Decedent—i.e., Malloy was named as a beneficiary under various annuities, a life insurance policy, and as beneficiary of an *inter vivos* trust all established by the Decedent. Merrill Lynch, Greene and Argo intentionally interfered with that expectancy through their tortious conduct that included using invalid powers of attorney and Decedent’s signature both obtained as a result of Decedent’s mental incompetence and/or through Thompson’s undue influence.

41. After Decedent executed the powers of attorney in September 2002 at Thompson's instigation, Merrill Lynch acted as the investment advisor and asset manager of all the funds held in the name of the December 11, 2002 trust. Merrill Lynch worked closely with Thompson as the purported trustee and with Argo and Greene as Thompson and the 2002 trust's accountant. Malloy is informed and believes Merrill Lynch was highly knowledgeable about the intricacies of the 2002 trust and Decedent's assets and knew or should have known Thompson was the sole beneficiary of the 2002 trust upon Decedent's death. In fact, according to an e-mail of Heather Sandler, Registered Client Associate and financial advisor of Merrill Lynch working out of the Columbia, SC office, to Argo of May 1, 2003, the account for Decedent set up by Defendants was initially titled as a joint account in the name of both Robert Chamblee and Swain N. Thompson. The joint account was later closed out into "the new Trust for Estate Planning purposes."

42. After Decedent executed the powers of attorney in September 2002 at Thompson's instigation, Argo and Greene acted as the accountant for the 2002 trust, the Decedent and Thompson. Argo and Greene prepared the tax returns for Decedent, the 2002 trust and Thompson. Malloy is informed and believes Greene and Argo were highly knowledgeable about the intricacies of the 2002 trust and Decedent's assets, possessed copies of the 2002 trust, and knew or should have known Thompson was the sole beneficiary of the 2002 trust upon Decedent's death.

43. On information and belief, all Defendants including Merrill Lynch, Greene and Argo knew of Malloy's expectancy under the Decedent's will, trust, and annuities. For instance, Decedent established a fund held by Banco Popular in New York, New York containing approximately \$145,000 in trust for Malloy in account

number 090-000078545 and titled "Chamblee, Robert I.T.F. James R. Malloy". As another example, Sendler of Merrill Lynch informed Argo and Greene prior to the transfer of funds to Merrill Lynch that Decedent owned an annuity contract through Nationwide Life Insurance with Malloy as the named death beneficiary. The Teacher's Retirement System of the City of New York also sponsored a significant and sizable retirement fund for Decedent where Malloy was named as a beneficiary of the death benefits under the plans.

44. Merrill Lynch, Argo, and Greene worked together and with Thompson to divert those funds and many other funds to the December 11, 2002 trust wherein Thompson was named as the sole beneficiary upon Decedent's death or to a newly established IRA at Merrill Lynch in which Thompson was named as the beneficiary. For instance, said Defendants and Thompson coordinated their efforts to convince Banco Popular to release Decedent's account titled in trust for Malloy to the Merrill Lynch account for the 2002 trust. After repeated requests for the funds, Heather Sendler of Merrill Lynch ascertained from Banco Popular the particular documents Banco Popular needed for the funds to be transferred. Said Defendants then obtained a misleading statement from Thompson's long-time attorney Edward A. Spitz implying Decedent was competent to execute the powers of attorney and from The Garden House of Anderson, SC without revealing Decedent was residing in its Alzheimer's unit. Argo, Greene and Sendler then submitted the documents to Banco Popular with a cover letter omitting that the attorney letter was from Thompson's own attorney and the true nature of Decedent's residence in a facility for dementia. Malloy is informed and believes all such facts were known to said Defendants at that time.

45. As another example of all Defendants conspiring to tortiously interfere with Malloy's expected inheritance and gifts, Thompson submitted the invalid New York power of attorney on October 4, 2002 to Citibank to begin acting as agent on all of Decedent's accounts associated with Citibank including the Nationwide Life Insurance Company annuity (marketed under the name of "The Best of America"). Thompson's letter also instructed Citibank to send all future mailings to Decedent's South Carolina address but then gave the address for Thompson's sister at 1206 Briarwood Ct., Anderson, SC 29621 instead of Decedent's actual address at The Garden House assisted-living facility. On February 10, 2003 Sandler e-mailed Argo an update on the status of their efforts to divert Decedent's assets to the 2002 trust. Sandler informed Argo "I spoke with Best of America (they were VERY helpful) Anyway the value is \$63,000+-, there is no penalty to surrender and the beneficiary is James Malloy I have the withdrawal form that needs to be signed if we decide to and they will also accept a fax of it Let me know what we want to do on these". After the Defendants decided to surrender the policy, Sandler faxed to Nationwide on February 13, 2003 a total withdrawal request signed by Thompson as attorney-in-fact. On February 26, 2003 the Nationwide annuity contract was terminated, and a check for the surrender value of \$67,094.74 was mailed to Merrill Lynch for the 2002 trust account. On the day the Nationwide annuity was surrendered, the policy had a death benefit payable 100% to Malloy in the amount of \$108,644.64 – a 62% increase over the surrender value obtained by Defendants. On March 4, 2003 Sandler deposited the surrender proceeds into the Merrill Lynch account for the 2002 trust in which Thompson was the sole surviving beneficiary.

46. Merrill Lynch, Greene, and Argo played a highly significant and substantial role in helping Thompson corral the various assets of Decedent from numerous institutions into the 2002 trust for the benefit of Thompson. The activities of Merrill Lynch, Greene and Argo included obtaining and completing all necessary forms and document requests to the various institutions holding funds of Decedent with the requests containing a false address of Decedent of 1206 Briarwood St., Anderson, SC 29621 which was actually the address of Thompson's sister Barbara T. Craft. Said Defendants also submitted invalid powers of attorney to the various third party institutions to convince them to submit funds to the trust accounts for the 2002 trust. For example on or about October 22, 2002 Argo directed the preparation of a letter under the name of Thompson to GE Capital Life Assurance Company of New York ("GE") to change Decedent's address for his annuity with GE to the address for Thompson's sister and included the invalid New York statutory short form durable power of attorney. On January 8, 2003 Sandler of Merrill Lynch received from GE its forms for requesting a full surrender of Decedent's annuity. On January 21, 2003 Argo "For Heather Sandler" faxed the annuity surrender forms to GE which forms provided that the funds be mailed to the attention to Sandler at Merrill Lynch. The forms were signed by Thompson as attorney-in-fact for Decedent.

47. Personnel from the Merrill Lynch office in Columbia, South Carolina also provided signature guarantees/Medallion guarantees for documents purporting to be signed by Robert Chamblee, even though such documents were not executed in the presence of the Merrill Lynch guarantor. Letters to HSBC Bank, JP Morgan/Chase Bank, Banco Popular and Apple Bank directing that funds be wired to the 2002 trust account at

Merrill Lynch to the attention of Sendler were purportedly signed by Decedent on December 18, 2002 with no Medallion signature guarantee in the files of Greene and Argo. That same day the letters were FedExed out to Sendler at Merrill Lynch in Columbia, SC. The files of Merrill Lynch subsequently contain the same letters but with the Medallion signature guarantees on all the letters. Malloy is informed and believes that this procedure violated the rules of Merrill Lynch in its Medallion/signature guarantee program. Such documents containing Merrill Lynch's Medallion signature guaranty were disseminated by Merrill Lynch, Argo and Greene to convince financial institutions to transfer Decedent's funds to the Merrill Lynch account for the 2002 trust set up by Thompson.

48. All funds rounded up with assistance of Greene, Argo and Merrill Lynch, through its agent Sendler, were transferred and held by Merrill Lynch for the 2002 trust.

49. Merrill Lynch, through its agent Sendler, Greene and Argo held many telephone conferences and on occasions in person conferences with various institutions to assist Thompson in convincing the various institutions to release Decedent's assets to the Merrill Lynch accounts in the name of the 2002 trust. These contacts by Sendler of Merrill Lynch included calls to David with Banco Popular on or before March 4, 2003 and March 5, 2003; telephone conference with GE on or before February 10, 2003; telephone conference with Citibank on or before February 10, 2003; and telephone conference with Nationwide Life on or before February 10, 2003. Contacts by Argo of Greene included calls to Clarissa Weiss of Teachers' Retirement System ("TRS") on December 5, 2002, calls to the Teachers' Retirement System on or before March 4, 2003, and a conference scheduled for December 13, 2003 with TRS personnel; calls to David

and/or Mabel Ortiz of Banco Popular on March 5, 2003 and on or after March 11, 2003; phone calls to Rena Mivakakis of Bank of New York on or about September 25, 2002 and with Scott Barry on or before April 24, 2003; and an in-person conference among Thompson, Argo and Sandi Sculac of Citicorp Investment Services on or before December 18, 2002.

50. On or about November 20, 2002, Defendants Greene and Argo provided Merrill Lynch with copies of the powers of attorney Thompson coerced Decedent into signing on September 16, 2002 and September 18, 2002. The September 16, 2002 power of attorney stated that it was Decedent's intention that the power of attorney not be used to disrupt the Decedent's estate plan. The September 18, 2002 power of attorney executed under the laws of the state of New York also specifically rejected the power of Thompson as agent to make gifts. Merrill Lynch, Greene, and Argo assisted Thompson and in many cases undertook all the actions to submit the powers of attorney to collect assets into the 2002 trust for the benefit of Thompson.

51. Merrill Lynch, Greene, and Argo not only provided substantial administrative assistance in collecting Decedent's assets for Thompson, they also originated ideas to perform difficult and significant rollovers of tax qualified retirement assets into the Merrill Lynch account for the benefit of Thompson and to Malloy's detriment. This includes, but is not limited to, effecting rollovers from Decedent's Citibank IRA account, his New York Teacher's Retirement Fund accounts, and other IRAs in which Malloy was named as the death beneficiary to a Merrill Lynch IRA that eliminated Malloy as a beneficiary.

52. The participation of Merrill Lynch, Greene, and Argo was done knowingly with the intent to funnel the assets of Decedent into the 2002 trust wherein Thompson was the known beneficiary to the complete exclusion of Malloy.

53. As a result of the substantial participation of Merrill Lynch, Greene, and Argo undertaken knowingly, Malloy was deprived of his expectant inheritance interest and gifts to be received from Decedent. As a result of the tortious interference with Malloy's expected inheritance and gifts from Decedent as committed by Merrill Lynch, Greene, and Argo, Malloy is entitled to judgment against said Defendants for the amounts diverted away from Malloy, plus punitive damages and attorney fees.

FOR A FIRST CAUSE OF ACTION

(Action to Set Aside Will For Lack of Mental Capacity)

54. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

55. Upon information and belief, at the time of Decedent's purported execution of the alleged 2002 will, Decedent was mentally incompetent and suffering from Alzheimer's disease and/or other dementia and lacked the requisite mental capacity to make a valid will.

56. Therefore, the alleged 2002 will is invalid and of no legal force and effect.

FOR A SECOND CAUSE OF ACTION

(Action to Set Aside Will Due to Undue Influence)

57. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

58. On information and belief, Thompson exercised undue influence on Decedent, to wit: Decedent was in a weakened mental state and susceptible to influence;

Decedent was subject to Thompson's control; Thompson took Decedent to Thompson's attorneys for execution of the alleged will; Thompson did not communicate with Decedent's own attorneys or with Malloy; and Thompson was never the primary beneficiary of any previous valid will of Decedent and the alleged 2002 will purports to name Thompson as sole beneficiary.

59. Therefore, the alleged 2002 will is invalid and of no legal force and effect.

FOR A THIRD CAUSE OF ACTION
(Action to Set Aside Will Due to Mistake)

60. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

61. On information and belief, Decedent would not have executed the alleged 2002 will unless he was mistaken about its contents or even that it was a will because it completely and suddenly changed his dispositive intent as demonstrated by his prior valid wills, for no reason.

62. Therefore, the alleged 2002 will is invalid and of no legal force and effect.

FOR A FOURTH CAUSE OF ACTION
(Action to Set Aside Purported *Inter Vivos* Trust for Lack of Mental Capacity)

63. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

64. Upon information and belief, at the time of Decedent's purported execution of the alleged 2002 trust, Decedent was mentally incompetent and suffering from Alzheimer's disease and/or other dementia and lacked the requisite mental capacity to make a valid trust.

65. Therefore, the alleged 2002 trust is invalid and of no legal force and effect.

FOR A FIFTH CAUSE OF ACTION

(Action to Set Aside Purported *Inter Vivos* Trust Due to Undue Influence)

66. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

67. On information and belief, Thompson exercised undue influence on Decedent, to wit: Decedent was in a weakened mental state and susceptible to influence; Decedent was subject to Thompson's control; Thompson took Decedent to Thompson's attorneys for execution of the alleged trust; Thompson did not communicate with Decedent's own attorneys or with Malloy; and Thompson was never the primary beneficiary of any previous valid trust or will of Decedent and the alleged 2002 trust purports to name Thompson as sole beneficiary.

68. Therefore, the alleged 2002 trust is invalid and of no legal force and effect.

FOR A SIXTH CAUSE OF ACTION

(Action to Set Aside Purported *Inter Vivos* Trust Due to Mistake)

69. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

70. On information and belief, Decedent would not have executed the alleged 2002 trust unless he was mistaken about its contents or even that it was a trust because it completely and suddenly changed his dispositive intent as demonstrated by his prior valid wills, for no reason.

71. Therefore, the alleged 2002 trust is invalid and of no legal force and effect.

FOR A SEVENTH CAUSE OF ACTION

(Action to Set Aside Putative Transfer of Real and Personal Property to Purported *Inter Vivos* Trust, Thompson, and/or Others)

72. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

73. At the time Decedent purportedly executed documents, either directly or through his putative agent, attempting to deliver property to the alleged trust, he was mentally incompetent and suffering from Alzheimer's disease and/or other dementia and lacked the requisite mental capacity to validly execute and deliver such instruments of transfer; moreover, on information and belief, Decedent was unduly influenced and/or suffering from mistake.

74. All instruments of transfer to the trusts allegedly created by the *inter vivos* trust documents are therefore invalid and of no legal force and effect.

FOR AN EIGHTH CAUSE OF ACTION

(Fraud as to Defendant Thompson)

75. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

76. Malloy is informed and believes that Thompson, or someone on his behalf and under his control, made false representations to Decedent about the content and effect of the alleged 2002 will and trust in the name of the Decedent. The false representations were material as they induced Decedent to sign the alleged 2002 will and trust which completely altered Decedent's long-time estate plans.

77. Malloy is informed and believes that Thompson, who in December 2002 had control and influence over Decedent, had knowledge about the falsity of the representations made to Decedent about the 2002 will and trust or either had a reckless disregard of their truth or falsity. Malloy is further informed and believes that Thompson intended for Decedent to act upon Thompson's representations about the content and/or effect of the 2002 will and trust by inducing Decedent to execute such documents.

78. Malloy is informed and believes that due to Decedent's mental incompetency, Decedent was ignorant of the falsity of Thompson's representations. Because of Decedent's Alzheimer's disease and/or dementia, Decedent rightfully relied on the substance of Thompson's representations.

79. Malloy and Decedent were proximately injured by Thompson's representations that prevented Decedent from exercising his own judgment and free choice to dispose of his property as he desired.

80. Upon information and belief, Thompson's actions constitute fraud, and all instruments of transfer to the trusts allegedly created by the *inter vivos* trust documents are therefore invalid and of no legal force and effect; the alleged will is therefore invalid and of no legal force and effect; any transfer caused by Thompson from Decedent or his estate to Thompson and/or others is therefore invalid and of no legal force and effect; and Thompson should be assessed with actual damages, punitive damages, costs, and attorneys' fees.

FOR A NINTH CAUSE OF ACTION
(Conversion as to Defendant Thompson)

81. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

82. Upon information and belief, Thompson has wrongfully taken property from Decedent and converted it to his own use, all to the damage of Decedent and Malloy.

83. Malloy is further informed and believe that he is entitled to an award of punitive damages as a result of said conversion by Thompson.

FOR A TENTH CAUSE OF ACTION
(Quantum Meruit/Unjust enrichment as to Defendant Thompson)

84. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

85. Plaintiff will show that Thompson has realized a non-gratuitous benefit by his appropriation of Decedent's assets and that it is inequitable for Thompson to retain such assets without paying for their value.

86. By virtue of Thompson's conduct, Thompson has been unjustly enriched to the detriment of Decedent and Malloy.

87. As a result of Thompson's unjust enrichment, a constructive trust should be imposed on any and all property interests distributed from Decedent or his estate to Thompson and/or others.

FOR AN ELEVENTH CAUSE OF ACTION
(Constructive Trust as to Defendant Thompson)

88. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

89. A constructive trust should be imposed on Thompson and/or others for all misappropriated property and any benefit therefrom.

FOR A TWELFTH CAUSE OF ACTION
(Resulting Trust as to Defendant Thompson)

90. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

91. A resulting trust should be imposed on Thompson and/or others for all misappropriated property and any benefit therefrom.

