

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

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JUL 30 2013

SC Court of Appeals

The Honorable Alexander S. Macaulay, Circuit Court Judge

Case Nos. 2010-CP-04-1845 and 2012-CP-04-1433

JAMES ROBERT MALLOYRESPONDENT

v.

SWAIN N. THOMPSON, JR.DEFENDANT.

JAMES ROBERT MALLOYRESPONDENT

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. ISAPPELLANT.

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INTRODUCTION

This case presents an unfounded effort to assign legal liability to a brokerage firm for its provision of ordinary financial services for funds that are now the subject of an inheritance dispute. In the Lower Court, Plaintiff-Appellee James Robert Malloy (“Appellee” or “Mr. Malloy”) asserts various claims against Defendant Swain N. Thompson (“Mr. Thompson”), alleging that Mr. Thompson improperly acted to deprive Mr. Malloy of the inheritance he should have received upon the death of Robert L. Chamblee (“Decedent”). Additionally, Mr. Malloy asserts claims against Defendant-Appellant Merrill Lynch, Pierce, Fenner & Smith Inc. (“Appellant” or “Merrill Lynch”) for tortiously interfering with Mr. Malloy’s expectancy of an inheritance, as well as conspiring to effect, and aiding and abetting, Mr. Thompson’s tortious interference with Mr. Malloy’s expectancy of an inheritance.

Merrill Lynch appeals the decision of the Lower Court denying its motion to dismiss and compel arbitration. Merrill Lynch acknowledges that resolution of the issues presented thereby, particularly arbitrability, is not simple, or at least straightforward. But that is due to the novel claims asserted in Mr. Malloy’s Complaint. Indeed, it does not appear that *any* of Mr. Malloy’s claims against Merrill Lynch are cognizable under South Carolina law. The South Carolina Supreme Court has to date not recognized the claim of tortious interference with an expectancy of an inheritance. *See Douglass v. Boyce*, 344 S.C. 5, 9, 542 S.E.2d

715, 717 (2001) (“We have not adopted the tort of intentional interference with inheritance....”). If such a claim *were* adopted, it typically would require – under the Restatement and decisional authority of States that have adopted that claim – pleading and proof of an act by Merrill Lynch *that was improper in and of itself*, and not merely because it interfered with Mr. Malloy’s alleged expectancy of an inheritance. However, the acts Mr. Malloy challenges as constituting interference are not pled by him to be independently tortious; indeed, he now disclaims that Merrill Lynch owed him any duty, the gravamen of tort, other than to not interfere with his inheritance.

One could allege, and in his Complaint Mr. Malloy did appear to allege, that Merrill Lynch’s duty to its client, Decedent, should be extended to Mr. Malloy as the known beneficiary of Decedent. However, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (“FAA”), and decisional authority interpreting that Act, because any such duty would be derivative in nature, any claims by Mr. Malloy premised on that duty would be subject to the mandatory arbitration provision contained in the agreement between Merrill Lynch and Decedent.

In essence, there are only three possible outcomes under the law. First, this Court may recognize that Mr. Malloy’s claims against Merrill Lynch are invalid under South Carolina law, and therefore the question of arbitrability need not be answered. If the Court adopts (or presumes for now) the claim of tortious interference with an expectancy of inheritance, it must decide whether Mr.

Malloy's claims against Merrill Lynch are premised upon a duty derived from Merrill Lynch's duty to Decedent. If not, given the lack of any allegation of a violation of any other duty, the claims are invalid and should be dismissed. If they are, the claims against Merrill Lynch should be compelled to arbitration. In other words, to the extent Mr. Malloy has stated any valid claims against Merrill Lynch, those claims should be compelled to arbitration.

STATEMENT OF ISSUES ON APPEAL

1. What is the nature of Mr. Malloy's claims against Merrill Lynch, and specifically what if any valid claims has he stated?
2. Whether any such claims should be compelled to arbitration.

STATEMENT OF THE CASE

The history of the proceedings in the Lower Court is as follows:

1. Mr. Malloy commenced this action by filing, on April 16, 2012, a Complaint in the Court of Common Pleas, Tenth Judicial Circuit, Anderson County, South Carolina. *See* Complaint, p. 1 (R. p. 17).
2. In the Complaint, Mr. Malloy alleges that Mr. Thompson improperly acted to deprive Mr. Malloy of the inheritance he should have received when Decedent died in 2009. Specifically, Mr. Malloy alleges:
 - a. From 1984 to 1999, Decedent executed several wills naming Mr. Malloy, his godson, as his primary beneficiary. *Id.* at ¶ 29 (R. p. 22, lines 7-10). Decedent also held a life insurance policy, an annuity, and a retirement plan, each designating Mr. Malloy to

receive a benefit upon the death of Decedent. *Id.* at ¶ 39 (R. p. 8, lines 21-23- p. 25, lines 1-16).

