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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Common Pleas Case No. 2022-CP-23-01064
Appellate Case No. 2026-000267

John R. Mensch and Shauna M. Waddell
Individually and as Personal Representative
Of the Estate of Florence Petrak Mensch and
John R. Mensch *Respondents,*

v.

Sterling Raymond Mensch, III, Individually
As Personal Representative of the Estate
of Florence Petrak Mensch and in the
former Capacity as Agent under a Power
of Attorney for Florence Petrak Mensch *Appellant.*

RECORD ON APPEAL
VOLUME I

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s/ Devon M. Puriefoy
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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE IN THE MATTER OF: Estate of Florence Petrak Mensch Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch, Petitioners, vs. Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch, Respondent.	IN THE PROBATE COURT CASE NO. 2018ES2302854 **FILED** JUL 29 2021 **GREENVILLE COUNTY PROBATE COURT** ORDER

This hearing was conducted via Zoom on March 17, 2021 on Petitioners' Motion requesting the Court to grant Summary Judgment to Petitioners on the following causes of action:.

- Violation of the S.C. Power of Attorney Act
- Breach of Fiduciary Duty as Agent and as PR
- Fraudulent and Negligent Misrepresentation and Concealment
- Conversion
- Negligence
- Unjust enrichment/Money Had and Received
- Constructive Trust

The Court also heard Respondent's Motion to Strike Petitioners' Memorandum in support of the Motion for Summary Judgement and struck the prayer for punitive damages as outside the Court's subject matter jurisdiction.

Present was Tyler E. McLeod of Brown, Massey, Evans, McLeod & Haynsworth, LLC for the Petitioners John Mensch and Shauna Waddell; and Devon Puriefoy of Truluck Thomason, LLC for Respondent Sterling Mensch (SRM). The parties also were present. No testimony was taken from any party.[1]

Based upon the pleadings, affidavits, memoranda, exhibits, and, arguments of counsel, the Court finds as follows:

PROCEDURAL HISTORY

1. On June 25, 1998, the Decedent executed her Last Will and Testament leaving her estate to her three children, Shauna Waddell, John R. Mensch, and SRM; and, naming all three as Co-Personal Representatives to serve without bond.

2. On May 17, 2010, the Decedent executed a Codicil amending her Will to name SRM as Personal Representative with Shauna Waddell and John Mensch to serve as Successors, to serve without bond. The Decedent republished her 1998 Will as amended by the Codicil.

3. On May 17, 2010, the Decedent executed a Durable Power of Attorney (DPOA) which names SRM as her Attorney in Fact (AIF)[2]. The DPOA was duly recorded in Greenville County on May 18, 2010.

4. On April 26, 2018, the Decedent died in Greenville County.

5. On December 14, 2018 the Will and Codicil were filed with the Court.

6. On January 23, 2019 SRM filed his application for admission of the Will and Codicil to Probate and for his appointment as Personal Representative.

7. On January 23, 2019, SRM was appointed Personal Representative (PR) of Decedent's

[1] Both Petitioners were on camera during the arguments. It wasn't until the conclusion of the hearing did the Court become aware that SRM was present in his attorneys' office but not on camera.
[2] The 2017 changes to the *Uniform Power of Attorney Statute* changed *Attorney in Fact* to *Agent*. Since this DPOA was executed prior to 2017, the term *Attorney in Fact* will be used in this Order.

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estate.

8. On May 15, 2019, this action was filed. An amended Petition was filed on May 13, 2020. The Petitioners allege the estate is due damages from SRM, including attorneys' fees and costs, as a result of his individual actions and his actions while serving as AIF and as PR.

9. Numerous contempt actions were filed by the Petitioners to enforce the Court's Orders regarding the production of discovery, etc.

10. On December 4, 2019, SRM was removed as PR for misconduct; and, Shauna Waddell, was appointed Successor PR in keeping with the Decedent's Will.

11. On February 17, 2021, this Motion for Summary Judgement was filed by the Petitioners.

LEGAL STANDARD

Summary Judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. S.C.R.C.P. 56. All evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences resolved in the same manner. *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990). Nevertheless, a court "cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996). Furthermore, when a motion for summary judgment is supported by affidavits, the nonmoving party cannot rest on the general denials of its answer, but must show that there is a genuine issue of material fact, through its own affidavits. S.C.R.C.P. 56(e). If the nonmoving party fails to do this, "summary judgment, if appropriate, shall be entered against [it]." Id.

The Petitioners request the Court grant Summary Judgement of the following causes of action:

A. Breach of Fiduciary Duty as Attorney in Fact
Summary Judgement: Granted

1. "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Davis v. Greenwood Sch. Dist.* 50, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to [399 S.C. 336] the plaintiff by the defendant, and, (3) damages proximately resulting from the wrongful conduct of the defendant. See generally *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct.App.2004) (discussing the elements comprising a breach of fiduciary duty claim). *RFT Mgmt. Co. v. Tinsley & Adams* 399 S.C, 322, 732 S.E. 166 (S.C. 2012).

2. In the case at hand, it is undisputed that SRM owed a fiduciary duty to the Decedent as her AIF. Instead of preserving her funds for the future use of the Decedent, SRM moved funds from the Decedent's accounts to his personal account while acting under the authority given to him by her in her DPOA. It is undisputed that SRM used funds from these transfers for his own personal use; resulting in the diminishment of available funds for the Decedent's estate to distribute. It is undisputed that the DPOA contained no gifting clause. Therefore, as a matter of law, no genuine issue of material fact exists as to this cause of action. Petitioners have satisfied the requirements of the cases recited above establishing that SRM had a fiduciary duty to the decedent as her AIF, that he breached that duty by using her funds for his own benefit without authority; and that her estate has been damaged by the amount of said breach including legal fees and costs. Therefore, Petitioners Motion for Summary Judgement is granted. The issue of damages owed to the estate remains contested and will be heard at trial.

B. Violation of Uniform Power of Attorney Act
Summary Judgement: Granted

3. The Decedent's DPOA contains the following provision on page 5, third paragraph:

> *Notwithstanding any provisions herein to the contrary, my attorney in fact shall not satisfy the legal obligations of the attorney in fact, out of any property subject to this power of attorney. Except to the extent this power of attorney specifically authorizes gifts to my attorney in fact, my attorney in fact may not exercise this power in favor to the attorney, the attorney's estate, the attorney's creditors, or the creditors of attorney's estate.*[3]

4. While serving as Decedent's AIF, SRM admits he transferred funds from the Decedent's accounts to his personal account. Some of the funds transferred were from retirement accounts which resulted in the assessment of unnecessary taxes and penalties. SRM admits he made the unauthorized transfers as described. However, he claims that he used a substantial part of the transfers for the benefit of the Decedent with the remainder for his personal benefit. He has yet to quantify these amounts or provide proof of the amounts despite several Court Orders requiring him to account for the funds.

5. While serving as AIF, SRM admits he failed to file Decedent's tax returns.

6. While acting as Decedent's AIF, SRM admits to liquidating Decedent's retirement accounts and transferring the retirement funds to Decedent's Bank of America Account. He admits to transferring funds from her Bank of America account to his own bank account and that he used some of these funds for his personal use. He admits that he failed to keep accurate and complete records while serving as AIF. Through his admission, he has violated the following provisions of the Uniform Power of Attorney Act, S.C. Code Annotated 62-8-114 (Supp. 2017):

- Failed to act in good faith;
- Failed to act within the scope of authority granted in the DPOA;
- Failed to act with care, competence, and diligence;

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[3] The DPOA contains no gifting clause.

- Failed to keep records or all receipts, disbursements, and transactions;
- Failed to preserve the Decedent's estate plan by liquidating retirement accounts;
- Failed to preserve the Decedent's estate plan by using her funds for his personal use resulting in less assets to be distributed to all three of her children from her estate;
- Failed to timely file taxes resulting in penalties and interest;
- Failed to minimize taxes and incurring penalties by liquidating retirement accounts;
- Acted with reckless indifference to the purpose of the power of attorney; and,
- Conduct was reckless and willful in complete disregard of duties imposed upon him as a fiduciary.

7. As a matter of law, no genuine issue of fact exists as to this cause of action. The Petitioners are granted Summary Judgement. SRM is liable to the Decedent's successors for the amount required to restore the value of the Decedent's property to what it would have been had the violations not occurred. S.C. Code Annot. 62-8-117 (Supp. 2017). Said amount is contested and is reserved for the final hearing.

C. Conversion
Summary Judgement: Granted

8. Conversion is a wrongful act and has been defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. *Owens v. Andrews Bank & Trust Co.*, 265 SC 490, 220 SE 2d 116 (1975). Conversion is a wrongful act which emanates by either a wrongful taking or wrongful detention Kirby v. *Horne Motor Co.* 295 S.C. 7, 11, 366 S.E. 2d 259, 261 (Ct.App.1988).

9. Respondent has admitted that three days before Florence Mensch's death, he transferred $249,000.00 from Florence Mensch's UBS retirement account to her Bank of America Account ending in 7059.

10. No genuine issue of material fact exists as to this cause of action as it relates to the USB account.

Therefore, Petitioners are granted Summary Judgement with the issue of damages preserved for the final hearing.

MISCELLANEOUS ISSUES

A. Motion to Strike Petitioner's Memorandum. Motion: Denied.

11. Respondent moved to strike Petitioners' Memorandum in Support of Motion for Summary Judgment claiming a failure to comply with Rule 12 of the *South Carolina Rules of Civil Procedure*. There is no rule contained in *South Carolina Rules of Civil Procedure* which sets a deadline for filing a Memorandum in Support. The Respondent's Motion to Strike Petitioners' Memorandum in Support of Motion for Summary Judgment is DENIED.

B. Affidavit and Memo Accepted.

12. Respondent filed an Affidavit in Opposition with the Court less than one (1) day before the hearing on the Motion for Summary Judgment and failed to serve the Affidavit in Opposition on Petitioner prior to the hearing. Respondent filed a Memorandum in Opposition to Petitioners' Summary Judgment and an additional Affidavit in Opposition to the Motion for Summary Judgment nine (9) days after the hearing on the Motion for Summary Judgment. The late filing of the Affidavits and Respondent's Memorandum in Opposition over Objection of Petitioners is ACCEPTED due to the fact that Summary Judgment should be cautiously invoked.

C. Punitive Damages

13. The Court on its own motion finds that Probate Court has no subject matter jurisdiction to award punitive damages; therefore, the prayer in the Petition for Punitive Damages is dismissed with prejudice.

D. FINAL HEARING

14. In the interest of time and judicial economy, the Respondent shall first provide a written accounting of the Decedent's funds he used for his personal benefit; and he shall include those funds, if not yet used, funds[4] he has retained or gifted or otherwise made unavailable to the Decedent or her estate from May 17, 2010 to the present. Respondent shall calculate the total of all funds misused and funds withheld or made unavailable and provide those totals to the Petitioners. Second, from May 17, 2010 to the present, Respondent shall provide a written accounting of Decedent's funds that he alleges he used properly either as authorized by the Decedent's DPOA, by her Will, or by the SC Probate Code. Both accountings are due to Petitioners' Counsel within (15) days of the date of this Order.

After considering this Court's Order to act in good faith and the Respondent's admissions of misuse of the Decedent's funds, should the Respondent then conclude that zero damages is due the estate, the Respondent shall provide a detailed accounting to support and justify this conclusion.

Unless previously provided to the Respondent, the Petitioners shall provide a written accounting of any undisputed payments made by the Respondent as AIF from the Decedent's funds or as PR from the estate's funds from May 17, 2010 to the present, including a total amount of undisputed payments. This is due to Respondent's counsel within fifteen (15) days of the date of this Order.

The attorneys are ordered to cooperate in this exchange of information in order to narrow the issues and to promote a more orderly hearing. Further, the attorneys are ordered to

[4] Respondent must identify the location of the funds if on deposit in an account for his benefit; and, he must identify any individual or entity in which he transferred the funds as a gift or in payment of a debt.

communicate in advance of the hearing to review and mark all trial exhibits and explore settlement. [5] The parties are ordered to act in good faith in this process.

IT IS SO ORDERED.

Deborah A. Faulkner
Deborah A. Faulkner
Probate Court Judge

Date: July 29, 2021
Greenville, South Carolina

[5] The parties are to freely exchange information as needed to fulfill the Court's Order. The parties shall provide as much information as possible on the accountings, including, dates, amounts, the purpose of the payments, etc.

STATE OF SOUTH CAROLINA **COUNTY OF GREENVILLE** **IN THE MATTER OF:** **Estate of Florence Petrak Mensch** Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch, **Petitioners,** **vs.** Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch, **Respondent.**	**IN THE PROBATE COURT** **CASE NO. 2018ES2302854** **ORDER**

This matter came before the court for trial with days one and two beginning on August 17 and 18, 2021. The third and fourth days of the trial were held on September 16 and 17, 2021. The purpose of the trial was to address causes of action asserted by Petitioners and defenses to those causes of action which had not been determined by this Court's Order filed July 29, 2021 relative to Petitioners' motion for summary judgment. Further, to the extent the court ruled in Petitioners favor at summary judgment, but damages remained to be determined, the trial addressed the damages claimed.

Present at the hearing was petitioner Shauna M. Waddell represented by Tyler McLeod. Petitioner John Mensch was present for days one and two of the hearing. Also present was Sterling

Mensch represented by Devin Puriefoy and Kimberly Thomason. Testimony was received from petitioner Shauna M. Waddell as well as Petitioner's expert witness Mr. John Markel. Testimony was also received from Respondent's expert Mr. Mark Chastain.

A. Findings of Fact and Conclusions of Law

I. Procedural History

1. On June 25, 1998, the Decedent executed her Last Will and Testament leaving her estate to her three children, Shauna Waddell, John R. Mensch, and Sterling R. Mensch; and, naming all three as Co-Personal Representatives.
2. On May 17, 2010, the Decedent executed a Codicil amending her Will to name Sterling R. Mensch as Personal Representative with Shauna Waddell and John Mensch to serve as Successors. The Decedent republished her 1998 Will as amended by the Codicil.
3. On May 17, 2010, the Decedent executed a Durable Power of Attorney (hereinafter "DPOA") which names Sterling Mensch as her Attorney in Fact (hereinafter "AIF")[1]. The DPOA was duly recorded in Greenville County on May 18, 2010.
4. On April 26, 2018, the Decedent died in Greenville County.
5. On December 14, 2018, the Will and Codicil were filed with the Court.
6. On January 23, 2019, Sterling Mensch filed his application for admission of the Will and Codicil to Probate and for his appointment as Personal Representative.
7. On January 23, 2019, Sterling Mensch was appointed Personal Representative (hereinafter "PR") of Decedent's Estate.

[1] The 2017 changes to the *Uniform Power of Attorney Statute* changed *Attorney in Fact* to *Agent.* Since this DPOA was executed prior to 2017, the term *Attorney in Fact* will be used in this Order.

8. On May 15, 2019, this action was filed. An Amended Petition was filed on May 13, 2020. The Petitioners allege the estate is due damages from Sterling Mensch, including attorneys' fees and costs, as a result of his individual actions and his actions while serving as AIF and as PR.

9. On February 17, 2021 Petitioner's Motion for Summary Judgment was filed.

10. On March 12, 2021, a hearing was held regarding Petitioner's Motion for Summary Judgment and an Order was issued on July 29, 2021.

II. Breach of Fiduciary Duty as Attorney in Fact

"A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." Davis v. Greenwood Sch. Dist. SO, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. See generally, Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) (discussing the elements comprising a breach of fiduciary duty claim); RFT Mgmt. Co. v. Tinsley & Adams, 399 S.C. 322, 732 S.E.2d 166 (2012).

In the case before the Court, it is undisputed that Sterling Mensch owed a fiduciary duty to the Decedent as her AIF. Instead of preserving her funds for the future use of the Decedent, Sterling Mensch transferred funds from the Decedent's accounts to his personal account while acting under the authority given to him by her in her DPOA. It is undisputed that Sterling Mensch usedfunds from these transfers for his own personal use, resulting in the diminishment of available funds for the Decedent's estate to distribute. Therefore, Sterling Mensch failed to maintain Decedent's estate plan as is required by the South Carolina Power of Attorney Act.

This Court has previously ruled as a matter of law that no genuine issue of material fact exists as to this cause of action and Petitioners are entitled to judgment against Respondent.

III. Violation of Uniform Power of Attorney Act

The Decedent's DPOA contains the following provision on page 5, third paragraph:

> *Notwithstanding any provisions herein to the contrary, my attorney in fact shall not satisfy the legal obligations of the attorney inf act, out of any property subject to this power of attorney. Except to the extent this power of attorney specifically authorizes gifts to my attorney in fact, my attorney in fact may not exercise this power in favor to the attorney, the attorney's estate, the attorney's creditors, or the creditors of attorney's estate.*[2]

While serving as Decedent's AIF, Sterling Mensch transferred funds from the Decedent's accounts to his personal account. Sterling Mensch admitted that he made the unauthorized transfers as described. However, he claims that he used a substantial part of the transfers for the benefit of Florence Mensch. As to these claims, the Court finds that Sterling Mensch was unable to demonstrate that the above-referenced transactions were for Florence Mensch's benefit and as a result of Mr. Mensch's failure to keep complete and accurate records, the Court finds he has violated the following provisions of the Uniform Power of Attorney Act, S.C. Code Ann. 62-8-114 (Supp. 2017): failed to act in good faith; failed to act within the scope of authority granted in the DPOA; failed to act with care, competence and diligence; failed to keep records or all receipts, disbursements and transactions; failed to preserve the Decedent's estate plan by liquidating retirement accounts; failed to preserve the Decedent's estate plan by using her funds for his personal use resulting in less assets to be distributed to all three of her children from her estate;

failed to timely file taxes resulting in penalties and interest; failed to minimize taxes and incurring penalties by liquidating retirement accounts; acted with reckless indifference to the purpose of the power of attorney; and his conduct was reckless and willful in complete disregard of duties imposed upon him as a fiduciary.

The Court finds that Sterling Mensch is liable to the Decedent's successors in interest for the amount required to restore the value of the Decedent's property to what it would have been had the violations not occurred. S.C. Code Annot. 62-8-117 (Supp. 2017).

As to the amount, See Section VII.

IV. Conversion

Conversion is a wrongful act and has been defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. Owens v. Andrews Bank & Trust Co., 265 SC 490, 220 S.E. 2d 116 (1975). Conversion is a wrongful act which emanates from either a wrongful taking or wrongful detention. Kirby v. Horne Motor Co., 295 S.C. 7, 11, 366 S.E.2d 259, 261 (Ct. App. 1988).

This Court previously ruled as a matter of law that no genuine issue of material fact exists as to this cause of action and Petitioners are entitled to judgment against Respondent.

V. Rent, Pre-Judgment Interest, Causes of Action for Negligence, Fraudulent and Negligent Misrepresentation and Concealment, Unjust Enrichment/Money Had and Received and Eviction/Ejectment.

Petitioner has requested pre-judgment interest as a part of its relief. However, in order to recover pre-judgment interest, such must be specifically pled. Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003). The Court finds that Petitioners statement of "including any interest and appreciation that should have accrued from the time of the violations," contained in line 70 of Petitioner's Petition does not constitute a specific pleading of pre-judgement interest. Therefore, the Court has determined that pre-judgment interest will not be awarded because it was not specifically pled.

Petitioner requested rent be charged against Respondent as damages related to Respondent's occupation of 512 New Tarleton Way. Special damages, however, must *be particularly alleged and proved*. Kline Iron & Steel Co. v. Superior Trucking Co., 261 S.C. 542, 547, 201 S.E.2d 388, 390 (1973) (emphasis added) (failure to plead and prove special damages will prevent recovery). Thus, special damages must be specifically stated to avoid surprise to the other party. Benedict College v. Nat'l. Credit Sys., 400 S.C. 538, 548, 735 S.E.2d 518 523 (Ct. App. 2012). The reasoning for such a pleading requirement is to give a party due notice of the amounts sought. Norwest Properties, LLC v. Strebler, 424 S.C. 617, 624, 819 S.E.2d 154, 158 (Ct. App. 2018). The Court finds that rent will not be awarded from Respondent as such is special damages which must be specifically pled.

Additionally, Petitioners asserted causes of action for negligence, fraudulent and negligent misrepresentation and concealment, unjust enrichment/money had and received as well as a motion for eviction/ejectment. The Court dismisses the foregoing actions asserted by Petitioner as cumulative given the affirmative relief granted by the Court in favor of Petitioners.

VI. Punitive Damages

The Court has determined it does not possess the authority to assess punitive damages against Respondent, therefore, the Court declines to award punitive damages against Respondent.

VII. Damages

The Court received a number of exhibits during the trial as well as testimony from various witnesses. Specifically, testimony was received from Mark Chastain, an expert witness submitted by Respondent. Mr. Chastain offered testimony regarding his opinions based upon a review of banking and other transactional documents as to the amounts of money transferred from the account of Florence Mensch as compared to the opinion and report of Petitioner's expert John Markel whose testimony was also received. Based upon the testimony of Mr. Chastain in conjunction with the evidence submitted by Mr. Markel, as well as the party's stipulation as to the amount, it is the finding of this court that $820,382.00 was transferred from Decedent's accounts by Sterling Mensch to his own account.

It is the further finding of this court based upon the evidence that Sterling Mensch is not due any offsets or credits regarding the aforementioned amounts transferred from Decedent's account. Under the settled law of this State, an essential preliminary to the allowance of an offset is that the offset claimed must be pleaded, and there must be some evidence tending to establish such plea. Hurst v. Sumter County, 189 S.C. 376, 1 S.E.2d 238 (1939). Likewise, Respondent was required to plead offset. Furthermore, based on the testimony and evidence presented at trial by Respondent, this Court finds that Sterling Mensch has failed to meet his burden of showing that any transfers of funds were made directly for the benefit of Florence Mensch.

It is a further finding of this Court that Petitioners shall not recover for allegations relative to avoidable taxes incurred due to IRA distributions in excess of minimum required distributions and avoidable taxes as the court finds that the sale of the residence of Decedent would have resulted in the same amount of tax as was incurred by the excess IRA distributions.

It is a further finding of this court that Petitioners shall not recover any amount for Sterling Mensch's failure to diversify Florence Mensch's assets, as such amount is too speculative for this Court to determine.

With regard to the $820,382.00 transferred from the Decedent's account by Sterling Mensch, the court subtracts from such amount $273,461.00 as a credit for Respondent's one-third (1/3rd) inheritance, leaving $546,921.00 as the amount which Respondent must pay John Mensch and Shauna Waddell. Added to this amount is $24,559.00 for avoidable taxes due to failure to itemize for the years 2011 through 2016, as well as 2018 penalties and interest, currently on appeal to the IRS, in the amount of $40,314.00. Additionally, Sterling Mensch admitted he owed penalties and interest in the amount of $13,820.00.00 thus, the total owed from Respondent to John Mensch and Shauna Waddell as damages is $625,614.00. This amount will be reduced by the 2018 penalties and interest if the appeal of those penalties and interest is successful. This Court awards judgment in favor of John Mensch and Shauna Waddell against Sterling Raymond Mensch, III in the amount of $625,614.00.

By preponderance of the evidence and to confirm the foregoing, the Court finds in favor of Petitioners on causes of action for violation of the SC Power of Attorney Act, breach of fiduciary duty as Power of Attorney and as Personal Representative, and conversion.

In addition to the damages referenced above, the court finds that Petitioners are entitled to recover from Respondent attorney's fees and costs in the total amount of $127,572.00. With regard to such fees, the court considered all the elements required under the case of Glasscock v. Glasscock, 304 S.C. 158, 403 S.E. 2d 313 (1991) and finds such fees to be reasonable. Specifically, the Court assessed (1) the nature, extent and difficulty of the case, (2) the time necessarily devoted to the case, (3) the professional standing of counsel, (4) the contingent nature of the compensation, if any, (5) the beneficial results obtained, and (6) customary legal fees for similar services. Applying the foregoing factors, as noted above, and after review of the Affidavit of Attorney's Fees and Costs submitted by Petitioners' Counsel, the Court finds $127,572.00 to be reasonable attorney's fees and costs. Therefore, this Court awards additional judgment against Respondent Sterling Mensch in favor of John Mensch and Shauna Waddell in the amount of $127,572.00 for attorney's fees and costs.

Post-judgment interest shall begin to accrue at the legal rate of interest (7.25%) on all amounts awarded in this Order compounded annually from the date of entry and execution of this Order until paid in full by Respondent. Notwithstanding the foregoing, and upon proper notice and motion to reconsider and/or supersedeas by Respondent, this Court shall consider staying the accrual of post-judgment interest during any appeals that may be taken in this matter.

VIII. Payment of Damages

As to payment, the court Orders that a constructive trust is hereby imposed upon the property or its proceeds that was the subject of this matter i.e. only those funds transferred from any accounts owned by Florence Mensch into Sterling Mensch's account. As such, it is hereby Ordered that this property or its proceeds not be sold, transferred or otherwise altered in any fashion, until further Order of this court.

IT IS SO ORDERED.

____
Debora A. Faulkner
Greenville County Probate Judge

Greenville, South Carolina
Dated this ____ day of ________, 2021

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE PROBATE COURT

CASE NO.2018ES2302854

IN THE MATTER OF:
Estate of Florence Petrak Mensch

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch,
Petitioners,

vs.

Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch,
Respondents.

ORDER

FILED
JAN 26 2022
GREENVILLE COUNTY
PROBATE COURT

Date of Hearing:	September 16, 17, 2021
Presiding Judge:	Debora A. Faulkner, Probate Judge
Attorney for Petitioners:	Tyler E. McLeod
Attorneys for Respondent:	Devon M. Puriefoy, Kimberly Thomason
Court Reporter:	Rachel Wood

This matter came before the court for trial to determine the amount of damages owed the Estate of Florence Mensch by Respondent, Sterling Raymond Mensch (SRM) admits he misappropriated funds belonging to Florence Mensch and her estate. However, the amount of damages due the estate is the central issue in the litigation. The relevant time period for the misappropriations is from May 17, 2010, the date Mrs. Mensch's executed her Durable Power of Attorney (DPOA) naming SRM as her Attorney in Fact, (AIF) and April 26, 2018, the date of Ms. Mensch's death.

Present at the hearing was Petitioner Shauna M. Waddell (SW) represented by Tyler McLeod. Petitioner John Mensch (JM) was present for days one and two of the hearing. SRM appeared for each day of trial with his attorneys, Devin Puriefoy and Kimberly Thomason. Witnesses in the case were Petitioner, SW, Petitioners' expert, John Markel, and Respondent's expert, Mark Chastain.

Prior to taking testimony the Court denied the Petitioner's *Motion in Limine.*

STIPULATIONS

1. SRM made a number of withdrawals from Mrs. Mensch's bank account totaling $820,382.

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2. SRM deposited the funds from these withdrawals into his single owner checking account.

3. Both expert witnesses are qualified to give their opinions

PROCEDURAL HISTORY

1. On December 14, 2018, SRM filed the Will and Codicil with the Court but took no action to have the documents admitted as the valid testamentary documents of his mother. Neither did he apply for appointment as Personal Representative (PR) which would have granted him legal authority over her assets for the benefit of the devisees named in her Will and any estate creditors.

2. On January 23, 2019, SRM filed his application for admission of the Will and Codicil to Probate and for his appointment as PR. He was appointed PR on January 23, 2019.

3. On May 15, 2019, this action was filed by Petitioners.

4. On August 28, 2019, the Hon. Clayton L. Jennings issued an Order in response to Petitioners' Motion to Compel which, among other rulings, ordered SRM to provide discovery to Petitioners within ten days of the entry of the Order. The Order attached hereto is incorporated herewith as if fully set out.

5. On December 4, 2019, the Hon. Clayton L. Jennings issued his Order in the Petitioner's first Rule to Show Cause proceeding finding SRM in willful contempt of the August 28, 2019 Order. Accordingly, the Court removed SRM as PR and appointed Shauna Waddell to serve as Successor PR. The Court imposed further financial sanctions against SRM. The Order is attached hereto and incorporated herewith as if fully set out.

6. On May 13, 2020, an Amended Petition was filed as permitted by Judge Jennings' Court Order.

7. On September 2, 2020, the Hon. Clayton L. Jennings issued an Order as a result of the Petitioners' filing a second Rule to Show Cause against SRM. The Court found SRM to be in willful contempt of the Court's prior Orders. This Order attached hereto is incorporated herewith as if fully set out.

8. On January 13, 2021, the Hon. Clayton L. Jennings issued an Order as a result of Petitioners third Rule to Show Cause alleging SRM willfully failed to comply with the September 2, 2020 Order. He was found to be in willful contempt, ordered to pay attorneys' fees to Petitioners and cautioned that he would be subject to incarceration should he violate this Order. This Order attached hereto is incorporated herewith as if fully set out.

9. On July 29, 2021, the Court entered an Order granting the Petitioners Summary Judgment on the following causes of action: 1) Breach of Fiduciary Duty as Attorney in Fact (AIF), 2) Violation of the S.C. Uniform Power of Attorney Act, and 3) Conversion. The Court denied Petitioners' Motion for Summary Judgment on the remaining causes of action: Negligence, Unjust Enrichment/Money Had and Received, and Constructive Trust.

10. Trial in this case was heard on September 16-17, '21. By agreement of counsel, Petitioner, John Mensch, participated by telephone on September 17, 2021.

11. A proposed Order was transmitted to the Court on 10/15/21. An extension was granted to SRM's counsel to Dec. 16, 2021 to lodge objections to the proposed Order.

FINDINGS OF FACT

By the preponderance of the evidence, I make the following findings of fact:

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1. Mrs. Mensch and her husband moved to Greenville from New York. From their marriage, they had three children, John, Sterling and Shauna.

2. Mr. Mensch died in or around 1995.

3. The record contains no evidence that Ms. Mensch had anything other than a loving relationship with all three of her children.

4. In 1998, Ms. Mensch executed a Will leaving her estate equally to each of her three children. She named all three children to serve as Co-Personal Representatives. Similarly, she named each of her 3 three children to share equally in her non-probate accounts which includes a retirement account. Based on the foregoing, I find that Ms. Mensch intended to leave her estate both probate and non-probate to each of her three children in equal shares.

5. In 2007, Mrs. Mensch executed a DPOA naming the Petitioner, SW, as her attorney in fact but it was later revoked in favor of SRM in 2010.

6. After her husband's death, Ms. Mensch lived in her own home at 207 West Beverly Street in Greer, S.C.

7. On May 17, 2010, Ms. Mensch, with the assistance of an attorney, executed another DPOA naming SRM as her AIF. This DPOA contained no provisions allowing SRM to make gifts to himself.

8. She also executed a Codicil to her 1998 Will naming SRM as her sole Personal Representative. She republished her 1998 Will in all other respects, i.e. her estate plan remained unchanged.

9. SW testified that around 2009 she began to take notice of her mother's dementia symptoms.

10. In or around 2012, she purchased an apartment at Rolling Green. She moved into the Rolling Green apartment and sold her home in Greer.

11. In or around 2013 or 2014, as a result of her diagnosis of dementia, Alzheimer's type, SW arranged for FM to be moved to the memory care unit at Oakleaf Village. No evidence was presented that this decision was contested. She died at Oakleaf Village on April 26, 2018.

12. At Ms. Mensch's funeral, SRM advised his brother John to return to Oregon, because he would be starting the estate administration immediately. After hearing nothing from SRM, SW called him about the estate administration. SRM told her he was waiting on tax information.[1] She called again and he said the taxes were done and that he would be dropping off the estate information to attorney, David Massey's office. After hearing nothing further, SW called the attorney's office and the attorney's office didn't have any estate information. SRM told SW that their secretary probably lost it. The firm was never hired by SRM. SW's communication with SRM became increasingly difficult.

13. On December 14, 2018, SRM filed FM's Will and Codicil in the Probate Court without opening an estate. On January 23, 2019, nine months after Ms. Mensch's death, SRM filed his application to admit the Will and be appointed as the PR. He was appointed PR on January 23, 2019. He filed this without the assistance of counsel.

14. On April 30, 2018, SRM signed and filed a sworn *Inventory and Appraisement* with the Court. The Inventory and Appraisement is part of the Court's record. On that Inventory, he swore that the balance in the UBS account on 4/30/2018 was $409,652. Petitioner's Exhibit 21, the UBS statement from April, 2018 shows that SRM had withdrawn $259,000.00 on April 23, 2018 with a resulting balance of $154,069. He also stated on the *Inventory*, under oath, that the Tarleton Way home had an existing mortgage of $238,170.00 Two months earlier on February

[1] The records would later show that upon her appointment as Successor PR, SW learned that the 2018 tax return had never been filed. Petitioner's #19 is an IRS Letter stating that on 12/31/18, the estate owed $91,367.

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8, 2019, he paid the sum of $232,047 in full satisfaction of the mortgage. So, after being sworn, he voluntarily and willfully filed perjured information to the Court. [2]

15. After his mother's death, rather than filing the Will immediately and becoming the PR of her estate, he was continuing to make post-death withdrawals from Ms. Mensch's x7059 account. He was also allowing her GE pension auto deposits to continue despite her death. He made his last withdrawals from FM's account in or around February, 2019 leaving approximately $1500 in x7059 and $65 in x2007. SRM withdrew a total of $170,000 from Ms. Mensch's bank accounts after her death. This proceeding was commenced three months later on May 15, 2019

TARLETON WAY HOUSE AND LOT

16. On April 18, 2007, Ms. Mensch purchased property in a subdivision in Greer. As such, she signed the mortgage obligating herself to pay $330,000.00 for the property in monthly installments. Further, she signed a "Rider" stating that this would be her second home and keep the home only for her exclusive use.

When she purchased the property, she was still living at her West Beverly Street property. Her intent was never to live at this Tarleton Way property. The intent was that the house would actually be purchased by SRM as a home for him and his daughter. SRM orchestrated this arrangement since he was a party in a divorce proceeding. He wanted to protect the property from being included as marital property subject to equitable division. SW testified that it wasn't until after FM's death that she and her brother discovered that the house was not actually owned by SRM.

SRM's expert witness, Mr. Chastain, listed that SRM should be given credit for $39,000.00 that he paid as a down payment from his own funds when the home was purchased. Upon further examination of the witness, it appeared this was untrue in that the amount was folded into the mortgage.

SRM paid nothing to FM for the 12 years he lived there. It was home with landscaping, pool, theatre room, and nice finishes. SRM alleges he made a total of $240,631.00 in payments from his personal funds to service the principal and interest on the Tarleton mortgage and that he should be credited with those payments as being beneficial to FM.

SRM's employment status and income were never presented in evidence. In order to weigh the veracity of this assertion, the ability of SRM to pay this would need to be known. It is unknown whether or not he was employed; or, if so, the dates of his employment and the amount of his income. Petitioner's expert witness, Mr. Markel, attempted to trace these alleged mortgage payments using bank documents. He found that many of the alleged payments were untraceable and were inconsistent with the dollar amounts alleged. Countless online cash withdrawals from x7059 to SRM's account were in amounts similar to the amount of the mortgage payments. Bank statements prior to 2012 were not available to the parties.

SRM also alleges that he used some of the cash from FM's accounts to make improvements and repairs to the home which were beneficial to FM. He alleges these expenditures amount to $69,957.00.[3] Despite repeated directions from the Court, SRM never produced receipts or other documents to prove this amount. He failed to testify at this hearing regarding how he arrived at this total. He failed to produce witnesses to confirm payments made for improvements. He failed to issue any subpoenas for merchants or repair companies to produce records.

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[2] The estate record contains a claim filed on 2/11/2019 by Traci Malone of South State Bank. On the same day, February 11, a *Loan Payoff Statement* was filed. SRM satisfied the mortgage in full on 2/8/19. SW's *Settlement Statement* (Exh. #25) when TW was sold shows a mortgage payoff of 218,579 to South State Bank on 12/3/2020

[3] SW testified in detail regarding the condition of the home after SRM moved resulting in an expense to the estate of $10,000.00 on extensive cleaning and repairs in order to make it fit for sale.

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When SRM moved from the home in September, 2020, the estate has to spend $10,000 for cleaning and repairs to make the property presentable for potential buyers.

As a minor point; but one that shows how no opportunity was missed by SRM, SRM collected $22,434.00 in insurance proceeds for hail damage to FM's home. The amount of the damage was not placed in the record. Again, these are proceeds from an insurance policy that FM pays for each month in mortgage payments for a house she doesn't need; and, that is being used as a residence for her able bodied son. SRM's expert witness testified that the damage estimate was less than the amount collected and that SRM appeared to have kept the balance not used. This was not contradicted by SRM.

FLORENCE MENSCH'S ASSETS

17. A listing of FM's assets and their values on the date SRM became FM's AIF in 2010 is not in evidence. Bank records were not available prior to 2012. However, from the evidence presented, it appeared that her assets, residential expenses were as follows on the dates indicated:

Asset	Value	Date of Value	Residential Expense
[4]Home on Tarleton Way	420,000.00	Sold 12/3/20	Moved to Rolling Green In 2012 Oakleaf in 2015
x7059 BOA Checking account	various		
x2007 BOA Savings account	various		
Elfin Trusts + GE stock IRA[5]	$1,321,717.00	1/1/2015	
UBS Retirement Acct	$913,511.00	12/30/16	

Annual Income

2012	$16,000.00 SSA	2580 x 12/ 31K
	$17,800.00 Pension	
	$49,240.00 IRA Distribution	
	$83,090.00	
2013	$16,000.00 SSA	2580 x 12/ 31K
	$17,800.00 Pension	
	$70,000.00 IRA Distribution	
	$104,125.00	
2014	$16,000.00 SSA	2580 x 12/ 31K
	$17,800.00 Pension	
	$90,594.00 IRA Distribution	
	$124,964.00	
2015	$16,000.00 SSA	4550x12/55K
	$17,800.00 Pension	

[4] Purchased 2007 for $330,000.00 includes $39,700.00 down payment, additional $65,000.00 for pool, home theater, fencing, landscaping, etc. SRM claims he paid this via his allegations in an affidavit.
[5] Elfin later managed by State Street Global.

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$213,945.00 IRA Distribution
$248,590.00

2016 $16,000.00 SSA 4550x12/55K
$17,800.00 Pension
$208,727.00 IRA Distribution
$243,379.00

MANAGEMENT OF ASSETS BY SRM

18. FM's Bank of America (BOA) accounts are her checking account, x7059 and a savings account x2007. The fund balance in x7059 was the result of FM's monthly income deposits plus any online transfers directed by SRM-AIF from her investment accounts. Payments for her residence at the facilities were automatically drafted from x7059.[6]

19. In 2013, SRM, using the authority granted to him by FM in the DPOA, decided to add his name as a joint account owner to x7059. No evidence was presented on why SRM chose to do this, especially since this change would affect FM's estate plan. Instead of the balance being a part of her estate to be shared by all 3 of her children, this change would result in SRM being able to claim all funds remaining on deposit for himself.

20. SRM's personal BOA account is x3259. From 2013 until FM's death in April, 2018, SRM engaged in over 239 online transfers, cash transactions, withdrawals, from FM's BOA accounts. He directed these transfers to his personal BOA account x3259 which was a POD account, providing that his daughter would be paid the balance in the account upon his death. The parties stipulate that the total for all these transfers comes to $820,382.00[7] Once deposited into his account, SRM spent the funds on a variety of personal pleasures including nice restaurants, men's clothing stores, jewelry, home improvement stores, grocery stores, travel, alcohol, etc. He made several large cash withdrawals and made online payments to his personal credit card company from FM's account. The piece de resistance $8000.00 to Greenville Matchmakers.

21. From 2015 through 2018, SRM withdrew funds from Elfin Trust, taking smaller amounts from FM's GM stock. On 12/31/2015, the Elfin fund's market value was $279,819.00; on the same date, the GM market value was $1,321,717.00.

22. SRM facilitated IRA distributions to FM in excess of the amount mandated for *required minimum distributions* (RMD).[8] In years 2011, 2012, 2015, 2016, and 2018, SRM unnecessarily caused FM's IRA distributions to exceed allowable RMD for each year. From the above chart, SSA and pension income were largely sufficient to cover her monthly living expense at Rolling Green and less so at Oak Leaf. However, no evidence is presented to show that the allowable RMD for each year plus her income would have been insufficient to comfortably pay for her care. The amount of income taxes incurred due to these excessive withdrawals was $163,420.00.

23. On March 20, 2018, SRM sold the GE stock for $406,255.80.

24. Petitioners allege that SRM failed to properly diversify FM's portfolio resulting in a reduction of approximately $400,000.00 in value. Court finds that this was speculative and not supported by the preponderance of the evidence.

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[6] Occasionally, SRM would use the x2007 to receive online transfers.
[7] No bank records were available prior to 2012.
[8] Under Treasury Regulations, taxpayers over 70.5, like FM must take the required minimum distributions.

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25. On April 23, 2019, three days prior to FM's death, SRM transferred $259,000.00 of the $409,652.00 held in FM's UBS retirement account to FM's 7059 account.

26. SRM failed to notify BOA and failed to notify GE Pension of FM's death. The pension payments continued unabated and SRM continued to make withdrawals from the BOA accounts. From the time of FM's death on April 26, 2018 until February 18, 2019, SRM directed $170,000 of FM's, i.e. the Estate's, post-death funds to his x3259 personal account. These were funds earmarked to be divided equally among her 3 children. SRM withdrew these post-death pension payments from FM's account for his personal use. To reimburse GE for these overpayments. As a result, the estate was charged with an overpayment of $30,157.00.

SW, as PR, agreed to forfeit the $10,000 of GE life insurance that FM intended to be shared equally by her children. SW assigned $3333.33 of the 10,000 for each beneficiary. This left a balance due to GE of $20,157.81 from the estate. SRM should be liable to the estate for the total amount of overpayment in the amount of $30,157.00.

27. At the time SW was appointed PR, there was only $15,000 in FM's x7059 account.

TAX LIABILITIES

28. Between 2012 and 2016, SRM's failed to timely file tax returns and failed to timely pay taxes due resulting in penalties for failure to file and penalties and interest for failure to pay the IRS and SCDOR. The amount admitted by SRM's attorneys is $13,820.17.

29. SRM failed to file tax return for FM for 2017.

30. SRM made gifts from FM to himself, SW and Steve, John and Shea, Sterling and Holly in the years 2014, 2015, and 2016 for the purpose of meeting the annual exclusion allowed by the IRS. This was permitted by FM's DPOA.

31. SRM failed to take action necessary to avoid $40,314.00 penalties and interest connected to FM's 2018 taxes. This amount is currently on appeal.

32. From 2011 through 2016, SRM failed to itemize deductions for property tax and mortgage interest on the Tarlton Way on FM's returns. FM as owner of the property was clearly entitled to claim those itemized deductions, and thereby proportionately reduce her tax liability for each respective year. This failure amounts to $24,559 in excessive tax.

33. From 2011 through 2018, SRM caused FM and, later, her estate to incur unnecessary tax liabilities of $163,420 as set forth in Petitioner's Exhibit #1 [9] due to SRM's withdrawals in excess of the RMD for each year.

34.. In 2015 and 2016, SRM wrote checks to his siblings, their spouses, to himself and his daughter in accordance with IRS rules that permit gifting a certain amount each year. Each year he wrote himself a check equal to the others, despite his siphoning of funds from his mother to subsidize his lifestyle. He has made no good faith effort whatsoever during this litigation to pay any amount that he admits he owes. The only amounts he has paid to the estate to date for his wrongdoing were attorneys' fees ordered by Judge Jennings short of incarceration. As a matter of equity, SRM should not be able to sit at the table with his siblings and collect a gift in an amount equal to theirs given his actions. Specifically, the record indicates he paid himself $14,000.00 for 2015 and 2016 for a total of $28,000.00.

[9] Pet. Exhib. 21, USB states RMD for 2018 is 33,358. SRM withdrew $259,000 or $ 225,642 in excess of IRS limits

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CONCLUSIONS OF LAW

Applying the facts to applicable law, I make the following conclusions of law:

BREACH OF FIDUCIARY DUTY

1. "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Davis v. Greenwood Sch. Dist. SO*, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. See generally, Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) (discussing the elements comprising a breach of fiduciary duty claim); *RFT Mgmt. Co. v. Tinsley & Adams*, 399 S.C. 322, 732 S.E.2d 166 (2012).

2. A fiduciary relationship existed between FM and SRM as expressed in the DPOA signed by FM in May, 2010. FM reposed special confidence in SRM; confidence that he would act in good faith placing her As such, SRM has all the duties and obligations set forth in the document plus he is duty bound to act at all times with due regard to the interests of FM. Moore v. Benson, 390 SC 153 (2010). Being in the firm grasp of Alzheimer's disease, she was squarely at the mercy of SRM to act in her best interests. Instead, SRM exploited the trust his mother bestowed on him at every turn.

3. The clear weight of the evidence shows SRM used the DPOA as a license to access as much of his mother's property as possible, leaving enough for her basic requirements, such as the payments to her facility. The chart above shows that her income and RMD distributions were substantially exceeded the amount of her monthly facility fees. The excess was taken as a part of the obvious scheme concocted by SRM to maximize his grift. At every opportunity, he placed his desire to take as much of her property as possible ahead of his mother's welfare. To further nail down his continued free use of his mother's money, to the detriment of his siblings, he added his name as a joint owner to her BOA accounts. By doing this, he was depriving his siblings of their right to inherit a share of the balance as their mother so intended. To further thwart his mother's estate plan, he designated his personal checking account as a POD account. With this change, all the ill-gotten funds in this account would become the property of his daughter to the detriment of his mother's estate, i.e. his siblings.

4. He breached his fiduciary duty by using the authority reposed in him by FM to delay or fail to file taxes, resulting in unnecessary fines and penalties, thus reducing FM's estate. He made withdrawals exceeding her RMDs, he liquidated her IRA, and also resulting is unnecessary taxes and penalties. These accounts were all created by FM to be divided equally at her death. FM's estate, both non-probate and probate, would have been substantially greater but for the shenanigans employed by SRM while his mother suffered with Alzheimer's disease, helpless to intervene.

5. The DPOA contained no express authority for SRM to gift himself any of his mother's property. The Decedent's DPOA contains the following provision on page 5, third paragraph:

Notwithstanding any provisions herein to the contrary, my attorney in fact shall not satisfy the legal obligations to the attorney in fact, out of any property subject to this power of attorney. Except to the extent this power of attorney specifically authorizes gifts to my attorney in fact, my attorney in fact may not exercise this power in favor to the attorney, the attorney's estate, the attorney's creditors, or the creditors of attorney's estate.

An agent acting for a principal pursuant to a power of attorney may not make a substantially gratuitous conveyance of the property of the principal to himself unless the power to do so is expressly granted by the instrument itself. Fender v. Fender, 329 SE2d 430 (1985).

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6. Florence Mensch died on April 26, 2018. S.C. law requires anyone in possession of a decedent's Will to file the Will within 30 days of the date of death. 62-2-901 (Supp. 2014). SRM waited until December, 2018 to file the Will and Codicil. He waited until January of 2019 to open his mother's estate. He continued to collect her pension and spend money belonging to the estate from April 26, 2018 until February, 2019. Since her death, he continued to convert her property to his own use, said amount totaling approximately $170,000.00 and causing the estate to be indebted to GE for the overpayment of monthly pensions.

SRM's actions equate him to executor de son tort. Because he continued to receive and spend estate property, he is chargeable as the executor of his own wrong. The value of the property is charged to the *executor de son tort*. 62-3-619 *S.C. Code Annot.* (Supp. 2014)

I find SRM, who was named as the PR in the Will of his mother, did intentionally and with bad faith convert and waste estate property by means of the concealment of the fact of his mother's death to her bank and to her pension company.

7. While serving as PR, SRM failed to repay or make any effort to repay to the Estate the property he converted to his own use. Further, he failed to comply with the Orders of this Court, failed to cooperate with his first attorney so the attorney could assist in the estate administration. All these acts together constitute a violation of his fiduciary duty as Personal Representative to the Estate causing unnecessary time and expense in the administration of what could have been a very straight forward estate administration.

8. While serving as PR, SRM failed to properly file his mother's 2018 tax returns resulting in taxes, penalties and interest assessed against her estate in excess of $40,000.00.

VIOLATION OF THE UNIFORM POWER OF ATTORNEY ACT

9. As a matter of law, it is undisputed SRM owed a fiduciary duty to the Decedent as her AIF. Loftis v. Eck, 341 SE 2d 641(1986). Instead of preserving her funds for the future use of the Decedent, Sterling Mensch transferred funds from the Decedent's accounts to his personal account while acting under the authority given to him by her in her DPOA. It is undisputed that Sterling Mensch used funds from these transfers for his own personal use, resulting in the diminishment of available funds for the Decedent's estate to distribute. Therefore, Sterling Mensch failed to maintain Decedent's estate plan as is required by the South Carolina Power of Attorney Act.

This Court has previously ruled as a matter of law that no genuine issue of material fact exists as to this cause of action and Petitioners are entitled to judgment against Respondent.

The Decedent's DPOA contains the following provision on page 5, third paragraph:

Notwithstanding any provisions herein to the contrary, my attorney in fact shall not satisfy the legal obligations of the attorney in fact, out of any property subject to this power of attorney. Except to the extent this power of attorney specifically authorizes gifts to my attorney in fact, my attorney in fact may not exercise this power in favor to the attorney, the attorney's estate, the attorney's creditors, or the creditors of attorney's estate.

While serving as Decedent's AIF, Sterling Mensch transferred funds from the Decedent's accounts to his personal account. Sterling Mensch admitted that he made the unauthorized transfers as described. However, he claims that he used a substantial part of the transfers for the benefit of Florence Mensch. In Moore v. Benson (supra), the Court of Appeals upheld the Master in Equity's refusal to allow credit for alleged tax payments without documentary evidence to support the claim. As to these claims, the Court finds that Sterling Mensch was unable to demonstrate that the above-referenced transactions were for Florence Mensch's benefit. He produced no receipts, documents, witnesses and he failed to testify. In addition to failure to provide proof, as a matter of equity, He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in

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which he seeks relief, Emery v. Smith, 361 S.C. 207,220, 603 SE2d 598, 605 (Ct. App. 2004). He who seeks equity must do equity. Norton v. Matthews, 249 S.C. 71, 152 SE2d 680 (1987).

As a result of Mr. Mensch's failure to keep complete and accurate records, the Court finds he has violated the following provisions of the Uniform Power of Attorney Act, S.C. Code Ann. 62-8-114 (Supp. 2017): failed to act in good faith; failed to act within the scope of authority granted in the DPOA; failed to act with care, competence and diligence; failed to keep records or all receipts, disbursements and transactions; failed to preserve the Decedent's estate plan by liquidating retirement accounts; failed to preserve the Decedent's estate plan by using her funds for his personal use resulting in less assets to be distributed to all three of her children from her estate; failed to timely file taxes resulting in penalties and interest; failed to minimize taxes and incurring penalties by liquidating retirement accounts; acted with reckless indifference to the purpose of the power of attorney; and his conduct was reckless and willful in complete disregard of duties imposed upon him as a fiduciary.

The Court finds that Sterling Mensch is liable to the Decedent's successors in interest for the amount required to restore the value of the Decedent's property to what it would have been had the violations not occurred. S.C. Code Annot. 62-8-117 (Supp. 2017).

As to the amount, See Section VII.

CONVERSION

10. The evidence is clear and convincing that SRM converted funds belonging to his mother, and later, the estate to his own use and control. To recover in an action for conversion, Petitioners must:

(1) Have an interest in the thing converted;

(2) Respondent must have converted the property to his own use;

(3) The use was without Petitioners' permission.

Moseley vs. Oswald, 656 SE 2d 380 (2008). The Personal Representative has an interest in and a duty to recover all property due the Estate of Florence Mensch. John Mensch as a devisee in her Will has joined the Personal Representative in order to secure the inheritance intended for him by his mother. SRM has admitted taking over $800,000.00. These funds were used without the permission of Florence Mensch, her Estate, or John Mensch.

By exploiting his status as AIF he wrongfully and willfully took without legal authority property belonging to FM and ultimately to FM's Estate. The wrongful detention of another's property may give rise to action for conversion; in such cases, conversion occurs when, without justification or excuse, one refuses to surrender the possession of goods after demand for possession by one entitled thereto. Conversion is a wrongful act and has been defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. Owens v. Andrews Bank & Trust Co., 265 SC 490, 220 S.E. 2d 116 (1975). Conversion is a wrongful act which emanates from either a wrongful taking or wrongful detention. Kirby v. Horne Motor Co., 295 S.C. 7, 11, 366 S.E.2d 259, 261 (Ct. App. 1988).

This Court previously ruled as a matter of law that no genuine issue of material fact exists as to this cause of action and Petitioners are entitled to judgment against Respondent.

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Rent, Pre-Judgment Interest, Causes of Action for Negligence, Fraudulent and Negligent Misrepresentation and Concealment, Unjust Enrichment/Money Had and Received and Eviction/Ejectment.

11. Petitioner has requested pre-judgment interest as a part of its relief. However, in order to recover pre-judgment interest, such must be specifically pled. Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003). The Court finds that Petitioners statement of "including any interest and appreciation that should have accrued from the time of the violations," contained in line 70 of Petitioner's Petition does not constitute a specific pleading of pre-judgement interest. Therefore, the Court has determined that pre-judgment interest will not be awarded because it was not specifically pled.

12. Petitioner requested rent be charged against Respondent as damages related to Respondent's occupation of 512 New Tarleton Way. Special damages, however, must be particularly alleged and proved. *Kline Iron & Steel* Co. *v. Superior Trucking Co.*, 261 S.C. 542, 547, 201 S.E.2d 388, 390 (1973) (emphasis added) (failure to plead and prove special damages will prevent recovery). Thus, special damages must be specifically stated to avoid surprise to the other party. *Benedict College v. Nat'l. Credit Sys.* 400 S.C. 538, 548, 735 S.E.2d 518 523 (Ct. App. 2012). The reasoning for such a pleading requirement is to give a party due notice of the amounts sought. *Norwest Properties, LLC v. Strebler*, 424 S.C. 617, 624, 819 S.E.2d 154, 158 (Ct. App. 2018). The Court finds that rent will not be awarded from Respondent as such is special damages which must be specifically pled.

Additionally, Petitioners asserted causes of action for negligence, fraudulent and negligent misrepresentation and concealment, unjust enrichment/money had and received as well as a motion for eviction/ejectment. The Court dismisses the foregoing actions asserted by Petitioner as cumulative given the relief granted by the Court herein.

PUNITIVE DAMAGES

13. The Probate Court can only exercise the jurisdiction provided by statute as enacted by the S.C. General Assembly. As such, the Probate Court lacks subject matter jurisdiction to award punitive damages.

DAMAGES

14. The Court received a number of exhibits during the trial as well as testimony from SW, the estate's PR, and lengthy testimony from both expert witnesses. Mr. Chastain, Respondent's expert, offered testimony regarding his opinions based upon a review of banking and other transactional documents as to the amounts of money transferred from the account of Florence Mensch as compared to the opinion and report of Petitioner's expert John Markel whose testimony was also received. Based upon the testimony of Mr. Chastain in conjunction with the evidence submitted by Mr. Markel, Petitioners' expert, as well as the party's stipulation as to the amount, it is the finding of this court that $820,382.00 was transferred from Decedent's accounts by Sterling Mensch to his own account for his own personal use.

It is the further finding of this court based upon the evidence that Sterling Mensch is not due any offsets or credits regarding the aforementioned amounts transferred from Decedent's account. Under the settled law of this State, an essential preliminary to the allowance of an offset is that the offset claimed must be pleaded, and there must be some evidence tending to establish such plea. *Hurst v. Sumter County*, 189 S.C. 376, 1 S.E.2d 238 (1939). Likewise, Respondent was required to plead offset. Furthermore, based on the testimony and evidence presented at trial by Respondent, this Court finds that Sterling Mensch has failed to meet his burden of showing that any transfers of funds were made directly for the benefit of Florence Mensch.

Pa 11 of 12 JMEH

It is a further finding of this court that Petitioners shall not recover any amount for Sterling Mensch's failure to diversify Florence Mensch's assets, as such amount is too speculative for this Court to determine.

With regard to the $820,382.00 transferred from the Decedent's account by Sterling Mensch, the court subtracts from such amount $273,461.00 as a credit for Respondent's one-third (1/3rd) inheritance, leaving $546,921.00 due from Respondent to the estate to compensate the Petitioners loss of inheritance. Added to this amount is $24,559.00 for avoidable taxes due to failure to itemize for the years 2011 through 2016, as well as 2018 penalties and interest, currently on appeal to the IRS, in the amount of $40,314.00. The Estate had to spend $10,000.00 to clean and repair Tarleton Way when SRM moved in order to market the property. Because SRM concealed the death of his mother resulting in an overpayment in pension funds, he owes the estate $ 30,000.00.

Sterling Mensch admitted he owed penalties and interest in the amount of $13,820.00.00 thus, the total owed from Respondent to John Mensch and Shauna Waddell as damages is $625,614.00. This amount will be reduced by the 2018 penalties and interest if the appeal of those penalties and interest is successful. Petitioner's expert calculated that $163,420 in taxes were levied to excessive RMD distribution. Further, he should not receive the benefit of a gift from his mother at a time he was converting her funds almost on a daily basis in violation of his fiduciary duty to her when she needed him most.

These are just the damages that Petitioners have been able to discover from SRM who has lied to the Court, lied to his siblings, lied by omission to GE Pension and BOA, failed to cooperate with his first attorney, refused to obey Court Orders, failed to produce cooperate in discovery, and failed to produce documentary evidence or witnesses to support his written allegations.,

By preponderance of the evidence and to confirm the foregoing, the Court finds in favor of Petitioners on causes of action for Breach of Fiduciary Duty both as AIF and Personal Representative, Violation of the SC Power of Attorney Act, and Conversion.

In addition to the damages referenced above, the court finds that Petitioners are entitled to recover from Respondent attorney's fees and costs in the total amount of $127,572.00 as provided by 62-1-111 SC Code Annot. (Supp. 2014). This is a reduction of $6380 related to time spent on engagement letters, subpoenas, time spent on Affidavit of Fees. I will further note that this amount includes the fees for Petitioners' expert witness. With regard to such fees, the court considered all the elements required under the case of Glasscock v. Glasscock, 304 S.C. 158, 403 S.E. 2d 313 (1991) and finds such fees to be reasonable. Specifically, the Court assessed (1) the nature, extent and difficulty of the case, (2) the time necessarily devoted to the case, (3) the professional standing of counsel, (4) the contingent nature of the compensation, if any, (5) the beneficial results obtained, and (6) customary legal fees for similar services. Applying the foregoing factors, as noted above, and after review of the Affidavit of Attorney's Fees and Costs submitted by Petitioners' Counsel, the Court finds $127,572.00 to be reasonable attorney's fees and costs.

Petitioners request the Court award the estate 1,462,495.00 not including pre-judgment interest. Respondent requests that Court award $513,336.00. To date, SRM has paid nothing toward even the amount he admits he owes.

The relief requested by John Mensch, as a 1/3 devisee of the estate, is addressed by payment to Shauna Waddell as Personal Representative of the Estate. Any claim he has against the Respondent is derivative to the Estate's claims.

In view of the foregoing, this Court awards the Estate of Florence Mensch a judgment in the amount of $821,343.00 calculated as follows:

$ 546,921.00 Misappropriations from FM's BOA accounts less SRM's 1/3 share in FM's Will

24,559.00 Failure to itemize FM's tax returns

[10] 40,314.00 2018, taxes, penalties and interest

13,820.00 Tax penalties and interest

163,420 .00 Avoidable Income tax due SRM taking more than the RMD from 2011-2018

30,157.00 GE pension overpayment

10,000.00 Cost to estate to clean and repair Tarleton Way

28,000.00 Annual exclusion gift to himself in 2015, 2016

127,572.00 Attorneys fees, costs

$ 984,763 Total Damages

PAYMENT OF DAMAGES

15. A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title. *Lollis v. Lollis*, 354 SE2d 559, 561 (1987). A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust. It is resorted to by equity to vindicate right and justice or frustrate fraud. *McNair v. Rainsford*, 499 SE2d 488, 501 (Ct. App 1988). The Court finds by clear and convincing evidence that a constructive trust should be imposed upon SRM's non-exempt property of whatever type, wherever located, and however titled. This remedy is appropriate as a result of his deceitful, devious, willful, wanton, and careless actions set forth above. He engaged in repeated action of civil theft for 8 years, depleting his mother's property without any regard to what her future needs might be, without regard to her estate plan, without regard to his siblings, without regard to tax law, probate law, prudent investment principles, etc.

16. If execution on this judgment is commenced by Petitioners, the specific property subject to this constructive trust will be identified in accordance with 14-23-360-420, *S. C. Code Annot.* (1976 as Amended) and any other applicable law. Any discovery regarding the ability of SRM to pay the judgment will be incident to these supplemental proceedings after they have commenced.

[10] This amount is on appeal with the IRS. SRM is allowed to reduce the total judgment should this amount change as a result of the appeal

Pa 13 of 14 4/11/21

ORDER

1. STERLING RAYMOND MENSCH, III shall pay $984,763.00 in damages to Shauna Waddell, Personal Representative of the Estate of Florence Mensch. Payment shall be made immediately.

2. Shauna Waddell, Personal Representative of the Estate of Florence Mensch, is hereby awarded judgment against STERLING RAYMOND MENSCH, III in the amount of $984,763.00.

3. Post-judgment interest shall begin to accrue at the legal rate of interest 7.25% or the current rate approved by the S.C. Supreme Court when this Judgment is transcribed and enrolled in the Offices of the Clerk of Court of Greenville County.

4. Should this Order be appealed, interest on the judgement will be governed by 14-23-380 S.C. Code Annot. (1976 as Amended) and other applicable law.

IT IS SO ORDERED.

Debora A. Faulkner
Greenville County Probate Judge

Greenville, South Carolina
Dated this 26 day of Jan, 2022

I ATTEST A TRUE COPY
Clerk, Probate Court
Greenville County, SC
Dated: 1/28/22

Pg14of14

FILED

STATE OF SOUTH CAROLINA FEB 17 2022 IN THE PROBATE COURT

GREENVILLE COUNTY

COUNTY OF GREENVILLE PROBATE COURT C. A. No.: 2018-ES-23-02854

Estate of Florence Petrak Mensch)

Shauna M. Waddell, individually and)
As Personal Representative of the Estate of)
Florence Petrak Mensch and John R.)
Mensch)
Petitioner,

ORDER

v.)

Sterling Raymond Mensch, III, individually,)
As former Personal Representative of the)
Estate of Florence Petrak Mensch and in)
His former capacity as Agent under Power)
Of Attorney for Florence Petrak Mensch.)
)
Respondent.)

This matter is before me to address Respondent's *MOTION TO ALTER OR AMEND* filed with the Court on February 2, 2022. Evidence of service by mail upon Petitioners' counsel on February 2, 2022 was filed with the Court. As of the date of this Order, no *RETURN* has been filed by the Petitioners' counsel.

S. C. Supreme Court Order of February 4, 2022 regarding the operation of trial courts during the Coronavirus Emergency, directs that hearings on Motions should be minimized. The Order directs trial judges to dispose of Motions without merit without waiting on a Return or other response from opposing counsel. [1]

The Court finds that the Motions fails to comply with Rule 7 (b) (1) in that it fails to state any grounds that would entitle the Respondent to relief. As such, the bare request to the Court to amend the Order under Rule 59 fails to give notice to the Court and opposing counsel of the relief being requested of the Court.

After careful review of the final Order in its entirety, I find no basis to give Respondent relief under SCRCP 59.

If view of the foregoing, Respondent's Motion is denied.

Debora A. Faulkner, Probate Judge

February 17, 2022
Greenville, S.C.

[1] See https://sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2655

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Greenville
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP2301064

Sterling Raymond Mensch
PLAINTIFF(S)

Shauna M Waddell et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☑ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

At the call of the case the Plaintiff was represented by Attorney John Baum. The Defendant was represented by Attorney Tyler Earl McLeod. After hearing the arguments of Counsel, the Court took the matter under advisement with Counsel for both sides to submit to the Court a proposed order within 10 days.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/27/2022 .