FOR A THIRTEENTH CAUSE OF ACTION
(Breach of Fiduciary Duty; Failure to Marshal Assets; Removal as to Defendant Thompson)

92. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

93. In August 2002 Thompson made two trips to New York to secure the release of the Decedent from St. Luke's Hospital. The trips were necessary because of the mental health of Decedent and the Decedent's need for supervision with day-to-day assistance due to his failed mental capacity.

94. Thompson was well aware of Decedent's mental deterioration from his interaction with the staff at St. Luke's Hospital and with Decedent. Thompson further knew that Decedent was a vulnerable adult due to Decedent's substantially impaired mental condition from Alzheimer's disease.

95. Thompson voluntarily assumed the responsibility for the oversight, care and protection of Decedent by offering to take control of Decedent to secure his release from St. Luke's Hospital. Thompson accepted and induced the Decedent to place confidence in him.

96. Thompson entered into a fiduciary relationship with Decedent and assumed the special obligations a fiduciary owes the other party such as Decedent. Thompson exploited this fiduciary relationship and his role as caregiver to improperly and unlawfully gain control of Decedent's assets for himself, thereby causing damages to the estate of Decedent and to the Plaintiff.

97. As fiduciary of Decedent's estate, Thompson is required to collect and marshal the assets of the estate, which duties include (1) the investigation of the validity of transfers purportedly made during Decedent's lifetime that may be invalid for such reasons as fraud, undue influence, mistake, conversion, and/or lack of mental capacity, and (2) attempt to bring into the estate any alleged *inter vivos* transfers which are defective for any such reason.

98. Upon information and belief, as the perpetrator of the delicts cited in the causes of action set forth above, Thompson obviously cannot conduct a fair investigation of himself; consequently, he should be removed as personal representative to allow the appointment of an unbiased fiduciary.

99. The failure of the personal representative to perform his duties constitutes a breach of fiduciary duty.

100. The Plaintiff is informed and believes that such actions described in this Complaint constitute a breach of fiduciary duties that Thompson owed Decedent, his

estate and the Plaintiff. The Plaintiff is therefore entitled to compensatory damages (with pre-judgment interest) and punitive damages from Thompson for his breach of fiduciary duties in an amount to be determined by the trier of fact.

FOR A FOURTEENTH CAUSE OF ACTION

(Tortious Interference with Inheritance and Gifts as to Defendant Thompson)

101. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

102. Malloy had an expectancy under the will of Decedent — i.e., to inherit his entire estate. Malloy also had an expectancy to receive various gifts from the Decedent including but not limited to life insurance policy benefits upon the death of the Decedent, death benefits under various annuities owned by the Decedent wherein Malloy was named as the beneficiary, and non-probate retirement accounts including individual retirement accounts and retirement annuities wherein Malloy was named as the beneficiary upon the death of the decedent. These accounts include but are not limited to the Veterans Administration life insurance policy, annuities with Nationwide Life Insurance Company, account with Banco Popular in trust for Malloy, and Decedent's retirement plans with the Teachers' Retirement System for Baruch College as described in paragraph 35 above.

103. On information and belief, Thompson knew of Malloy's expectancy under Decedent's will and non-probate assets such as life insurance policies, annuities, and IRAs. Thompson intentionally interfered with that expectancy through his tortious conduct that included using invalid powers of attorney and Decedent's signatures both procured through Decedent's incompetence and/or through Thompson's undue influence. To cover up his tortious conduct, Thompson changed Decedent's address with all the

various financial institutions to the address of his sister Barbara T. Craft of 1206 Briarwood St., Anderson, SC 29621. Decedent never lived at such address.

104. But for Thompson's tortious interference with Malloy's inheritance, Malloy would have inherited all of Decedent's estate, including those assets transferred through Thompson's actions during Decedent's lifetime. Consequently, Malloy has been damaged by Thompson's tortious conduct in that he would be denied his inheritance of the entire estate, to which he was entitled.

105. But for Thompson's tortious interference with the gifts the Decedent planned and designated for Malloy, Malloy would have received such gifts from the Decedent upon his death, including assets wherein Malloy was designated as the death beneficiary but transferred to Thompson through Thompson's actions during Decedent's lifetime. Consequently, Malloy has been damaged by Thompson's tortious conduct in that he has been denied the gifts the Decedent established for Malloy, to which he was entitled.

106. As a result of Thompson's tortious interference with Malloy's inheritance and gifts, Malloy is entitled to a judgment against Thompson imposing a constructive trust on any and all property interests distributed from Decedent and/or Decedent's estate and from Decedent's non-probate assets and contracts to Thompson and/or others, plus damages, punitive damages, and attorneys' fees.

FOR A FIFTEENTH CAUSE OF ACTION

(Attorneys' Fees and Costs)

107. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

108. Because of the actions of Thompson, Malloy has been forced to obtain the services of an attorney and others to defend himself from the actions of Thompson.

109. Consequently, Malloy is entitled to an Order from this Court commanding Thompson to pay for the costs and attorneys' fees he has incurred due to the actions of Thompson.

FOR A SIXTEENTH CAUSE OF ACTION

(Tortious Interference with Inheritance and Gifts and Aiding and Abetting as to Defendants Merrill Lynch, Greene and Argo)

110. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

111. Malloy had an expectancy under the will of Decedent—i.e., to inherit his entire estate. Malloy also had an expectancy to receive various gifts from Decedent—i.e., Malloy was named as a beneficiary under various annuities, a life insurance policy, and as beneficiary of an *inter vivos* trust all established by the Decedent. Merrill Lynch, Greene and Argo intentionally interfered with that expectancy through their tortious conduct that included using invalid powers of attorney and Decedent's signature both obtained as a result of Decedent's mental incompetence and/or through Thompson's undue influence.

112. After Decedent executed the powers of attorney in September 2002 at Thompson's instigation, Merrill Lynch acted as the investment advisor and asset manager of all the funds held in the name of the December 11, 2002 trust. Merrill Lynch worked

closely with Thompson as the purported trustee and with Argo and Greene as Thompson and the 2002 trust's accountant. Malloy is informed and believes Merrill Lynch was highly knowledgeable about the intricacies of the 2002 trust and Decedent's assets and knew or should have known Thompson was the sole beneficiary of the 2002 trust upon Decedent's death.

113. After Decedent executed the powers of attorney in September 2002 at Thompson's instigation, Argo and Greene acted as the accountant for the 2002 trust, the Decedent and Thompson. Argo and Greene prepared the tax returns for Decedent, the 2002 trust and Thompson. Malloy is informed and believes Greene and Argo were highly knowledgeable about the intricacies of the 2002 trust and Decedent's assets, possessed copies of the 2002 trust, and knew or should have known Thompson was the sole beneficiary of the 2002 trust upon Decedent's death.

114. On information and belief, all Defendants including Merrill Lynch, Greene and Argo knew of Malloy's expectancy under the Decedent's will, trust, and annuities as set forth in paragraph 43 above.

115. Merrill Lynch, Argo, and Greene worked together and with Thompson to intentionally interfere with Malloy's expectancy by diverting those funds and many other funds to the December 11, 2002 trust wherein Thompson was named as the sole beneficiary upon Decedent's death, as set forth in paragraphs 44 and 45 above.

116. Merrill Lynch, Greene, and Argo played a highly significant and substantial role in helping Thompson corral the various assets of Decedent from numerous institutions into the 2002 trust for the benefit of Thompson as set forth in paragraphs 46 and 47 above.

117. All funds rounded up with assistance of Greene, Argo and Merrill Lynch, through its agent Sendler, were transferred and held by Merrill Lynch for the 2002 trust.

118. Merrill Lynch, through its agent Sendler, Greene and Argo held many telephone conferences and on occasions in person conferences with various institutions to assist Thompson in convincing the various institutions to release Decedent's assets to the Merrill Lynch accounts in the name of the 2002 trust, as set forth in paragraph 49 above.

119. On or about November 20, 2002, Defendants Greene and Argo provided Merrill Lynch with copies of the powers of attorney Thompson coerced Decedent into signing on September 16, 2002 and September 18, 2002. The September 16, 2002 power of attorney stated that it was Decedent's intention that the power of attorney not be used to disrupt the Decedent's estate plan. The September 18, 2002 power of attorney executed under the laws of the state of New York also specifically rejected the power of Thompson as agent to make gifts. Merrill Lynch, Greene, and Argo assisted Thompson and in many cases undertook all the actions to submit the powers of attorney to collect assets into the 2002 trust for the benefit of Thompson.

120. Merrill Lynch, Greene, and Argo not only provided substantial administrative assistance in collecting Decedent's assets for Thompson, they also originated ideas to perform difficult and significant rollovers of tax qualified retirement assets into the Merrill Lynch account for the benefit of Thompson and to Malloy's detriment, as set forth in paragraph 51 above.

121. The participation of Merrill Lynch, Greene, and Argo was done knowingly with the intent to funnel the assets of Decedent into the trust wherein Thompson was the known beneficiary to the complete exclusion of Malloy.

122. As a result of the substantial participation of Merrill Lynch, Greene, and Argo undertaken knowingly and intentionally, Malloy was deprived of his expectant inheritance interest and gifts to be received from the Decedent. Since Decedent named Malloy as beneficiary of his will prior to December 2002, beneficiary under his life insurance, annuities, qualified retirement plans and IRAs, it is reasonably certain that Malloy's expectancy would have been realized but for the interference of Merrill Lynch, Greene, and Argo. As a result of the tortious interference with Malloy's expected inheritance and gifts from Decedent as committed by Merrill Lynch, Greene, and Argo, Malloy has been damaged by the loss of the expected substantial benefits he never received from Decedent and retained by Thompson. Malloy is therefore entitled to judgment against said Defendants for the amounts diverted away from Malloy, plus punitive damages and attorney fees.

FOR A SEVENTEENTH CAUSE OF ACTION
(Civil Conspiracy as to All Defendants)

123. Malloy realleges and reiterates all of the allegations contained in the preceding paragraphs as fully as if repeated herein verbatim.

124. Thompson, Argo, various agents or representatives of defendant Greene, including, but not limited to Argo, and various agents or representatives of defendant Merrill Lynch, including, but not limited to Sandler, conspired among themselves for the purpose of injuring Malloy.

125. As a direct and proximate result of the actions and conduct of all defendants, Malloy, directly or indirectly, suffered special damages as set forth herein, including, but not limited to, the loss of the expected inheritance and gifts from Decedent as desired by Decedent.

126. Malloy is informed and believes he is entitled to recover compensation from all Defendants jointly and severally for his actual damages and losses, and he is entitled to recover punitive damages from each defendant in an amount to be determined by a jury.

WHEREFORE, Malloy prays that he be granted judgment for the first through seventeenth causes of action, including but not limited to the following:

- A. For an order setting aside the alleged will dated December 11, 2002 previously admitted to probate;
- B. For an order setting aside the alleged trust purportedly signed by Decedent dated December 11, 2002;
- C. For an order declaring the transfers to the alleged trust of December 11, 2002 invalid and of no legal effect thereby setting aside all transfers of any property to the purported trust;
- D. For actual and punitive damages, costs and attorney fees against Thompson for fraud, conversion, breach of trust, and tortious interference with Malloy's inheritance;
- E. For actual and punitive damages, costs and attorney fees against Merrill Lynch, Greene, and Argo for tortious interference with inheritance and gifts and aiding and abetting the same and for civil conspiracy;
- F. For a constructive trust to be imposed on any and all property interests distributed from Decedent or his estate to Thompson and others;
- G. For a resulting trust to be imposed on Thompson and/or others for all misappropriated property and any benefit therefrom;

- H. For removal of Thompson as personal representative of the estate of Robert L. Chamblee and as trustee of the alleged December 11, 2002 trust;
- I. For attorney fees and costs;
- J. For such other relief as the Court deems just and proper.

PLAINTIFF DEMANDS TRIAL BY JURY.

THE GILREATH LAW FIRM, P.A.

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and

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Telephone: (803) 777-7465
Fax: (803) 777-7465

ATTORNEYS FOR PLAINTIFF

Dated: October 29, 2012
Greenville, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

James Robert Malloy,

Plaintiff,

vs.

Swain N. Thompson, Jr., Merrill Lynch,
Pierce, Fenner & Smith, Inc., Joseph T.
Argo, and Greene and Company, L.L.P.,

Defendants.

In the Matter of:

Estate of Robert L. Chamblee

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

2010-CP-04-1845

**AMENDED
SUMMONS**

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint, in this action, a copy of which is served upon you herewith, and to serve a copy of your answer to the said Amended Complaint on the subscribers at their office located at 110 Lavinia Avenue, Greenville, South Carolina 29601, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Amended Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

THE GILREATH LAW FIRM, P.A.

By: William M. Hogan
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William M. Hogan (SC Bar #65272)
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A TRUE COPY

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Richard M. Kelly
CLERK OF COURT

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ATTORNEYS FOR PLAINTIFF

Dated: October 29, 2012
Greenville, South Carolina

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

JAMES ROBERT MALLOY.....RESPONDENT

v.

SWAIN N. THOMPSON, JR. DEFENDANT.

JAMES ROBERT MALLOY.....RESPONDENT

v.

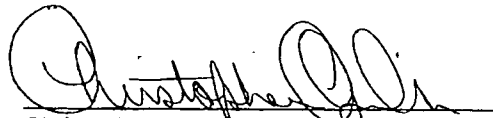
SWAIN N. THOMPSON, JR.,
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.
JOSEPH T. ARGO, AND GREENE AND COMPANY, L.L.P DEFENDANTS,

OF WHOM MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. IS APPELLANT.

NOTICE OF APPEAL

Appellant Merrill Lynch, Pierce, Fenner & Smith, Inc. appeals the order of the Honorable Alexander S. Macaulay in the above-captioned matters, which was filed on October 25, 2012. Appellant received written notice of entry of this order on October 30, 2012 (a copy of which is attached as Exhibit "A").

November 9, 2012.



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EXHIBIT "A"

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

James Robert Malloy,

Plaintiff,

vs.

Swain N. Thompson, Jr.,

Defendant.

In the Matter of:
Estate of Robert L. Chamblee

James Robert Malloy,

Plaintiff,

vs.

Swain N. Thompson, Jr., Merrill Lynch,
Pierce, Fenner & Smith, Inc., Joseph T.
Argo, and Greene and Company, L.L.P.,

Defendants.

In the Matter of:
Estate of Robert L. Chamblee

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Case No.: 2010-CP-04-1845

Case No.: 2012-CP-04-1433

**ORDER ON MOTION TO AMEND,
MOTION TO CONSOLIDATE,
MOTION TO DISMISS, AND
MOTION TO COMPEL
ARBITRATION**

FILED - CLERK'S OFFICE
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GENERAL SESSIONS

Before this court are a Motion to Amend the Complaint in case number 2010-CP-04-1845 in which the Plaintiff seeks to add additional Defendants; Plaintiff's Motion to Consolidate case number 2010-CP-04-1845 with case number 2012-CP-04-1433; Defendant Thompson's Motion to Dismiss case number 2012-CP-04-1433; and Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc.'s ("Merrill Lynch") Motion to Dismiss and Compel Arbitration in case number 2012-CP-04-1433.

1 of 3

The Plaintiff originally filed this action in Anderson County Probate Court against Defendant Thompson concerning various causes related to an alleged incompetency of the decedent Robert L. Chamblee ("Decedent"). The causes of action include claims to set aside Decedent's last will and revocable trust and other claims related to allegations of tortious interference with expected inheritance and gifts. The probate action was subsequently removed to this court upon Plaintiff's motion and the Order of Removal signed by the Anderson County Probate Court filed May 18, 2010.

On October 6, 2011, Plaintiff filed a Motion to Amend Plaintiff's Complaint to add Defendants Merrill Lynch, Joseph T. Argo ("Argo"), and Greene and Company, L.L.P. ("Greene and Company"). The proposed Amended Complaint asserts two causes of action against the new defendants for aiding and abetting tortious interference with expected inheritance and gifts and conspiracy. The latter cause of action was also asserted against Defendant Thompson.

Defendant Thompson opposed the Motion to Amend on the grounds that the circuit court, on removal from probate court, lacks subject matter jurisdiction beyond the causes of action to set aside the will and trust of Decedent. Plaintiff's Motion to Amend was argued before this court on March 12, 2012, and this court took the matter under advisement.

On April 16, 2012, Plaintiff filed a new action in case number 2012-CP-04-1433 which was nearly identical to Plaintiff's proposed Amended Complaint in 2010-CP-04-1845 except that it did not contain the causes of action for setting aside Decedent's will. Simultaneous with the filing of the new action, Plaintiff also filed a Motion for Consolidation of both cases. All Defendants in case number 2012-CP-04-1433 were

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served and responded. Merrill Lynch filed a Motion to Dismiss and Compel Arbitration, and Defendant Thompson filed a Motion to Dismiss 2012-CP-04-1433 and opposed the Plaintiff's Motion to Consolidate. Defendants Argo and Greene and Company filed responsive pleadings.