- b. In August 2002, a treating physician diagnosed Decedent with Alzheimer's Disease and stated in hospital records that "Pt [patient] is not competent & will need placement." *Id.* at ¶¶ 22-23 (R. p. 20, lines 20-21- p. 21, lines 1-3).
- c. A subsequent assessment by a treating physician diagnosed Decedent with Alzheimer's Disease. *Id.* at ¶ 27 (R. p. 21 lines 18-23- p. 22, lines 1-3).
- d. Mr. Malloy did not seek a declaration that Decedent was incompetent. *Id.* at ¶ 25 (R. p. 21, lines 7-10).
- e. In August/September 2002, Mr. Thompson, Decedent's nephew, arranged for Decedent to move from New York to South Carolina and live in an assisted living facility. *Id.* at ¶ 26 (R. p. 21, lines 11-17).
- f. On September 16, 2002, Mr. Thompson coerced Decedent to execute a power of attorney, under South Carolina law, appointing Mr. Thompson as his attorney in fact. *Id.* at ¶ 31 (R. p. 22, lines 16-23- p. 23, lines 1-6). On September 18, 2002, Mr. Thompson coerced Decedent to execute a second power of attorney, under New York law, likewise appointing Mr. Thompson as his attorney in fact.

Id. (R. p. 22, lines 16-23- p. 23, lines 1-6) (Collectively referred to herein as the “Thompson Powers of Attorney.”)

- g. On December 11, 2002, Mr. Thompson coerced Decedent to execute a new will, naming Mr. Thompson as his beneficiary. *Id.* at ¶ 32 (R. p. 23, lines 7-10).
- h. On the same date, Mr. Thompson coerced Decedent to execute documents establishing an *inter vivos* trust (the “Trust”), with Mr. Thompson as the trustee and beneficiary. *Id.* at ¶¶ 45, 107 (R. p. 10, lines 20-23- p. 27, lines 1-8; p. 25, lines 23-25; p. 26, lines 1-5).
- i. After the Thompson Powers of Attorney were executed, an account was established at Merrill Lynch for the Trust. *Id.* at ¶ 45 (R. p. 10, lines 20-23- p. 27, lines 1-8).
- j. Merrill Lynch served as the “investment advisor and asset manager” for the Trust’s Merrill Lynch account. *Id.* at ¶¶ 45, 107 (R. p. 10, lines 20-23- p. 27, lines 1-8; p. 25, lines 23-25- p. 26, lines 1-5).
- k. Merrill Lynch helped Mr. Thompson “corral” and “round[] up” assets of the Decedent and transfer them to the Trust’s Merrill Lynch account. *Id.* at ¶¶ 48-49, 110-112 (R. p. 28, lines 4-23 - p. 29, lines 1-18; p. 42, lines 16-23- p. 27, lines 1-2). Specifically, Merrill Lynch: (i) conferred with persons at other financial institutions concerning the transfer of funds (*id.* at ¶¶ 53, 113) (R. p. 22, lines 8-22; p. 27, lines 3-6); (ii) obtained and completed forms and

documents requested by institutions holding funds to be transferred (*id.* at ¶ 50) (R. p. 29, lines 19-23- p. 30, lines 1-13); (iii) submitted the Thompson Powers of Attorney to institutions to facilitate the transfers of funds (*id.* at ¶¶ 50, 54, 114) (R. p. 29, lines 19-23-p. 30, lines 1-13; p. 16, lines 1-9; p. 43, lines 7-15); and (iv) acted to ensure that certain of the transfers – ones involving tax qualified retirement assets – be done as “rollovers” for purposes of tax treatment (*id.* at ¶¶ 55, 115) (R. p. 32, lines 10-17; p. 43, lines 16-20).