Probate Court

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2022 Apr 28 8:50 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Greenville Common Pleas

Case Caption: Sterling Raymond Mensch VS Shauna M Waddell , defendant, et al

Case Number: 2022CP2301064

Type: Order/Electronic Form 4

So Ordered

s/Alex Kinlaw, Jr., #2763

Electronically signed on 2022-04-27 15:41:34 page 3 of 3

ELECTRONICALLY FILED - 2022 Apr 28 8:50 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

ELECTRONICALLY FILED - 2022 May 17 8:52 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
IN THE MATTER OF: Estate of Florence Petrak Mensch	)	C.A. No.: 2022-CP-23-01064
Sterling Raymond Mensch, III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in the former capacity as Agent under a Power of Attorney for Florence Petrak Mensch	)	
Appellant,	)	ORDER
vs.	)	
Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch,	)	
Respondent.	)	

This matter came before the Court for a hearing on April 27, 2022 pursuant to Petitioner's Motion to Dismiss Respondent's "Appeal" of the Orders of the Honorable Debora A. Faulkner entered on January 26, 2022 and February 17, 2022. In addressing the motion before the court, the court has reviewed Judge Faulkner's two Orders, the underlying Motion to Alter or Amend filed with the probate court as well as Memoranda submitted by counsel for both parties and in considering the arguments of counsel at the hearing, I find Respondent's Motion should be granted.

<u>Factual Summary</u>

On May 15, 2019, the Respondents filed a Petition with the probate court alleging numerous causes of action against the Appellant. On July 29, 2021, the probate court entered an

Order granting Respondent's Motion for Summary Judgment on breach of fiduciary duty, violation of the S.C. Uniform Power of Attorney Act and conversion. A four-day damages hearing was held on August 17 and 18 and September 16 and 17 of 2021. On January 26, 2022, the probate court found in favor of Respondents and awarded nine hundred eighty-four thousand seven hundred sixty-three and 00/100 dollars ($984,763.00) in favor of the Estate of Florence Mensch. On February 2, 2022, Appellant filed a Motion to Alter or Amend Judge Faulkner's Order dated January 26th, 2022. The Honorable Debora A. Faulkner in her Order dated February 17th, found that Appellant failed to comply with the mandates of SCRCP Rule 7(b)(1) by failing to state any grounds that would entitle Respondent to relief. Not only did Appellant fail to state any grounds whatsoever in the Motion to Alter or Amend, but Appellant also failed to state the relief or order sought as required under SCRCP Rule 7(b)(1). Respondent argues that the legal effect of Appellant's failure to specify the grounds of his motion is that the filing of the motion to alter or amend did not stay the time for appeal pursuant to Rule 59(f), SCRCP.

I. Appellant's Argument that the Appeal filed by Appellant was not timely

After review of Appellant's Memorandum in Opposition and arguments made by Appellant's counsel, Appellant is arguing that their appeal should be dismissed as untimely because they allege that the January damages Order was not a final order. Appellant argued at the hearing that **his appeal** was untimely because Judge Faulkner's Order for damages **against Appellant** included a reduction of the judgment amount allocated to 2018 taxes, penalties and interest ($40,314.00), based on whether the IRS forgives penalties and interest which are currently being appealed by Shauna Waddell as Personal Representative of the Estate of Florence Mensch.

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Judge Faulkner emphasized in her Order dated February 17, 2022 that the January 26, 2022 Order was a **final Order**. The Order awarding damages was issued following a four-day trial on damages, and such was clearly intended by Judge Faulkner to be a final Order in the case. The Court previously granted summary judgment in favor of Petitioners and the January Order was the final Order awarding damages after the trial. The Order discusses the filing of supplemental proceedings, and disposes of every cause of action in the case. There is nothing in the Order which says the Order will be amended at a later date, nor that further proceedings are necessary in the probate court after the IRS rules on the Appeal. The Order states that the $40,314.00 **will be** reduced by the 2018 penalties and interest if the appeal of those penalties and interest is successful. Clearly, there is nothing further for the probate court to do. An IRS appeal could take a substantial amount of time, and it would be inequitable to require completion of the IRS appeal before the court can issue a final order in the case, and before the Estate can collect any amount of the judgment, especially given the fact that the amount subject to that appeal is some portion of $40,314.00, which is a small percentage of the overall judgment of $984,763.00.

In addition, Appellant did not allege that the January Order for damages was not a final order in his Motion to Alter or Amend the Order, nor at any time prior to filing the notice of appeal. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is clear that the issue was not raised as Appellant did not state any grounds for the Motion to Alter or Amend and they did not request any specific relief. An issue cannot be raised for the first time on appeal, and therefore Appellant's argument that this is not a final Order cannot be raised at this time. The IRS appeal

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is a good example of a ground that could have been stated in a motion to alter or amend. If that were stated as a ground then Judge Faulkner could have dealt with the issue at the time, but rather Appellant is just now stating this ground for the very first time on appeal. The Court in *Elam v. South Carolina Department of Transportation* found, "A party must file a Rule 59(e) motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Appellant did not state any grounds in the Motion to Alter or Amend, and certainly did not raise the issue that the January Order for damages was not a final order.

This Court finds that Judge Faulkner's January 26, 2022 Order was a final order, and therefore Appellant's request that the case be remanded to probate court is DENIED.

II. Respondent's Motion to Dismiss the Appeal

Respondent's Counsel argues that the legal effect of Appellant's failure to specify the grounds of his Motion to Alter or Amend is that the filing of the motion did not stay the time for appeal pursuant to Rule 59(f), SCRCP. Therefore, Appellant's notice of appeal was untimely. As such, Appellant has failed to comply with the provisions of S.C. Code Ann. §62-1-308(a) by appealing in a timely fashion the probate court's Order for damages dated January 26th, 2022.

The substance of Appellant's Motion to Alter or Amend filed on February 2, 2022 stated:

> "Respondent…move pursuant to Rule 59 of the South Carolina Rules of Civil Procedure to alter or amend the Order granting Petitioner damages. WHEREFORE, Respondent respectfully requests this court to alter or amend its January 26, 2022, Order."

In Camp v. Camp, the Court of Appeals stated, "'A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such

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motion.' " Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (quoting Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004)); Rule 203(b)(1), SCACR; Rule 59(f), SCRCP. "Rule 7(b)(1), SCRCP requires that motions '**shall state with particularity the grounds therefor, and shall set forth the relief or order sought**.' " Camp, 386 S.C. at 575, 689 S.E.2d at 636. "The particularity requirement 'is to be read flexibly in recognition of the peculiar circumstances of the case.' " Id. (quoting Cambridge Plating Co., Inc. v. Napco, Inc., 85 F.3d 752, 760 (1st Cir.1996)). " 'By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly.' " [401 S.C. 132] Id. (quoting Calderon v. Kansas Dep't of Soc. & Rehab. Servs., 181 F.3d 1180, 1186 (10th Cir.1999)). The Court in Camp v. Camp further stated, "The purposes of insufficient and successive post-trial motions appear to be the same: both attempt to buy time without asserting a meritorious claim. These tactics further neither justice nor efficiency, and we cannot facilitate their use. *Id.*

The holding in Camp v. Camp was overruled by the Supreme Court, but for reasons that do not exist in the present case. The Supreme Court held that "we do not believe applying the particularity requirement in an overly technical fashion **in this case** would serve the purpose behind the rule." Camp v. Camp, 386 S.C. 571, 576, 689 S.E.2d 634, 636-37 (2010). However, the Supreme Court goes onto state that it is not necessary to apply the particularity requirement in that case because (1) neither party was prejudiced and (2) the court was able to both comprehend the motion and deal with it fairly. *Id*. Therefore, the Supreme Court found in **that particular case** that the lower court was able to deal with the motion for reconsideration fairly. *Id.*

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However, unlike cases in which the court and the parties can comprehend the basis of the motion and deal with it fairly, in this case Judge Faulkner specifically found in her Order dated February 23, 2022 "the bare request to the Court to amend the Order under Rule 59 fails to give notice to the Court and opposing counsel of the relief being requested of the Court." In the February Order, Judge Faulkner referenced the S.C. Supreme Court Order of February 4, 2022 regarding the operation of trial courts during the Coronavirus Emergency which directs that hearings on motions should be minimized. The Order directs trial judges to dispose of motions without merit without waiting on a return or other response from opposing counsel.[1] Therefore, **in this case** Appellant did not state sufficient grounds or relief sought and the court was unable to comprehend the motion or deal with it fairly.

Judge Faulkner's Order denying the motion to alter or amend is consistent with the spirit and letter of Rule 7(b)(1). No overly technical application of the Rule is being applied. It was incumbent upon Appellant to comply with the requirements of Rule 7(b)(1) in order to trigger the stay provided by Rule 59(f). SCRCP Rule 1 admonishes both the court and the parties to a case to construe, administer and employ the Rules to secure the just, speedy and inexpensive determination of every action and proceeding. "The Rules governing civil procedure exist for a reason and Plaintiff has failed to show good cause for not complying with those rules." Sapphire Enters v. Allstate Ins. Co. (D. S.C. 2020).

The legal effect of Appellant's failure to specify the grounds of his motion is that the filing of the motion did not stay the time for appeal pursuant to Rule 59(f), SCRCP. Therefore, Appellant's notice of appeal was untimely. As such, Appellant has failed to comply with the

[1] See https://sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2655

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provisions of S.C. Code Ann. §62-1-308(a) by appealing in a timely fashion the probate court's Order for damages dated January 26th, 2022.

Based on the foregoing, this Court dismisses the appeal of the underlying Orders from the probate court as there exist no appellate jurisdiction of this Court.

The Court hereby orders as follows:

1. This Court finds that Judge Faulkner's January 26, 2022 Order was a final order, and Appellant's request that the case be remanded to probate court is **DENIED**.
2. Respondent's Motion to Dismiss the appeals of the Probate Court Orders is **GRANTED**.

IT IS SO ORDERED.

[electronic signature page to follow]

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Greenville Common Pleas

Case Caption: Sterling Raymond Mensch VS Shauna M Waddell , defendant, et al

Case Number: 2022CP2301064

Type: Order/Dismissal

So Ordered

s/Alex Kinlaw, Jr., #2763

Electronically signed on 2022-05-16 13:35:05 page 8 of 8

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of: Estate of Florence Petrak Mensch.

Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in the former capacity as Agent under a Power of Attorney for Florence Petrak Mensch, Petitioner,

v.

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch, and John R. Mensch, Respondent.

Appellate Case No. 2025-000386

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Alex Kinlaw Jr., Circuit Court Judge

Memorandum Opinion No. 2025-MO-037
Submitted May 2, 2025 – Filed July 2, 2025

REVERSED AND REMANDED

Kimberly Truluck Thomason, Devon Marc Puriefoy, and Howard Walton Anderson III, all of Truluck Thomason, LLC, Greenville, for Petitioner.

Knox L. Haynsworth III and Tyler Earl McLeod, both of Brown Massey Evans McLeod & Haynsworth, LLC, Greenville, for Respondent.

PER CURIAM: Petitioner Sterling Raymond Mensch III (Mensch) seeks a writ of certiorari to review the court of appeals' decision in *Mensch v. Waddell* (*In re Estate of Mensch*), Op. No. 2024-UP-384 (S.C. Ct. App. filed Nov. 13, 2024). We grant Mensch's petition for a writ of certiorari only as to whether the appeal to circuit court was timely, dispense with briefing, reverse the court of appeals on that issue, and remand to the circuit court.

Respondent Shauna M. Waddell, individually and as personal representative of the estate of Florence Petrak Mensch, commenced this action in probate court. Waddell alleged Mensch improperly managed the assets of their mother, Florence Mensch, both before and after her death. In an order filed January 26, 2022, the probate court awarded $984,763 in damages against Mensch to the estate for breach of fiduciary duty, violation of the Uniform Power of Attorney Act, and conversion.

On February 2, 2022, Mensch made a motion to alter or amend the probate court's judgment under Rule 59(e), SCRCP. On February 17, the probate court denied Mensch's motion on the basis it did not comply with Rule 7(b)(1), SCRCP, which provides, "An application to the court for an order . . . shall state with particularity the grounds therefor, and shall set forth the relief or order sought." About a month after the initial order, but within ten days after receipt of the order denying Mensch's Rule 59(e) motion, he appealed to the circuit court.

The circuit court dismissed the appeal as untimely because the Rule 59(e) motion was defective under Rule 7(b)(1) and, thus, did not stay the deadline to appeal. *See* S.C. Code Ann. § 62-1-308(a) (2022) (stating the notice of intent to appeal a probate court order must be filed within ten days); Rule 59(f), SCRCP (providing "[t]he time for appeal for all parties shall be stayed by a timely motion under this Rule").

The court of appeals affirmed the dismissal, holding the motion did not stay the time to appeal because it violated Rule 7(b)(1). *See In re Estate of Mensch*, Op. No. 2024-UP-384, at 2 ("The lack of specificity in the motion and the absence of other written or oral argument of counsel did not allow the probate court to 'deal with the motion fairly.' Because the motion was properly [denied], it failed to stay the time to appeal.").

We reverse the court of appeals. Although the Rule 59(e) motion was procedurally improper under Rule 7(b)(1), a Rule 59(e) motion is timely when it is "served on the opposing parties not later than ten days from the date of receipt of written notice of the entry of the order the merits of which the motion purports to address." *Swing v. Swing*, 445 S.C. 340, 351, 914 S.E.2d 158, 164 (2025). Thus, even a procedurally improper motion stays the time for the notice of appeal if it is served within ten days, unless the situation fits one of two limited exceptions. *See Swing*, 445 S.C. at 347, 914 S.E.2d at 162 ("As we explained in *Elam* [*v. S.C. Dep't of Transp.*, 361 S.C. 9, 16, 602 S.E.2d 772, 776 (2004)], the decisions of this Court and our court of appeals . . . recognized two limited situations in which a Rule 59(e) motion filed within ten days of receipt of the order the motion purports to address—a timely motion—nevertheless fails to stay the Rule 203(b)(1) deadline."). As we specifically noted in *Swing*, Rule 59(e) motions that are procedurally improper under Rule 7(b)(1) are not among the exceptions. 445 S.C. at 352, 914 S.E.2d at 164-65. Thus, regardless of whether the Rule 59(e) motion was defective under Rule 7(b)(1), it tolled the time to appeal, and the court of appeals erred in affirming the circuit court's ruling that the appeal was untimely.

We reverse the court of appeals, hold Mensch's appeal was timely, and remand to the circuit court for consideration of the merits of the appeal.

REVERSED AND REMANDED.

KITTREDGE, C.J., FEW, JAMES, HILL and VERDIN, JJ., concur.

The Supreme Court of South Carolina

PATRICIA A. HOWARD
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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July 18, 2025

The Honorable Jay Gresham
305 E. North St
Greenville, SC 29601-2121

REMITTITUR

Re: In the Matter of: Estate of Florence Petrak Mensch
Lower Court Case No. 2022CP2301064
Appellate Case No. 2025-000386

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Sincerely,

Brenda F. Shealy

CLERK

cc: Devon Marc Puriefoy
Tyler Earl McLeod

Knox L. Haynsworth, III
Kimberly Truluck Thomason
Howard Walton Anderson, III

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of: Estate of Florence Petrak Mensch.

Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in the former capacity as Agent under a Power of Attorney for Florence Petrak Mensch, Petitioner,

v.

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch, and John R. Mensch, Respondent.

Appellate Case No. 2025-000386

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Alex Kinlaw Jr., Circuit Court Judge

Memorandum Opinion No. 2025-MO-037
Submitted May 2, 2025 – Filed July 2, 2025

REVERSED AND REMANDED

Kimberly Truluck Thomason, Devon Marc Puriefoy, and Howard Walton Anderson III, all of Truluck Thomason, LLC, Greenville, for Petitioner.

Knox L. Haynsworth III and Tyler Earl McLeod, both of Brown Massey Evans McLeod & Haynsworth, LLC, Greenville, for Respondent.

PER CURIAM: Petitioner Sterling Raymond Mensch III (Mensch) seeks a writ of certiorari to review the court of appeals' decision in *Mensch v. Waddell* (*In re Estate of Mensch*), Op. No. 2024-UP-384 (S.C. Ct. App. filed Nov. 13, 2024). We grant Mensch's petition for a writ of certiorari only as to whether the appeal to circuit court was timely, dispense with briefing, reverse the court of appeals on that issue, and remand to the circuit court.

Respondent Shauna M. Waddell, individually and as personal representative of the estate of Florence Petrak Mensch, commenced this action in probate court. Waddell alleged Mensch improperly managed the assets of their mother, Florence Mensch, both before and after her death. In an order filed January 26, 2022, the probate court awarded $984,763 in damages against Mensch to the estate for breach of fiduciary duty, violation of the Uniform Power of Attorney Act, and conversion.

On February 2, 2022, Mensch made a motion to alter or amend the probate court's judgment under Rule 59(e), SCRCP. On February 17, the probate court denied Mensch's motion on the basis it did not comply with Rule 7(b)(1), SCRCP, which provides, "An application to the court for an order . . . shall state with particularity the grounds therefor, and shall set forth the relief or order sought." About a month after the initial order, but within ten days after receipt of the order denying Mensch's Rule 59(e) motion, he appealed to the circuit court.

The circuit court dismissed the appeal as untimely because the Rule 59(e) motion was defective under Rule 7(b)(1) and, thus, did not stay the deadline to appeal. *See* S.C. Code Ann. § 62-1-308(a) (2022) (stating the notice of intent to appeal a probate court order must be filed within ten days); Rule 59(f), SCRCP (providing "[t]he time for appeal for all parties shall be stayed by a timely motion under this Rule").

The court of appeals affirmed the dismissal, holding the motion did not stay the time to appeal because it violated Rule 7(b)(1). *See In re Estate of Mensch*, Op. No. 2024-UP-384, at 2 ("The lack of specificity in the motion and the absence of other written or oral argument of counsel did not allow the probate court to 'deal with the motion fairly.' Because the motion was properly [denied], it failed to stay the time to

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appeal.").

We reverse the court of appeals. Although the Rule 59(e) motion was procedurally improper under Rule 7(b)(1), a Rule 59(e) motion is timely when it is "served on the opposing parties not later than ten days from the date of receipt of written notice of the entry of the order the merits of which the motion purports to address." *Swing v. Swing*, 445 S.C. 340, 351, 914 S.E.2d 158, 164 (2025). Thus, even a procedurally improper motion stays the time for the notice of appeal if it is served within ten days, unless the situation fits one of two limited exceptions. *See Swing*, 445 S.C. at 347, 914 S.E.2d at 162 ("As we explained in *Elam* [*v. S.C. Dep't of Transp.*, 361 S.C. 9, 16, 602 S.E.2d 772, 776 (2004)], the decisions of this Court and our court of appeals . . . recognized two limited situations in which a Rule 59(e) motion filed within ten days of receipt of the order the motion purports to address—a timely motion—nevertheless fails to stay the Rule 203(b)(1) deadline."). As we specifically noted in *Swing*, Rule 59(e) motions that are procedurally improper under Rule 7(b)(1) are not among the exceptions. 445 S.C. at 352, 914 S.E.2d at 164-65. Thus, regardless of whether the Rule 59(e) motion was defective under Rule 7(b)(1), it tolled the time to appeal, and the court of appeals erred in affirming the circuit court's ruling that the appeal was untimely.

We reverse the court of appeals, hold Mensch's appeal was timely, and remand to the circuit court for consideration of the merits of the appeal.

REVERSED AND REMANDED.

KITTREDGE, C.J., FEW, JAMES, HILL and VERDIN, JJ., concur.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of: Estate of Florence Petrak Mensch

Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in the former capacity as Agent under a Power of Attorney for Florence Petrak Mensch, Appellant,

v.

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch, Respondents.

Appellate Case No. 2022-000731

Appeal From Greenville County
Alex Kinlaw, Jr., Circuit Court Judge

Unpublished Opinion No. 2024-UP-384
Heard September 24, 2024 – Filed November 13, 2024

AFFIRMED

Devon Marc Puriefoy, of Truluck Thomason, LLC, of Greenville, for Appellant.

Knox L. Haynsworth III and Tyler Earl McLeod, both of Brown Massey Evans McLeod & Haynsworth, LLC, of Greenville, for Respondents.

PER CURIAM: In this probate matter, Sterling Raymond Mensch III, (Sterling), son of Florence Petrak Mensch and the agent designated in her power of attorney, appeals the circuit court's order dismissing his appeal as untimely. He also asserts the probate court's order was not a final order which would deprive the circuit court of appellate jurisdiction and argues the probate court lacked subject matter jurisdiction over the case. We affirm.

As to Sterling's argument the circuit court erred in finding the probate court's order constituted a final order, we affirm. While the order allowed for adjustment of the amount of taxes Sterling owed based on a pending appeal to the Internal Revenue Service, it adjudicated and completely fixed the rights of the parties leaving nothing further for the probate court to do. *See Olson v. Fac. House of Carolina, Inc.*, 344 S.C. 194, 213, 544 S.E.2d 38, 48 (Ct. App. 2001) ("Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory; *but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final.*" (quoting *Adickes v. Allison & Bratton,* 21 S.C. 245, 259 (1883) (emphasis added); *Watson v. Underwood*, 407 S.C. 443, 458-59, 756 S.E.2d 155, 163 (Ct. App. 2014) ("[A] decree or judgment that leaves in doubt whether the plaintiff will prevail is not final."); *Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209, 212 (1942) ("[I]t has been laid down that in substance the decision must show intrinsically and distinctly, and not inferentially, that the matters in the record have been determined in favor of one of the litigants, or that the rights of the parties in litigation have been adjudicated." (quoting 2 R.C.L. 32, Appeal and Error § 10)).

As to Sterling's argument the circuit court erred in finding his appeal untimely because his motion for reconsideration violated Rule 7(b)(1), SCRCP, we affirm. The lack of specificity in the motion and the absence of other written or oral argument of counsel did not allow the probate court to "deal with the motion fairly." Because the motion was properly dismissed, it failed to stay the time to appeal. *See* S.C. Code Ann. § 62-1-308(a) (2022) (stating the notice of intent to appeal a probate court order must be filed within ten days); Rule 59(f), SCRCP (indicating "[t]he time for appeal for all parties shall be stayed by a timely motion under this Rule"); Rule 7(b)(1), SCRCP ("An application to the court for an order shall be by motion . . . shall be made in writing, *shall state with particularity the grounds therefor, and shall set forth the relief or order sought*.") (emphasis added); *Camp v. Camp*, 386 S.C. 571, 576 S.E.2d 634, 637 (2010) (finding appellant's

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motion for reconsideration did not violate Rule 7(b)(1) because "[t]he trial court's order denying Father's motion for reconsideration stated that [b]ased on the arguments of counsel the motion was denied," therefore, "neither party was prejudiced, and the court dealt with the motion fairly.") (internal quotations omitted); *Nexstar Media Grp., Inc. v. Davis Roofing Grp., LLC*, 431 S.C. 593, 601 848 S.E.2d 597, 601 (Ct. App. 2020) (finding the master-in-equity was "in a position to understand [the appellant's] motion [to reconsider] . . . fairly" after a hearing on the motion); *Operation of the Trial Courts During the Coronavirus Emergency*, S.C. Sup. Ct. Order dated June 15, 2021, (c)(4)(d) (recognizing that although hearings on motions were generally conducted, if, during the coronavirus emergency "a judge determine[d] that the motion [wa]s without merit, the motion [could] be denied without waiting for any return or other response from the opposing party or parties").

Finally, as to Sterling's argument the probate court lacked subject matter jurisdiction to the hear the causes of action in the case related to pre-death damages, we affirm. Claims against an agent to whom authority is designated through a power of attorney are within the probate court's subject matter jurisdiction. *See* S.C. Code Ann. § 62-8-401 (Supp. 2018) ("The probate court has concurrent jurisdiction with the circuit courts of this State over all subject matter related to the creation, exercise, construction, and termination of powers of attorney governed by the provisions of this article."); S.C. Code Ann. § 62-8-116(a)(4)(5)(6) (2022) ("The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief: . . . (4) the principal's spouse, parent, or adult descendant; (5) an individual who would qualify as a presumptive heir of the principal; [and] (6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death . . . ."); S.C. Code Ann. § 62-8-117 (2022) ("An agent that violates this article is liable to the principal or the principal's successors in interest for the amount required to: (1) restore the value of the principal's property to what it would have been had the violation not occurred; and (2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.").

AFFIRMED.

KONDUROS, GEATHERS, AND MCDONALD, JJ., concur.

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THE STATE OF SOUTH CAROLINA
Court of Common Pleas

APPEAL FROM GREENVILLE COUNTY
Probate Court

Debra A. Faulkner, Probate Judge
Probate Case No. 2018-ES-23-02854

Appellate Case No. 2022-CP-23-01064

IN THE MATTER OF:

Estate of Florence Petrak Mensch,

Sterling Raymond Mensch, III, individually as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under a Power of Attorney for Florence Petrak Mensch

Appellant,

v.

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch

Respondents.

ORDER AFFIRMING THE PROBATE COURT

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This matter came before the Court for a hearing on Thursday, October 16, 2025 pursuant to Appellant's appeal from the Probate Court's Order following trial in September of 2021. After the Circuit Court and South Carolina Court of Appeals affirmed the Probate Court's Order, Appellant petitioned the Supreme Court for a writ of certiorari, which they granted "only as to whether the appeal to circuit court was timely…." *Mensch v. Waddell*, Op. No. 2025-MO-037 (S.C.Sup.Ct. filed July 2, 2025). Based on the newly decided case *Swing v. Swing*, the Supreme Court ruled that even though Appellant's Rule 59(e) motion was defective under Rule 7(b)(1), it tolled the time to appeal and therefore Appellant's appeal was timely. *Swing v. Swing*, 445 S.C. 340, 351, 914 S.E.2d 158, 164 (2025). The case was then remanded to this court for consideration of the merits of the appeal. After hearing arguments from Counsel for both parties and a complete review of the file, the Order of the Probate Court is affirmed.

STANDARD OF REVIEW

In a probate appeal, the circuit court, court of appeals, or supreme court shall hear and determine the appeal according to the rules of law. S.C. Code Ann. § 62-1-308(i) (Supp. 2018). "[I]f the action is at law, the circuit court should uphold the findings of the probate court if there is any evidence to support them." *In re Estate of Weeks*, 329 S.C. 251, 260, 495 S.E.2d 454, 459 (Ct. App. 1997).

An action to declare a constructive trust is in equity, and a court may find facts in accordance with its own view of the evidence. *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 732 S.E.2d 876 (2012) (citing *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987)).

"An award of attorneys' fees and costs is a discretionary matter not to be overturned absent abuse by the trial court." *Donahue v. Donahue*, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989). "Similarly, the specific amount of attorneys' fees awarded pursuant to statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008).

I. The Probate Court's Order constituted a final order.

The Order of the Probate Court adequately addressed this issue and this Court adopts the findings of the Court of Appeals on this issue. The Court of Appeals held that:

> While the order allowed for adjustment of the amount of taxes Sterling owed based on a pending appeal to the Internal Revenue Service, it adjudicated and completely fixed the rights of the parties leaving nothing further for the probate court to do. *See Olson v. Fac. House of Carolina, Inc.*, 344 S.C. 194, 213, 544 S.E.2d 38, 48 (Ct. App. 2001) ("Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory; *but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final.*" (quoting *Adickes v. Allison & Bratton*, 21 S.C. 245, 259 (1883) (emphasis added); *Watson v. Underwood*, 407 S.C. 443, 458-59, 756 S.E.2d 155, 163 (Ct. App. 2014) ("[A] decree or judgment that leaves in doubt whether the plaintiff will prevail is not final."); *Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209, 212 (1942) ("[I]t has been laid down that in substance the decision must show intrinsically and distinctly, and not inferentially, that the matters in the record have been determined in favor of one of the litigants, or that the rights of the parties in litigation have been adjudicated." (quoting 2 R.C.L. 32, Appeal and Error § 10)).

Mensch v. Waddell, Op. No. 2024-UP-384 (S.C.Ct.App. filed Nov. 13, 2024) (Howard Adv.Sh. No. 44).

The order of the probate court was final. Nothing further needs to be done by the probate court, and there is nothing the probate court could do that would change in any way what the IRS decides. The amount of damages owed by Appellant was fixed and determined, and any decision by the IRS may simply modify that figure.

Appellant could not have filed an appeal of an order that was not "final." Section 62-1-308 of the Probate Code states in pertinent part: "Except as provided in subsection (g), appeal from

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the probate court must be to the circuit court and are governed by the following rules: (a): A person interested in a **final order, sentence or decree of a probate court** and considering himself injured by it may appeal to the circuit court in the same county." S.C. Code Ann. §62-1-308 (emphasis added). The Supreme Court of South Carolina confirms that Section 62-1-308 codifies the final judgment rule in the case of *Fulmer v. Cain*. 380 S.C. 466, 469, 670 S.E.2d 652, 654 (2008). A final judgment is required before Appellant can appeal.

II. The Probate Court had subject matter jurisdiction to hear the causes of action in the case related to pre-death damages.

The Order of the Probate Court adequately addressed this issue and this Court adopts the findings of the Court of Appeals on this issue. The Court of Appeals held that:

> Finally, as to Sterling's argument the probate court lacked subject matter jurisdiction to hear the causes of action in the case related to pre-death damages, we affirm. Claims against an agent to whom authority is designated through a power of attorney are within the probate court's subject matter jurisdiction. *See* S.C. Code Ann. § 62-8-401 (Supp. 2018) ("The probate court has concurrent jurisdiction with the circuit courts of this State over all subject matter related to the creation, exercise, construction, and termination of powers of attorney governed by the provisions of this article."); S.C. Code Ann. § 62-8-116(a)(4)(5)(6) (2022) ("The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief: . . . (4) the principal's spouse, parent, or adult descendant; (5) an individual who would qualify as a presumptive heir of the principal; [and] (6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death . . . ."); S.C. Code Ann. § 62-8-117 (2022) ("An agent that violates this article is liable to the principal or the principal's successors in interest for the amount required to: (1) restore the value of the principal's property to what it would have been had the violation not occurred; and (2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.").

Mensch v. Waddell, Op. No. 2024-UP-384 (S.C.Ct.App. filed Nov. 13, 2024) (Howard Adv.Sh. No. 44).

After Mr. Mensch appealed the final order, he then took the position that the circuit court had no appellate jurisdiction because there was no "final order" from the probate court. Nowhere at the trial court level did Mr. Mensch ever challenge the jurisdiction of the probate court prior to the issuance of the final order dated January 26, 2022. While it is true that subject matter jurisdiction may be raised at any time, even on appeal, it is also true that a party may not invoke the provisions of Rule 60(b) where it is clear the issue could have been litigated at trial. Appellant may not make an argument for lack of subject matter jurisdiction for the first time to the circuit court because he failed to make that argument to the probate court. "It is axiomatic that an issue cannot be raised for the first time on appeal." *State v. Haygood*, 409 S.C. 420, 762 S.E.2d 69, 74 (Ct. App. 2014) (quoting *State v. Cope*, 405 S.C. 317, 338-339, 748 S.E.2d 194, 205 (2013)). "For an issue to be properly preserved it has to be raised and ruled on by the trial court." *State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011). "An argument advanced on appeal but not raised and ruled on below is not preserved." *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005).

III. The Probate Court properly imposed a constructive trust in this case.

Appellant raises the issue of constructive trust for the first time in his Initial Brief. (App. Brief p. 11). Appellant could have made an argument regarding the impropriety of a constructive trust at trial or in his written motion to reconsider, but he failed to do so, and therefore that argument has been waived. *See Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481 (Ct. App. 1990). "It is axiomatic that an issue cannot be raised for the first time on appeal." *State v. Haygood*, 409 S.C. 420, 762 S.E.2d 69, 74 (Ct. App. 2014) (quoting *State v. Cope*, 405 S.C. 317, 338-339, 748 S.E.2d 194, 205 (2013)). "For an issue to be properly preserved it has to be raised and ruled on by the trial court." *State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011). "An

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argument advanced on appeal but not raised and ruled on below is not preserved." *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005).

Even if Appellant had properly preserved the issue of constructive trust, the imposition of the constructive trust was proper and the Probate Court appropriately applied the law.

After the first two days of trial, Counsel for Respondents sent out updated subpoenas for bank records of Appellant[1]. Respondents discovered that Appellant had liquidated his T. Rowe Price account of $267,105.00 between April 1, 2021 and June 30, 2021. After counsel for Respondents filed a motion for preliminary injunction, Counsel for Appellant disclosed that the funds were in their IOLTA account. With the knowledge that Appellant's funds were in the IOLTA account of Truluck Thomason, Judge Faulkner issued the January 26, 2022 final order imposing a constructive trust over all of Appellant's non-exempt property "of whatever type, **wherever located, and however titled.** This remedy is appropriate as a result of his deceitful, devious, willful, wanton and careless actions set forth above." (R. p. 17 (emphasis added)).

As far as the propriety of a constructive trust, this is exactly the scenario for which constructive trusts were created. "A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding legal title." *Lollis v. Lollis*, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987) (internal citations omitted). (R. p. 17). "As was held in the case of *All v. Prillaman*, 200 S.C. 279, 20 S.E.2d 741, a constructive trust …. is resorted to by equity to vindicate right and justice or frustrate fraud." *Dominick v. Rhodes*, 202 S.C. 139, 148, 24 S.E.2d 168, 172 (1943) (internal citations omitted). "A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title, as against another, provided some

[1] Appellant's records through December 2020 were already obtained in the case, and the subpoena was to update the records from January 2021 through present.

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confidential relation exists between the two, and provided the raising of a trust is necessary to prevent a failure of justice. So, as has been said, the form and varieties of constructive trusts are practically without limit, such trusts being raised, broadly speaking, whenever necessary to prevent injustice." *Id*. at 149, 172-173 (internal citations omitted).

In this case, Appellant was power of attorney for Florence Mensch and then personal representative for the Estate of Florence Mensch and abused the fiduciary relationship to completely drain her assets. (R. p. 17). "He engaged in repeated action of civil theft for 8 years, depleting his mother's property without any regard to what her future needs might be, without regard to her estate plan, without regard to his siblings, without regard to tax law, probate law, prudent investment principles, etc." *Id*. The constructive trust was necessary "as a result of his deceitful, devious, willful, wanton, and careless actions.." *Id*. A constructive trust arises when fraud, bad faith, abuse of confidence or violation of a fiduciary duty occurs which gives rise to an obligation in equity to make restitution. In this case, Appellant acted fraudulently, in bad faith, in abuse of confidence and in violation of the fiduciary duty imposed on him as power of attorney and therefore must, in equity, make restitution to his mother's estate.

"A constructive trust …can arise from a breach of a fiduciary duty giving rise to the obligation in equity to make *restitution*." *See Verenes v. Alvanos,* 387 S.C. 11, 17 n.7, 690 S.E.2d 771, 774 n.7 (2010) (emphasis added). Appellant makes an unsupported argument that the constructive trust must be traceable to misappropriated property. Appellant attempts to differentiate his case by claiming that the money he stole from his mother and then spent, cannot now be subject to a constructive trust because he spent it. "It is an attempt at a technical avoidance which rests upon an asserted public policy or illegality of some kind. The courts have refused to accept this ruse because to do so would be to compound the defendant's wrong. In those instances,

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as here, the defendant is really attempting to assert, not a public policy but a "private policy" to insulate the defendant from his own wrong. Equity does not permit a defendant to defeat justice by such a ploy." *Chapman v. Citizens and Souther Nat'l. Bank of South Carolina*, 302 S.C. 469, 395 S.E.2d 446 (Ct. App. 1990).

As an appellate court, this Court defers to the trial court's award. "…[T]he discretion that must be accorded to the [special referee] compels us to affirm the award as appropriate recompense for misconduct necessitating the imposition of a constructive trust." *Hale v. Finn*, 388 S.C. 79, 694 S.E.2d 51 (Ct. App. 2010).

IV. The Probate Court's award of attorneys' fees was proper.

Appellant raises the issue of attorney's fees for the first time in his Appellant Brief. (Appellant's Brief p. 12). Appellant could have made an argument regarding the attorney's fees award at trial or in his written motion to reconsider, but he failed to do so, and therefore that argument has been waived. *See Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481 (Ct. App. 1990). "It is axiomatic that an issue cannot be raised for the first time on appeal." *State v. Haygood*, 409 S.C. 420, 762 S.E.2d 69, 74 (Ct. App. 2014) (quoting *State v. Cope*, 405 S.C. 317, 338-339, 748 S.E.2d 194, 205 (2013)). "For an issue to be properly preserved it has to be raised and ruled on by the trial court." *State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011). "An argument advanced on appeal but not raised and ruled on below is not preserved." *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005).

Even if Appellant had properly preserved the issue of the award of attorneys fees, the award of attorneys' fees was proper and the Probate Court appropriately applied the law.

"The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion….Similarly, the specific amount of attorneys' fees awarded

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pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008).

Respondents were awarded attorney's fees and costs in the total amount of $127,572.00 pursuant to § 62-1-111 of the South Carolina Probate Code which states, "in a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the estate that is the subject of the controversy." (R. p. 16). Judge Faulkner reduced the requested fees by $6,380.00 for time spent on engagement letters, subpoenas and the Affidavit of Fees. *Id*. Judge Faulkner's order specifically states that she reviewed all elements under the case of *Glasscock v. Glasscock,* and finds such fees to be reasonable. *Id*. Judge Faulkner listed the factors, specifically stated that she considered them, and even reduced the fees to the amount she considered reasonable. *Id.*

Appellant cites no legal authority for his contention that "[e]vidence for each of the factors must be specific." "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Id*. (quoting *Glasscock, Inc. v. U.S. Fid. & Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)). Rather than citing applicable legal authority, Appellant refers to a case where only a conclusory affidavit of attorney's fees was not upheld on appeal. The Amended Affidavit of Attorney's Fees and Costs filed by Counsel for Respondents was in no way conclusory as Appellant alleges. The Amended Affidavit was seven pages long. (R. p. 116-122). In addition to the affidavit, Counsel for Respondents included all of their billing entries, expense entries, and subtracted amounts previously awarded by the Probate Court. *Id*. The affidavit was not conclusory

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like the cases cited by Appellant. Additionally, Judge Faulkner made thirty-four (34) findings of fact in her order spanning five (5) of the twelve (12) pages. (R. pp. 6-11).

As to the factor of contingency of compensation, Judge Faulkner specifically listed it as a factor that was considered in her Order. (R. p. 16). In 2021, the Court of Appeals decided the case of *Jordan v. Postell* and considered the "contingency of compensation" factor by stating "neither party had entered into contingency fee arrangements with their respective counsel." 434 S.C. 510, 529, 864 S.E.2d 558, 568 (Ct. App. 2021)

Judge Faulkner was familiar with the nature, extent, and difficulty of the case as the presiding trial judge. Judge Faulkner considered all of the factors including the time devoted to the case, the professional standing of counsel, and the beneficial results obtained and awarded attorneys fees to Respondents. (R. p. 16). The Probate Court's Order is affirmed.

IT IS SO ORDERED.

[Electronic Signature of Judge Gravely to follow]

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Greenville Common Pleas

Case Caption: Sterling Raymond Mensch VS Shauna M Waddell , defendant, et al

Case Number: 2022CP2301064

Type: Order/Dismissal

So Ordered

s/ Honorable Perry H. Gravely, #2755

Electronically signed on 2026-01-04 09:23:22 page 11 of 11

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STATE OF SOUTH CAROLINA

COUNTY OF: GREENVILLE

IN THE MATTER OF:
ESTATE OF FLORENCE PETRAK MENSCH
☒ Decedent ☐ Alleged Incapacitated Individual

FILED

MAY 15 2019

GREENVILLE COUNTY PROBATE COURT

▲ PROBATE COURT USE ONLY ▲

IN THE PROBATE COURT
CASE NUMBER 2018-ES-23-02854

John R. Mensch and Shauna M. Waddell,
Petitioner(s),

vs.

Sterling Raymond Mensch III, individually, as Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under a Power of Attorney for Florence Petrak Mensch,
Respondent(s).*

SUMMONS

*For Guardianship/Conservatorship matters, you must include the alleged incapacitated individual as a Respondent.

TO THE RESPONDENT(S) LISTED ABOVE:

YOU ARE HEREBY SUMMONED and required to Answer the Petition in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the Petitioner(s) listed above at the following address(es):

Please Type or Print.

Tyler E. McLeod, Esquire
(Name of Petitioner/Attorney for Petitioner)
Brown, Massey, Evans, McLeod & Haynsworth, LLC
106 Williams St.
(Street Address or Mailing Address)
Greenville, SC 29601
(City, State, and Zip Code)

Your Answer must be served on the Petitioner at the above address within **thirty (30) days** after the service of this Summons and Petition upon you, exclusive of the day of such service; and if you fail to answer the Petition within that time, judgment by default will be rendered against you for the relief demanded in the Petition.

Tyler McLeod
Signature of Petitioner(s)/Attorney for Petitioner(s)

Date: May 15, 2019

SCCA 401PC (01/2019)

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE IN THE MATTER OF: Estate of Florence Petrak Mensch John R. Mensch and Shauna M. Waddell, Petitioners, vs. Sterling Raymond Mensch III, individually, as Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under a Power of Attorney for Florence Petrak Mensch, Respondent.	IN THE PROBATE COURT THIRTEENTH JUDICIAL CIRCUIT CASE NO. 2018ES2302854 **FILED** MAY 15 2019 GREENVILLE COUNTY PROBATE COURT PETITION

The Petitioners, John R. Mensch and Shauna M. Waddell, complaining of the above-named Respondent, Sterling R. Mensch III, individually, as Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under a Power of Attorney for Florence Petrak Mensch, would respectfully show unto the Court as follows:

PARTIES AND JURISDICTION

1. Petitioner, John R. Mensch, is a citizen and resident of West Linn, Oregon.

2. Petitioner, Shauna M. Waddell, is a citizen and resident of Easley, South Carolina.

3. Respondent, Sterling R. Mensch III, individually, as Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under a Power of Attorney for Florence Petrak Mensch, is a citizen and resident of Greer, South Carolina.

4. Florence Petrak Mensch died on April 26, 2018 in Greenville County, State of South Carolina ("Decedent").

5. Petitioners are adult descendants, successors in interest and named as beneficiaries in Decedent's Will, which is on file with the Court, and named as beneficiaries of certain non-

probate assets owned by Decedent.

6. Respondent was appointed Personal Representative of the Estate of Florence Petrak Mensch by this Court on January 23, 2019.

7. Respondent, Sterling Raymond Mensch, III, was named as Agent under a Power of Attorney for Florence Mensch in that certain Durable Power of Attorney recorded in the Greenville County Register of Deeds Office on May 18, 2010 in Deed Book 2372 at Page 3133, and such is attached hereto as Exhibit A ("Power of Attorney").

8. That this Court has personal jurisdiction over the parties hereto.

9. This Court has subject matter jurisdiction over the causes of action set forth herein.

GENERAL ALLEGATIONS

10. Sterling Raymond Mensch, III, John R. Mensch and Shauna M. Waddell are the biological children of Florence P. Mensch and named as equal beneficiaries in Florence P. Mensch's Will, which has been filed with the court.

11. Florence P. Mensch was not married at the time of her death.

12. Respondent, Sterling Raymond Mensch, III was named as Agent under a Power of Attorney for Florence P. Mensch in that certain Durable Power of Attorney recorded in the Greenville County Register of Deeds Office on May 18, 2010 in Deed Book 2372 at Page 3133.

13. Pursuant to § 62-8-114 of the South Carolina Power of Attorney Act, Petitioners requested Respondent, Sterling Raymond Mensch III, to provide an accounting of receipts, disbursements and transactions conducted on behalf of the Principal, Florence Petrak Mensch, during his time serving as Agent under a Power of Attorney for Principal, and such provides that the Agent under the Power of Attorney must comply with the request within thirty (30) days from the date of the request which was made on March 22, 2019.

14. Respondent, Sterling Raymond Mensch, III, has failed to comply, or respond with a reason why he needed more time to comply, and therefore has violated § 62-8-114 of the South Carolina Power of Attorney Act.

15. After numerous requests by Petitioners for Respondent to communicate with Petitioners and provide information relating to the Decedent's assets, Respondent has continued to ignore such requests and to withhold information from Petitioners.

16. Petitioner, Shauna Waddell, and Respondent set up an appointment with the Probate Court, but Respondent did not attend such nor inform the Probate Court nor Shauna Waddell that he was not going to attend.

17. Petitioner, Shauna Waddell, has attempted to set up at least three meetings with Respondent to review the assets of the Estate and Respondent has cancelled each time. At a fourth meeting scheduled by Shauna Waddell, Petitioner showed up to the meeting, but did not bring any of the requested records, and only vaguely described the value of the accounts without providing any specific information.

18. When asked by Shauna Waddell about the status of the Estate, Respondent indicated that he was waiting on his mother's income tax return to be prepared. A few months later, when asked again about the status of the Estate, Respondent indicated that he was dropping everything off at the attorney's office so that the attorney could administer the Estate. When Shauna Waddell called David Merline's office, which is the attorney that Respondent claimed to be using, David Merline told Shauna Waddell that he had not heard from Respondent. Subsequently, when Shauna Waddell asked Respondent about why David Merline had not heard from him, Respondent indicated that the secretary at Merline & Meachem's office must have lost the documents.

19. During Respondent's time as Agent under the Power of Attorney for Decedent, Decedent had several liens filed against her for failure to pay homeowners association dues and failure to pay income taxes. A Lis Pendens and Complaint was filed by the homeowner's association against Decedent in the Greenville County Court of Common Pleas for failure to pay homeowners association dues, and only after such was filed did Respondent pay the homeowners association dues.

20. Upon information and belief, the value of Decedent's Estate should be substantially higher than the amount listed on the inventory for the probate assets, and the non-probate asset values should also be higher than Respondent has indicated.

21. Upon an accounting of the assets of the Estate, along with an accounting of the receipts and disbursements by Respondent during his time as Agent under the Power of Attorney for Florence Petrak Mensch, Petitioners believe that such accounting will prove some assets were misappropriated by Respondent in violation of the South Carolina Power of Attorney Act and other applicable South Carolina laws.

22. Respondent has also failed to recover over 18 parcels of unclaimed property in Decedent's name after being informed of such by Petitioner, Shauna M. Waddell, on multiple occasions.

FOR A FIRST CAUSE OF ACTION
(FAILURE TO COMPLY WITH § 62-8-114 OF THE SOUTH CAROLINA POWER OF ATTORNEY ACT)

23. All allegations set forth above not inconsistent herewith are hereby realleged as if fully set forth in this cause of action.

24. Petitioners are Successors in Interest to Decedent's Estate as named beneficiaries in Decedent's Will which has been filed with the Court and have been named as beneficiaries on

certain non-probate assets.

25. Respondent, Sterling Raymond Mensch, III, was appointed Agent under the Power of Attorney for Florence R. Mensch in that certain Durable Power of Attorney recorded in the Greenville County Register of Deeds Office on May 18, 2010 in Deed Book 2372 at Page 3133, and such is attached hereto as Exhibit A.

26. Pursuant to § 62-8-114 of the South Carolina Power of Attorney Act, Petitioners requested Respondent, Sterling Raymond Mensch III, for an accounting of receipts, disbursements and transactions conducted on behalf of the Principal, Florence Petrak Mensch, during his time serving as Agent under a Power of Attorney for Principal, and such provides that the Agent under the Power of Attorney must comply with the request within thirty (30) days from the date of the request which was made on March 22, 2019.

27. Respondent, Sterling Raymond Mensch, III, has failed to comply, or respond with a reason why he needed more time to comply, and therefore has violated § 62-8-114 of the South Carolina Power of Attorney Act.

28. Petitioners request the Court issue an Order demanding Sterling Raymond Mensch, III, to comply with the Statute and to provide an accounting of receipts, disbursements and transactions conducted on behalf of the Principal, Florence Petrak Mensch, during Sterling Raymond Mensch, III's time serving as Agent under the Power of Attorney since May 17, 2010.

FOR A SECOND CAUSE OF ACTION
(ACCOUNTING)

29. All allegations set forth above not inconsistent herewith are hereby realleged as if fully set forth in this cause of action.

30. Decedent's Will explicitly states in Item 12 on Page 9 and 10:

"My Personal Representative and Trustee shall keep all records and books of account and shall prepare inventories and accountings which must be filed with the Probate Court, and shall give the beneficiaries a statement of their receipts and disbursements and investments at least annually."

31. Decedent's Will further states in Item 12 on Page 10:

"At all reasonable times my Personal Representative and Trustee shall make all records, books of account, inventories and related papers and documents available for inspection by the beneficiaries hereunder or their authorized representatives."

32. Despite several demands by Petitioners, Respondent has failed to provide or otherwise make available all records, books of account, inventories and related papers and documents.

33. Petitioners have filed a demand for non-probate property inventory with the Probate Court and Respondent has not provided such as of the filing of this Petition.

34. Petitioners are entitled to and seek an accounting of all of the probate and non-probate assets of the Estate, and Petitioners request an Order from the Court demanding that Respondent make all records, books of account, inventories and related papers and documents available for inspection by the Petitioners or their authorized representatives.

FOR A THIRD CAUSE OF ACTION
(REMOVAL OF PERSONAL REPRESENTATIVE)

35. All allegations set forth above not inconsistent herewith are hereby realleged as if fully set forth in this cause of action.

36. Respondent has ignored requests for an accounting of receipts and disbursements during his time as Power of Attorney despite the requirement to provide such under § 62-8-114 of the South Carolina Power of Attorney Act.

37. As Personal Representative of the Estate of Florence Petrak Mensch, Respondent has a fiduciary duty to the beneficiaries of the Estate and has breached that duty by failing to comply with the requests for an accounting of receipts and disbursements made by him as Agent under the Power of Attorney in accordance with § 62-8-114 of the South Carolina Power of Attorney Act.

38. Decedent's Will explicitly states in Item 12 on Page 9 and 10:

> "My Personal Representative and Trustee shall keep all records and books of account and shall prepare inventories and accountings which must be filed with the Probate Court, and shall give the beneficiaries a statement of their receipts and disbursements and investments at least annually."

39. Decedent's Will further states in Item 12 on Page 10:

> "At all reasonable times my Personal Representative and Trustee shall make all records, books of account, inventories and related papers and documents available for inspection by the beneficiaries hereunder or their authorized representatives."

40. Despite numerous requests by Petitioners for Respondent to communicate with Petitioners and provide information relating to the Decedent's assets, Respondent continues to ignore such requests and to withhold information from Petitioners. Petitioner, Shauna Waddell, and Respondent set up an appointment with the Greenville County Probate Court, and Decedent did not attend such and did not inform the Probate Court nor Shauna Waddell that he was not going to attend.

41. Petitioner, Shauna Waddell, has attempted to set up at least three meetings with Respondent to review the assets of the Estate and Respondent has cancelled each time. At a fourth meeting scheduled by Shauna Waddell, Petitioner showed up to the meeting, but did not bring any

of the requested records, and only vaguely described the value of the accounts without providing any specific information.

42. When asked by Shauna Waddell about the status of the Estate, Respondent indicated that he was waiting on his mother's income tax return to be prepared. A few months later, when asked again about the status of the Estate, Respondent indicated that he was dropping everything off at the attorney's office so that the attorney could administer the Estate. When Shauna Waddell called David Merline's office, which is the attorney that Respondent claimed to be using, David Merline told Shauna Waddell that he had not heard from Respondent. Subsequently, when Shauna Waddell asked Respondent about why David Merline had not heard from him, Respondent indicated that the secretary at Merline & Meachem's office must have lost the documents.

43. Respondent has listed the property at 512 New Tarleton Way, Greer, SC 29650 on the inventory for the Estate at the tax assessment value despite being told by the probate court clerk that tax assessment valuations are usually below market value. Respondent ignored the suggestion by the probate court to have a realtor appraise the property to reduce any potential taxes that may be incurred if the property is not valued correctly and later sells at a higher price. Respondent indicated to Shauna Waddell that he would have an appraisal done, but instead just listed the property on the probate inventory at the tax value, despite the potential negative tax implications.

44. Upon information and belief, the value of Decedent's Estate should be substantially higher than the amount listed on the inventory for the probate assets, and the non-probate assets values should be higher than Respondent has indicated.

45. Upon an accounting of the assets of the Estate, and of the receipts and disbursements by Respondent during his time as Agent under the Power of Attorney for Florence Petrak Mensch, Petitioners believe that such accounting will prove that some assets were misappropriated by Respondent in violation of the South Carolina Power of Attorney Act and other applicable laws of South Carolina.

46. Respondent will be required to account to the Estate for his acts and doings as Agent under the Power of Attorney for Decedent, and this presents a conflict of interest, and therefore he should be removed as Personal Representative.

47. As Personal Representative of the Estate of Florence Petrak Mensch, Respondent has a fiduciary duty to the beneficiaries of the Estate and has breached that duty by failing to comply with the requests for an accounting of receipts and disbursements made by him as Agent under the Power of Attorney in accordance with § 62-8-114 of the South Carolina Power of Attorney Act, along with his failure to properly respond and make records available to the beneficiaries of the Estate.

48. Petitioners request the Court remove Sterling Raymond Mensch, III, as Personal Representative and terminate his appointment immediately pursuant to § 62-3-611 of the South Carolina Probate Code.

FOR A FOURTH CAUSE OF ACTION
(APPOINTMENT OF PERSONAL REPRESENTATIVE)

49. The allegations contained in the preceding paragraphs are re-alleged and incorporated herein by reference as if fully set forth herein.

50. Shauna M. Waddell is the daughter of Florence Petrak Mensch and named as successor Personal Representative under the Will of Florence Petrak Mensch which has been filed with the Court.

51. Petitioners have filed the Application for Appointment contemporaneously herewith requesting the Court to appoint Shauna M. Waddell as Personal Representative of the Estate of Florence Petrak Mensch, which is attached hereto and incorporated herein.

52. Upon the termination of Sterling Raymond Mensch's appointment, Petitioners request the court to appoint Shauna M. Waddell as Personal Representative of the Estate of Florence Petrak Mensch pursuant to § 62-3-613 of the South Carolina Probate Code.

FOR A FIFTH CAUSE OF ACTION
(PETITION TO REVIEW AGENT'S CONDUCT UNDER POWER OF ATTORNEY AND GRANT APPROPRIATE RELIEF PURSUANT TO § 62-8-116 AND § 62-8-117 OF THE SOUTH CAROLINA POWER OF ATTORNEY ACT)

53. That all allegations of this Petition are reaffirmed as fully as if repeated herein.

54. Petitioners, as beneficiaries named in Decedent's Will, request the Court to construe the Power of Attorney and review Respondent, Sterling Raymond Mensch's conduct during his time as Agent under the Power of Attorney for Decedent.

55. Decedent had several liens filed against her for failure to pay homeowners association dues and income taxes during Respondent's time as Agent under a Power of Attorney for Decedent. A Lis Pendens and Complaint was filed by the homeowner's association against Decedent in the Greenville County Court of Common Pleas for failure to pay homeowners association dues, and only after such was filed did Respondent pay the homeowners association dues.

56. Decedent's estate is valued substantially lower than Petitioners expected, and upon an accounting of the receipt and disbursements, Petitioners have reason to believe that such accounting will prove some assets were misappropriated by Respondent in violation of the South Carolina Power of Attorney Act.

57. Respondent has failed to recover over 18 parcels of unclaimed property in Decedent's name after being informed of such by Respondent, Shauna M. Waddell, multiple times in 2017 and 2018.

58. Petitioner requests the Court order Sterling Raymond Mensch, III, to restore the value of the principal's property to what it would have been had the violation(s) not occurred pursuant to § 62-8-117 of the South Carolina Probate Code, including any interest and appreciation that should have accrued from the time of the violation.

WHEREFORE, the Petitioners pray as follows:

1) For an Order compelling Respondent, Sterling Raymond Mensch, III, to provide an itemized accounting of all receipts and disbursements made as Agent under Power of Attorney to or from funds or accounts owned by Florence Petrak Mensch since May of 2010, as he is required to under § 62-8-114 of the South Carolina Power of Attorney Act;

2) For an Order compelling an accounting of all of the probate and non-probate assets of the Estate, and an order from the Court demanding that Respondent make all records, books of account, inventories and related papers and documents available for inspection by the Petitioners or their authorized representatives;

3) For the Court to construe the Power of Attorney of Florence Petrak Mensch and review the Agent's conduct, and grant appropriate relief pursuant to § 62-8-116 and as provided in § 62-8-117 to restore the value of the principal's property to what it would have been had the violation(s) not occurred;

4) For an Order removing Sterling Raymond Mensch, III as Personal Representative of the Estate of Florence Petrak Mensch;

5) For an Order appointing Shauna M. Waddell as Personal Representative of the Estate of Florence Petrak Mensch;

6) That the Court order assets previously held by Sterling Raymond Mensch, III, as Personal Representative of the Estate of Florence Petrak Mensch be transferred to Shauna M. Waddell as Personal Representative of the Estate of Florence Petrak Mensch;

7) A judgment for damages, including all actual, consequential and punitive damages;

8) The costs of this action;

9) Reasonable attorney's fees; and

9) For such other and further relief as the Court deems just and proper.

[SIGNATURE APPEARS ON THE FOLLOWING PAGE]

BROWN, MASSEY, EVANS,
MCLEOD & HAYNSWORTH, LLC

Tyler E. McLeod (S.C. Bar # 101309)
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tmcleod@bmemhlaw.com
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Attorneys for Petitioners,
Shauna M. Waddell and John R. Mensch

May 15, 2019

Exhibit A

2010033214 P/ATTY 9 PGS
Book:DE 2372 Page:3133-3141
May 18, 2010 01:53:27 PM
Rec:$20.00 Cnty Tax:$0 00 State Tax:$0.00
FILED IN GREENVILLE COUNTY,SC

STATE OF SOUTH CAROLINA)
) DURABLE POWER OF ATTORNEY
COUNTY OF GREENVILLE)

KNOW ALL MEN BY THESE PRESENTS, that I, the undersigned, FLORENCE P. MENSCH, a legal resident of the County of Greenville, State of South Carolina, hereby revoke any and all other powers of attorney heretofore made by me, and by these presents do make, constitute and appoint my son, STERLING R. MENSCH, III, as my true and lawful attorney in fact to set in, manage, and conduct all my estate and all my affairs, and for that purpose for me and in my name, place and stead, and for my use and benefit, and as my act and deed, to do and execute, or to concur with persons jointly interested with myself therein in the doing or executing of, all or any of the following acts, deeds, and things, all of which shall be done in a fiduciary capacity:

(1) To buy, receive, lease, accept or otherwise acquire, sell, give, convey, transfer, mortgage, hypothecate, pledge, borrow, quitclaim, or otherwise encumber or dispose of, or to contract or agree for the acquisition, disposal, or encumbrance of any property, real, personal, tangible or intangible, upon such terms, considerations and conditions as my said attorney in fact shall think proper;

(2) To take, hold, possess, invest, lease, or let, or otherwise manage any or all of my property or any interest therein; to eject, remove, or relieve tenants or other persons from, and recover possession of, such property by all lawful means; and to maintain, protect, preserve, insure, remove, store, transport, repair, build on, raze, rebuild, alter, modify or improve the same or any part thereof;

(3) To make, do, and transact all and every kind of business of whatever nature, including the receipt, recovery, collection, payment, compromise, settlement, and adjustment of all accounts, legacies, bequests, interests, dividends, annuities, social security payments, veteran's administration benefits, demands, debts, taxes and obligations, or any rebate, refund or discount thereon, which may now or hereafter be due, owing or payable by me or to me, and to make disclaimers on my behalf for any inheritance or any other reason;

(4) To make, endorse, negotiate, accept, receive, sign, seal, execute, acknowledge, and deliver deeds, contracts of sale, assignments, agreements, certificates, hypothecations, checks, notes, vouchers, receipts, and such other instruments in writing of whatever kind and nature as may be necessary, convenient or proper in the premises;

(5) To deposit and withdraw for the purposes hereof, in either my said attorney's name, or my name or jointly in both names, or in my name jointly with another person, in or from any banking or savings institution, money market fund or other investment, any funds, negotiable papers, or moneys which may come into my said attorney's hands as such attorney in fact, or which I now or hereafter may have on deposit, or be entitled to;

(6) To institute, prosecute, protest, defend, compromise, arbitrate, and dispose of legal, equitable, or administrative hearings, actions, claims for refund, assessment notices or tax deficiencies, suits, attachments, arrests, distresses or other proceedings, or otherwise engage in litigation in connection with the premises;

(7) To act as my attorney in fact or proxy in respect to any stocks, shares, bonds, warrants, rights, or other investments, rights, or interests, that I may now or hereafter hold;

(8) To receive, endorse, and collect checks payable to the order of the undersigned drawn on any firm, person, corporation, limited liability company, partnership, or association, or on the treasurer or other fiscal officer of the United States, or any sovereign state or authority, or any political subdivision or instrumentality thereof;

(9) To make, verify and file federal, state and/or other tax returns of all kinds, claims for refund, requests for extensions of time, make petitions to the tax court or other courts regarding tax matters and/or any and all other tax related documents, including receipts, offers, waivers, consents, powers of attorney as needed for federal and state tax purposes, closing agreements of all kinds and for all periods before all officers of the Internal Revenue Service and/or any other taxing authority, including receipt of confidential information, and to cause me to be represented in any and all such proceedings;

(10) To transfer any of my assets to my children and my lineal descendants by gift, including to any such person serving as attorney in fact, or to any trust funds of which said persons are beneficiaries, revocable or irrevocable, funded or unfunded; provided, however, that my attorney in fact shall not be authorized to make any gift which incurs federal or state gift tax or to make any gift to one person in any calendar year which exceeds the amount of the federal annual gift tax exclusion under Section 2503(b) of the Internal Revenue Code, as then in effect at the time of the gift;

(11) Subject to the limitations set forth in Paragraph (10) above, to establish trust funds, revocable or irrevocable, funded or unfunded, for the benefit of me, my children and my lineal descendants, and to transfer any of my assets to such trusts;

(12) To have access at any time or times to any safe deposit box rented by me or jointly with another, wherever located, to inventory same, and to remove anything from said safe deposit box, including, but not limited to, 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 attorney in fact to exercise this power. This power is exercisable without: (a) any contact with or notice to me and/or any interested persons to my estate; (b) any prior court order or authorization; (c) any knowledge of or any prior determination as to my mental or physical capacity or incapacity; (d) any knowledge as to my whereabouts regardless of whether my whereabouts are known or unknown; or (e) any inquiry;

(13) To purchase for my benefit and in my behalf United States Government bonds redeemable at par in payment of United States estate taxes imposed at my death upon my estate; and

(14) To exercise or perform any act, power, duty, right, or obligation whatsoever that I, as principal, now have, or may hereafter acquire the legal right, power, or capacity to exercise or perform, in connection with, arising from, or relating to any person, item, transaction, thing, business, property, real, personal, tangible or intangible, or matter whatsoever.

This instrument is to be construed and interpreted as a general power of attorney. The enumeration of specific items, rights, acts, or powers herein is not intended to, nor does it limit or restrict, and is not to be construed or interpreted as limiting or restricting, the general powers herein granted to my said attorney in fact.

No person who may act in reliance upon the representations of my attorney in fact for the scope of authority granted to the attorney in fact shall incur any liability as to me or to my estate as a result of permitting the attorney in fact to exercise this authority, nor is any such person who deals with my attorney in fact responsible to determine or ensure the proper application of funds or property.

This power of attorney shall remain in full force and effect until I have revoked it by written instrument. This power of attorney may be amended by me at any time and from time to time by written instrument. Any person named herein as attorney in fact may be removed by written instrument executed by me. If this power of attorney has been recorded in the public records of the County aforesaid, then any revocation, amendment, or removal shall also be recorded in the public records of the County aforesaid. All references to attorney in fact shall include the plural as well as the singular, and the feminine, masculine and neuter genders.

Notwithstanding any provisions herein to the contrary, my attorney in fact shall not satisfy the legal obligations of the attorney in fact out of any property subject to this power of attorney. Except to the extent this power of attorney specifically authorizes gifts to my attorney in fact, my attorney in fact may not exercise this power in favor of the attorney, the attorney's estate, the attorney's creditors, or the creditors of the attorney's estate.

Notwithstanding any provision herein to the contrary, my attorney in fact shall have no power or authority whatever with respect to (a) any policy of insurance owned by me on the life of my attorney in fact, and (b) any trust created by my attorney in fact as to which I am a trustee.

Notwithstanding any provision herein to the contrary, this power of attorney shall not revoke, or be deemed to revoke, any health care powers of attorney heretofore made by me.

By this power of attorney I am giving and granting unto my said attorney in fact full power and authority to do and perform all and every act, deed, matter, and thing whatsoever in and about my estate, property, and affairs as fully and effectually to all intents and purposes as I might or could do in my own proper person if personally present, the above specifically enumerated powers herein being in aid and exemplification of the full, complete and general powers herein granted and not in limitation or definition thereof; and hereby ratifying all that my said attorney in fact shall lawfully do or cause to be done by virtue of these presents.