For the reasons stated below, the Court (1) grants Plaintiff's Motion to Amend the Complaint to add additional parties in case number 2010-CP-04-1845 as provided in Plaintiff's proposed Amended Complaint attached to its motion; (2) grants Plaintiff's Motion to Consolidate case number 2010-CP-04-1845 with case number 2012-CP-04-1433; (3) denies Defendant Thompson's Motion to Dismiss case number 2012-CP-04-1433, and (4) denies the motion of Merrill Lynch to dismiss and compel arbitration in case number 2012-CP-04-1433.

I. Motion to Amend Complaint in Case Number 2010-CP-04-1845.

Defendant Thompson argued that a removal to circuit court of Plaintiff's petition to set aside the will and trust of Decedent and remove Thompson as personal representative is effectively an appeal of the probate court orders admitting the will to probate and appointing Thompson as personal representative. The circuit court then would apply the standards for appellate review in deciding Plaintiff's claim to set aside the will. Thompson further argues that the appellate rules and standards differ significantly from the procedures for trying new matters and therefore the causes of action for setting aside the will and trust should not be heard at the same time as the remaining causes of action. Thompson further argued that some of Plaintiff's causes of action sound in equity and that the probate court is a court of law which would make equitable and legal proceedings incompatible.

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The removal statute in S.C. Code Ann. § 62-1-302(d) provides that the circuit court in cases removed from probate court "shall proceed upon the matter de novo." Under the South Carolina Probate Code, an admission of a will to probate and the appointment of a personal representative through the informal probate procedures are not adjudicated actions but instead are *ex parte* administrative statements. See S.C. Code Ann. § 62-3-302 ("upon receipt of an application requesting informal probate of a will, the court, upon making the findings required by § 62-3-303, shall issue a written statement of informal probate.") *cf.* § 62-3-309 ("a declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings."). With the removed case being heard *de novo*, the circuit court procedures for determining the tort claims are not incompatible with those for setting aside the will and trust. See S.C. Code Ann. § 62-1-304 (providing that generally the Rules of Civil Procedure adopted for the probate court and in their absence those adopted for the circuit court govern formal proceedings); see also S.C. Code Ann. § 62-1-103 (specifying that principles of both law and equity supplement the provisions of the probate code).

South Carolina Code § 62-1-302 sets forth the subject matter jurisdiction of South Carolina courts regarding decedents' estates. Subsection (a) states the general rule that "the probate court has exclusive original jurisdiction over all subject matter related to estates of decedents." S.C. Code § 62-1-302(a)(1). Matters related to "estates of decedents" include the ability of a court to determine the property that belongs to a decedent's estate. See S.C. Code Ann. § 62-3-706 (requiring personal representative to file inventory and appraisal with probate court detailing assets of decedent's estate). Since the probate court is empowered to determine the assets that comprise a decedent's

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estate, the removal subsection transfers that same power to the circuit court. Section 62-1-302(d) grants the circuit court jurisdiction over actions to try title. S.C. Code § 62-1-302(d)(3). This removal provision directs the circuit court to hear matters related to determining the probate assets of a decedent and who owns title to property. An action to try title would include a determination of the proper titleholder of assets transferred through an invalid *inter vivos* conveyance when the assets would otherwise belong to the decedent's estate. See Ex parte Cannon, 385 S.C. 343, 685, S.E. 2d 814 (Ct. App. 2009) (holding court of common pleas had subject matter jurisdiction on probate court removal to hear matters pertaining to claims of misappropriation of potential estate assets by a trustee).

The probate code also gives this court subject matter jurisdiction by conferring authority to handle matters concerning powers of attorney under S.C. Code § 62-5-503. Plaintiff's proposed Amended Complaint alleges that Defendant Thompson, with the assistance of the remaining Defendants, used two invalid powers of attorney to remove assets from Decedent's estate. (see e.g., Prop. Amend. Compl. ¶¶ 27, 28, 36, 40, 41, 44-46, 50, 103, 111, and 119). South Carolina Code § 62-5-503 provides "The probate court has concurrent jurisdiction with the circuit courts of this state over all subject matter related to the creation, exercise, and termination of powers of attorney governed by the provisions of this part . . ." S.C. Code Ann. § 62-5-503 (2009).

The gravamen of Plaintiff's claims in his original and proposed Amended Complaint involve allegedly improper transfers by Defendants of Decedent's property into an invalid revocable trust, with Defendant Thompson as remainder beneficiary, created while Decedent was incompetent and subject to undue influence. These

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purportedly void conveyances from Decedent removed property from Decedent's estate. Plaintiff is seeking a determination of the proper title holder to these allegedly wrongfully conveyed assets. Thus these claims are within the subject matter jurisdiction of the probate court. See Judy v. Judy, 393 S.C. 160, 169, 712 S.E.2d 408, 412 (2011) (emphasizing "the broad wording of [§§ 62-1-302(a)(1) and 62-1-201(4)], particularly the phrase 'all subject matter related to estates of decedents,' " allowed probate court to rule on a tort claim for waste).

In addition to the probate code's grant of subject matter jurisdiction related to matters determining the probate estate of decedents and the creation and exercise of powers of attorney, the probate code also provides concurrent jurisdiction between the probate and circuit courts regarding external trust affairs. S. C. Code Ann. §62-7-201(c). South Carolina Code § 62-1-302(d)(4) provides that the circuit court on removal has jurisdiction to proceed *de novo* upon matters related to trusts. In addition to causes of action for setting aside the purported revocable trust of Decedent, Plaintiff has alleged that Defendants used the purported trust to divert assets away from Decedent's probate estate and that Decedent's trust was the vehicle for tortiously interfering with Plaintiff's expected inheritance and gifts. (see *e.g.*, Prop. Amend. Compl. ¶¶ 27, 28, 36, 40, 41, 44-46, 50, 103, 111, and 119).

The Plaintiff's claims set forth in paragraph 35 of the proposed Amended Complaint are in excess of \$5,000. Plaintiff also alleges that Defendants wrongfully transferred other assets of Decedent that would potentially comprise estate assets if Plaintiff's claims are proven. See *e.g.*, Prop. Amend. Compl. ¶ 47). Plaintiff has sought

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damages in his prayer for relief for tortious interference with inheritance, aiding and abetting the same and conspiracy. Prop. Amend. Compl., Prayer ¶¶ D and E.

The Probate Code grants the circuit court subject matter jurisdiction over "actions in which a party has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value..." S.C. Code Ann. § 62-1-302(d)(4). Plaintiff's claim of tortious interference with inheritance and gifts in connection with these assets constitutes a jury claim meeting the statutory amount. See Bateman v. Rouse, 358 S.C. 667, 673, 596 S.E.2d 386, 389 (Ct. App. 2004) (holding right to jury trial preserved for legal actions and that action for damages is an action at law); see also Nat'l Bank of S.C., 283 S.C. 438, 440, 322 S.E.2d 689, 690 (1984) (whether party is entitled to jury trial is determined by the pleadings); see also In Re Estate of Russell, 311 S.W.3d 528 (Tex. App. 2009) (upholding jury's verdict for tortious interference with inheritance).

The Court of Common Pleas has subject matter jurisdiction to hear Plaintiff's claims through both case numbers 2010-CP-04-1845 and 2012-CP-04-1433. Based on the broad wording of S.C. Code § 62-1-302(a)(1) and (d), the court has subject matter jurisdiction upon removal to hear all of Plaintiff's claims in case number 2010-CP-04-1845. In case number 2012-CP-04-1433 the court has subject matter jurisdiction under S.C. Code §§ 62-7-201 and 62-5-503 because the causes of action all relate to the external affairs of the trust and the creation and exercise of Decedent's power of attorney.

II. Motion for Consolidation.

The two cases filed by Plaintiff contain identical allegations and duplicated causes of action except that case number 2012-CP-04-1433 does not contain the three claims to set aside the will of Decedent for lack of mental capacity, undue influence and mistake

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contained in case number 2010-CP-04-1845. These two actions therefore contain common questions of law and fact. At the time this matter was heard on September 20, 2012, the additional Defendants Merrill Lynch, Argo, and Greene and Company had been served with the Summons and Complaint in case number 2012-CP-04-1433. Since an order on the Motion to Amend had not yet been issued, the new Defendants have not yet been served with the pleadings in case number 2010-CP-04-1845. If the court were to dismiss case number 2012-CP-04-1433, Defendants Merrill Lynch, Argo, and Greene and Company would have to be served and the case started anew before Merrill Lynch's Motion to Compel could be heard. At this stage, Merrill Lynch has already filed a Motion to Dismiss and Compel Arbitration in case number 2012-CP-04-1433 in which the parties and the Court are prepared to entertain. A dismissal of case number 2012-CP-04-1433 would cause a further delay in this action which the Court wishes to avoid. Therefore a just, speedy, and inexpensive determination of this action would be best served by a consolidation of the two actions in order to allow the claims and defenses to proceed. See Rule 1, SCRCP.

III. Defendant Thompson's Motion to Dismiss.

Defendant Thompson filed a Motion to Dismiss case number 2012-CP-04-1433 on the basis that Plaintiff is not the real party in interest to bring his claims and lacks standing to prosecute the causes of action except for the setting aside of the will and trust.¹ Thompson submits that because he is the appointed personal representative, he is the only person with standing to bring claims of fraud, breach of fiduciary duty, and

¹ Defendant Thompson also moved to dismiss on the basis of the lack of subject matter jurisdiction which this court denies pursuant to the reasons stated in section I.

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related claims. Plaintiff countered that as the sole beneficiary of Decedent's prior will of 1999 and the primary beneficiary of Decedent's prior estate plan, he has standing to bring his claims as the real party in interest. The South Carolina Supreme Court has recognized the principle that a trust beneficiary may bring a derivative claim on behalf of the trust where the trustee or third persons join in the wrong and receive a benefit therefrom. See Neal v. Bleckley, 51 S.C. 506, 29 S.E. 249, 257 (1898). The South Carolina Supreme Court stated:

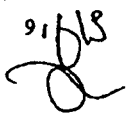
If a trustee refuse, after demand, to bring action on behalf of the trust estate or the beneficiaries thereof, or if he has an adverse interest or has conspired to defeat the trust, the beneficiary may himself bring the action against the third person, joining the trustee as a defendant. In doing so, the beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust.

Bailes v. Southern Ry. Co., 227 S.C. 176, 182-83, 87 S.E.2d 481, 484 (1955); see also Restatement (Second) of Trusts §282 (1959) ("If the trustee improperly refuses or neglects to bring an action against the third person, the beneficiary can maintain a suit in equity against the trustee and the third person."); see also Pillsbury v. Karmgard, 27 Cal.Rptr.2d 491, 22 Cal. App.4th 743, 756 (1994) (recognizing that California's "real party in interest" statute has not modified common law of beneficiary standing under Restatement (Second) of Trusts § 282).

Since Plaintiff as the beneficiary under Decedent's prior estate plan may derivatively bring an action on behalf of the trust, he is a real party in interest under Rule 17(a), SCRPC.

IV. Motion of Defendant Merrill Lynch to Dismiss and Compel Arbitration.

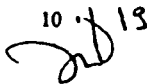
Plaintiff has asserted two causes of action against Merrill Lynch -- for tortious

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interference with inheritance and gifts and for conspiracy. Merrill Lynch filed a motion to compel arbitration based on two Client Relationship Agreements that Decedent purportedly executed, one individually and one as trustee of the Robert L. Chamblee Trust. The Client Relationship Agreements included arbitration agreements between Decedent and Merrill Lynch. Merrill Lynch acknowledges that Plaintiff did not sign the Client Relationship Agreements containing the arbitration clauses. However, it contends that as a nonsignatory, Plaintiff should be estopped from denying the arbitration clauses since it claims Plaintiff is a third-party beneficiary of the accounts and that Plaintiff's lawsuit has a substantial relationship to the accounts.

Plaintiff's Complaint and proposed Amended Complaint both seek to set aside the December 11, 2002 revocable trust allegedly executed by mistake or while Decedent was incompetent or under undue influence. See Compl. 2012-CP-04-1433, ¶¶ 58-66. Plaintiff contends the trust is void *ab initio* and in the fourth cause of action seeks to set aside transfers to the trust. See Id. at ¶¶ 67-69. Plaintiff is not seeking benefits from the trust but instead seeks to annul the transfers to the trust held in accounts with Merrill Lynch. Plaintiff's claims, therefore, do not pertain to the relationship between Merrill Lynch and Decedent.

The United States Supreme Court has held under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steel Workers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 (1960); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 591, 553 S.E.2d 110, 116 (2001) ("the FAA does not require parties to arbitrate when they have not agreed to do so...").

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In proper cases, courts applying the FAA have required nonsignatories to arbitrate disputes pursuant to an arbitration provision within a contract executed by other parties. See Int'l Paper Co. v Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000)(holding that nonsignatory could be estopped from disclaiming arbitration agreement when it seeks benefits under the contract).

The Second Circuit Court of Appeals recognized five theories "aris[ing] out of common law principles of contract and agency law" that could provide a basis "for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel." Thomson-CSF, S.A. v. Am. Arbitration Ass'n., 64 F.3d 773, 776 (2nd Cir. 1995). A review of the pleadings and the documents submitted with the Motion to Compel Arbitration by Merrill Lynch show that none of the above-stated factors apply to Plaintiff in this action.

This Court has also reviewed other case law submitted by Merrill Lynch in its motion in addition to consideration of oral arguments of counsel. This Court finds that there are absolutely no good grounds on which to base an order to compel arbitration in this case. The motion of Merrill Lynch to compel arbitration is therefore denied.

Plaintiff responded in its brief that it would be moving for sanctions against Merrill Lynch under the South Carolina Frivolous Civil Proceedings Act for making the motion to compel arbitration. At the hearing Plaintiff's counsel said it was not asking for sanctions at this time. While the Court finds that there are absolutely no good grounds for making the motion to compel arbitration, any award for sanctions under the Frivolous

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[Signature]

Civil Proceedings Act is not appropriate at this stage of the case.² Whether sanctions are appropriate should be determined by the trial judge at the termination of proceedings upon motion properly made at that time.

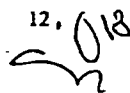
CONCLUSION

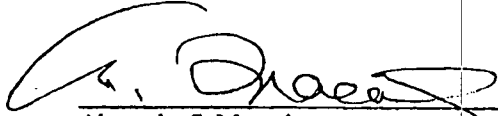
The Court hereby grants Plaintiff's Motion to Amend Plaintiff's Complaint in case number 2010-CP-04-1845 in the form of the proposed Amended Complaint submitted with the Motion to Amend. The Court denies Defendant Thompson's Motion to Dismiss for lack of subject matter jurisdiction and standing in case number 2012-CP-04-1433. The Court grants Plaintiff's Motion to Consolidate case numbers 2010-CP-04-1433 and 2012-CP-04-1433. The Court denies the Motion to Dismiss and Compel Arbitration of Defendant Merrill Lynch.

IT IS SO ORDERED.

[SIGNATURE ON NEXT PAGE]

² S.C. Code Ann. § 15-36-30 provides that any award of sanctions "must be determined by the trial judge at the conclusion of a trial..."(emphasis added). See also S.C. Code. 15-36-10(2)(requiring that "the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.")(emphasis added). The Act does not authorize sanctions during pre-trial proceedings prior to conclusion of the action.

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Alexander S. Macaulay
Presiding Circuit Court Judge
Tenth Judicial Circuit

Dated: October 12, 2012
Walhalla, South Carolina.

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COMMON PLEAS AND
GENERAL SESSIONS

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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

JAMES ROBERT MALLOY RESPONDENT

v.

SWAIN N. THOMPSON, JR. DEFENDANT.

JAMES ROBERT MALLOY RESPONDENT

v.

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JOSEPH T. ARGO, AND GREENE AND COMPANY, L.L.P. DEFENDANTS,
OF WHOM MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. IS APPELLANT.

PROOF OF SERVICE OF NOTICE OF APPEAL

This is to certify that I have this day served counsel for the Appellant in the foregoing matter with a copy of the foregoing *Notice of Appeal* by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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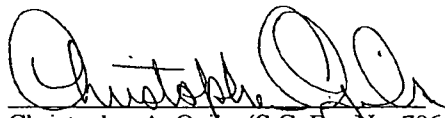
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November 9, 2012.



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STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON) COURT OF GENERAL SESSIONS
2012-CP-04-01433

JAMES R. MALLOY,)
)
PLAINTIFF.)
)
vs.) TRANSCRIPT OF RECORD
)
) **COPY**
SWAIN N. THOMPSON, JR.,)
ET AL.,)
)
DEFENDANTS.)

SEPTEMBER 20, 2012
ANDERSON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE ALEXANDER S. MACAULAY, JUDGE.

A P P E A R A N C E S:

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VIVIAN H. CROSS
OFFICIAL COURT REPORTER

SEPTEMBER 20, 2012
(JAMES R. MALLOY V. SWAIN N. THOMPSON, JR., ET AL.)
(MOTIONS HEARING)
(2012-CP-04-01433)

COLLOQUY

PAGE
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CERTIFICATE OF REPORTER

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E X H I B I T S

IDENTIFICATION

ENTERED

*****NO EXHIBITS OFFERED*****

P R O C E E D I N G S

(SEPTEMBER 20, 2012 - 3:09 P.M.)