3. Mr. Malloy asserts claims against Merrill Lynch for: (a) tortious interference with expectancy of inheritance; (b) aiding and abetting a tortious interference with expectancy of inheritance; and (c) conspiracy to tortiously interfere with an expectancy of inheritance. *Id.* at ¶¶ 105-121 (R. p. 41, lines 13-25- p. 45, lines 1-4).
4. On May 29, 2012, Merrill Lynch moved to dismiss and compel arbitration. *See* Defendant Merrill Lynch, Pierce, Fenner and Smith, Inc.’s Motion to Dismiss and Compel Arbitration (R. pp. 106-108). In Support thereof, Merrill Lynch presented, by authenticating affidavit:
 - a. a November 25, 2002 Client Relationship Agreement signed by Decedent; and
 - b. a January 24, 2003 Client Relationship Agreement signed by Decedent and Mr. Thompson as trustees of the Trust.

Id. at Exhibits 1(A) (signature pages) (R. pp. 159-160); 1(B) (R. pp. 162-169); and 1(C) (R. pp. 171-178). (Collectively referred to herein as the “CRAs.”)

5. Further, Merrill Lynch presented, again by authenticating affidavit, the following documents obtained by it upon opening the accounts for Decedent and the Trust, and which attested to the authority of Decedent and Mr. Thompson to act on behalf of Decedent and the Trust:
 - a. the September 16, 2002 South Carolina Power of Attorney, which was witnessed, notarized, and publicly-filed in South Carolina (*id.* at Exhibit 1(D)) (R. pp. 183-190);
 - b. the September 18, 2002 New York Power of Attorney, which was notarized (*id.*) (R. pp. 180-182);
 - c. a November 25, 2002 Power of Attorney, specific to the Merrill Lynch accounts, which was witnessed, notarized, and publicly-filed in South Carolina (*id.* at Exhibit 1(E)) (R. pp. 192-198); and
 - d. a January 29, 2003 Trustee Certification Form attesting to the establishment of the Trust and the designation of Decedent and Mr. Thompson as trustees of the Trust (*id.* at Exhibit 1(F)) (R. pp. 200-202).
6. Both CRAs contain mandatory arbitration provisions. *Id.* at Exhibit 1(B) at ¶ 11 (R. p. 168, lines 48-88); Exhibit 1(C) at ¶ 6 (R. p. 176, lines 52-79- p.

177 lines 1-16); *see also* Exhibit 1(A), text directly above signature lines, referring in bold type to arbitration requirement (R. pp. 159-160).

7. In Merrill Lynch's motion to dismiss and compel arbitration, Merrill Lynch argued that: "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." *See* Defendant Merrill Lynch, Pierce, Fenner and Smith, Inc.'s Memorandum in Support of Motion to Dismiss and Compel Arbitration, at p. 6 (R. p. 153, lines 6-8). Citing federal and South Carolina law, Merrill Lynch argued that whatever valid claims Mr. Malloy had against Merrill Lynch should be compelled to arbitration. *Id.* at pp. 4-6 (R. pp. 151-153).
8. Mr. Malloy responded, arguing that: (i) he did not personally sign the CRAs and is not claiming any status as a direct beneficiary of the CRAs, therefore he should not be bound by the arbitration provisions in the CRAs; and (ii) the CRAs are invalid because Decedent was incompetent at the time Decedent signed them. *See* Plaintiff's Response to Defendant Merrill Lynch, Pierce, Fenner and Smith, Inc.'s Memorandum in Support of Motion to Dismiss and Compel Arbitration, at pp. 2-6 (R. pp. 223-227).
9. The Lower Court held a hearing on Merrill Lynch's motion to dismiss and compel arbitration on September 20, 2012, at the conclusion of which it denied the motion. *See* 9/20/2012 Transcript, at pp. 55-67 (R. pp. 338-350).

10. The Lower Court entered its Order denying Merrill Lynch's motion to dismiss and compel arbitration on October 25, 2012. *See* 10/25/2012 Order, at pp. 9-12 (R. pp. 10-13). The Lower Court held that because Mr. Malloy did not personally sign the CRAs and is not claiming any status as a direct beneficiary of the CRAs, he is not bound by the arbitration provisions in the CRAs. *Id.* at p. 10-11 (R. pp. 11-12).
11. Merrill Lynch, following receipt of the Order on October 30, 2012 timely filed and served its Notice of Appeal on November 9, 2012. *See* 11/9/2012 Notice of Appeal (R. pp 265-283).

ARGUMENT

To the extent Mr. Malloy has stated any valid claims against Merrill Lynch, those claims should be compelled to arbitration.

I. WHAT IF ANY VALID CLAIMS HAS MALLOY ASSERTED AGAINST MERRILL LYNCH?

To resolve the question of arbitrability, the Court must first determine the nature of any valid claims stated by Mr. Malloy against Merrill Lynch. In so doing, the Court should look beyond the legal label assigned in the Complaint to the substance of what is alleged. *See Zabinski v. Bright Acres Assocs.*, 553 S.E.2d 110, 118 (S.C. 2001).