And I hereby declare that any act or thing lawfully done hereunder by my said attorney in fact shall be binding on myself, my heirs, my legal and personal representatives, and assigns, whether the same shall have been done before or after my death, or other revocation of this instrument, unless and until reliable intelligence or notice thereof shall have been received by my said attorney in fact.

This power of attorney shall not be affected by physical disability or mental incompetence of the principal which renders the principal incapable of managing his own estate. It is my intention that the power and authority conferred herein upon my attorney in fact shall be exercisable notwithstanding my physical disability or mental incompetence. All acts done by my attorney in fact pursuant to this power during any period of disability or mental incompetence shall have the same effect and inure to the benefit of and bind me, and my heirs, devisees, legatees and personal representatives as if I were mentally competent and not disabled.

It is my express intention that after the onset of mental disability my attorney in fact shall not be required to file any inventory or accounting with the Probate Court, but my attorney in fact shall keep accurate books and records in order to account to me or my heirs or personal representatives. I direct that no surety bond or other security shall be required to be posted in any jurisdiction by my attorney in fact or any successor before or after my mental disability.

In the event of the resignation, death, removal, or inability to act of the original attorney in fact named herein, then I hereby make, constitute and appoint my daughter, SHAUNA M. WADDELL, as my successor attorney in fact. In the event of the resignation, death, removal, or inability to act of SHAUNA M. WADDELL, then I hereby make, constitute and appoint my son, JOHN R. MENSCH, as my successor attorney in fact. Any attorney in fact at any time serving hereunder may resign at any time by written notice to me. Unless otherwise provided for herein, in the event of my mental incompetence any attorney in fact resigning hereunder may appoint a successor attorney in fact. Any successor attorney in fact shall be vested with all the duties, rights, titles and powers, whether discretionary or otherwise conferred herein, as if originally named as attorney in fact. No successor attorney in fact shall be liable or responsible in any way for any acts or defaults of any predecessor attorney in fact, but such successor attorney in fact shall be liable only for his or her own acts and defaults with respect to property actually received by him or her as such attorney in fact. The successor attorney in fact may accept the accounting rendered and the assets and property delivered to him or her by the predecessor attorney in fact as a full and complete discharge of the predecessor attorney in fact, and shall incur no liability or responsibility by reason thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 17 day of May, 2010, and I direct that photographic copies of this Durable Power of Attorney can be made which shall have the same force and effect as an original.

FPM Florence P. Mensch
FLORENCE P. MENSCH

SIGNED, SEALED, PUBLISHED and DECLARED by the above-named FLORENCE P. MENSCH as and for her Durable Power of Attorney, in the sight and presence of us, who, at her request, and in her sight and presence, and in the sight and presence of each other, have hereunto signed our names as attesting witnesses.

Sandra K Shumaker of 105 Yorktown Ct
Simpsonville, SC

Paul A Merz of 56 Round Pond Rd
Greenville SC

STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF GREENVILLE)

PERSONALLY appeared before me the undersigned witness and made oath that ( )he saw the within named FLORENCE P. MENSCH sign, seal and as her act and deed, deliver the within written Durable Power of Attorney, and that ( )he with the other witness subscribed above witnessed the execution thereof.

Witness

SWORN to before me this 17th
day of May, 20 10.
Notary Public for South Carolina
My Commission Expires: 8/16/2010

FILED FOR RECORD IN GREENVILLE COUNTY,SC ROD
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May 18, 2010 01:53:27 PM

THE STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)))	IN THE PROBATE COURT C.A. No.: 2018-ES-23-02854

IN THE MATTER OF:
Estate of Florence Petrak Mensch

John R. Mensch and Shauna M. Waddell

Petitioners,

-vs-

Sterling Raymond Mensch, III, Individually As Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrak Mensch

Respondent.

FILED

JUN 24 2019

GREENVILLE COUNTY
PROBATE COURT

ANSWER

The Respondent, answering the Petition of the Petitioners, would respectfully show unto this Court:

AzR #1

AS TO PARTIES AND JURISDICTION AND GENERAL ALLEGATIONS

1. Each allegation of the Petition not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

2. The allegations of paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the Petition are admitted.

3. The Respondent lacks sufficient information or knowledge with which to form a belief to the allegations of Paragraph 9 of the Petition and therefore denies same and demands strict proof thereof.

4. The allegations of paragraphs 10, 11, 12 and 13 of the Petition are admitted.

5. The allegations of paragraph 14, 15 and 16 of the Petition, are specifically denied and strict proof demanded thereof.

5. As to the allegations of paragraph 17 of the Petition, the Respondent would admit that he and his sister attempted to meet at various occasion. The remaining allegations of Paragraph 17 of the Petition are strictly denied strict proof demanded thereof.

6. As to the allegations of paragraph 18 of the Petition, the Respondent would specifically deny and demand strict proof of the allegations regarding his mother's tax returns and those relating to his indicating that he was , "... dropping everything off at the attorney's office so that the attorney could administer the estate.". Respondent lacks sufficient information or knowledge with which to form a belief as to the remaining allegations of Paragraph 18 of the Petition and therefore denies same and demands strict proof thereof.

AKR #2

7. The allegations of paragraph 19, 20, 21 and 22 of the Petition, are specifically denied and strict proof demanded thereof.

AS TO THE FIRST CAUSE OF ACTION
(FAILURE TO COMPLY WITH §62-8-114 SOUTH CAROLINA POWER OF ATTORNEY ACT)

8. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

9. Each allegation of the First Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

10. The allegations of paragraph 23 of the Petition require no response.

11. As to the allegations of paragraph 24 of the Petition, the Respondent would admit only that the Petitioners are Successors in Interest to the Decedent's Estate as named Beneficiaries in Decedent's will. Respondent lacks sufficient information or knowledge with which to form a belief as to the remaining allegations of Paragraph 24 of the Petition and therefore denies same and demands strict proof thereof.

12. The allegations of paragraphs 25 and 26 of the Petition are admitted.

13. As to the allegations of paragraph 27 of the Petition, the Respondent would admit that he has not provided all information requested, but denies that he failed to comply or respond with a reason why he needed more time. The remaining allegations of paragraph 27 of the Petition are specifically denied and strict proof demanded thereof.

14. As to the allegations of paragraph 28 of the Petition, the Respondent recognizes the Petitioners right to an accounting and fully intends to provide same.

<u>AS TO THE SECOND CAUSE OF ACTION</u>
(ACCOUNTING)

15. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

AZR #3

16. Each allegation of the Second Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

17. The allegations of paragraph 29 of the Petition require no response.

18. The allegations of paragraphs 30 and 31 of the Petition are admitted.

19. As to the allegations of paragraphs 32, 33 and 34 of the Petition the Respondent admists that he has not provided all information requested by Petitioners and fully intends to provide a full and complete accounting of his activities.

<u>AS TO THE THIRD CAUSE OF ACTION</u>
<u>(REMOVAL OF PERSONAL REPRESENTATIVE)</u>

<u>FOR A FIRST DEFENSE</u>

20. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

21. Each allegation of the Third Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

22. The allegations of paragraph 35 of the Petition require no response.

23. The allegations of paragraphs 36 and 37 of the Petition are specifically denied and strict proof demanded thereof.

24. The allegations of paragraphs 38 and 39 of the Petition are admitted.

25. The allegations of paragraphs 40 and 41 of the Petition are specifically denied and strict proof demanded thereof.

26. As to the allegations of paragraph 42 of the Petition, the Respondent would specifically deny and demand strict proof of the allegations regarding his mother's tax returns and those relating to his indicating that he was , "... dropping everything off at the attorney's office so that the attorney could administer the estate.". Respondent lacks sufficient information or knowledge with which to form a belief as to the remaining allegations of Paragraph 42 of the Petition and therefore denies same and demands strict proof thereof.

AKP #4

27. The allegations of paragraph 43 of the Petition are admitted.

28. Respondent lacks sufficient information or knowledge with which to form a belief as to the allegations of Paragraph 44 of the Petition and therefore denies same and demands strict proof thereof.

29. The allegations of paragraph 45, 46, 47 and 48 of the Petition, are specifically denied and strict proof demanded thereof.

FOR A SECOND DEFENSE
(Rule 12(b)(6) - Failure to State a Cause of Action)

30. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

31. The Third Cause of Action of the Petition does not contain allegations sufficient to state a cause of action against the Respondent and should be dismissed under Rule 12(b)(6), *South Carolina Rules of Civil Procedure.*

AS TO THE FOURTH CAUSE OF ACTION
(APPOINTMENT OF PERSONAL REPRESENTATIVE)

FOR A FIRST DEFENSE

32. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

33 Each allegation of the Fourth Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

34. The allegations of paragraph 49 of the Petition require no response.

35. The allegations of paragraph 50 of the Petition are admitted.

36. The allegations of paragraphs 51 of the Petition are specifically denied and strict proof demanded thereof.

MLR #5

FOR A SECOND DEFENSE
(Rule 12(b)(6) - Failure to State a Cause of Action)

37. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

38. The Fourth Cause of Action of Petition does not contain allegations sufficient to state a cause of action against the Respondent and should be dismissed under Rule 12(b)(6), *South Carolina Rules of Civil Procedure*.

AS TO THE FIFTH CAUSE OF ACTION
(PETITION TO REVIEW AGENTS CONDUCT UNDER POWER OF ATTORNEY AND GRANT APPROPRIATE RELIEF PURSUANT TO §62-8-116 AND §62-8-117 OF THE SOUTH CAROLINA POWER OF ATTORNEY ACT)

FOR A FIRST DEFENSE

39. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

40. Each allegation of the Fifth Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

41. The allegations of paragraphs 55, 56, 57 and 58 of the Petition are specifically denied and strict proof demanded thereof.

FOR A SECOND DEFENSE
(Rule 12(b)(6) - Failure to State a Cause of Action)

#6

15. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

16. The Fifth Cause of Action of Petition does not contain allegations sufficient to state a cause of action against the Respondent and should be dismissed under Rule 12(b)(6), *South Carolina Rules of Civil Procedure*.

WHEREFORE, having fully answered the Petition, the Respondent prays that the Petition be dismissed with prejudice, with costs assessed against the Petitioners and for such other and further relief as to the Court may seem just, equitable and proper.

Respectfully Submitted,

ASHMORE, LEAPHART & RABON, LLC

By: ______________________
Ben G. Leaphart
(SC Bar#3231)
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Greenville, South Carolina
June 24, 2019

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE MATTER OF:
Estate of Florence Petrak Mensch

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch,

Petitioners,

vs.

Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch,

Respondent.

IN THE PROBATE COURT
THIRTEENTH JUDICIAL CIRCUIT
CASE NO. 2018ES2302854

FIRST AMENDED SUMMONS

TO THE RESPONDENT ABOVE NAMED,

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Petition in the above entitled action, a copy of which is hereby served upon you (and which has been filed in the Office of the Probate Court), and to serve a copy of your Answer upon the subscriber at their office located at 106 Williams Street, Greenville, South Carolina, 29601, within thirty (30) days after the date of such service, exclusive of the day of service; and, if you fail to answer the said Petition within such time, the Petitioner will apply to the Court for the relief demanded in the Petition.

BROWN, MASSEY, EVANS, MCLEOD & HAYNSWORTH, LLC

Tyler McLeod

Tyler E. McLeod (S.C. Bar # 101309)
R. David Massey (S.C. Bar #3681)
106 Williams St.
Greenville, SC 29602
(864) - 271-7424
tmcleod@bmemhlaw.com
Attorneys for Petitioners, Shauna M. Waddell and John R. Mensch

May 12, 2020

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE MATTER OF:
Estate of Florence Petrak Mensch

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch,

Petitioners,

vs.

Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch,

Respondent.

IN THE PROBATE COURT
THIRTEENTH JUDICIAL CIRCUIT
CASE NO. 2018ES2302854

FIRST AMENDED PETITION

The Petitioners, John R. Mensch and Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch, complaining of the above-named Respondent, Sterling R. Mensch III, individually, in his former capacity as Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch, would respectfully show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Petitioner, John R. Mensch, is a citizen and resident of West Linn, Oregon.

2. Petitioner, Shauna M. Waddell, is a citizen and resident of Easley, South Carolina.

3. Respondent, Sterling R. Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under a Power of Attorney for Florence Petrak Mensch, is a citizen and resident of Greer, South Carolina.

4. Florence Petrak Mensch died on April 26, 2018 in Greenville County, State of South Carolina ("Decedent").

5. Petitioners are adult descendants, successors in interest and named as beneficiaries in Decedent's Will, which is on file with the Court, and named as beneficiaries of certain non-probate assets owned by Decedent.
6. Respondent was appointed Personal Representative of the Estate of Florence Petrak Mensch by this Court on January 23, 2019.
7. Respondent was removed as Personal Representative of the Estate of Florence Petrak Mensch by Order of this Court on December 4, 2019.
8. Respondent, Sterling Raymond Mensch, III, was named as Agent under a Power of Attorney for Florence Mensch in that certain Durable Power of Attorney recorded in the Greenville County Register of Deeds Office on May 18, 2010 in Deed Book 2372 at Page 3133.
9. That this Court has personal jurisdiction over the parties hereto.
10. This Court has subject matter jurisdiction over the causes of action set forth herein.

GENERAL ALLEGATIONS

11. Sterling Raymond Mensch, III, John R. Mensch and Shauna M. Waddell are the biological children of Florence P. Mensch and named as equal beneficiaries in Florence P. Mensch's Will, which has been filed with the court.
12. Florence P. Mensch was not married at the time of her death.
13. Respondent, Sterling Raymond Mensch, III was named as Agent under a Power of Attorney for Florence P. Mensch in that certain Durable Power of Attorney recorded in the Greenville County Register of Deeds Office on May 18, 2010 in Deed Book 2372 at Page 3133.
14. After numerous requests by Petitioners for Respondent to communicate with Petitioners and provide information relating to the Decedent's assets, Respondent continued to ignore such requests and to withhold information from Petitioners.

15. Several months after Florence Mensch's death in 2018, when Respondent had failed to file the Application for Probate, Petitioner, Shauna Waddell, attempted to set up at least three meetings with Respondent to review the assets of the Estate and Respondent cancelled each time. At a fourth meeting scheduled by Shauna Waddell at the house owned by Florence Mensch which Respondent did and still does reside, Respondent attended the meeting but would not provide any of the requested records, and only vaguely described Florence Mensch's accounts without providing any specific information and failed to disclose the transfers he had made nor the fact that he had not filed tax returns for 2017 or 2018.

16. When asked by Shauna Waddell about the status of the Estate, Respondent indicated that he was waiting on his mother's income tax return to be prepared. A few months later, when asked again about the status of the Estate, Respondent indicated that he was dropping everything off at the attorney's office so that the attorney could administer the Estate. When Shauna Waddell called David Merline's office, which is the attorney that Respondent claimed to be using, David Merline told Shauna Waddell that he had not heard from Respondent. Subsequently, when Shauna Waddell asked Respondent about why David Merline had not heard from him, Respondent indicated that the secretary at Merline & Meachem's office must have lost the documents.

17. Pursuant to § 62-8-114 of the South Carolina Power of Attorney Act, Petitioners requested Respondent, Sterling Raymond Mensch III, to provide an accounting of receipts, disbursements and transactions conducted on behalf of the Principal, Florence Petrak Mensch, during his time serving as Agent under a Power of Attorney for Principal, and such provides that the Agent under the Power of Attorney must comply with the request within thirty (30) days from the date of the request which was made on March 22, 2019. Respondent, Sterling

Raymond Mensch, III, failed to comply, or respond with a reason why he needed more time to comply, and therefore has violated § 62-8-114 of the South Carolina Power of Attorney Act.

18. Subsequent to the filing of Petitioner's Petition, upon motion by Petitioners for partial summary judgment and to compel, the Court issued an Order on August 28, 2019, attached to this Petition as **Exhibit A**, which required Respondent to produce an accounting of all receipts, disbursements and transactions conducted on behalf of the principal from May 17, 2010 until Florence Petrak Mensch's death on April 26, 2018, along with supporting documentation for such, along with an accounting of all probate and non-probate assets.

19. At the hearing on August 21, 2019, Respondent's attorney brought a box of documents to the hearing which were given to the Respondent's attorney the day before the hearing. Such documents did not constitute a complete accounting of all receipts and transactions conducted by Respondent, nor did it satisfy the request for an accounting of the probate and non-probate assets of the Estate.

20. The Order dated August 28, 2019 warned Respondent that there would be severe consequences if he did not comply.

21. Respondent did not produce the information required after the August 28, 2019 Order was issued, and Petitioner's refiled its Motion for Partial Summary Judgment and Motion to Compel in accordance with the Order.

22. The Court issued an Order on December 4, 2019, attached to this Petition as **Exhibit B** which required Respondent to do the following:

    A. Provide a full accounting of the probate and non-probate assets of the Estate of Florence Mensch, along with all supporting documentation for such accounting, and subpoena any records which were not in Respondent's possession and control within ten (10) days from entry and execution of the Order; to comply with § 62-8-114 and provide a full accounting of receipts, disbursements and transactions conducted on behalf of the Principal, Florence Petrak Mensch, during Respondent's time as Agent under Power of Attorney for Florence Petrak Mensch within ten (10) days from entry and execution of the Order; and to comply with the Petitioners request for a non-probate property inventory in accordance with South Carolina Probate Code § 62-3-706 within ten (10) days from entry and execution of the Order.

B. Reimburse the Petitioners from Respondent's personal funds in the amount of Ten Thousand and 00/100 Dollars ($10,000.00) within thirty (30) days of entry and execution of this Order.

C. Comply with the instructions set-forth in the Order dated August 28, 2019 and produce the records and accountings required therein within ten (10) days from entry and execution of the August 28, 2019 Order, which include, but not are not limited to: the items that Respondent failed to produce as outlined in the Affidavits of John Mensch and Shauna Waddell which were filed with the Court.

D. Respondent was to identify the name and identity of the account holder and institution for any financial accounts that received funds from any account formerly owned by Florence Petrak Mensch (regardless of whether or not such account was owned jointly with another person), or accounts now owned by the Estate of Florence Petrak Mensch, including any funds which were transferred before or after her death, via online transfer, withdrawal of cash or check written to such person or account. Such accounts specifically include, but are not limited to: the account ending in 3259 and all accounts outlined in the Affidavits of John Mensch and Shauna Waddell which were filed with the Court. Respondent was ordered to identify any and all financial accounts in his name, or any other person or entity's name, which received funds from an account formerly owned by Florence Petrak Mensch, including but not limited to: the bank of America checking account ending in 7059 and the UBS retirement account ending in 1480 GE. Sterling Mensch was to provide the information outlined in this paragraph to Petitioners within five (5) days from entry and execution of this Order.

23. Respondent did not provide any information after the entry and execution of the December 4, 2019 Order, and therefore it follows that Respondent has still not accounted for, nor provided the necessary documentation required by the August 28, 2019 and December 4, 2019 Orders.

24. After over six months from the entry and execution of the December 4, 2019 Order, Respondent has not produced any further information and has continued to disregard the Court's Orders.

25. The December 4, 2019 Order removed Respondent as Personal Representative of the Estate of Florence Petrak Mensch.

26. The December 4, 2019 Order stated, "Due to the Respondent's willful failure to comply with the Order dated August 28, 2019, the clear risk of loss to the Estate of Florence Mensch and Respondent's violation of South Carolina Probate Code § 62-3-704 and § 62-3-706, Respondent Sterling Mensch is hereby removed as Personal Representative of the Estate of Florence Petrak Mensch."

27. The December 4, 2019 Order appointed Shauna Waddell as Personal Representative of the Estate of Florence Petrak Mensch.

28. Respondent's counsel filed a Motion to be relieved as counsel on February 11, 2020 which stated, "Sterling Raymond Mensch, III has been uncooperative, non communicative and nonresponsive to the undersigned's numerous requests for information to enable the undersigned to properly represent him. In particular, Sterling Raymond Mensch, III did not respond to numerous email requests for meetings necessary to properly prepare for the hearing held on November 20, 2019, and in fact failed to appear at such hearing. In addition the undersigned on December 9, 2019 emailed Mr. Mensch the order issued as a result of the hearing and to date the undersigned has had no response or other communication from Sterling Raymond Mensch, III."

29. After obtaining statements and other documentation from the various bank accounts owned by Florence Petrak Mensch, Petitioners discovered that Sterling Mensch had made hundreds of online transfers to himself and to his family which amounted to hundreds of thousands of dollars from Florence Mensch's accounts to his own accounts during his time as Power of Attorney for Florence Petrak Mensch.

30. Respondent withdrew a large amount of cash from Florence Mensch's bank account through various teller withdrawals.

31. Respondent transferred funds from the Bank of America checking account of Florence Petrak Mensch, account number ending in 7059 for online payments of the credit card bill for the Bank of America credit card owned by Sterling Mensch, to account ending in account number 7061.

32. The transfers made by Sterling Mensch were in violation of the South Carolina Power of Attorney Act, the Power of Attorney of Florence Petrak Mensch and other applicable statutory and common laws of South Carolina.

33. After further obtaining bank statements for accounts owned by Sterling Mensch, Petitioners discovered that Respondent, Sterling Mensch, had spent the money Respondent transferred from Florence Petrak Mensch to his Bank of America Checking Account ending in 3259 on extravagant dinners, events for his family, jewelry, extensive travel, furniture, wine and liquor and other expenditures for Respondent's own personal benefit.

34. Upon information and belief, Sterling Mensch added himself as a joint owner of Florence Mensch's Bank of America checking account ending in account number 7059.

35. In less than three and a half years, between December 23, 2014 and April 23, 2018, Sterling withdrew and/or transferred well over a million dollars from the IRA and investment accounts of Florence Mensch into her Bank of America checking account ending in 7059.

36. Florence Mensch's rent, meals and memory care expenses at managed care facilities for those three and a half years totaled only $215,410.39 and, between December 23, 2014 and April 23, 2018 she received approximately $116,254.55 in income from GE Pension and Social Security during that time.

37. On April 23, 2019, three days before Florence Petrak Mensch passed away while she was in hospice care and when it was obvious that she was very close to death, Respondent transferred $259,000.00 from Florence Mensch's UBS retirement account, which would have passed to Florence Mensch's three children under her Will, to Florence Mensch's Bank of America checking account ending in 7059. From the time of Florence Mensch's death until February

18, 2019, Respondent proceeded to transfer these funds from Florence Mensch's Bank of America checking account to his checking account ending in 3259.

38. Prior to the Court removing Respondent as Personal Representative of the Estate, Respondent listed Florence Petrak Mensch's UBS Retirement Account on the Probate Inventory with a value of $409,652.44, which is what it would had been had Respondent not transferred $259,000.00 from the UBS retirement account to Florence Petrak Mensch's checking account three days before Florence Mensch's death, which Sterling Mensch had made himself a joint owner of.

39. The transfers made by Respondent from the retirement accounts of Florence Mensch created unnecessary tax liability for Florence Petrak Mensch and her Estate.

40. Respondent failed to file tax returns for Florence Mensch for years 2017 and 2018, and the taxes which were due have now accrued failure to file penalties, failure to pay penalties and other penalties and interest which continue to accrue to Florence Mensch's Estate.

41. After Florence Petrak Mensch's death, Respondent failed to notify the Company paying Florence Mensch's pension that she had passed away, and Respondent continued to remove funds from Florence Petrak Mensch's checking account which included the pension funds. By the time Sterling Mensch was replaced as Personal Representative by Shauna Waddell, the balance in Florence Mensch's checking account was less than the Pension payments her account received after her death.

42. Respondent has subjected the Estate to potential liability for the pension funds due to Respondent not reporting Florence Mensch's death to the Company and taking the pension funds out of Florence Mensch's account for his own personal use.

43. While Respondent was Power of Attorney for Florence Mensch, he kept a large proportion of her assets in GE Stock, which lost a substantial amount of value, and even as it continued to decline he neglected to seek financial advice or to sell the stock, despite being advised that he should sell such by Shauna Waddell.

44. While Sterling Mensch was Agent under Power of Attorney for Florence Mensch, Ms. Mensch had to pay penalties and interest to South Carolina Department of Revenue and the IRS for five years in a row: 2012, 2013, 2014, 2015 and 2016.

45. During Respondent's time as Agent under the Power of Attorney for Decedent, Decedent had several liens filed against her for failure to pay homeowners association dues and failure to pay income taxes. A Lis Pendens and Complaint was filed by the homeowner's association against Decedent in the Greenville County Court of Common Pleas for failure to pay homeowners association dues, and only after such was filed did Respondent pay the homeowners association dues.

46. Respondent also failed to recover over 18 parcels of unclaimed property in Decedent's name in the amount of $38,208.00 even after being informed of such by Petitioner, Shauna M. Waddell, on multiple occasions.

47. Upon an accounting of the assets of the Estate, along with an accounting of the receipts and disbursements by Respondent during his time as Agent under the Power of Attorney for Florence Petrak Mensch, such accounting will show that assets were misappropriated by Respondent in violation of the South Carolina Power of Attorney Act and other applicable South Carolina laws.

48. Respondent has continued to transfer large amounts of funds from his financial accounts in an effort to make himself judgment proof.

FOR A FIRST CAUSE OF ACTION
(FAILURE TO COMPLY WITH § 62-8-114 OF THE SOUTH CAROLINA POWER OF ATTORNEY ACT)

49. That all allegations set forth herein which are not inconsistent herewith are hereby realleged as if fully set forth in this cause of action.

50. Petitioners are Successors in Interest to Decedent's Estate as named beneficiaries in Decedent's Will which has been filed with the Court and have been named as beneficiaries on certain non-probate assets.

51. Respondent, Sterling Raymond Mensch, III, was appointed Agent under the Power of Attorney for Florence R. Mensch in that certain Durable Power of Attorney recorded in the Greenville County Register of Deeds Office on May 18, 2010 in Deed Book 2372 at Page 3133, and such is attached hereto as Exhibit A.

52. Pursuant to § 62-8-114 of the South Carolina Power of Attorney Act, Petitioners requested Respondent, Sterling Raymond Mensch III, for an accounting of receipts, disbursements and transactions conducted on behalf of the Principal, Florence Petrak Mensch, during his time serving as Agent under a Power of Attorney for Principal, and such provides that the Agent under the Power of Attorney must comply with the request within thirty (30) days from the date of the request which was made on March 22, 2019.

53. Respondent, Sterling Raymond Mensch, III, failed to comply, or respond with a reason why he needed more time to comply, and therefore has violated § 62-8-114 of the South Carolina Power of Attorney Act. As previously stated herein, the Court has issued Orders attached hereto as Exhibit A and Exhibit B demanding that Petitioner comply with § 62-8-114 and provide an accounting of the assets of the Estate.

54. Respondent has willfully disregarded the Court's Orders and has not produced documentation nor responses of any kind after the December 4, 2019 Order was issued.

55. Petitioners request the Court issue further Orders and Rules to Show Cause demanding Sterling Raymond Mensch, III to comply with the statute and to provide an accounting of receipts, disbursements and transactions conducted on behalf of the Principal, Florence Petrak Mensch, during Sterling Raymond Mensch, III's time serving as Agent under the Power of Attorney since May 17, 2010.

56. As a direct and proximate result of Respondent's failure to comply with § 62-8-114 of the South Carolina Power of Attorney Act and with the Court's Orders, the Estate of Florence Mensch has suffered damages, including but not limited to: actual, consequential, incidental and punitive damages.

57. Petitioners are therefore entitled to recover damages for Respondent's failure to comply with § 62-8-114 of the South Carolina Power of Attorney Act and subsequently with the Court's Orders in an amount to be determined by the Court.

FOR A SECOND CAUSE OF ACTION
(ACCOUNTING)

58. All allegations set forth herein which are not inconsistent herewith are hereby realleged as if fully set forth in this cause of action.

59. Decedent's Will explicitly states in Item 12 on Page 9 and 10:

> "My Personal Representative and Trustee shall keep all records and books of account and shall prepare inventories and accountings which must be filed with the Probate Court, and shall give the beneficiaries a statement of their receipts and disbursements and investments at least annually."

60. Decedent's Will further states in Item 12 on Page 10:

"At all reasonable times my Personal Representative and Trustee shall make all records, books of account, inventories and related papers and documents available for inspection by the beneficiaries hereunder or their authorized representatives."

61. Despite several demands by Petitioners, and several Orders issued by the Court, Respondent has failed to provide or otherwise make available all records, books of account, inventories and related papers and documents.

62. In addition, Petitioners filed a demand for non-probate property inventory with the Probate Court and Respondent has not provided such as of the filing of this Petition.

63. Petitioners are entitled to seek an accounting by Sterling Mensch of all receipts and expenditures made to or from funds or accounts of Florence Mensch or the Estate of Florence Mensch and for all other personal property of Florence Mensch used or possessed by Sterling Mensch for the entire period during which Sterling Mensch held power of attorney for Florence Mensch and of all of the probate and non-probate assets of the Estate, and Petitioners request an Order from the Court demanding that Respondent produce an accounting disclosing all transactions conducted by him in his capacity as former Agent under Power of Attorney for Florence Mensch and as former Personal Representative of her Estate.

FOR A THIRD CAUSE OF ACTION
(PETITION TO REVIEW AGENT'S CONDUCT UNDER POWER OF ATTORNEY AND GRANT APPROPRIATE RELIEF PURSUANT TO § 62-8-116 AND § 62-8-117 OF THE SOUTH CAROLINA POWER OF ATTORNEY ACT)

64. That all allegations of this Petition are reaffirmed as fully as if repeated herein.

65. Petitioners, as beneficiaries named in Decedent's Will, request the Court to construe the Power of Attorney and review Respondent, Sterling Raymond Mensch's conduct during his time as Agent under the Power of Attorney for Decedent.

66. Decedent had several liens filed against her for failure to pay homeowners association dues and income taxes during Respondent's time as Agent under a Power of Attorney for Decedent. A Lis Pendens and Complaint was filed by the homeowner's association against Decedent in the Greenville County Court of Common Pleas for failure to pay homeowners association dues, and only after such was filed did Respondent pay the homeowners association dues.

67. Decedent's Estate is valued substantially lower than Petitioners expected, and upon an accounting of the receipt and disbursements, such accounting will prove large amounts of assets were misappropriated by Respondent in violation of the South Carolina Power of Attorney Act and Florence Mensch's Power of Attorney.

68. Upon review of the bank statements of Florence Petrak Mensch, Respondent made a large amount of online transfers and teller withdrawals during his time serving as Agent under Power of Attorney for Florence Mensch.

69. Respondent failed to file tax returns for Florence Mensch for 2017 and 2018 which have caused, and will continue to cause, large amounts of penalties and interest to be owed by her Estate.

70. Petitioners request the Court order Sterling Raymond Mensch, III, to restore the value of the Principal's property to what it would have been had the violation(s) not occurred pursuant to § 62-8-117 of the South Carolina Probate Code, including any interest and appreciation that should have accrued from the time of the violation.

FOR A FOURTH CAUSE OF ACTION
(BREACH OF FIDUCIARY DUTY)

71. That all allegations set forth herein not inconsistent herewith are hereby realleged

as if fully set forth in this cause of action.

72. Respondent owed fiduciary duties including a duty of care and duty of loyalty to Florence Mensch and the successors in interest to her Estate by virtue of his capacity as Agent under power of attorney for Florence Mensch.

73. Respondent breached these fiduciary duties by:

A. Making numerous transfers from Florence Mensch's account(s) to his own bank accounts for Respondent's personal gain;

B. Failing to keep an adequate record of all receipts, disbursements and transactions made on behalf of Florence Petrak Mensch;

C. Failing to act only within the scope of authority granted in the power of attorney;

D. Failing to act loyally for the Principal's benefit;

E. Failing to attempt to preserve Principal's estate plan;

F. Failing to file tax returns for Florence Mensch causing her to incur substantial penalties and interest which continue to accrue to her Estate;

G. Failing to invest Florence Mensch's assets in a prudent manner;

74. In addition to the duties owed to Florence Mensch and to the successors in interest to her Estate during her life, Respondent, as Personal Representative of the Estate owed fiduciary duties including duty of care and duty of loyalty to the Petitioners as beneficiaries of Florence Mensch's Estate.

75. Respondent ignored requests by Petitioners for an accounting of receipts and disbursements during his time as Power of Attorney despite the requirement to provide such under § 62-8-114 of the South Carolina Power of Attorney Act.

76. As Personal Representative of the Estate of Florence Petrak Mensch, Respondent has a fiduciary duty to the beneficiaries of the Estate and has breached that duty by failing to comply with the requests for an accounting of receipts and disbursements made by him as Agent under the Power of Attorney in accordance with § 62-8-114 of the South Carolina Power of Attorney Act.

77. Decedent's Will explicitly states in Item 12 on Page 9 and 10:

"My Personal Representative and Trustee shall keep all records and books of account and shall prepare inventories and accountings which must be filed with the Probate Court, and shall give the beneficiaries a statement of their receipts and disbursements and investments at least annually."

78. Decedent's Will further states in Item 12 on Page 10:

"At all reasonable times my Personal Representative and Trustee shall make all records, books of account, inventories and related papers and documents available for inspection by the beneficiaries hereunder or their authorized representatives."

79. Despite numerous requests by Petitioners for Respondent to communicate with Petitioners and provide information relating to the Decedent's assets, Respondent continued to ignore such requests and to withhold information from Petitioners, and has still not provided the accounting or documentation that the Court demanded him provide in the August 28, 2019 and December 4, 2019 Orders.

80. When asked by Shauna Waddell about the status of the Estate, Respondent indicated that he was waiting on his mother's income tax return to be prepared. A few months later, when asked again about the status of the Estate, Respondent indicated that he was dropping everything off at the attorney's office so that the attorney could administer the Estate. When

Shauna Waddell called David Merline's office, which is the attorney that Respondent claimed to be using, David Merline told Shauna Waddell that he had not heard from Respondent. Subsequently, when Shauna Waddell asked Respondent about why David Merline had not heard from him, Respondent indicated that the secretary at Merline & Meachem's office must have lost the documents.

81. During the time Respondent was refusing to provide information and refusing to move forward with probating the Estate, he transferred a large amount of the funds he had taken from Florence Mensch's accounts to his own accounts and engaging in excessive spending as shown by his financial accounts and as will be further shown by an accounting of the transactions Respondent engaged in.

82. Upon an accounting of the assets of the Estate, and of the receipts and disbursements from the transactions conducted by Respondent during his time as Agent under the Power of Attorney for Florence Petrak Mensch, such accounting will prove that assets were misappropriated and/or used improperly by Respondent in violation of the South Carolina Power of Attorney Act and other applicable laws of South Carolina.

83. As Personal Representative of the Estate of Florence Petrak Mensch, Respondent has a fiduciary duty to the beneficiaries of the Estate and has breached that duty by failing to comply with the requests for an accounting of receipts and disbursements made by him as Agent under the Power of Attorney in accordance with § 62-8-114 of the South Carolina Power of Attorney Act, along with his failure to properly respond and make records available to the beneficiaries of the Estate, which continues as of the date of this Amended Petition despite the Orders from the Court demanding that Respondent provide the accounting and supporting documentation.

84. In addition, Respondent breached that duty by failing to inform Petitioners that he had not filed tax returns, that he had stolen money from the pension fund, that he had converted assets belonging to the Estate to his own and that he had spent most of the money he took for his and his families own personal benefit and enjoyment.

85. As a direct and proximate result of Respondent's breach of his fiduciary duties, the Estate of Florence Mensch has suffered damages, including but not limited to, actual, consequential and incidental damages associated with the Agent's breach. Petitioners are therefore entitled to recover damages for the Respondent's breach in an amount to be determined by the trier of fact.

FOR A FIFTH CAUSE OF ACTION
(FRAUDULENT AND NEGLIGENT MISREPRESENTATION AND CONCEALMENT)

86. That all allegations contained herein are re-alleged and incorporated herein by reference as if fully set forth herein.

87. After Respondent refused to move forward with administering the Estate, and after several months passed with no information from Respondent, Shauna Waddell began to inquire as to the status of the Estate and the assets of the Estate.

88. Shauna Waddell attempted to set up at least three meetings with Respondent to review the assets of the Estate and Respondent cancelled each time. At a fourth meeting scheduled by Shauna Waddell, Respondent showed up to the meeting, because such was at Florence Mensch's property which Respondent was occupying, but did not provide any of the requested records, only vaguely described the accounts without providing any specific information and failed to disclose that he had not filed tax returns for Florence Mensch nor that he had taken hundreds of thousands of dollars from Florence Mensch's accounts during his time as power of attorney for Florence Mensch.

89. When asked by Shauna Waddell about the status of the Estate, Respondent stated that he was waiting on his mother's income tax return to be prepared. A few months later, when asked again about the status of the Estate, Respondent indicated that he was dropping everything off at the attorney's office so that the attorney could administer the Estate. When Shauna Waddell called David Merline's office, which is the attorney that Respondent claimed to be using, David Merline told Shauna Waddell that he had not heard from Respondent. Subsequently, when Shauna Waddell asked Respondent about why David Merline had not heard from him, Respondent indicated that the secretary at Merline & Meachem's office must have lost the documents.

90. In contrast to the representation by Respondent that he was waiting on the 2018 tax return to be filed, Respondent in fact did not file a tax return for Florence Mensch in 2017 nor 2018 and had not retained David Merline to help with administration of the Estate.

91. Respondent intentionally made the false representation due to the fact that he had taken large amounts of money from Florence Mensch during the years that he served as Agent under Power of Attorney for Florence Mensch, and was attempting to delay any action or knowledge by Petitioners so that he could further transfer and spend the funds he had taken and was continuing to take from Florence Mensch and her Estate.

92. Prior to the Court removing Respondent as Personal Representative of the Estate, Respondent listed Florence Petrak Mensch's UBS Retirement Account on the Probate Inventory with a value of $409,652.44, which is what it would have been had Respondent not transferred $259,000.00 from Florence Mensch's UBS retirement account to Florence Mensch's checking account three days before Florence Mensch's death. Upon information and belief, Sterling Mensch had previously made himself a joint owner of such checking account which was also never disclosed to Petitioners. Such was a misrepresentation to Petitioners as beneficiaries of the Estate,

and also a misrepresentation to the Court in the notarized Probate Inventory he submitted to the Court.

93. Respondent's failure to produce an accounting to Petitioners, even after two Orders were issued from the Court demanding that he do so, and his failure to disclose the fact that he had taken large amounts of money from Florence Mensch and not filed tax returns, constitute fraudulent concealment as he had a duty to speak due to the Court's Orders and due to his position as Personal Representative of the Estate of Florence Mensch.

94. Respondent owed a duty of care to communicate truthfully with Shauna Waddell and John Mensch as equal beneficiaries under Florence Mensch's Will and successors in interest to the Estate of Florence Mensch.

95. Respondent continuously breached his duty by failing to exercise due care in communicating and providing information to Petitioners.

96. Petitioners justifiably relied on the representations by Respondent.

97. Petitioners have suffered loss as a result of the misrepresentations by Respondent in an amount to be shown at the trial of this case.

98. Petitioners are entitled to all actual, consequential and incidental damages caused by Respondent's Fraudulent and Negligent Misrepresentations and Concealments. Respondent's actions were willful, wanton or in reckless disregard of Petitioners' rights and therefore Petitioners are entitled to punitive damages.

FOR A SIXTH CAUSE OF ACTION
(CONVERSION)

99. That all allegations contained herein are re-alleged and incorporated herein by reference as if fully set forth herein.

100. Respondent used his capacity as Power of Attorney to exercise exclusive control and dominion over funds, financial accounts, and other property owned by Florence Mensch for Respondent's own benefit, including but not limited to, numerous teller cash withdrawals and online transfers from accounts owned by Florence Mensch to accounts owned by Respondent.

101. Respondent made hundreds of online transfers from accounts owned by Florence Mensch to himself and to his family during his time as Power of Attorney for Florence Petrak Mensch and during his time as Personal Representative of the Estate of Florence Mensch.

102. Respondent withdrew cash from Florence Mensch's accounts through numerous teller withdrawals.

103. Respondent used such funds transferred from Florence Mensch's accounts to his accounts to benefit Respondent in the form of extravagant purchases and expenditures for Respondent and his family.

104. On April 23, 2019, three days before Florence Petrak Mensch passed away, while she was in hospice care and when it was obvious that she was very close to death, Respondent transferred $259,000.00 from Florence Mensch's UBS retirement account, which would have passed to Florence Mensch's three children under her Will, to her checking account ending in 7059. From the time of Florence Mensch's death until February 18, 2019, Respondent proceeded to transfer funds from the checking account ending in 7059 to his checking account ending in 3259.

105. In the event that Respondent added his name as a joint account holder to any accounts owned by Principal, such creation of a joint account was improper in breach of Respondent's fiduciary duties to Florence Mensch and the successors in interest to her Estate.

106. Pursuant to S.C. Code Ann. §62-6-201 and the common law of South Carolina,

any funds in a joint account of Sterling Mensch and Florence Mensch belonged to Florence Mensch because Florence Mensch contributed the funds to the joint account(s).

107. The Estate of Florence Mensch is the rightful and beneficial owner of the funds converted by Respondent.

108. Agent has refused to relinquish control over the property described above.

109. Agent has therefore converted property owned by Florence Mensch and her Estate.

110. The Estate of Florence Mensch is therefore entitled to an order for possession of the property described above; damages for Respondent's unlawful retention of the property; or, in the event the property may not be had, for an order directing payment of the value of the property improperly converted by Respondent.

FOR A SEVENTH CAUSE OF ACTION
(NEGLIGENCE)

111. That all allegations contained herein are re-alleged and incorporated herein by reference as if fully set forth herein.

112. Respondent owed a fiduciary duty to Florence Mensch and her successor in interest as her Agent under Power of Attorney.

113. Respondent breached his duty by not diversifying her investments and leaving a large amount of Florence Mensch's assets in GE stock and failing to sell the stock despite significant decline in the stock. Respondent further breached this duty by failing to file tax returns for Florence Mensch for 2017 and 2018 despite taxes being due which in addition to the tax liability which was unnecessarily incurred has also caused large amounts of penalties and interest, including but not limited to: failure to file and failure to pay penalties.

114. Respondent made large amounts of transfers and liquidated Florence Mensch's interest in certain assets which would have gained in value if such transfers and liquidations had not occurred.

115. Respondent's negligence proximately caused damage to Florence Mensch, her Estate and her successors in interest.

116. Due to Respondent's negligence in not diversifying Florence Mensch's assets and not filing tax returns, among other facts listed in previous paragraphs of this Petition and to be further discovered in discovery for this matter, the Estate of Florence Mensch and Petitioners as her successors in interest have been damaged in an amount to be determined by the Court.

FOR A EIGHTH CAUSE OF ACTION
(MOTION FOR EVICTION/EJECTMENT)

117. That all allegations contained herein are re-alleged and incorporated herein by reference as if fully set forth herein.

118. In the Court's December 4, 2019 Order attached hereto as Exhibit B, the Court states, in pertinent part, "The Court will not issue as part of this Order for Sterling Mensch to vacate the Home located at 512 New Tarleton Way, Greer, SC 29650 (the "Home") because that issue is not properly before the Court and Respondent was not on notice of such request. However, the successor Personal Representative, Shauna M. Waddell, has certain statutory powers and authority under the Will and she may decide how she wishes to possess or control the Home. In addition, the Court cautions Respondent against removing any fixtures in the Home and against damaging the Home, or the surrounding Property, in any way. There will be severe consequences if the Respondent causes damage to the home, including sanctions and potentially being held in contempt until such damages is repaired by Respondent."

119. Petitioners request an Order from the Court requiring the Petitioner to vacate the Property located at 512 New Tarleton Way, Greer, SC 29650.

120. To the extent of any damage caused to the home, Petitioners request an Order from the Court requiring Respondent repair such damages.

FOR A NINTH CAUSE OF ACTION
(UNJUST ENRICHEMENT/MONEY HAD AND RECEIVED)

121. That all allegations contained herein are re-alleged and incorporated herein by reference as if fully set forth herein.

122. Respondent took funds, financial accounts, and other property owned by Florence Mensch and utilized said property for his own personal benefit in violation of the Power of Attorney Act and the Financial Power of Attorney.

123. Respondent has refused to return any of the funds and/or property he improperly converted for his own personal benefit.

124. As a result of Respondent's actions and conduct described herein, Respondent has received and appreciated benefits that would be inequitable for him to retain under the circumstances.

125. Respondent should be required to disgorge all moneys, profits and other gains that he has obtained at the expense of Florence Mensch and her Estate.

FOR A TENTH CAUSE OF ACTION
(CONSTRUCTIVE TRUST)

126. That all allegations contained herein are re-alleged and incorporated herein by reference as if fully set forth herein.

127. Petitioners request the Court to impose a Constructive Trust in favor of the Estate of Florence Mensch over all funds which were transferred, or withdrawn, by Sterling Mensch from Florence Mensch's accounts.

128. Petitioners request the Court to impose a Constructive Trust in favor of the Estate of Florence Mensch over all funds which were transferred by Sterling Mensch from Florence Mensch's UBS retirement account, or any other account owned by Florence Mensch, to the Bank of America Checking Account which Sterling Mensch made himself a joint owner of and over all funds which Sterling Mensch now has in his possession.

WHEREFORE, the Petitioners pray as follows:

1) For an Order compelling Respondent, Sterling Raymond Mensch, III, to provide an itemized accounting of all receipts and disbursements made as Agent under Power of Attorney to or from funds or accounts owned by Florence Petrak Mensch since May of 2010, as he is required to under § 62-8-114 of the South Carolina Power of Attorney Act;

2) For an Order compelling an accounting of all of the probate and non-probate assets of the Estate, and an order from the Court demanding that Respondent make all records, books of account, inventories and related papers and documents available for inspection by the Petitioners or their authorized representatives;

3) For the Court to construe the Power of Attorney of Florence Petrak Mensch and review the Agent's conduct, and grant appropriate relief pursuant to § 62-8-116 and as provided in § 62-8-117 to restore the value of the principal's property to what it would have been had the violation(s) not occurred;

4) Petitioners request the Court to impose a Constructive Trust in favor of the Estate of Florence Mensch over all funds which were transferred by Sterling Mensch from Florence Mensch's UBS retirement account, or any other account owned by Florence Mensch, to the Bank of America Checking Account which Sterling Mensch made himself a joint owner of and over all funds which Sterling Mensch now has in his possession;

5) A judgment for damages, including all actual, consequential and punitive damages;

6) Reasonable attorney's fees and costs of this action;

7) For such other and further relief as the Court deems just and proper.

BROWN, MASSEY, EVANS,
MCLEOD & HAYNSWORTH, LLC

Tyler McLeod

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Attorneys for Petitioners,
Shauna M. Waddell and John R. Mensch

May 12, 2020

Exhibit A

STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
IN THE MATTER OF THE ESTATE OF FLORENCE PETRAK MENSCH	)	C.A. No.: 2018-ES-2302854
John R. Mensch and Shauna M. Waddell,	)	FILED AUG 2 8 2019 GREENVILLE COUNTY PROBATE COURT
Petitioners,	)	ORDER
vs.	)	
Sterling Raymond Mensch III, individually, as Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under a Power of Attorney for Florence Petrak Mensch,	)	
Respondent.	)	

This matter comes before the Court on August 2, 2019 upon Petitioners, John R. Mensch and Shauna M. Waddell, filing the following motions: (i) a Motion for partial Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure as to Petitioners' claims for failure to comply with § 62-8-114 of the South Carolina Probate Code, Accounting, Removal of Personal Representative, and Application for Appointment of Personal Representative; and (ii) a Motion to Compel requesting the Court to compel Respondent to comply with § 62-8-114 of the South Carolina Probate Code, which requires Respondent to provide an accounting of receipts, disbursements and transactions conducted on behalf of the Principal, Florence Petrak Mensch, during Respondent's time as Agent under Power of Attorney for Florence Petrak Mensch. Petitioners also requested an Order compelling Respondent to provide an accounting of the probate and non-probate assets of the Estate, and for Respondent to

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make all records, books of account, inventories and related papers and documents available for inspection by the beneficiaries or their authorized representatives pursuant to Decedent's original Will which is on file with the Court. In addition, Petitioners requested the Court to demand Respondent to produce a non-probate property inventory, based upon Petitioners having filed Form 327, which was filed with the Court and served on Respondent on March 18, 2019, and which Respondent had not provided to Petitioner as of the day of the hearing. A hearing was held on the pending motions on August 21, 2019. Present at the hearing were Tyler E. McLeod of Brown, Massey, Evans, McLeod & Haynsworth, LLC representing Petitioners and Shauna Waddell, and Ben Leaphart of Ashmore Leaphart & Rabon, LLC representing Respondent.

Based on the pleadings filed in this matter, the Court's file, affidavits filed with the Court and the arguments of Counsel, I find as follows:

I. **Petitioner's Motion for partial Summary Judgment**

As to Petitioners' claim for failure to comply with § 62-8-114 of the South Carolina Power of Attorney Act, Respondent produced a one-page spreadsheet showing some of the financial information one day prior to the hearing and produced records at the hearing which Respondent's Counsel represented to the Court may be all of the records. The Court makes no ruling as to the sufficiency or completeness of such spreadsheet or records. If anything is missing from the spreadsheet or the records, Respondent shall provide Petitioners with a complete accounting of all receipts, disbursements or transactions conducted on behalf of the principal from May 17, 2010 until Decedent's death on April 26, 2018, along with supporting documentation for such, within ten (10) days from entry and execution of this Order. If anything is missing from the records, Respondent shall be responsible for obtaining such records, including but not limited to, serving any subpoenas upon banks or other financial institutions to

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obtain such records, within ten (10) days from entry and execution of this Order. Due to the records being produced at the hearing on August 21, 2019, Petitioners did not have an opportunity to review such records prior to the hearing and therefore could not confirm whether the records were sufficient. If Petitioners determine that such accounting or supporting records are insufficient, or Respondent fails to produce the complete accounting and all records within ten (10) days from entry and execution of this Order, then Petitioners may refile their motion for summary judgment. Considering that Respondent produced certain records and in a light most favorable to the Respondent, the records may be sufficient; therefore, Petitioners' Motion for Summary Judgment with regard to Petitioners' claim for failure to comply with § 62-8-114 of the South Carolina Power of Attorney Act is **DENIED**, although Petitioner may refile a motion for summary judgment if Petitioner determines that Respondent has not produced the accounting showing all receipts and disbursements along with all supporting documentation, or has failed to subpoena any necessary records, within ten (10) days of entry and execution of this Order.

As to Petitioners' claims for an accounting and demand for non-probate property inventory, Respondent did not respond to Petitioners' request to make all the records, books of account, inventories and related papers and documents available to the beneficiaries as requested by Petitioners and as required by Decedent's Will. At 3:30 p.m. on the day before this hearing, Respondent provided to Petioners a box of information along with a one-page spreadsheet summary showing some of the financial information. Petitioners contend that the summary was insufficient and was not a satisfactory response to their request for all records, books of account, inventories and related papers and documents. Due to the last minute delivery of the documents, Petitioners have had insufficient time to review the records. Respondent shall send Petitioners all records for the probate and non-probate assets within ten (10) days from entry of this Order.

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In addition, Respondent shall send Petitioners the non-probate property inventory within ten (10) days from entry of this Order. Respondent shall be responsible for requesting and issuing any subpoenas for all records, including but not limited to serving any subpoenas upon institutions to obtain such records, within ten (10) days from entry of this Order. If Respondent does not deliver all the records, books of account, inventories and related papers and documents in his possession, along with the non-probate property inventory, to Petitioners within ten (10) days from entry of this Order Respondent will be sanctioned and ordered to pay attorney's fees and costs of Petitioners, including the attorney's fees and costs to file a subsequent motion to enforce this Order. In the event that Respondent must order or subpoena financial records to comply with this Order, Respondent must order or subpoena such records within ten (10) days from entry and execution of this Order and provide a copy of the request or subpoena to Petitioners. Respondent must provide to Petitioners copies of any records received pursuant to a subpoena or request within ten (10) days from receipt of such records.

As to Petitioners' claim for removal of Sterling Mensch, III as Personal Representative, in reviewing this matter in a light most favorable to the nonmoving party and considering the guidance provided by our Supreme Court, in *Blackmon v. Weaver,* 366 S.C. 245, 164, 621 S.E.2d 42 (S.C., 2005) , "...The power to remove a personal representative should be executed with great caution, and not at all, unless it is made to appear to be necessary for the protection of the estate, to prevent loss or injury to it from misappropriation, maladministration or fraud." Citing *Smith v. Heyward,* 115 S.C. 145, 164, 105 S.E. 275, 282 (1920), the Court finds that there is not sufficient evidence at this time to support Respondent's removal as Personal Representative. However, the Court is concerned by the Respondent's irresponsiveness, and he is cautioned that he is walking on thin ice. For this reason, if Respondent continues to fail to perform his duties as

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Personal Representative of the Estate, or there appears to be a risk of loss to the Estate, the Court will reconsider this matter, or Petitioner, Shauna Waddell, may request review in a formal hearing related to her Application for Appointment as Personal Representative. Therefore, Petitioner's Motion for Summary Judgment as to removal of Personal Representative is **DENIED**, subject to the Court reserving the right to review this matter on its own or upon motion by Petitioners, and to remove the Personal Representative if he continues to fail to perform his duties as Personal Representative of the Estate or there appears to be a risk of loss to the Estate.

II. Petitioner's Motion to Compel

As to Petitioners' Motion to Compel the required documents under § 62-8-114 of the South Carolina Power of Attorney Act, the non-probate property inventory and all records, books of account, inventories and related papers and documents, Respondent produced one day prior to the hearing a one-page spreadsheet showing some of the financial information and produced records at the hearing which Respondent's Counsel represented to the Court may be all of the records, except for Bank of America account statements for the year 2016. The Court makes no ruling as to the sufficiency or completeness of such spreadsheet or the records. If anything is missing from the accounting or the records, Respondent shall provide Petitioners with a complete accounting of all receipts, disbursements or transactions conducted on behalf of the principal from May 17, 2010 until Decedent's death on April 26, 2018, along with supporting documentation for such, within ten (10) days from entry of this Order. Respondent shall also produce the non-probate property inventory and all records, books of account, inventories and related papers and documents as required by the Decedent's Will within ten (10) days from entry of this Order. If anything is missing from the records, Respondent shall be responsible for

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obtaining such records, including but not limited to serving any subpoenas upon institutions to obtain such records, within ten (10) days from entry of this Order. Due to the records being produced on the day of the hearing, Petitioners had no opportunity to review the records thoroughly and therefore could not confirm whether the records were sufficient. Respondent provided a spreadsheet listing some expenses of the Estate and records which may or may not be all of the records of the Estate, and the Court makes no finding as to accuracy or completeness of the records or any accounting. If Petitioners determine that records are deficient, or Petitioner determines that Respondent has not produced all records or documents within ten (10) days from entry of this Order, Petitioner can file an additional Motion to Compel requesting a more sufficient and complete production of records from Respondent. Respondent is ordered to produce all such records within ten (10) days of entry of this Order. In the event that Respondent must order or subpoena financial records to comply with this Order, Respondent must order or subpoena such records within ten (10) days from entry of this Order and provide a copy of the request or subpoena to Petitioners. Respondent must provide to Petitioners copies of any records received pursuant to a subpoena or request within ten (10) days from receipt of such records.

Due to the Respondent's failure to produce all records within the timeframe required by § 62-8-114 of the South Carolina Power of Attorney Act, failure to make all records available pursuant to the Will, and failure to respond to Petitioners' demand for non-probate property inventory, Respondent's share of this estate shall be reduced by $1,500.00, representing a portion of the attorney's fees and costs incurred by Petitioners as a result of pursuing these motions.

If Respondent fails to comply with this Order, he will not enjoy any more leniency from the Court, and there may be severe consequences for Respondent, including imposition of

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sanctions, attorney's fees, and costs of Petitioners.

IT IS SO ORDERED.

Clayton L. Jennings
Associate Probate Judge
Greenville County Probate Court

August 28, 2019
Greenville, South Carolina

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Exhibit B

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE MATTER OF THE ESTATE OF FLORENCE PETRAK MENSCH

John R. Mensch and Shauna M. Waddell,

Petitioners,

vs.

Sterling Raymond Mensch III, individually, as Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under a Power of Attorney for Florence Petrak Mensch,

Respondent.

IN THE PROBATE COURT
THIRTEENTH JUDICIAL CIRCUIT
C.A. No.: 2018-ES-2302854

FILED
DEC 04 2019
GREENVILLE COUNTY PROBATE COURT

ORDER

This matter came before the Court on October 16, 2019 upon a Motion for Partial Summary Judgment and a Motion to Compel filed by Petitioners, John R. Mensch and Shauna M. Waddell. An Order dated August 28, 2019 was previously issued by this Court, following a hearing on August 21, 2019 on Petitioners previous Motions. Petitioners refiled the Motions in accordance with the Order dated August 28, 2019 due to Respondent's failure to comply with the Order and to produce all records and accountings required by such Order. A hearing was then held on November 20, 2019. Present at the hearing were Tyler E. McLeod of Brown, Massey, Evans, McLeod & Haynsworth, LLC representing Petitioners, Shauna Waddell and John Mensch; and Ben Leaphart of Ashmore Leaphart & Rabon, LLC representing Respondent.

Based on the pleadings filed in this matter, the Court's file, affidavits filed with the Court, the arguments of Counsel, and the Order dated August 28, 2019, I find as follows:

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1. I find that the Respondent has willfully failed to comply with the Court's Order dated August 28, 2019, which ordered Respondent to provide a full accounting of the probate and non-probate assets of the Estate of Florence Mensch, along with all supporting documentation for such accounting, and to subpoena any records which were not in Respondent's possession and control within ten (10) days from entry and execution of the Order; to comply with § 62-8-114 and provide a full accounting of receipts, disbursements and transactions conducted on behalf of the Principal, Florence Petrak Mensch, during Respondent's time as Agent under Power of Attorney for Florence Petrak Mensch within ten (10) days from entry and execution of the Order; and to comply with the Petitioners request for a non-probate property inventory in accordance with South Carolina Probate Code § 62-3-706 within ten (10) days from entry and execution of the Order.

2. Due to Respondent's willful failure to comply with the Order dated August 28, 2019, the clear risk of loss to the Estate of Florence Mensch and Respondent's violation of South Carolina Probate Code § 62-3-704 and § 62-3-706, Respondent, Sterling Mensch, is hereby removed as Personal Representative of the Estate of Florence Petrak Mensch.

3. The Court appoints Shauna M. Waddell to serve as successor Personal Representative of the Estate of Florence Petrak Mensch because she is named as the first successor in the First Codicil to the Will of Florence Petrak Mensch, and she shall serve without bond.

4. Respondent, due to his failure to comply with the Order dated August 28, 2019, has caused the Petitioners to incur unnecessary attorney's fees and costs and therefore the Court orders that Respondent must reimburse the Petitioners from Respondent's personal funds in the amount of Ten Thousand and 00/100 Dollars ($10,000.00) within thirty (30) days of entry and execution of this Order, in addition to the $1,500.00 that Respondent paid as ordered by the court

#2 cag

in the Order dated August 28, 2019. As an alternative to Petitioners seeking collection from Respondent, in the event that Respondent fails to make the payment within thirty days (30) from entry and execution of this Order, the Respondent's share of the Estate, if any, shall be reduced by Ten Thousand and 00/100 Dollars ($10,000.00), along with interest which will begin to accrue after thirty days (30) from entry and execution of this Order on amounts unpaid by Respondent at the legal rate of interest. If a Court later determines that Respondent does not have an interest in the Estate, or if Respondent's share of the Estate is not sufficient to cover the full amount, Respondent shall still owe from his personal funds Ten Thousand and 00/100 Dollars ($10,000.00), along with any interest that accrues on such amount, to Petitioners. The Petitioners may also seek further sanctions against Respondent if he fails to comply with this Order, including attorney's fees and costs incurred to enforce this Order and collect such amounts.

5. The Court Orders that any financial accounts formerly in the name of the Decedent, Florence Petrak Mensch, and financial accounts now owned by the Estate of Florence Petrak Mensch, shall be transferred into the name of Shauna M. Waddell, as Personal Representative of the Estate of Florence Petrak Mensch, including but not limited to: the Bank of America checking account ending in 7059 and the UBS retirement account ending in 1480 GE. The Personal Representative should not distribute funds unless authorized to do so by this Court.

6. The Court Orders that all assets of the Estate of Florence Petrak Mensch shall be transferred to Shauna Waddell, as Personal Representative of the Estate of Florence Mensch, and she shall have the right to take possession and control of all assets of the Estate of Florence Mensch.

7. The Court will not issue as part of this Order for Sterling Mensch to vacate the Home

#3 cag

located at 512 New Tarleton Way, Greer, SC 29650 (the "Home") because that issue is not properly before the Court and Respondent was not on notice of such request. However, the successor Personal Representative, Shauna M. Waddell, has certain statutory powers and authority under the Will and she may decide how she wishes to possess or control the Home. In addition, the Court cautions Respondent against removing any fixtures in the Home and against damaging the Home, or the surrounding Property, in any way. There will be severe consequences if the Respondent causes damage to the Home, including sanctions and potentially being held in contempt, until such damage is repaired by Respondent.

8. The instructions set forth in the Order dated August 28, 2019 still apply, and Respondent must produce the records and accountings required therein within ten (10) days from entry and execution of this Order, which include, but not are not limited to: the items that Respondent failed to produce as outlined in the Affidavits of John Mensch and Shauna Waddell which were filed with the Court.

9. In addition, I find that Respondent must identify the name and identity of the account holder and institution for any financial accounts that received funds from any account formerly owned by Florence Petrak Mensch (regardless of whether or not such account was owned jointly with another person), or accounts now owned by the Estate of Florence Petrak Mensch, including any funds which were transferred before or after her death, via online transfer, withdrawal of cash or check written to such person or account. Such accounts specifically include, but are not limited to: the account ending in 3259 and all accounts outlined in the Affidavits of John Mensch and Shauna Waddell which were filed with the Court. Sterling Mensch must identify any and all financial accounts in his name, or any other person or entity's name, which received funds from an account formerly owned by Florence Petrak Mensch, including but not limited to: the bank of

#4 cag

America checking account ending in 7059 and the UBS retirement account ending in 1480 GE. Sterling Mensch shall provide the information outlined in this paragraph to Petitioners within five (5) days from entry and execution of this Order.

I commend Respondent's attorney, Ben Leaphart, for his efforts at communication with his Client and his efforts in attempting to get his Client to comply with the Court's Order. However, it appears to this Court that Sterling Mensch has disregarded the Court's Order dated August 28, 2019 and has attempted to hide certain information from Petitioners.

If Respondent continues to disregard the Court's Orders, there will be further consequences, including the possibility of sanctions, being held in contempt of court, and payment of all reasonable attorney's fees and costs of Petitioners.

IT IS SO ORDERED.

Clayton L. Jennings
Associate Probate Judge
Greenville County Probate Court

December 4, 2019
Greenville, South Carolina

#5
C>J

THE STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	
COUNTY OF GREENVILLE	)	C.A. NO.: 2018-ES-23-02854
	)	
IN THE MATTER OF: Estate of Florence Petrak Mensch	)	FILED JUN 2 2 2020 GREENVILLE COUNTY PROBATE COURT
	)	
John R. Mensch and Shauna M. Waddell Individually and as Personal Representative Of the Estate of Florence Petrak Mensch and John R. Mensch,	)	
	)	
Petitioners,	)	
	)	
-vs-	)	**RESPONDENT'S ANSWER TO AMENDED PETITION**
	)	
Sterling Raymond Mensch, III, Individually As Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrak Mensch	)	
	)	
Respondent.	)	

The Respondent, answering the First Amended Summons and Petition ("Petition") of the Petitioners, would respectfully show unto the Court as follows:

FIRST DEFENSE
General Denial

1. Each allegation of the Petition not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

AS TO PARTIES, JURISDICTION, AND GENERAL ALLEGATIONS

2. The allegations contained in paragraphs 1, 2, 3, 4, 5 ,6, 7, 8, 9, 10, 11, 12, and 13 of the Petition are admitted.

3. The allegations contained in paragraphs 14, 15, and 16 of the Petition are denied.

4. As to the allegations contained in paragraph 17, Respondent admits he has provided previously-prepared accountings to Petitioners and is now preparing a more detailed accounting for Petitioners' review. The remaining allegations contained in paragraph 17 are denied.

5. The allegations of paragraph 18 detail the procedural history of this case and therefore require no response.

6. As to the allegations contained in paragraph 19, Respondent admits Respondent's attorney at the time brought a box of documents to the hearing which were Respondent's records. The remaining allegations contained in paragraph 19 are denied.