(CASE NUMBER: 2012-CP-04-01433)

THE COURT: This is *James Robert Malloy versus Swain N. Thompson, Jr., Merrill Lynch, Pierce Fenner & Smith, Inc., Joseph T. Argo, and Greene and Company L-L-P*, Defendants in the matter of the Estate of Robert L. Chamblee.

Mr. Hogan and Mr. Gil- -- Gilreath and Mr. Medlin here on behalf of the Plaintiff; is that correct?

MR. GILREATH: Yes, Your Honor.

MR. HOGAN: That's correct.

THE COURT: And Mr. Gaskins is here on behalf of Merrill Lynch, Pierce Fenner & Smith?

MR. GASKINS: Yes, Your Honor.

THE COURT: And, um, Mr. Smith here on Joseph -- on behalf of Joseph T. Argo, Greene and Company---

MR. SMITH: That's correct, Your Honor.

THE COURT: ---L-L-P? All right; you in this matter or you gonna---

MR. SMITH: Uh -- we're -- we have no pending motions today.

THE COURT: All right; very good.

(WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A CONFERENCE, OFF THE RECORD.)

(WHEREUPON, PROCEEDINGS CONTINUED.)

1 THE COURT: All right, uh, and Mr. O'Rourke and --
2 O'Rourke and Mr. Threlkeld are here on behalf of Swain N.
3 Thompson, Junior, P-R -- Personal Representative of the
4 Estate of Robert L. Chamblee; is that correct?

5 MR. THRELKELD: Yes, sir.

6 THE COURT: Very good; all right, let's -- let's see if
7 we can wait for the Clerk to get here in case we need to...

8 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED WHILE WAITING
9 FOR THE CLERK.)

10 (WHEREUPON, PROCEEDINGS CONTINUED.)

11 THE COURT: All right, the Clerk is here.

12 THE CLERK: Sorry, Your Honor.

13 THE COURT: No -- no problem at all; we've -- we've all
14 just gathered.

15 All right, who wants to, uh -- Mr. -- the order of the
16 motions; I understand we have several motions.

17 MR. MEDLIN: Your Honor, we are here to argue the --
18 against the Motion to Dismiss brought by Mr. Thompson. And,
19 we favor the Motion to Consolidate. And the Motion to
20 Dismiss involves jurisdictional issues which, if it pleases
21 The Court I will address. And the Motion to Consolidate
22 would involve dealing with some other issues, uh---

23 THE COURT: Well, the Motion to Dismiss would probably
24 be the ones (sic) that'd be dispositive.

25 MR. MEDLIN: And then also we have a -- a -- a motion

1 about whether we require an arbitration which Mr. Gilreath is
2 gonna handle.

3 THE COURT: All right. Well, let's take the Motion to
4 Dismiss; whose motion is that?

5 MR. THRELKELD: That's our motion, Your Honor.

6 THE COURT: Mr. Threlkeld.

7 MR. THRELKELD: There was a new complaint filed under
8 case, number 2012-1433, and the number of causes of action --
9 of course, they're stated in there -- but the first motion is
10 directed to the first cause of action. And, the basis for
11 that, uh, Motion to Dismiss is lack of subject matter
12 jurisdiction. And -- and I think to address that issue we
13 need to go back to the point of this -- earlier this year, in
14 March of, uh -- arguing the question to, uh, amend the
15 complaint which is substantially the same issue as we're
16 having today.

17 Uh -- this case is primarily a Wills contest that has
18 been removed to the, uh -- uh, Court of Common Pleas for
19 trial. The Court of Common Pleas has derivative jurisdiction
20 for the limited purpose of hearing the Wills contest.

21 If the Wills contest is successful, then the documents
22 in question, of course, would be invalidated and the
23 Plaintiff then might can prove his standing in this case in
24 some respect, somewhere, uh, to maintain an action, uh, on,
25 uh -- something else.

1 Uh -- if the Will contest is unsuccessful, then it seems
2 to me this matter is -- is -- is over.

3 When the Will -- when a Will is filed in Probate Court
4 under a procedure called Informal Probate, The Court
5 routinely, without a hearing or notice, admits that Will to
6 Informal Probate, which effectively, or -- or, uh -- uh, at
7 that time makes a preliminary judgment that the testator made
8 a valid Will and that the Will is -- is enforceable subject
9 to any right of any interested person to the extend there is
10 an interested person that has a right to, uh, file for a
11 Formal Probate and testacy, in which case this issue becomes
12 ripe for hearing.

13 Uh -- a formal protest proceeding -- a formal probate
14 proceeding simply is an appeal of the, uh -- uh, Lower Court
15 Order and the appeal can either heard (sic) -- b- -- be heard
16 by the Probate Court or it can be removed to the, uh, Court
17 of Common Pleas for hearing.

18 And if it is removed, then the sole purpose of that
19 removal would be to hear the contest on that formal, uh,
20 Petition. And then, after that decision is, uh, culminated,
21 the results would be, uh, remanded to the Probate Court for
22 action as far as the administration of the estate.

23 It is critical to understand that a Lower Court Order --
24 a Probate Court Order -- cannot be collaterally impeached.
25 That's by statute and the case law. A particular statute,

1 section 14-23, Section 260 says that no Probate Order can be
2 impeached -- or, collaterally impeached. It has to be done
3 by a direct attack.

4 If Mr. Chamblee was competent and free to act, then
5 there's no basis for this suit. The thrust of the Motion to,
6 uh -- and again, the Motion to, uh, Consolidate -- and I
7 understand that's not exactly, uh -- uh, the point we're
8 making now, but we'll get to that. But, the -- the thrust of
9 this action is to collaterally impeach the Probate Court
10 Order.

11 Now, in regard to the Motion, section -- I mean, uh, the
12 first cause of action, paragraphs fifty-eight through sixty
13 involves, uh, pleadings that say, upon information and belief
14 the 2002 Trust by the Decedent, the Decedent was mentally
15 incompetent and suffering from Alzheimer's disease.

16 Now, I -- I think that's particularly important. (After
17 pause) If we -- we look at the brief of the, uh, Plaintiff in
18 this case, it says -- this action is an action by the
19 Plaintiff, a complete stranger to the Trust, contesting the
20 validity of the Trust set up by the Defendant Thompson. The
21 use of the Trust as a vehicle to interfere with the
22 Plaintiff's expected inheritance and gifts, et cetera.

23 Well, I think that best characterizes the case as one
24 where the Plaintiff is a complete stranger. Uh -- and
25 therefore The Court lacks subject matter jurisdiction for

1 that cause of action because that cause of action involves
2 something that is within the exclusive jurisdiction --
3 subject matter jurisdiction of the Probate Court. And, if it
4 is part of the exclusive jurisdiction of the Probate Court,
5 then it can be dealt with as part of the appeal but it cannot
6 be dealt with by a separate action.

7 The second cause of action is essentially the same.
8 Uh -- it -- it alleges that there was undue influence. Once
9 again that goes to a collateral attack on the lower court
10 orders and also reinforces the statement made in the
11 Plaintiff's brief that there's really no relationship between
12 Malloy and the Trust -- it's a complete stranger.

13 Uh -- then the third cause of action, paragraph
14 sixty-four through sixty-six, allege that there was a mistake
15 made by the Settlor when he created the Trust. Once again
16 the argument is there's lack of subject matter jurisdiction
17 and in addition to that lack of standing.

18 Uh -- the same kind of causes of action are alleged in
19 the fourth cause of action which says there was mentally --
20 mental incompetence. And once again all of this is merely,
21 uh, a collateral -- attempt to collaterally improve (sic) --
22 impeach the, uh, the lower court order, uh, and also a
23 question of standing to raise that question in the same sense
24 that anybody in this room, according to the procedures going
25 on, would be in the same position -- no relationship.

1 Uh -- then the fifth cause of action is a -- is an
2 allegation of fraud against the independent -- against the
3 individual Defendant, Thompson. Uh -- which, uh, seems --
4 seems to me there's again a -- a -- a -- a question of
5 whether or not Mr., uh -- uh, Chamblee was -- was competent
6 and also whether or not there's any standing for bring this
7 kind of issue.

8 Then the sixth cause of action alleges -- it says
9 conversion, but what it -- the -- the pleadings relate to is
10 Thompson has wrongfully taken property. Now, obviously
11 that -- it -- it -- certainly conversion is a -- is -- is --
12 is a -- an action that can be maintained in the Court of
13 Common Pleas. But, the action that we're prosecuting, the,
14 uh -- the, uh, formal testacy proceedings is based on
15 derivative jurisdiction from -- from Probate Court and the
16 Court of Common Pleas does not -- does not have the
17 jurisdiction in that action to entertain or hear cases that
18 are Court of Common Pleas causes of action unrelated to that
19 Decedent. Also it's a question of standing in that case.

20 The seventh cause of action is essentially the same;
21 alleges quantum meruit and unjust enrichment which it's -- of
22 course is causes of action that provide for equitable relief
23 in the, uh -- uh, in -- in the Court of Common Pleas but
24 Probate Court has its own, uh, legal form of relief in the
25 Probate Court and the jurisdiction of the pending action is

1 derivative jurisdiction from Probate Court.

2 The same relating to the action for constructive trust,
3 uh, again which is an equitable cause of action that provides
4 a -- a remedy in the Court of Common Pleas but is -- is --
5 it's not a cause of action that exists in -- in the Probate
6 Court. In fact, the Probate Court specifically states there
7 is no, uh, such, uh, relief available because the Probate
8 Court has legal form of relief, uh -- uh, that does not
9 require equitable relief.

10 The ninth cause of action is -- is -- is a resulting
11 Trust which is the same kind of equitable cause of
12 action that once again, uh -- uh, certainly is in the
13 jurisdiction -- subject matter jurisdiction of the Court of
14 Common Pleas but not in the Probate Court. So -- so it
15 cannot be combined with the, uh -- uh, a action for Informal
16 Probate.

17 And then the tenth cause of action is -- is pretty much
18 the same. Uh -- uh -- once again in all of these they are --
19 many of them are causes of action in which the Court of
20 Common Pleas has original subject matter jurisdiction but
21 Probate Court does not have any subject matter jurisdiction
22 and therefore the, uh -- the action cannot be combined or
23 consolidated with the, uh -- uh -- uh, Probate Court appeal.

24 In addition to that the procedures -- in the same sense
25 that we argue then the amendment situation -- the procedures

1 for trying a Wills contest is totally inconsistent. The
2 burden of proof is inconsistent; the procedures are
3 inconsistent, uh, with, uh, other causes of action within the
4 original subject matter jurisdiction of the Court of Common
5 Pleas.

6 We'd asked The Court to dismiss those causes of action
7 on -- on that basis and also on lack of standing. Thank you.

8 THE COURT: Well now, you're talking about the first ten
9 causes of action as the Motion to Dismiss?

10 MR. THRELKELD: Yes, sir.

11 THE COURT: You got some -- all right, so there's
12 twenty-seven causes of action?

13 MR. THRELKELD: No, sir; this is -- this is under the
14 new -- new complaint. There's only, uh -- (after pause) I
15 believe that's all the causes of action. No, there's
16 thirteen -- thirteen.

17 THE COURT: Thirteen?

18 MR. MEDLIN: Fourteen.

19 MR. THRELKELD: Yes, sir; there is fourteen. And those
20 actions -- those -- the last three are within the subject
21 matter jurisdiction of the, uh -- of the Court of Common
22 Pleas. And, of course, they can stand there, but -- but
23 they -- but they can't be combined or consolidated without --
24 without interfering with subject matter jurisdiction of this
25 proceeding and also because the, uh -- the -- the Court of

1 Common Pleas simply doesn't have jurisdiction of the -- of --
2 of the causes of action to allow the consolidation necessary.

3 THE COURT: All right then, who wants to hear it on the
4 Motion to Dismiss?

5 MR. MEDLIN: Your Honor, if it please the court, I
6 would.

7 Let me first, if I may, address a couple of points that
8 Mr. Threlkeld made about the process of bringing an action in
9 the Probate Court and removing it to your Court, Your Honor.

10 Uh -- first of all, the section that deals with the
11 exclusive original jurisdiction of the Probate Court in South
12 Carolina as well as the removal of matters from that Probate
13 Court is Section 62-1-302.

14 There's another section of the Probate Code that's going
15 to affect our jurisdictional argument. It's now placed in
16 the Trust Code Section of the overall Probate Code, and
17 that's 62-7-201.

18 Now, in one option available to the Petitioner, the
19 Petitioner could bring an action within the exclusive
20 original jurisdiction of the Probate Court and have the
21 hearing there. The Petitioner has another option; the
22 Petitioner can remove it, the Respondent can remove it, the
23 Probate Judge sua sponte can remove it. In which case, Your
24 Honor would hear it. And I don't agree with Mr. Threlkeld's
25 notion of a removed matter being an appeal, particularly when

1 we are removing the issue of the probate of the Will.

2 Now, in a while. -- if you would bear with me -- I'll
3 explain why I think all of our causes of action are
4 appropriately before this Court. But all of our causes of
5 action before were appropriately before the Circuit, uh --
6 the Probate Court and we properly removed those as well. So,
7 I'm going to argue that in two ways all of these causes of
8 action are properly before this Court now, Your Honor.

9 But with respect particularly to this notion that the
10 Informal Probate of a Will, once agreed to by the Probate
11 Court and then removed when the dispute about the propriety
12 of that decision by the Probate Court is somehow an appeal is
13 not how I would describe it.

14 The Probate Code provides for an Informal Probate of a
15 Will which, in many cases, simply requires handing the Will
16 to the Probate Judge and the Probate Judge can say it looks
17 good to me and it's a valid Will.

18 That's done without any notice and it's done without any
19 hearing other than if one wants to technically say the judge
20 looking at the Will and saying it looks okay to me is a
21 hearing, but there's no evidentiary hearing, there's no
22 opportunity for anybody to be heard at that point.

23 Now recognizing that those interested persons in the
24 estate have due process rights, the Probate Code allows the
25 interested persons to contest that Informal Probate

1 determination. In fact, the Probate Code doesn't even call
2 the admission document in an Informal Probate an order; it
3 calls it a written statement. It doesn't want to call it an
4 order because there isn't a hearing and there hasn't been an
5 opportunity by those who have an interest to present their
6 case.

7 Notice after that Informal Probate must be given to
8 interested persons and those interested persons then have an
9 opportunity to bring a formal testacy proceeding which does
10 require a notice, which does require a hearing. And that too
11 can be done either in the Probate Court or it can be removed
12 to the Circuit Court. Whichever Court hears that hears the
13 matter de novo. In fact, it would have to be de novo and not
14 an appeal because there's been no hearing held by The Court
15 granting the Informal Probate.

16 So, again I would take exception to a likening of the
17 bringing of a formal testacy proceeding to an appeal. This
18 Court would have full-blown authority to conduct a hearing,
19 take evidence, hear arguments, and you could issue the Order.
20 That would be the first Order that would be issued in that
21 process.

22 Now, I also heard that our client doesn't have standing.
23 And I don't agree with that obviously. In fact, if I sort of
24 parse through Mr. Thompson's arguments, it is that
25 Mr. Thompson, who is accused of -- through a variety of

1 improper mechanisms -- coercing the Decedent to do things
2 with this property that he didn't want to do and undoing
3 things that he had already done -- that Mr. Thompson is the
4 only person with standing to sue Mr. Thompson. And other
5 than perhaps the issue of the Will contest, no Court has
6 jurisdiction to hear Mr. Thompson sue Mr. Thompson. I think
7 that's not a logical result.

8 Our client has standing because, among other reasons, he
9 was named a beneficiary of the earlier Will, which we would
10 prove is a valid Will, and was not revoked or overturned by
11 the punitive subsequent Will because we are going to argue
12 that it is invalid for any number of reasons.

13 Our client is beneficiary of other non-Probate transfers
14 which, through these mechanisms by Mr. Thompson, we would
15 allege were also changed.

16 Clearly he had standing; clearly he had rights to
17 property, expectations of property that we claim were taken
18 away from him by the improper actions of Mr. Thompson. If he
19 doesn't have standing to assert those claims then any person
20 in a position to coerce or unduly influence someone, who is
21 smart enough to -- as part of that coercion -- name himself
22 as the Personal Representative under a Will and the Trustee
23 of a Trust would be home free. No one would be able to
24 contest, because under Mr. Thompson's position only he has
25 standing in these matters.

1 The jurisdiction of the Probate Court and the Circuit
2 Court is interrelated certainly under the Probate Code. The
3 Legislature understood that some litigants may rather have
4 issues heard first in the Circuit Court. And so, gave that
5 opportunity so that in the same section -- Section 62-1-302
6 that grants the original exclusive jurisdiction to the
7 Probate Court -- in paragraph (d) the Legislature gives
8 litigants in almost every one of those situations -- it's not
9 an exact match but in almost every one of those situations,
10 and we would argue certainly in all of our situations -- the
11 opportunity to choose the Circuit Court as the Court to hear
12 the matter. Again, the Respondent has that same right and
13 again the Probate Judge has that same right.