A. South Carolina Has to Date Declined to Adopt the Tort of Interference with an Expectancy of Inheritance.

Mr. Malloy asserts in his Complaint that Merrill Lynch tortiously interfered with his expectancy of an inheritance, and further conspired to effect, and aided

and abetted, Mr. Thompson's tortious interference with Mr. Malloy's expectancy of an inheritance. Mr. Malloy's first problem is that the South Carolina Supreme Court has to date declined to adopt the claim of tortious interference with an expectancy of an inheritance. *See Douglass v. Boyce*, 344 S.C. at 9, 542 S.E.2d at 717 (S.C. 2001) ("We have not adopted the tort of intentional interference with inheritance...."). The simplest resolution of this appeal would be for the Court to dismiss Mr. Malloy's claims against Merrill Lynch as not supported by South Carolina law.

B. Even if South Carolina Were to Adopt the Tort of Interference with an Expectancy of Inheritance, it Would Require Elements Not Present in Mr. Malloy's Complaint to State Such a Claim Against Merrill Lynch.

Even presuming the adoption by South Carolina of the tort of interference with an expectancy of inheritance *as a general matter*, consideration must be given to what elements would be required to state such a claim *against a bank or brokerage firm*. States that have adopted this tort have relied on Section 774B of the Restatement (Second) of Torts, which defines it as follows:

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

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

the act of interference is tortious *by some measure beyond the interference itself*.

That comment states:

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

Id.

Here, Mr. Malloy fails to allege any act by Merrill Lynch that would in another context support tort liability. Mr. Malloy alleges that Merrill Lynch served as the investment advisor for the Trust's Merrill Lynch account (Complaint at ¶¶ 45, 107) (R. p. 10, lines 20-23 - p. 27, lines 1-8); p. 25, lines 23-25 - p. 26, lines 1-5). But there is nothing improper about a brokerage firm serving as a financial advisor. Mr. Malloy alleges that Merrill Lynch facilitated transfers of funds from other institutions to the Trust's Merrill Lynch account by: completing transfer forms (*id.* at ¶ 50) (R. p. 29, lines 19-23 - p. 30, lines 1-13), conferring with personnel at the other institutions (*id.* at ¶¶ 53, 113) (R. p. 22, lines 8-22; p. 27, lines 3-6), submitting to those institutions the Thompson Powers of Attorney (*id.* at ¶¶ 50, 54, 114) (R. p. 29, lines 19-23 - p. 30, lines 1-13; p. 16, lines 1-9; p. 43, lines 7-15), and ensuring that certain transfers be done as tax-free rollovers (*id.* at ¶¶ 55, 115) (R. p. 32, lines 10-17; p. 43, lines 16-20). But the facilitation by a brokerage firm of transfers of funds into and out of an account is not tortious in and of itself. While Mr. Malloy alleges that the Thompson Powers of Attorney and the agreement establishing the Trust were invalid, he expressly alleges that it

was Mr. Thompson, not Merrill Lynch, who improperly obtained Decedent's signatures on those documents (*id.* at ¶¶ 31, 45, 107) (R. p. 22, lines 16-23 - p. 23, lines 1-6; p. 10, lines 20-23 - p. 27, lines 1-8; p. 25, lines 23-25 - p. 26, lines 1-5). Merrill Lynch's acceptance of signed and notarized – and in two instances fully witnessed and publicly-filed – powers of attorney and trust agreements is not tortious.

The implied, but never directly stated, allegation that Merrill Lynch should have known that Decedent was allegedly incompetent when he signed the Thompson Powers of Attorney and the agreement establishing the Trust, does not change the analysis. The Complaint acknowledges that at the time no adjudication of Decedent's competence had been sought or made. Certainly, Merrill Lynch had no duty to independently assess Decedent's competence. Courts have held that brokers and brokerage firms do not have a duty to ascertain a client's mental competence. For example, in *Edward D. Jones & Co. v. Fletcher*, the Texas Supreme Court considered an allegation that a stockbroker had acted improperly by acting on an elderly client's instruction to transfer stock to a caretaker relative when he knew or should have known of the client's diminished mental capacity. 975 S.W. 2d 539, 541-42 (Tex. 1998). That court held that the stockbroker did not have a legal duty to ascertain the client's competence, explaining:

Stock brokers and other services providers cannot be expected to have any expertise in assessing mental capacity. The burden of making this assessment is thus especially great. A service provider should not be put to choosing between refusing to assist an elderly person with legitimate transactions and incurring liability for

providing such assistance when the provider lacks any qualifications for determining competence. A stock broker's fiduciary obligation does not include the duty to ascertain the client's mental competence.