7. The allegations of paragraph 20, 21, and 22 detail the procedural history and contents of an order in this case and therefore require no response.

8. Respondent at this time is preparing an updated accounting for Petitioners. Respondent denies the remaining allegations contained in paragraph 23.

9. Respondent has produced all documents in his possession. Respondent denies the remaining allegations contained in paragraph 24.

10. The allegations of paragraph 25, 26, 27, and 28 detail the procedural history and contents of an order in this case and therefore require no response.

11. Respondent is without first-hand knowledge or information sufficient to form a belief as to Petitioners' allegations contained in paragraph 29 and therefore denies those allegations.

12. The allegations of paragraph 30 and 31 are denied.

13. Paragraph 32 is a legal conclusion and therefore no response is required. To the extent a response is required, Respondent denies the allegations contained in paragraph 32.

14. Respondent denies the allegations contained in paragraphs 33, 34, 35, 36, and 37.

15. As to the allegations of paragraph 38, Respondent admits he listed Florence Petrak Mensch's UBS Retirement account on the probate inventory with a value of $409,652.44. The remaining allegations contained in paragraph 38 are denied.

16. The allegations contained in paragraph 39 are a legal conclusion and therefore no response is required. To the extent a response is required, Respondent denies the allegations contained in paragraph 39.

17. The allegations contained in paragraph 40 and 41 are denied.

18. The allegations contained in paragraph 42 are a legal conclusion and therefore no response is required. To the extent a response is required, Respondent denies the allegations contained in paragraph 42.

19. The allegations contained in paragraph 43, 44, 45, and 46 are denied.

20. The allegations contained in paragraph 47 are a legal conclusion and therefore no response is required. To the extent a response is required, Respondent denies the allegations contained in paragraph 47.

21. The allegations contained in paragraph 48 are denied.

AS TO THE FIRST CAUSE OF ACTION
(FAILURE TO COMPLY WITH §62-8-114
SOUTH CAROLINA POWER OF ATTORNEY ACT)

22. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into the defense by reference thereto.

23. Each allegation of the First Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

24. The allegations contained in paragraph 49 do not require a response.

25. The allegations in paragraph 50 are only admitted in that the Petitioners are Successors in the interest to the decedent's Estate as named beneficiaries in the decedent's Will. Respondent lacks sufficient information or knowledge with which to form a belief as to the remaining allegations of paragraph 50 of the Petition and therefore denies same.

26. The allegations of paragraph 51 are admitted.

27. As to the allegations contained in paragraph 52, Respondent admits that Petitioners requested Respondent for an accounting of receipts, disbursements and transactions conducted on behalf of the Principal, Florence Petrak Mensch, during his time serving as Agent under a Power of Attorney. The remaining allegations contained in paragraph 52 are denied.

28. As to the allegations of paragraph 53, the Respondent admits that he has not provided all the information requested by the Petitioners and fully intends to provide a full and complete accounting of the assets of the Estate. Respondent denies the remaining allegations contained in paragraph 53.

29. The allegations contained in paragraph 54 are denied.

30. The allegations of paragraph 55 request relief from the court and therefore require no response. To the extent a response is required, the allegations of paragraph 55 is denied.

31. The allegations contained in paragraphs 56 and 57 are legal conclusions and therefore no responses are required. To the extent responses are required, Respondent denies the allegations contained in paragraphs 56 and 57.

AS TO THE SECOND CAUSE OF ACTION
(ACCOUNTING)

32. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

33. Each allegation of the Second Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

34. The allegation of 58 requires no response.

35. The allegations contained in paragraphs 59 and 60 are admitted.

36. As to the allegations contained in paragraph 61, Respondent has provided all documentation in his possession. All remaining allegations contained in paragraph 61 are denied.

37. As to the allegations contained in paragraph 62, Respondent admits Petitioners filed a demand for non-probate property inventory with the Probate Court. Respondent denies the remaining allegations contained in paragraph 62.

38. The allegations contained in paragraph 63 are legal conclusions and therefore no responses are required. To the extent responses are required, Respondent denies the allegations contained in paragraph 63.

AS TO THE THIRD CAUSE OF ACTION (PETITION TO REVIEW AGENT'S CONDUCT UNDER POWER OF ATTORNEY AND GRANT APPROPRIATE RELIEF PURSUANT TO § 62-8-116 AND § 62-8-117 OF THE SOUTH CAROLINAPOWER OF ATTORNY ACT)

39. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

40. Each allegation of the Third Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

41. The allegations of 64 and 65 require no response.

42. The allegations contained in paragraphs 66, 67, 68, and 69 are denied.

43. The allegations of paragraph 70 request relief from the court and therefore require no response. To the extent a response is required, the allegations of paragraph 70 are denied.

AS TO THE FOURTH CAUSE OF ACTION (BREACH OF FIDUCIARY DUTY)

44. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

45. Each allegation of the Fourth Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

46. The allegations of paragraph 71 require no response.

47. The allegations contained in paragraph 72 are legal conclusions and therefore no responses are required. To the extent responses are required, Respondent denies the allegations contained in paragraph 72.

48. The allegations of paragraph 73 are denied.

49. The allegations contained in paragraph 74 are legal conclusions and therefore no responses are required. To the extent responses are required, Respondent denies the allegations contained in paragraph 74.

50. The allegations contained in paragraph 75 are denied.

51. The allegations contained in paragraph 76 are legal conclusions and therefore no responses are required. To the extent responses are required, Respondent denies the allegations contained in paragraph 76.

52. The allegations contained in paragraphs 77 and 78 are admitted.

53. As to the allegations of paragraph 79, Respondent has provided all documentation to Petitioners in his possession. The remaining allegations contained in paragraph 79 are denied.

54. The allegations of paragraphs 80, 81, and 82 are denied.

55. The allegations contained in paragraphs 83, 84, and 85 are legal conclusions and therefore no responses are required. To the extent responses are required, Respondent denies the allegations contained in paragraphs 83, 84, and 85.

AS TO THE FIFTH CAUSE OF ACTION (FRAUDULENT AND NEGLIGENT MISREPRESENTATION AND CONCEALMENT

56. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

57. Each allegation of the Fifth Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

58. The allegations of paragraph 86 require no response.

59. The allegations of paragraph 87, 88, 89, 90, and 91 are denied.

60. As to the allegations of paragraph 92, Respondent admits he listed Florence Petrak Mensch's UBS Retirement account on the probate inventory with a value of $409,652.44. The remaining allegations contained in paragraph 92 are denied.

61. The allegations of paragraph 93 are denied.

62. The allegations contained in paragraphs 94, 95, 96, 97, and 98 are legal conclusions and therefore no responses are required. To the extent responses are required, Respondent denies the allegations contained in paragraphs 94, 95, 96, 97, and 98.

AS TO THE SIXTH CAUSE OF ACTION (CONVERSION)

63. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

64. Each allegation of the Sixth Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

65. The allegations of paragraph 99 requires no response.

66. The allegations contained in paragraphs 100, 101, 102, 103, and 104 are denied.

67. The allegations contained in paragraphs 105, 106, 107, 108, 109, and 110 are legal conclusions and therefore no responses are required. To the extent responses are required, Respondent denies the allegations contained in paragraphs 105, 106, 107, 108, 109, and 110.

AS TO THE SEVENTH CAUSE OF ACTION (NEGLIEGENCE)

68. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

69. Each allegation of the Seventh Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

70. The allegation of paragraph 111 requires no response.

71. The allegations contained in paragraph 112 are legal conclusions and therefore no response is required. To the extent a response is required, Respondent denies the allegations contained in paragraph 112.

72. The allegations contained in paragraphs 113 and 114 are denied.

73. The allegations contained in paragraphs 115 and 116 are legal conclusions and therefore no responses are required. To the extent responses are required, Respondent denies the allegations contained in paragraphs 115 and 116.

AS TO THE EIGHTH CAUSE OF ACTION (MOTION FOR EVICTION/EJECTMENT)

74. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

75. Each allegation of the Eighth Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

76. The allegations of paragraph 117 requires no response.

77. The allegations of paragraph 118 detail the contents of an order of the court and procedural history of this case and therefore require no response.

78. The allegations contained in paragraphs 119 and 120 are legal conclusions and therefore no responses are required. To the extent responses are required, Respondent denies the allegations contained in paragraphs 119 and 120.

AS TO THE NINTH CAUSE OF ACTION (UNJUST ENRICHMENT/MONEY HAD AND RECEIVED)

79. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

80. Each allegation of the Ninth Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

81. The allegations contained in paragraphs 122, 123, 124, and 125 are denied.

AS TO THE TENTH CAUSE OF ACTION (CONSTRUCTIVE TRUST)

82. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

83. Each allegation of the Tenth Cause of Action not hereinafter admitted, modified or explained is specifically denied and strict proof demanded thereof.

84. That the allegations of paragraph 126 requires no response.

85. The allegations contained in paragraphs 127 and 128 are legal conclusions and therefore no responses are required. To the extent responses are required, Respondent denies the allegations contained in paragraphs 127 and 128.

SECOND DEFENSE
(Failure to State a Claim)

86. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

87. Petitioners have failed to state facts in their Petition sufficient to constitute a cause of action against Respondent.

FOR A THIRD DEFENSE
(Waiver)

88. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

89. Petitioners' claims are barred by the equitable doctrine of waiver.

FOR A FOURTH DEFENSE
(Unclean Hands)

90. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

91. Petitioners' claims are barred by the equitable doctrine of unclean hands.

FOR A FIFTH DEFENSE
(Laches)

92. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

93. Petitioners' claims are barred by the equitable doctrine of laches.

FOR A SIXTH DEFENSE
(Estoppel)

94. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

95. Petitioners' claims are barred by the equitable doctrine of estoppel.

FOR A SEVENTH DEFENSE
(Reliance)

96. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

97. Any action taken by Respondent was done in reliance on the advice of a professional.

FOR AN EIGHTH DEFENSE
(Ratification)

98. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

99. Petitioners' claims are barred by the doctrine of ratification.

FOR A NINTH DEFENSE
(Accord and Satisfaction)

100. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

101. Petitioners' claims are barred by the applicable doctrine of accord and satisfaction.

FOR A TENTH DEFENSE
(Punitive Damages Barred)

102. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

103. Petitioners' claim for punitive damages is barred because the conduct alleged in the Petition is insufficient as a matter of law to support an award of punitive damages.

FOR AN ELEVENTH DEFENSE
(Reservation of Right to Amend)

104. All previous responses contained in this Answer not inconsistent herewith are specifically incorporated into this defense by reference thereto.

105. Respondent may have other defenses against Petitioners and reserves his right to assert such defenses in a timely fashion after the facts to assert such defenses become known to them and to request amendments to these affirmative defenses to conform to the evidence.

WHEREFORE, having fully answered the Petition, the Respondent prays that the allegations of the Petition which are denied be dismissed with prejudice.

Respectfully submitted,

TRULUCK THOMASON, LLC

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SC Bar No.: 101747
Kimberly T. Thomason
SC Bar No.: 79179
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Attorneys for Respondent

Greenville, South Carolina
June 18, 2020

R. David Massey
F. Douglas P. Evans
Stanley E. McLeod
Knox L. Haynsworth, III
Tyler E. McLeod

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OF COUNSEL
Suzanne Massey Schemm

August 5, 2021

Via Hand Delivery
Kim Thomason &
Devon Puriefoy
Truluck Thomason, LLC
3 Boyce Avenue
Greenville, SC 29601

RE: Estate of Florence Petrak Mensch
Case Number: 2018ES2302854

Dear Ms. Thomason and Mr. Puriefoy,

Enclosed, please find a copy of the filed Notice of Motion and Motion for Attorney's Fees and Costs with the attached Affidavit of Attorney's Fees and Costs and Total Attorney Fees & Costs Incurred to Date on behalf of Tyler E. McLeod, counsel for Petitioners, John R. Mensch and Shauna M. Waddell for service.

If you have any questions, please contact Tyler McLeod at (864) 271-7424 or by email at tmcleod@bmemhlaw.com.

Respectfully,

Erin Callahan
Paralegal to Tyler E. McLeod
Brown, Massey, Evans, McLeod
& Haynsworth, LLC
106 Williams St.
Greenville, SC 29601
(864) 271-7424 ext. 109
ecallahan@bmemhlaw.com

RECEIVED
AUG 05 2021
GREENVILLE COUNTY
PROBATE COURT

STATE OF SOUTH CAROLINA	IN THE PROBATE COURT
COUNTY OF GREENVILLE	CASE NO: 2018ES2302854

IN THE MATTER OF:
Florence Petrak Mensch

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch,

Petitioners,

vs.

Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch,

Respondent.

NOTICE OF MOTION AND MOTION FOR ATTORNEY'S FEES AND COSTS PURSUANT TO S.C. CODE §62-1-111

TO: KIMBERLY T. THOMASON AND DEVIN PURIEFOY OF THE LAW OFFICES OF TRULUCK THOMASON, ATTORNEYS FOR THE RESPONDENT STERLING RAYMOND MENSCH III, INDIVIDUALLY, AS FORMER PERSONAL REPRESENTATIVE OF THE ESTATE OF FLORENCE PETRAK MENSCH AND IN HIS FORMER CAPACITY AS AGENT UNDER POWER OF ATTORNEY FOR FLORENCE PETRAK MENSCH:

You will please take notice that Petitioners will move on the tenth day following service hereof or as soon thereafter as counsel may be heard for an Order pursuant to the Court's authority granted in S.C. Code Ann. §62-1-111 requesting the Court to Order Sterling Mensch to pay the Estate of Florence Mensch's attorney's fees, accountant's fees and costs incurred in prosecuting claims of the Estate of Florence Petrak Mensch and seeking damages for Respondent's Breach of Fiduciary Duty as Agent under Power of Attorney for Florence Petrak Mensch, Violation of the South Carolina Power of Attorney Act and Conversion.

This Motion is supported by the pleadings on file with the Court, the previous Orders of the Court, the Petitioners' Motion for Summary Judgment and supporting Memorandum of Law previously filed with the Court, a Memorandum of Law which may be filed with the Court prior to the hearing, attorney's fees affidavits submitted with this Motion as **Exhibit A**, the Court's file and such other and further materials as the Court may consider.

Respectfully Submitted,

BROWN, MASSEY, EVANS,
McLEOD & HAYNSWORTH, LLC

Tyler M'Leod

Tyler E. McLeod (S.C. Bar #: 101309)
tmcleod@bmemlaw.com
R. David Massey (S.C. Bar #: 3681)
davidmassey@bmemhlaw.com
Knox Haynsworth (S.C. Bar #10275)
Knoxhaynsworth@bmemhlaw.com
106 Williams St.
Greenville, South Carolina 29601
(864) 271-7424

Attorneys for Petitioners,
John R. Mensch and Shauna M. Waddell

August 5, 2021
Greenville, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA	IN THE PROBATE COURT
COUNTY OF GREENVILLE	C.A. No.: 2018-ES-23-02854
IN THE MATTER OF:	
Estate of Florence Petrak Mensch	
Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch, Petitioners,	**AFFIDAVIT OF ATTORNEY'S FEES AND COSTS**
vs.	
Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch, Respondent.	

Personally appeared before me, Tyler E. McLeod, who, after being duly sworn states as follows:

1. David Massey, Knox Haynsworth and I of the firm Brown, Massey, Evans, McLeod & Haynsworth LLC are attorneys for Petitioners in the above captioned case.

2. Petitioners are requesting the Court to order Respondent to pay the Estate of Florence Mensch's attorney fees, accountant fees and costs incurred to prosecute certain claims of the Estate for Respondent's Breach of Fiduciary Duty as Agent under Power of Attorney for Florence Petrak Mensch, Violation of the South Carolina Power of Attorney Act and Conversion.

3. David Massey is an attorney licensed in South Carolina who has practiced in South Carolina for over 40 years, with much of his practice devoted to probate litigation. David Massey's hourly rate is $400.00 per hour.

4. Knox Haynsworth is an attorney licensed in South Carolina who has practiced in South Carolina for over 33 years, with much of his practice devoted to civil litigation. Knox Haynsworth's hourly rate is $400.00 per hour.

4. I am an attorney licensed in South Carolina who has practiced in South Carolina for over 8 years, with the majority of my practice involving estate planning, probate administration and probate litigation. My hourly rate for this matter is $250.00 per hour.

5. Our firm is billing on an hourly basis in this matter. I affirm that the hourly rates specified herein are reasonable given the attorney's professional qualifications and the fees customarily charged in South Carolina for similar legal services.

6. I have set forth an itemized list of actual fees and costs on Exhibit A of this Affidavit, and I assert that these fees and costs are reasonable pursuant to Rule 1.5 of the S.C. Rules of Professional Conduct. The total unpaid attorney's fees, accountant's fees and costs to date in this matter total One Hundred Thousand Seven Hundred Thirty-Four and 00/100 ($100,734.00) Dollars.

7. Further attorney's fees and costs will be incurred prior to the trial on damages which is set for August 17 and 18, 2021. Petitioners will update this affidavit to reflect the total fees and costs incurred as of the date of the hearing on the Motion for Attorney's Fees and Costs. Petitioner's also requested attorney's fees and costs in their Amended Petition.

Tyler McLeod

Tyler E. McLeod (S.C. Bar #: 101309)
tmcleod@bmemlaw.com
106 Williams St.
Greenville, South Carolina 29601
(864) 271-7424

Greenville, South Carolina
August 5, 2021

SWORN to before me
this 5th day of August 2021.

E. Callahan
Notary Public, State of South Carolina
My commission expires: 12/02/2030

ERIN CALLAHAN
My Commission Expires
NOTARY
PUBLIC
December 2, 2030
SOUTH CAROLINA

EXHIBIT A

<u>Total Attorney Fees & Costs Incurred to Date</u>

Attorney Billing

Date	Atty	Billing Rate $/hr	Hour(s)	Description	Total ($)
3/5/2019	RDM	$400.00	2.00	Multiple telephone conferences, in-office conference with John Mensch.	$800.00
3/18/2019	TEM	$250.00	2.30	Telephone call with John Mensch followed by drafting of Demand for Notice, Demand for Non-Probate Inventory and Letter to Sterling Mensch.	$575.00
5/6/2019	TEM	$250.00	3.70	Begin drafting Petition to Probate Court.	$925.00
5/7/2019	TEM	$250.00	2.30	Continue work on Petition to Probate Court.	$575.00
5/13/2019	RDM	$400.00	0.50	Review, analysis of pleadings. Conduct legal research; meet with John Mensch.	$200.00
5/15/2019	TEM	$250.00	2.70	Finalize Petition for submission to Court. Draft Application for Appointment.	$675.00
5/15/2019	TEM	$250.00	0.50	Meeting with Shauna Waddell in-office; Signing of Petition.	$125.00
7/4/2019	TEM	$250.00	0.50	Email communications with opposing counsel.	$125.00
7/8/2019	TEM	$250.00	0.70	Email communications to and from Shauna Waddell and John Mensch	$175.00
7/19/2019	TEM	$250.00	2.30	Begin drafting Motion for Partial Summary Judgment and Witness Affidavits.	$575.00
7/22/2019	TEM	$250.00	4.70	Work on Motion for Partial Summary Judgment and Affidavits.	$1,175.00
7/29/2019	TEM	$250.00	0.10	Telephone call with John Mensch.	$25.00
7/29/2019	TEM	$250.00	1.30	Reviewed and Edited Motion for Summary Judgment/ Compel	$325.00
8/1/2019	TEM	$250.00	1.70	Prepared Affidavit of Shauna Waddell; appointment to execute Affidavit and Conference	$425.00
8/19/2019	TEM	$250.00	2.30	Preparation for Hearing on Motion for Summary Judgment.	$575.00
8/19/2019	TEM	$250.00	0.10	Telephone call with Shauna M. Waddell.	$25.00
8/20/2019	RDM	$0.00	1.70	Meeting with Tyler McLeod to Prepare for Hearing	$0.00
8/20/2019	TEM	$250.00	1.70	Preparation for Hearing on Motion for Summary Judgment.	$425.00
8/21/2019	TEM	$250.00	1.30	Begin drafting Order for Probate Court.	$325.00
8/21/2019	TEM	$250.00	5.40	Preparation for Probate Court Hearing.	$1,350.00
8/22/2019	TEM	$250.00	3.30	Continued work drafting Order.	$825.00
8/23/2019	RDM	$0.00	1.50	Reviewed Order	$0.00
9/16/2019	TEM	$250.00	0.70	Telephone call with Shauna and John.	$175.00
9/16/2019	TEM	$250.00	1.20	Email to opposing counsel.	$300.00
9/24/2019	TEM	$250.00	2.30	Review of John and Shauna's Summary; Email to John and Shauna.	$575.00
9/26/2019	KLH	$400.00	1.00	Discussion re: Order and Motion with Knox Haynsworth.	$400.00
9/26/2019	TEM	$250.00	2.30	Work on 2nd Motion to Compel and Summary Judgment; Call with Shauna Waddell.	$575.00
9/27/2019	TEM	$250.00	0.30	Telephone call with John and Shauna; worked on Motion.	$75.00
10/1/2019	TEM	$250.00	1.30	Drafting Second Motion.	$325.00
10/9/2019	TEM	$250.00	1.70	Research and drafting of Motion for SJ and Compel; Affidavit for John Mensch.	$425.00
10/9/2019	RDM	$400.00	0.70	Review and revise Second Motion.	$280.00
10/10/2019	TEM	$250.00	1.30	Worked on Affidavit for Shauna Waddell	$325.00
11/1/2019	TEM	$250.00	0.10	Email to Probate Court.	$25.00
11/18/2019	TEM	$250.00	2.70	Preparation for 11/20/19 Hearing on Summary Judgment & Motion to Dismiss.	$675.00
11/18/2019	TEM	$250.00	0.10	Email to John Mensch and Shauna Waddell.	$25.00
11/20/2019	TEM	$250.00	3.20	Preparation for Hearing	$800.00
11/20/2019	TEM	$250.00	1.70	Hearing on 11/20/2019	$425.00
11/22/2019	TEM	$250.00	1.70	Worked on Order	$425.00
11/27/2019	TEM	$250.00	3.30	Worked on Proposed Order	$825.00
11/27/2019	RDM	$400.00	1.00	Reviewed Order	$400.00
11/27/2019	TEM	$250.00	0.30	E-mail to Judge Jennings	$75.00
11/27/2019	TEM	$250.00	0.30	E-mail to Shauna M. Waddell & John Mensch	$75.00
1/2/2020	TEM	$250.00	1.30	Subpoena to BOA	$325.00
1/15/2020	TEM	$250.00	4.30	Worked on Motion to Amend; e-mails to John Mensch and Shauna M. Waddell	$1,075.00
1/17/2020	TEM	$250.00	3.30	Review of BOA Documents; Upload to Dropbox for John Mensch and Shauna M. Waddell	$825.00
1/23/2020	RDM	$400.00	0.50	Office Conference with Tyler McLeod Re: various issues of case	$200.00
2/1/2020	TEM	$250.00	1.50	Telephone Call with John Mensch and Shauna Waddell; Plan for moving forward with motion to amend and rule to show cause; determination of what to do with house	$375.00
2/1/2020	TEM	$250.00	0.70	Worked on Motion to Amend	$175.00
2/4/2020	TEM	$250.00	2.90	Worked on Rule to Show Cause and Affidavit	$725.00
2/4/2020	TEM	$250.00	1.30	Review of E-mails with transactions performed by Sterling Raymond Mensch III	$325.00
2/5/2020	RDM	$400.00	0.70	Reviewed Engagement Letter	$280.00
2/6/2020	TEM	$250.00	3.70	Worked on Updated Engagement Letter; Rule to Show Cause	$925.00
2/7/2020	TEM	$250.00	0.70	Reviewed Subpoena to T. Rowe Price	$175.00
2/7/2020	TEM	$125.00	1.00	Subpoena for Production of Documents to T. Rowe Price, Notice of Issuance of Subpoena and Letters to T. Rowe Price and Ben Leaphart	$125.00
2/10/2020	TEM	$250.00	1.10	E-mail responses to John Mensch and Shauna M. Waddell	$275.00
2/12/2020	TEM	$250.00	1.30	Worked on Updated Engagement Letter	$325.00
2/12/2020	TEM	$250.00	1.20	Finalized Rule and Order to Show Cause and Affidavit	$300.00
2/14/2020	TEM	$125.00	0.50	Preparation of Exhibits to Motion to Amend for filing with Probate Court	$62.50
2/14/2020	TEM	$250.00	1.30	E-mails to Probate Court; Telephone Call with Kim; E-mails to John Mensch and Shauna M. Waddell	$325.00
2/17/2020	TEM	$125.00	1.50	Revision to Petitioners' Rule and Order to Show Cause with Affidavit of Tyler E. McLeod and preparation of Exhibits A-D; Revision of Exhibits 1-2 to Petitioners' Motion to Amend Petition: prepare Notice of Hearing and Proof of Delivery to Ben Leaphart; Revision to Letter to Judge Jennings on behalf of Tyler E. McLeod; Cover Letter to Kimberly Watford	$187.50
2/18/2020	TEM	$125.00	0.20	Establish new, secure DropBox link for use by John Mensch in downloading documents from BOA; E-mail link to John Mensch	$25.00
2/18/2020	TEM	$250.00	0.50	Review of Documents from T. Rowe Price	$125.00
2/19/2020	TEM	$250.00	0.30	Email to Probate Court, Shauna and John.	$75.00
2/21/2020	TEM	$125.00	0.45	Analysis, Preparation, Upload of new T. Rowe Price document production.	$56.25
2/26/2020	TEM	$125.00	0.50	Processing and Preparation of Bates Series Petitioners_000001-002437.	$62.50
3/9/2020	TEM	$250.00	1.30	Review of John Mensch Email regarding expenditures.	$325.00
3/9/2020	TEM	$250.00	0.70	Review of Motion to Withdraw as Counsel; Emails to John and Shauna.	$175.00
3/13/2020	TEM	$250.00	0.50	Review of Email from Shauna Waddell regarding Bank of America.	$125.00
3/17/2020	TEM	$250.00	0.50	Email to John and Shauna regarding hearing and Covid-19 impact.	$125.00
3/23/2020	TEM	$250.00	1.20	Telephone call with Ben Leaphart; Review Probate Order re: Hearing; Emails to Shauna and John; Email to Probate Court.	$300.00
3/23/2020	TEM	$250.00	0.10	Telephone call to Amela at Bank of America.	$25.00
3/23/2020	TEM	$250.00	0.20	Email to John and Shauna regarding hearing.	$50.00
3/25/2020	TEM	$250.00	0.90	Preparation for call with Judge Jennings and Ben Leaphart.	$225.00
3/25/2020	TEM	$250.00	0.70	Telephone call with Judge Jennings and Ben Leaphart.	$175.00
3/25/2020	TEM	$250.00	0.70	Telephone call with John and Shauna.	$175.00
3/26/2020	TEM	$250.00	4.30	Preparation for Motion to Amend Hearing and Ben Leaphart's Motion to be relieved as Counsel; Review of new information to present at Hearing on Motion to Amend; Preparation of Argument.	$1,075.00

3/26/2020	TEM	$250.00	1.30	Telephone call to to Bank of America Legal Counsel regarding their compliance with the Order dated December 4, 2019.	$325.00
3/30/2020	TEM	$250.00	1.30	Work on Order for Motion to Amend	$325.00
3/30/2020	TEM	$250.00	1.70	Reviewed Order to be relieved as counsel and made revisions; email to Judge Jennings and Ben Leaphart	$425.00
3/31/2020	TEM	$250.00	0.70	E-Mail to John Mensch regarding Motion to Amend	$175.00
3/31/2020	TEM	$250.00	2.30	Worked on Order for Motion to Amend	$575.00
4/8/2020	TEM	$0.00	1.30	Telephone Call with Peter Tiffany; Telephone call with John Markel regarding forensic accounting services	$0.00
4/8/2020	TEM	$250.00	0.70	Telephone Call with John Markel regarding accounting	$175.00
4/14/2020	TEM	$250.00	1.50	Telephone Call with Bank of America; Telephone Call with John Mensch and Shauna Waddell regarding accounting and other issues	$375.00
4/23/2020	TEM	$250.00	0.70	E-mail to John Markel regarding accounting	$175.00
4/27/2020	TEM	$250.00	3.40	Worked on Complaint	$850.00
4/29/2020	TEM	$250.00	1.80	Telephone Call with John Mensch and Shauna Waddell; Telephone Call with Accountant	$450.00
5/1/2020	TEM	$250.00	0.70	Telephone Call with Kim Thomason	$175.00
5/6/2020	TEM	$250.00	5.50	Worked on Complaint; Added Causes of Action	$1,375.00
5/7/2020	TEM	$250.00	1.50	E-mails to Rachael Hardin (attorney for Sterling Mensch III)	$375.00
5/8/2020	TEM	$250.00	4.30	Worked on Complaint; Incorporated changes from John Mensch and Shauna Waddell	$1,075.00
5/11/2020	TEM	$250.00	0.70	E-mail to John Markel regarding accounting	$175.00
5/11/2020	TEM	$250.00	1.80	Telephone Call with John Mensch and Shauna Waddell; Telephone Call with Accountant	$450.00
5/11/2020	TEM	$250.00	4.70	Finalized Complaint; added Motion for Eviction and Motion for TRO; e-mails with Shauna Waddell and John Mensch; Prepared to file Complaint	$1,175.00
5/11/2020	TEM	$250.00	0.50	Review of Information from John Mensch	$125.00
5/12/2020	TEM	$250.00	0.70	Various e-mails with John Mensch and Shauna Waddell	$175.00
5/12/2020	TEM	$250.00	0.20	E-mail correspondence with Rachael Hardin	$50.00
5/13/2020	TEM	$250.00	1.20	Telephone Call with Rachael Hardin	$300.00
5/13/2020	TEM	$250.00	0.90	Telephone Call with John Mensch and Shauna Waddell	$225.00
5/13/2020	TEM	$250.00	0.70	E-mail to Rachael Hardin regarding pension repayment	$175.00
5/16/2020	TEM	$250.00	1.70	E-mails to Counsel for Sterling Mensch III; John Mensch and Shauna Waddell	$425.00
6/1/2020	TEM	$250.00	0.30	Review of Information regarding filing tax returns from Shauna Waddell	$75.00
6/19/2020	TEM	$250.00	3.70	E-mail to Rachael Hardin; Review of eviction issue, Attorney's Fees, GE Repayment	$925.00
				E-mail Correspondence with Shauna Waddell and John Mensch; reviewed e-mails from Rachael Hardin	$175.00
6/30/2020	TEM	$250.00	0.70	Telephone Call with Shauna Waddell and John Mensch	$175.00
7/1/2020	TEM	$250.00	2.80	Worked on Interrogatories and RFP	$700.00
7/8/2020	TEM	$250.00	1.20	Telephone Call with John Mensch and Shauna Waddell; E-mail to Rachael Hardin	$300.00
7/8/2020	TEM	$250.00	2.00	Visited house at New Tarleton with Shauna Waddell	$500.00
7/9/2020	TEM	$250.00	2.70	E-mails to Rachael Hardin; telephone call with rachael Hardin; e-mails to John Mensch and Shauna Waddell; all regarding negotiation of Sterling Mensch III vacating 512 New Tarleton	$675.00
7/10/2020	TEM	$250.00	2.30	E-mails to Rachael Hardin	$575.00
7/13/2020	TEM	$250.00	1.40	E-mail to Rachael Hardin; Worked on Interrogatories and RFP; Emails to John Mensch and Shauna Waddell	$350.00
7/17/2020	TEM	$250.00	0.70	E-mails to John Mensch and Shauna Waddell regarding Interrogatories and RFP	$175.00
7/20/2020	TEM	$250.00	2.70	Updates to Interrogatories and RFP based on questions-input from John Mensch; worked on Requests for Admission	$675.00
7/22/2020	TEM	$250.00	0.30	Research on Requests for Admission; E-mail response to John Mensch	$75.00
8/11/2020	TEM	$250.00	1.20	Email to John Mensch concerning account and discovery	$300.00
8/11/2020	RDM	$0.00	1.70	Consultation with Tyler McLeod regarding potential accountant and options for moving forward	$0.00
8/11/2020	TEM	$250.00	0.70	E-mail correspondence with John Mensch and Shauna Waddell	$175.00
8/12/2020	TEM	$250.00	1.30	Answered questions in e-mail form John Mensch concerning discovery	$325.00
8/12/2020	TEM	$295.00	1.70	Review of restrictions; E-mail to seller's attorney regarding right of first refusal	$501.50
8/12/2020	TEM	$250.00	1.70	Worked on requests for admission; Interrogatories and requests for production	$425.00
8/13/2020	TEM	$250.00	0.30	Telephone Call with Kim Campos Ivy to set hearing for rule to show cause	$75.00
8/13/2020	TEM	$250.00	3.20	Worked on revised rule to show cause; Incorporated language for zoom hearing; emails with John Mensch concerr concerning requests for admission and interrogatories	$800.00
8/14/2020	TEM	$250.00	1.70	Worked on Rule to Show Cause and Affidavit	$425.00
8/17/2020	TEM	$250.00	0.70	E-mail to John Markel	$175.00
8/21/2020	TEM	$250.00	0.30	E-mails to Rachael Hardin; Telephone Call with Process Server	$75.00
8/31/2020	TEM	$250.00	5.50	Preparation for Rule to Show Cause Hearing	$1,375.00
9/1/2020	TEM	$250.00	3.70	Preparation for Rule to Show Cause Hearing	$925.00
9/2/2020	TEM	$250.00	3.00	Preparation for Rule to Show Cause Hearing	$750.00
9/3/2020	TEM	$250.00	1.20	Worked on Discovery Request ; E-mails to John and Shauna	$300.00
9/3/2020	TEM	$250.00	1.30	Discussion with david Massey on Hearing for Rule to Show Cause	$325.00
9/15/2020	TEM	$250.00	3.70	Worked on proposed Order for Rule to Show Cause; Review of Transcripts from Hearing	$925.00
9/18/2020	TEM	$250.00	0.80	Telephone Call with John and Shauna regarding answering discovery	$200.00
9/24/2020	TEM	$250.00	1.20	Worked on Discovery Requests	$300.00
9/25/2020	TEM	$250.00	2.30	Worked on proposed Order	$575.00
10/2/2020	TEM	$250.00	0.70	Review of Judge Jennings' Order and Rule to Show Cause	$175.00
10/6/2020	TEM	$250.00	1.70	Review of Discovery Documents from John Mensch	$425.00
10/7/2020	TEM	$250.00	1.20	Review of Requests for Admission; Research on denials from devon Puriefoy	$300.00
10/13/2020	TEM	$125.00	1.67	Work on Answers to Interrogatories	$208.75
10/14/2020	TEM	$125.00	2.25	Work on Answers and Responses to Interrogatoris and Requests for Production	$281.25
10/15/2020	TEM	$250.00	0.20	Telephone Call with John Mensch	$50.00
10/15/2020	TEM	$250.00	1.20	Worked on Discovery Responses	$300.00
10/21/2020	TEM	$250.00	0.80	Telephone Call with John and Shauna	$200.00
10/21/2020	TEM	$250.00	0.90	Review of Discovery Production	$225.00
10/23/2020	TEM	$250.00	1.20	Review of Markel Report	$300.00
11/6/2020	TEM	$250.00	2.30	Worked on discovery responses	$575.00
11/6/2020	TEM	$125.00	1.00	Reviewed/Prepared Discovery Production	$125.00
11/17/2020	TEM	$250.00	1.30	E-mails to Truluck Thomason regarding production/Order	$325.00
11/17/2020	TEM	$250.00	1.30	E-mails to John Mensch regarding deposition questions, failure of Sterling to comply with Order; Motion to Determine Sufficiency of Answers to Requests for Admission	$325.00
11/23/2020	TEM	$250.00	0.30	E-mail to Court; response to attorney's fee question	$75.00
11/30/2020	TEM	$250.00	1.50	Review of Deposition Questions from John Mensch; e-mail to John Mensch	$375.00
11/30/2020	TEM	$250.00	0.70	E-mails to John Mensch	$175.00
12/3/2020	TEM	$250.00	2.70	Worked on Second Rule to Show Cause; Affidavit; letter to Judge Jennings	$675.00
12/3/2020	TEM	$250.00	1.30	Worked on Motion to Determine Sufficiency and Motion to Compel	$325.00
12/14/2020	TEM	$125.00	0.50	Worked on Affidavit for Rule to Show Cause	$62.50
12/14/2020	TEM	$250.00	5.70	Worked on Third Rule and Order to Show Cause - delivered to Court; Affidavit; Motion to Determine Sufficiency and to Compel	$1,425.00

12/14/2020	TEM	$250.00	1.50	Worked on TRO/ Injunction	$375.00
12/14/2020	TEM	$250.00	1.20	E-mail to Court and opposing party regarding Rule to Show Cause	$300.00
12/15/2020	TEM	$250.00	0.90	Worked on Motion to Compel and Determine Sufficiency; Filed with Court; Sent to opposing Counsel	$225.00
12/15/2020	TEM	$250.00	2.50	Worked on/Prepared Subpoenas for financial information from BOA accounts and T. Rowe Price	$625.00
12/17/2020	TEM	$250.00	1.70	E-mails to John and Shauna; Preparation for Motion to Compel and to Determine Sufficiency and Rule to Show Cause	$425.00
12/18/2020	TEM	$250.00	0.90	Telephone Call with John & Shauna regarding Rule to Show Cause; Motion to Compel and Motion to Determine Sufficiency	$225.00
12/21/2020	TEM	$250.00	4.80	Worked on Memorandum for Motion to Deem Admitted/Compel	$1,200.00
12/21/2020	KLH	$350.00	1.20	Research on Motion to Determine Sufficiency of Requests for Admission	$420.00
12/21/2020	TEM	$250.00	4.30	Preparation for Hearing on Rule to Show Cause and Motion to Compel	$1,075.00
12/22/2020	TEM	$250.00	2.30	Review of John Mensch Comments, E-mails regarding Requests for Admission to John Mensch; Worked on Memorandum in Support of Motion to Determine Sufficiency and to Compel	$575.00
12/22/2020	TEM	$250.00	1.70	Prepared Exhibits and Memorandum for filing; final edits to Memorandum	$425.00
12/29/2020	TEM	$250.00	2.30	Preparation for Hearing, Review of Transactions, T/C to Jeff Lynch Appliances	$575.00
12/30/2020	TEM	$250.00	4.30	Preparation for and Hearing on Petition; T/C with Home Depot	$1,075.00
1/19/2021	TEM	$250.00	1.20	Review of Discovery Production from Respondent	$300.00
1/20/2021	TEM	$250.00	6.20	T/C with John Markel; John and Shauna Mensch; discussion on production, accounting, summary judgment motion; review of production and expert report to determine amount for summary judgment motion; worked on summary judgment motion	$1,550.00
1/22/2021	TEM	$250.00	0.90	Review of Requests to Admit Answers; email to John/Shauna - Email to John Markel	$225.00
1/25/2021	TEM	$250.00	0.90	Review of Affidavits from John Markel	$225.00
1/27/2021	TEM	$250.00	4.20	Worked on Motion for Summary Judgment; review of accountant's assfidavit	$1,050.00
1/28/2021	TEM	$250.00	1.70	Work on Subpoenas for UBS and State Street Global Advisors Financial Records and Prepare Documents for Service	$425.00
1/29/2021	TEM	$250.00	0.70	Review of Subpoenas	$175.00
1/29/2021	TEM	$250.00	4.20	Worked on Summary Judgment Motion; review of cases regarding transfers	$1,050.00
1/29/2021	TEM	$250.00	2.10	Worked on Motion for Summary Judgment	$525.00
2/1/2021	TEM	$250.00	2.30	Worked on Summary Judgment; email discussion on damages	$575.00
2/2/2021	TEM	$250.00	0.70	Emails with John Mensch regarding Summary Judgment Motion; email to John Markel	$175.00
2/2/2021	TEM	$250.00	0.70	T/C with UBS and Shauna Waddell	$175.00
2/3/2021	TEM	$250.00	0.30	Email to Court regarding Sterling complying with Order	$75.00
2/3/2021	TEM	$250.00	1.70	Worked on Summary Judgment Motion; T/C with John Markel	$425.00
2/11/2021	TEM	$250.00	3.70	Worked on Motion for Summary Judgment and Memorandum	$925.00
2/12/2021	TEM	$250.00	1.30	Review of John Markel Affidavit and Amended Report	$325.00
2/17/2021	TEM	$250.00	3.70	Worked on Summary Judgment Motion; Prepared for filing; filed with the Court	$925.00
2/22/2021	TEM	$250.00	0.70	Review of documents related to accounts of Sterling Mensch; Email to John Mensch and Shauna Waddell	$175.00
2/22/2021	TEM	$250.00	1.20	Review of Email from John Mensch	$300.00
3/1/2021	TEM	$250.00	1.70	Worked on Settlement Proposal; Emails to John and Shauna	$425.00
3/2/2021	TEM	$250.00	1.20	Worked on Settlement Agreement	$300.00
3/4/2021	RDM	$400.00	0.70	Reviewed Settlement Offer	$280.00
3/4/2021	TEM	$250.00	3.70	Worked on Settlement Offer; various emails to John and Shauna; email to Kim Thomason	$925.00
3/9/2021	TEM	$250.00	7.50	Worked on Motion for Summary Judgment Memorandum; review of case file an all production	$1,875.00
3/10/2021	KLH	$250.00	0.50	Conversation with Tyler on punitive damages	$125.00
3/10/2021	TEM	$250.00	4.70	Worked on Motion for Summary Judgment	$1,175.00
3/12/2021	TEM	$250.00	3.90	Worked on Memorandum for Motion for Summary Judgment; Worked on Exhibits for the Motion; Emails the Court and Devon Purlefoy regarding Respondent's request for Judge Jennings to recuse himself	$975.00
3/15/2021	TEM	$250.00	6.90	Worked on Memorandum and Exhibits for Motion for Summary Judgment	$1,725.00
3/16/2021	TEM	$250.00	8.20	Preparation for Summary Judgment Hearing	$2,050.00
3/17/2021	TEM	$250.00	3.90	Sumamry Judgment Hearing; research on cases regarding punitives	$975.00
3/22/2021	TEM	$250.00	0.70	Email to John Mensch regarding false affidavit	$175.00
4/22/2021	TEM	$250.00	1.30	Review of Ruling from Judge Faulkner; various emails to John & Shauna	$325.00
4/27/2021	TEM	$250.00	1.70	Worked on Order for Summary Judgment	$425.00
4/28/2021	TEM	$250.00	0.70	T/C with John and Shauna	$175.00
4/30/2021	TEM	$250.00	2.70	Review of file in prep for hearing on damages; emails	$675.00
5/5/2021	TEM	$250.00	1.90	Worked on Order; determined relevant facts to client	$475.00
5/10/2021	TEM	$250.00	0.90	Responses to John Mensch comments relating to mitigation of damages	$225.00
5/12/2021	TEM	$250.00	1.20	Worked on Order for Summary Judgment	$300.00
5/14/2021	TEM	$250.00	3.20	Review of Memo in Opp. to MST filed by Respondent; Worked on Order	$800.00
5/17/2021	TEM	$250.00	0.90	Worked on Order	$225.00
5/17/2021	KLH	$350.00	1.00	Drafting of Order	$350.00
5/18/2021	KLH	$350.00	1.10	Work on order; review elements of cause of action to plug into order	$385.00
5/19/2021	KLH	$350.00	0.60	Worked on Order	$210.00
5/24/2021	TEM	$250.00	2.70	Drafted Attorney Fee Affidavit; Review of File	$675.00
5/26/2021	KLH	$350.00	1.50	T/C with Tyler regarding damages hearing	$525.00
5/26/2021	TEM	$250.00	2.70	Preparation for Damages Hearings	$675.00
5/27/2021	TEM	$250.00	0.30	Final Review of Order	$75.00
6/15/2021	TEM	$250.00	1.30	Various email correspondence to the Court; correction to proposed Order; emails to John and Shauna	$325.00
6/17/2021	TEM	$250.00	1.70	Responses to Devon's Comments to Proposed Order	$425.00
7/20/2021	TEM	$250.00	3.70	Work on attorney fee motion and affidavit; prep. for meeting with John Markel; emails to John and Shauna	$925.00
7/22/2021	TEM	$250.00	5.70	Preparation for damages hearing	$1,425.00
7/23/2021	TEM	$250.00	0.50	Emails to court regarding moving trial; email to Kim Thomason; research on motion and 106	$125.00
7/26/2021	TEM	$250.00	1.70	Research on cases on Damage hearing	$425.00
8/1/2021	TEM	$250.00	2.30	Worked on Reply to Motion for Continuance	$575.00
8/4/2021	TEM	$250.00	0.90	Prep for and Hearing on Motion for Continuance	$225.00
8/4/2021	TEM	$250.00	4.20	Prep. for trial; prep. of exhibits for trial; review of file; email to Kim Thomason regarding stipulations	$1,050.00
8/5/2021	TEM	$250.00	1.30	Preparation of Exhibits for trial; review of bank account statements	$325.00
SUBTOTAL - Attorney Billing			394.77		$99,402.75

Expenses

1/17/2020	Check BOA Legal Order Processing for document production	$88.07
1/27/2020	Check for Transcript Order from Legal Eagle for Probate Court Hearings held 8/21/2019 and 11/20/2019	$340.50
3/22/2019	Probate Court filing fee for Demand Notice.	$5.00
5/13/2019	Probate Court filing fee for Petition.	$150.00

5/28/2019	Service of Process for Sterling Raymond Mensch, III.	$65.00
3/6/2020	Service of Process for Sterling Raymond Mensch.	$65.00
4/30/2020	Accounting Fee Retainer to John Markel to evaluate accounts of Florence Mensch	$3,000.00
5/26/2020	Priority Overnight Check to John Mensch	$59.24
6/29/2020	Interrogatories and Requests for Production - Paralegal Services	$120.00
8/26/2020	Process Server Fee for Service of Rule and Order to Show Cause	$115.00
8/31/2020	Accounting Fees to prepare 2017 and 2018 tax returns which Sterling Raymond Mensch III failed to file	$2,900.00
9/15/2020	Legal Eagel Fees (Invoice# 93067) for Transcriptionand Exhibit Pages for Probate Hearing	$356.78
10/2/2020	John Markel Expert Accounting Fees (Invoice #20137)	$8,300.00
12/4/2020	FedEx Expense for Reimbursement Check to John R. Mensch	$24.02
12/15/2020	Mailing of Subpoenas	$25.00
12/16/2020	Certified Mail Notice of Hearing, Rule and Order to Show Cause, and Motion to Compel	$9.40
12/23/2020	Certified Mail Memorandum and Affidavit of Attorney Fees for Service	$14.65
1/25/2021	BOA Fee for Subpoena of Financial Records	$73.50
1/27/2021	FedEx John R. Mensch - Reimbursement of Attorney's Fees	$26.69
1/28/2021	Mailing Fees for Service of UBS and State Street Global Advisors Subpoenas	$23.95
2/17/2021	UBS Subpoena Production - Invoice #2102161216SK	$152.25
2/27/2021	John Markel Expert Accounting Fees (Invoice #21106)	$5,375.00
3/15/2021	BOA Fees - Subpoena for Document Production (Invoice #688522)	$42.20
7/15/2021	John Markel Expert Accounting Fees (Invoice #21127)	$9,000.00
SUBTOTAL - Expenses		**$30,331.25**
Less Amount Previously Awarded by Court		
	Amount awarded per Order of Probate Court dated August 28, 2019	$1,500.00
	Amount awarded per Order of Probate Court dated December 4, 2019	$10,000.00
	Amount awarded per Order of Probate Court dated September 30, 2020	$10,000.00
	Amount awarded per Order of Probate Court dated January 13, 2021	$7,500.00
SUBTOTAL - Amounts Previously Awarded by Court		**$29,000.00**
GRAND TOTAL - Attorney Fees and Costs (Attorney Billing + Expenses) - (Previously Awarded)		**$100,734.00**

Attorney Billing Rates
R. David Massey (RDM) @ $400.00/hr
Knox L. Haynsworth (KLH) @ $400.00/hr
Tyler E. McLeod (TEM) @ $250.00/hr

THE STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	
COUNTY OF GREENVILLE	)	C.A. NO.: 2018-ES-23-02854
	)	
IN THE MATTER OF: Estate of Florence Petrak Mensch	)	
	)	
John R. Mensch and Shauna M. Waddell Individually and as Personal Representative Of the Estate of Florence Petrak Mensch and John R. Mensch,	)	
	)	
Petitioners,	)	
	)	
-vs-	)	**MEMORANDUM IN OPPOSITION TO PETIONERS MOTION FOR ATTORNEY'S FEES**
	)	
Sterling Raymond Mensch, III, Individually As Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrak Mensch	)	
	)	
Respondent.	)	

TO PETITIONERS AND THEIR ATTORNEY OF COUNSEL:

Respondent, Sterling Raymond Mensch ("Respondent"), by and through his undersigned counsel, hereby submits this Memorandum in Opposition to Petitioners, John R. Mensch and Shauna M. Wadell ("Petitioners"), Attorney's Fee Affidavit. Respondent requests the Court deny Petitioners' Attorney's Fee Affidavit. S.C. Code Ann. § 62-1-111 provides that reasonable attorney's fees and costs ***may*** be awarded to a prevailing party; however, the statute is not mandatory. (emphasis added). In this case, attorney's fees are not appropriate for the reasons detailed herein, Respondent requests that the Court in its discretion, decline to award attorney's fees to Petitioners. Petitioners have failed to satisfy their burden of establishing the six factors set forth by the Supreme Court in *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997), to warrant fees. Petitioners have also not provided any supporting evidence detailing the "costs" that they seek to recover. Therefore, the Court should also refuse to award any costs absent sufficient proof.

I. Petitioner has not provided sufficient evidence justifying an award of attorney's fees.

The Supreme Court has stated that the Court should consider the following six factors when determining a reasonable attorney's fee:

> "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services."

Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

Pursuant to Rule 6(d), SCRCP Petitioners were required to serve any supporting affidavits along with their motion. *See Id.* Petitioners have not submitted any evidence supporting any of the *Jackson* factors beyond a cursory affidavit from trial counsel which does not assert whether each element has been satisfied. This affidavit is not sufficient to satisfy Petitioners burden under South Carolina Law. *See*, e.g., *Abbott v. Gore*, 304 S.C. 116, 119, 403 S.E.2d 154, 157 (Ct. App. 1991) ("A party who seeks attorney's fees has the burden to show that request is well-founded and failure to offer any evidence on the issue of attorney's fees precludes an award."); *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493-94, 427 S.E.2d 659, 660-61 (1993) (noting that the courts have reversed fee awards and remanded the issue "when there was a lack of evidence"). The affidavit from Petitioners' Counsel states, "their firm is billing on an hourly basis in this matter." (McLeod Aff. ¶ 5.). However, Petitioners' own attorney's fee affidavit supporting exhibit states that it has billed 5.7 hours on reviewing and updating the engagement letter with Petitioners. The updated engagement agreement was completed almost a year after Petitioners' Counsel was retained. This begs the question as to why the engagement agreement was changed and what the engagement was changed to or from. South Carolina law is clear, that an award of attorney's fees is to the party, not his or her lawyer. *Jackson*, 326 S.C. at 307, 486 S.E.2d at 759. Therefore, if the agreement was changed to a contingency fee contract it is not dispositive evidence of the appropriate amount of fees. See, e.g., *S.C. Dep't of Transp. v. Revels*, 411 S.C. 1, 11-12, 766 S.E.2d 700, 705 (2014) (examining claim for attorney's fees under the condemnation statutes, noting that "[t]he court may, in fact, conclude that the contingency fee agreement yields a reasonable fee," but "the court is not bound by the terms of the agreement"); *Jackson*, 326 S.C. at 308, 486 S.E.2d at 759 ("When determining the reasonableness of attorney's fees under a statute mandating the award of attorney fees, the contract between the client and his counsel does not control the determination of a reasonable hourly rate.").

Petitioners must provide evidence of the reasonableness of the fees sought. That has not been done in this case. Petitioners conclusory affidavit does not meet this standard, and this alone warrants denying Petitioners' request for attorney's fees. Additionally, the assessment of the six factors demonstrates that Petitioners are either not entitled to attorney's fees or, at a minimum, the total amount of fees should be considerably less than what the Petitioners have requested.

The first factor concerns the nature, extent, and difficulty of the case. Petitioners do not allege that this case was complex and the facts do not support that this was a particularly complex case. Second, the time devoted to the case also weighs against awarding attorney's fees. In fact, the Court should question how much time was spent by Plaintiffs' counsel based on the lack of documentation that was offered supporting the attorney's fee affidavit. For example, Petitioners Counsel billed 1.5 hours for a TRO and an injunction, however, no such document has been filed with Court and/or produced to Respondent's Counsel. This is not sufficient to meet Petitioners evidentiary burden under South Carolina law. Petitioners also fault Respondent for failing to settle the case. However, Respondent should not be faulted for failing to settle where there was a good faith dispute of fact concerning damages and Respondent made numerous attempts and actual offers. It would be fundamentally unfair to punish a party for exercising his rights to have a claim tried at a damages hearing.

The third factor is the professional standing of counsel. The only evidence provided by Petitioner on this element is counsel's affidavit that states that a majority of his practice involves probate litigation. This conclusory statement is not sufficient to meet Petitioners burden on this element.

As to the fourth factor, Petitioners' Counsel's compensation was clearly changed at some point during the litigation. However, as detailed above, it is not sufficient to merely assert that since the case was brought on a billable hourly basis, Petitioners are entitled to recover the full amount of the fees provided by the fee agreement if the fee agreement was changed. Petitioners have failed to provide the engagement agreement. This is not appropriate or sufficient under South Carolina law. *See Revels*, 411 S.C. at 11- 12, 766 S.E.2d at 705 (2014); Jackson, 326 S.C. at 308, 486 S.E.2d at 759.

Lastly, Petitioners have not established that their fee is a customary legal fee for similar services. Without any example or explanation, Petitioners' counsel's affidavit summarily states that this is a customary fee percentage for this type of case. Petitioners, however, have not provided any evidence or testimony detailing the customary rate or time spent on such a matter. Therefore, Petitioners have not satisfied this element either.

II. Petitioners have not provided any sufficient evidence of costs.

Petitioners motion and supporting affidavit state without any evidentiary support that they have incurred "litigation costs in the amount of $30,331.25." S.C. Code Ann. § 62-1-111 provides that a party who violates the probate code may be liable for "court costs." *Id.* However, the statute does not delineate the types of costs that are recoverable and, as South Carolina Jurisprudence explains, recoverable costs are not a well-developed issue in South Carolina. See 7 S.C. Jur. Costs §§ 27. Regardless, the traditional costs recoverable in this type of action might include filing fees, fees relating to serving process, deposition fees, printing costs, and witness fees. See generally 7 S.C. Jur. Costs §§ 27-33. Again, however, Petitioners have not provided any supporting bills and have made no effort to establish that the costs they seek are, in fact, recoverable costs under South Carolina law. For example, Petitioner incurred costs for "interrogatories and Request for Production – paralegal services." This expense likely resulted from Petitioners' Counsel seeking outside help from his office to obtain interrogatories and request for production. Not only does this support Respondent's position as to the third element in the *Jackson* factors, but Respondent should not be burdened for a cost that was done because of particular discovery that was outsourced by his firm.

Additionally, most of the costs were incurred by Petitioners in connection with claims for which Respondent was not found liable. Petitioners have asserted Fourteen (14) causes of action and Respondent has only been found liable for three (3) causes of action. This is not sufficient to warrant an award of costs. See, e.g., *Black v. Roche Biomedical Lab'ys, a Div. of Hoffman-LaRoche, Inc.*, 315 S.C. 223, 229, 433 S.E.2d 21, 25 (Ct. App. 1993) (reversing award of certain costs where there was insufficient supporting documentation). Therefore, the Court should also reject Petitioners request for costs.

Conclusion

For these reasons stated herein and in Respondents Response in Opposition to Petitioners Motion for Attorney's Fees, Respondent respectfully requests that this Court deny Petitioners' motion for attorney's fees and costs.

Respectfully Submitted this 17th day of August, 2021

TRULUCK THOMASON, LLC

s/ Kimberly Thomason
Kimberly Thomason
Bar No.:79179
Truluck Thomason, LLC
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Greenville, SC 29601
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Attorney for Respondent

FILED
SEP 15 2021
GREENVILLE COUNTY
PROBATE COURT

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE PROBATE COURT

C.A. No.: 2018-ES-23-02854

IN THE MATTER OF:

Estate of Florence Petrak Mensch

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch,

Petitioners,

vs.

Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch,

Respondent.

AMENDED AFFIDAVIT OF ATTORNEY'S FEES AND COSTS

Personally appeared before me, Tyler E. McLeod, who, after being duly sworn states as follows:

1. David Massey, Knox Haynsworth and I of the firm Brown, Massey, Evans, McLeod & Haynsworth LLC are attorneys for Petitioners in the above captioned case.

2. Petitioners are requesting the Court to order Respondent to pay the Estate of Florence Mensch's attorney's fees, accountant fees and costs incurred to prosecute certain claims of the Estate for Respondent's Breach of Fiduciary Duty as Agent under Power of Attorney for Florence Petrak Mensch, Violation of the South Carolina Power of Attorney Act and Conversion.

3. David Massey is an attorney licensed in South Carolina who has practiced in South Carolina for over 40 years, with much of his practice devoted to probate litigation. David Massey's hourly rate is $400.00 per hour.

4. Knox Haynsworth is an attorney licensed in South Carolina who has practiced in South Carolina for over 33 years, with much of his practice devoted to civil litigation. Knox Haynsworth's hourly rate is $400.00 per hour.

4. I am an attorney licensed in South Carolina who has practiced in South Carolina for over 8 years, with the majority of my practice involving estate planning, probate administration and probate litigation. My hourly rate for this matter is $250.00 per hour.

5. Our firm is billing on an hourly basis in this matter. I affirm that the hourly rates specified herein are reasonable given the attorney's professional qualifications and the fees customarily charged in South Carolina for similar legal services.

6. I have set forth an itemized list of actual fees and costs on Exhibit A of this Affidavit, and I assert that these fees and costs are reasonable pursuant to Rule 1.5 of the S.C. Rules of Professional Conduct. The total unpaid attorney's fees, accountant's fees and costs to date in this matter total One Hundred Thirty-Three Thousand Nine Hundred Fifty-Two and 95/100 ($133,952.95) Dollars.

7. This Amended Affidavit of Attorney's Fees and Costs is an update to the Affidavit of Attorney's Fees and Costs dated August 5, 2021 which was submitted as Exhibit A to Petitioner's Motion for Attorney's Fees and Costs. The update is submitted to include the attorney's fees and accountant fees incurred since August 5, 2021. Petitioner's also requested attorney's fees and costs in their Amended Petition.

Tyler E. McLeod (S.C. Bar #: 101309)
tmcleod@bmemlaw.com
106 Williams St.
Greenville, South Carolina 29601
(864) 271-7424

Greenville, South Carolina
September 15, 2021

SWORN to before me
this 15th day of September 2021.