14 This notion that -- and I know we're getting a little
15 ahead of ourselves, but I'm trying to address some of what
16 Mr. Threlkeld said, which I think seeps over into the Motion
17 to Consolidate -- the notion that we can't consolidate cases
18 that are heard partly in the Probate Court and partly in the
19 jurisdiction of the Circuit Court I think is not consistent
20 with what our Courts have done.

21 I have, along with Mr. Gilreath and many, many other
22 lawyers in this state been involved for years in the *James*
23 *Brown/State* matter, and there was a settlement agreement
24 which my client was a party to, that was appealed to the
25 Supreme Court. And not once -- although the Supreme Court

1 hadn't issued an Order there -- has the Supreme Court said
2 this is an improper subject matter jurisdiction issue because
3 some of these matters were Probate Court jurisdiction matters
4 and some were Circuit Court jurisdiction matters. And in
5 fact, the Supreme Court did issue an Order in a related case
6 in the James Brown estate -- the *Cannon* matter -- and didn't
7 bother to say in its opinion that we shouldn't be ruling
8 because there were these combination issues, some that were
9 Probate Court decided and some that were Circuit Court
10 decided.

11 And in fact, the *Boyce* case that Mr. Gilreath may talk
12 about later if it comes up in his argument, which deals with
13 tortious interference, in fact is a case where The Court says
14 there was a claim brought in Probate Court, it was
15 transferred to the Circuit Court, and it was consolidated
16 with other matters in the Circuit Court.

17 Now, here's where I'm a little confused by the argument
18 Mr. Thompson is making here. We brought almost all of these
19 causes of action originally in the Probate Court. Again,
20 when you look at the very broad jurisdiction granted to the
21 Probate Court in 62-1-302(d) it says estates of Decedents and
22 then goes on to explain what all that means. But, that would
23 include a determination of what property belongs to the
24 estate of a Decedent. That has to be something that would be
25 part of any discussion of the Decedent's estate. In fact,

1 very much of what the Personal Representative has to do in
2 administering the estate is to determine the assets that
3 belong to the Decedent. And our argument is that there are
4 assets that were wrongfully steered from the Decedent's
5 estate, ultimately to the benefit of our client, so that the
6 issue is what belongs in the estate.

7 We removed those matters to the Circuit Court and again,
8 under any one of several provisions of paragraph (d) of
9 Section 62-1-302, Mr. Thompson's counsel agrees I think that
10 we could remove the formal proceedings of the probated Will,
11 but I think that's all I'm hearing him agree to.

12 But, a lot of this involves the matter of a Trust and
13 part of the process of, we allege, wrongfully moving the
14 property of the Decedent was to use a Trust as that
15 mechanism.

16 We have an action that, uh, a jury trial over four --
17 five thousand dollars, so under any number of categories one
18 could argue that we had the right to remove.

19 Now, I think all of those are encompassed in this
20 particular case just in one other of the removal sections,
21 which would be paragraph (d)(3), an action to try title. As
22 I understand that section, an action to try title is an
23 action to determine whether the estate owns the assets of the
24 estate or should have assets that someone else is claiming
25 determined to belong to the estate.

1 So, I think pretty clearly we started a case in the
2 Probate Court; it was properly commenced there. We removed
3 it to this Court; it was properly removed. And at that
4 point, this Court had jurisdiction to hear all the matters
5 de novo.

6 There is no need to hold the Will contest first. In
7 fact, I think that would be a terribly inefficient thing to
8 do. All of our causes of action essentially center around
9 one argument and that is that Mr. Thompson, and with some of
10 our other causes of action, with the assistance of others---

11 THE COURT: You only get one civil conspiracy cause of
12 action, don't you?

13 MR. MEDLIN: Well, we do Your Honor, but we also had
14 tortious interference, et cetera.

15 THE COURT: Right, but---

16 MR. MEDLIN: But most of it centered on Mr. Thompson's
17 actions.

18 THE COURT: ---but it's like a civil conspiracy issue.

19 MR. MEDLIN: Yes, Your Honor, and mostly it's centered
20 on Mr. Thompson's actions. And all of it essentially means
21 that this property should be in Mr. Chamblee's estate. And,
22 under the last valid Will of Mr. Chamblee would pass to our
23 client.

24 So, all of these actions are related. To focus only on
25 the Will contest to determine that first our client has

1 standing when he's already clearly an interested person as
2 defined under the Probate Code would be a Judicial nightmare
3 because it would involve a lot of the same evidence, a lot of
4 the same discussion, a lot of the same arguments for all of
5 the other mechanisms in which we would argue that
6 Mr. Thompson did what we claim he shouldn't have done.

7 So, in March -- and I'm sorry that I was unable to
8 attend that hearing, Your Honor -- it's my understanding --
9 and hopefully everyone who was there will correct me if I'm
10 wrong -- that Mr. Thompson complained that this Court didn't
11 have jurisdiction because we improperly commenced all those
12 cases in the Probate Court. So, to use a belt and suspenders
13 approach, we brought another action in the Circuit Court
14 alleging---

15 THE COURT: Are you saying they lack confidence?

16 MR. MEDLIN: I don't think it's a lack of confidence; I
17 always like belt and suspenders. I'm a transactional lawyer,
18 Your Honor, as you can probably already tell. Certainly not
19 a litigator.

20 But, it was to make it even more obvious that we're in
21 the right Court. Moreover, we amended the complaint, we
22 added some more Defendants, both at this Court level. One
23 with the removed action and then separately with our
24 independent action.

25 So, the question then becomes whether this action that

1 we brought in the Circuit Court originally is also properly
2 within the Circuit Court subject matter jurisdiction. And
3 the answer is it is as well. Because, the Circuit Court has
4 concurrent jurisdiction with the Probate Court as to matters
5 involving the internal -- excuse me, the external affairs of
6 Trusts.

7 And the external affairs of Trusts would be when some
8 third party sued the Trustee.

9 Now, we admit our client is not the beneficiary of the
10 Trust. Of course he's not because we claim that what
11 Mr. Thompson did was to coerce the Decedent to cutting him
12 out of any of his dispositive provisions.

13 So clearly we have a third party who's attacking the
14 validity of the Trust and who has standing to do so because
15 we claim that he is entitled to those assets.

16 Now, there's case law in South Carolina -- there's
17 general case law pretty much everywhere -- and I think that
18 would be obvious -- if the Trustee or a Personal
19 Representative isn't going to pursue a claim of the estate or
20 the Trust, then a beneficiary who is aggrieved by that does
21 have standing to bring it. Again, otherwise the fiduciary
22 who was the one responsible for the misdirection of the
23 property would have no one to contest his actions. And I
24 don't think Mr. Thompson is going to sue himself even if he
25 can decide whether any Court has jurisdiction over any of

1 these matters.

2 So, on the Trust matters, we could have brought that in
3 the Probate Court, which we did, and we could have brought it
4 in the Circuit Court, which we did.

5 Now, you'll note that we did leave out the Will contest
6 issues in our pleading that commenced in the Circuit Court
7 because we do think that the Probate Court has exclusive
8 original jurisdiction and not concurrent jurisdiction with
9 this Court as to those few issues.

10 The bottom line is we're here correctly two ways; we
11 properly brought these actions within the original
12 jurisdiction of the Probate Court, including the Trust
13 matters because the Probate Court, although not having
14 exclusive original jurisdiction, they are -- does have
15 concurrent jurisdiction. And we properly removed all those
16 matters, which gives this Court the first bite of the apple
17 on any of those matters under the way the system works with
18 the South Carolina Probate Code.

19 And, as I said, as a belt to the suspenders, in response
20 to Mr. Threlkeld's claims as well, we brought an independent
21 action and since all of those issues involve matters that are
22 properly commenced initially in the Circuit Court because we
23 did exclude the Will contest issues, we're properly before
24 this Court as well under that complaint.

25 Now, the way we see it is we're here properly two

1 different ways jurisdictionally. The way Mr. Thompson would
2 argue it, neither way would work even though when we first
3 brought the action and removed it he said we shouldn't have
4 brought it in the Probate Court. So then when we brought it
5 in the Circuit Court; he now says we can't bring it in the
6 Circuit Court.

7 I understand his argument. If he wins, nobody can ever
8 find jurisdiction to determine whether what he did was
9 improper. But it is an illogical argument and it is not the
10 way the Probate Code works.

11 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
12 CONFERENCE, OFF THE RECORD.)

13 (WHEREUPON, PROCEEDINGS CONTINUED.)

14 MR. MEDLIN: I'll do that, Mr. Gilreath. Mr. Gilreath
15 wants me to make it clear that the Will contest matters which
16 we brought in Probate Court and then removed are still before
17 this Court, it's just that we think the only proper way to
18 get those before you was---

19 THE COURT: And that's what the consolidation is?

20 MR. MEDLIN: ---well, yes, sir. Now, I also don't
21 understand the notion that the Probate Court doesn't have
22 equitable jurisdiction. The Probate Court has jurisdiction
23 over Trusts -- it's pretty clear under 1-302(d) and 7-201,
24 Title 62 -- and most trust matters are matters in equity. So
25 the notion that somehow the Probate Court sits only as a

1 Court of law is something that again I don't think we could
2 agree to.

3 The one issue that one might argue is most important
4 here I think, Your Honor, is the issue of judicial
5 efficiency. Assuming that we have subject matter
6 jurisdiction -- and we do -- the issue then is, do we have to
7 wait to hear the Will contest or can we hear all the related
8 cases together? And I'm not aware of anything in the Probate
9 Code that says we can't do that.

10 Now, I also don't agree that we're making some
11 collateral attack on the Order of the Probate Court with the
12 Informal Probate. First of all, let me, once again, at the
13 risk of being redundant, point out there is no Order of
14 Informal Probate. It is a Written Statement of Informal
15 Probate under the Probate Code. There was no hearing, there
16 was no evidence gathered, there were no arguments made, no
17 positions exchanged; so, there's no order to collaterally
18 attack.

19 The case and the statute cited by Mr. Thompson's counsel
20 for the notion that one can't collaterally attack the Probate
21 Court jurisdiction I don't think stands for that proposition
22 either. The *Simmons v. Bradley* case, which is cited, simply
23 talks about whether the Probate Court or the Family Court has
24 jurisdiction to decide relationship issues. And in any
25 event, that case eventually was pretty much overturned both

1 by the *Neely versus Thomasson* case of the Supreme Court
2 and by a statutory clarification of the South Carolina
3 Legislature. It didn't say anything about not being able to
4 attack them.

5 When you read the reporter's comments and the case notes
6 under Section 62 -- oh, excuse me, under the, uh, Section
7 14-23-460, it cites that case. But if you actually go read
8 the case, it doesn't say that at all. And for that matter,
9 the cited section doesn't say that at all. It says you can't
10 attack for, um, matters involving the place or a residence or
11 a location of the estate. That don't even make sense anyway.

12 First of all, we're not collaterally attacking at all.
13 There's a mechanism, there's a process to hear a formal
14 testacy proceeding and related matters under the Probate
15 Code. There is no order to attack, and those, uh, cited, uh,
16 authorities don't stand for the proposition anyway.

17 So, Your Honor, we would ask that this Court deny a
18 Motion to Dismiss; allow us an opportunity to be heard; to
19 recognize the due process rights this Probate Code recognizes
20 in allowing someone who disagrees with what the standing
21 fiduciary -- both under the Will and the Trust -- did to the
22 Decedent during his lifetime. Because, if he can't, no one
23 can.

24 And if we look at the position taken by Mr. Thompson in
25 March and now the position taken today, there's no Court that

1 has jurisdiction. That can't be. In fact, this Court has
2 jurisdiction two ways, and without question, Mr. Malloy has
3 standing.

4 Now, Your Honor, I don't know if we want to address the
5 Motion to Consolidate issues as well at this point?

6 THE COURT: Well, I'd like to hear Mr. Threlkeld in
7 response to your---

8 MR. THRELKELD: Yes, sir.

9 THE COURT: ---argument at this time, unless you have
10 something else, sir.

11 MR. GILREATH: Your Honor, we've got--

12 THE COURT: Whoa -- whoa -- whoa now, which one---

13 MR. GILREATH: Well, this is a different matter; kind-a
14 related to what he's talking about. We had this last year
15 and we had a Motion to Amend our first case to their amended
16 complaint that basically was what we filed in the second case
17 but we still believe it would be proper to amend that case
18 and you just have those two cases going forward with the
19 amendment and then consolidate; right?

20 MR. MEDLIN: Exactly.

21 THE COURT: Well let's see, uh---

22 MR. GILREATH: We argued that Motion to Amend back in
23 March. And so he -- and that's when he started raising some
24 of these issues and that's when we said well, we'll just --
25 we'll file the other case -- we'll file a new case but

1 we'll -- we still---

2 THE COURT: All right, let's -- that's what I -- I'm --
3 in this file -- in, uh, -- 1433 is filing an Amended
4 Complaint?

5 MR. GILREATH: No, that's a new action. But there is
6 another action which is the first action we filed but we --
7 we -- we -- we removed -- we filed the first one -- we filed
8 the case originally in the Probate Court and then we
9 removed---

10 THE COURT: And then you removed it and it had a Common
11 Pleas number?

12 MR. GILREATH: Yeah, and it had a Common Pleas number
13 and it had basically allegations similar to what are in this
14 case.

15 MR. THRELKELD: You-all have a num- -- a number I can
16 get?

17 THE COURT: Eighteen-forty-five.

18 MR. GILREATH: Yeah. And then when we started -- once
19 we got into discovery and we found out all this stuff about
20 Merrill-Lynch and the C-P-A firm and whatever, then we -- we
21 filed a Motion to file again---

22 THE COURT: All right, just -- well now I understand
23 it, because my notes on the March -- March hearing were
24 somewhat, um, brief. In fact, the last entry is lunch.
25 (Room laughter.)

1 So in other words, the Motion to Amend was not
2 granted---

3 MR. GILREATH: It was not---

4 THE COURT: ---was not -- it was not completed.

5 MR. GILREATH: ---you never -- you never ruled on it.

6 THE COURT: That's what---

7 MR. GILREATH: And, you know---

8 THE COURT: ---you know, that's what I'm saying.

9 MR. GILREATH: ---and so we -- we decided, just out of
10 an abundance of caution, that we would cover the whole front.

11 THE COURT: All right, well let -- now, let me hear from
12 Mr. Threlkeld. Just -- it would help The Court, uh, bring it
13 back into some sort of, um -- uh, understanding.

14 You've got your two actions; the first one's the 2010
15 action.

16 MR. THRELKELD: Yes, sir.

17 THE COURT: And that was the one we had a Motion to
18 Amend the Complaint---

19 MR. THRELKELD: Yes, sir.

20 THE COURT: ---in that -- in that action.

21 MR. THRELKELD: Yes, sir.

22 THE COURT: And, uh, apparently noth- -- nothing was
23 decided in the sense that no formal Order was entered
24 granting the Motion to Amend.

25 MR. THRELKELD: Yes, sir.

1 THE COURT: Subsequent to that, uh, this new action --
2 1433, a 2012 action was---

3 MR. THRELKELD: Yes, sir.

4 THE COURT: ---filed. Now, your -- your Motion to
5 Dismiss is based as to the, uh, 2012 action?

6 MR. THRELKELD: Yes, sir.

7 THE COURT: Not to the 2010?

8 MR. THRELKELD: Right.

9 THE COURT: And in the 2010 we're in Court -- in on --
10 on the, uh, removal, or?

11 MR. GILREATH: Uh -- did you file a Motion to Dismiss on
12 the 2010 action? And we argued that also. He -- I think --
13 it's your motion.

14 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
15 CONFERENCE, OFF THE RECORD.)

16 (WHEREUPON, PROCEEDINGS CONTINUED.)

17 MR. GILREATH: He -- he claimed what -- he -- he
18 basically made the same arguments in that case he's making
19 here. That's what Alan was saying.

20 THE COURT: All right, so those -- the consolidation is
21 the 2010 and 2012 if, uh -- well, I don't know.

22 MR. GILREATH: We believe it'd still be proper for those
23 two cases to move forward but they ought to be consolidated;
24 they're -- they're basically the same. Now we can---

25 THE COURT: Well---

1 MR. GILREATH: ---weigh in with some reason---

2 THE COURT: ---there's a 2010, uh, Motion to Amend the
3 Complaint. Does that address everything in the 2000 and,
4 uh -- let's say 1433 case?

5 MR. GILREATH: Yes.

6 THE COURT: The 2012 action? Is that correct,
7 Mr. Threlkeld?

8 MR. THRELKELD: (No response.)

9 THE COURT: In other words, I'm just saying, that --
10 that should take care of the Motion to Consolidate. I'd
11 still have the same, uh, problems, uh, with one action.