975 S.W. 2d 539, 545 (Tex. 1998). *See also Anton v. Merrill Lynch*, 36 S.W.3d 251, 256 (Tex. App. 2001) (“We ... reject appellant’s argument that the appellees had to ascertain [decedent’s] competence before letting him change beneficiaries [on an retirement account].”). Thus, Merrill Lynch was entitled to accept the documents presented to it as legally binding and required by law to act on the instructions communicated to it in accordance with those documents.

Put another way, Mr. Malloy has failed to allege that Merrill Lynch owed him any duty, *i.e.* the gravamen of tortious conduct, and therefore cannot establish that any act that he contends constituted interference was tortious by some measure beyond the interference itself. Accordingly, even presuming the adoption by South Carolina of the tort of interference with an expectancy of inheritance, Mr. Malloy has failed to plead acts by Merrill Lynch that would support such a claim against Merrill Lynch.¹

¹ To be clear, Mr. Malloy’s claims of conspiracy and aiding and abetting are derivative of his primary claim of tortious interference with an expectancy of inheritance, and therefore suffer the same fatal flaws. Moreover, the conspiracy claim fails because Mr. Malloy does not “allege acts in furtherance of the conspiracy and special damages that are separate and independent of the other acts and damages that underlie the other causes of action within the same complaint.” *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 118, 682 S.E.2d 871, 874 (Ct. App. 2009). Likewise, the aiding and abetting claim fails for lack of allegations of facts that would establish that Merrill Lynch participated in conduct it knew to be tortious. *See Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008) (holding, in analyzing claim for aiding and abetting a breach of fiduciary duty, that the “gravamen of the claim is the defendant's knowing participation in the [underlying tort]”); *Gordon v. Busbee*, 397 S.C.

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

Following from the above, the only possible way for Mr. Malloy to establish an independently tortious act by Merrill Lynch would be for him to allege that Merrill Lynch's duty to its client, Decedent, should be extended to Mr. Malloy as the known beneficiary of Decedent. However, it now appears that Mr. Malloy has entirely disclaimed the suggestion that Merrill Lynch owed him a duty, other than to not interfere with his inheritance (the violation of which, again, is not enough to state the claim asserted – the act of interference must be *independently* tortious). *See* Plaintiff's Response to Defendant Merrill Lynch, Pierce, Fenner and Smith, Inc.'s Memorandum in Support of Motion to Dismiss and Compel Arbitration, at p. 5 (stating Malloy "was not in any way an intended beneficiary of the Client Relationship Agreements between Merrill Lynch and Decedent...") (R. p. 226, lines 4-6).²

119, 134, 723 S.E.2d 822, 830 (Ct. App. 2012) (plaintiff must establish actual knowledge of the underlying tortious conduct). Given that South Carolina to date has declined to adopt the tort of interference with an expectancy of inheritance, Mr. Malloy certainly cannot show that Merrill Lynch had actual knowledge that Mr. Thompson was committing that tort.

² Mr. Malloy further appears to disclaim the suggestion that his claim involves an allegation of a breach of a duty owed to Decedent. *See* Plaintiff's Response to Defendant Merrill Lynch, Pierce, Fenner and Smith, Inc.'s Memorandum in Support of Motion to Dismiss and Compel Arbitration, at p. 5 (stating Malloy "is not suing on behalf of Decedent's estate but instead is suing Merrill Lynch for its acts committed against him directly....") (R. p. 226, lines 2-4).

Regardless, because any such duty would be derivative in nature, it would be subject – pursuant to the FAA, 9 U.S.C. § 1, *et seq.* (“FAA”), and decisional authority interpreting that Act – to the mandatory arbitration provision contained in the CRAs between Merrill Lynch and Decedent.

The FAA governs arbitration provisions in contracts that involve interstate commerce. 9 U.S.C. § 1. Securities brokerage agreements by definition involve interstate commerce and, thus, are governed by the FAA. *See, e.g., Mastick v. TD Ameritrade, Inc.*, 209 Cal.App.4th 1258, 1263, 147 Cal.Rptr.3d 717 (Cal. Ct. App. Oct. 9, 2012). In applying the FAA, state courts should look to the body of federal substantive law of arbitrability. *Bank of the Commonwealth v. Hudspeth*, 714 S.E.2d 566, 569-70 (Va. 2011).