Notary Public, State of South Carolina
My commission expires:

ERIN CALLAHAN
My Commission Expires
NOTARY
PUBLIC
December 2, 2030
SOUTH CAROLINA

EXHIBIT A

Total Attorney Fees & Costs Incurred to Date

Attorney Billing

Date	Atty	Billing Rate $/hr	Hour(s)	Description	Total ($)
3/5/2019	RDM	$400.00	2.00	Multiple telephone conferences, in-office conference with John Mensch.	$800.00
3/18/2019	TEM	$250.00	2.30	Telephone call with John Mensch followed by drafting of Demand for Notice, Demand for Non-Probate Inventory and Letter to Sterling Mensch.	$575.00
5/6/2019	TEM	$250.00	3.70	Begin drafting Petition to Probate Court.	$925.00
5/7/2019	TEM	$250.00	2.30	Continue work on Petition to Probate Court.	$575.00
5/13/2019	RDM	$400.00	0.50	Review, analysis of pleadings. Conduct legal research; meet with John Mensch.	$200.00
5/15/2019	TEM	$250.00	2.70	Finalize Petition for submission to Court. Draft Application for Appointment.	$675.00
5/15/2019	TEM	$250.00	0.50	Meeting with Shauna Waddell in-office; Signing of Petition.	$125.00
7/4/2019	TEM	$250.00	0.50	Email communications with opposing counsel.	$125.00
7/8/2019	TEM	$250.00	0.70	Email communications to and from Shauna Waddell and John Mensch	$175.00
7/19/2019	TEM	$250.00	2.30	Begin drafting Motion for Partial Summary Judgment and Witness Affidavits.	$575.00
7/22/2019	TEM	$250.00	4.70	Work on Motion for Partial Summary Judgment and Affidavits.	$1,175.00
7/29/2019	TEM	$250.00	0.10	Telephone call with John Mensch.	$25.00
7/29/2019	TEM	$250.00	1.30	Reviewed and Edited Motion for Summary Judgment/ Compel	$325.00
8/1/2019	TEM	$250.00	1.70	Prepared Affidavit of Shauna Waddell; appointment to execute Affidavit and Conference	$425.00
8/19/2019	TEM	$250.00	2.30	Preparation for Hearing on Motion for Summary Judgment.	$575.00
8/19/2019	TEM	$250.00	0.10	Telephone call with Shauna M. Waddell.	$25.00
8/20/2019	RDM	$0.00	1.70	Meeting with Tyler McLeod to Prepare for Hearing	$0.00
8/20/2019	TEM	$250.00	1.70	Preparation for Hearing on Motion for Summary Judgment.	$425.00
8/21/2019	TEM	$250.00	1.30	Begin drafting Order for Probate Court.	$325.00
8/21/2019	TEM	$250.00	5.40	Preparation for Probate Court Hearing.	$1,350.00
8/22/2019	TEM	$250.00	3.30	Continued work drafting Order.	$825.00
8/23/2019	RDM	$0.00	1.50	Reviewed Order	$0.00
9/16/2019	TEM	$250.00	0.70	Telephone call with Shauna and John.	$175.00
9/16/2019	TEM	$250.00	1.20	Email to opposing counsel.	$300.00
9/24/2019	TEM	$250.00	2.30	Review of John and Shauna's Summary; Email to John and Shauna.	$575.00
9/26/2019	KLH	$400.00	1.00	Discussion re: Order and Motion with Knox Haynsworth.	$400.00
9/26/2019	TEM	$250.00	2.30	Work on 2nd Motion to Compel and Summary Judgment; Call with Shauna Waddell.	$575.00
9/27/2019	TEM	$250.00	0.30	Telephone call with John and Shauna; worked on Motion.	$75.00
10/1/2019	TEM	$250.00	1.30	Drafting Second Motion.	$325.00
10/9/2019	TEM	$250.00	1.70	Research and drafting of Motion for SJ and Compel; Affidavit for John Mensch.	$425.00
10/9/2019	RDM	$400.00	0.70	Review and revise Second Motion.	$280.00
10/10/2019	TEM	$250.00	1.30	Worked on Affidavit for Shauna Waddell	$325.00
11/1/2019	TEM	$250.00	0.10	Email to Probate Court.	$25.00
11/18/2019	TEM	$250.00	2.70	Preparation for 11/20/19 Hearing on Summary Judgment & Motion to Dismiss.	$675.00
11/18/2019	TEM	$250.00	0.10	Email to John Mensch and Shauna Waddell.	$25.00
11/20/2019	TEM	$250.00	3.20	Preparation for Hearing	$800.00
11/20/2019	TEM	$250.00	1.70	Hearing on 11/20/2019	$425.00
11/22/2019	TEM	$250.00	1.70	Worked on Order	$425.00
11/27/2019	TEM	$250.00	3.30	Worked on Proposed Order	$825.00
11/27/2019	RDM	$400.00	1.00	Reviewed Order	$400.00
11/27/2019	TEM	$250.00	0.30	E-mail to Judge Jennings	$75.00
11/27/2019	TEM	$250.00	0.30	E-mail to Shauna M. Waddell & John Mensch	$75.00
1/2/2020	TEM	$250.00	1.30	Subpoena to BOA	$325.00
1/15/2020	TEM	$250.00	4.30	Worked on Motion to Amend; e-mails to John Mensch and Shauna M. Waddell	$1,075.00
1/17/2020	TEM	$250.00	3.30	Review of BOA Documents; Upload to Dropbox for John Mensch and Shauna M. Waddell	$825.00
1/23/2020	RDM	$400.00	0.50	Office Conference with Tyler McLeod Re: various issues of case	$200.00
2/1/2020	TEM	$250.00	1.50	Telephone Call with John Mensch and Shauna Waddell; Plan for moving forward with motion to amend and rule to show cause; determination of what to do with house	$375.00
2/1/2020	TEM	$250.00	0.70	Worked on Motion to Amend	$175.00
2/4/2020	TEM	$250.00	2.90	Worked on Rule to Show Cause and Affidavit	$725.00
2/4/2020	TEM	$250.00	1.30	Review of E-mails with transactions performed by Sterling Raymond Mensch III	$325.00
2/5/2020	RDM	$400.00	0.70	Reviewed Engagement Letter	$280.00
2/6/2020	TEM	$250.00	3.70	Worked on Updated Engagement Letter; Rule to Show Cause	$925.00
2/7/2020	TEM	$250.00	0.70	Reviewed Subpoena to T. Rowe Price	$175.00
2/7/2020	TEM	$125.00	1.00	Subpoena for Production of Documents to T. Rowe Price, Notice of Issuance of Subpoena and Letters to T. Rowe Price and Ben Leaphart	$125.00
2/10/2020	TEM	$250.00	1.10	E-mail responses to John Mensch and Shauna M. Waddell	$275.00
2/12/2020	TEM	$250.00	1.30	Worked on Updated Engagement Letter	$325.00
2/12/2020	TEM	$250.00	1.20	Finalized Rule and Order to Show Cause and Affidavit	$300.00
2/14/2020	TEM	$125.00	0.50	Preparation of Exhibits to Motion to Amend for filing with Probate Court	$62.50
2/14/2020	TEM	$250.00	1.30	E-mails to Probate Court; Telephone Call with Kim; E-mails to John Mensch and Shauna M. Waddell	$325.00
2/17/2020	TEM	$125.00	1.50	Revision to Petitioners' Rule and Order to Show Cause with Affidavit of Tyler E. McLeod and preparation of Exhibits A-D; Revision of Exhibits 1-2 to Petitioners' Motion to Amend Petition: prepare Notice of Hearing and Proof of Delivery to Ben Leaphart; Revision to Letter to Judge Jennings on behalf of Tyler E. McLeod; Cover Letter to Kimberly Watford	$187.50
2/18/2020	TEM	$125.00	0.20	Establish new, secure DropBox link for use by John Mensch in downloading documents from BOA; E-mail link to John Mensch	$25.00
2/18/2020	TEM	$250.00	0.50	Review of Documents from T. Rowe Price	$125.00
2/19/2020	TEM	$250.00	0.30	Email to Probate Court, Shauna and John.	$75.00
2/21/2020	TEM	$125.00	0.45	Analysis, Preparation, Upload of new T. Rowe Price document production.	$56.25
2/26/2020	TEM	$125.00	0.50	Processing and Preparation of Bates Series Petitioners_000001-002437.	$62.50
3/9/2020	TEM	$250.00	1.30	Review of John Mensch Email regarding expenditures.	$325.00
3/9/2020	TEM	$250.00	0.70	Review of Motion to Withdraw as Counsel; Emails to John and Shauna.	$175.00
3/13/2020	TEM	$250.00	0.50	Review of Email from Shauna Waddell regarding Bank of America.	$125.00
3/17/2020	TEM	$250.00	0.50	Email to John and Shauna regarding hearing and Covid-19 impact.	$125.00
3/23/2020	TEM	$250.00	1.20	Telephone call with Ben Leaphart; Review Probate Order re: Hearing; Emails to Shauna and John; Email to Probate Court.	$300.00
3/23/2020	TEM	$250.00	0.10	Telephone call to Amela at Bank of America.	$25.00
3/23/2020	TEM	$250.00	0.20	Email to John and Shauna regarding hearing.	$50.00
3/25/2020	TEM	$250.00	0.90	Preparation for call with Judge Jennings and Ben Leaphart.	$225.00
3/25/2020	TEM	$250.00	0.70	Telephone call with Judge Jennings and Ben Leaphart.	$175.00
3/25/2020	TEM	$250.00	0.70	Telephone call with John and Shauna.	$175.00
3/26/2020	TEM	$250.00	4.30	Preparation for Motion to Amend Hearing and Ben Leaphart's Motion to be relieved as Counsel; Review of new information to present at Hearing on Motion to Amend; Preparation of Argument.	$1,075.00

3/26/2020	TEM	$250.00	1.30	Telephone call to to Bank of America Legal Counsel regarding their compliance with the Order dated December 4, 2019.	$325.00
3/30/2020	TEM	$250.00	1.30	Work on Order for Motion to Amend	$325.00
3/30/2020	TEM	$250.00	1.70	Reviewed Order to be relieved as counsel and made revisions; email to Judge Jennings and Ben Leaphart	$425.00
3/31/2020	TEM	$250.00	0.70	E-Mail to John Mensch regarding Motion to Amend	$175.00
3/31/2020	TEM	$250.00	2.30	Worked on Order for Motion to Amend	$575.00
4/8/2020	TEM	$0.00	1.30	Telephone Call with Peter Tiffany; Telephone call with John Markel regarding forensic accounting services	$0.00
4/8/2020	TEM	$250.00	0.70	Telephone Call with John Markel regarding accounting	$175.00
4/14/2020	TEM	$250.00	1.50	Telephone Call with Bank of America; Telephone Call with John Mensch and Shauna Waddell regarding accounting and other issues	$375.00
4/23/2020	TEM	$250.00	0.70	E-mail to John Markel regarding accounting	$175.00
4/27/2020	TEM	$250.00	3.40	Worked on Complaint	$850.00
4/29/2020	TEM	$250.00	1.80	Telephone Call with John Mensch and Shauna Waddell; Telephone Call with Accountant	$450.00
5/1/2020	TEM	$250.00	0.70	Telephone Call with Kim Thomason	$175.00
5/6/2020	TEM	$250.00	5.50	Worked on Complaint; Added Causes of Action	$1,375.00
5/7/2020	TEM	$250.00	1.50	E-mails to Rachael Hardin (attorney for Sterling Mensch III)	$375.00
5/8/2020	TEM	$250.00	4.30	Worked on Complaint; incorporated changes from John Mensch and Shauna Waddell	$1,075.00
5/11/2020	TEM	$250.00	0.70	E-mail to John Markel regarding accounting	$175.00
5/11/2020	TEM	$250.00	1.80	Telephone Call with John Mensch and Shauna Waddell; Telephone Call with Accountant	$450.00
5/11/2020	TEM	$250.00	4.70	Finalized Complaint; added Motion for Eviction and Motion for TRO; e-mails with Shauna Waddell and John Mensch; Prepared to file Complaint	$1,175.00
5/11/2020	TEM	$250.00	0.50	Review of information from John Mensch	$125.00
5/12/2020	TEM	$250.00	0.70	Various e-mails with John Mensch and Shauna Waddell	$175.00
5/12/2020	TEM	$250.00	0.20	E-mail correspondence with Rachael Hardin	$50.00
5/13/2020	TEM	$250.00	1.20	Telephone Call with Rachael Hardin	$300.00
5/13/2020	TEM	$250.00	0.90	Telephone Call with John Mensch and Shauna Waddell	$225.00
5/13/2020	TEM	$250.00	0.70	E-mail to Rachael Hardin regarding pension repayment	$175.00
5/16/2020	TEM	$250.00	1.70	E-mails to Counsel for Sterling Mensch III; John Mensch and Shauna Waddell	$425.00
6/1/2020	TEM	$250.00	0.30	Review of information regarding filing tax returns from Shauna Waddell	$75.00
6/19/2020	TEM	$250.00	3.70	E-mail to Rachael Hardin; Review of eviction issue, Attorney's Fees, GE Repayment	$925.00
				E-mail Correspondence with Shauna Waddell and John Mensch; reviewed e-mails from Rachael Hardin	$175.00
6/30/2020	TEM	$250.00	0.70	Telephone Call with Shauna Waddell and John Mensch	$175.00
7/1/2020	TEM	$250.00	2.80	Worked on Interrogatories and RFP	$700.00
7/8/2020	TEM	$250.00	1.20	Telephone Call with John Mensch and Shauna Waddell; E-mail to Rachael Hardin	$300.00
7/8/2020	TEM	$250.00	2.00	Visited house at New Tarleton with Shauna Waddell	$500.00
7/9/2020	TEM	$250.00	2.70	E-mails to Rachael Hardin; telephone call with rachael Hardin; e-mails to John Mensch and Shauna Waddell; all regarding negotiation of Sterling Mensch III vacating 512 New Tarleton	$675.00
7/10/2020	TEM	$250.00	2.30	E-mails to Rachael Hardin	$575.00
7/13/2020	TEM	$250.00	1.40	E-mail to Rachael Hardin; Worked on Interrogatories and RFP; Emails to John Mensch and Shauna Waddell	$350.00
7/17/2020	TEM	$250.00	0.70	E-mails to John Mensch and Shauna Waddell regarding Interrogatories and RFP	$175.00
7/20/2020	TEM	$250.00	2.70	Updates to Interrogatories and RFP based on questions-input from John Mensch; worked on Requests for Admission	$675.00
7/22/2020	TEM	$250.00	0.30	Research on Requests for Admission; E-mail response to John Mensch	$75.00
8/11/2020	TEM	$250.00	1.20	Email to John Mensch concerning account and discovery	$300.00
8/11/2020	RDM	$0.00	1.70	Consultation with Tyler McLeod regarding potential accountant and options for moving forward	$0.00
8/11/2020	TEM	$250.00	0.70	E-mail correspondence with John Mensch and Shauna Waddell	$175.00
8/12/2020	TEM	$250.00	1.30	Answered questions in e-mail form John Mensch concerning discovery	$325.00
8/12/2020	TEM	$295.00	1.70	Review of restrictions; E-mail to seller's attorney regarding right of first refusal	$501.50
8/12/2020	TEM	$250.00	1.70	Worked on requests for admission; interrogatories and requests for production	$425.00
8/13/2020	TEM	$250.00	0.30	Telephone Call with Kim Campos Ivy to set hearing for rule to show cause	$75.00
8/13/2020	TEM	$250.00	3.20	Worked on revised rule to show cause; incorporated language for zoom hearing; emails with John Mensch concerr concerning requests for admission and interrogatories	$800.00
8/14/2020	TEM	$250.00	1.70	Worked on Rule to Show Cause and Affidavit	$425.00
8/17/2020	TEM	$250.00	0.70	E-mail to John Markel	$175.00
8/21/2020	TEM	$250.00	0.30	E-mails to Rachael Hardin; Telephone Call with Process Server	$75.00
8/31/2020	TEM	$250.00	5.50	Preparation for Rule to Show Cause Hearing	$1,375.00
9/1/2020	TEM	$250.00	3.70	Preparation for Rule to Show Cause Hearing	$925.00
9/2/2020	TEM	$250.00	3.00	Preparation for Rule to Show Cause Hearing	$750.00
9/3/2020	TEM	$250.00	1.20	Worked on Discovery Request ; E-mails to John and Shauna	$300.00
9/3/2020	TEM	$250.00	1.30	Discussion with david Massey on Hearing for Rule to Show Cause	$325.00
9/15/2020	TEM	$250.00	3.70	Worked on proposed Order for Rule to Show Cause; Review of Transcripts from Hearing	$925.00
9/18/2020	TEM	$250.00	0.80	Telephone Call with John and Shauna regarding answering discovery	$200.00
9/24/2020	TEM	$250.00	1.20	Worked on Discovery Requests	$300.00
9/25/2020	TEM	$250.00	2.30	Worked on proposed Order	$575.00
10/2/2020	TEM	$250.00	0.70	Review of Judge Jennings' Order and Rule to Show Cause	$175.00
10/6/2020	TEM	$250.00	1.70	Review of Discovery Documents from John Mensch	$425.00
10/7/2020	TEM	$250.00	1.20	Review of Requests for Admission; Research on denials from devon Puriefoy	$300.00
10/13/2020	TEM	$125.00	1.67	Work on Answers to Interrogatories	$208.75
10/14/2020	TEM	$125.00	2.25	Work on Answers and Responses to Interrogatoris and Requests for Production	$281.25
10/15/2020	TEM	$250.00	0.20	Telephone Call with John Mensch	$50.00
10/15/2020	TEM	$250.00	1.20	Worked on Discovery Responses	$300.00
10/21/2020	TEM	$250.00	0.80	Telephone Call with John and Shauna	$200.00
10/21/2020	TEM	$250.00	0.90	Review of Discovery Production	$225.00
10/23/2020	TEM	$250.00	1.20	Review of Markel Report	$300.00
11/6/2020	TEM	$250.00	2.30	Worked on discovery responses	$575.00
11/6/2020	TEM	$125.00	1.00	Reviewed/Prepared Discovery Production	$125.00
11/17/2020	TEM	$250.00	1.30	E-mails to Truluck Thomason regarding production/Order	$325.00
11/17/2020	TEM	$250.00	1.30	E-mails to John Mensch regarding deposition questions, failure of Sterling to comply with Order; Motion to Determine Sufficiency of Answers to Requests for Admission	$325.00
11/23/2020	TEM	$250.00	0.30	E-mail to Court; response to attorney's fee question	$75.00
11/30/2020	TEM	$250.00	1.50	Review of Deposition Questions from John Mensch; e-mail to John Mensch	$375.00
11/30/2020	TEM	$250.00	0.70	E-mails to John Mensch	$175.00
12/3/2020	TEM	$250.00	2.70	Worked on Second Rule to Show Cause; Affidavit; letter to Judge Jennings	$675.00
12/3/2020	TEM	$250.00	1.30	Worked on Motion to Determine Sufficiency and Motion to Compel	$325.00
12/14/2020	TEM	$125.00	0.50	Worked on Affidavit for Rule to Show Cause	$62.50
12/14/2020	TEM	$250.00	5.70	Worked on Third Rule and Order to Show Cause - delivered to Court; Affidavit; Motion to Determine Sufficiency and to Compel	$1,425.00

12/14/2020	TEM	$250.00	1.50	Worked on TRO/ Injunction	$375.00
12/14/2020	TEM	$250.00	1.20	E-mail to Court and opposing party regarding Rule to Show Cause	$300.00
12/15/2020	TEM	$250.00	0.90	Worked on Motion to Compel and Determine Sufficiency; Filed with Court; Sent to opposing Counsel	$225.00
12/15/2020	TEM	$250.00	2.50	Worked on/Prepared Subpoenas for financial information from BOA accounts and T. Rowe Price	$625.00
12/17/2020	TEM	$250.00	1.70	E-mails to John and Shauna; Preparation for Motion to Compel and to Determine Sufficiency and Rule to Show Cause	$425.00
12/18/2020	TEM	$250.00	0.90	Telephone Call with John & Shauna regarding Rule to Show Cause; Motion to Compel and Motion to Determine Sufficiency	$225.00
12/21/2020	TEM	$250.00	4.80	Worked on Memorandum for Motion to Deem Admitted/Compel	$1,200.00
12/21/2020	KLH	$350.00	1.20	Research on Motion to Determine Sufficiency of Requests for Admission	$420.00
12/21/2020	TEM	$250.00	4.30	Preparation for Hearing on Rule to Show Cause and Motion to Compel	$1,075.00
12/22/2020	TEM	$250.00	2.30	Review of John Mensch Comments, E-mails regarding Requests for Admission to John Mensch; Worked on Memorandum in Support of Motion to Determine Sufficiency and to Compel	$575.00
12/22/2020	TEM	$250.00	1.70	Prepared Exhibits and Memorandum for filing; final edits to Memorandum	$425.00
12/29/2020	TEM	$250.00	2.30	Preparation for Hearing, Review of Transactions, T/C to Jeff Lynch Appliances	$575.00
12/30/2020	TEM	$250.00	4.30	Preparation for and Hearing on Petition; T/C with Home Depot	$1,075.00
1/19/2021	TEM	$250.00	1.20	Review of Discovery Production from Respondent	$300.00
1/20/2021	TEM	$250.00	6.20	T/C with John Markel; John and Shauna Mensch; discussion on production, accounting, summary judgment motion; review of production and expert report to determine amount for summary judgment motion; worked on summary judgment motion	$1,550.00
1/22/2021	TEM	$250.00	0.90	Review of Requests to Admit Answers; email to John/Shauna - Email to John Markel	$225.00
1/25/2021	TEM	$250.00	0.90	Review of Affidavits from John Markel	$225.00
1/27/2021	TEM	$250.00	4.20	Worked on Motion for Summary Judgment; review of accountant's asffidavit	$1,050.00
1/28/2021	TEM	$250.00	1.70	Work on Subpoenas for UBS and State Street Global Advisors Financial Records and Prepare Documents for Service	$425.00
1/29/2021	TEM	$250.00	0.70	Review of Subpoenas	$175.00
1/29/2021	TEM	$250.00	4.20	Worked on Summary Judgment Motion; review of cases regarding transfers	$1,050.00
1/29/2021	TEM	$250.00	2.10	Worked on Motion for Summary Judgment	$525.00
2/1/2021	TEM	$250.00	2.30	Worked on Summary Judgment; email discussion on damages	$575.00
2/2/2021	TEM	$250.00	0.70	Emails with John Mensch regarding Summary Judgment Motion; email to John Markel	$175.00
2/2/2021	TEM	$250.00	0.70	T/C with UBS and Shauna Waddell	$175.00
2/3/2021	TEM	$250.00	0.30	Email to Court regarding Sterling complying with Order	$75.00
2/3/2021	TEM	$250.00	1.70	Worked on Summary Judgment Motion; T/C with John Markel	$425.00
2/11/2021	TEM	$250.00	3.70	Worked on Motion for Summary Judgment and Memorandum	$925.00
2/12/2021	TEM	$250.00	1.30	Review of John Markel Affidavit and Amended Report	$325.00
2/17/2021	TEM	$250.00	3.70	Worked on Summary Judgment Motion; Prepared for filing; filed with the Court	$925.00
2/22/2021	TEM	$250.00	0.70	Review of documents related to accounts of Sterling Mensch; Email to John Mensch and Shauna Waddell	$175.00
2/22/2021	TEM	$250.00	1.20	Review of Email from John Mensch	$300.00
3/1/2021	TEM	$250.00	1.70	Worked on Settlement Proposal; Emails to John and Shauna	$425.00
3/2/2021	TEM	$250.00	1.20	Worked on Settlement Agreement	$300.00
3/4/2021	RDM	$400.00	0.70	Reviewed Settlement Offer	$280.00
3/4/2021	TEM	$250.00	3.70	Worked on Settlement Offer; various emails to John and Shauna; email to Kim Thomason	$925.00
3/9/2021	TEM	$250.00	7.50	Worked on Motion for Summary Judgment Memorandum; review of case file an all production	$1,875.00
3/10/2021	KLH	$250.00	0.50	Conversation with Tyler on punitive damages	$125.00
3/10/2021	TEM	$250.00	4.70	Worked on Motion for Summary Judgment	$1,175.00
3/12/2021	TEM	$250.00	3.90	Worked on Memorandum for Motion for Summary Judgment; Worked on Exhibits for the Motion; Emails the Court and Devon Puriefoy regarding Respondent's request for Judge Jennings to recuse himself	$975.00
3/15/2021	TEM	$250.00	6.90	Worked on Memorandum and Exhibits for Motion for Summary Judgment	$1,725.00
3/16/2021	TEM	$250.00	8.20	Preparation for Summary Judgment Hearing	$2,050.00
3/17/2021	TEM	$250.00	3.90	Sumamry Judgment Hearing; research on cases regarding punitives	$975.00
3/22/2021	TEM	$250.00	0.70	Email to John Mensch regarding false affidavit	$175.00
4/22/2021	TEM	$250.00	1.30	Review of Ruling from Judge Faulkner; various emails to John & Shauna	$325.00
4/27/2021	TEM	$250.00	1.70	Worked on Order for Summary Judgment	$425.00
4/28/2021	TEM	$250.00	0.70	T/C with John and Shauna	$175.00
4/30/2021	TEM	$250.00	2.70	Review of file in prep for hearing on damages; emails	$675.00
5/5/2021	TEM	$250.00	1.90	Worked on Order; determined relevant facts to client	$475.00
5/10/2021	TEM	$250.00	0.90	Responses to John Mensch comments relating to mitigation of damages	$225.00
5/12/2021	TEM	$250.00	1.20	Worked on Order for Summary Judgment	$300.00
5/14/2021	TEM	$250.00	3.20	Review of Memo in Opp. to MST filed by Respondent; Worked on Order	$800.00
5/17/2021	TEM	$250.00	0.90	Worked on Order	$225.00
5/17/2021	KLH	$350.00	1.00	Drafting of Order	$350.00
5/18/2021	KLH	$350.00	1.10	Work on order; review elements of cause of action to plug into order	$385.00
5/19/2021	KLH	$350.00	0.60	Worked on Order	$210.00
5/24/2021	TEM	$250.00	2.70	Drafted Attorney Fee Affidavit; Review of File	$675.00
5/26/2021	KLH	$350.00	1.50	T/C with Tyler regarding damages hearing	$525.00
5/26/2021	TEM	$250.00	2.70	Preparation for Damages Hearings	$675.00
5/27/2021	TEM	$250.00	0.30	Final Review of Order	$75.00
6/15/2021	TEM	$250.00	1.30	Various email correspondence to the Court; correction to proposed Order; emails to John and Shauna	$325.00
6/17/2021	TEM	$250.00	1.70	Responses to Devon's Comments to Proposed Order	$425.00
7/20/2021	TEM	$250.00	3.70	Work on attorney fee motion and affidavit; prep. for meeting with John Markel; emails to John and Shauna	$925.00
7/22/2021	TEM	$250.00	5.70	Preparation for damages hearing	$1,425.00
7/23/2021	TEM	$250.00	0.50	Emails to court regarding moving trial; email to Kim Thomason; research on motion and 106	$125.00
7/26/2021	TEM	$250.00	1.70	Research on cases on Damage hearing	$425.00
8/1/2021	TEM	$250.00	2.30	Worked on Reply to Motion for Continuance	$575.00
8/4/2021	TEM	$250.00	0.90	Prep for and Hearing on Motion for Continuance	$225.00
8/4/2021	TEM	$250.00	4.20	Prep. for trial; prep. of exhibits for trial; review of file; email to Kim Thomason regarding stipulations	$1,050.00
8/5/2021	TEM	$250.00	1.30	Preparation of Exhibits for trial; review of bank account statements	$325.00
8/9/2021	TEM	$250.00	7.80	Preparation for Trial; Worked on pre-trial brief; Worked on complying with SJ order; prep of Exhibits; Questions for Witnesses	$1,950.00
8/11/2021	TEM	$250.00	5.70	Preparation for Meeting with Kim Thomason and Devon Puriefoy; Various emails to John Markel; Email correspondence with Truluck Thomason; T/C with Shauna and John Mensch	$1,425.00
8/13/2021	TEM	$250.00	8.50	Meeting with Kim Thomason and accountants; worked on accounting for the court; prep for trial	$2,125.00
8/13/2021	KLH	$350.00	1.30	Discussion with Tyler on trial issues	$455.00
8/15/2021	TEM	$250.00	9.70	Preparation for Trial	$2,425.00
8/16/2021	TEM	$250.00	13.30	Preparation for Trial	$3,325.00
8/17/2021	TEM	$250.00	11.30	Trial	$2,825.00
8/18/2021	TEM	$250.00	9.30	Trial	$2,325.00
8/23/2021	TEM	$250.00	0.30	Email to Judge Faulkner concerning subpoenas	$75.00

8/27/2021	TEM	$250.00	0.90	Motion for TRO; discussion with Tyler	$225.00
8/30/2021	KLH	$350.00	0.40	Discussion with Tyler on Subpoena	$140.00
9/13/2021	TEM	$250.00	7.30	Preparation for trial; cross-examination of expert witness and Sterling Mensch; Closing Argument	$1,825.00
9/15/2021	TEM	$250.00	3.70	Preparation for final damages hearing; update to attorney's fee affidavit	$925.00
SUBTOTAL - Attorney Billing			394.77		$119,447.75

Expenses

1/17/2020	Check BOA Legal Order Processing for document production	$88.07
1/27/2020	Check for Transcript Order from Legal Eagle for Probate Court Hearings held 8/21/2019 and 11/20/2019	$340.50
3/22/2019	Probate Court filing fee for Demand Notice.	$5.00
5/13/2019	Probate Court filing fee for Petition.	$150.00
5/28/2019	Service of Process for Sterling Raymond Mensch, III.	$65.00
3/6/2020	Service of Process for Sterling Raymond Mensch.	$65.00
4/30/2020	Accounting Fee Retainer to John Markel to evaluate accounts of Florence Mensch	$3,000.00
5/26/2020	Priority Overnight Check to John Mensch	$59.24
6/29/2020	Interrogatories and Requests for Production - Paralegal Services	$120.00
8/26/2020	Process Server Fee for Service of Rule and Order to Show Cause	$115.00
8/31/2020	Accounting Fees to prepare 2017 and 2018 tax returns which Sterling Raymond Mensch III failed to file	$2,900.00
9/15/2020	Legal Eagel Fees (Invoice# 93067) for Transcriptionand Exhibit Pages for Probate Hearing	$356.78
10/2/2020	John Markel Expert Accounting Fees (Invoice #20137)	$8,300.00
12/4/2020	FedEx Expense for Reimbursement Check to John R. Mensch	$24.02
12/15/2020	Mailing of Subpoenas	$25.00
12/16/2020	Certified Mail Notice of Hearing, Rule and Order to Show Cause, and Motion to Compel	$9.40
12/23/2020	Certified Mail Memorandum and Affidavit of Attorney Fees for Service	$14.65
1/25/2021	BOA Fee for Subpoena of Financial Records	$73.50
1/27/2021	FedEx John R. Mensch - Reimbursement of Attorney's Fees	$26.69
1/28/2021	Mailing Fees for Service of UBS and State Street Global Advisors Subpoenas	$23.95
2/17/2021	UBS Subpoena Production - Invoice #21021612165K	$152.25
2/27/2021	John Markel Expert Accounting Fees (Invoice #21106)	$5,375.00
3/15/2021	BOA Fees - Subpoena for Document Production (Invoice #688522)	$42.20
7/15/2021	John Markel Expert Accounting Fees (Invoice #21127)	$9,000.00
8/11/2021	Legal Eagle Fee - Copy of Transcription from 03/17/2021 Hearing	$173.95
8/25/2021	John Markel Expert Accounting Fees (Invoice #21133)	$13,000.00
SUBTOTAL - Expenses		$43,505.20

Less Amount Previously Awarded by Court

Amount awarded per Order of Probate Court dated August 28, 2019	$1,500.00
Amount awarded per Order of Probate Court dated December 4, 2019	$10,000.00
Amount awarded per Order of Probate Court dated September 30, 2020	$10,000.00
Amount awarded per Order of Probate Court dated January 13, 2021	$7,500.00
SUBTOTAL - Amounts Previously Awarded by Court	$29,000.00

GRAND TOTAL - Attorney Fees and Costs (Attorney Billing + Expenses) - (Previously Awarded)	$133,952.95

Attorney Billing Rates
R. David Massey (RDM) @ $400.00/hr
Knox L. Haynsworth (KLH) @ $400.00/hr
Tyler E. McLeod (TEM) @ $250.00/hr

FILED

SEP 15 2021

GREENVILLE COUNTY PROBATE COURT

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE PROBATE COURT

C.A. No.: 2018-ES-23-02854

IN THE MATTER OF:

Estate of Florence Petrak Mensch

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch,

Petitioners,

vs.

Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch,

Respondent.

AMENDED AFFIDAVIT OF ATTORNEY'S FEES AND COSTS

Personally appeared before me, Tyler E. McLeod, who, after being duly sworn states as follows:

1. David Massey, Knox Haynsworth and I of the firm Brown, Massey, Evans, McLeod & Haynsworth LLC are attorneys for Petitioners in the above captioned case.

2. Petitioners are requesting the Court to order Respondent to pay the Estate of Florence Mensch's attorney's fees, accountant fees and costs incurred to prosecute certain claims of the Estate for Respondent's Breach of Fiduciary Duty as Agent under Power of Attorney for Florence Petrak Mensch, Violation of the South Carolina Power of Attorney Act and Conversion.

3. David Massey is an attorney licensed in South Carolina who has practiced in South Carolina for over 40 years, with much of his practice devoted to probate litigation. David Massey's hourly rate is $400.00 per hour.

4. Knox Haynsworth is an attorney licensed in South Carolina who has practiced in South Carolina for over 33 years, with much of his practice devoted to civil litigation. Knox Haynsworth's hourly rate is $400.00 per hour.

4. I am an attorney licensed in South Carolina who has practiced in South Carolina for over 8 years, with the majority of my practice involving estate planning, probate administration and probate litigation. My hourly rate for this matter is $250.00 per hour.

5. Our firm is billing on an hourly basis in this matter. I affirm that the hourly rates specified herein are reasonable given the attorney's professional qualifications and the fees customarily charged in South Carolina for similar legal services.

6. I have set forth an itemized list of actual fees and costs on Exhibit A of this Affidavit, and I assert that these fees and costs are reasonable pursuant to Rule 1.5 of the S.C. Rules of Professional Conduct. The total unpaid attorney's fees, accountant's fees and costs to date in this matter total One Hundred Thirty-Three Thousand Nine Hundred Fifty-Two and 95/100 ($133,952.95) Dollars.

7. This Amended Affidavit of Attorney's Fees and Costs is an update to the Affidavit of Attorney's Fees and Costs dated August 5, 2021 which was submitted as Exhibit A to Petitioner's Motion for Attorney's Fees and Costs. The update is submitted to include the attorney's fees and accountant fees incurred since August 5, 2021. Petitioner's also requested attorney's fees and costs in their Amended Petition.

Tyler E. McLeod (S.C. Bar #: 101309)
tmcleod@bmemlaw.com
106 Williams St.
Greenville, South Carolina 29601
(864) 271-7424

Greenville, South Carolina
September 15, 2021

SWORN to before me
this 15th day of September 2021.

Notary Public, State of South Carolina
My commission expires:

ERIN CALLAHAN
My Commission Expires
NOTARY
PUBLIC
December 2, 2030
SOUTH CAROLINA

EXHIBIT A

Total Attorney Fees & Costs Incurred to Date

Attorney Billing

Date	Atty	Billing Rate $/hr	Hour(s)	Description	Total ($)
3/5/2019	RDM	$400.00	2.00	Multiple telephone conferences, in-office conference with John Mensch.	$800.00
3/18/2019	TEM	$250.00	2.30	Telephone call with John Mensch followed by drafting of Demand for Notice, Demand for Non-Probate Inventory and Letter to Sterling Mensch.	$575.00
5/6/2019	TEM	$250.00	3.70	Begin drafting Petition to Probate Court.	$925.00
5/7/2019	TEM	$250.00	2.30	Continue work on Petition to Probate Court.	$575.00
5/13/2019	RDM	$400.00	0.50	Review, analysis of pleadings. Conduct legal research; meet with John Mensch.	$200.00
5/15/2019	TEM	$250.00	2.70	Finalize Petition for submission to Court. Draft Application for Appointment.	$675.00
5/15/2019	TEM	$250.00	0.50	Meeting with Shauna Waddell in-office; Signing of Petition.	$125.00
7/4/2019	TEM	$250.00	0.50	Email communications with opposing counsel.	$125.00
7/8/2019	TEM	$250.00	0.70	Email communications to and from Shauna Waddell and John Mensch	$175.00
7/19/2019	TEM	$250.00	2.30	Begin drafting Motion for Partial Summary Judgment and Witness Affidavits.	$575.00
7/22/2019	TEM	$250.00	4.70	Work on Motion for Partial Summary Judgment and Affidavits.	$1,175.00
7/29/2019	TEM	$250.00	0.10	Telephone call with John Mensch.	$25.00
7/29/2019	TEM	$250.00	1.30	Reviewed and Edited Motion for Summary Judgment/ Compel	$325.00
8/1/2019	TEM	$250.00	1.70	Prepared Affidavit of Shauna Waddell; appointment to execute Affidavit and Conference	$425.00
8/19/2019	TEM	$250.00	2.30	Preparation for Hearing on Motion for Summary Judgment.	$575.00
8/19/2019	TEM	$250.00	0.10	Telephone call with Shauna M. Waddell.	$25.00
8/20/2019	RDM	$0.00	1.70	Meeting with Tyler McLeod to Prepare for Hearing	$0.00
8/20/2019	TEM	$250.00	1.70	Preparation for Hearing on Motion for Summary Judgment.	$425.00
8/21/2019	TEM	$250.00	1.30	Begin drafting Order for Probate Court.	$325.00
8/21/2019	TEM	$250.00	5.40	Preparation for Probate Court Hearing.	$1,350.00
8/22/2019	TEM	$250.00	3.30	Continued work drafting Order.	$825.00
8/23/2019	RDM	$0.00	1.50	Reviewed Order	$0.00
9/16/2019	TEM	$250.00	0.70	Telephone call with Shauna and John.	$175.00
9/16/2019	TEM	$250.00	1.20	Email to opposing counsel.	$300.00
9/24/2019	TEM	$250.00	2.30	Review of John and Shauna's Summary; Email to John and Shauna.	$575.00
9/26/2019	KLH	$400.00	1.00	Discussion re: Order and Motion with Knox Haynsworth.	$400.00
9/26/2019	TEM	$250.00	2.30	Work on 2nd Motion to Compel and Summary Judgment; Call with Shauna Waddell.	$575.00
9/27/2019	TEM	$250.00	0.30	Telephone call with John and Shauna; worked on Motion.	$75.00
10/1/2019	TEM	$250.00	1.30	Drafting Second Motion.	$325.00
10/9/2019	TEM	$250.00	1.70	Research and drafting of Motion for SJ and Compel; Affidavit for John Mensch.	$425.00
10/9/2019	RDM	$400.00	0.70	Review and revise Second Motion.	$280.00
10/10/2019	TEM	$250.00	1.30	Worked on Affidavit for Shauna Waddell	$325.00
11/1/2019	TEM	$250.00	0.10	Email to Probate Court.	$25.00
11/18/2019	TEM	$250.00	2.70	Preparation for 11/20/19 Hearing on Summary Judgment & Motion to Dismiss.	$675.00
11/18/2019	TEM	$250.00	0.10	Email to John Mensch and Shauna Waddell.	$25.00
11/20/2019	TEM	$250.00	3.20	Preparation for Hearing	$800.00
11/20/2019	TEM	$250.00	1.70	Hearing on 11/20/2019	$425.00
11/22/2019	TEM	$250.00	1.70	Worked on Order	$425.00
11/27/2019	TEM	$250.00	3.30	Worked on Proposed Order	$825.00
11/27/2019	RDM	$400.00	1.00	Reviewed Order	$400.00
11/27/2019	TEM	$250.00	0.30	E-mail to Judge Jennings	$75.00
11/27/2019	TEM	$250.00	0.30	E-mail to Shauna M. Waddell & John Mensch	$75.00
1/2/2020	TEM	$250.00	1.30	Subpoena to BOA	$325.00
1/15/2020	TEM	$250.00	4.30	Worked on Motion to Amend; e-mails to John Mensch and Shauna M. Waddell	$1,075.00
1/17/2020	TEM	$250.00	3.30	Review of BOA Documents; Upload to Dropbox for John Mensch and Shauna M. Waddell	$825.00
1/23/2020	RDM	$400.00	0.50	Office Conference with Tyler McLeod Re: various issues of case	$200.00
2/1/2020	TEM	$250.00	1.50	Telephone Call with John Mensch and Shauna Waddell; Plan for moving forward with motion to amend and rule to show cause; determination of what to do with house	$375.00
2/1/2020	TEM	$250.00	0.70	Worked on Motion to Amend	$175.00
2/4/2020	TEM	$250.00	2.90	Worked on Rule to Show Cause and Affidavit	$725.00
2/4/2020	TEM	$250.00	1.30	Review of E-mails with transactions performed by Sterling Raymond Mensch III	$325.00
2/5/2020	RDM	$400.00	0.70	Reviewed Engagement Letter	$280.00
2/6/2020	TEM	$250.00	3.70	Worked on Updated Engagement Letter; Rule to Show Cause	$925.00
2/7/2020	TEM	$250.00	0.70	Reviewed Subpoena to T. Rowe Price	$175.00
2/7/2020	TEM	$125.00	1.00	Subpoena for Production of Documents to T. Rowe Price, Notice of Issuance of Subpoena and Letters to T. Rowe Price and Ben Leaphart	$125.00
2/10/2020	TEM	$250.00	1.10	E-mail responses to John Mensch and Shauna M. Waddell	$275.00
2/12/2020	TEM	$250.00	1.30	Worked on Updated Engagement Letter	$325.00
2/12/2020	TEM	$250.00	1.20	Finalized Rule and Order to Show Cause and Affidavit	$300.00
2/14/2020	TEM	$125.00	0.50	Preparation of Exhibits to Motion to Amend for filing with Probate Court	$62.50
2/14/2020	TEM	$250.00	1.30	E-mails to Probate Court; Telephone Call with Kim; E-mails to John Mensch and Shauna M. Waddell	$325.00
2/17/2020	TEM	$125.00	1.50	Revision to Petitioners' Rule and Order to Show Cause with Affidavit of Tyler E. McLeod and preparation of Exhibits A-D; Revision of Exhibits 1-2 to Petitioners' Motion to Amend Petition: prepare Notice of Hearing and Proof of Delivery to Ben Leaphart; Revision to Letter to Judge Jennings on behalf of Tyler E. McLeod; Cover Letter to Kimberly Watford	$187.50
2/18/2020	TEM	$125.00	0.20	Establish new, secure DropBox link for use by John Mensch in downloading documents from BOA; E-mail link to John Mensch	$25.00
2/18/2020	TEM	$250.00	0.50	Review of Documents from T. Rowe Price	$125.00
2/19/2020	TEM	$250.00	0.30	Email to Probate Court, Shauna and John.	$75.00
2/21/2020	TEM	$125.00	0.45	Analysis, Preparation, Upload of new T. Rowe Price document production.	$56.25
2/26/2020	TEM	$125.00	0.50	Processing and Preparation of Bates Series Petitioners_000001-002437.	$62.50
3/9/2020	TEM	$250.00	1.30	Review of John Mensch Email regarding expenditures.	$325.00
3/9/2020	TEM	$250.00	0.70	Review of Motion to Withdraw as Counsel; Emails to John and Shauna.	$175.00
3/13/2020	TEM	$250.00	0.50	Review of Email from Shauna Waddell regarding Bank of America.	$125.00
3/17/2020	TEM	$250.00	0.50	Email to John and Shauna regarding hearing and Covid-19 impact.	$125.00
3/23/2020	TEM	$250.00	1.20	Telephone call with Ben Leaphart; Review Probate Order re: Hearing; Emails to Shauna and John; Email to Probate Court.	$300.00
3/23/2020	TEM	$250.00	0.10	Telephone call to Amela at Bank of America.	$25.00
3/23/2020	TEM	$250.00	0.20	Email to John and Shauna regarding hearing.	$50.00
3/25/2020	TEM	$250.00	0.90	Preparation for call with Judge Jennings and Ben Leaphart.	$225.00
3/25/2020	TEM	$250.00	0.70	Telephone call with Judge Jennings and Ben Leaphart.	$175.00
3/25/2020	TEM	$250.00	0.70	Telephone call with John and Shauna.	$175.00
3/26/2020	TEM	$250.00	4.30	Preparation for Motion to Amend Hearing and Ben Leaphart's Motion to be relieved as Counsel; Review of new information to present at Hearing on Motion to Amend; Preparation of Argument.	$1,075.00

3/26/2020	TEM	$250.00	1.30	Telephone call to to Bank of America Legal Counsel regarding their compliance with the Order dated December 4, 2019.	$325.00
3/30/2020	TEM	$250.00	1.30	Work on Order for Motion to Amend	$325.00
3/30/2020	TEM	$250.00	1.70	Reviewed Order to be relieved as counsel and made revisions; email to Judge Jennings and Ben Leaphart	$425.00
3/31/2020	TEM	$250.00	0.70	E-Mail to John Mensch regarding Motion to Amend	$175.00
3/31/2020	TEM	$250.00	2.30	Worked on Order for Motion to Amend	$575.00
4/8/2020	TEM	$0.00	1.30	Telephone Call with Peter Tiffany; Telephone call with John Markel regarding forensic accounting services	$0.00
4/8/2020	TEM	$250.00	0.70	Telephone Call with John Markel regarding accounting	$175.00
4/14/2020	TEM	$250.00	1.50	Telephone Call with Bank of America; Telephone Call with John Mensch and Shauna Waddell regarding accounting and other issues	$375.00
4/23/2020	TEM	$250.00	0.70	E-mail to John Markel regarding accounting	$175.00
4/27/2020	TEM	$250.00	3.40	Worked on Complaint	$850.00
4/29/2020	TEM	$250.00	1.80	Telephone Call with John Mensch and Shauna Waddell; Telephone Call with Accountant	$450.00
5/1/2020	TEM	$250.00	0.70	Telephone Call with Kim Thomason	$175.00
5/6/2020	TEM	$250.00	5.50	Worked on Complaint; Added Causes of Action	$1,375.00
5/7/2020	TEM	$250.00	1.50	E-mails to Rachael Hardin (attorney for Sterling Mensch III)	$375.00
5/8/2020	TEM	$250.00	4.30	Worked on Complaint; incorporated changes from John Mensch and Shauna Waddell	$1,075.00
5/11/2020	TEM	$250.00	0.70	E-mail to John Markel regarding accounting	$175.00
5/11/2020	TEM	$250.00	1.80	Telephone Call with John Mensch and Shauna Waddell; Telephone Call with Accountant	$450.00
5/11/2020	TEM	$250.00	4.70	Finalized Complaint; added Motion for Eviction and Motion for TRO; e-mails with Shauna Waddell and John Mensch; Prepared to file Complaint	$1,175.00
5/11/2020	TEM	$250.00	0.50	Review of information from John Mensch	$125.00
5/12/2020	TEM	$250.00	0.70	Various e-mails with John Mensch and Shauna Waddell	$175.00
5/12/2020	TEM	$250.00	0.20	E-mail correspondence with Rachael Hardin	$50.00
5/13/2020	TEM	$250.00	1.20	Telephone Call with Rachael Hardin	$300.00
5/13/2020	TEM	$250.00	0.90	Telephone Call with John Mensch and Shauna Waddell	$225.00
5/13/2020	TEM	$250.00	0.70	E-mail to Rachael Hardin regarding pension repayment	$175.00
5/16/2020	TEM	$250.00	1.70	E-mails to Counsel for Sterling Mensch III; John Mensch and Shauna Waddell	$425.00
6/1/2020	TEM	$250.00	0.30	Review of information regarding filing tax returns from Shauna Waddell	$75.00
6/19/2020	TEM	$250.00	3.70	E-mail to Rachael Hardin; Review of eviction issue, Attorney's Fees, GE Repayment	$925.00
				E-mail Correspondence with Shauna Waddell and John Mensch; reviewed e-mails from Rachael Hardin	$175.00
6/30/2020	TEM	$250.00	0.70	Telephone Call with Shauna Waddell and John Mensch	$175.00
7/1/2020	TEM	$250.00	2.80	Worked on Interrogatories and RFP	$700.00
7/8/2020	TEM	$250.00	1.20	Telephone Call with John Mensch and Shauna Waddell; E-mail to Rachael Hardin	$300.00
7/8/2020	TEM	$250.00	2.00	Visited house at New Tarleton with Shauna Waddell	$500.00
7/9/2020	TEM	$250.00	2.70	E-mails to Rachael Hardin; telephone call with rachael Hardin; e-mails to John Mensch and Shauna Waddell; all regarding negotiation of Sterling Mensch III vacating 512 New Tarleton	$675.00
7/10/2020	TEM	$250.00	2.30	E-mails to Rachael Hardin	$575.00
7/13/2020	TEM	$250.00	1.40	E-mail to Rachael Hardin; Worked on Interrogatories and RFP; Emails to John Mensch and Shauna Waddell	$350.00
7/17/2020	TEM	$250.00	0.70	E-mails to John Mensch and Shauna Waddell regarding Interrogatories and RFP	$175.00
7/20/2020	TEM	$250.00	2.70	Updates to Interrogatories and RFP based on questions-input from John Mensch; worked on Requests for Admission	$675.00
7/22/2020	TEM	$250.00	0.30	Research on Requests for Admission; E-mail response to John Mensch	$75.00
8/11/2020	TEM	$250.00	1.20	Email to John Mensch concerning account and discovery	$300.00
8/11/2020	RDM	$0.00	1.70	Consultation with Tyler McLeod regarding potential accountant and options for moving forward	$0.00
8/11/2020	TEM	$250.00	0.70	E-mail correspondence with John Mensch and Shauna Waddell	$175.00
8/12/2020	TEM	$250.00	1.30	Answered questions in e-mail form John Mensch concerning discovery	$325.00
8/12/2020	TEM	$295.00	1.70	Review of restrictions; E-mail to seller's attorney regarding right of first refusal	$501.50
8/12/2020	TEM	$250.00	1.70	Worked on requests for admission; interrogatories and requests for production	$425.00
8/13/2020	TEM	$250.00	0.30	Telephone Call with Kim Campos Ivy to set hearing for rule to show cause	$75.00
8/13/2020	TEM	$250.00	3.20	Worked on revised rule to show cause; incorporated language for zoom hearing; emails with John Mensch concerr concerning requests for admission and interrogatories	$800.00
8/14/2020	TEM	$250.00	1.70	Worked on Rule to Show Cause and Affidavit	$425.00
8/17/2020	TEM	$250.00	0.70	E-mail to John Markel	$175.00
8/21/2020	TEM	$250.00	0.30	E-mails to Rachael Hardin; Telephone Call with Process Server	$75.00
8/31/2020	TEM	$250.00	5.50	Preparation for Rule to Show Cause Hearing	$1,375.00
9/1/2020	TEM	$250.00	3.70	Preparation for Rule to Show Cause Hearing	$925.00
9/2/2020	TEM	$250.00	3.00	Preparation for Rule to Show Cause Hearing	$750.00
9/3/2020	TEM	$250.00	1.20	Worked on Discovery Request ; E-mails to John and Shauna	$300.00
9/3/2020	TEM	$250.00	1.30	Discussion with david Massey on Hearing for Rule to Show Cause	$325.00
9/15/2020	TEM	$250.00	3.70	Worked on proposed Order for Rule to Show Cause; Review of Transcripts from Hearing	$925.00
9/18/2020	TEM	$250.00	0.80	Telephone Call with John and Shauna regarding answering discovery	$200.00
9/24/2020	TEM	$250.00	1.20	Worked on Discovery Requests	$300.00
9/25/2020	TEM	$250.00	2.30	Worked on proposed Order	$575.00
10/2/2020	TEM	$250.00	0.70	Review of Judge Jennings' Order and Rule to Show Cause	$175.00
10/6/2020	TEM	$250.00	1.70	Review of Discovery Documents from John Mensch	$425.00
10/7/2020	TEM	$250.00	1.20	Review of Requests for Admission; Research on denials from devon Puriefoy	$300.00
10/13/2020	TEM	$125.00	1.67	Work on Answers to Interrogatories	$208.75
10/14/2020	TEM	$125.00	2.25	Work on Answers and Responses to Interrogatoris and Requests for Production	$281.25
10/15/2020	TEM	$250.00	0.20	Telephone Call with John Mensch	$50.00
10/15/2020	TEM	$250.00	1.20	Worked on Discovery Responses	$300.00
10/21/2020	TEM	$250.00	0.80	Telephone Call with John and Shauna	$200.00
10/21/2020	TEM	$250.00	0.90	Review of Discovery Production	$225.00
10/23/2020	TEM	$250.00	1.20	Review of Markel Report	$300.00
11/6/2020	TEM	$250.00	2.30	Worked on discovery responses	$575.00
11/6/2020	TEM	$125.00	1.00	Reviewed/Prepared Discovery Production	$125.00
11/17/2020	TEM	$250.00	1.30	E-mails to Truluck Thomason regarding production/Order	$325.00
11/17/2020	TEM	$250.00	1.30	E-mails to John Mensch regarding deposition questions, failure of Sterling to comply with Order; Motion to Determine Sufficiency of Answers to Requests for Admission	$325.00
11/23/2020	TEM	$250.00	0.30	E-mail to Court; response to attorney's fee question	$75.00
11/30/2020	TEM	$250.00	1.50	Review of Deposition Questions from John Mensch; e-mail to John Mensch	$375.00
11/30/2020	TEM	$250.00	0.70	E-mails to John Mensch	$175.00
12/3/2020	TEM	$250.00	2.70	Worked on Second Rule to Show Cause; Affidavit; letter to Judge Jennings	$675.00
12/3/2020	TEM	$250.00	1.30	Worked on Motion to Determine Sufficiency and Motion to Compel	$325.00
12/14/2020	TEM	$125.00	0.50	Worked on Affidavit for Rule to Show Cause	$62.50
12/14/2020	TEM	$250.00	5.70	Worked on Third Rule and Order to Show Cause - delivered to Court; Affidavit; Motion to Determine Sufficiency and to Compel	$1,425.00

12/14/2020	TEM	$250.00	1.50	Worked on TRO/ Injunction	$375.00
12/14/2020	TEM	$250.00	1.20	E-mail to Court and opposing party regarding Rule to Show Cause	$300.00
12/15/2020	TEM	$250.00	0.90	Worked on Motion to Compel and Determine Sufficiency; Filed with Court; Sent to opposing Counsel	$225.00
12/15/2020	TEM	$250.00	2.50	Worked on/Prepared Subpoenas for financial information from BOA accounts and T. Rowe Price	$625.00
12/17/2020	TEM	$250.00	1.70	E-mails to John and Shauna; Preparation for Motion to Compel and to Determine Sufficiency and Rule to Show Cause	$425.00
12/18/2020	TEM	$250.00	0.90	Telephone Call with John & Shauna regarding Rule to Show Cause; Motion to Compel and Motion to Determine Sufficiency	$225.00
12/21/2020	TEM	$250.00	4.80	Worked on Memorandum for Motion to Deem Admitted/Compel	$1,200.00
12/21/2020	KLH	$350.00	1.20	Research on Motion to Determine Sufficiency of Requests for Admission	$420.00
12/21/2020	TEM	$250.00	4.30	Preparation for Hearing on Rule to Show Cause and Motion to Compel	$1,075.00
12/22/2020	TEM	$250.00	2.30	Review of John Mensch Comments, E-mails regarding Requests for Admission to John Mensch; Worked on Memorandum in Support of Motion to Determine Sufficiency and to Compel	$575.00
12/22/2020	TEM	$250.00	1.70	Prepared Exhibits and Memorandum for filing; final edits to Memorandum	$425.00
12/29/2020	TEM	$250.00	2.30	Preparation for Hearing, Review of Transactions, T/C to Jeff Lynch Appliances	$575.00
12/30/2020	TEM	$250.00	4.30	Preparation for and Hearing on Petition; T/C with Home Depot	$1,075.00
1/19/2021	TEM	$250.00	1.20	Review of Discovery Production from Respondent	$300.00
1/20/2021	TEM	$250.00	6.20	T/C with John Markel; John and Shauna Mensch; discussion on production, accounting, summary judgment motion; review of production and expert report to determine amount for summary judgment motion; worked on summary judgment motion	$1,550.00
1/22/2021	TEM	$250.00	0.90	Review of Requests to Admit Answers; email to John/Shauna - Email to John Markel	$225.00
1/25/2021	TEM	$250.00	0.90	Review of Affidavits from John Markel	$225.00
1/27/2021	TEM	$250.00	4.20	Worked on Motion for Summary Judgment; review of accountant's asffidavit	$1,050.00
1/28/2021	TEM	$250.00	1.70	Work on Subpoenas for UBS and State Street Global Advisors Financial Records and Prepare Documents for Service	$425.00
1/29/2021	TEM	$250.00	0.70	Review of Subpoenas	$175.00
1/29/2021	TEM	$250.00	4.20	Worked on Summary Judgment Motion; review of cases regarding transfers	$1,050.00
1/29/2021	TEM	$250.00	2.10	Worked on Motion for Summary Judgment	$525.00
2/1/2021	TEM	$250.00	2.30	Worked on Summary Judgment; email discussion on damages	$575.00
2/2/2021	TEM	$250.00	0.70	Emails with John Mensch regarding Summary Judgment Motion; email to John Markel	$175.00
2/2/2021	TEM	$250.00	0.70	T/C with UBS and Shauna Waddell	$175.00
2/3/2021	TEM	$250.00	0.30	Email to Court regarding Sterling complying with Order	$75.00
2/3/2021	TEM	$250.00	1.70	Worked on Summary Judgment Motion; T/C with John Markel	$425.00
2/11/2021	TEM	$250.00	3.70	Worked on Motion for Summary Judgment and Memorandum	$925.00
2/12/2021	TEM	$250.00	1.30	Review of John Markel Affidavit and Amended Report	$325.00
2/17/2021	TEM	$250.00	3.70	Worked on Summary Judgment Motion; Prepared for filing; filed with the Court	$925.00
2/22/2021	TEM	$250.00	0.70	Review of documents related to accounts of Sterling Mensch; Email to John Mensch and Shauna Waddell	$175.00
2/22/2021	TEM	$250.00	1.20	Review of Email from John Mensch	$300.00
3/1/2021	TEM	$250.00	1.70	Worked on Settlement Proposal; Emails to John and Shauna	$425.00
3/2/2021	TEM	$250.00	1.20	Worked on Settlement Agreement	$300.00
3/4/2021	RDM	$400.00	0.70	Reviewed Settlement Offer	$280.00
3/4/2021	TEM	$250.00	3.70	Worked on Settlement Offer; various emails to John and Shauna; email to Kim Thomason	$925.00
3/9/2021	TEM	$250.00	7.50	Worked on Motion for Summary Judgment Memorandum; review of case file an all production	$1,875.00
3/10/2021	KLH	$250.00	0.50	Conversation with Tyler on punitive damages	$125.00
3/10/2021	TEM	$250.00	4.70	Worked on Motion for Summary Judgment	$1,175.00
3/12/2021	TEM	$250.00	3.90	Worked on Memorandum for Motion for Summary Judgment; Worked on Exhibits for the Motion; Emails the Court and Devon Purlefoy regarding Respondent's request for Judge Jennings to recuse himself	$975.00
3/15/2021	TEM	$250.00	6.90	Worked on Memorandum and Exhibits for Motion for Summary Judgment	$1,725.00
3/16/2021	TEM	$250.00	8.20	Preparation for Summary Judgment Hearing	$2,050.00
3/17/2021	TEM	$250.00	3.90	Sumamry Judgment Hearing; research on cases regarding punitives	$975.00
3/22/2021	TEM	$250.00	0.70	Email to John Mensch regarding false affidavit	$175.00
4/22/2021	TEM	$250.00	1.30	Review of Ruling from Judge Faulkner; various emails to John & Shauna	$325.00
4/27/2021	TEM	$250.00	1.70	Worked on Order for Summary Judgment	$425.00
4/28/2021	TEM	$250.00	0.70	T/C with John and Shauna	$175.00
4/30/2021	TEM	$250.00	2.70	Review of file in prep for hearing on damages; emails	$675.00
5/5/2021	TEM	$250.00	1.90	Worked on Order; determined relevant facts to client	$475.00
5/10/2021	TEM	$250.00	0.90	Responses to John Mensch comments relating to mitigation of damages	$225.00
5/12/2021	TEM	$250.00	1.20	Worked on Order for Summary Judgment	$300.00
5/14/2021	TEM	$250.00	3.20	Review of Memo in Opp. to MST filed by Respondent; Worked on Order	$800.00
5/17/2021	TEM	$250.00	0.90	Worked on Order	$225.00
5/17/2021	KLH	$350.00	1.00	Drafting of Order	$350.00
5/18/2021	KLH	$350.00	1.10	Work on order; review elements of cause of action to plug into order	$385.00
5/19/2021	KLH	$350.00	0.60	Worked on Order	$210.00
5/24/2021	TEM	$250.00	2.70	Drafted Attorney Fee Affidavit; Review of File	$675.00
5/26/2021	KLH	$350.00	1.50	T/C with Tyler regarding damages hearing	$525.00
5/26/2021	TEM	$250.00	2.70	Preparation for Damages Hearings	$675.00
5/27/2021	TEM	$250.00	0.30	Final Review of Order	$75.00
6/15/2021	TEM	$250.00	1.30	Various email correspondence to the Court; correction to proposed Order; emails to John and Shauna	$325.00
6/17/2021	TEM	$250.00	1.70	Responses to Devon's Comments to Proposed Order	$425.00
7/20/2021	TEM	$250.00	3.70	Work on attorney fee motion and affidavit; prep. for meeting with John Markel; emails to John and Shauna	$925.00
7/22/2021	TEM	$250.00	5.70	Preparation for damages hearing	$1,425.00
7/23/2021	TEM	$250.00	0.50	Emails to court regarding moving trial; email to Kim Thomason; research on motion and 106	$125.00
7/26/2021	TEM	$250.00	1.70	Research on cases on Damage hearing	$425.00
8/1/2021	TEM	$250.00	2.30	Worked on Reply to Motion for Continuance	$575.00
8/4/2021	TEM	$250.00	0.90	Prep for and Hearing on Motion for Continuance	$225.00
8/4/2021	TEM	$250.00	4.20	Prep. for trial; prep. of exhibits for trial; review of file; email to Kim Thomason regarding stipulations	$1,050.00
8/5/2021	TEM	$250.00	1.30	Preparation of Exhibits for trial; review of bank account statements	$325.00
8/9/2021	TEM	$250.00	7.80	Preparation for Trial; Worked on pre-trial brief; Worked on complying with SJ order; prep of Exhibits; Questions for Witnesses	$1,950.00
8/11/2021	TEM	$250.00	5.70	Preparation for Meeting with Kim Thomason and Devon Purlefoy; Various emails to John Markel; Email correspondence with Truluck Thomason; T/C with Shauna and John Mensch	$1,425.00
8/13/2021	TEM	$250.00	8.50	Meeting with Kim Thomason and accountants; worked on accounting for the court; prep for trial	$2,125.00
8/13/2021	KLH	$350.00	1.30	Discussion with Tyler on trial issues	$455.00
8/15/2021	TEM	$250.00	9.70	Preparation for Trial	$2,425.00
8/16/2021	TEM	$250.00	13.30	Preparation for Trial	$3,325.00
8/17/2021	TEM	$250.00	11.30	Trial	$2,825.00
8/18/2021	TEM	$250.00	9.30	Trial	$2,325.00
8/23/2021	TEM	$250.00	0.30	Email to Judge Faulkner concerning subpoenas	$75.00

8/27/2021	TEM	$250.00	0.90	Motion for TRO; discussion with Tyler	$225.00
8/30/2021	KLH	$350.00	0.40	Discussion with Tyler on Subpoena	$140.00
9/13/2021	TEM	$250.00	7.30	Preparation for trial; cross-examination of expert witness and Sterling Mensch; Closing Argument	$1,825.00
9/15/2021	TEM	$250.00	3.70	Preparation for final damages hearing; update to attorney's fee affidavit	$925.00
SUBTOTAL - Attorney Billing			394.77		$119,447.75

Expenses

1/17/2020	Check BOA Legal Order Processing for document production	$88.07
1/27/2020	Check for Transcript Order from Legal Eagle for Probate Court Hearings held 8/21/2019 and 11/20/2019	$340.50
3/22/2019	Probate Court filing fee for Demand Notice.	$5.00
5/13/2019	Probate Court filing fee for Petition.	$150.00
5/28/2019	Service of Process for Sterling Raymond Mensch, III.	$65.00
3/6/2020	Service of Process for Sterling Raymond Mensch.	$65.00
4/30/2020	Accounting Fee Retainer to John Markel to evaluate accounts of Florence Mensch	$3,000.00
5/26/2020	Priority Overnight Check to John Mensch	$59.24
6/29/2020	Interrogatories and Requests for Production - Paralegal Services	$120.00
8/26/2020	Process Server Fee for Service of Rule and Order to Show Cause	$115.00
8/31/2020	Accounting Fees to prepare 2017 and 2018 tax returns which Sterling Raymond Mensch III failed to file	$2,900.00
9/15/2020	Legal Eagel Fees (Invoice# 93067) for Transcriptionand Exhibit Pages for Probate Hearing	$356.78
10/2/2020	John Markel Expert Accounting Fees (Invoice #20137)	$8,300.00
12/4/2020	FedEx Expense for Reimbursement Check to John R. Mensch	$24.02
12/15/2020	Mailing of Subpoenas	$25.00
12/16/2020	Certified Mail Notice of Hearing, Rule and Order to Show Cause, and Motion to Compel	$9.40
12/23/2020	Certified Mail Memorandum and Affidavit of Attorney Fees for Service	$14.65
1/25/2021	BOA Fee for Subpoena of Financial Records	$73.50
1/27/2021	FedEx John R. Mensch - Reimbursement of Attorney's Fees	$26.69
1/28/2021	Mailing Fees for Service of UBS and State Street Global Advisors Subpoenas	$23.95
2/17/2021	UBS Subpoena Production - Invoice #21021612165K	$152.25
2/27/2021	John Markel Expert Accounting Fees (Invoice #21106)	$5,375.00
3/15/2021	BOA Fees - Subpoena for Document Production (Invoice #688522)	$42.20
7/15/2021	John Markel Expert Accounting Fees (Invoice #21127)	$9,000.00
8/11/2021	Legal Eagle Fee - Copy of Transcription from 03/17/2021 Hearing	$173.95
8/25/2021	John Markel Expert Accounting Fees (Invoice #21133)	$13,000.00
SUBTOTAL - Expenses		$43,505.20

Less Amount Previously Awarded by Court

	Amount awarded per Order of Probate Court dated August 28, 2019	$1,500.00
	Amount awarded per Order of Probate Court dated December 4, 2019	$10,000.00
	Amount awarded per Order of Probate Court dated September 30, 2020	$10,000.00
	Amount awarded per Order of Probate Court dated January 13, 2021	$7,500.00
SUBTOTAL - Amounts Previously Awarded by Court		$29,000.00

GRAND TOTAL - Attorney Fees and Costs (Attorney Billing + Expenses) - (Previously Awarded) **$133,952.95**

Attorney Billing Rates
R. David Massey (RDM) @ $400.00/hr
Knox L. Haynsworth (KLH) @ $400.00/hr
Tyler E. McLeod (TEM) @ $250.00/hr

THE LAW OFFICES OF
TRULUCK THOMASON, LLC

3 Boyce Avenue • Greenville • SC • 29601
Phone (864) 331-1751 • Facsimile (864) 243-8115

Kimberly T. Thomason — kim@truluckthomason.com
Thomas C. Brissey — sonya@truluckthomason.com
Devon M. Puriefoy — devon@truluckthomason.com
John-Paul Baum — johnpaul@truluckthomason.com

February 2, 2022

Tyler McLeod
BROWN, MASSEY, EVANS, MCLEOD & HAYNSWORTH, LLC
106 Williams Street
Greenville, South Carolina 29601

RE: Estate of Florence Petra Mensch
2018-ES-23-02854

Dear Mr. McLeod:

Please find enclosed a clocked copy of the Motion to Alter or Amend in the above captioned matter, as well as a certificate of service for the same.

Should you have any questions, please contact our office at 864-331-1751.

Respectfully,

Sonya Autrey
sonya@truluckthomason.com

Enclosures

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE PROBATE COURT

Estate of Florence Petrak Mensch,

John R. Mench and Shauna M. Waddell Individually and as Personal Representative Of the Estate Florence Petrak Mensch And John R. Mensch

Petitioner,

v.

Sterling Raymond Mensch, III, Individually As Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrack Mensch

Respondent.

C.A. No.: 2018-ES-02854

FILED

FEB 02 2022

GREENVILLE COUNTY
PROBATE COURT

MOTION TO ALTER OR AMEND

Respondent, Sterling Raymond Mensch, III, Individually as Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrack Mensch ("Respondent"), through his undersigned counsel, move pursuant to Rule 59 of the South Carolina Rules of Civil Procedure to alter or amend the Order granting Petitioner damages.

WHEREFORE, Respondent respectfully requests this Court to alter or amend its January 26, 2022, Order.

[signature page to follow]

COPY

Respectfully Submitted this
2nd day of February, 2022

TRULUCK THOMASON, LLC

Kimberly Thomason
Bar No.:79179
Truluck Thomason, LLC
3 Boyce Avenue
Greenville, SC 29601
Phone: (864) 331-1751
Fax: (864) 243-8115
kim@truluckthomason.com

Attorney for Respondent

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL DISTRICT
C.A. FILE NO. 2018-ES-23-02854

Estate of Florence Petra Mensch

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch

Petitioner,

v.

Sterling Raymond Mensch, III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch, and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch

Respondent.