12 MR. THRELKELD: Yes, sir.

13 THE COURT: In other words, I wouldn't have the worries
14 that, uh -- to bifurcate.

15 MR. THRELKELD: Yes, sir.

16 THE COURT: All right -- all right, well I -- all right,
17 I understand that now. All right, so in other words, this --
18 there's, um, agreement that the 2010 action, uh, there's a
19 Motion to Amend the Complaint---

20 MR. THRELKELD: Yes, Your Honor.

21 THE COURT: ---which -- which was not decided.

22 MR. THRELKELD: Yes, sir.

23 THE COURT: So after -- and after that, there was a, uh,
24 a new action commenced, uh, the 2012 which is now 1433 which
25 contains all of the elements, or, all of the allegations in

1 the causes of action of the 1410 -- I mean, the 2010 case as
2 amended.

3 MR. GILREATH: Except the Will contest. The Will
4 contest is not---

5 THE COURT: Did you remo---

6 MR. GILREATH: ---in the new complaint.

7 THE COURT: ---all right, did you remove the Will?

8 MR. GILREATH: So we've got to keep those two cases.

9 THE COURT: Well let me ask you, did you remove the Will
10 contest, uh, in your 2010?

11 MR. GILREATH: Right.

12 THE COURT: It was removed to the Circuit Court?

13 MR. GILREATH: Yeah; we -- we removed -- we removed it
14 to Circuit Court and that -- that's got the Will Contest.
15 So, we've got to keep that 2010 case; it's got to stay alive.

16 THE COURT: And you don't have it in the, uh, 2012 case?

17 MR. GILREATH: We -- we can't -- you can't bring a Will
18 contest in original in the Circuit Court.

19 THE COURT: Well I'm just asking. I -- listen---

20 MR. GILREATH: Okay.

21 THE COURT: ---I'm dependent upon you-all to tell me
22 what the law is.

23 MR. GILREATH: All right; that's why it's not in there.

24 THE COURT: I got you.

25 MR. GILREATH: We've just got the Trust allegations in

1 this one and the Trust and Will is in the other one.

2 But we believe it would be---

3 THE COURT: Well what would happen if I granted your
4 amendment?

5 MR. GILREATH: That would -- we think you should grant
6 the amendment.

7 THE COURT: After I granted your amendment, wouldn't
8 that carry the whole thing -- or did you -- you have a
9 limited removal?

10 MR. GILREATH: That would...

11 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
12 CONFERENCE, OFF THE RECORD.)

13 (WHEREUPON, PROCEEDINGS CONTINUED.)

14 MR. MEDLIN: All right; I'm sorry to gang up on you,
15 Your Honor.

16 THE COURT: Well you -- the -- you -- you're testing the
17 rules, and the rules are there for a purpose because Judges
18 have limited concentration. I can only consider two sides,
19 not, uh, one side and the second 'A' and 'B' side.

20 MR. MEDLIN: I understand, Your Honor, and---

21 THE COURT: All right.

22 MR. MEDLIN: ---so again I apologize, because I wasn't
23 here---

24 THE COURT: No apology necessary; I'm still trying to
25 understand. But you have to -- un- -- under your pleadings,

1 you need a, um -- uh -- you need to leave -- you've got --
2 something's back in Probate Court; the Will contest?

3 MR. MEDLIN: No, sir; it's in front of you as well.
4 Everything---

5 THE COURT: Because it was carried along.

6 MR. MEDLIN: Right.

7 THE COURT: Now---

8 MR. MEDLIN: The 2010 action, Your Honor---

9 THE COURT: ---all right now---

10 MR. MEDLIN: ---included the Will contest and a bunch of
11 other---

12 THE COURT: Well that's what I was thinking; that was
13 the only way. You were telling me a removal, then that would
14 carry everything with it..

15 MR. MEDLIN: And then, we've asked to amend it and
16 that's what I wasn't familiar with since I wasn't here in
17 March.

18 THE COURT: All right, so the amendment would only
19 have...

20 MR. MEDLIN: If -- if -- if -- if we were allowed to
21 move forward in this Court with---

22 THE COURT: Well how are you gonna get the Will contest
23 back in, um, Probate?

24 MR. MEDLIN: We don't intend to do that; we intend to
25 try all these matters together.

1 THE COURT: Then you don't need a consolidation.

2 MR. MEDLIN: Well, if Your Honor would---

3 THE COURT: I'm just trying to think. If -- if -- if --
4 if I granted the amendment because---

5 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
6 CONFERENCE, OFF THE RECORD.)

7 (WHEREUPON, PROCEEDINGS CONTINUED.)

8 MR. MEDLIN: Okay; just confirming---

9 THE COURT: All right, what -- what is it?

10 MR. MEDLIN: ---as -- as I understood it, Your Honor,
11 the 2010 action removed to this Court covers all the matters.

12 THE COURT: All right; so you don't have anything in
13 Probate Court.

14 MR. MEDLIN: So, if we prevail on the Mr. Thompson's
15 Motion---

16 THE COURT: Well I'm just asking, as far as
17 procedurally, when you removed the entire Probate, uh --
18 uh, action to Circuit Court, that didn't leave you anything
19 then in Probate?

20 MR. MEDLIN: No, Your Honor.

21 THE COURT: In other words, everything's in Circuit?

22 MR. MEDLIN: That's correct, Your Honor. Now, if you
23 would agree that this Court had subject matter jurisdiction
24 pursuant to that 2010 removal to this Court, and would grant
25 our, uh, amended complaint Motion then the 2010 action would

1 be just fine because it would cover all the matters. The
2 2012 action brought independently in this Court covers a few
3 fewer matters because you can't initiate a Will contest in
4 the Circuit Court.

5 THE COURT: I understand.

6 MR. MEDLIN: And I'm sorry to have confused matters.

7 THE COURT: Well I -- I -- again, the -- the amendment,
8 uh, that -- that does deal with, um -- um -- let's see...

9 (After pause) That does deal with the, um -- um -- uh,
10 re- -- uh, formal proceedings for the probate of Wills and
11 for the appointment of general -- Personal Representatives.
12 Now, that doesn't grant the -- doesn't give the Circuit Court
13 jurisdiction?

14 MR. MEDLIN: Not to initiate, uh, the determination.
15 That---

16 THE COURT: So you've got to keep the 2010 alive in
17 Circuit Court?

18 MR. MEDLIN: We do as to those Will contest issues.
19 Again, one can -- as we did -- bring a Will contest in the
20 Probate Court. One can't bring it initially in the Circuit
21 Court. But, one can remove the Will contest to the Circuit
22 Court, which is what we did.

23 THE COURT: Well, what I just ask is, somehow we've got
24 to clean up the record for our Clerk of Court down here.
25 He's gonna have two causes -- I mean, two separate causes of

1 action -- oh, not causes of action, two, uh, proceedings,
2 um -- uh, Common Pleas files dealing with the same matter to
3 a point.

4 MR. GILREATH: Your Honor, can I confer with him one
5 minute?

6 THE COURT: Yeah, you can.

7 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
8 CONFERENCE, OFF THE RECORD.)

9 (WHEREUPON, PROCEEDINGS CONTINUED.)

10 THE COURT: All right, let me hear what Mr. Gilreath's
11 got to say.

12 MR. MEDLIN: Well -- or maybe not, Your Honor. Um --
13 he's usually over my head.

14 So, if the 2010 action removed completely to the Circuit
15 Court, and if the amendment were granted, were left in this
16 Court, it would cover all the matters. Now---

17 THE COURT: Then I should just grant the Motion, um --
18 uh, of Mr. Threlkeld to dismiss, uh, the 2012 action.

19 MR. MEDLIN: Well actually, Your Honor---

20 THE COURT: Grant the Motion to Amend the 2010 and grant
21 the Motion to Dismiss the 2012.

22 MR. MEDLIN: Well, actually, Your Honor, we think that
23 if you granted our Motion to also retain the 2012 action and
24 simply consolidate the two, it will remove the opportunity to
25 argue about subject matter jurisdiction or at least lessen

1 the temptation to argue about subject matter jurisdiction,
2 uh, at the Appellate level so that this won't be a waste of
3 its time.

4 THE COURT: So this is the Appellate level?

5 MR. MEDLIN: Well actually, no, Your Honor, not in
6 the---

7 THE COURT: I know it says de novo, but the way I see it
8 I'm---

9 MR. MEDLIN: But I'm talking about the Court of Appeals
10 and the Supreme Court.

11 THE COURT: The real Courts.

12 MR. MEDLIN: The Appellate Courts. (Room laughter.)
13 I'm sort of partial to Probate Courts and Circuit Courts,
14 Your Honor.

15 THE COURT: All right.

16 MR. MEDLIN: But, um---

17 THE COURT: All right, but really I mean, in all
18 seriousness, I'm trying to figure out what's the best thing
19 to -- to have. When we talk about consolidation, what we are
20 talking about is removing any, um -- uh, redundancy or, um --
21 uh, supernumerary causes of action. If you've got the same
22 cause of action in two actions; the same parties, everything,
23 you know, the same. Not have -- not have two separate trials
24 because every Judge who hears this matter is gonna be faced
25 with the same problem; now which one am I talking about, 1210

1 (sic) or 12- uh, 2012. I mean -- excuse me, 1210 -- 2010 or
2 2012.

3 MR. MEDLIN: When -- and -- and, Your Honor, what -- the
4 way I would see it is that once the two cases were
5 consolidated they mesh seamlessly together.

6 THE COURT: Well you say con- -- well that -- I don't
7 under- -- they're not meshing as much as -- why is it --
8 because usually you got something different in one, you know.
9 And you're telling me that all but those, uh -- the Probate
10 matters---

11 MR. MEDLIN: The Will matters.

12 THE COURT: ---Will matters; nevertheless---

13 MR. MEDLIN: Yes, Your Honor; and again---

14 THE COURT: ---the other matters are really not, uh,
15 limited to the Will---

16 MR. MEDLIN: Correct.

17 THE COURT: ---or the Probate.

18 MR. MEDLIN: Well, they're all, as we see it, involving
19 the question of the estate of the Decedent, which---

20 THE COURT: But they're not limited to the Probate; in
21 other words they could be separately barred in, uh -- uh,
22 Circuit Court.

23 MR. MEDLIN: Your Honor, we would think that to the
24 extent that they also relate to the Trust, they could be
25 brought in either Court.

1 But even if brought in the Probate Court, as we did,
2 they're still properly removable.

3 THE COURT: Why -- well, that's not the point. My point
4 is, I'm trying to figure out so that, um, if there is some,
5 uh, resolution, their clients will put it, uh -- uh, in a
6 posture where somebody can look at it without saying, well
7 this is paragraph what to paragraph that.

8 MR. MEDLIN: Well, and, Your Honor, again the reason
9 that we would prefer most having the Motions to Dismiss as to
10 either denied and the consolidation of the 2010 and the 2012
11 case is that it will eliminate---

12 THE COURT: Well how about if I granted your Motion to
13 Amend?

14 MR. MEDLIN: Well, that would be very helpful, Your
15 Honor.

16 THE COURT: Well, what I mean, wouldn't (sic) that not
17 accomplish the same purpose if I do do that?

18 MR. MEDLIN: With -- with one exception; and that would
19 be that it doesn't take away the -- as much -- the temptation
20 that Mr. Thompson would have to argue subject matter
21 jurisdiction.

22 With the belt and suspenders, we've just got two
23 arguments to make it clearer at the Appellate level.

24 THE COURT: Well, I'm -- I kind-a am beginning to agree
25 with, um, the observation about some day we have to have

1 confidence that one of those things was right -- will work.

2 MR. MEDLIN: Well then, it would have to be the -- it
3 would have to be the 2010 case with the amended complaint
4 because that's got the Will issue.

5 THE COURT: Well, that's what I'm looking at. I --
6 it -- and, um -- all right. Now, what damage would that
7 do? You'd still have your -- and he concedes that -- you'd
8 still have your arguments about jurisdiction if I just
9 consolidated. I mean if I was to grant the Motion to Amend
10 which -- which would accomplish the consolidation. But under
11 one cause of action there's no duplication.

12 MR. THRELKELD: Your Honor, the -- the -- I -- I -- I
13 think it's important to understand that thought. So while
14 there -- there was jurisdiction in the Circuit Court of all
15 the causes of action but it's a different jurisdiction -- a
16 different level of jurisdiction on the Wills cases.

17 And on the Wills case, that is a -- an action that was
18 brought in -- in Probate Court; removed for purposes of
19 trying that case. And therefore, there should not be a
20 joinder of that case with all the other cases. I think
21 that's very -- very critical.

22 Uh -- and the reason for that is, uh -- I -- I -- I
23 certainly would point out that -- that the -- the fact that
24 there's discussion about the effect of the Probate Court
25 Order, I can tell you this about Statute. If an action is

1 not brought for Formal Probate within one year, the prior
2 Order becomes the final Order of The Court. That's why I'm
3 saying that it's a -- it's an -- actually, uh, in the nature
4 of an appeal. I understand that it's de novo, but -- but --
5 but, uh, the -- the jurisdiction of The Court for purposes of
6 dealing with the Wills contest is -- is -- is a limited
7 derivative jurisdiction.

8 THE COURT: Well that's -- that's my understanding too.

9 MR. THRELKELD: Yes, sir. Therefore---

10 THE COURT: I was just trying to bring some, um---

11 MR. THRELKELD: Yes, sir.

12 THE COURT: ---order to the thing.

13 MR. THRELKELD: Also---

14 THE COURT: All right, so now we're back to just if, uh,
15 if -- is -- if the Circuit Court does have jurisdiction over
16 the, um, action as it, under 1210 (sic) was brought, which
17 included the appeal of the Probate, um, -- so it's probably
18 better, um -- uh, questions as well as, um -- uh, whether I
19 should consolidate it with this new action, uh, that only has
20 what I would say, uh, Common Pleas jurisdiction.

21 MR. THRELKELD: Your -- Your -- Your Honor, I -- I -- I
22 just want to make it clear that I agree that the -- the Court
23 of Common Pleas has subject matter jurisdiction over all the
24 causes of action---

25 THE COURT: Under one -- one Court -- one -- either as

1 a, uh -- uh, Appellate---

2 MR. THRELKELD: Right.

3 THE COURT: ---Court or -- as to the Probate matters---

4 MR. THRELKEND: Yes.

5 THE COURT: ---or as, uh---

6 MR. THRELKELD: Yes.

7 THE COURT: ---um, original jurisdiction as to the, uh,
8 Common Pleas matters.

9 MR. THRELKELD: But they should not be consolidated.

10 THE COURT: And -- but the thing -- but the fact is,
11 the -- the -- the Code provides that regardless of however
12 it comes, uh, to Circuit Court -- either an original
13 jurisdiction or, uh, on appeal from Probate Court -- it's a
14 de novo proceeding.

15 MR. THRELKELD: Yes; yes, I agree. The -- the -- in
16 fact---

17 THE COURT: The -- do you-all, um -- um, do you and
18 Mr. Gilreath, uh, disagree?

19 MR. MEDLIN: Well, Your Honor, if I---

20 THE COURT: What I'm -- what I'm -- if -- if I grant an
21 Order and I'm -- I'm -- I'm somewhat -- because I'd be very
22 candid with you, I can understand why I went to lunch after
23 the last one. (Room laughter.) I mean, it was clear I was
24 gonna have to have some time to, you know, to think about it.

25 Now, I'm trying to put this in a context that -- and not

1 a context as much as a posture that whatever is done in it,
2 it has some, uh -- uh -- well, let's just say, um -- uh,
3 consistency.

4 And the consistency I'm talking about, if I -- if
5 something's already in Common Pleas; I don't care if it's
6 under the appeal from Probate Court or when it is, um -- uh,
7 the original Circuit filing here. But whoever addresses it
8 is going to have to -- or however it is addressed, it's gonna
9 have to be done, uh, you know, in the -- with the
10 understanding that, um -- uh, whatever's done in Pro- --
11 in -- in -- in Circuit Court is gonna be dispositive of those
12 matters which are in the jurisdiction of the Probate -- or,
13 the Circuit Court.

14 In other words, when you have the de novo hearing, it's
15 gonna be a de novo hearing on the merits and we're not gonna
16 be in a situation where although we -- you know, well
17 fortunately I -- I'm saying Probate Code is also governed by
18 the Codes of Civil Procedure, so...

19 All right, well I'll just -- I'll have to deal with that
20 when I -- when I do.

21 MR. MEDLIN: Your Honor, if I may make a couple more
22 points?

23 THE COURT: Please.

24 MR. MEDLIN: Uh -- again, technically, I just disagree
25 with the notion that in any way that the contest of a Will or

1 the removal of a Will contest to the Circuit Court is an
2 appeal. That's not the way the Probate Code is structured.
3 The Probate Code doesn't say that if it's not contested
4 within a year it---

5 THE COURT: Well, I guess what I'm trying to say, if you
6 will hear me, I can't Probate your Will in Circuit Court.

7 MR. MEDLIN: Not unless the action is---

8 THE COURT: Then how does it get here?

9 MR. MEDLIN: By removal from the Probate Court.

10 THE COURT: All right, there -- and that's -- that's
11 what -- it's not -- in other words, Probate matters are not
12 in the original jurisdiction of the Circuit Court.