This body of law has long recognized that nonsignatories to arbitration agreements may be bound by those agreements. As explained by the Virginia Supreme Court in *Hudspeth*, under federal substantive law:

[T]he obligation and entitlement to arbitrate does not attach only to one who has personally signed the written arbitration provision. Rather, well-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.

Id. at 570 (quoting *Washington Square Sec., Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir. 2004)).

Specifically, claims by a beneficiary of an agreement that contains an arbitration provision are subject to arbitration regardless of whether the beneficiary personally signed the agreement. *See, e.g., Graves v. BP America*,

Inc., 568 F.3d 221, 223 (5th Cir. 2009); *Int'l Paper Co. v Schwabedissen Maschinen & Anlagen GMBH*, 206 F. 3d 411, 417-18 (4th Cir. 2000) (nonsignatories may be compelled to arbitrate if their claims implicate a “direct benefit” received from an agreement containing an arbitration clause); *Pritzker v. Merrill Lynch*, 7 F.3d 1110, 1122 (3d Cir. 1993) (nonsignatories to arbitration agreement may be bound if they are third-party beneficiaries of the agreement, have “directly-related” interests, or are agents through a “direct or derivative” relationship); *McCutcheon v THI of SC at Charleston, LLC*, 2011 WL 6318575 (D.S.C. December 15, 2011) (nonsignatory third-party beneficiary of agreement is bound by arbitration provision therein).

The same is true where a nonsignatory of an agreement with an arbitration provision is asserting claims that are derivative of a signatory’s claims. See *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923 (3rd Cir. 1993) (contingent beneficiaries to a deferred compensation plan, who were nonsignatories to an arbitration agreement between the primary beneficiary and the defendant, were compelled to arbitrate because their claims were derivative of the primary beneficiary); *Smith Barney, Inc. v. Henry*, 775 So.2d 722 (Miss. 2001) (compelling decedent’s beneficiary to arbitrate claim for negligent management of decedent’s funds); *Jansen v. Salomon Smith Barney, Inc.*, 776 A.2d 816 (N.J. App. Div. 2001) (compelling decedent’s beneficiaries to arbitrate claims that were derivative of the decedent’s rights).

As set forth above, it appeared that in his Complaint Mr. Malloy was alleging that Merrill Lynch owed him a duty as the known beneficiary of Decedent. Absent such an allegation, he has no claims upon which he can recover. With such an allegation, Mr. Malloy's claims would be derivative of, and dependent upon, claims that Decedent's estate or the Trust could pursue against Merrill Lynch. Because any such claims would be premised upon a duty derived from Merrill Lynch's obligations to Decedent and/or the Trust under the Client Relationship Agreements, they should be compelled to arbitration in accordance with the FAA and federal decisional law interpreting that Act.

CONCLUSION

While the novelty of Mr. Malloy's claims against Merrill Lynch complicates the analysis, it is clear that the Lower Court erred in denying Merrill Lynch's motion to dismiss and compel arbitration. As stated in that motion, "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." *See* Defendant Merrill Lynch, Pierce, Fenner and Smith, Inc.'s Memorandum in Support of Motion to Dismiss and Compel Arbitration, at p. 6 (R. p. 153, lines 6-8).

For the foregoing reasons, the Court should reverse the Lower Court's October 25, 2012 Order, and hold that:

- Mr. Malloy's claims against Merrill Lynch are invalid because South Carolina does not recognize the tort of interference with an expectancy of inheritance; or
- Mr. Malloy's claims against Merrill Lynch are invalid because – even if South Carolina did adopt the tort of interference with an expectancy of inheritance – the acts he contends constituted interference by Merrill Lynch are not independently tortious.

If the Court instead finds or presumes that Mr. Malloy has stated cognizable claims against Merrill Lynch, then because any such claims could only be premised on a duty derived from the Client Relationship Agreements between Merrill Lynch and Decedent, the claims, therefore, should be compelled to arbitration.

In other words, to the extent Mr. Malloy has stated any valid claims against Merrill Lynch, his claims should be compelled to arbitration.

Dated: July 30, 2013

Respectfully submitted,



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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,

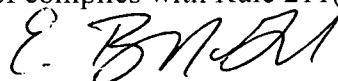
v.

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

July 30, 2013



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PROOF OF SERVICE

This is to certify that I have this date served a true and correct copy of the *Final Brief of Appellant* on the parties identified below by U.S. Mail with sufficient postage properly affixed thereto, to:

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