CERTIFICATE OF SERVICE

I, Sonya Autrey, certify on this date, **February 2, 2022** I served a copy of the ***Motion to Alter or Amend*** on Tyler McLeod by personal delivery to:

Tyler McLeod
106 Williams St
Greenville, SC 29601

Respectfully submitted,

Sonya Autrey
Legal Assistant

Sworn to and Subscribed before me
This 2nd day of Feb., 2022.

Notary Public for South Carolina
My commission expires: 7-31-2030.

FILED

FEB 2 3 2022

GREENVILLE COUNTY
PROBATE COURT

STATE OF SOUTH CAROLINA)
IN THE CIRCUIT COURT

COUNTY OF _Greenville_________________)
Appeal from Probate Court for Greenville County

CASE NUMBER: 2018-ES-23-02854

IN THE MATTER OF:
_Florence Petrak Mensch______________
(Decedent)
Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mencsh,

Respondent(s).

vs.

Sterling Raymond Mensch, III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch, and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch.

Appellant(s),

NOTICE OF INTENT TO APPEAL TO CIRCUIT COURT

Pursuant to SCPC 62-1-308, Appellant hereby provides his/her/its Notice of Appellant's Intent to Appeal the Order/Sentence/Decree of the Probate Court dated January 26, 2022. Said Order/Sentence/Decree was received by the Appellant or Appellant's counsel on January 26, 2022. A copy of said Final Order is attached.

Respectfully submitted,

Signature: ______________________
Devon M. Puriefoy
Address: 3 Boyce Avenue
Greenville, SC 29601
Telephone: 864-331-1751
Email: devon@truluckthomason.com

Attorney for Appellant

SWORN to before me this _23___
day of February, 2022
____
Notary Public for: Greenville
My Commission Expires: 7-21-22__

IMPORTANT:

1. This Notice must be filed with the Probate Court, the Circuit Court, and all parties not in default within ten (10) days after receipt ofwritten notice of the appealed-from order, sentence, or decree of the Probate Court. Parties must comply with requirements set forth in SCPC 62-1-308.

2. This form is not intended for appeals other than appeals to the County Circuit Court. An Appeal to a Court other than the County Circuit Court must follow SCPC 62-1-308(I) and the South Carolina Appellate Court Rules, as applicable.

FORM #356ES (1/2014)
62-1-308

FILED

FEB 23 2022

GREENVILLE COUNTY
PROBATE COURT

CERTIFICATE OF SERVICE

I, Devon M. Puriefoy, certify that I served a copy of the foregoing document on the following party by U.S. Mail, first -class postage prepaid, on February 23, 2022:

Tyler McLeod
Brown, Massey, Evans, McLeod & Haynsworth, LLC
106 Williams Street
Greenville, SC 29701

Devon M. Puriefoy

State of South Carolina)
County of Greenville)

Subscribed to and sworn before
me this 23rd day of February, 2022.

Norary Public

BRANDI LAROBARDIERE
Notary Public-State of South Carolina
My Commission Expires
July 21, 2030

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE PROBATE COURT

IN THE MATTER OF:
Estate of Florence Petrak Mensch

C.A. No.: 2018-ES-23-02854

John R. Mensch and Shauna M. Waddell Individually and as Personal Representative Of the Estate of Florence Petrak Mensch and John R. Mensch,

Plaintiff,

v.

Sterling Raymond Mensch, III, Individually As Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrak Mensch,

Defendant.

NOTICE OF FILING

Please take notice that Defendants have filed the attached notice of appeal to the Court of Common Pleas in the Thirteenth Judicial District

Date this 23rd day of February, 2022.

TRULUCK THOMASON, LLC

s/Devon M. Puriefoy
Devon M. Puriefoy
SC Bar No.: 102097
Kimberly T. Thomason
SC Bar No.: 70179
3 Boyce Avenue
Greenville, SC 29601
devon@truluckthomason.com
kim@truluckthomason.com
T: 864-331-1751

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE PROBATE COURT

CASE NO.2018ES2302854

IN THE MATTER OF:
Estate of Florence Petrak Mensch

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch,
Petitioners,

vs.

Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch,
Respondents.

ORDER

FILED

JAN 2 6 2022

GREENVILLE COUNTY
PROBATE COURT

Date of Hearing:	September 16, 17, 2021
Presiding Judge:	Debora A. Faulkner, Probate Judge
Attorney for Petitioners:	Tyler E. McLeod
Attorneys for Respondent:	Devon M. Puriefoy, Kimberly Thomason
Court Reporter:	Rachel Wood

This matter came before the court for trial to determine the amount of damages owed the Estate of Florence Mensch by Respondent, Sterling Raymond Mensch (SRM) admits he misappropriated funds belonging to Florence Mensch and her estate. However, the amount of damages due the estate is the central issue in the litigation. The relevant time period for the misappropriations is from May 17, 2010, the date Mrs. Mensch's executed her Durable Power of Attorney (DPOA) naming SRM as her Attorney in Fact, (AIF) and April 26, 2018, the date of Ms. Mensch's death.

Present at the hearing was Petitioner Shauna M. Waddell (SW) represented by Tyler McLeod. Petitioner John Mensch (JM) was present for days one and two of the hearing. SRM appeared for each day of trial with his attorneys, Devin Puriefoy and Kimberly Thomason. Witnesses in the case were Petitioner, SW, Petitioners' expert, John Markel, and Respondent's expert, Mark Chastain.

Prior to taking testimony the Court denied the Petitioner's *Motion in Limine.*

STIPULATIONS

1. SRM made a number of withdrawals from Mrs. Mensch's bank account totaling $820,382.

Pg 1of 14 YMEH

APX 2

2. SRM deposited the funds from these withdrawals into his single owner checking account.

3. Both expert witnesses are qualified to give their opinions

PROCEDURAL HISTORY

1. On December 14, 2018, SRM filed the Will and Codicil with the Court but took no action to have the documents admitted as the valid testamentary documents of his mother. Neither did he apply for appointment as Personal Representative (PR) which would have granted him legal authority over her assets for the benefit of the devisees named in her Will and any estate creditors.

2. On January 23, 2019, SRM filed his application for admission of the Will and Codicil to Probate and for his appointment as PR. He was appointed PR on January 23, 2019.

3. On May 15, 2019, this action was filed by Petitioners.

4. On August 28, 2019, the Hon. Clayton L. Jennings issued an Order in response to Petitioners' Motion to Compel which, among other rulings, ordered SRM to provide discovery to Petitioners within ten days of the entry of the Order. The Order attached hereto is incorporated herewith as if fully set out.

5. On December 4, 2019, the Hon. Clayton L. Jennings issued his Order in the Petitioner's first Rule to Show Cause proceeding finding SRM in willful contempt of the August 28, 2019 Order. Accordingly, the Court removed SRM as PR and appointed Shauna Waddell to serve as Successor PR. The Court imposed further financial sanctions against SRM. The Order is attached hereto and incorporated herewith as if fully set out.

6. On May 13, 2020, an Amended Petition was filed as permitted by Judge Jennings' Court Order.

7. On September 2, 2020, the Hon. Clayton L. Jennings issued an Order as a result of the Petitioners' filing a second Rule to Show Cause against SRM. The Court found SRM to be in willful contempt of the Court's prior Orders. This Order attached hereto is incorporated herewith as if fully set out.

8. On January 13, 2021, the Hon. Clayton L. Jennings issued an Order as a result of Petitioners third Rule to Show Cause alleging SRM willfully failed to comply with the September 2, 2020 Order. He was found to be in willful contempt, ordered to pay attorneys' fees to Petitioners and cautioned that he would be subject to incarceration should he violate this Order. This Order attached hereto is incorporated herewith as if fully set out.

9. On July 29, 2021, the Court entered an Order granting the Petitioners Summary Judgment on the following causes of action: 1) Breach of Fiduciary Duty as Attorney in Fact (AIF), 2) Violation of the S.C. Uniform Power of Attorney Act, and 3) Conversion. The Court denied Petitioners' Motion for Summary Judgment on the remaining causes of action: Negligence, Unjust Enrichment/Money Had and Received, and Constructive Trust.

10. Trial in this case was heard on September 16-17, '21. By agreement of counsel, Petitioner, John Mensch, participated by telephone on September 17, 2021.

11. A proposed Order was transmitted to the Court on 10/15/21. An extension was granted to SRM's counsel to Dec. 16, 2021 to lodge objections to the proposed Order.

FINDINGS OF FACT

By the preponderance of the evidence, I make the following findings of fact:

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1. Mrs. Mensch and her husband moved to Greenville from New York. From their marriage, they had three children, John, Sterling and Shauna.

2. Mr. Mensch died in or around 1995.

3. The record contains no evidence that Ms. Mensch had anything other than a loving relationship with all three of her children.

4. In 1998, Ms. Mensch executed a Will leaving her estate equally to each of her three children. She named all three children to serve as Co-Personal Representatives. Similarly, she named each of her 3 three children to share equally in her non-probate accounts which includes a retirement account. Based on the foregoing, I find that Ms. Mensch intended to leave her estate both probate and non-probate to each of her three children in equal shares.

5. In 2007, Mrs. Mensch executed a DPOA naming the Petitioner, SW, as her attorney in fact but it was later revoked in favor of SRM in 2010.

6. After her husband's death, Ms. Mensch lived in her own home at 207 West Beverly Street in Greer, S.C.

7. On May 17, 2010, Ms. Mensch, with the assistance of an attorney, executed another DPOA naming SRM as her AIF. This DPOA contained no provisions allowing SRM to make gifts to himself.

8. She also executed a Codicil to her 1998 Will naming SRM as her sole Personal Representative. She republished her 1998 Will in all other respects, i.e. her estate plan remained unchanged.

9. SW testified that around 2009 she began to take notice of her mother's dementia symptoms.

10. In or around 2012, she purchased an apartment at Rolling Green. She moved into the Rolling Green apartment and sold her home in Greer.

11. In or around 2013 or 2014, as a result of her diagnosis of dementia, Alzheimer's type, SW arranged for FM to be moved to the memory care unit at Oakleaf Village. No evidence was presented that this decision was contested. She died at Oakleaf Village on April 26, 2018.

12. At Ms. Mensch's funeral, SRM advised his brother John to return to Oregon, because he would be starting the estate administration immediately. After hearing nothing from SRM, SW called him about the estate administration. SRM told her he was waiting on tax information.[1] She called again and he said the taxes were done and that he would be dropping off the estate information to attorney, David Massey's office. After hearing nothing further, SW called the attorney's office and the attorney's office didn't have any estate information. SRM told SW that their secretary probably lost it. The firm was never hired by SRM. SW's communication with SRM became increasingly difficult.

13. On December 14, 2018, SRM filed FM's Will and Codicil in the Probate Court without opening an estate. On January 23, 2019, nine months after Ms. Mensch's death, SRM filed his application to admit the Will and be appointed as the PR. He was appointed PR on January 23, 2019. He filed this without the assistance of counsel.

14. On April 30, 2018, SRM signed and filed a sworn *Inventory and Appraisement* with the Court. The Inventory and Appraisement is part of the Court's record. On that Inventory, he swore that the balance in the UBS account on 4/30/2018 was $409,652. Petitioner's Exhibit 21, the UBS statement from April, 2018 shows that SRM had withdrawn $259,000.00 on April 23, 2018 with a resulting balance of $154,069. He also stated on the *Inventory*, under oath, that the Tarleton Way home had an existing mortgage of $238,170.00 Two months earlier on February

[1] The records would later show that upon her appointment as Successor PR, SW learned that the 2018 tax return had never been filed. Petitioner's #19 is an IRS Letter stating that on 12/31/18, the estate owed $91,367.

Pg 3 of 14 4/11/21

8, 2019, he paid the sum of $232,047 in full satisfaction of the mortgage. So, after being sworn, he voluntarily and willfully filed perjured information to the Court. [2]

15. After his mother's death, rather than filing the Will immediately and becoming the PR of her estate, he was continuing to make post-death withdrawals from Ms. Mensch's x7059 account. He was also allowing her GE pension auto deposits to continue despite her death. He made his last withdrawals from FM's account in or around February, 2019 leaving approximately $1500 in x7059 and $65 in x2007. SRM withdrew a total of $170,000 from Ms. Mensch's bank accounts after her death. This proceeding was commenced three months later on May 15, 2019

TARLETON WAY HOUSE AND LOT

16. On April 18, 2007, Ms. Mensch purchased property in a subdivision in Greer. As such, she signed the mortgage obligating herself to pay $330,000.00 for the property in monthly installments. Further, she signed a "Rider" stating that this would be her second home and keep the home only for her exclusive use.

When she purchased the property, she was still living at her West Beverly Street property. Her intent was never to live at this Tarleton Way property. The intent was that the house would actually be purchased by SRM as a home for him and his daughter. SRM orchestrated this arrangement since he was a party in a divorce proceeding. He wanted to protect the property from being included as marital property subject to equitable division. SW testified that it wasn't until after FM's death that she and her brother discovered that the house was not actually owned by SRM.

SRM's expert witness, Mr. Chastain, listed that SRM should be given credit for $39,000.00 that he paid as a down payment from his own funds when the home was purchased. Upon further examination of the witness, it appeared this was untrue in that the amount was folded into the mortgage.

SRM paid nothing to FM for the 12 years he lived there. It was home with landscaping, pool, theatre room, and nice finishes. SRM alleges he made a total of $240,631.00 in payments from his personal funds to service the principal and interest on the Tarleton mortgage and that he should be credited with those payments as being beneficial to FM.

SRM's employment status and income were never presented in evidence. In order to weigh the veracity of this assertion, the ability of SRM to pay this would need to be known. It is unknown whether or not he was employed; or, if so, the dates of his employment and the amount of his income. Petitioner's expert witness, Mr. Markel, attempted to trace these alleged mortgage payments using bank documents. He found that many of the alleged payments were untraceable and were inconsistent with the dollar amounts alleged. Countless online cash withdrawals from x7059 to SRM's account were in amounts similar to the amount of the mortgage payments. Bank statements prior to 2012 were not available to the parties.

SRM also alleges that he used some of the cash from FM's accounts to make improvements and repairs to the home which were beneficial to FM. He alleges these expenditures amount to $69,957.00.[3] Despite repeated directions from the Court, SRM never produced receipts or other documents to prove this amount. He failed to testify at this hearing regarding how he arrived at this total. He failed to produce witnesses to confirm payments made for improvements. He failed to issue any subpoenas for merchants or repair companies to produce records.

[2] The estate record contains a claim filed on 2/11/2019 by Traci Malone of South State Bank. On the same day, February 11, a *Loan Payoff Statement* was filed. SRM satisfied the mortgage in full on 2/8/19. SW's *Settlement Statement* (Exh. #25) when TW was sold shows a mortgage payoff of 218,579 to South State Bank on 12/3/2020
[3] SW testified in detail regarding the condition of the home after SRM moved resulting in an expense to the estate of $10,000.00 on extensive cleaning and repairs in order to make it fit for sale.

SW

Pg 4 of 14 UM[illegible]

When SRM moved from the home in September, 2020, the estate has to spend $10,000 for cleaning and repairs to make the property presentable for potential buyers.

As a minor point; but one that shows how no opportunity was missed by SRM, SRM collected $22,434.00 in insurance proceeds for hail damage to FM's home. The amount of the damage was not placed in the record. Again, these are proceeds from an insurance policy that FM pays for each month in mortgage payments for a house she doesn't need; and, that is being used as a residence for her able bodied son. SRM's expert witness testified that the damage estimate was less than the amount collected and that SRM appeared to have kept the balance not used. This was not contradicted by SRM.

FLORENCE MENSCH'S ASSETS

17. A listing of FM's assets and their values on the date SRM became FM's AIF in 2010 is not in evidence. Bank records were not available prior to 2012. However, from the evidence presented, it appeared that her assets, residential expenses were as follows on the dates indicated:

Asset	Value	Date of Value	Residential Expense
[4]Home on Tarleton Way	420,000.00	Sold 12/3/20	Moved to Rolling Green In 2012 Oakleaf in 2015
x7059 BOA Checking account	various		
x2007 BOA Savings account	various		
Elfin Trusts + GE stock IRA[5]	$1,321,717.00	1/1/2015	
UBS Retirement Acct	$913,511.00	12/30/16	

Annual Income		
2012	$16,000.00 SSA	2580 x 12/ 31K
	$17,800.00 Pension	
	$49,240.00 IRA Distribution	
	$83,090.00	
2013	$16,000.00 SSA	2580 x 12/ 31K
	$17,800.00 Pension	
	$70,000.00 IRA Distribution	
	$104,125.00	
2014	$16,000.00 SSA	2580 x 12/ 31K
	$17,800.00 Pension	
	$90,594.00 IRA Distribution	
	$124,964.00	
2015	$16,000.00 SSA	4550x12/55K
	$17,800.00 Pension	

[4] Purchased 2007 for $330,000.00 Includes $39,700.00 down payment, additional $65,000.00 for pool, home theater, fencing, landscaping, etc. SRM claims he paid this via his allegations in an affidavit.
[5] Elfin later managed by State Street Global.

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$213,945.00 IRA Distribution
$248,590.00

2016 $16,000.00 SSA 4550x12/55K
$17,800.00 Pension
$208,727.00 IRA Distribution
$243,379.00

MANAGEMENT OF ASSETS BY SRM

18. FM's Bank of America (BOA) accounts are her checking account, x7059 and a savings account x2007. The fund balance in x7059 was the result of FM's monthly income deposits plus any online transfers directed by SRM-AIF from her investment accounts. Payments for her residence at the facilities were automatically drafted from x7059.[6]

19. In 2013, SRM, using the authority granted to him by FM in the DPOA, decided to add his name as a joint account owner to x7059. No evidence was presented on why SRM chose to do this, especially since this change would affect FM's estate plan. Instead of the balance being a part of her estate to be shared by all 3 of her children, this change would result in SRM being able to claim all funds remaining on deposit for himself.

20. SRM's personal BOA account is x3259. From 2013 until FM's death in April, 2018, SRM engaged in over 239 online transfers, cash transactions, withdrawals, from FM's BOA accounts. He directed these transfers to his personal BOA account x3259 which was a POD account, providing that his daughter would be paid the balance in the account upon his death. The parties stipulate that the total for all these transfers comes to $820,382.00[7] Once deposited into his account, SRM spent the funds on a variety of personal pleasures including nice restaurants, men's clothing stores, jewelry, home improvement stores, grocery stores, travel, alcohol, etc. He made several large cash withdrawals and made online payments to his personal credit card company from FM's account. The piece de resistance $8000.00 to Greenville Matchmakers.

21. From 2015 through 2018, SRM withdrew funds from Elfin Trust, taking smaller amounts from FM's GM stock. On 12/31/2015, the Elfin fund's market value was $279,819.00; on the same date, the GM market value was $1,321,717.00.

22. SRM facilitated IRA distributions to FM in excess of the amount mandated for *required minimum distributions* (RMD).[8] In years 2011, 2012, 2015, 2016, and 2018, SRM unnecessarily caused FM's IRA distributions to exceed allowable RMD for each year. From the above chart, SSA and pension income were largely sufficient to cover her monthly living expense at Rolling Green and less so at Oak Leaf. However, no evidence is presented to show that the allowable RMD for each year plus her income would have been insufficient to comfortably pay for her care. The amount of income taxes incurred due to these excessive withdrawals was $163,420.00.

23. On March 20, 2018, SRM sold the GE stock for $406,255.80.

24. Petitioners allege that SRM failed to properly diversify FM's portfolio resulting in a reduction of approximately $400,000.00 in value. Court finds that this was speculative and not supported by the preponderance of the evidence.

---

[6] Occasionally, SRM would use the x2007 to receive online transfers.
[7] No bank records were available prior to 2012.
[8] Under Treasury Regulations, taxpayers over 70.5, like FM must take the required minimum distributions.

Pa 6 of 14 [illegible]

25. On April 23, 2019, three days prior to FM's death, SRM transferred $259,000.00 of the $409,652.00 held in FM's UBS retirement account to FM's 7059 account.

26. SRM failed to notify BOA and failed to notify GE Pension of FM's death. The pension payments continued unabated and SRM continued to make withdrawals from the BOA accounts. From the time of FM's death on April 26, 2018 until February 18, 2019, SRM directed $170,000 of FM's, i.e. the Estate's, post-death funds to his x3259 personal account. These were funds earmarked to be divided equally among her 3 children. SRM withdrew these post-death pension payments from FM's account for his personal use. To reimburse GE for these overpayments. As a result, the estate was charged with an overpayment of $30,157.00.

SW, as PR, agreed to forfeit the $10,000 of GE life insurance that FM intended to be shared equally by her children. SW assigned $3333.33 of the 10,000 for each beneficiary. This left a balance due to GE of $20,157.81 from the estate. SRM should be liable to the estate for the total amount of overpayment in the amount of $30,157.00.

27. At the time SW was appointed PR, there was only $15,000 in FM's x7059 account.

TAX LIABILITIES

28. Between 2012 and 2016, SRM's failed to timely file tax returns and failed to timely pay taxes due resulting in penalties for failure to file and penalties and interest for failure to pay the IRS and SCDOR. The amount admitted by SRM's attorneys is $13,820.17.

29. SRM failed to file tax return for FM for 2017.

30. SRM made gifts from FM to himself, SW and Steve, John and Shea, Sterling and Holly in the years 2014, 2015, and 2016 for the purpose of meeting the annual exclusion allowed by the IRS. This was permitted by FM's DPOA.

31. SRM failed to take action necessary to avoid $40,314.00 penalties and interest connected to FM's 2018 taxes. This amount is currently on appeal.

32. From 2011 through 2016, SRM failed to itemize deductions for property tax and mortgage interest on the Tarlton Way on FM's returns. FM as owner of the property was clearly entitled to claim those itemized deductions, and thereby proportionately reduce her tax liability for each respective year. This failure amounts to $24,559 in excessive tax.

33. From 2011 through 2018, SRM caused FM and, later, her estate to incur unnecessary tax liabilities of $163,420 as set forth in Petitioner's Exhibit #1 [9] due to SRM's withdrawals in excess of the RMD for each year.

34. In 2015 and 2016, SRM wrote checks to his siblings, their spouses, to himself and his daughter in accordance with IRS rules that permit gifting a certain amount each year. Each year he wrote himself a check equal to the others, despite his siphoning of funds from his mother to subsidize his lifestyle. He has made no good faith effort whatsoever during this litigation to pay any amount that he admits he owes. The only amounts he has paid to the estate to date for his wrongdoing were attorneys' fees ordered by Judge Jennings short of incarceration. As a matter of equity, SRM should not be able to sit at the table with his siblings and collect a gift in an amount equal to theirs given his actions. Specifically, the record indicates he paid himself $14,000.00 for 2015 and 2016 for a total of $28,000.00.

[9] Pet. Exhib. 21, USB states RMD for 2018 is 33,358. SRM withdrew $259,000 or $ 225,642 in excess of IRS limits

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CONCLUSIONS OF LAW

Applying the facts to applicable law, I make the following conclusions of law:

BREACH OF FIDUCIARY DUTY

1. "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Davis v. Greenwood Sch. Dist. SO*, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. See generally, Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) (discussing the elements comprising a breach of fiduciary duty claim); *RFT Mgmt. Co. v. Tinsley & Adams*, 399 S.C. 322, 732 S.E.2d 166 (2012).

2. A fiduciary relationship existed between FM and SRM as expressed in the DPOA signed by FM in May, 2010. FM reposed special confidence in SRM; confidence that he would act in good faith placing her As such, SRM has all the duties and obligations set forth in the document plus he is duty bound to act at all times with due regard to the interests of FM. Moore v. Benson, 390 SC 153 (2010). Being in the firm grasp of Alzheimer's disease, she was squarely at the mercy of SRM to act in her best interests. Instead, SRM exploited the trust his mother bestowed on him at every turn.

3. The clear weight of the evidence shows SRM used the DPOA as a license to access as much of his mother's property as possible, leaving enough for her basic requirements, such as the payments to her facility. The chart above shows that her income and RMD distributions were substantially exceeded the amount of her monthly facility fees. The excess was taken as a part of the obvious scheme concocted by SRM to maximize his grift. At every opportunity, he placed his desire to take as much of her property as possible ahead of his mother's welfare. To further nail down his continued free use of his mother's money, to the detriment of his siblings, he added his name as a joint owner to her BOA accounts. By doing this, he was depriving his siblings of their right to inherit a share of the balance as their mother so intended. To further thwart his mother's estate plan, he designated his personal checking account as a POD account. With this change, all the ill-gotten funds in this account would become the property of his daughter to the detriment of his mother's estate, i.e. his siblings.

4. He breached his fiduciary duty by using the authority reposed in him by FM to delay or fail to file taxes, resulting in unnecessary fines and penalties, thus reducing FM's estate. He made withdrawals exceeding her RMDs, he liquidated her IRA, and also resulting is unnecessary taxes and penalties. These accounts were all created by FM to be divided equally at her death. FM's estate, both non-probate and probate, would have been substantially greater but for the shenanigans employed by SRM while his mother suffered with Alzheimer's disease, helpless to intervene.

5. The DPOA contained no express authority for SRM to gift himself any of his mother's property. The Decedent's DPOA contains the following provision on page 5, third paragraph:

Notwithstanding any provisions herein to the contrary, my attorney in fact shall not satisfy the legal obligations to the attorney in fact, out of any property subject to this power of attorney. Except to the extent this power of attorney specifically authorizes gifts to my attorney in fact, my attorney in fact may not exercise this power in favor to the attorney, the attorney's estate, the attorney's creditors, or the creditors of attorney's estate.

An agent acting for a principal pursuant to a power of attorney may not make a substantially gratuitous conveyance of the property of the principal to himself unless the power to do so is expressly granted by the instrument itself. Fender v. Fender, 329 SE2d 430 (1985).

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6. Florence Mensch died on April 26, 2018. S.C. law requires anyone in possession of a decedent's Will to file the Will within 30 days of the date of death. 62-2-901 (Supp. 2014). SRM waited until December, 2018 to file the Will and Codicil. He waited until January of 2019 to open his mother's estate. He continued to collect her pension and spend money belonging to the estate from April 26, 2018 until February, 2019. Since her death, he continued to convert her property to his own use, said amount totaling approximately $170,000.00 and causing the estate to be indebted to GE for the overpayment of monthly pensions.

SRM's actions equate him to executor de son tort. Because he continued to receive and spend estate property, he is chargeable as the executor of his own wrong. The value of the property is charged to the *executor de son tort*. 62-3-619 *S.C. Code Annot.* (Supp. 2014)

I find SRM, who was named as the PR in the Will of his mother, did intentionally and with bad faith convert and waste estate property by means of the concealment of the fact of his mother's death to her bank and to her pension company.

7. While serving as PR, SRM failed to repay or make any effort to repay to the Estate the property he converted to his own use. Further, he failed to comply with the Orders of this Court, failed to cooperate with his first attorney so the attorney could assist in the estate administration. All these acts together constitute a violation of his fiduciary duty as Personal Representative to the Estate causing unnecessary time and expense in the administration of what could have been a very straight forward estate administration.

8. While serving as PR, SRM failed to properly file his mother's 2018 tax returns resulting in taxes, penalties and interest assessed against her estate in excess of $40,000.00.

VIOLATION OF THE UNIFORM POWER OF ATTORNEY ACT

9. As a matter of law, it is undisputed SRM owed a fiduciary duty to the Decedent as her AIF. Loftis v. Eck, 341 SE 2d 641(1986). Instead of preserving her funds for the future use of the Decedent, Sterling Mensch transferred funds from the Decedent's accounts to his personal account while acting under the authority given to him by her in her DPOA. It is undisputed that Sterling Mensch used funds from these transfers for his own personal use, resulting in the diminishment of available funds for the Decedent's estate to distribute. Therefore, Sterling Mensch failed to maintain Decedent's estate plan as is required by the South Carolina Power of Attorney Act.

This Court has previously ruled as a matter of law that no genuine issue of material fact exists as to this cause of action and Petitioners are entitled to judgment against Respondent.

The Decedent's DPOA contains the following provision on page 5, third paragraph:

Notwithstanding any provisions herein to the contrary, my attorney in fact shall not satisfy the legal obligations of the attorney in fact, out of any property subject to this power of attorney. Except to the extent this power of attorney specifically authorizes gifts to my attorney in fact, my attorney in fact may not exercise this power in favor to the attorney, the attorney's estate, the attorney's creditors, or the creditors of attorney's estate.

While serving as Decedent's AIF, Sterling Mensch transferred funds from the Decedent's accounts to his personal account. Sterling Mensch admitted that he made the unauthorized transfers as described. However, he claims that he used a substantial part of the transfers for the benefit of Florence Mensch. In Moore v. Benson (supra), the Court of Appeals upheld the Master in Equity's refusal to allow credit for alleged tax payments without documentary evidence to support the claim. As to these claims, the Court finds that Sterling Mensch was unable to demonstrate that the above-referenced transactions were for Florence Mensch's benefit. He produced no receipts, documents, witnesses and he failed to testify. In addition to failure to provide proof, as a matter of equity, He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in

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which he seeks relief, Emery v. Smith, 361 S.C. 207,220, 603 SE2d 598, 605 (Ct. App. 2004). He who seeks equity must do equity. Norton v. Matthews, 249 S.C. 71, 152 SE2d 680 (1987).

As a result of Mr. Mensch's failure to keep complete and accurate records, the Court finds he has violated the following provisions of the Uniform Power of Attorney Act, S.C. Code Ann. 62-8-114 (Supp. 2017): failed to act in good faith; failed to act within the scope of authority granted in the DPOA; failed to act with care, competence and diligence; failed to keep records or all receipts, disbursements and transactions; failed to preserve the Decedent's estate plan by liquidating retirement accounts; failed to preserve the Decedent's estate plan by using her funds for his personal use resulting in less assets to be distributed to all three of her children from her estate; failed to timely file taxes resulting in penalties and interest; failed to minimize taxes and incurring penalties by liquidating retirement accounts; acted with reckless indifference to the purpose of the power of attorney; and his conduct was reckless and willful in complete disregard of duties imposed upon him as a fiduciary.

The Court finds that Sterling Mensch is liable to the Decedent's successors in interest for the amount required to restore the value of the Decedent's property to what it would have been had the violations not occurred. S.C. Code Annot. 62-8-117 (Supp. 2017).

As to the amount, See Section VII.

CONVERSION

10. The evidence is clear and convincing that SRM converted funds belonging to his mother, and later, the estate to his own use and control. To recover in an action for conversion, Petitioners must:

(1) Have an interest in the thing converted;

(2) Respondent must have converted the property to his own use;

(3) The use was without Petitioners' permission.

Moseley vs. Oswald, 656 SE 2d 380 (2008). The Personal Representative has an interest in and a duty to recover all property due the Estate of Florence Mensch. John Mensch as a devisee in her Will has joined the Personal Representative in order to secure the inheritance intended for him by his mother. SRM has admitted taking over $800,000.00. These funds were used without the permission of Florence Mensch, her Estate, or John Mensch.

By exploiting his status as AIF he wrongfully and willfully took without legal authority property belonging to FM and ultimately to FM's Estate. The wrongful detention of another's property may give rise to action for conversion; in such cases, conversion occurs when, without justification or excuse, one refuses to surrender the possession of goods after demand for possession by one entitled thereto. Conversion is a wrongful act and has been defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. Owens v. Andrews Bank & Trust Co., 265 SC 490, 220 S.E. 2d 116 (1975). Conversion is a wrongful act which emanates from either a wrongful taking or wrongful detention. Kirby v. Horne Motor Co., 295 S.C. 7, 11, 366 S.E.2d 259, 261 (Ct. App. 1988).

This Court previously ruled as a matter of law that no genuine issue of material fact exists as to this cause of action and Petitioners are entitled to judgment against Respondent.

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Rent, Pre-Judgment Interest, Causes of Action for Negligence, Fraudulent and Negligent Misrepresentation and Concealment, Unjust Enrichment/Money Had and Received and Eviction/Ejectment.

11. Petitioner has requested pre-judgment interest as a part of its relief. However, in order to recover pre-judgment interest, such must be specifically pled. Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003). The Court finds that Petitioners statement of "including any interest and appreciation that should have accrued from the time of the violations," contained in line 70 of Petitioner's Petition does not constitute a specific pleading of pre-judgement interest. Therefore, the Court has determined that pre-judgment interest will not be awarded because it was not specifically pled.

12. Petitioner requested rent be charged against Respondent as damages related to Respondent's occupation of 512 New Tarleton Way. Special damages, however, must be particularly alleged and proved. *Kline Iron & Steel* Co. *v. Superior Trucking Co.*, 261 S.C. 542, 547, 201 S.E.2d 388, 390 (1973) (emphasis added) (failure to plead and prove special damages will prevent recovery). Thus, special damages must be specifically stated to avoid surprise to the other party. *Benedict College v. Nat'l. Credit Sys.* 400 S.C. 538, 548, 735 S.E.2d 518 523 (Ct. App. 2012). The reasoning for such a pleading requirement is to give a party due notice of the amounts sought. *Norwest Properties, LLC v. Strebler*, 424 S.C. 617, 624, 819 S.E.2d 154, 158 (Ct. App. 2018). The Court finds that rent will not be awarded from Respondent as such is special damages which must be specifically pled.

Additionally, Petitioners asserted causes of action for negligence, fraudulent and negligent misrepresentation and concealment, unjust enrichment/money had and received as well as a motion for eviction/ejectment. The Court dismisses the foregoing actions asserted by Petitioner as cumulative given the relief granted by the Court herein.

PUNITIVE DAMAGES

13. The Probate Court can only exercise the jurisdiction provided by statute as enacted by the S.C. General Assembly. As such, the Probate Court lacks subject matter jurisdiction to award punitive damages.

DAMAGES

14. The Court received a number of exhibits during the trial as well as testimony from SW, the estate's PR, and lengthy testimony from both expert witnesses. Mr. Chastain, Respondent's expert, offered testimony regarding his opinions based upon a review of banking and other transactional documents as to the amounts of money transferred from the account of Florence Mensch as compared to the opinion and report of Petitioner's expert John Markel whose testimony was also received. Based upon the testimony of Mr. Chastain in conjunction with the evidence submitted by Mr. Markel, Petitioners' expert, as well as the party's stipulation as to the amount, it is the finding of this court that $820,382.00 was transferred from Decedent's accounts by Sterling Mensch to his own account for his own personal use.

It is the further finding of this court based upon the evidence that Sterling Mensch is not due any offsets or credits regarding the aforementioned amounts transferred from Decedent's account. Under the settled law of this State, an essential preliminary to the allowance of an offset is that the offset claimed must be pleaded, and there must be some evidence tending to establish such plea. *Hurst v. Sumter County*, 189 S.C. 376, 1 S.E.2d 238 (1939). Likewise, Respondent was required to plead offset. Furthermore, based on the testimony and evidence presented at trial by Respondent, this Court finds that Sterling Mensch has failed to meet his burden of showing that any transfers of funds were made directly for the benefit of Florence Mensch.

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It is a further finding of this court that Petitioners shall not recover any amount for Sterling Mensch's failure to diversify Florence Mensch's assets, as such amount is too speculative for this Court to determine.

With regard to the $820,382.00 transferred from the Decedent's account by Sterling Mensch, the court subtracts from such amount $273,461.00 as a credit for Respondent's one-third (1/3rd) inheritance, leaving $546,921.00 due from Respondent to the estate to compensate the Petitioners loss of inheritance. Added to this amount is $24,559.00 for avoidable taxes due to failure to itemize for the years 2011 through 2016, as well as 2018 penalties and interest, currently on appeal to the IRS, in the amount of $40,314.00. The Estate had to spend $10,000.00 to clean and repair Tarleton Way when SRM moved in order to market the property. Because SRM concealed the death of his mother resulting in an overpayment in pension funds, he owes the estate $ 30,000.00.

Sterling Mensch admitted he owed penalties and interest in the amount of $13,820.00.00 thus, the total owed from Respondent to John Mensch and Shauna Waddell as damages is $625,614.00. This amount will be reduced by the 2018 penalties and interest if the appeal of those penalties and interest is successful. Petitioner's expert calculated that $163,420 in taxes were levied to excessive RMD distribution. Further, he should not receive the benefit of a gift from his mother at a time he was converting her funds almost on a daily basis in violation of his fiduciary duty to her when she needed him most.

These are just the damages that Petitioners have been able to discover from SRM who has lied to the Court, lied to his siblings, lied by omission to GE Pension and BOA, failed to cooperate with his first attorney, refused to obey Court Orders, failed to produce cooperate in discovery, and failed to produce documentary evidence or witnesses to support his written allegations.,

By preponderance of the evidence and to confirm the foregoing, the Court finds in favor of Petitioners on causes of action for Breach of Fiduciary Duty both as AIF and Personal Representative, Violation of the SC Power of Attorney Act, and Conversion.

In addition to the damages referenced above, the court finds that Petitioners are entitled to recover from Respondent attorney's fees and costs in the total amount of $127,572.00 as provided by 62-1-111 SC Code Annot. (Supp. 2014). This is a reduction of $6380 related to time spent on engagement letters, subpoenas, time spent on Affidavit of Fees. I will further note that this amount includes the fees for Petitioners' expert witness. With regard to such fees, the court considered all the elements required under the case of Glasscock v. Glasscock, 304 S.C. 158, 403 S.E. 2d 313 (1991) and finds such fees to be reasonable. Specifically, the Court assessed (1) the nature, extent and difficulty of the case, (2) the time necessarily devoted to the case, (3) the professional standing of counsel, (4) the contingent nature of the compensation, if any, (5) the beneficial results obtained, and (6) customary legal fees for similar services. Applying the foregoing factors, as noted above, and after review of the Affidavit of Attorney's Fees and Costs submitted by Petitioners' Counsel, the Court finds $127,572.00 to be reasonable attorney's fees and costs.

Petitioners request the Court award the estate 1,462,495.00 not including pre-judgment interest. Respondent requests that Court award $513,336.00. To date, SRM has paid nothing toward even the amount he admits he owes.

The relief requested by John Mensch, as a 1/3 devisee of the estate, is addressed by payment to Shauna Waddell as Personal Representative of the Estate. Any claim he has against the Respondent is derivative to the Estate's claims.

In view of the foregoing, this Court awards the Estate of Florence Mensch a judgment in the amount of $821,343.00 calculated as follows:

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$ 546,921.00	Misappropriations from FM's BOA accounts less SRM's 1/3 share in FM's Will
24,559.00	Failure to itemize FM's tax returns
[10] 40,314.00	2018, taxes, penalties and interest
13,820.00	Tax penalties and interest
163,420.00	Avoidable Income tax due SRM taking more than the RMD from 2011-2018
30,157.00	GE pension overpayment
10,000.00	Cost to estate to clean and repair Tarleton Way
28,000.00	Annual exclusion gift to himself in 2015, 2016
127,572.00	Attorneys fees, costs
$ 984,763	Total Damages

PAYMENT OF DAMAGES

15. A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title. *Lollis v. Lollis*, 354 SE2d 559, 561 (1987). A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust. It is resorted to by equity to vindicate right and justice or frustrate fraud. *McNair v. Rainsford*, 499 SE2d 488, 501 (Ct. App 1988). The Court finds by clear and convincing evidence that a constructive trust should be imposed upon SRM's non-exempt property of whatever type, wherever located, and however titled. This remedy is appropriate as a result of his deceitful, devious, willful, wanton, and careless actions set forth above. He engaged in repeated action of civil theft for 8 years, depleting his mother's property without any regard to what her future needs might be, without regard to her estate plan, without regard to his siblings, without regard to tax law, probate law, prudent investment principles, etc.

16. If execution on this judgment is commenced by Petitioners, the specific property subject to this constructive trust will be identified in accordance with 14-23-360-420, *S. C. Code Annot.* (1976 as Amended) and any other applicable law. Any discovery regarding the ability of SRM to pay the judgment will be incident to these supplemental proceedings after they have commenced.

[10] This amount is on appeal with the IRS. SRM is allowed to reduce the total judgment should this amount change as a result of the appeal

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ORDER

1. STERLING RAYMOND MENSCH, III shall pay $984,763.00 in damages to Shauna Waddell, Personal Representative of the Estate of Florence Mensch. Payment shall be made immediately.

2. Shauna Waddell, Personal Representative of the Estate of Florence Mensch, is hereby awarded judgment against STERLING RAYMOND MENSCH, III in the amount of $984,763.00.

3. Post-judgment interest shall begin to accrue at the legal rate of interest 7.25% or the current rate approved by the S.C. Supreme Court when this Judgment is transcribed and enrolled in the Offices of the Clerk of Court of Greenville County.

4. Should this Order be appealed, interest on the judgement will be governed by 14-23-380 S.C. Code Annot. (1976 as Amended) and other applicable law.

IT IS SO ORDERED.

Debora A. Faulkner
Greenville County Probate Judge

Greenville, South Carolina
Dated this 26 day of Jan, 2022

I ATTEST A TRUE COPY
Clerk, Probate Court
Greenville County, SC
Dated: 1/28/22

Pg14of14

FILED

FEB 17 2022

GREENVILLE COUNTY
PROBATE COURT

STATE OF SOUTH CAROLINA IN THE PROBATE COURT

COUNTY OF GREENVILLE C. A. No.: 2018-ES-23-02854

Estate of Florence Petrak Mensch)

Shauna M. Waddell, individually and)
As Personal Representative of the Estate of)
Florence Petrak Mensch and John R.)
Mensch)
Petitioner,

v.)

Sterling Raymond Mensch, III, individually,)
As former Personal Representative of the)
Estate of Florence Petrak Mensch and in)
His former capacity as Agent under Power)
Of Attorney for Florence Petrak Mensch.)
)
Respondent.)

ORDER

This matter is before me to address Respondent's *MOTION TO ALTER OR AMEND* filed with the Court on February 2, 2022. Evidence of service by mail upon Petitioners' counsel on February 2, 2022 was filed with the Court. As of the date of this Order, no *RETURN* has been filed by the Petitioners' counsel.

S. C. Supreme Court Order of February 4, 2022 regarding the operation of trial courts during the Coronavirus Emergency, directs that hearings on Motions should be minimized. The Order directs trial judges to dispose of Motions without merit without waiting on a Return or other response from opposing counsel. [1]

The Court finds that the Motions fails to comply with Rule 7 (b) (1) in that it fails to state any grounds that would entitle the Respondent to relief. As such, the bare request to the Court to amend the Order under Rule 59 fails to give notice to the Court and opposing counsel of the relief being requested of the Court.

After careful review of the final Order in its entirety, I find no basis to give Respondent relief under SCRCP 59.

If view of the foregoing, Respondent's Motion is denied.

Debora A Faulkner

Debora A. Faulkner, Probate Judge

February 17, 2022
Greenville, S.C.

[1] See https://sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2655

1

ELECTRONICALLY FILED - 2022 Feb 25 2:16 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
IN THE MATTER OF: Estate of Florence Petrak Mensch	)	C.A. No.: 2022-CP-23-01064
John R. Mensch and Shauna M. Waddell Individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch Respondent,	)	NOTICE OF MOTION AND MOTION TO DISMISS APPEAL
vs.	)	
Sterling Raymond Mensch, III, Individually as Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrak Mensch Appellant.	)	

TO: DEVON M. PURIEFOY, ESQUIRE AND KIMBERLY T. THOMASON, ESQUIRE, ATTORNEYS FOR DEFENDANT/APPELLANT STERLING RAYMOND MENSCH, III

You will please take notice that Respondent will move on the tenth day following service hereof, or as soon thereafter as counsel may be heard for an Order dismissing the appeal. The grounds for this motion are that pursuant to Rule 7(b)(1), SCRCP, and case law interpreting the same Appellant was required to specify the grounds of his motion to alter or amend the probate court's underlying Order. As found by the Honorable Debora A. Faulkner in her Order dated February 17, 2022, Appellant failed to comply with the mandates of Rule 7(b)(1). The legal effect of Appellant's failure to specify the grounds of his motion to reconsider is that the filing of the motion did not stay the time for appeal pursuant to Rule 59(f), SCRCP. As such, Appellant has failed to comply with the provisions of S.C. Code Ann. §62-1-308(a) by appealing in a timely fashion the Probate Court's Order granting Petitioner summary judgment.

Based on the foregoing, it is respectfully submitted this Court must dismiss the appeal of the underlying Orders from the Probate Court as there exist no appellate jurisdiction of this Court.

This Motion is based upon the pleadings on file with the Court, pleadings which may be contained within the Probate Court file, a memorandum of law to be submitted and such other and further materials as the Court may consider.

Respectfully submitted,

BROWN, MASSEY, EVANS,
McLEOD & HAYNSWORTH, LLC

s/ Tyler E. McLeod

Tyler E. McLeod
S.C. Bar No. 101309
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Greenville, South Carolina

February 25, 2022

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ELECTRONICALLY FILED - 2022 Apr 04 3:16 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

THE STATE OF SOUTH CAROLINA
In The Court of Common Pleas

APPEAL FROM THE GREENVILLE COUNTY PROBATE COURT

Hon. Debora A. Falkner, Probate Judge

Probate No. 2018-ES-23-02854

Common Pleas No. 2022-CP-23-01064

IN THE MATTER OF:
Estate of Florence Petrak Mensch,

JOHN R. MENSCH & SHAUNA M. WADDELL, Individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch — *Respondents*,

v.

STERLING RAYMOND MENSCH, III, Individually as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch, — *Appellant.*

Designation of Issues on Appeal

Devon M. Puriefoy (#102097)
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COMES NOW Appellant Sterling Raymond Mensch, III, and, pursuant to S.C. Code § 62-1-308(b) identifies the following issues for this appeal:

1. Does this Court have appellate jurisdiction where the Probate Court has not yet entered a final order?

2. Did the Probate Court have subject-matter jurisdiction to award damages for alleged misconduct that occurred prior to Florence Petrak Mensch's death, when no statute authorizes such jurisdiction?

3. Did the Probate Court err in imposing a constructive trust over all of Mr. Mensch's non-exempt property, such that it sought to encumber funds unconnected with any alleged misconduct?

4. Did the Probate Court err in awarding $127,572.00 in attorney's fees?

Signature on following page

Dated this 4th day of April, 2022.

STERLING RAYMOND MENSCH, III

s/ Devon M. Puriefoy
Devon M. Puriefoy
(#102097)

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Proof of Service

I certify that I filed the foregoing with the Clerk of Court on April 4, 2022, using the Court's electronic filing system, which will send notice to all counsel of record, including:

Tyler E. McLeod, Esq.
P.O. Box 2646
Greenville, SC 29602

s/Devon M. Puriefoy
Devon M. Puriefoy
(#102097)

ELECTRONICALLY FILED - 2022 Apr 04 3:16 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

ELECTRONICALLY FILED - 2022 May 04 10:32 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

THE STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

APPEAL FROM THE GREENVILLE COUNTY PROBATE COURT

Hon. Debora A. Falkner, Probate Judge

Probate No. 2018-ES-23-02854

Common Pleas No. 2022-CP-23-01064

IN THE MATTER OF:
Estate of Florence Petrak Mensch,

STERLING RAYMOND MENSCH, III, Individually as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch,

Appellant,

v.

JOHN R. MENSCH & SHAUNA M. WADDELL, Individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch,

Respondents.

DESIGNATION OF RECORD MATTER

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Appellant Sterling Raymond Mensch proposes the following matter (with attachments) to be included in the record on appeal, which undersigned counsel certifies contains no matter irrelevant to this appeal:

1. 5/15/2019 Summons and Petition
2. 5/12/2020 First Amended Petition
3. 6/24/2019 Answer
4. 6/18/2020 Amended Answer
5. 8/17 -8/18/2021 and 9/16 – 9/17/2021 All Trial Transcripts
6. 8/5/2021 Motion of Attorney's Fees and Attorney Fees affidavit
7. 9/15/2021 Amended Motion of Attorney's Fees and Attorney Fees affidavit
8. 9/17/2021 Memorandum in opposition of Attorney's Fees
9. 12/21/2021 Appellant's Revised Proposed Order
10. 1/26/2022 Damages Order
11. 2/2/2022 Motion to Reconsider
12. 2/17/2022 Order denying Motion to Reconsider
13. 2/23/2022 Notice of Appeal
14. 4/28/2022 Order by Circuit Court

[signature page to follow]

Dated this 4th day of May, 2022.

Respectfully submitted,

STERLING RAYMOND MENSCH, III

s/Devon M. Puriefoy
Devon M. Puriefoy
(#102097)

s/John-Paul Baum
John-Paul Baum
(#104938)

DEVON M. PURIEFOY
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ELECTRONICALLY FILED - 2022 May 04 10:32 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex A. Kinlaw, Circuit Court Judge

Common Pleas Case No. 2022-CP-23-01064

Appellate Case No.

John R. Mensch and Shauna M. Waddell
Individually and as Personal Representative
Of the Estate of Florence Petrak Mensch and
John R. Mensch *Respondent,*

v.

Sterling Raymond Mensch, III, Individually
As Personal Representative of the Estate
of Florence Petrak Mensch and in the
former Capacity as Agent under a Power
of Attorney for Florence Petrak Mensch *Appellant.*

NOTICE OF APPEAL

Sterling Raymond Mensch, III, Individually As Personal Representative of the Estate of Florence Petrak Mensch and in the former capacity as Agent under a Power of Attorney for Florence Petrak Mensch appeals the dismissal of its Appeal and appeals the Orders filed on January 26, 2022 and February 17, 2022. Copy of the written Orders are attached to this Notice as Exhibit "A", Exhibit "B", and Exhibit "C".

Dated this 27th day of May 2022

TRULUCK THOMASON, LLC

s/John-Paul Baum
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Exhibit A

ELECTRONICALLY FILED - 2022 May 17 8:52 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
IN THE MATTER OF: Estate of Florence Petrak Mensch	)	C.A. No.: 2022-CP-23-01064
Sterling Raymond Mensch, III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in the former capacity as Agent under a Power of Attorney for Florence Petrak Mensch	)	
Appellant,	)	ORDER
vs.	)	
Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch,	)	
Respondent.	)	

This matter came before the Court for a hearing on April 27, 2022 pursuant to Petitioner's Motion to Dismiss Respondent's "Appeal" of the Orders of the Honorable Debora A. Faulkner entered on January 26, 2022 and February 17, 2022. In addressing the motion before the court, the court has reviewed Judge Faulkner's two Orders, the underlying Motion to Alter or Amend filed with the probate court as well as Memoranda submitted by counsel for both parties and in considering the arguments of counsel at the hearing, I find Respondent's Motion should be granted.

Factual Summary

On May 15, 2019, the Respondents filed a Petition with the probate court alleging numerous causes of action against the Appellant. On July 29, 2021, the probate court entered an

Order granting Respondent's Motion for Summary Judgment on breach of fiduciary duty, violation of the S.C. Uniform Power of Attorney Act and conversion. A four-day damages hearing was held on August 17 and 18 and September 16 and 17 of 2021. On January 26, 2022, the probate court found in favor of Respondents and awarded nine hundred eighty-four thousand seven hundred sixty-three and 00/100 dollars ($984,763.00) in favor of the Estate of Florence Mensch. On February 2, 2022, Appellant filed a Motion to Alter or Amend Judge Faulkner's Order dated January 26th, 2022. The Honorable Debora A. Faulkner in her Order dated February 17th, found that Appellant failed to comply with the mandates of SCRCP Rule 7(b)(1) by failing to state any grounds that would entitle Respondent to relief. Not only did Appellant fail to state any grounds whatsoever in the Motion to Alter or Amend, but Appellant also failed to state the relief or order sought as required under SCRCP Rule 7(b)(1). Respondent argues that the legal effect of Appellant's failure to specify the grounds of his motion is that the filing of the motion to alter or amend did not stay the time for appeal pursuant to Rule 59(f), SCRCP.

I. Appellant's Argument that the Appeal filed by Appellant was not timely

After review of Appellant's Memorandum in Opposition and arguments made by Appellant's counsel, Appellant is arguing that their appeal should be dismissed as untimely because they allege that the January damages Order was not a final order. Appellant argued at the hearing that **his appeal** was untimely because Judge Faulkner's Order for damages **against Appellant** included a reduction of the judgment amount allocated to 2018 taxes, penalties and interest ($40,314.00), based on whether the IRS forgives penalties and interest which are currently being appealed by Shauna Waddell as Personal Representative of the Estate of Florence Mensch.

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Judge Faulkner emphasized in her Order dated February 17, 2022 that the January 26, 2022 Order was a **final Order**. The Order awarding damages was issued following a four-day trial on damages, and such was clearly intended by Judge Faulkner to be a final Order in the case. The Court previously granted summary judgment in favor of Petitioners and the January Order was the final Order awarding damages after the trial. The Order discusses the filing of supplemental proceedings, and disposes of every cause of action in the case. There is nothing in the Order which says the Order will be amended at a later date, nor that further proceedings are necessary in the probate court after the IRS rules on the Appeal. The Order states that the $40,314.00 **will be** reduced by the 2018 penalties and interest if the appeal of those penalties and interest is successful. Clearly, there is nothing further for the probate court to do. An IRS appeal could take a substantial amount of time, and it would be inequitable to require completion of the IRS appeal before the court can issue a final order in the case, and before the Estate can collect any amount of the judgment, especially given the fact that the amount subject to that appeal is some portion of $40,314.00, which is a small percentage of the overall judgment of $984,763.00.

In addition, Appellant did not allege that the January Order for damages was not a final order in his Motion to Alter or Amend the Order, nor at any time prior to filing the notice of appeal. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is clear that the issue was not raised as Appellant did not state any grounds for the Motion to Alter or Amend and they did not request any specific relief. An issue cannot be raised for the first time on appeal, and therefore Appellant's argument that this is not a final Order cannot be raised at this time. The IRS appeal

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is a good example of a ground that could have been stated in a motion to alter or amend. If that were stated as a ground then Judge Faulkner could have dealt with the issue at the time, but rather Appellant is just now stating this ground for the very first time on appeal. The Court in *Elam v. South Carolina Department of Transportation* found, "A party must file a Rule 59(e) motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Appellant did not state any grounds in the Motion to Alter or Amend, and certainly did not raise the issue that the January Order for damages was not a final order.

This Court finds that Judge Faulkner's January 26, 2022 Order was a final order, and therefore Appellant's request that the case be remanded to probate court is DENIED.

II. Respondent's Motion to Dismiss the Appeal

Respondent's Counsel argues that the legal effect of Appellant's failure to specify the grounds of his Motion to Alter or Amend is that the filing of the motion did not stay the time for appeal pursuant to Rule 59(f), SCRCP. Therefore, Appellant's notice of appeal was untimely. As such, Appellant has failed to comply with the provisions of S.C. Code Ann. §62-1-308(a) by appealing in a timely fashion the probate court's Order for damages dated January 26th, 2022.

The substance of Appellant's Motion to Alter or Amend filed on February 2, 2022 stated:

> "Respondent...move pursuant to Rule 59 of the South Carolina Rules of Civil Procedure to alter or amend the Order granting Petitioner damages. WHEREFORE, Respondent respectfully requests this court to alter or amend its January 26, 2022, Order."

In Camp v. Camp, the Court of Appeals stated, "'A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such

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motion.' " Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (quoting Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004)); Rule 203(b)(1), SCACR; Rule 59(f), SCRCP. "Rule 7(b)(1), SCRCP requires that motions '**shall state with particularity the grounds therefor, and shall set forth the relief or order sought**.' " Camp, 386 S.C. at 575, 689 S.E.2d at 636. "The particularity requirement 'is to be read flexibly in recognition of the peculiar circumstances of the case.' " Id. (quoting Cambridge Plating Co., Inc. v. Napco, Inc., 85 F.3d 752, 760 (1st Cir.1996)). " 'By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly.' " [401 S.C. 132] Id. (quoting Calderon v. Kansas Dep't of Soc. & Rehab. Servs., 181 F.3d 1180, 1186 (10th Cir.1999)). The Court in Camp v. Camp further stated, "The purposes of insufficient and successive post-trial motions appear to be the same: both attempt to buy time without asserting a meritorious claim. These tactics further neither justice nor efficiency, and we cannot facilitate their use. *Id.*

The holding in Camp v. Camp was overruled by the Supreme Court, but for reasons that do not exist in the present case. The Supreme Court held that "we do not believe applying the particularity requirement in an overly technical fashion **in this case** would serve the purpose behind the rule." Camp v. Camp, 386 S.C. 571, 576, 689 S.E.2d 634, 636-37 (2010). However, the Supreme Court goes onto state that it is not necessary to apply the particularity requirement in that case because (1) neither party was prejudiced and (2) the court was able to both comprehend the motion and deal with it fairly. *Id.* Therefore, the Supreme Court found in **that particular case** that the lower court was able to deal with the motion for reconsideration fairly. *Id.*

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However, unlike cases in which the court and the parties can comprehend the basis of the motion and deal with it fairly, in this case Judge Faulkner specifically found in her Order dated February 23, 2022 "the bare request to the Court to amend the Order under Rule 59 fails to give notice to the Court and opposing counsel of the relief being requested of the Court." In the February Order, Judge Faulkner referenced the S.C. Supreme Court Order of February 4, 2022 regarding the operation of trial courts during the Coronavirus Emergency which directs that hearings on motions should be minimized. The Order directs trial judges to dispose of motions without merit without waiting on a return or other response from opposing counsel.[1] Therefore, **in this case** Appellant did not state sufficient grounds or relief sought and the court was unable to comprehend the motion or deal with it fairly.

Judge Faulkner's Order denying the motion to alter or amend is consistent with the spirit and letter of Rule 7(b)(1). No overly technical application of the Rule is being applied. It was incumbent upon Appellant to comply with the requirements of Rule 7(b)(1) in order to trigger the stay provided by Rule 59(f). SCRCP Rule 1 admonishes both the court and the parties to a case to construe, administer and employ the Rules to secure the just, speedy and inexpensive determination of every action and proceeding. "The Rules governing civil procedure exist for a reason and Plaintiff has failed to show good cause for not complying with those rules." Sapphire Enters v. Allstate Ins. Co. (D. S.C. 2020).

The legal effect of Appellant's failure to specify the grounds of his motion is that the filing of the motion did not stay the time for appeal pursuant to Rule 59(f), SCRCP. Therefore, Appellant's notice of appeal was untimely. As such, Appellant has failed to comply with the

[1] See https://sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2655

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provisions of S.C. Code Ann. §62-1-308(a) by appealing in a timely fashion the probate court's Order for damages dated January 26th, 2022.

Based on the foregoing, this Court dismisses the appeal of the underlying Orders from the probate court as there exist no appellate jurisdiction of this Court.

The Court hereby orders as follows:

1. This Court finds that Judge Faulkner's January 26, 2022 Order was a final order, and Appellant's request that the case be remanded to probate court is **DENIED**.
2. Respondent's Motion to Dismiss the appeals of the Probate Court Orders is **GRANTED**.

IT IS SO ORDERED.

[electronic signature page to follow]

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Greenville Common Pleas

Case Caption: Sterling Raymond Mensch VS Shauna M Waddell , defendant, et al

Case Number: 2022CP2301064

Type: Order/Dismissal

So Ordered

s/Alex Kinlaw, Jr., #2763

Electronically signed on 2022-05-16 13:35:05 page 8 of 8

ELECTRONICALLY FILED - 2022 May 17 8:52 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

Exhibit B

FILED

FEB 17 2022

GREENVILLE COUNTY
PROBATE COURT

STATE OF SOUTH CAROLINA — IN THE PROBATE COURT

COUNTY OF GREENVILLE — C. A. No.: 2018-ES-23-02854

Estate of Florence Petrak Mensch)

Shauna M. Waddell, individually and)
As Personal Representative of the Estate of)
Florence Petrak Mensch and John R.)
Mensch)
Petitioner,

ORDER

v.)

Sterling Raymond Mensch, III, individually,)
As former Personal Representative of the)
Estate of Florence Petrak Mensch and in)
His former capacity as Agent under Power)
Of Attorney for Florence Petrak Mensch.)
)
Respondent.)

This matter is before me to address Respondent's *MOTION TO ALTER OR AMEND* filed with the Court on February 2, 2022. Evidence of service by mail upon Petitioners' counsel on February 2, 2022 was filed with the Court. As of the date of this Order, no *RETURN* has been filed by the Petitioners' counsel.

S. C. Supreme Court Order of February 4, 2022 regarding the operation of trial courts during the Coronavirus Emergency, directs that hearings on Motions should be minimized. The Order directs trial judges to dispose of Motions without merit without waiting on a Return or other response from opposing counsel. [1]

The Court finds that the Motions fails to comply with Rule 7 (b) (1) in that it fails to state any grounds that would entitle the Respondent to relief. As such, the bare request to the Court to amend the Order under Rule 59 fails to give notice to the Court and opposing counsel of the relief being requested of the Court.

After careful review of the final Order in its entirety, I find no basis to give Respondent relief under SCRCP 59.

If view of the foregoing, Respondent's Motion is denied.

Debora A. Faulkner

Debora A. Faulkner, Probate Judge

February 17, 2022
Greenville, S.C.

[1] See https://sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2655

Exhibit C

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE PROBATE COURT

CASE NO.2018ES2302854

IN THE MATTER OF:
Estate of Florence Petrak Mensch

Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mensch,
Petitioners,

vs.

Sterling Raymond Mensch III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch,
Respondents.

ORDER

FILED

JAN 26 2022

GREENVILLE COUNTY
PROBATE COURT

Date of Hearing:	September 16, 17, 2021
Presiding Judge:	Debora A. Faulkner, Probate Judge
Attorney for Petitioners:	Tyler E. McLeod
Attorneys for Respondent:	Devon M. Puriefoy, Kimberly Thomason
Court Reporter:	Rachel Wood

This matter came before the court for trial to determine the amount of damages owed the Estate of Florence Mensch by Respondent, Sterling Raymond Mensch (SRM) admits he misappropriated funds belonging to Florence Mensch and her estate. However, the amount of damages due the estate is the central issue in the litigation. The relevant time period for the misappropriations is from May 17, 2010, the date Mrs. Mensch's executed her Durable Power of Attorney (DPOA) naming SRM as her Attorney in Fact, (AIF) and April 26, 2018, the date of Ms. Mensch's death.

Present at the hearing was Petitioner Shauna M. Waddell (SW) represented by Tyler McLeod. Petitioner John Mensch (JM) was present for days one and two of the hearing. SRM appeared for each day of trial with his attorneys, Devin Puriefoy and Kimberly Thomason. Witnesses in the case were Petitioner, SW, Petitioners' expert, John Markel, and Respondent's expert, Mark Chastain.

Prior to taking testimony the Court denied the Petitioner's *Motion in Limine*.

STIPULATIONS

1. SRM made a number of withdrawals from Mrs. Mensch's bank account totaling $820,382.

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2. SRM deposited the funds from these withdrawals into his single owner checking account.

3. Both expert witnesses are qualified to give their opinions

PROCEDURAL HISTORY

1. On December 14, 2018, SRM filed the Will and Codicil with the Court but took no action to have the documents admitted as the valid testamentary documents of his mother. Neither did he apply for appointment as Personal Representative (PR) which would have granted him legal authority over her assets for the benefit of the devisees named in her Will and any estate creditors.

2. On January 23, 2019, SRM filed his application for admission of the Will and Codicil to Probate and for his appointment as PR. He was appointed PR on January 23, 2019.

3. On May 15, 2019, this action was filed by Petitioners.

4. On August 28, 2019, the Hon. Clayton L. Jennings issued an Order in response to Petitioners' Motion to Compel which, among other rulings, ordered SRM to provide discovery to Petitioners within ten days of the entry of the Order. The Order attached hereto is incorporated herewith as if fully set out.

5. On December 4, 2019, the Hon. Clayton L. Jennings issued his Order in the Petitioner's first Rule to Show Cause proceeding finding SRM in willful contempt of the August 28, 2019 Order. Accordingly, the Court removed SRM as PR and appointed Shauna Waddell to serve as Successor PR. The Court imposed further financial sanctions against SRM. The Order is attached hereto and incorporated herewith as if fully set out.

6. On May 13, 2020, an Amended Petition was filed as permitted by Judge Jennings' Court Order.

7. On September 2, 2020, the Hon. Clayton L. Jennings issued an Order as a result of the Petitioners' filing a second Rule to Show Cause against SRM. The Court found SRM to be in willful contempt of the Court's prior Orders. This Order attached hereto is incorporated herewith as if fully set out.

8. On January 13, 2021, the Hon. Clayton L. Jennings issued an Order as a result of Petitioners third Rule to Show Cause alleging SRM willfully failed to comply with the September 2, 2020 Order. He was found to be in willful contempt, ordered to pay attorneys' fees to Petitioners and cautioned that he would be subject to incarceration should he violate this Order. This Order attached hereto is incorporated herewith as if fully set out.