13 MR. MEDLIN: Well, but, Your Honor---

14 THE COURT: And -- and that's the only thing I'm trying
15 to say and I -- you know, we can dance around on the bin if
16 we want to, but, um, I -- I would rather see what comes out
17 of this.

18 And you -- and then, of course---

19 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
20 CONFERENCE, OFF THE RECORD.)

21 (WHEREUPON, PROCEEDINGS CONTINUED.)

22 MR. MEDLIN: Well, and -- and, Your Honor, then---

23 THE COURT: ---they -- they do have appellate courts for
24 both Circuit Court and Probate Court.

25 MR. MEDLIN: Your Honor, the only reason that I'm being

1 so hyper-technical probably is because when it goes to the
2 issue of consolidation it isn't as if we have an appeal of
3 the Will issues and then everything else is a -- a first
4 trial. They're all first trials. They all came out of
5 the---

6 THE COURT: I've -- I've tried to use the word of the
7 Code, de novo -- the terms of the Code, de novo.

8 MR. MEDLIN: Yes, I---

9 THE COURT: I know what de novo means.

10 MR. MEDLIN: ---I know that, Your Honor.

11 THE COURT: Okay; thank you.

12 MR. MEDLIN: Um -- I'm---

13 THE COURT: I'm not -- I'm not being facetious, I'm
14 trying to move on if I can, all right?

15 MR. MEDLINE: Yes, Your Honor; and it -- and just to go
16 back to the previous issue, one other problem, if we're not
17 allowed to keep both the 2010 and the 2012 action and have
18 them consolidated, is -- because we hadn't gotten approval of
19 the amended complaint in the 2010 action -- everybody else
20 here today isn't yet served -- isn't yet a party under the
21 2010 action. This might be cutting my own throat here, but
22 that means we're not gonna argue the next Motion because
23 they're not here yet unless they're gonna accept service on
24 behalf of Merrill Lynch and the other parties.

25 THE COURT: Is that the other?

1 MR. MEDLIN: So, it's just gonna delay a case that's
2 already two years---

3 THE COURT: All right, have a seat then. The problem
4 now is to make the most telling argument on it.

5 All right, anything else? Now that -- that's on the --
6 and I'm -- I'm really looking at the Motion to Dismiss and
7 the, um -- uh, Consolidation Motions.

8 MR. THRELKELD: Uh -- Your Honor, I would just briefly
9 reply to a couple things---

10 THE COURT: Please.

11 MR. THRELKELD: ---if I may?

12 THE COURT: Certainly.

13 MR. THRELKELD: Uh -- one of the issues that was raised
14 is the question of, uh, standing. And there was an argument
15 made that Mr. Malloy is an interested person. And I'm
16 looking at the definition of interested person, and it
17 includes heirs, devisees, children, spouses, creditors,
18 beneficiaries, and others having a property right in or a
19 claim against a Trust estate or the estate of a Decedent,
20 ward, et. Cetera. And there is not any such right in---

21 THE COURT: What is it, a Godson or something? I think
22 I saw an allegation to that effect.

23 MR. THRELKELD: He's not legally---

24 MR. MEDLIN: Nephew, Godson---

25 THE COURT: Nephew, Godson.

1 MR. THRELKELD: I'm -- I'm not sure he's, uh -- I'm not
2 sure he has any blood -- I don't think he has any blood
3 relationship, Your Honor.

4 THE COURT: You mean he's not a nephew?

5 MR. THRELKELD: No, sir.

6 MR. MEDLIN: Well he's -- was called nephew I think if I
7 recall, Your Honor.

8 MR. THRELKELD: Yeah, he's not a nephew.

9 MR. MEDLIN: And -- but they aren't technically related
10 by blood, Your Honor.

11 MR. THRELKELD: And -- and, uh, in -- in addition to
12 that, there is no Will to Mr. Malloy that has been filed in
13 any place. If he had brought an action for Informal Probate
14 or Probate of a Will, then he might come within the findings
15 of an interested person.

16 THE COURT: But he doesn't have a Will?

17 MR. THRELKELD: Sir?

18 THE COURT: There's not a Will?

19 MR. THRELKELD: I don't know if they got a Will or not.
20 That -- I don't have it.

21 THE COURT: I mean---

22 MR. MEDLIN: Your Honor, there is a Will; it's a '99
23 Will. It's the original. Our client was the devisee under
24 that Will. It -- it -- it -- clearly, in any Probate matter
25 contesting a later Will---

1 THE COURT: All right, so you -- you would say that if
2 the Will -- the -- well, listen to him. I mean---

3 MR. MEDLIN: I -- I -- I -- I've got it.

4 THE COURT: I don't have to but you have to, all right?
5 No, if it -- it there's -- in other words, if -- if you're
6 saying -- if you are successful then would the -- the
7 testamentary instruments that we have in the current Probate
8 file that's on the removal to this Court, if they are, uh --
9 the reasons alleged in your complaint, uh, invalidated, then
10 was it the -- the next existing Will would be the '99 Will?

11 MR. MEDLIN: Yes, Your Honor. And in fact, that Will
12 was filed with our complaint. So it is before The Court.

13 THE COURT: All right; well that's what I'm saying. So
14 in other words, uh, it's almost like a deed that hasn't been
15 delivered or recorded or something like that. It's a deed
16 still.

17 MR. MEDLIN: Well, in the Prob- ---

18 THE COURT: But---

19 MR. MEDLIN: I'm sorry, Your Honor; I interrupted you
20 again.

21 THE COURT: Go ahead.

22 MR. MEDLIN: No, Your Honor; I'd rather not have
23 interrupted you.

24 THE COURT: Well the point is, I'm just trying to say
25 that, all right, your -- your client would be a per- -- a

1 person of interest in property if the '99 Will was
2 established as still in effect and not was it affected by
3 any subsequent Will or testamentary ins- -- testamentary
4 instrument---

5 MR. MEDLIN: Yes, Your Honor.

6 THE COURT: ---the powers of, um, some---

7 MR. THRELKELD: Your Honor, it's -- it's -- it's not
8 a -- it's not a -- it's not an issue. I mean, there's been
9 no action to, uh, prove his Will or anything like that. It's
10 not anything that's before The Court.

11 THE COURT: Well he says it's -- well, he says it's --
12 it's before The Court as an exhibit. Is it an exhibit to the
13 1210 (sic) action?

14 MR. MEDLIN: That was -- yes, Your Honor. And Probate
15 clearly anticipates that natural order of things.

16 If someone probates a Will and that validity is in
17 question, an interested person includes someone who was named
18 under a previous Will. But, you have to decide first if the
19 most recent Will pro- -- uh, offered to Probate is the valid
20 one.

21 THE COURT: Which one is, uh -- revokes all.

22 MR. MEDLIN: But, the person with standing would be the
23 person who would take without it. And the Probate Code
24 anticipates the same order when you have intestacy issues.

25 THE COURT: All right.

1 MR. MEDLIN: You have to first determine the Will but
2 the intestate heirs would have standing.

3 MR. THRELKELD: But that's not a definition of an
4 interested person, Your Honor.

5 THE COURT: Well, you tell him the definition of an
6 interested person. What -- have you got -- what's the -- is
7 it?

8 MR. THRELKELD: 62-1-201-20 (sic).

9 THE COURT: 201(20)?

10 MR. THRELKELD: Yes, sir.

11 THE COURT: (After pause.) Well, if the '99 Will, uh,
12 would -- is determined to be a valid Will, then Mr. Malloy
13 would be a devisee.

14 MR. MEDLIN: Correct, under that---

15 THE COURT: Under that instrument.

16 MR. MEDLIN: I don't understand an argument that he's
17 not an interested person under a very broad definition in the
18 Probate Code. And I would also refer you, Your Honor, to
19 Section 62-3-407 which talks about the order that I just
20 described in deciding whether Wills are valid. So, when you
21 read those two sections together, it -- clearly the devisee
22 under the earlier Will is an interested person. He's
23 entitled to notice.

24 MR. THRELKELD: Your -- Your -- Your Honor, I don't know
25 of any reason why he's entitled to notice. As a matter of

1 fact, Section, uh, 62-3-403 says he's not entitled to the
2 notice unless he has a Will that's been, uh -- uh, probated
3 or offered for Probate; something like that. Not something
4 that is, uh -- uh -- uh -- uh, some kind of a theory. You
5 have the actual Will, uh, to, uh -- that's in -- that's in,
6 uh, play.

7 THE COURT: (After pause.) Now, looking at 407, it looks
8 like it has -- maybe I'm misreading it, uh, not reading it
9 the same way -- but it seems that, if a Will is opposed by
10 the petition for the probate of late -- of a later Will
11 revoking the former, it must be determined first whether the
12 later Will is entitled to probate.

13 MR. THRELKELD: Yes, sir.

14 MR. MEDLIN: Your Honor, if I may again disagree with
15 Mr. Threlkeld about the issue of notice, if you go to Section
16 62-3-705---

17 THE COURT: Which, 62-3-705?

18 MR. MEDLIN: Yes, Your Honor. (After pause.) Within
19 thirty days after appointment, a Personal Representative
20 shall give information of his appointment -- that's a form
21 that effectively gives notice to satisfy due process concerns
22 dealing with an Informal Probate -- and among those entitled
23 to notice would be devisees, including, if there has been no
24 formal testacy proceeding and any Will mentioned in the
25 application for appointment of a Personal Representative.

1 He should have mentioned a Will that he had knowledge
2 about. We've mentioned the Will in the complaint. Again,
3 it's only logical that someone who would take, under a Will
4 that's valid if not revoked by an invalid later Will, is an
5 interested person to argue about the validity of that Will.

6 Again, under Mr. Threlkeld's argument---

7 THE COURT: All right.

8 MR. MEDLIN: ---there would be no one to contest a later
9 Will.

10 THE COURT: Okay; very good. So, uh, your -- let's see,
11 the argument for the dismissal would be that The Court lacks
12 jurisdiction and the, um, Plaintiff lacks standing.

13 MR. THRELKELD: Yes, sir.

14 THE COURT: Okay; anything else?

15 MR. GILREATH: Your Honor, I was gonna argue the
16 arbitration motion if -- unless you let us go forward with
17 the later case then we're gonna have to start over against
18 the gentlemen from Merrill Lynch. I would argue -- I would
19 plea with The Court to please let us keep that case on if for
20 no other reason so we can get this thing moving.

21 My client filed this case in 2010 and now we're gonna
22 have to file another amended complaint, he's gonna have to
23 file another Motion, we're gonna have to come back over here
24 and reargue an Arbitration Motion which has already been
25 keyed up in the 2012 case.

1 THE COURT: So what are you saying? You want -- you
2 want your Motion to Amend, um---

3 MR. GILREATH: I want the Motion to Amend granted,
4 but---

5 THE COURT: And then you want a consolidation?

6 MR. GILREATH: ---I want -- I want to keep the other
7 case going and consolidate if for no other reason so we can
8 get this case moving.

9 THE COURT: Well, I agree with you there.

10 MR. GILREATH: 'Cause I can't -- he -- he can stand up,
11 which I would expect him to, and say, you know Judge, I ain't
12 been served in the other case so we got -- we got to reserve
13 him, we got to wait thirty days, got to file another Motion
14 to Dismiss, we got to come over here and reargue all of what
15 we're all right here today ready to argue. That's why I
16 say The Court -- we consolidate 'em, we put two captions on
17 'em---

18 THE COURT: Well -- well the only thing is, I -- well,
19 now your -- your 2012 action has been filed -- uh -- uh,
20 served?

21 MR. GILREATH: It has been filed and he has been served.
22 And he's filed---

23 THE COURT: He being?

24 MR. GILREATH: Merrill Lynch.

25 THE COURT: Merrill Lynch.

1 MR. GILREATH: Now, I mean of course if you do allow me
2 to amend, I haven't served him---

3 THE COURT: But not with -- not with -- but not with the
4 2010 action?

5 MR. GILREATH: Yes, we'll have to serve him with the
6 Motion to -- to do that, but he -- once you rule in the 2012
7 case obviously it's gonna be kind-a res judicata against him
8 in the other case. I -- I wouldn't expect he would try
9 another Motion to Arbitrate something that's identical to
10 what he's already lost on hopefully if you rule with us.

11 THE COURT: If I rule.

12 MR. GILREATH: If you rule our way. I just -- my
13 client's in New York.

14 THE COURT: All right now, let me ask you about your
15 mediation. Now, you say it's on line -- it's in -- you've
16 got it lined up or what?

17 MR. GILREATH: No, we -- we do not.

18 THE COURT: Yet?

19 MR. GILREATH: We do not have a mediation. I -- we --
20 we would welcome the ability at any time to mediate. I -- I
21 don't know what Merrill -- Merrill -- I don't think Merrill
22 Lynch is -- I may be wrong, but I think we mentioned
23 something to them about mediation and they said---

24 THE COURT: Well, they got a Motion to Dismiss and,
25 uh -- well, wait a minute. You got -- Merrill Lynch has---

1 MR. GILREATH: Merrill Lynch has filed Motion to Compel
2 Arbitration. We asked them if---

3 THE COURT: Oh.

4 MR. GILREATH: ---they would be interested in mediation
5 and they---

6 THE COURT: All right, I'm -- I'm sorry, I didn't read
7 it right. Yours is to dismiss the arbitration.

8 MR. GILREATH: Right, sir; yes, Your Honor. We're
9 prepared to argue that today. It's just been briefed and
10 we're ready to go.

11 THE COURT: Well, let's go ahead. Let's -- I'll take
12 these others up right now; I'm just thinking about them.

13 All right, uh---

14 MR. GILREATH: Okay.

15 THE COURT: ---your Motion to, uh, Arbitrate?

16 MR. GILREATH: His Motion to Arbitrate.

17 THE COURT: Your Motion to Arbitrate.

18 MR. GILREATH: No, we -- we don't want to arbitrate.

19 THE COURT: You want to mediate.

20 MR. GILREATH: I'll argue -- I'll argue about that after
21 he gets through.

22 THE COURT: Yes, sir. All right, Mr. Gaskins.

23 MR. GASKINS: Yes, sir. Our -- our Motion to Compel
24 Arbitration arises from two client relationship agreements
25 that were entered into between my client, Merrill Lynch, and

1 the Decedent and the Decedent's Trust.

2 The first client relationship agreement was entered into
3 on -- in November 2002, and it was signed by the Decedent.

4 There was a second client relationship agreement
5 that was signed by the Trustee of the Trust -- it was
6 Mr. Thompson -- in January 2003.

7 Both client relationship agreements contained an
8 arbitration provision that required the parties to arbitrate
9 all controversies between them.

10 Now, Plaintiff's claims seek to invalidate those client
11 relationships -- client relationship agreements -- the
12 relationships that were established thereunder and to set
13 aside the Trust.

14 So, Plaintiff's claims are intricately intertwined with,
15 and dependent upon, this relationship that was -- that was
16 established by the client relationship.

17 THE COURT: But they were -- they were not -- or, the
18 Plaintiff was not a party to---

19 MR. GASKINS: Right.

20 THE COURT: ---your agreement?

21 MR. GASKINS: No, Your Honor, they were -- they were not
22 a signatory to -- to these agreements. But because --
23 because they are so intertwined with and dependent upon
24 these agreements and the relationship, we feel that they
25 should be compelled despite the fact that they were not

1 signatories.

2 And the Courts, interpreting the Federal Arbitration
3 Act, has specifically ruled that non-signatories may be
4 compelled to arbitrate under several theories. And I think
5 there are three recognized theories that apply to this case.

6 The first is agency. The Plaintiff claims in -- in its
7 opposition to Mr. Thompson's Motion to Dismiss that these are
8 derivative claims that are brought after the Trust -- on
9 behalf of the Trust.

10 And this is what it says, and I'm quoting. Since
11 Plaintiff as beneficiary under Decedent's estate plan may
12 derivatively bring an action on behalf of the Trust, he is a
13 real party in interest.

14 Now, if these claims were asserted by the Trust or by
15 the Trustee on behalf of the Trust, they would undoubtedly
16 fall within this arbitration agreement and they -- and they
17 would have to -- and we would have to arbitrate.

18 THE COURT: But the Trust is not recognizing them as
19 the, uh, beneficiary.

20 MR. GASKINS: Well, it -- it's not recognizing them as a
21 beneficiary.

22 THE COURT: Well then doesn't that take 'em out of, um,
23 that, uh, agreement?

24 MR. GASKINS: Well, I -- I don't -- I don't think so,
25 Your Honor.

1 THE COURT: Now, if you-all wanted to recognize this
2 provision, I'm sure Mr. Threlkeld and Mr. O'Rourke would have
3 something to say about that.

4 MR. GASKINS: No, I'm -- I'm certain they -- they would,
5 Your Honor, which brings me to the -- to the second theory,
6 which is equitable estoppel.

7 And under the estoppel theory, uh, a party -- or, a
8 party cannot, uh, take inconsistent or contradictory stands
9 with regard to the arbitration agreement. So, in the---

10 THE COURT: Well, they don't have a standing on the
11 arbitration---

12 MR. GASKINS: Your Honor---

13 THE COURT: ---agreement.

14 MR. GASKINS: I'm sorry?

15 THE COURT: The -- the -- the -- the Plaintiff has no
16 standing. I mean, at least that's what Mr. Threlkeld just
17 said.

18 MR. GASKINS: No, I understand that, and---

19 THE COURT: And he represents the, uh, Trust.

20 MR. GASKINS: ---and -- and -- and we're not taking a
21 position on that. I -- this goes to estoppel and what
22 they're claiming.

23 They are claiming on one hand that they are bringing an
24 action on behalf of the Trust and on the other they're saying
25 we have no benefit. And that -- and therefore---

1 THE COURT: Well, once it's established that -- why is
2 it they are the beneficiary of the Trust and, um, all of
3 that, then of course why is it -- then your arbitration, uh,
4 argument would be more, uh, persuasive.

5 However, if it's decided that the Trust and the Will
6 that you, uh, have your arbitration agreement in or with --
7 the estate and the Trust -- uh, is found to be invalid for
8 some reason, then why is it, um -- uh, they wouldn't be bound
9 at all by it.

10 MR. GASKINS: Well, Your Honor, I think the estoppel
11 theory, uh, as applies to non-signatories---

12 THE COURT: I mean, they wouldn't be estopped because
13 that wouldn't be their position being inconsistent -- it's
14 inconsistent with their position even now.

15 MR. GASKINS: Well, I -- I think they are taking
16 inconsistent positions, and I think that's what the estoppel
17 theory looks at, not the -- the merits or the validity of the
18 argument---

19 THE COURT: Well, I'm not talking -- I'm talking about
20 merits, 'cause I'm just saying that that's -- ultimately, if
21 they're the ones that should prevail, then they're -- there
22 would be no Trust.

23 MR. GASKINS: Well, you -- I -- I think you're -- I
24 think you're right, Your Honor. And to the extent that they
25 are challenging the validity of the -- of the whole

1 arbitration other than the---

2 THE COURT: Well, they're -- they're not challenging the
3 validity of the arbitration agreement, unless -- is that
4 right -- right, Mr. Gilreath? Do you want to be bound by
5 that arbitration agreement?

6 MR. GILREATH: No.

7 THE COURT: Okay; I didn't think so. All right, go
8 ahead.

9 MR. GASKINS: Your -- Your -- Your Honor, going back to
10 the argument, I think that the estoppel theory would apply
11 because they are saying we're bringing this on behalf of the
12 Trust and then saying well, no we shouldn't---

13 THE COURT: Well, when they bring it on behalf of the
14 Trust I'm sure they are talking about the corpus of the
15 Trust.

16 MR. GASKINS: Well---

17 THE COURT: They're not bring it -- I -- is that the
18 position of the Plaintiff, Mr. Gilreath?

19 MR. GILREATH: No -- no, Your Honor.

20 THE COURT: What?

21 MR. GILREATH: We're not bring it on behalf of it.

22 THE COURT: Well, that's what I'm saying; you don't --
23 you're not seeking any benefit under the Trust, are you?

24 MR. GILREATH: No, that's absolutely correct.

25 THE COURT: So, I mean, why are they taking an

1 inconsistent position?

2 MR. GASKINS: I -- I don't know why they're taking it,
3 but I mean -- that's -- that's what they put---

4 THE COURT: Well, what they're saying is that right now,
5 that the Trust is, um -- uh, created or -- well, I mean,
6 comes into effect -- it -- actually it's in effect in the
7 sense that there is some, um -- uh, memorandum or, you know,
8 statute or such, uh, but it -- we don't know the validity of
9 it. But if it should come into effect before us why is it --
10 then they would be out. And so, he would have no interest in
11 the Trust.

12 However, they are interested in what would be in the
13 trust, which would then go under the '99 Will.

14 MR. GASKINS: Yes, sir; and that -- I---

15 THE COURT: In there do they say that they bringing on
16 behalf of the '99 Will?

17 MR. GASKINS: Well, I -- I -- I agree that that's their
18 position.

19 THE COURT: No, do you have an agreement with, uh -- um,
20 devisees under the '99 Will?

21 MR. GASKINS: No -- no, sir.

22 THE COURT: All right; well, that's what I'm thinking.
23 All right, anything else?

24 MR. GASKINS: Yes, sir.

25 THE COURT: Yes, sir?

1 MR. GASKINS: Yes, sir; there's one other theory that I
2 was able to find, and that is the derivative claims theory.
3 And it's not cited in the memo, but I have the -- the case
4 where it was first recognized---

5 THE COURT: Okay.

6 MR. GASKINS: ---if I could bring it up now?

7 THE COURT: Please; either -- you can give it to us or
8 just cite it; okay.

9 MR. GASKINS: Your Honor, the case that I handed up is
10 *Barrowclough* -- I think I'm pronouncing that correctly --
11 *Barrowclough versus Kidder, Peabody and Company*. And in that
12 case, the Plaintiffs included the children of an employee who
13 was a participant in a deferred compensation plan.

14 They were contingent beneficiaries and the employee --
15 their father -- had an agreement with the employer -- or the
16 Plaintiff -- which required arbitration.

17 The Plaintiffs -- the children -- were not signatories
18 to that agreement, but their claims derived from the
19 relationship between their father and the Plaintiff.

20 And The Court said that they could be compelled to
21 arbitrate even though they were not signatories---

22 THE COURT: Well the only -- that -- that comes back to
23 the same observation I made earlier. I don't know about the
24 Plaintiff making any claim under your signatory.

25 MR. GASKINS: I'm not sure -- I'm not sure I understand,

1 Your Honor.

2 THE COURT: I mean, if -- in other words, you -- your,
3 uh -- your agreement -- arbitration agreement is with, uh --
4 is between two parties; right?

5 MR. GASKINS: Yes, sir.

6 THE COURT: All right; and they're not -- one is, of
7 course -- what is it? Uh -- uh, Merrill Lynch and the other
8 is the, uh -- um -- uh, the Trust. Is that right?

9 MR. GASKINS: Yes, Your Honor, I believe -- I believe
10 that's correct.

11 THE COURT: Well, they're not making any claim under the
12 Trust. In fact, they're trying to demolish the Trust -- or,
13 to abolish the Trust.

14 MR. GASKINS: I understand that, Your Honor, but their
15 claims derive from the---

16 THE COURT: No, I -- no, I -- they -- they're claiming
17 under a 1999 Will. I don't think they -- they're giving
18 anyone -- is it, uh, province to the, um -- uh, to the Trust.

19 But I mean, I'm just talking about the pleadings. I --
20 I -- I have no idea of what will develop, but I mean---

21 MR. GASKINS: Well, Your -- Your Honor, I think their
22 plan---

23 THE COURT: ---I don't -- I don't find anything in the
24 pleadings that would say that they would be, uh, bound by
25 something between your client and, uh, Mr. Threlkeld's

1 client.

2 MR. GASKINS: Well, I think if you look at the
3 underlying allegations in the complaint as they relate to my
4 client, they're -- all their allegations are based on the
5 course of conduct between Merrill Lynch and the Decedent and
6 the Trust. And because those allegations---

7 THE COURT: Are they in favor?

8 MR. GASKINS: Are they in favor of?

9 THE COURT: What -- you know, that -- in their -- I
10 hadn't read all the allegations, but they're -- are they in
11 favor of what your client did -- Merrill Lynch?

12 MR. GASKINS: Oh, absolutely not, Your Honor.

13 THE COURT: Well, that's -- I wouldn't say it's
14 consistent.

15 MR. GASKINS: Well, I -- I think if you look at the --
16 the *Barrowclough* claim---

17 THE COURT: Well, they -- they have their own
18 beneficiaries under the, uh, agreement.

19 MR. GASKINS: Well then---

20 THE COURT: I mean, there was a -- a nexus and there is
21 none here. In fact, crazy as their -- everything I've heard
22 this afternoon -- and I heard too much maybe -- they
23 disavowed everything that's a Code.

24 MR. GASKINS: I -- but if you look at the *Barrowclough*
25 case, they -- The Court was not addressing it either under

1 the theory of estoppel or under agency. It was looking at a
2 different theory, which is derivative claims. We---

3 THE COURT: Well it's a derivative claim because they --
4 the -- they derived their claim from the, um, signatory. And
5 they are not, uh -- or, he's not -- what, is it Plaintiffs?
6 It's an individual Plaintiff, isn't it?

7 MR. MEDLIN: Individual; yes, Your Honor.

8 THE COURT: I mean, he's not claiming anything under the
9 Trust. Your -- your, uh---

10 MR. GASKINS: Well, I -- I think it goes towards the
11 conduct. I think that's what *Barrowclough*---

12 THE COURT: Well, that -- I -- I -- I -- from -- I would
13 imagine, if your -- your client is being mentioned in it --
14 the only action that I saw that perhaps could be included --
15 I didn't look to see if that was it -- uh, was the civil
16 conspiracy.

17 MR. GILREATH: Tortuous interference, Your Honor.

18 THE COURT: Pardon?

19 MR. GILREATH: Tortuous interference with inheritance.

20 THE COURT: Well, same difference. Those -- so they are
21 not sug- -- suggesting they -- they like anything you do.

22 MR. GASKINS: No, I -- I -- and frankly neither were the
23 clients in -- in the other cases. If they did there would --
24 there would never be a controversy.

25 THE COURT: Well I mean, it's evident they are not

1 trying to derive any benefit from your services. In fact,
2 they say you interfered with them.

3 MR. GASKINS: And I think that's con- -- I mean, I think
4 that's always going to be the case and consistent with---

5 THE COURT: I -- I don't know about that.

6 MR. GILREATH: Your Honor, can I just briefly respond?

7 THE COURT: If you need -- if you want to snatch -- what
8 is it? Um---

9 MR. GILREATH: Your Honor, I -- I don't want -- I don't
10 want to snatch---

11 THE COURT: ---defeat from the jaws of victory, go right
12 ahead.

13 MR. GILREATH: Your Honor, I was taught a long time ago
14 that when The Judge seems to be in agreement with you not to
15 stand up and---

16 THE COURT: Well, this might be one of those times.

17 MR. GILREATH: I think -- I think it is, Your Honor. I
18 do want to just hand up that case, which is a fifth circuit
19 case, that we've highlighted some portions on and point out
20 the one thing he did not mention and just to be sure -- and
21 this -- this is all in our brief so I'm not going to belabor
22 the point, is that we have sued them for tortuous
23 interference with an inheritance and -- and a conspiracy.
24 And -- and that's got -- you read this case -- he -- he
25 doesn't bother to mention that in any of his papers, so---

1 THE COURT: Well, I -- I wasn't aware of that; I'm
2 sorry. Thank you for bringing it to my attention again.

3 MR. GILREATH: Okay; thank you. I -- I'm now going to
4 sit down.

5 THE COURT: There you go. All right, anything else?

6 MR. GILREATH: Nothing from the Plaintiff.

7 THE COURT: Uh -- Mr. Threlkeld?

8 MR. THRELKELD: No, sir.

9 THE COURT: Mr. Gaskins?

10 MR. GASKINS: No, Your Honor.

11 THE COURT: All right. All right, I'm going back, uh,
12 and grant the Motion to Amend 1210 (sic), uh -- I mean, 2010,
13 uh -- uh, complaint.

14 I am gonna grant the Motion to Consolidate the two so at
15 lease somebody can put it together.

16 And, I'm going to deny the, um -- uh, Motion to, uh,
17 Arbitrate -- to Compel Arbitration.

18 And, of course, the Dismiss.

19 MR. GILREATH: Your Honor, we also cited in our papers,
20 and I -- I -- I think you can make this on the record, we
21 believe this Motion to Arbitrate is -- is basically --
22 there's no grounds whatsoever and it's a frivolous
23 proceeding. So I want to put on the record that we are
24 making that Motion.

25 THE COURT: Well I thought I was dismissing the, uh,

1 Motion to Compel.

2 You -- I mean, you -- you're gonna put -- slash it out.

3 I mean---

4 MR. GILREATH: Well, I -- I know, but what---

5 THE COURT: What are you're saying, you want grounds for
6 it?

7 MR. GILREATH: I -- I think that -- I think he has no
8 grounds for his Motion.

9 THE COURT: Well, I thought I addressed each -- each way
10 that he---

11 MR. GILREATH: You did.

12 THE COURT: ---tried to -- to -- to get it in under
13 equitable estoppel, uh, derivative, and what was the third
14 one?

15 MR. GASKINS: Uh -- agency.

16 THE COURT: Agency.

17 MR. GILREATH: I think you -- you covered all of 'em,
18 Your Honor, but I -- I---

19 THE COURT: Well, you're gonna be drafting the Order or
20 somebody in your office or Mr. Medlin's office, so why is
21 it -- your -- you put that in.

22 MR. GILREATH: You'll grant the Order on it, but we
23 believe that -- that's why I made this Motion; we believe he
24 really had no grounds to file this Motion and -- and
25 therefore, that -- the -- the -- the---

1 THE COURT: You're not looking for sanctions, are you?

2 MR. GILREATH: I'm not looking for any sanctions, but it
3 ought to be deemed a frivolous Motion because that -- what
4 I'm concerned about -- I'll say it on the record -- he -- he
5 can file a Motion to Appeal and then we're gonna stop this
6 whole thing again. Now I -- 'cause he's got the right to
7 file that Motion. And that's why he filed it; so he can file
8 a Motion to Appeal.

9 MR. GASKINS: Your Honor.

10 MR. GILREATH: And -- and that's why---

11 THE COURT: No, just a minute. All right, I -- rather
12 than get -- I -- I -- I'm gonna want that this week. But,
13 um, I am a little bit concerned about some of the things I've
14 heard. Not in this case; particularly not until now.

15 Now, are you suggesting there is some ulterior motive?

16 MR. GASKINS: Your Honor, I can, uh---

17 THE COURT: I mean, he's suggesting there is.

18 MR. GASKINS: He is, but I -- I can assure you there was
19 no ulterior motive. We think we had -- we think we had the
20 grounds for it. Um -- we understand The Court disagrees, and
21 that's fine; but of course we---

22 THE COURT: Well, I'll -- I'll put that in; I'll add --
23 instruct Mr. Gilreath to put it in his Order that I find no
24 good grounds.

25 MR. GILREATH: Thank you, Your Honor.

1 THE COURT: So we'll -- you-all -- and let somebody else
2 ride with it and decide what they want to do. 'Cause as I
3 say, of the three -- and I'm -- this is no reflection on
4 anything on your argument or anything else, but I think you
5 took the best shot you had -- but as far as the three basis,
6 I do not feel that they are applicable in any way to this
7 particular---

8 MR. GASKINS: I understand, Your Honor.

9 THE COURT: ---this -- this particular party. Now, it
10 could be applicable to -- if Mr. Threlkeld and Mr. O'Rourke
11 are successful, you probably have a pretty good argument.

12 MR. GASKINS: Thank you.

13 THE COURT: But, I don't find them -- and particularly
14 their causes of action -- any way, um, contemplated by a,
15 uh -- um, arbitration agreement.

16 MR. GASKINS: Your Honor, I -- I understand that and I
17 respect The Court's decision. But I -- I would like---

18 THE COURT: Well, thank you.

19 MR. GASKINS: ---to state for the record that -- that
20 there was no ulterior motive---

21 THE COURT: Well, I -- I -- as I say, I'm gonna accept
22 your -- your -- your statement as to that. But, uh---

23 MR. GASKINS: Thank you, Your Honor.

24 THE COURT: ---I -- and I trust Mr. Gilreath was only
25 trying to clear the record.

1 MR. GILREATH: Thank you, Your Honor.

2 THE COURT: All right, anything else?

3 MR. GILREATH: Thank you, Judge.

4 THE COURT: All right. So it's Rule 5; be sure that
5 everybody has a copy.

6 And also, Mr. Gilreath, whoever does the Order, um, do
7 it on my email so I can play with it.

8 (WHEREUPON, PROCEEDINGS WERE INTERRUPTED FOR A
9 CONFERENCE, OFF THE RECORD.)

10 (WHEREUPON, PROCEEDINGS CONTINUED.)

11 (WHEREUPON, HEARING ENDED AT 4:41 P.M.)

12 *****END OF REQUESTED TRANSCRIPT*****
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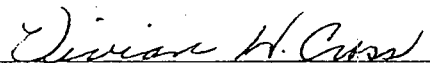
STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED VIVIAN H. CROSS, OFFICIAL COURT REPORTER FOR THE EIGHTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF THOSE PROCEEDINGS AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS FOR ANDERSON COUNTY, SOUTH CAROLINA, ON THE 20TH DAY OF SEPTEMBER 2012.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

JANUARY 23, 2012


VIVIAN H. CROSS
CIRCUIT COURT REPORTER

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

July 10, 2013

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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.

PROOF OF SERVICE

This is to certify that I have this date served a true and correct copy of the *Record on Appeal* on the parties identified below by U.S. Mail with sufficient postage properly affixed thereto, to:

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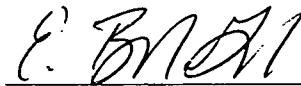
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