9. On July 29, 2021, the Court entered an Order granting the Petitioners Summary Judgment on the following causes of action: 1) Breach of Fiduciary Duty as Attorney in Fact (AIF), 2) Violation of the S.C. Uniform Power of Attorney Act, and 3) Conversion. The Court denied Petitioners' Motion for Summary Judgment on the remaining causes of action: Negligence, Unjust Enrichment/Money Had and Received, and Constructive Trust.

10. Trial in this case was heard on September 16-17, '21. By agreement of counsel, Petitioner, John Mensch, participated by telephone on September 17, 2021.

11. A proposed Order was transmitted to the Court on 10/15/21. An extension was granted to SRM's counsel to Dec. 16, 2021 to lodge objections to the proposed Order.

FINDINGS OF FACT

By the preponderance of the evidence, I make the following findings of fact:

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1. Mrs. Mensch and her husband moved to Greenville from New York. From their marriage, they had three children, John, Sterling and Shauna.

2. Mr. Mensch died in or around 1995.

3. The record contains no evidence that Ms. Mensch had anything other than a loving relationship with all three of her children.

4. In 1998, Ms. Mensch executed a Will leaving her estate equally to each of her three children. She named all three children to serve as Co-Personal Representatives. Similarly, she named each of her 3 three children to share equally in her non-probate accounts which includes a retirement account. Based on the foregoing, I find that Ms. Mensch intended to leave her estate both probate and non-probate to each of her three children in equal shares.

5. In 2007, Mrs. Mensch executed a DPOA naming the Petitioner, SW, as her attorney in fact but it was later revoked in favor of SRM in 2010.

6. After her husband's death, Ms. Mensch lived in her own home at 207 West Beverly Street in Greer, S.C.

7. On May 17, 2010, Ms. Mensch, with the assistance of an attorney, executed another DPOA naming SRM as her AIF. This DPOA contained no provisions allowing SRM to make gifts to himself.

8. She also executed a Codicil to her 1998 Will naming SRM as her sole Personal Representative. She republished her 1998 Will in all other respects, i.e. her estate plan remained unchanged.

9. SW testified that around 2009 she began to take notice of her mother's dementia symptoms.

10. In or around 2012, she purchased an apartment at Rolling Green. She moved into the Rolling Green apartment and sold her home in Greer.

11. In or around 2013 or 2014, as a result of her diagnosis of dementia, Alzheimer's type, SW arranged for FM to be moved to the memory care unit at Oakleaf Village. No evidence was presented that this decision was contested. She died at Oakleaf Village on April 26, 2018.

12. At Ms. Mensch's funeral, SRM advised his brother John to return to Oregon, because he would be starting the estate administration immediately. After hearing nothing from SRM, SW called him about the estate administration. SRM told her he was waiting on tax information.[1] She called again and he said the taxes were done and that he would be dropping off the estate information to attorney, David Massey's office. After hearing nothing further, SW called the attorney's office and the attorney's office didn't have any estate information. SRM told SW that their secretary probably lost it. The firm was never hired by SRM. SW's communication with SRM became increasingly difficult.

13. On December 14, 2018, SRM filed FM's Will and Codicil in the Probate Court without opening an estate. On January 23, 2019, nine months after Ms. Mensch's death, SRM filed his application to admit the Will and be appointed as the PR. He was appointed PR on January 23, 2019. He filed this without the assistance of counsel.

14. On April 30, 2018, SRM signed and filed a sworn *Inventory and Appraisement* with the Court. The Inventory and Appraisement is part of the Court's record. On that Inventory, he swore that the balance in the UBS account on 4/30/2018 was $409,652. Petitioner's Exhibit 21, the UBS statement from April, 2018 shows that SRM had withdrawn $259,000.00 on April 23, 2018 with a resulting balance of $154,069. He also stated on the *Inventory*, under oath, that the Tarleton Way home had an existing mortgage of $238,170.00 Two months earlier on February

[1] The records would later show that upon her appointment as Successor PR, SW learned that the 2018 tax return had never been filed. Petitioner's #19 is an IRS Letter stating that on 12/31/18, the estate owed $91,367.

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8, 2019, he paid the sum of $232,047 in full satisfaction of the mortgage. So, after being sworn, he voluntarily and willfully filed perjured information to the Court. [2]

15. After his mother's death, rather than filing the Will immediately and becoming the PR of her estate, he was continuing to make post-death withdrawals from Ms. Mensch's x7059 account. He was also allowing her GE pension auto deposits to continue despite her death. He made his last withdrawals from FM's account in or around February, 2019 leaving approximately $1500 in x7059 and $65 in x2007. SRM withdrew a total of $170,000 from Ms. Mensch's bank accounts after her death. This proceeding was commenced three months later on May 15, 2019

TARLETON WAY HOUSE AND LOT

16. On April 18, 2007, Ms. Mensch purchased property in a subdivision in Greer. As such, she signed the mortgage obligating herself to pay $330,000.00 for the property in monthly installments. Further, she signed a "Rider" stating that this would be her second home and keep the home only for her exclusive use.

When she purchased the property, she was still living at her West Beverly Street property. Her intent was never to live at this Tarleton Way property. The intent was that the house would actually be purchased by SRM as a home for him and his daughter. SRM orchestrated this arrangement since he was a party in a divorce proceeding. He wanted to protect the property from being included as marital property subject to equitable division. SW testified that it wasn't until after FM's death that she and her brother discovered that the house was not actually owned by SRM.

SRM's expert witness, Mr. Chastain, listed that SRM should be given credit for $39,000.00 that he paid as a down payment from his own funds when the home was purchased. Upon further examination of the witness, it appeared this was untrue in that the amount was folded into the mortgage.

SRM paid nothing to FM for the 12 years he lived there. It was home with landscaping, pool, theatre room, and nice finishes. SRM alleges he made a total of $240,631.00 in payments from his personal funds to service the principal and interest on the Tarleton mortgage and that he should be credited with those payments as being beneficial to FM.

SRM's employment status and income were never presented in evidence. In order to weigh the veracity of this assertion, the ability of SRM to pay this would need to be known. It is unknown whether or not he was employed; or, if so, the dates of his employment and the amount of his income. Petitioner's expert witness, Mr. Markel, attempted to trace these alleged mortgage payments using bank documents. He found that many of the alleged payments were untraceable and were inconsistent with the dollar amounts alleged. Countless online cash withdrawals from x7059 to SRM's account were in amounts similar to the amount of the mortgage payments. Bank statements prior to 2012 were not available to the parties.

SRM also alleges that he used some of the cash from FM's accounts to make improvements and repairs to the home which were beneficial to FM. He alleges these expenditures amount to $69,957.00.[3] Despite repeated directions from the Court, SRM never produced receipts or other documents to prove this amount. He failed to testify at this hearing regarding how he arrived at this total. He failed to produce witnesses to confirm payments made for improvements. He failed to issue any subpoenas for merchants or repair companies to produce records.

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[2] The estate record contains a claim filed on 2/11/2019 by Traci Malone of South State Bank. On the same day, February 11, a *Loan Payoff Statement* was filed. SRM satisfied the mortgage in full on 2/8/19. SW's *Settlement Statement* (Exh. #25) when TW was sold shows a mortgage payoff of 218,579 to South State Bank on 12/3/2020

[3] SW testified in detail regarding the condition of the home after SRM moved resulting in an expense to the estate of $10,000.00 on extensive cleaning and repairs in order to make it fit for sale.

When SRM moved from the home in September, 2020, the estate has to spend $10,000 for cleaning and repairs to make the property presentable for potential buyers.

As a minor point; but one that shows how no opportunity was missed by SRM, SRM collected $22,434.00 in insurance proceeds for hail damage to FM's home. The amount of the damage was not placed in the record. Again, these are proceeds from an insurance policy that FM pays for each month in mortgage payments for a house she doesn't need; and, that is being used as a residence for her able bodied son. SRM's expert witness testified that the damage estimate was less than the amount collected and that SRM appeared to have kept the balance not used. This was not contradicted by SRM.

FLORENCE MENSCH'S ASSETS

17. A listing of FM's assets and their values on the date SRM became FM's AIF in 2010 is not in evidence. Bank records were not available prior to 2012. However, from the evidence presented, it appeared that her assets, residential expenses were as follows on the dates indicated:

Asset	Value	Date of Value	Residential Expense
[4]Home on Tarleton Way	420,000.00	Sold 12/3/20	Moved to Rolling Green In 2012 Oakleaf in 2015
x7059 BOA Checking account	various		
x2007 BOA Savings account	various		
Elfin Trusts + GE stock IRA[5]	$1,321,717.00	1/1/2015	
UBS Retirement Acct	$913,511.00	12/30/16	

Annual Income		
2012	$16,000.00 SSA	2580 x 12/ 31K
	$17,800.00 Pension	
	$49,240.00 IRA Distribution	
	$83,090.00	
2013	$16,000.00 SSA	2580 x 12/ 31K
	$17,800.00 Pension	
	$70,000.00 IRA Distribution	
	$104,125.00	
2014	$16,000.00 SSA	2580 x 12/ 31K
	$17,800.00 Pension	
	$90,594.00 IRA Distribution	
	$124,964.00	
2015	$16,000.00 SSA	4550x12/55K
	$17,800.00 Pension	

[4] Purchased 2007 for $330,000.00 includes $39,700.00 down payment, additional $65,000.00 for pool, home theater, fencing, landscaping, etc. SRM claims he paid this via his allegations in an affidavit.
[5] Elfin later managed by State Street Global.

Da [illegible]

$213,945.00 IRA Distribution
$248,590.00

2016 $16,000.00 SSA 4550x12/55K
$17,800.00 Pension
$208,727.00 IRA Distribution
$243,379.00

MANAGEMENT OF ASSETS BY SRM

18. FM's Bank of America (BOA) accounts are her checking account, x7059 and a savings account x2007. The fund balance in x7059 was the result of FM's monthly income deposits plus any online transfers directed by SRM-AIF from her investment accounts. Payments for her residence at the facilities were automatically drafted from x7059.[6]

19. In 2013, SRM, using the authority granted to him by FM in the DPOA, decided to add his name as a joint account owner to x7059. No evidence was presented on why SRM chose to do this, especially since this change would affect FM's estate plan. Instead of the balance being a part of her estate to be shared by all 3 of her children, this change would result in SRM being able to claim all funds remaining on deposit for himself.

20. SRM's personal BOA account is x3259. From 2013 until FM's death in April, 2018, SRM engaged in over 239 online transfers, cash transactions, withdrawals, from FM's BOA accounts. He directed these transfers to his personal BOA account x3259 which was a POD account, providing that his daughter would be paid the balance in the account upon his death. The parties stipulate that the total for all these transfers comes to $820,382.00[7] Once deposited into his account, SRM spent the funds on a variety of personal pleasures including nice restaurants, men's clothing stores, jewelry, home improvement stores, grocery stores, travel, alcohol, etc. He made several large cash withdrawals and made online payments to his personal credit card company from FM's account. The piece de resistance $8000.00 to Greenville Matchmakers.

21. From 2015 through 2018, SRM withdrew funds from Elfin Trust, taking smaller amounts from FM's GM stock. On 12/31/2015, the Elfin fund's market value was $279,819.00; on the same date, the GM market value was $1,321,717.00.

22. SRM facilitated IRA distributions to FM in excess of the amount mandated for *required minimum distributions* (RMD).[8] In years 2011, 2012, 2015, 2016, and 2018, SRM unnecessarily caused FM's IRA distributions to exceed allowable RMD for each year. From the above chart, SSA and pension income were largely sufficient to cover her monthly living expense at Rolling Green and less so at Oak Leaf. However, no evidence is presented to show that the allowable RMD for each year plus her income would have been insufficient to comfortably pay for her care. The amount of income taxes incurred due to these excessive withdrawals was $163,420.00.

23. On March 20, 2018, SRM sold the GE stock for $406,255.80.

24. Petitioners allege that SRM failed to properly diversify FM's portfolio resulting in a reduction of approximately $400,000.00 in value. Court finds that this was speculative and not supported by the preponderance of the evidence.

[6] Occasionally, SRM would use the x2007 to receive online transfers.
[7] No bank records were available prior to 2012.
[8] Under Treasury Regulations, taxpayers over 70.5, like FM must take the required minimum distributions.

25. On April 23, 2019, three days prior to FM's death, SRM transferred $259,000.00 of the $409,652.00 held in FM's UBS retirement account to FM's 7059 account.

26. SRM failed to notify BOA and failed to notify GE Pension of FM's death. The pension payments continued unabated and SRM continued to make withdrawals from the BOA accounts. From the time of FM's death on April 26, 2018 until February 18, 2019, SRM directed $170,000 of FM's, i.e. the Estate's, post-death funds to his x3259 personal account. These were funds earmarked to be divided equally among her 3 children. SRM withdrew these post-death pension payments from FM's account for his personal use. To reimburse GE for these overpayments. As a result, the estate was charged with an overpayment of $30,157.00.

SW, as PR, agreed to forfeit the $10,000 of GE life insurance that FM intended to be shared equally by her children. SW assigned $3333.33 of the 10,000 for each beneficiary. This left a balance due to GE of $20,157.81 from the estate. SRM should be liable to the estate for the total amount of overpayment in the amount of $30,157.00.

27. At the time SW was appointed PR, there was only $15,000 in FM's x7059 account.

TAX LIABILITIES

28. Between 2012 and 2016, SRM's failed to timely file tax returns and failed to timely pay taxes due resulting in penalties for failure to file and penalties and interest for failure to pay the IRS and SCDOR. The amount admitted by SRM's attorneys is $13,820.17.

29. SRM failed to file tax return for FM for 2017.

30. SRM made gifts from FM to himself, SW and Steve, John and Shea, Sterling and Holly in the years 2014, 2015, and 2016 for the purpose of meeting the annual exclusion allowed by the IRS. This was permitted by FM's DPOA.

31. SRM failed to take action necessary to avoid $40,314.00 penalties and interest connected to FM's 2018 taxes. This amount is currently on appeal.

32. From 2011 through 2016, SRM failed to itemize deductions for property tax and mortgage interest on the Tarlton Way on FM's returns. FM as owner of the property was clearly entitled to claim those itemized deductions, and thereby proportionately reduce her tax liability for each respective year. This failure amounts to $24,559 in excessive tax.

33. From 2011 through 2018, SRM caused FM and, later, her estate to incur unnecessary tax liabilities of $163,420 as set forth in Petitioner's Exhibit #1 [9] due to SRM's withdrawals in excess of the RMD for each year.

34.. In 2015 and 2016, SRM wrote checks to his siblings, their spouses, to himself and his daughter in accordance with IRS rules that permit gifting a certain amount each year. Each year he wrote himself a check equal to the others, despite his siphoning of funds from his mother to subsidize his lifestyle. He has made no good faith effort whatsoever during this litigation to pay any amount that he admits he owes. The only amounts he has paid to the estate to date for his wrongdoing were attorneys' fees ordered by Judge Jennings short of incarceration. As a matter of equity, SRM should not be able to sit at the table with his siblings and collect a gift in an amount equal to theirs given his actions. Specifically, the record indicates he paid himself $14,000.00 for 2015 and 2016 for a total of $28,000.00.

[9] Pet. Exhib. 21, USB states RMD for 2018 is 33,358. SRM withdrew $259,000 or $ 225,642 in excess of IRS limits

CONCLUSIONS OF LAW

Applying the facts to applicable law, I make the following conclusions of law:

BREACH OF FIDUCIARY DUTY

1. "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Davis v. Greenwood Sch. Dist.* 50, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. See generally, Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) (discussing the elements comprising a breach of fiduciary duty claim); *RFT Mgmt. Co. v. Tinsley & Adams*, 399 S.C. 322, 732 S.E.2d 166 (2012).

2. A fiduciary relationship existed between FM and SRM as expressed in the DPOA signed by FM in May, 2010. FM reposed special confidence in SRM; confidence that he would act in good faith placing her As such, SRM has all the duties and obligations set forth in the document plus he is duty bound to act at all times with due regard to the interests of FM. Moore v. Benson, 390 SC 153 (2010). Being in the firm grasp of Alzheimer's disease, she was squarely at the mercy of SRM to act in her best interests. Instead, SRM exploited the trust his mother bestowed on him at every turn.

3. The clear weight of the evidence shows SRM used the DPOA as a license to access as much of his mother's property as possible, leaving enough for her basic requirements, such as the payments to her facility. The chart above shows that her income and RMD distributions were substantially exceeded the amount of her monthly facility fees. The excess was taken as a part of the obvious scheme concocted by SRM to maximize his grift. At every opportunity, he placed his desire to take as much of her property as possible ahead of his mother's welfare. To further nail down his continued free use of his mother's money, to the detriment of his siblings, he added his name as a joint owner to her BOA accounts. By doing this, he was depriving his siblings of their right to inherit a share of the balance as their mother so intended. To further thwart his mother's estate plan, he designated his personal checking account as a POD account. With this change, all the ill-gotten funds in this account would become the property of his daughter to the detriment of his mother's estate, i.e. his siblings.

4. He breached his fiduciary duty by using the authority reposed in him by FM to delay or fail to file taxes, resulting in unnecessary fines and penalties, thus reducing FM's estate. He made withdrawals exceeding her RMDs, he liquidated her IRA, and also resulting is unnecessary taxes and penalties. These accounts were all created by FM to be divided equally at her death. FM's estate, both non-probate and probate, would have been substantially greater but for the shenanigans employed by SRM while his mother suffered with Alzheimer's disease, helpless to intervene.

5. The DPOA contained no express authority for SRM to gift himself any of his mother's property. The Decedent's DPOA contains the following provision on page 5, third paragraph:

Notwithstanding any provisions herein to the contrary, my attorney in fact shall not satisfy the legal obligations to the attorney in fact, out of any property subject to this power of attorney. Except to the extent this power of attorney specifically authorizes gifts to my attorney in fact, my attorney in fact may not exercise this power in favor to the attorney, the attorney's estate, the attorney's creditors, or the creditors of attorney's estate.

An agent acting for a principal pursuant to a power of attorney may not make a substantially gratuitous conveyance of the property of the principal to himself unless the power to do so is expressly granted by the instrument itself. Fender v. Fender, 329 SE2d 430 (1985).

6. Florence Mensch died on April 26, 2018. S.C. law requires anyone in possession of a decedent's Will to file the Will within 30 days of the date of death. 62-2-901 (Supp. 2014). SRM waited until December, 2018 to file the Will and Codicil. He waited until January of 2019 to open his mother's estate. He continued to collect her pension and spend money belonging to the estate from April 26, 2018 until February, 2019. Since her death, he continued to convert her property to his own use, said amount totaling approximately $170,000.00 and causing the estate to be indebted to GE for the overpayment of monthly pensions.

SRM's actions equate him to executor de son tort. Because he continued to receive and spend estate property, he is chargeable as the executor of his own wrong. The value of the property is charged to the *executor de son tort*. 62-3-619 *S.C. Code Annot.* (Supp. 2014)

I find SRM, who was named as the PR in the Will of his mother, did intentionally and with bad faith convert and waste estate property by means of the concealment of the fact of his mother's death to her bank and to her pension company.

7. While serving as PR, SRM failed to repay or make any effort to repay to the Estate the property he converted to his own use. Further, he failed to comply with the Orders of this Court, failed to cooperate with his first attorney so the attorney could assist in the estate administration. All these acts together constitute a violation of his fiduciary duty as Personal Representative to the Estate causing unnecessary time and expense in the administration of what could have been a very straight forward estate administration.

8. While serving as PR, SRM failed to properly file his mother's 2018 tax returns resulting in taxes, penalties and interest assessed against her estate in excess of $40,000.00.

VIOLATION OF THE UNIFORM POWER OF ATTORNEY ACT

9. As a matter of law, it is undisputed SRM owed a fiduciary duty to the Decedent as her AIF. Loftis v. Eck, 341 SE 2d 641(1986). Instead of preserving her funds for the future use of the Decedent, Sterling Mensch transferred funds from the Decedent's accounts to his personal account while acting under the authority given to him by her in her DPOA. It is undisputed that Sterling Mensch used funds from these transfers for his own personal use, resulting in the diminishment of available funds for the Decedent's estate to distribute. Therefore, Sterling Mensch failed to maintain Decedent's estate plan as is required by the South Carolina Power of Attorney Act.

This Court has previously ruled as a matter of law that no genuine issue of material fact exists as to this cause of action and Petitioners are entitled to judgment against Respondent.

The Decedent's DPOA contains the following provision on page 5, third paragraph:

Notwithstanding any provisions herein to the contrary, my attorney in fact shall not satisfy the legal obligations of the attorney in fact, out of any property subject to this power of attorney. Except to the extent this power of attorney specifically authorizes gifts to my attorney in fact, my attorney in fact may not exercise this power in favor to the attorney, the attorney's estate, the attorney's creditors, or the creditors of attorney's estate.

While serving as Decedent's AIF, Sterling Mensch transferred funds from the Decedent's accounts to his personal account. Sterling Mensch admitted that he made the unauthorized transfers as described. However, he claims that he used a substantial part of the transfers for the benefit of Florence Mensch. In Moore v. Benson (supra), the Court of Appeals upheld the Master in Equity's refusal to allow credit for alleged tax payments without documentary evidence to support the claim. As to these claims, the Court finds that Sterling Mensch was unable to demonstrate that the above-referenced transactions were for Florence Mensch's benefit. He produced no receipts, documents, witnesses and he failed to testify. In addition to failure to provide proof, as a matter of equity, He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in

which he seeks relief, Emery v. Smith, 361 S.C. 207,220, 603 SE2d 598, 605 (Ct. App. 2004). He who seeks equity must do equity. Norton v. Matthews, 249 S.C. 71, 152 SE2d 680 (1987).

As a result of Mr. Mensch's failure to keep complete and accurate records, the Court finds he has violated the following provisions of the Uniform Power of Attorney Act, S.C. Code Ann. 62-8-114 (Supp. 2017): failed to act in good faith; failed to act within the scope of authority granted in the DPOA; failed to act with care, competence and diligence; failed to keep records or all receipts, disbursements and transactions; failed to preserve the Decedent's estate plan by liquidating retirement accounts; failed to preserve the Decedent's estate plan by using her funds for his personal use resulting in less assets to be distributed to all three of her children from her estate; failed to timely file taxes resulting in penalties and interest; failed to minimize taxes and incurring penalties by liquidating retirement accounts; acted with reckless indifference to the purpose of the power of attorney; and his conduct was reckless and willful in complete disregard of duties imposed upon him as a fiduciary.

The Court finds that Sterling Mensch is liable to the Decedent's successors in interest for the amount required to restore the value of the Decedent's property to what it would have been had the violations not occurred. S.C. Code Annot. 62-8-117 (Supp. 2017).

As to the amount, See Section VII.

CONVERSION

10. The evidence is clear and convincing that SRM converted funds belonging to his mother, and later, the estate to his own use and control. To recover in an action for conversion, Petitioners must:

(1) Have an interest in the thing converted;

(2) Respondent must have converted the property to his own use;

(3) The use was without Petitioners' permission.

Moseley vs. Oswald, 656 SE 2d 380 (2008). The Personal Representative has an interest in and a duty to recover all property due the Estate of Florence Mensch. John Mensch as a devisee in her Will has joined the Personal Representative in order to secure the inheritance intended for him by his mother. SRM has admitted taking over $800,000.00. These funds were used without the permission of Florence Mensch, her Estate, or John Mensch.

By exploiting his status as AIF he wrongfully and willfully took without legal authority property belonging to FM and ultimately to FM's Estate. The wrongful detention of another's property may give rise to action for conversion; in such cases, conversion occurs when, without justification or excuse, one refuses to surrender the possession of goods after demand for possession by one entitled thereto. Conversion is a wrongful act and has been defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. Owens v. Andrews Bank & Trust Co., 265 SC 490, 220 S.E. 2d 116 (1975). Conversion is a wrongful act which emanates from either a wrongful taking or wrongful detention. Kirby v. Horne Motor Co., 295 S.C. 7, 11, 366 S.E.2d 259, 261 (Ct. App. 1988).

This Court previously ruled as a matter of law that no genuine issue of material fact exists as to this cause of action and Petitioners are entitled to judgment against Respondent.

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Rent, Pre-Judgment Interest, Causes of Action for Negligence, Fraudulent and Negligent Misrepresentation and Concealment, Unjust Enrichment/Money Had and Received and Eviction/Ejectment.

11. Petitioner has requested pre-judgment interest as a part of its relief. However, in order to recover pre-judgment interest, such must be specifically pled. Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003). The Court finds that Petitioners statement of "including any interest and appreciation that should have accrued from the time of the violations," contained in line 70 of Petitioner's Petition does not constitute a specific pleading of pre-judgement interest. Therefore, the Court has determined that pre-judgment interest will not be awarded because it was not specifically pled.

12. Petitioner requested rent be charged against Respondent as damages related to Respondent's occupation of 512 New Tarleton Way. Special damages, however, must be particularly alleged and proved. *Kline Iron & Steel Co. v. Superior Trucking Co.*, 261 S.C. 542, 547, 201 S.E.2d 388, 390 (1973) (emphasis added) (failure to plead and prove special damages will prevent recovery). Thus, special damages must be specifically stated to avoid surprise to the other party. *Benedict College v. Nat'l. Credit Sys.* 400 S.C. 538, 548, 735 S.E.2d 518 523 (Ct. App. 2012). The reasoning for such a pleading requirement is to give a party due notice of the amounts sought. *Norwest Properties, LLC v. Strebler*, 424 S.C. 617, 624, 819 S.E.2d 154, 158 (Ct. App. 2018). The Court finds that rent will not be awarded from Respondent as such is special damages which must be specifically pled.

Additionally, Petitioners asserted causes of action for negligence, fraudulent and negligent misrepresentation and concealment, unjust enrichment/money had and received as well as a motion for eviction/ejectment. The Court dismisses the foregoing actions asserted by Petitioner as cumulative given the relief granted by the Court herein.

PUNITIVE DAMAGES

13. The Probate Court can only exercise the jurisdiction provided by statute as enacted by the S.C. General Assembly. As such, the Probate Court lacks subject matter jurisdiction to award punitive damages.

DAMAGES

14. The Court received a number of exhibits during the trial as well as testimony from SW, the estate's PR, and lengthy testimony from both expert witnesses. Mr. Chastain, Respondent's expert, offered testimony regarding his opinions based upon a review of banking and other transactional documents as to the amounts of money transferred from the account of Florence Mensch as compared to the opinion and report of Petitioner's expert John Markel whose testimony was also received. Based upon the testimony of Mr. Chastain in conjunction with the evidence submitted by Mr. Markel, Petitioners' expert, as well as the party's stipulation as to the amount, it is the finding of this court that $820,382.00 was transferred from Decedent's accounts by Sterling Mensch to his own account for his own personal use.

It is the further finding of this court based upon the evidence that Sterling Mensch is not due any offsets or credits regarding the aforementioned amounts transferred from Decedent's account. Under the settled law of this State, an essential preliminary to the allowance of an offset is that the offset claimed must be pleaded, and there must be some evidence tending to establish such plea. *Hurst v. Sumter County*, 189 S.C. 376, 1 S.E.2d 238 (1939). Likewise, Respondent was required to plead offset. Furthermore, based on the testimony and evidence presented at trial by Respondent, this Court finds that Sterling Mensch has failed to meet his burden of showing that any transfers of funds were made directly for the benefit of Florence Mensch.

It is a further finding of this court that Petitioners shall not recover any amount for Sterling Mensch's failure to diversify Florence Mensch's assets, as such amount is too speculative for this Court to determine.

With regard to the $820,382.00 transferred from the Decedent's account by Sterling Mensch, the court subtracts from such amount $273,461.00 as a credit for Respondent's one-third (1/3rd) inheritance, leaving $546,921.00 due from Respondent to the estate to compensate the Petitioners loss of inheritance. Added to this amount is $24,559.00 for avoidable taxes due to failure to itemize for the years 2011 through 2016, as well as 2018 penalties and interest, currently on appeal to the IRS, in the amount of $40,314.00. The Estate had to spend $10,000.00 to clean and repair Tarleton Way when SRM moved in order to market the property. Because SRM concealed the death of his mother resulting in an overpayment in pension funds, he owes the estate $ 30,000.00.

Sterling Mensch admitted he owed penalties and interest in the amouht of $13,820.00.00 thus, the total owed from Respondent to John Mensch and Shauna Waddell as damages is $625,614.00. This amount will be reduced by the 2018 penalties and interest if the appeal of those penalties and interest is successful. Petitioner's expert calculated that $163,420 in taxes were levied to excessive RMD distribution. Further, he should not receive the benefit of a gift from his mother at a time he was converting her funds almost on a daily basis in violation of his fiduciary duty to her when she needed him most.

These are just the damages that Petitioners have been able to discover from SRM who has lied to the Court, lied to his siblings, lied by omission to GE Pension and BOA, failed to cooperate with his first attorney, refused to obey Court Orders, failed to produce cooperate in discovery, and failed to produce documentary evidence or witnesses to support his written allegations.,

By preponderance of the evidence and to confirm the foregoing, the Court finds in favor of Petitioners on causes of action for Breach of Fiduciary Duty both as AIF and Personal Representative, Violation of the SC Power of Attorney Act, and Conversion.

In addition to the damages referenced above, the court finds that Petitioners are entitled to recover from Respondent attorney's fees and costs in the total amount of $127,572.00 as provided by 62-1-111 SC Code Annot. (Supp. 2014). This is a reduction of $6380 related to time spent on engagement letters, subpoenas, time spent on Affidavit of Fees. I will further note that this amount includes the fees for Petitioners' expert witness. With regard to such fees, the court considered all the elements required under the case of Glasscock v. Glasscock, 304 S.C. 158, 403 S.E. 2d 313 (1991) and finds such fees to be reasonable. Specifically, the Court assessed (1) the nature, extent and difficulty of the case, (2) the time necessarily devoted to the case, (3) the professional standing of counsel, (4) the contingent nature of the compensation, if any, (5) the beneficial results obtained, and (6) customary legal fees for similar services. Applying the foregoing factors, as noted above, and after review of the Affidavit of Attorney's Fees and Costs submitted by Petitioners' Counsel, the Court finds $127,572.00 to be reasonable attorney's fees and costs.

Petitioners request the Court award the estate 1,462,495.00 not including pre-judgment interest. Respondent requests that Court award $513,336.00. To date, SRM has paid nothing toward even the amount he admits he owes.

The relief requested by John Mensch, as a 1/3 devisee of the estate, is addressed by payment to Shauna Waddell as Personal Representative of the Estate. Any claim he has against the Respondent is derivative to the Estate's claims.

In view of the foregoing, this Court awards the Estate of Florence Mensch a judgment in the amount of $821,343.00 calculated as follows:

$ 546,921.00	Misappropriations from FM's BOA accounts less SRM's 1/3 share in FM's Will
24,559.00	Failure to itemize FM's tax returns
[10] 40,314.00	2018, taxes, penalties and interest
13,820.00	Tax penalties and interest
163,420 .00	Avoidable Income tax due SRM taking more than the RMD from 2011-2018
30,157.00	GE pension overpayment
10,000.00	Cost to estate to clean and repair Tarleton Way
28,000.00	Annual exclusion gift to himself in 2015, 2016
127,572.00	Attorneys fees, costs
$ 984,763	Total Damages

PAYMENT OF DAMAGES

15. A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title. *Lollis v. Lollis*, 354 SE2d 559, 561 (1987). A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust. It is resorted to by equity to vindicate right and justice or frustrate fraud. *McNair v. Rainsford*, 499 SE2d 488, 501 (Ct. App 1988). The Court finds by clear and convincing evidence that a constructive trust should be imposed upon SRM's non-exempt property of whatever type, wherever located, and however titled. This remedy is appropriate as a result of his deceitful, devious, willful, wanton, and careless actions set forth above. He engaged in repeated action of civil theft for 8 years, depleting his mother's property without any regard to what her future needs might be, without regard to her estate plan, without regard to his siblings, without regard to tax law, probate law, prudent investment principles, etc.

16. If execution on this judgment is commenced by Petitioners, the specific property subject to this constructive trust will be identified in accordance with 14-23-360-420, S. C. *Code Annot.* (1976 as Amended) and any other applicable law. Any discovery regarding the ability of SRM to pay the judgment will be incident to these supplemental proceedings after they have commenced.

[10] This amount is on appeal with the IRS. SRM is allowed to reduce the total judgment should this amount change as a result of the appeal

ORDER

1. STERLING RAYMOND MENSCH, III shall pay $984,763.00 in damages to Shauna Waddell, Personal Representative of the Estate of Florence Mensch. Payment shall be made immediately.

2. Shauna Waddell, Personal Representative of the Estate of Florence Mensch, is hereby awarded judgment against STERLING RAYMOND MENSCH, III in the amount of $984,763.00.

3. Post-judgment interest shall begin to accrue at the legal rate of interest 7.25% or the current rate approved by the S.C. Supreme Court when this Judgment is transcribed and enrolled in the Offices of the Clerk of Court of Greenville County.

4. Should this Order be appealed, interest on the judgement will be governed by 14-23-380 S.C. Code Annot. (1976 as Amended) and other applicable law.

IT IS SO ORDERED.

Debora A. Faulkner
Greenville County Probate Judge

Greenville, South Carolina
Dated this 26 day of Jan, 2022

I ATTEST A TRUE COPY
Clerk, Probate Court
Greenville County, SC
Dated: 1/28/22

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL DISTRICT
John R. Mensch and Shauna M. Waddell Individually and as Personal Representative Of the Estate of Florence Petrak Mensch and John R. Mensch Respondent, v. Sterling Raymond Mensch, III, Individually As Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrak Mensch Appellant.	C.A. FILE NO. 2022-CP-23-01064

NOTICE OF FILING

To: Clerk of Court and Respondent of Record

Please take notice that the Appellant has filed the attached notice of appeal to the South Carolina Court of Appeals.

Dated this 27th day of May, 2022

TRULUCK THOMASON
s/John-Paul Baum
John-Paul Baum
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CERTIFICATE OF SERVICE

I, the undersigned, served a copy of this document on the following counsel of record this 27th day of May, 2022, by email and U.S. mail to the following addresses of record:

Tyler McLeod (#101309)
Knox L. Haynsworth, III (#10275)
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TRULUCK THOMASON

s/John-Paul Baum
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FILED

FEB 2 3 2022

GREENVILLE COUNTY
PROBATE COURT

STATE OF SOUTH CAROLINA) IN THE CIRCUIT COURT

COUNTY OF _Greenville_) Appeal from Probate Court for Greenville County

CASE NUMBER: 2018-ES-23-02854

IN THE MATTER OF:
Florence Petrak Mensch
(Decedent)
Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch and John R. Mencsh,

Respondent(s).

vs.

Sterling Raymond Mensch, III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch, and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch.

Appellant(s),

NOTICE OF INTENT TO APPEAL TO CIRCUIT COURT

Pursuant to SCPC 62-1-308, Appellant hereby provides his/her/its Notice of Appellant's Intent to Appeal the Order/Sentence/Decree of the Probate Court dated January 26, 2022. Said Order/Sentence/Decree was received by the Appellant or Appellant's counsel on January 26, 2022. A copy of said Final Order is attached.

Respectfully submitted,

Signature: ____________________
Devon M. Puriefoy
Address: 3 Boyce Avenue
Greenville, SC 29601
Telephone: 864-331-1751
Email: devon@truluckthomason.com

Attorney for Appellant

SWORN to before me this _23_ day of February, 2022
____
Notary Public for: Greenville
My Commission Expires: 7-21-22__

IMPORTANT:

1. This Notice must be filed with the Probate Court, the Circuit Court, and all parties not in default within ten (10) days after receipt ofwritten notice of the appealed-from order, sentence, or decree of the Probate Court. Parties must comply with requirements set forth in SCPC 62-1-308.

2. This form is not intended for appeals other than appeals to the County Circuit Court. An Appeal to a Court other than the County Circuit Court must follow SCPC 62-1-308(I) and the South Carolina Appellate Court Rules, as applicable.

FORM #356ES (1/2014)
62-1-308

ELECTRONICALLY FILED - 2022 May 31 1:20 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

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GREENVILLE COUNTY
PROBATE COURT

CERTIFICATE OF SERVICE

I, Devon M. Puriefoy, certify that I served a copy of the foregoing document on the following party by U.S. Mail, first -class postage prepaid, on February 23, 2022:

Tyler McLeod
Brown, Massey, Evans, McLeod & Haynsworth, LLC
106 Williams Street
Greenville, SC 29701

Devon M. Puriefoy

State of South Carolina)
County of Greenville)

Subscribed to and sworn before
me this 23rd day of February, 2022.

Norary Public

BRANDI LAROBARDIERE
Notary Public-State of South Carolina
My Commission Expires
July 21, 2030

ELECTRONICALLY FILED - 2022 May 31 1:20 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2301064

STATE OF SOUTH CAROLINA	IN THE PROBATE COURT
COUNTY OF GREENVILLE	
IN THE MATTER OF: Estate of Florence Petrak Mensch	C.A. No.: 2018-ES-23-02854
John R. Mensch and Shauna M. Waddell Individually and as Personal Representative Of the Estate of Florence Petrak Mensch and John R. Mensch, Plaintiff, v. Sterling Raymond Mensch, III, Individually As Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrak Mensch, Defendant.	**NOTICE OF FILING**

Please take notice that Defendants have filed the attached notice of appeal to the Court of Common Pleas in the Thirteenth Judicial District

Date this 23rd day of February, 2022.

TRULUCK THOMASON, LLC

s/Devon M. Puriefoy
Devon M. Puriefoy
SC Bar No.: 102097
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STATE OF SOUTH CAROLINA) IN THE PROBATE COURT
) THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE) CASE NO. 2018ES2302854

IN THE MATTER OF:

ESTATE OF FLORENCE PETRAK MENSCH

SHAUNA M. WADDELL, individually and as Personal Representative of the Estate of Florence Petrak Mensch, and JOHN R. MENSCH,

PETITIONERS,

STERLING RAYMOND MENSCH, III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch,

RESPONDENT.

Probate hearing taken in the aforementioned matter was heard before the Honorable Debora A. Faulkner taken before Rachel H. Wood, Court Reporter and Notary Public, at Probate Court, Greenville County Square, 301 University Ridge, Greenville, South Carolina, on the 17th day of August, 2021, commencing at the hour of 9:11 a.m.

REPORTED BY: Rachel H. Wood, Court Reporter

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APPEARANCES:

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Attorney for Petitioners,

DEVON M. PURIEFOY, Esquire
KIMBERLY THOMASON, Esquire
The Law Offices of Truluck Thomason, LLC
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(864) 331-1751
(Devon@truluckthomason.com)
Attorney for Respondent.

ALSO PRESENT: John Mensch, Shauna Waddell, Sterling Mensch
Erin Callahan, Brandi Larobardiere, Phyllis
Jones

INDEX

EXHIBITS:

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

THE COURT: 9:11:23.9

Okay. We will go on the record. We are here today for a Final Hearing in the Estate of Florence Mensch. The Case File Number is 2018ES2302854. The Petitioners in this matter of Shauna M. Waddell, Individually and as Personal Representative of the Estate of Florence Mensch, and John R. Mensch. Both Petitioners are represented by Tyler McLeod. They're present in the courtroom along with their counsel. Respondent is Sterling Raymond Mensch, III, individually and as former PR of the Estate of Florence Mensch and in his former capacity as agent under a Power of Attorney for Florence Mensch. He is present along with his counsel, Mr. Puriefoy, and also I believe we've got -- I'm sorry. I'm drawing a blank.

MS. THOMASON:

Kimberly Thomason.

THE COURT:

Thomason. I'm sorry.

MS. THOMASON:

No problem.

THE COURT:

They are both present in the courtroom. Okay. Before we get started let me just kind of run down for those of you who aren't familiar. For the last year or so we've been doing our hearings virtually. Because there was a request to do this in person back some months ago it appeared to be a safe method to conduct this trial. Since there's been some escalation of this virus we are going to be requiring everyone here to wear a mask unless you're speaking. I'm speaking right now and if you can't hear me I will take it off, but if you are speaking, if you are testifying or you are a lawyer conducting any examination feel free to take your mask off. It will help the sound. It will help our court reporter, who is Rachel Wood. If there's somebody in here who is a high risk for this virus, if you have a compromised immune system and that sort of thing, you probably need to let us know. If you're not absolutely essential to the case, i.e., not a party or a witness who is about to be called, or support staff to the attorneys, or my one court personnel, I don't need an audience or observers who are just in here to observe only because of the virus. So if that's the case and that describes you I would appreciate it if you would wait somewhere until you're called and I just am trying to make as few people in here as possible just because that is the instructions I have from the Supreme Court. Also we are supposed to be six feet apart as best we can. I understand with counsel and their clients they've got be able to speak with one another. I'm clearly not six feet from the witness here, but I am surrounded by plexiglass and I'm going to keep my mask on. So we're going to do everything possible, but I don't want to compromise the parties being able to have a full and fair hearing given the constraints we're under. So that's kind of how we're going to operate. Please silence all your mobile devices. If you have a mobile device that rings I'm going to give it to that nice deputy over there and he is going to hold it until I decide to give it back. We don't need devices going off during the trial. So if you've got it with you and you don't want this nice gentleman to have it, please turn it off at this time. After each witness testifies Phyllis Jones, who is seated at the back works for me in our Records Division, is going to come down with a little wipe and she's going to wipe down the witness stand before the next witness comes up. We might take a little break in between witnesses while she does that. So I just wanted to let you know kind of how we're going to treat this going forward. Now, today we've got the trial and I want to make sure we have a clear understanding on what the issues are at the trial. Previously I issued an Order as a result of a Summary Judgment Motion and the issues I have on my list for trial today are damages as a result of a breach of fiduciary duty under the Power of Attorney, which I have found previously that the Petitioner has established damages as a result of violation of the Uniform Power of Attorney Statute, damages as a result of the conversion on the UBS Retirement Account and Petitioner's request for attorney's fees and costs. That is what I have as a result of the Motion for Summary Judgment, which leaves under the issues or the prayer for relief under the Petition was, and I didn't rule upon under the Summary Judgment, an accounting from Mr. Mensch as the Agent under the Power of Attorney, accounting of Probate and non-Probate assets, restore property misused by Agent under POA, Constructive Trust Judgment for damages and attorney's fees. So, Mr. McLeod, are you going to proceed under the other Causes of Action or since The Court has already found that the Respondent –- that you met the burden of evidence as a matter of law on the breach of fiduciary duty, the violation of the Power of Attorney Statute, the conversion of the retirement account, are you going to proceed on damages under those three or are you going to also include in your case testimony to support the other Causes of Action that you've enumerated? And if you would stand, please.

MR. MCLEOD:

Yes, ma'am.

THE COURT:

You can take your mask off of you want to.

MR. MCLEOD:

Yeah. Your Honor, we have not prepared to do the other Causes of Action.

THE COURT:

Okay. That's fine.

MR. MCLEOD:

I sort of assumed like --

THE COURT:

I think this overlapped.

MR. MCLEOD:

They overlap a lot. We're going to argue overall damages and --

THE COURT:

Okay.

MR. MCLEOD:

-- some of those things may, like a Constructive Trust we may move on later. So I don't know if that -- are we going to have a final judgment or those Causes of Action could potentially be tried later or --

THE COURT:

No, we're going to try everything that you want to try today.

MR. MCLEOD:
Okay.
THE COURT:
And from the Summary Judgment Order I have found as a matter of law that the Conversion, the Power of Attorney Statute, and the breach of fiduciary duty you have -- and the evidence show that as a matter of law you have met your burden. And the matter then before me becomes what are the damages as a result of that. And the only other thing that I have would be your –- in your Pleadings was a request for attorney's fees and costs. So that is what I have for today unless you still want to proceed under the other Causes of Action that you enumerated in your Petition or do you believe that the ones that I've already found that you succeeded on are sufficient to cover all the damages that you're going to seek from the Respondent?
MR. MCLEOD:
I think they're sufficient to cover them.
THE COURT:
Okay.
MR. MCLEOD:
There is the Constructive Trust we will proceed on that today, Your Honor. I think we will make that request.
THE COURT:

Okay. So we'll add to this list you're going to proceed on Constructive Trust.

MR. MCLEOD:

And then also I believe -- let me look at my Causes of Action. Money hadn't received I think -- like I said a lot of them overlap, but there may be some discrepancy between them to where you might say it's more like money hadn't received in conversion. So I guess we could add that one.

THE COURT:

And that was in your Pleadings?

MR. MCLEOD:

That's in the Pleadings. Let's see. Next Cause of Action unjust enrichment, money hadn't received for 9th Cause of Action.

THE COURT:

Okay. All right. So --

MR. MCLEOD:

I do believe one of our arguments negligence it would fit right under that, so I think I can argue negligence today.

THE COURT:

Tell me where --

MR. MCLEOD:

That's the 7th Cause of Action on page 22.

THE COURT:
All right. And tell me how does that fit in with my Probate Court jurisdiction, just the negligence?
MR. MCLEOD:
We're going to make the argument that he should not have held GE stock and that he failed to diversify assets which I believe falls under breach of fiduciary duty.
THE COURT:
I think so.
MR. MCLEOD:
I think it does. The negligence you could also make an argument that he had a duty. He breached that duty by not diversifying. He has damaged –- we have damages and causation.
THE COURT:
I think negligence per se is more a Cause of Action in Common Pleas rather than just here, so I think that muddies the water for me.
MR. MCLEOD:
That's fine.
THE COURT:
Especially since I think fiduciary duty breach covers all of that.
MR. MCLEOD:
That's fine, Your Honor.

THE COURT:
Okay. So what I have then is damages as to breach of fiduciary duty, damages as to the violation of the Uniform Power of Attorney Statute, damages as to the conversion Cause of Action to be proven, the Constructive Trust and money hadn't received plus attorney's fees. Mr. Puriefoy, any response to those as an outline of our issues today?
MR. PURIEFOY:
Nothing, Your Honor. Of course, Mr. McLeod certainly is entitled to prosecute the case as he sees fit. We would certainly note on the record that we believe that all Causes of Action that fall beyond the three that have already been ruled on by This Court the damages across the board are the same. I believe that for purposes of limiting the testimony today in hopes of being to conclude this in an expeditious manner that the focus should likely stay on the damages rather than any liability issues unless The Court finds that as it relates to the Constructive Trust and the other claim I believe Mr. McLeod is attempting to establish liability on that we focus on the damages today.
THE COURT:
Okay. Very good. Thank you. I agree. I think this is primarily a hearing where my job is to determine

damages.

MR. MCLEOD:

Your Honor, can I clarify one thing?

THE COURT:

Yes.

MR. MCLEOD:

On the Petition to review agent's conduct and the Power of Attorney I believe you are saying those would fall under breach of fiduciary duty and the Power of Attorney Statutes?

THE COURT:

Yes.

MR. MCLEOD:

I just wanted to clarify.

THE COURT:

Yes. Now, also in my Order for the Summary Judgment I asked that counsel, you exchange certain information prior to today's hearing and that you communicate with each other, mark exhibits, so on and so forth. Have you done that?

MR. PURIEFOY:

Your Honor, I believe Mr. McLeod sent us a list of stipulations including exhibits that he intends on entering today. We conferred at the beginning of the trial there are only two items on the stipulations that we do not agree to, but the exhibits themselves have been agreed to and as it relates to providing the agreed upon transfers benefits to the Estate and benefits directly to the Respondent, we have produced those as well and so has Mr. McLeod.

THE COURT:

Mr. McLeod.

MR. MCLEOD:

Your Honor, we have stipulated to certain things. We obviously have the Motion in Limine that we filed and they have a Motion in Limine, so we do not stipulate to their Expert Report. And I haven't looked through every --

THE COURT:

Right.

MR. MCLEOD:

-- and I haven't looked through every exhibit in here.

THE COURT:

But you have complied with my Order as I requested in good faith?

MR. MCLEOD:

I believe we all made a good faith effort, yes, Your Honor.

THE COURT:

Have you resolved any of these issues between yourselves in terms of have you agreed that "X" amount of dollars is between you both you agree on this amount of money so that we start out with a figure or have you not?

MR. PURIEFOY:

Your Honor, so the -- the experts in this case have both prepared their own independent reports. Unfortunately as it relates to the transfers from mom's account to the Respondent's account those accountings were only off by about $2,000, which was incredible based on the amount of transactions that took place. And so we are all certainly starting from the same starting point. The only difference that we may run into is items that we deem to be for the benefit of the Estate --

THE COURT:

Right.

MR. PURIEFOY:

-- versus those that -- that Petitioners deem were not for the benefit of the Estate. But even in those figures we have narrowed it down I believe within a couple of -- about ten thousands of dollars as it relates to what we're claiming was actually used for the Respondent's benefit versus the Estate's benefit.

THE COURT: 9:26:01.0

So are you saying that you-all have -- you have a figure that you believe would satisfy what the Petitioner is entitled to, you have a figure in mind already based on that? And then of course he doesn't agree with that, but you have a figure in mind and he knows what that is?

MR. PURIEFOY:

Yes, Your Honor.

THE COURT:

Okay. Is that --

MR. MCLEOD:

Based on the Expert Report I think I can figure out what it is. As to the transfers I think there's so many transfers that is what will take a lot of time if we had to actually prove that. I think our numbers -- their number is more than ours. So I don't know if we can stipulate to the transfers. We didn't really nail that down. You-all's is 852,951.15. Our is 820,000 something.

THE COURT:

Okay.

MR. MCLEOD:

So I'll take their money.

THE COURT:

Well, what I'm trying to do is figure out if you guys were able to work on this so that today we can save some time.

MR. MCLEOD:

That's what I'm hoping.

THE COURT:

So I'm going to assume that you-all have done that and I'm not going to have to hear testimony about every little thing because we won't get finished. I mean I understand that some of those details have got to be testified to, but –- and I'm going to let both of you try your case if it takes –- if we run out of time tomorrow we will come back and continue the hearing because I want both of you to try your case. But also I don't want to waste The Court's time and waste your time either on details that are accumulative and that are not pertinent to what we've got to prove here today. So the point of my Order was to get you guys to talk and we agree on this, we agree on this, we agree to at least this much is due. This over here is what we don't agree to, so we can at least start out with something so we don't have to go through and take testimony on things that everybody is in agreement on, you know, because that –- that is not an efficient use of our time. Now, as to the Motion in Limine, Mr. McLeod, I got that I believe yesterday and here's what I don't –- and I assume, Mr. Puriefoy, you've gotten a copy of this?

MR. PURIEFOY:

I have, Your Honor, and if I may we have two Motions in

Limine as well I've provided to Mr. McLeod with copies. If I may approach --

THE COURT:

Okay.

MR. PURIEFOY:

-- I'll hand you copies of these.

THE COURT:

Yes. Well, first of all, let me say this before we get into this. You-all realize this is not a jury trial. I can separate the wheat from the chaff and I don't need a lot of the typical motions that are in a civil jury trial when a jury could get confused about certain evidence. So Motions in Limine in these cases as you know I can rule on these and it doesn't make any difference because if you don't bring it up during the trial it doesn't -- it doesn't -- it really is kind of a waste of time because it doesn't mean anything unless you bring it up during the trial. So I'm not sure what we gain by me ruling on this. It becomes almost academic since it doesn't hold any weight in terms of evidence that's allowed in and evidence that's not allowed in. So my ruling is going to be on the all the Motions in Limine is that I'm going to take up each one of these issues if and when they come up during the trial and I'll rule on them then. Okay. All right.

All right. Mr. McLeod, or Mr. Puriefoy, Ms. Thomason, anything else before we have Mr. McLeod call his first witness?

MR. PURIEFOY:

Nothing, Your Honor, and I just want to apologize because I'm afraid that there will likely be an early objection depending on the direction of the testimony to begin with based on our Motions in Limine, but hopefully we can get that ruled upon very quickly.

THE COURT:

That's okay. I'll rule on that and that's not a problem.

MR. PURIEFOY:

Thank you, Your Honor. Nothing further.

THE COURT:

Mr. McLeod, are you ready to proceed with your witness?

MR. MCLEOD:

Your Honor, would you want us to read in the stipulations into the record right off the bat?

THE COURT:

Yes, that would be great.

MR. MCLEOD:

Can we go off the record for five minutes and discussion them to make sure we're clear on them?

THE COURT:

Yes. Yes. Let's go off the record for ten minutes while the attorneys talk about the stipulations and we're going back on the record when they're finished.

Off the Record: 9:31:06.9

On the Record: 9:42:41.8

Okay. I think we can go back on the record. When we left we were going to have one of the attorneys recite stipulations that have been made between counsel and, Mr. McLeod, you're standing. Could you do that for us?

MR. MCLEOD:

Yes, Your Honor. The parties have stipulated to the following facts and state that these are true and uncontested as fact and will be read into the record and I'll do that now. The parties stipulate that John Markel and Mark Chastain are experts so it's not necessary to qualify them. The transfers by Sterling Mensch from Florence Mensch's Bank of America account ending 7059 and 2007 to his Bank of America account ending in 3259 total 820,382.13. So we have stipulated the total transfers amount to 820,382.13. We have not stipulated that all of that was wrongful I guess or there will be certain offsets they'll try to argue we'll object to.

THE COURT:

I understand.

MR. MCLEOD:
Thank you, Your Honor. There are no objections by Petitioner or Respondent to the following documents being admitted into evidence and such is admitted into evidence by stipulation of the parties. That all bank records previously produced by Petitioner or Respondent were obtained from the respective banks and have not been altered. These include but are not limited to the following: Florence Mensch Bank of America Statements ending in account number 7059. Statements from June 2012 through December 2019. Florence Mensch Bank of America account –- or Bank of America savings account ending in account number 2007, June 2012 through January 2020. Sterling Mensch Bank of America statements ending in account number 3259. These are statements from 2013 through February of 2019, including the notebook produced on January 1, 2021 by Respondent pursuant to Judge Jennings' Order dated September 30th, 2020, with certain highlighted items by Sterling Mensch which was previously produced in the evidence for Motion of Summary Judgment. And that's these two notebooks essentially.
THE COURT:
Okay.
MR. MCLEOD:

Let's see. The GE Mutual Funds accounts that's number 095-200352563. Also account number 095-2000352571 and also account number 095-2000 [three zeros] 352589 and then account number 095-2000352597. Those are all in the name of Florence Mensch. Yearly investment statements for each of the years 2009 through 2015. UBS Financial Services account number 1C61480JG in the name of Florence Mensch. Statements of account activity covering each of the months during the time frame of June 2016 through March of 2020. The State Street Global Advisors account number 0952000352563. Account number 0952000352571 and account number 0952000352589 in the name of Florence Mensch there are yearly investment statements for each of the years 2016 through 2018 and for three months ending March 29th, 2019. And then the Sterling Mensch T. Rowe Price Retirement Plan account statement obtained via subpoena or discovery in this matter for all bank statement –- for all bank accounts and retirement accounts. This includes any deposit slips, tickets, checks, withdrawals, which have been produced by Petitioner or Respondent in discovery. Tax returns and IRS notices of Sterling Mensch and Florence Mensch including the following: Florence P. Mensch United States Individual Income Tax Returns for each of the years 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018 and 2019. The same thing for her South Carolina Individual Income Tax Returns for each of the years 2011 through 2019. Sterling Mensch Federal and State Tax Returns produced by Respondent. GE Pension form showing amounts owed to the GE Pension. Discovery responses from Petitioners or Respondent. And that's all, Your Honor.

THE COURT:

Mr. Puriefoy, are you in agreement with that?

MR. PURIEFOY:

We are, Your Honor.

THE COURT:

Thank you. And I did want to make one other mention on the record from my previous Order as to damages. I did find in my previous Order that punitive damages were outside the scope of the subject matter jurisdiction of The Court so we won't be bringing any punitive damages. Okay. Mr. McLeod, if you're ready you may call your first witness.

MR. MCLEOD:

All right. Your Honor, I will call John Markel, expert accountant.

THE COURT:

All right, Mr. Markel. Good morning, sir.

MR. MARKEL:

Good morning.

THE COURT:

If you will step around here and face me and raise your right hand, please, sir.

***** ***** ***** *****

JOHN MARKEL, being duly sworn to tell the truth, the whole truth, and nothing but the truth of his own knowledge concerning the matter herein, testified as follows:

***** ***** ***** *****

THE COURT:

All right. If you'll have a seat and let me make sure you have some water. You may proceed.

MR. MCLEOD:

Thank you, Your Honor. May it please The Court.

***** ***** ***** *****

EXAMINATION BY MR. MCLEOD:

Q. John, my name is Tyler McLeod as you know, and I'm going to be asking you some questions today. Can you please state your name for the record?

A. My name is John Robert Markel.

Q. And can you please tell The Court what your occupation is?

A. I'm a certified public accountant.

Q. Okay. And we've stipulated that you are an expert so I won't go too far into that, but in general have you

testified in court before?
A. Yes.
Q. Okay. Have you testified as to -- let me state it this way: have you -- what matters and what subject matter have you testified about previously?
A. I've testified on various matters including commercial damages, business valuation, intellectual property, infringement damages.
Q. Okay.
A. Divorce matters and business disputes and breach of trust.
Q. Okay. I'm going to hand you what's been stipulated and admitted into evidence as Petitioner's Exhibit 1. I'll just mostly refer to things as Exhibit 1 for my exhibits and then we'll say Respondent's if ours overlap.
THE COURT:
Have they already been marked? They've been marked.
MR. MCLEOD:
They're already marked.
THE COURT:
Okay.
MR. MCLEOD:
And some overlap a little bit.
THE COURT:
That's fine.

MR. MCLEOD:

Me and Devon talked about that.

MR. PURIEFOY:

Your Honor, I believe, and Mr. McLeod already noted it as well he's going to have certain objections to our Expert Report. We stipulate to the parties being designated as experts, but to the extent that they're going to discuss certain aspects of the Report we would reserve the right to object to those portions of the Report.

THE COURT:

Sure. Thank you. Okay. And we will then -- as to Petitioner's Exhibit Number 1 the parties have agreed that will be admitted as an exhibit without objection. However, other objections may be raised other than the fact that they are -- that the exhibit itself has been compiled of records from certain bank accounts without alterations, so on and so forth.

MR. MCLEOD:

That's correct, Your Honor. And I've spoken too fast. I said it was stipulated to. The Report itself was not stipulated initially.

THE COURT:

Right.

MR. MCLEOD:

That he's expert. So I'm sorry about that.

THE COURT:

Okay.

(Introduction of previously marked document, Markel 2nd Amended Expert Report August 16, 2021 as Petitioner's Exhibit Number 1.)

EXAMINATION RESUMED BY MR. MCLEOD:

Q. So I will hand you Exhibit 1. Can you identify that document for me?

A. This is the 2nd Amended -- it's titled 2nd Amended Expert Report of John R. Markel, CPA, August 16th, 2021, which is a Report that I prepared especially for this hearing and for the purposes of this hearing. It's an amendment of a previous Report that I prepared for the -- in support of the Motion for Summary Judgment.

Q. And did you rely on certain documents in preparing that Report?

A. Yes, I did.

Q. What documents did you rely on?

A. I think they're listed in the Appendix B of this Report, which is on page 18 and 19.

Q. Okay. And can you quickly go through what you relied on in that Appendix B? I believe is it Appendix C?

A. Appendix C. I'm sorry.

Q. Appendix C. Can you briefly go through that?
A. Do I really need to read all this?
Q. You don't need to read through all of it. In general did you rely on the Florence Mensch Bank of America accounts 3259 and 2007?
A. Yes.
Q. Was that for the years --
A. Well, no. Her account numbers were 7059 and 2007.
Q. Okay. Yeah, 7059 and 2007?
A. Right.
Q. Okay.
A. And on --
Q. What years were those statements through?
A. June 2012 through January of 2020 for both of them.
Q. Okay. And did you also rely on Bank of America checking accounts ending in 3259, which are in the name of Sterling Mensch?
A. Yes.
Q. And what years do those --
A. They cover approximately the same period June 2012 through January of -- part of January of 2020.
Q. Okay. And did you rely on certain tax returns of Florence Mensch?
A. Yes, I did.
Q. Were those for the years 2011 through 2018?

A. Yes.
Q. Both federal and state tax returns; is that correct?
A. Yes.
Q. You referenced certain Orders of the Probate Court, the August 28, 2019 Order, the December 4th, 2019 Order, July 29th, 2021 Order; did you rely on all of those?
A. Yes.
Q. Did you rely on Respondent's Responses to Interrogatories and Request for Production?
A. Yes.
Q. Okay. Did you rely on the State Street Global Advisors account, the three account numbers that you list in your exhibit –- or your Appendix C?
A. Yes.
Q. Okay. Did you rely on the UBS Financial Services account number 1C61480JG, which is in the name of Florence Mensch?
A. Yes, I did.
Q. And is that for the time frame June 2016 through March 2020?
A. That's correct.
Q. Okay. And all of these things listed in Appendix C of your Expert Report you relied upon; correct?
A. Yes.
Q. John, I'm just going to ask you to go through your

Report and explain to The Court your findings.

MR. PURIEFOY:

Objection, Your Honor. I believe that Mr. McLeod testified –- not testify, argued to The Court a moment ago that the Reports themselves were not being stipulated to in evidence and therefore I would ask that he move to enter that Expert Report into evidence and allow for any objections that I deem necessary, Your Honor.

THE COURT:

All right. Mr. McLeod, is it your intention to move this Report into evidence?

MR. MCLEOD:

Yes, Your Honor. We ask that it be admitted into evidence.

THE COURT:

Okay.

MR. PURIEFOY:

And, Your Honor, we do object for the very limited purpose of relevance which was addressed in our Motion in Limine. We do not object on the whole to the Report coming in. However, there are a few specific damage calculations that we do believe are not properly before The Court. Your Honor, as The Court knows there are two different types of damages that we're dealing with here.

There are general damages, which are the natural result of the tort that has been alleged against the Respondent, and there are also special damages that are being asserted within this Expert Report. Specifically there are two. Your Honor, the first there is a rent calculation on page 7, paragraph 19 of Mr. Markel's Report where he goes through a calculation of back rent that he believes is due to the Estate of Ms. Mensch. As our courts have held and as Rule 9(g) has made clear, Your Honor, under the Rules of Civil Procedure in order to plead special damages or at least being able to recover special damages you must specifically plead that damage in your Petition. The Petitioners in this case, Your Honor, did not make a single mention to back rents being part of the recovery that they're entitled to in either their original Petition or their Amended Petition. The Courts in South Carolina, Your Honor, they made very clear that because special damages are not implied by law they must be specifically pled with specificity and failure to do so is fatal to any claim for recovery of the same.

THE COURT:

Okay. What page are you talking about here?

MR. PURIEFOY:

Your Honor, specifically in Mr. Markel's Report, page 7, paragraph 19. And the case law to support this position, Your Honor, was contained in our Motion in Limine.

THE COURT:

Okay.

MR. PURIEFOY:

But it is the calculation in paragraph 19 that we're seeking to exclude from being introduced as evidence in this case as the Petitioners did not plead a single cause of action or a single fact related to these back rents.

THE WITNESS:

I'm sorry I think that's an incorrect paragraph referenced.

THE COURT:

Okay. Mr. Puriefoy, if you will just hold on a minute. I'm looking at paragraph 22, page 7.

MR. PURIEFOY:

And, Your Honor, I apologize. There was a 2nd Amended Report. I am so sorry. I was referring to the 1st Amended Report.

THE COURT:

Okay. And, Mr. McLeod, I'll hear from you now.

MR. MCLEOD:

Your Honor, I received these Motions in Limine right before the hearing. I haven't prepared anything and I'm looking through my answer at the -- when we filed the answer we did not have discovery. We did not know how long Mr. Mensch had lived at the property. We didn't know the facts. Even new facts have come out, which we'll object to today stating that this was -- you know, I think they're taking the position that this was actually Mr. Mensch's house. So I've learned that recently. It's very difficult to, you know, plead everything when you're having to go through two years of trying to get discovery and then you get an Expert Report or affidavit nine days after Summary Judgment. So we are basing that rent calculation on him occupying her property and utilizing the Power of Attorney to his own benefit, which we have clearly pled in several Causes of Action. The rent is damages for him doing that, for breaching his fiduciary duty.

MR. PURIEFOY:

Your Honor, if I may. Rule 9(g) could not be more clear. It specifically states that special damages, which are not the natural result of the tort that's been alleged. And all ten of the Petitioner's Causes of Action the damage related to all of those Causes of Action are the same. I.e., the removal of funds from Ms. Mensch's account and the benefit that was derived by the Respondent in this case. The amended –- or the original Petition and the Amended Petition failed to make any mention to allege back rent and, in fact, Mr. Markel's original Report was created on February 12th of 2021. It is now August 17th of 2021 and in that original Report Mr. Markel makes reference to the rent calculation. However, that does not satisfy our pleading requirements in the state. The Petitioners simply needed to amend their Petition to include this damage calculation. They never intended to do so and it is only at this hearing that they are now raising this issue for the first time to actually be considered by The Court on the purposes of these back rents. The case law, Your Honor, Holdings, LLC verse BJC Enterprises, LLC makes clear that a failure to state with specificity a special damage in your Petition, not through the discovery process, but in your Petition is fatal to your ability to recover that damage, Your Honor, and therefore we would ask as a preliminary matter that the back rent portion of Mr. Markel's Expert Report be excluded from evidence.

THE COURT:

Let me ask you this: do you have case law that equates the request for rent amounting to a special damage?

MR. PURIEFOY:

No, Your Honor, but what the case law does state is that the difference between a general damage and special damage is general damage is the resulting damage as a result of the tort is the natural and necessary result of the tort. For example, the breach of fiduciary duty that has been claimed in this case where it has been alleged that the Respondent in this case removed funds from the Estate or the bank account of Ms. Mensch into his own account. To the extent he did not use that to Ms. Mensch's benefit the damage is the natural result of his removal of those funds and placing them into his account. What the case law states that we've referenced, Your Honor, Holdings, LLC v. BJC Enterprises, LLC is that although a special damage is a consequence of the tort that has been alleged, if it is not a necessary result of the tort then it is in fact special. Here the removal of the funds from Ms. Mensch's account is natural harm that resulted from the tort that was alleged. There are a number of special damages. However some of them have been pled. For example, the resulting tax implications as a result of those removals have been pled with specificity and therefore are properly before The Court. The rent itself was not pled and is not the natural result of the alleged tort. The allegation is that through some economic computation Mr. Markel has come up with a formula to determine what rent could or should have been. That is not the natural result of the removal of any funds from Ms. Mensch's account. That requires -- that although a consequence of the removal is not the natural result. And what the case law very clearly states is that the general damages are those that are the necessary result of the tort.

THE COURT:

Was this question about the rental value, was that a subject of discovery?

MR. PURIEFOY:

Your Honor, there's been -- there's nothing that it could be. Nothing could be discoverable related to that topic because it's more of an abstract finding. There's no document that indicates that rents were intended. There was no letters, lease agreements, or anything that exists that would suggest that rent was something that was intended to be paid. This is an exercise in an economic calculation by Mr. Markel that's not tied to any document or claim in this case. It's simply through his Expert Report he's unilaterally determined that rent should have been imposed on the Respondent in this case. But I think the Rule 9(g) in South Carolina Rules of Civil Procedures states that damages must be -- shall be, Your Honor, and I think that's extremely important, that special damages shall be stated with specificity. That has certainly not been done in this case, Your Honor.

THE COURT:

All right. Mr. McLeod.

MR. MCLEOD:

And, Your Honor, are we talking about the tort because under the failure to comply with Section 62-8-114 of the South Carolina Power of Attorney Act we plead as a direct and approximate result of Respondent's failure to comply with 62-8-114 of the South Carolina Power of Attorney Act and with The Court's Orders the Estate of Florence Mensch has suffered damages including, but not limited to actual consequential, incidental and punitive damages. Petitioners are therefore entitled to recovery damages for Respondent's failure to comply with Section 62-8-114 of the South Carolina Power of Attorney Act. That's the Agent's duties, 62-8-114 list the Agent's duties. I don't have to read it to you, but keep a record of all receipts, disbursements and transactions. Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances. Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest. Act loyally for the principal's benefit. I think having a house that you used for 13 years and do not pay any rent whatsoever and, you know, use when that could be rented to somebody and, you know, made to be income producing I think that's a breach of fiduciary duty. I think it's a violation of the Section 62-8-114 and I believe we have pled damages. His Report came out in –- when did we say, February? They've known about it for a long time. That's all I have, Your Honor.

MR. PURIEFOY:

Your Honor, just very briefly. I believe that Mr. McLeod's recitation, the Petitioner's recitation of the Power of Attorney Act demonstrated exactly why this Rule is in place. He is arguing from a liability standpoint. Liabilities aren't even established. We're arguing simply as it relates to the introduction of damages to this damages hearing. What Mr. McLeod has failed to point to in either his original Petition or his Amended Petition is a plea for special damages related to these rents. Mr. McLeod went through a very comprehensive review of the facts as it related to his Amended Petition and it was very clear that he had some additional documentation that went into the creation of that document and what he failed to do was to plead these rents. What the case law that has been cited in the Memoranda that was produced to Your Honor makes very, very clear is the purpose of requiring special damages be plead with specificity in the Pleadings is to put the Respondent on notice as to the damages that are going to be sought at trial. That's exactly what we're dealing with here. There are a number of calculations contained in Mr. Markel's Report that are not tied in any way to the allegations claimed by the Petitioners in the case and this is one prime example. There's a second example, and I believe the last example, Your Honor, in follow-up to this, but what I believe we've done throughout the course of these proceedings is ensure that we're holding the parties' feet to the fire as it relates to their responsibilities and adherence, strict adherence to the Rules of Civil Procedure, our ethical obligations, and every other rule state, common law and statutory. It has been This Court's practice throughout this entire litigation to ensure a strict adherence to those rules. The rule in this case, Your Honor, could not be more clear. Rule 9(g), which is the South Carolina Rules of Civil Procedures, states special damages are not implied and must be pled with specificity. Mr. McLeod has not been able to point to that. I would be more than happy to give him opportunity to review his Amended Petition to determine whether or not he made any reference whatsoever to back rents being a portion of the damages in this case, but I can assure you, Your Honor, he did not.

THE COURT:

And would you agree that the Report you received, the initial Report of Mr. Markel, had this rental calculation in it and you received that in February?

MR. PURIEFOY:

Yes, it did, Your Honor, but I think there's an important distinction. Rule 9 specifically deals with pleading your special damages. The discovery process in and of itself is not a pleading. That is not to be relied on by the Respondent in this case. We understand that that went into his calculation, but we did not prepare a case in response to an allegation that was not plead in the Complaint. And I believe that in suggesting that the affidavit itself put the Respondent on notice of these special damages seems to circumvent the Rule what the case law is and that is you must plead them with specificity. Now, there are other issues when you are dealing with Interrogatories for example where notice in and of itself is satisfactory to put you on notice that a claim is being made or certain damages are being alleged. The problem is even take it a step further if you look at the Discovery Responses in this case it does not have a breakdown of the rent calculation whatsoever. And, again, the Petition itself does not plead that as a special damage. I don't believe that there is any gray area as it relates to a Petitioner's responsibility to plead special damages. Those special damages have been plead all throughout the Petitioner's Amended Complaint and will be relied on and are properly before This Court, but that particular special damage was absolutely not before This Court as Mr. Markel's affidavit was not submitted to This Court as part of the Pleadings, but simply in the discovery process in preparation for trial. So we do not believe that reliance on that affidavit for satisfying Rule 9(g) is appropriate.

THE COURT:

Mr. McLeod.

MR. MCLEOD:

Your Honor, I've stated my position. I believe we pled general damages and we pled -- let me see. Back to that paragraph I mean as I said I believe that him occupying the property was clearly a breach of his fiduciary duty. I think we've alleged damages and we are now presenting those damages as to the breach of fiduciary duty. I do not believe that we had to actually state that we were claiming rent. We're claiming damages for his actions and we had –- you know, we've had this in our Complaint or in our Report. We argued it at Summary Judgment. I believe liability was founded. We part on that. Now, we're arguing the damages. So I just don't understand the argument and I believe –-

THE COURT:

So are you saying by his Report on this that you are wanting now to collect 13 years of back rent; is that what you're –- is that the purpose of this?

MR. MCLEOD:

We're asking The Court to award rent, imputed rent, based on his occupancy of the property.

THE COURT:

And do you agree that if you had pled that the Respondent would have had notice to assert any defenses that he may have had such as statute of limitations, things of that nature, if it had been specifically pled so that your clients now decide that they want to collect this back rent? And I'm assuming that they were aware that he's living in the house rent free for that –- for those years. I'm not sure. But my concern is –- I see your point because the Respondent was her attorney-in-fact under a Power of Attorney. That Power of Attorney had no gifting provision to him and, in fact, it had a clause that said he was not to use –- he shall not satisfy his legal obligations out of any property subject to this Power of Attorney, except to the extent this Power of Attorney specifically authorizes gifts to my attorney-in-fact, which I didn't see one. My attorney-in-fact may not exercise this Power of Attorney in favor of the attorney-in-fact. The attorney's estate, his creditors, or the creditors of the attorney's estate. So if he was living there out of his -- and being there because he -- he was living there as her attorney-in-fact, he wasn't paying anything. He wasn't authorized to use her property in his favor unless she specifically gave him authority to do so under this Power of Attorney, which she did not. I understand that and I understand him living there can on its face doesn't look like someone who was trying to adhere strictly to that Power of Attorney. But then again the failure to completely plead that for a 13 year period of time also puts the Respondent at a disadvantage because they have not been able to assert whatever defense they may have to that being they've exceeded their statute of limitations. They have -- maybe there was some agreement somehow. I don't know, but it puts them at a disadvantage. Now, if I exclude this you certainly can proceed as an offer of proof. Put it on the record and in the event of an appeal it will be on the record for you to have preserved. But that's such an extensive period of time I believe that it puts the Respondent at a disadvantage. I agree they saw it in his Report, but just because it's in his Report doesn't mean that it's going to be before me. I mean there's lots of things in Reports that don't amount to Pleadings. But I can see your point that clearly he received a benefit from her property, which she did not specifically authorize in her Power of Attorney, but he received that benefit for of course 13 years. But I have not been able -- but I'm not able to receive that information because I think they have been -- they should have been able to respond by presenting any affirmative defenses or any other thing that they may have. So I'm going to exclude that in terms of what we're going to -- what I'm going to consider here today. But as an offer of proof if you would like to go ahead with that and preserve it for the record you certainly have my permission to do that.

MR. MCLEOD:

And, Your Honor, I'd just like to in light of that there's also in the Report giving him credit for paying the mortgage payment and taxes that we can actually show that he paid on bank statements. I think that should also be excluded. We were only going to give him credit if that imputed rent wasn't opposed by The Court. That was just in fairness to him if he did pay mortgage and taxes then we were going to give him a credit for that.

THE COURT:

Okay. Well, we will address that when that comes up. Okay. All right.

MR. MCLEOD:

Thank you, Your Honor.

MR. PURIEFOY:

Your Honor, finally kind of in line with the special damages, and I don't believe that there should be too much of an objection to this. However, there's been some indication based on the Report that was submitted by Mr. Markel that they will also be seeking pre-judgment interest as it relates to all damages that are presented to The Court today. Once again Tilley v. Pacesetter Corporation requires that the Petition must be clear and specifically pled for the purpose of –- there's three reasons why, Your Honor, pre-judgment interest can't be considered for purposes of today's hearing. The first being that you must plead pre-judgment damages as part of your Petition, which the Petitioners failed to do either in their original or their Amended Petition. For that reason alone the parties cannot seek pre-judgment interest. For a second reason South Carolina has stated that in addition to specifically pleading pretrial damages you also have to be able to demonstrate that you're entitled to those damages as a result of contract or statute. There's no contract in this case between Respondent and the Petitioners that would give rise to pre-judgment interest, nor does any statute that's been pled in this particular case permit or allow for pre-judgment interest, Your Honor. So for those two independent reasons and then a final reason, if one is necessary, pre-judgment interest inherently requires that the damage itself be a liquidated damage amount for –- can be reduced to a sum certain amount. The inability for the parties to reduce a proposed pre-judgment interest to a liquidated amount or a sum certain amount bars recovery of pretrial interest. Your Honor, in this case the entire hearing today is about the damages associated with certain transfers, over 800 transfers I believe there were, and the experts have not been able to agree as to what that damage figure was and therefore it's impossible through any mathematical formula to reduce this damage number to a sum certain amount. And so for those three independent reasons, Your Honor, we would ask that the testimony by Mr. Markel be limited insomuch that no reference be made to any pre-judgment interest.

It's no different than special damages, Your Honor, that the case law could not be more clear that it is must pled. Petitioners have not specifically pled pre-judgment interest. The Petitioners a moment ago read to The Court the damages that they are seeking which are general, actual, consequential, and punitive. And in no Cause of Action has the Petitioners asked for pre-judgment interest and that in and of itself is fatal to their ability to recover the same, Your Honor.

THE COURT:

Is there any law in opposition of what you're arguing to me?

MR. PURIEFOY:

Your Honor, there is not. This is –- and we are very candid with The Court when presenting our case law. And if there is a distinguishing case that we believe can be distinguished, although it may have some negative impact on our case, nothing that we found. In fact, every case that we found, and we're talking dozen of cases, Your Honor, have cited this particular case site which is Tilley v. Pacesetters Corp 33 or 355 SC 361 at page 375 which stands for the proposition that it must be clear and specifically pled in order to recover pre-judgment interest. There is a string site that is attached to that as well, Your Honor, but there are three or four other cases that have asserted that same -- found that same holding, Your Honor.

THE COURT:

Well, do you think this is premature? I mean I've got to determine the amount. My job here is to determine what is necessary to make the Estate of Florence Mensch whole. If Mr. Sterling Mensch had complied strictly with his duties as Power of Attorney and his duties as Personal Representative what would the inventory of Ms. Mensch look like? And I've got to make that decision and once I make that decision then that becomes my judgment. And then once that happens the issue of pre-judgment then I hear your argument. Once I make that decision am I allowed to order the Respondent to pay pre-judgment interest and that under the law you're arguing to me today is only if Mr. McLeod has pled that in his Pleadings in which he asked for certain relief and he should have specifically, what you're saying he should have specifically asked for pre-judgment interest; is that correct?

MR. PURIEFOY:

That's correct, Your Honor. But I think it's also important, and to the extent that The Court is inclined to allow to some testimony related to that to come in because it's important to note that Mr. Markel's Report does a thorough analysis in the conclusion section which includes a pre-judgment interest amount that changes --

THE COURT:

Right.

MR. PURIEFOY:

-- the total amount of that's being allocated to that particular harm. But it's important I think, Your Honor, at least for me to state or request that I have a standing objection related to any pre-judgment interest because what I don't want is at the conclusion of Petitioners case-in-chief is to move to amend their Pleadings if conforming with evidence that's been presented --

THE COURT:

I understand.

MR. PURIEFOY:

-- and so I would ask that there be a standing objection to any reference to pre-judgment interest, Your Honor.

THE COURT:

Okay. I don't have a problem with that. Mr. McLeod, I'll hear from you.

MR. MCLEOD:

Your Honor, I think I can end this right now.

THE COURT:

Okay.

MR. MCLEOD:

For page 13 of our Amended Petition for 3rd Cause of Action Petitioner to review agent's conduct under Power of Attorney and grant appropriate relief pursuant to Section 68 –- 62-8-116 and 62-8-117 of the South Carolina Power of Attorney Act. Number 70, paragraph 70, of our Petition states Petitioners request The Court to order Sterling Raymond Mensch, III to restore the value of the principal's property to what it would have been had the violations not occurred pursuant to Section 62-8-117 of South Carolina Probate Code, including any interest and appreciation that should have accrued from the time of the violations. And I have a case. It's Maybank verse BBT Corp –- Corporation. It states that "In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum." It goes on further to state, "The trial court's decision whether to award pre-judgment interest will not be disturbed on appeal absent an abuse of discretion. The proper test for determining whether pre-judgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose."

MR. PURIEFOY:

Your Honor, I believe the last sentence of that goes in favor of the third independent reason why pre-judgment interest are improper in this case. There is no mathematical formula by which to deduce or reduce this damage calculation to. If there was there really be no need for a damages hearing. It is not a sum certain amount that we're discussing. There are highly contested facts that would alter and fluctuate what the –- the total damage amount is. But more importantly, Your Honor, I believe we've also gotten away from there's been a failure to indicate that there's any contract or statute that gives rise to pre-judgment interest. Each one of these –- these instances that I've made reference to, Your Honor, are independent reasons why pre-judgment interests are improper. So if The Court believes that Mr. McLeod or the Petitioners have pled pre-judgment interest as a result of the reading of that particular provision, which I don't believe is the case because it simply says an increase in any –- what was the language? Any interest in the case if there have been an allegations that are a failure to properly diversify an account resulted in damages to that account. We believe that would be applicable to that particular allegations. But the fact remains, Your Honor, that the case law is very clear you have to plead it with specificity and to simply say all interest is not pleading pretrial interest with specificity. Nor has there any indication that there exists a contract or a statute under any of the Causes of Action that have been raised by the Petitioners that allows for the collection or proving of pre-judgment interest. The case that Mr. McLeod and the Petitioners have referred to I would venture I guess, although I do not have it in front of me, related to a statute that allowed for pre-judgment interest or a contract that considered pre-judgment interest.

MR. MCLEOD:

Your Honor, I think we clearly stipulated to liquidated amounts and a sum certain. I mean we had a sum certain on the transfers out of the account and we know the exact time frame, the exact date that they were transferred out of the account. It is literally you can trace each one and that's what John is going to testify about that he has done pre-judgment interest, a calculation based on each transfer out of the account. And so each –– those sum certains that were transferred out, he's calculated pre-judgment interest.

MR. PURIEFOY:

Your Honor, that's incorrect. The Petitioners are arguing that the transfers themselves constituted sum certain damage. In fact, they took a directly contrary position prior to this trial starting. In fact, what they indicated that we are not stipulating to the rightful or wrongful use of the funds that resulted from those transactions. We're simply stipulating to the fact that those transactions occurred. The totality of the transactions is not what would be reduced for the sum certain amount. It's going through the factual allegations and the defenses in the case as relates to the damages to determine which transfers were rightful and which transfers were wrong. That cannot be reduced to a mathematical formula.

THE COURT:

Yes, Mr. Puriefoy, though it's the –- when The Court rules on this case The Court is going to come up with some number that The Court feels is in compliance with all applicable law and it will have to come up with that number by going through the evidence that's presented. Once that number is arrived at the question then becomes would the Petitioners be entitled to pre-judgment interest and at that time it would have to be –- a calculation would have to be done on The Court's –- whatever The Court comes to in terms of a number. The

Pleadings ask for interest. It says penalties and interest. If –- no, I'm sorry. It says penalties and interests as a result of tax returns, but it asks for interest and appreciation. I'm not ruling on appreciation right here, because I don't know if that can be proven. But the interest –- the fact if he used funds that would have been available to the Estate at the time of her death and they now are not available then there would have been whatever the interest was made available or what it was accruing at that time. The Estate has lost that, which would be something that the expert would have to quantify. And I suppose that is tantamount to pre-judgment interest; is that right, Mr. McLeod?

MR. MCLEOD:

That's correct, Your Honor.

THE COURT:

My job is to make Ms. Florence Mensch's Estate whole as she would have wanted it based on her Power of Attorney and based on her Will. And if she had funds that would have been available, but they were not because they were misused, then those funds have been denied to the Estate and including whatever interest they were gaining at that time. And he has asked for interest under this Code Section and it says under this Code Section that the agent that violates this article is to restore the value of the principal's property to what it would have been had the violation not occurred. And so that necessarily involves not only the funds, but interest. And he's asked for that in his paragraph 70, which could have been explored through discovery or counterclaim or -- so I'm going to --

MR. PURIEFOY:

Your Honor, if I may just briefly.

THE COURT:

Yes.

MR. PURIEFOY:

There's a particular point. I apologize. I apologize for interrupting.

THE COURT:

Okay. I'll be glad to hear from you.

MR. PURIEFOY:

Two points in particular, Your Honor. We are not disputing the Petitioner's ability to introduce evidence as it relates to interest. If the Petitioner is able to demonstrate that the funds that were transferred from the Bank of America account were accruing interest and had they been allowed to stay there they would have continued to accrued interest at that rate we absolutely do not dispute that and we will simply have to produce our own counter testimony to that point. But interest accruing on the banking account versus pre-judgment interest is not the same. Prejudgment interest for purposes of today's hearing will be calculated at 8.75 percent. We have absolutely no idea what the interest was that was accruing on the Bank of America account, and Mr. Markel can certainly testify to that, but we do not believe that those two figures would conflate. So I don't believe that it would be proper to impose pre-judgment interest related to that interest in particular. But, Your Honor, there's a very important point that you hit on. There's a case here in South Carolina that's referred to as the Dixie Bell Case and this is South Carolina Court of Appeals 374 at page 656. And it goes through the exact analysis that Your Honor just went through as it relates to The Court. Prong four of this test, Your Honor, it's a four part test, and prong four of this test and prong five it is not reduced to a sum certain operation of law or controlling statute. It can only be reduced to certainty by a jury determination. We're not here in front of a jury and so the only way to reduce this to a sum certain amount is through Your Honor weighing the credibility of the witnesses and determining which damages Your Honor believes to be appropriate in this case. The Court cannot simply rely on anything that has been presented to The Court today to simply say the damage is this exact number. It requires your –- your ability to listen to the credibility of the witnesses and determine what you personally believe, Your Honor, and sitting as a jurist believe the damages to be. That is the exact consideration that was –- that was taken under consideration in the Dixie Bell Case. If it's such that the damage that's being alleged could only be reduced to certainty by a jury in this particular instance, but a judge in this instance, Your Honor, then it cannot be considered for purposes of pretrial –- pretrial –- pretrial interest. Excuse me, Your Honor, pre-judgment interest. This is the Dixie Bell Case. It goes through the very analysis that you went through, Your Honor.

THE COURT:

Mr. McLeod.

MR. MCLEOD:

Your Honor, I don't have that case in front of me and I haven't reviewed it. But again I couldn't have pled better including any interest and appreciation that should have accrued from the time of the valuation –- the violation.

THE COURT:

If I understand Mr. Puriefoy's argument what he's saying, what the cases are saying, that a pre-judgment interest is for cases in which there is a clear sum due. Say for instance in a foreclosure action you have a judgment of $40,000 was due on a mortgage, it never got paid. The $40,000 would be subject to a pre-judgment interest. What he's arguing this case says that in a case like this where your clients are alleging he has misspent a large sum of money. He's going to allege he didn't. There's not a clear sum such that anyone should -- or is on notice that they owe some certain amount of money for which they are going to be charged pre-interest because that sum is unknown. And the interest that the money was earning of course it makes sense that that would be pertinent to the amount that would be due to the Estate to make it whole. Your argument is that --

MR. MCLEOD:

Your Honor, I think there's also cases, and I don't it in front of me, I've read them previous to this trial and I'll find it for you, but it basically is saying any offsets that they try to claim you assess pre-judgment interest first. You don't do it after the offset. It's assessed on those amounts, those sum certain amounts that were transferred out of the account. So that's where you assess it. You don't wait and see what it comes out to. It's assessed on those sum certain amounts and they're gone. He transferred 75,000 out, or whatever the number is, he transfers it out of her -- this joint account that he was added on. He owes the Estate that sum right there.

THE COURT:

Okay.

MR. MCLEOD:

And there should be pre-judgment interest to capture when she was deprived from that sum.

THE COURT:

Okay. I think what I'm going to do is I'm going to note your objection. I'm not -- I'm not going to rule on it at this time. I'm going to note it. I'm going to let you go ahead and proceed to ask your witness about pre-judgment and -- but this is an issue that I need to study because I'm not swayed one way or the other. I've got questions and I need to study it more. So with that I'm going to make a note of that. I'll rule on that at the end of the case, but for right now I'm going to let you go ahead and ask him about that. Okay.

MR. MCLEOD:

Okay. Thank you, Your Honor.

THE COURT:

Okay.

MR. PURIEFOY:
Just for clarification, Your Honor, can I have a standing objection?
THE COURT:
A standing objection is noted on any testimony or documents or Reports having to do with pre-judgment interest.
MR. PURIEFOY:
Thank you, Your Honor.
THE COURT:
Uh-huh.
EXAMINATION RESUMED BY MR. MCLEOD:
Q. All right, John, we'll resume. Can you please go through the Report and explain your findings to The Court?
A. Okay. I think the simplest way to do this is to look at my Appendix D in the Report, which appears on –- let me make sure I have the page number right. Page 20 of my Report, it's Exhibit 1. And just go through. Appendix D what it does is it breaks down the losses under my primary computational approach. It breaks the losses down into categories. Row Number 1 is the aggregate and unexplained cash transfers out of Ms. Mensch's bank account for the benefit of Sterling Mensch, III. And this is where we come up with the amount just to the

right of that of $820,382. And that's not -- let's be clear here. That's not just an abstract number of dollars out there. I work with numbers every day and sometimes very large numbers, but it helps me to kind of break them down just to see what that consist of. Okay. This $820,382 figure consisted of 239 specific line items, which are referenced in my Appendix E to my Report. So it's very much a sum certain and very much a sum certain as to --

MR. PURIEFOY:

Objection, Your Honor.

A. -- as to --

THE COURT:

Excuse me.

A. -- 239 --

THE COURT:

Mr. Markel, if you'll wait.

THE WITNESS:

Yes.

MR. PURIEFOY:

Your Honor, I would object to any reference to sum certain as that is legal question for The Court and he has not been tendered has an expert to speak to any legal matters whatsoever. He can speak to what is referenced in his Report, but I don't believe that he's qualified to speak as to what constitutes a sum certain amount for purposes of determination of pre-judgment interest, Your Honor.

THE COURT:

Thank you, Mr. Puriefoy. I overrule your objection. He can speak to what he has. His aggregate unexplained cash transfers he has computed to be 820,382. That doesn't mean that you don't have the chance to talk about how much of that went for her benefit or not, but he can add up the transfers. Okay. You may proceed.

EXAMINATION RESUMED BY MR. MCLEOD:

A. And the term sum certain is also an accounting term. Okay. It's 239 specific line items that we know the exact date that those went out of Florence Mensch's account and into Sterling Mensch's account. So I computed what we can call pre-judgment interest, or whatever you want to call it, as an advisory, because I had the dates and amounts available to me and it's a very easy computation to make on an Excel spreadsheet. They give you tools to just do it, so I computed it for informational purposes. So if you take each one of those 239 different cash transfers out and bring them forward to today, August 17, 2021, and apply the Supreme Court's pre-judgment interest rate for this year, they change it every year, of 7.25 percent you come up with an associated pre-judgment, or whatever else you want to call it, interest amount of $312,955. I traced each one of these 239 line items from Florence's bank statement records to Sterling's bank statement records. So I know that they happened. These bank statements were -- were obtained on subpoena directly from Bank of America, so it's an outside third-party source. I'm not -- I'm supposed to be independent. I'm just taking third-party evidence and -- and accumulating it into a useful form, which I tried to do. And so the detail supporting Row Number 1 is contained in my Report paragraph 17 and the detailed number of computations are included at Appendix E. But let's also look at this 800 -- what makes up this 820,382 figure. This was taken out over a 73 month period from February 2013 to February 2019. That's an average of $11,238 per month for that 73 month period. On an annual 12 month basis, 12 times $11,238 that adds up to a little bit under $135,000 per 12 month period. During one six month time frame in 2016 Sterling transferred over 181,000 from Florence's account to his account. I'm saying this to rebut the contention that there is credits that should be applied, or whatever, for Ms. Mensch's benefit. These numbers are so large that it just doesn't make sense that there were substantial offsets to this amount. And I'll just put

that out there for information. I guess we can move along to Row Number 2.
Q. Well, tell me one more time --
A. Sure.
Q. -- the date range of these transfers.
A. Well, let's make absolutely sure about that. We refer to Appendix E. The first line item, the first item that was removed according to my analysis. I might have missed some items. We're talking about thousands of line items. I tried to be as accurate as I could, but the first one I noted was on February 25th, 2013 for $300. Okay. Then that continued, if we move on to page 27 of my Report, the next to the last line item there was on February 19th, 2019 for $400. The very last item on this -- on page 27 I added it at a later date when I picked up on it, but the time frame is February 2013 to February 2019.
Q. Okay. And, Mr. Markel, for each transaction did you calculate pre-judgment interest?
A. In -- in the far right-hand column of Appendix E I have all the information I need to calculate what I call pre-judgment interest. We can argue about what the proper label is, but I have the date it was withdrawn. I have the date of today, August 17th, 2021. And through the magic of an Excel spreadsheet I can immediately come up

with the fact that 3,095 days elapsed between February 25th, 2013 and today. And I can apply a daily interest rate. In other words, I took the annual interest rate of 7.25 percent and divided it by 365 days to come up with a daily simple interest rate. And that's how I came up with in this first line pre-judgment interest of $184.43. And I did that for every single line item out of the 239 line items in here that have a dollar amount in the debit column.

Q. And all of these transfers came out of either 7059 or 2007?

A. Right.

Q. Those are Florence Mensch Bank of America accounts. Those are the last four digits; is that correct?

A. That's correct.

Q. And when you're looking at Appendix E is there any real consistency to the transfers in your opinion?

A. I --

Q. And I'm speaking about amounts. Is there consistency in the amounts or the times?

A. Over the years I've gotten pretty good at spotting patterns, but I didn't see a noticeable pattern as to dates or amounts. Although there are a lot of transfers in the amount of $2,000 even. I guess you could call that a pattern.

Q. Well, how often does that pattern occur? I'm looking at Appendix E, the overall. Going through I don't see too many 2,000 in a row.
A. (Witness reviewing exhibit.) Well, like on page 23 there are four or five of them.
Q. Okay.
A. You know, out of 35 line items on that page. There don't appear to be that many of them on the other pages. This is one, I just eyeballed.
Q. So for example can you read line 83?
THE COURT:
Excuse me, but let me interrupt. Is that somebody's cell phone that just went off? It's yours?
THE DEPUTY:
Yes, I was trying to --
THE COURT:
Okay. All right. Okay. You're allowed.
THE DEPUTY:
Excuse me.
THE COURT:
You're exempt.
EXAMINATION RESUMED BY MR. MCLEOD:
A. On page 23, line 83.
Q. Well, actually you can start at line 72, please. What is the date and amount?

A. June 4, 2014, $2,000.
Q. And then line 83?
A. It's September 9th, 2014, $2,000.
Q. And line 86?
A. It's October 28, 2014, $2,000.
Q. And line 87?
A. It's November 10, 2014, $2,000.
Q. And line 94?
A. It's December 24, 2014, $2,000.31.
Q. Okay. Can you read line 105 for me?
A. It's February 25th, 2015, $11,167.43.
Q. On page 26 can you read line 178?
A. August 4, 2016, $75 even.
Q. All right. And I think you misstated that one.
A. 178?
Q. Page 178 on page 26.
THE COURT:
I think he meant 75,000.
Q. You mean 75,000?
A. No –- 75,000.
Q. You said $75.
A. 75,000 even.
Q. Okay.
A. It's what I said.
Q. Okay. I may have misheard. Then line 189?

A. February 8, 2017, $12,996.03.
Q. And line 194?
A. It's on May 2nd, 2017, $35,721.43.
Q. Line 197?
A. That's July 11, 2017, $12,641.63.
Q. And line 201?
A. That's on October 30, 2017, $28,000.
Q. Line 205?
A. May 18, 2018, $7,385.
Q. 206?
A. June 19, 2018, $5,500.
Q. 207?
A. It's on July 6, 2018, $6,206.71.
Q. Read line 242 on page 27 of your Appendix E of your Expert Report?
A. That was line 242 is a transfer was made on November 4, 2013 for $1,651.20.
Q. And actually I'm going to go back to 211.
A. That was on July 23, 2018, $12,000.
Q. And line 215?
A. August 20, 2018, $8,500.
Q. Line 239?
A. That was on January 16, 2019, $13,500.
Q. And state your total for these one more time.
A. My total which is stated at the bottom of page 27 was

$820,382.13.
Q. And your total for pre-judgment interest?
A. That's also at the bottom of page 27 and the total is $312,955.11.
Q. And did you also review Florence's GE stock and UBS and her South -- South State or State Street bank records?
A. Well, they're broker records.
Q. Yeah, you can correct me on it. They were brokerage records; is that correct?
A. South State is a brokerage firm, yes.
Q. Okay.
A. Yes, I did.
Q. Okay. And what did you learn from those statements regarding -- related to these transfers on your Appendix E?
A. They were -- they were transferred -- there were several large transfers made from the brokerage account into one of Florence's two Bank of America accounts.
Q. So were most of these amounts derived from her retirement accounts?
A. Well, certainly they --
Q. I'll restate that. Were most of them derived from the UBS account, State Street account, and the GE stock account?
A. Let me put it this way: those transfers accumulated to

hundreds of thousands of dollar and, yes, they went into Florence's bank account. So we have these large transfers in from her retirement accounts and then we have these large transfers out to Sterling's account.
Q. Okay. All right. I'll let you pick up where you left off going through your Appendix –- what was your Appendix?
A. Appendix D.
Q. D. Okay. I'll let you pick back up going through that.
A. Okay. In the far left-hand column it says Row Number 2 and the time frame was 2011 to 2018. And this line item has to do with avoidable income taxes generated by IRA distributions to Ms. Mensch that were of course during this time facility by Sterling Mensch either as agent under the Power of Attorney and Personal Representative, in excess of the amount mandated for minimum required IRA distributions for a particular year. There's a rule in the Internal Revenue Code that once you reach the age of seventy and a half that a certain percentage of your IRA balance at the end of the previous year has to be distributed to you as taxable income. This was a law was made to plug a tax loophole to keep wealthy people from just dumping funds into IRA's and then just keeping them there forever without ever having to pay tax, because when you contribute to an IRA it's a tax free

transaction. When you take it out years later you're taxed on it at that time. So that's the -- so but what happened in these particular years is that Sterling caused large outflows to be made from the IRA accounts in excess of the required minimum distribution. In some years quite an excess.

Q. And you lay that out on your Appendix F; is that correct?

A. Yes. And if I could step down and go back and get something out of my briefcase it will help.

THE COURT:

That's fine. Yes.

MS. THOMASON:

Your Honor, may we take this opportunity to a quick five minute break?

THE COURT:

Any objection, Mr. McLeod?

MR. MCLEOD:

No objection, Your Honor.

THE COURT:

Okay. Let's take a 15 minute recess and we will come back at 11:25.

MS. THOMASON:

Thank you, Your Honor.

Off the Record: 11:07:38.5

On the Record: 11:26:21.2

All right. We're back on the record after a recess. Mr. Markel is still on the stand. He has already been sworn. Mr. McLeod, you may proceed.

MR. MCLEOD:

Thank you, Your Honor.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. So, John, let's pick back up where we were. We were on Appendix E and you were going over your Row 2 of your Expert Report.

A. Right.

Q. And we were looking at Appendix F and we are going to turn to that and have you explain how you came up with your 163,420 on line –- or Row 2.

A. Okay. Appendix F is summarized somewhat, but it boils down in –- in the year on the 2011 tax return there was $999 in excess in distributions from the IRA in excess of the required minimum distribution. And applying a blended state and federal tax rate of .3304 to that, which that was one of the rates in effect in 2011, the income tax that should have been avoided had this been done properly would have been $330. So $330 in income tax was incurred that year that should not have been. And those taxes would have been due on April 15th, 2012. 3,411 days have elapsed since April 15 of 2012 and today. So if you plug in the equivalent daily interest rate, the 7.25 percent, that yields pre-judgment interest of $224. And for the year -- for taxes for the year 2012 there was $10,230 distributed in excess of the required minimum distribution. And if you, again, apply the blended federal and state rate of .3304 you come up with excess income tax of $3,380. So that's on the second line on the schedule on Appendix F and that tax was due on April 25, 2013. 3,046 days have elapsed since that day and today. So if you apply the daily interest rate you come up with $2,045 in pre-judgment interest. Okay. In the year 2015 IRA distributions were made in excess of the required minimum distribution that year of $78,699. Applying the blended state and federal rate again would yield income tax that should have been avoided of $26,002. That tax was due on April 15, 2016. And since that day 1,950 days have elapsed which would yield $10,071 in pre-judgment interest. On January 1, 2016 a retirement plan distribution was made that exceeded the required minimum distribution for that year by $238,105. Applying the blended rate of .3304 that yields avoidable income tax of $78,670. That tax was due on April 15, 2017. 1,585 days have elapsed between then and today, so that would yield pre-judgment interest on the avoidable income tax of $24,768.

Finally in 2018 there was -- there were IRA distributions made in the amount of $187,715 in excess of the required minimum distribution. The blended tax rate went down that year because of federal, new federal tax legislation, so the blended rate became .2932. That would yield avoidable income tax of $55,038 as shown in the schedule. If you add all those up, all those avoidable income tax amounts up, they total up to $163,420, which is shown on my Appendix D in the losses column. For the income -- for the avoidable income tax for 2018 I did not compute pre-judgment interest because that income tax return was filed late and is still under -- interest and penalties are still under appeal with the IRS. So I decided that the best thing to do with that was just to not compute pre-judgment interest so that it wouldn't be overstated, but it will have to be computed at some future date.

Q. And your total for pre-judgment interest?

A. For the years -- for avoidable income taxes in the years, '11, '12, '15 and '16 total $37,107, which is also shown on my Appendix D.

Q. Okay. And for the entry on April 23rd, 2018, do you know what day Florence Mensch died?

A. I believe it was on April 26th, 2018.

Q. Okay.

A. So just a few days before she died.
Q. All right. Do you know the amount that was transferred that caused that tax? The total amount of the transfer?
A. I don't -- I don't have that right at hand.
Q. Okay.
A. We can look it up.
Q. Is it 249,000?
A. It was somewhere in that --
Q. Somewhere in that vicinity?
A. Between 2 and 300,000. Somewhere in that range.
Q. Okay. All right. And so you're calculating only the amount above the required minimum distribution; is that correct?
A. Right. Because my -- my assumption was that Ms. Mensch's living expenses in the memory care facility as a general rule are pretty much covered by her pension income and her Social Security income. So she -- she didn't -- had no real need to take distributions out in excess of the required amount. So I attributed these excess amounts to really poor management on the part of Sterling Mensch in terms of his fiduciary duty. You know income taxes that could have easily been avoided or at the best deferred for a number of years just by keeping them in the account. There was no need to incur those taxes. So that's why I included it.

Q. And these were incurred by taking it from her retirement accounts, at least the amounts that make up your calculation in Appendix F, that came from retirement accounts that were taxable accounts; is that correct?
A. If you take funds out of them they become taxable.
Q. Correct.
A. To the extent they -- and if you take out the minimum, you have to take out that amount. In fact, you're taxed on it even if you don't take it out. But the amount that you take out in excess just adds to your tax bill that year. So it's something that can be avoided if it's managed properly.
Q. And is it correct to say that usually you only want to take your required minimum distributions?
A. That's -- everybody who has an IRA, I fall in the category of being over seventy and half years of age. I only take the minimum. I leave the rest in there. There's no point in paying tax on it if you don't -- unless you need it for something. Thankfully I have not needed.
Q. Yeah. These are tax advantage accounts; correct?
A. Right. Right.
Q. There's an advantage to that.
A. When you put -- the amount that you put in is excluded from income in the year that you put it in. So during

your higher earning younger years you can exclude income from tax. But then it's only fair that when you take it out, and that's the way the law is written, when you take it out it becomes taxable. But then there's a special provision for older people. Those over seventy and half that they're required to take out a certain amount every year.

Q. So there is a benefit to leaving it in that account and only taking your required minimum distributions; correct?

A. Right. My mother is 98 years old. She's been taking out required minimum distributions for the last 26 years or so. And she only takes the minimum believe me.

Q. Yeah. And is it true that if you leave it in you're actually making money by not paying that tax?

A. Right. And everything that -- the buildup in value is tax free, too. You don't pay current tax on the buildup in value. So there's all kinds of advantages to just leaving in there unless you absolutely have to take it out.

Q. So do you think your Report captures all the damage from taking those excess required minimum distributions?

A. No, it actually probably understates it to the extent that if those -- if those dollars were left in those funds they could have grown based on the investment

portfolio that was in the IRA and they would have grown, but I did not make that computation.
Q. And, again, the years this tax was imposed, can you just read those years again?
A. The tax was imposed on the returns of the years 2011, 2012, 2015, 2016 and 2018.
Q. And were the majority of those between 2015 and 2016 and 2018?
A. That's where most of the dollars were, yes. All but about $3,600 of the 163,000.
Q. So during --
A. For the tax, increased tax.
Q. Yeah.
A. You know the distributions would have been far greater than that, but I don't have that --
Q. Yeah.
A. -- the amount of distributions right here at hand.
Q. Yeah. And if those amounts weren't taken there would have been in theory some appreciation over time; is that correct?
A. That's correct.
Q. Is that difficult to quantify?
A. That would be difficult to quantify. Now, I have a line item later on where a portion of that increase in value might possibly be picked up, but it's probably only a

portion but we can deal with that at that time.

Q. Yes, sir. And would the Estate in your opinion have realized any benefit if those amounts were not taken in excess above those required minimum distributions?

A. Well, the Estate would have realized the benefit that they would have been able –- those funds could have stayed in the investment account and continue to grow in value in addition to generating premature income taxes.

Q. So what you're capturing in this Appendix F based on what you've said is just the income taxes that were in excess?

A. The income taxes generate by the –- only the distributions in excess of the required minimum amount.

Q. Okay. All right. We can go back to Appendix D and your Row 3.

A. Okay. Okay. Row 3 consist of what I have called avoidable penalties and interest that were assessed as a result of late payments by Sterling Mensch of Ms. Mensch's income tax liabilities for the years 2012 through 2016. And they total to as shown in the loss –- losses column on Row 3 of $13,820. And associated with that was pre-judgment interest, perspective pre-judgment interest, calculated to today of $4,115. And on Appendix G of my Report there are 17 line items that add up to the $13,820 figure. These are penalties and interest that were incurred over time for late filing, late payment of income taxes in each of the years -- for taxes for each of the years 2012, 2013, 2014, 2015, 2016. And these really were just again poor management. These -- all these items were paid out to the IRS and to the South Carolina Department of Revenue just because taxes weren't paid when they were due and returns weren't filed on time. Just items of negligent management year by year over time that added up to a fairly substantial amount of money. If you look at individual years you say, "Well, there's $46 there and $79 there. You know $418 there," but over time it adds up. So I included it in my Report.

Q. Okay. And on Row 5 can you explain that?

A. On Row 4?

Q. Actually Row 5 on your Appendix D. Well, let me stop you.

A. Well, we could go ahead with Row 5.

Q. Let's go to Appendix H for a minute. Turn to Appendix H.

A. Okay. That's associated with Row 4.

Q. Yeah. Can you explain just -- you don't have go line by line, but just in general what you've done on Appendix H?

A. Okay. In the years -- in the tax returns for the years

2011 through 2016, each one of those years, Sterling Mensch failed to itemize deductions for property tax and mortgage interest in each of those years. You know I examined, scrutinized each of the tax returns for those years, and he did not include itemized deductions for property tax and mortgage interest in those years. And those –- that failure to itemize resulted in taxes, income taxes, in those years that really just didn't have to be paid. But they could have been –- for tax liability for each of those years would have been lower by the amount of, for example, $5,130 in 2011. $5,676 in 2016 as shown on Appendix H. And all those overpayments for that six-year time frame amounted to $24,559 and the associated pre-judgment interest was $11,099.

Q. Have you reviewed Sterling Mensch's tax returns?

A. Yes.

Q. Do you know if any of these deductions that you list in your Appendix H were taken on his tax returns?

A. I didn't do a full line by line analysis, but I know in at least –- I can state from personal knowledge in several of those years he apparently took those deductions himself even though they were taxes –- taxes on Florence's property. That is the house in Greer, the 512 New Tarleton Way. And the interest on the mortgage note it was –- it was collateralized by that real Estate.

Q. And by Florence's property you mean it was titled in her name?

A. Titled to her and, you know, it would seem like the deduction should follow the ownership, but, you know I think the assertion can be made that the person who paid the taxes and paid the interest might somehow qualify to take those deductions.

Q. Or in some cases if the person was living at the property; is that correct?

A. That shouldn't have had anything to do with it.

Q. All right. In your experience do people sometimes have the tenant pay those taxes?

MR. PURIEFOY:

Objection, Your Honor. I believe you have ruled on the issue of back rent.

MR. MCLEOD:

What do you want me to do, Your Honor? Do you want me to proffer every time I'm about to say something that's even related to it?

THE COURT:

I'll just note for the record that this is being asked under a proffer.

MR. MCLEOD:

It's not only related to the rent. It's also related to the ownership. Who owned it, who the payments were for the benefit of? So there's actually like dual.

THE COURT:

Yeah. I will allow it as it might pertain to the Respondent's action with regard to this property and his tax returns as in is it appropriate for someone who isn't an owner of a piece of property, but he just lives there, to take deduction A, B, and C? I will allow it for that because you're –- one of your loss statements shows that these deductions were not properly taken for Ms. Mensch, but I won't let it be for the purpose of calculating the collection of past due rents under –- because I've already ruled on that. So if you want to have it be for both then I will allow it without restriction as to the fact that it impacts the losses to the Estate but –- and I will allow it under your proffer as far as rental. Collection of past due rents.

MR. MCLEOD:

Your Honor, there's also an argument that we've having to get into the intent of, you know, was this Sterling Mensch's residence during this time or was it for Florence Mensch's benefit, because when we're looking at whether mortgage payments and taxes should be –-

THE COURT:

That will fall under whether or not the actions of the Respondent taken by him during his service to her as her attorney-in-fact and/or as her Personal Representative were those actions taken did they result in a benefit to her or did they not. Under the terms of Power of Attorney did his actions and transactions result in a benefit or an enhancement to the property interest of Ms. Mensch or did they not.

MR. MCLEOD:

Okay.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. Let's go back to your Appendix D, John.

A. Okay.

Q. All right. Tell us what Line 5 is.

A. Okay. That –– that relates to avoidable penalties and interest that were assessed as a result of late payment and failure to file by Sterling Mensch of Ms. Mensch's income tax returns for 2018. And a summary of those losses appears in my Appendix I.

Q. Okay. Can you turn to Appendix I and walk us through your numbers there?

A. I have some additional work papers of mine that I think explain it a lot more –– a lot clearer, more clearly than what I have in that Appendix if you want.

Q. All right.

A.   It depends on how deep you want to get into this.

MR. MCLEOD:

If Your Honor will allow it. Can the witness obtain his work papers? I think he's got them in the back of the room.

THE WITNESS:

No, no, I have copies of them.

MR. MCLEOD:

Oh, you've got them on you?

THE WITNESS:

Right here. They're --

THE COURT:

Are they a part of his --

MR. MCLEOD:

Are these a part of your Report?

THE COURT:

Did you rely on those in making this Report?

THE WITNESS:

Yeah. Absolutely. They just -- I think they will just aid in the explanation.

THE COURT:

Okay. They haven't been agreed upon as an exhibit; correct? As part of this exhibit that you-all agreed on?

MR. MCLEOD:

We will hand copies and let them look it over.

THE COURT:

Okay. But it hasn't as far as what you stipulated it's not a part of this. You-all can stipulate, but it's --

MR. MCLEOD:

Some of our stipulations are so broad.

THE COURT:

Okay.

MR. MCLEOD:

Like we're saying all tax returns. And so I don't know if that's what it is.

THE COURT:

Right. We don't know. We can address that as he testifies.

THE WITNESS:

It's just a more detailed schedule of what's in Appendix I. That's all it is.

THE COURT:

Just make sure you provide counsel with a copy.

MR. PURIEFOY:

Your Honor, we don't mind referring to it for purposes of testimony without it being admitted.

THE COURT:

Okay.

MR. PURIEFOY:

But he can certainly testify to it.

THE COURT:

Okay.

THE WITNESS:

I just thought it would help everybody understand it.

THE COURT:

Okay.

THE WITNESS:

More easily. Save some time.

THE COURT:

Mr. McLeod, don't forget to move it into evidence if you want it.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. All right.

A. Okay. These amounts are not computed up to today's date. I decided from many years experience with the IRS, and you can ask any other CPA about this, that their method of computing penalties and interest they have a proprietary program that they use. And you can attempt to do it by the rules, but it never seems to come out to exactly the same amount. So I made the simplifying assumption in this case that I would just go with what the IRS has put forth in their most recent bill for the 2018 taxes. And if you'll look at the work paper that looks like this, it ties the amounts on this latest bill to the amount of tax penalties and interest due supported totally by the IRS's bill. So it's all right there. The pages behind this –- this gray sheet is the latest one and then the pages behind that are a previous bill from the IRS and from the South Carolina Department of Revenue that was back in –- dated March of 2021. So basically if you combine those two you come up with the figures that I have on my Appendix I and that totals up to $40,314. And I chose not to compute pre-judgment interest because for one thing it's not the final amount as of today. And this particular year is still under appeal to try to get the penalties and interest abated. So the way it works with the IRS you can't pay the amount and then they give you a refund. That just hurts your case as far as getting –- you just never get any refund back. So the best thing to do is just not to pay it and be hopeful about the appeals process. So there again as a simplifying assumption I didn't compute associated pre-judgment interest, but if pre-judgment interest is allowed at some point that will have to be computed.

MR. MCLEOD:

Okay. Your Honor, I'd offer this into evidence as Exhibit 19.

THE COURT:

Any objection, Mr. Puriefoy?

MR. PURIEFOY:

No objections, Your Honor.

THE COURT:

All right. Thank you. So admitted without objection Petitioner's Number 19.

(Court Reporter marks document, Supporting Paper Work to Appendix I as Petitioner's Exhibit Number 19.)

EXAMINATION RESUMED BY MR. MCLEOD:

Q. (Counsel reviewing documents.) I'm going to hand you Exhibit 17. I'll give counsel one first. It's been premarked as Exhibit 17. Can you tell me what this document is?

A. It's an IRS Notice for taxes due for Florence Mensch for the year 2018. It's a final balance due reminder and notice of intent to seize or levy property.

Q. Can you just tell us the amount on that notice?

A. Right. It's $92,845.98. The same amount that was on my work paper I guess in Exhibit 16.

Q. Okay.

A. And of that $63,431 is tax and the remaining $29,414 are penalties and interest.

Q. And on Exhibit 19 that we've just looked at on I think it's page 2 you have a notice there.

MR. PURIEFOY:
Your Honor, we don't have Exhibit 19.
MR. MCLEOD:
This is Exhibit 19 she just marked it. That's all it is.
EXAMINATION RESUMED BY MR. MCLEOD:
Q. Do you see that the IRS notice is dated April 5th, 2021?
A. Yes, I see it.
Q. Okay. And can you read the amount on that one?
A. It's $91,367.34. And that same amount appears on page 2 of Trial Exhibit 17.
Q. And what is the date of that notice?
A. May 24, 2021. That's the date of Trial Exhibit 17.
Q. And on Trial Exhibit 19 these were you work papers that we just admitted into evidence.
A. Oh, okay. The date that was –- the $91,367 figure came from that was dated March 15, 2021.
Q. And why is the amount different on that notice on Exhibit 19 and Exhibit 17?
A. An additional 527 –- $527 in interest and $951 in penalties had been accrued.
Q. Okay. And you said the date of that was May 24, 2021; is that correct?
A. Yes.
Q. So has the amount increased since then?

A. Yes, because we're now August 17, 2021 so it would be maybe as much as $2,000 more.
Q. And will it continue to increase until --
A. Until it's paid, yes.
Q. Or how about an appeal?
A. Well, if -- if the appeal is successful then, if the appeal is 100 percent successful, then only the amount of the tax will be due which is $63,431. That's an absolute. That's what it is unless the IRS should later examine the return and raise it, but that amount is going to have to be paid.
Q. Yeah.
A. But the additional amount of penalties and interest that's what is being appealed. And the basis for the appeal is because this occurred in the year of death and there was a change in the Personal Representatives. I mean I think there's at least some chance that the appeal will be successful.
Q. Are you aware of whether they have ever forgiven penalties and interest in the past, the IRS?
A. On Florence Mensch's account, yes, they had in a prior year. But their general policy is if you get -- you kind of like get one free pass, but after that you don't -- you have to pay the penalties and interest. They're much less likely to allow it. You know this -- this

particular appeal, you know, you have some additional like the change of the Personal Representative, the year of death. That's sort of special case for income tax so, you know, the appeal is not without -- totally without merit, but its probability of success is probably -- probably less likely than not. We'll just have to see how it comes out.

Q. But in the meantime that amount will continue to increase and --

A. Right.

Q. -- will not decrease until the appeal is done?

A. Is settled. Right.

Q. If it's successful it might be decrease, but it will continue to increase; correct?

A. Right.

Q. Okay.

MR. MCLEOD:

And I would offer Exhibit 17 into evidence.

THE COURT:

Okay.

MR. PURIEFOY:

Your Honor, I'm not sure is this outside what we've already stipulated to? I understood that all the documents that are being referenced are already stipulated in evidence beyond the Row 5 calculation that was provided.

MR. MCLEOD:

It's just if you consider it to fall under the tax returns. It's a notice related to the tax returns.

THE COURT:

I have that it's a Notice of 2018 Tax Return, but I guess this a little different than that. But if you don't have an objection just for the record make it clear.

MR. PURIEFOY:

I don't have an objection, Your Honor.

THE COURT:

Okay. This will be moved into evidence as Exhibit 17 without objection.

(Introduction of previously marked document, IRS Tax Notices as Petitioner's Exhibit Number 17.)

EXAMINATION RESUMED BY MR. MCLEOD:

Q. I had it marked as Exhibit 17 already.

A. Which copy is this? Is that your copy?

Q. Yeah, that's your copy. You can keep that.

A. Are you sure?

Q. Yeah, in case I refer to it. So in your Appendix D you come up with a subtotal. Can you please read that for The Court? It's in Row 6 of your Expert Report,

Appendix D.
A. Right. The subtotal of losses, that is the total of Rows 1 through 5 on Appendix D, is $1,062,495 and the associated pre-judgment interest would be $365,276.
Q. Okay. Can you turn to Appendix N? Can you just describe what Appendix N is?
A. Okay. On your copy it might have an incorrect label.
Q. Okay.
A. Okay. The proper label is Summary of Losses Under the 2nd Alternative Computation. And lines 1 through 6 are exactly the same as Appendix D that we just ran through.
Q. Okay.
A. Totally the same.
Q. And what is the difference between Appendix N and Appendix D?
A. Okay. In Appendix D I include a figure for accrued unpaid rent on line 7 of Appendix D. In Appendix N I omit that line item. That's the only difference between Appendix D and Appendix N. In Appendix N there's no -- no accrued rent. There is however another line item below line item 6 that we haven't discussed yet.
Q. We will discuss that in a minute, but Appendix K, can you turn to Appendix K?
A. Okay. Appendix K is also the same as Appendix D for lines 1 through -- for Rows 1 through 6, but then it

deviates from both Appendix D and Appendix N in that there is accrued unpaid rent on Row 7 and a credit for property taxes and mortgage payments on Row 8.
Q. Okay. So the difference between N –- or actually D and K is that you are giving him –- or you are crediting disbursements made for property tax and mortgage payments against the accrued unpaid rent; is that correct?
A. That's correct. And actually in Row –- Row 8 of Appendix K there is a typo in Row 8 in the bottom line of the description column. It should read instead of Row 6 it should be Row 7. Just to eliminate any confusion. In other words, the –- the items on Row 8 credit against the items on Row 7. And the assumption here is that the items on Row 8 were for property tax and mortgage payments that we could identify by reference to the bank statements.
Q. So that credit for disbursements, that line 8, are those amounts that you could actually see in the bank statements were made for the property taxes and the mortgage payments on 512 New Tarleton?
A. Right. That were made by –- out of Sterling Mensch's account.
Q. And so –-
A. So I mean the economic approach to that is on line 7 we

have imputed rent and on line 8 we have defacto rent in the form of property taxes and mortgage payments paid by Sterling Mensch.
Q. Okay. And you mentioned that it was paid from Sterling's account. Is that the account, Bank of America account ending 3259?
A. That is.
Q. Okay. And is that the same account where the funds of Florence Mensch's Bank of America accounts were transferred to?
A. Yes.
Q. And as you reviewed the account statements for Sterling Mensch ending in 3259, did the some the funds that he transferred from Florence Mensch go to pay some of the mortgage payment and taxes?
A. I did not make that analysis line by line, but, you know, once -- once the funds go into Sterling's account then they just become part of a whole. It's like pouring water into a bathtub. It's all there and, of course, once it's there it's used for whatever goes out of the fund, so.
Q. So after it leaves Florence's account ending in 7059, her Bank of America account, and goes to Sterling Mensch's account it's pretty difficult once it gets there to see what it's being used for; is that correct?

A. Right. Right. It's very -- it would require some speculation to say. There were no transfers that I could find out of Florence's account into Sterling's account in the exact same amount of either the property taxes or the mortgage payments that I can recall.
Q. I'm going to turn to Appendix M and hold that thought.
A. Appendix M.
Q. Appendix M.
A. Okay.
Q. All right. And tell me what Appendix M is, please.
A. Okay. These are potential credits to be applied against accrued rent and they consist of, these potential credits consist of mortgage payments to Park Sterling Bank and South State Bank and property taxes on the 512 New Tarleton house for Greenville County real estate tax.
Q. And so these amounts and payments were they paid out of Sterling's account, his 3259 account?
A. Yes.
Q. And when you compared Appendix E, which is the unexplained outgoing cash transfers for the benefit of Sterling Mensch is there -- are any of those transfers, do any of them match up to the mortgage payments that he made?
A. I haven't -- I haven't done that, but I can do it now.

Q. Please -- please review the document and let me know when you're ready.
A. (Witness reviewing documents.) Okay. On June 10, 2013 there was a $2,580 transfer from Florence to Sterling and three days later there was a mortgage payment made by Sterling of $1,351.68.
Q. And which line on Appendix E are you referring to?
A. Three.
Q. So you're referring to the June 10th, 2013 there was a transfer of 2,580 and then on Appendix M, which one are you referring to?
A. I'm referring to -- there's no line numbers there, but it's the transfer about eight lines down on June 13, 2013, three days later.
Q. Do those match up?
A. No, the transfer -- the transfer into Sterling's account was larger than the amount --
Q. Yeah.
A. -- transferred -- amount used to pay the mortgage payment.
Q. And what I'm asking just to clarify is do any of the payment amounts match the amounts transferred from Florence's account?
MR. PURIEFOY:
Your Honor, I have to object to speculation unless we're

going to go line by line through every single mortgage payment verse every single transfer, which I thought we were trying to avoid doing in this particular instance.

THE COURT:

Okay. I think, Mr. McLeod, I think and maybe counsel will stipulate to this, by looking at this in this fashion you're trying to make the point that the transfers made by Respondent from his mother's account into his account those transfer don't match dollar amounts, any of the amounts that he paid from his account to Park Sterling Bank and South State Bank; is that --

MR. MCLEOD:

That's correct, Your Honor.

THE COURT:

So further supporting -- so the witness' testimony that once you put funds from Ms. Mensch's account into a bank account owned by Sterling and they become commingled with his own funds it becomes more difficult to account for Ms. Mensch's funds were used?

MR. MCLEOD:

Correct, Your Honor.

THE COURT:

So if that's the point you're trying to make in getting him to make these comparison I think we can make a finding of that without an objection. Is that --

MR. PURIEFOY:

Absolutely, Your Honor.

THE COURT:

Okay.

MR. PURIEFOY:

Those figures were included in the 820,000 that we stipulated to, so.

THE COURT:

Okay. All right. With that we can go to the next question.

MR. MCLEOD:

All right.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. Can you tell me the dates on Appendix M? The first mortgage payment you list and the last mortgage payment?

A. The first mortgage I list was on June 19, 2012 to Parks Sterling Bank and the last mortgage payment, which was made to South State Bank, was on November 7, 2019.

Q. And as to the taxes on page 39 of Appendix M can you read the amount of the taxes starting at, the date is February 11, 2014?

A. Right. On February 11, 2014 there was $6,772.37 paid. On March 2nd, 2015 there was $6,669.33 paid. On April 18, 2016 there was $6,587.25 paid. On February 8, 2017 there was $6,592.11 paid. On August 21, 2018 there was $6,940.89 paid. And on April 16, 2019 there was $6,946.50 paid.

Q. Are those amounts higher than you would think property taxes would be?

MR. PURIEFOY:

Objection, Your Honor. Speculation to ask this witness.

THE WITNESS:

Well --

THE COURT:

Just a second, Mr. Markel. Let him make his objection.

MR. PURIEFOY:

The objection calls for speculation. Your Honor, if there's a document that Mr. Markel can refer to directly to refute the numbers that are contained in his Report he certainly can do that. Beyond that it would be speculation as to what he believed what these property taxes should be every year.

THE COURT:

I will -- Mr. McLeod, could you kind of lay more of a foundation as to his --

EXAMINATION RESUMED BY MR. MCLEOD:

Q. Yeah.

A. Well, these -- these are the actual amount of the tax due for those years. I've eliminated penalties that

were paid on these dates. Like for example, taxes were paid on April 18, 2016. Well, by that time you've got a 15 percent penalty riding on top of your tax plus a $40 fee, but I've eliminated those. I'm not giving credit for penalties paid. This is just a base amount of the tax. I went to the Greenville County Website and looked up what the amount of the tax was for that year and I did not show any penalties paid though, obviously, like there's one area he did pay till August. You know it was due in January. So, you know, absolutely there would have been penalties, but I've struck those penalties out.
Q. And also I was alluding to the penalties, but also what rate are these taxes being assessed?
A. Okay. They're assessed at the rate of six percent.
Q. And why are they assessed at six percent?
A. Because this is property that is not occupied by the owner and therefore not eligible for the homestead exemption where the rate would be I understand is three percent. So tax would be half, approximately half of what is shown here for each of the years.
Q. And who was the owner of record for these years?
A. Florence Mensch. The house is titled –- was titled to her until it was sold recently.
Q. Okay.

A. But she did not occupy it, so it was as if it were rental property. You know it was taxed at a rate that rental property would be taxed at.
Q. And do you know who was occupying the property?
A. Sterling occupied the property throughout this -- throughout this time frame, 2013 through 2019.
Q. Did he occupy it prior to 2014?
A. I understand that he started occupying it as soon as it was built, which it was completed according to the tax records sometime in 2007. So he occupancy goes all the way back to 2007.
Q. So were property taxes at a rate of six percent from 2007 to 2000 -- I guess to present or 2020?
A. I didn't observe the tax records all the way back to 2007, but since -- my understanding is Ms. Mensch never lived in the house, so it would -- if it got the homestead exemption rate it was not correct.
Q. All right.
A. But I would assume that since it was taxed at the rental property rate later on in the '13 through 19 period it was probably taxed the same way before that.
Q. Okay. So your last line of property tax is on 4/16/2019?
A. Right.
Q. Florence Mensch had already passed away at that point;

right? Is that correct?
A. Yes. Well, what was paid on 4/16/2019 would have been 2018 property taxes.
Q. Right. And to be clear on your Appendix M in your Report you were only giving him credit towards accrued rent; is that correct?
A. Yes.
MR. PURIEFOY:
Objection, Your Honor. We're speaking about rent again. I believe there's a limited instruction that this is not to be presented for purposes of offsetting rent against any damage figure. It's simply supposed to be based on the Report that he produced without any reference being made to this rent issue.
THE COURT:
You have a standing objection and he has the ability to ask him under an offer of proof, so I'll take for that purpose only.
MR. PURIEFOY:
All right.
EXAMINATION RESUMED BY MR. MCLEOD:
Q. And we talked about your Appendix N. Can you turn to that for me?
A. Okay.
Q. So in this Appendix N you don't have any allocation for

any kind of rent and you also don't give any offset against any kind of rent; is that correct?

A. There's no rent imputed and no credits against the rent because the whole idea behind the –- the credits were that they would be considered defacto rent, but in all cases if you add those two things together they didn't come up to what the market rent would have been for that property. So the only reasonable way economically to treat that was to impute market rent and then –- and then credit –-

MR. MCLEOD:

Your Honor, this is under proffer.

THE COURT:

Yes, so noted.

A. And credit these items that might be considered to be defacto rent even though they were below –- they didn't come up to market and in order to –- to be properly managed they needed to be at market level rents. So there's a real economic reason for doing it this particular way.

Q. Okay. And can you detail for me how you came up with your rent amount, and we're under proffer? How did you come up with your rent amount?

A. Sure. That would be Appendix J. Okay. In a nutshell what I did was I looked on Zillow earlier this month and found a rental house in their neighborhood that was somewhat smaller. And I took the rent, the actual rent on that house on Zillow, Zillow website, gives, you know, market information on sales prices of houses as well rental prices. And I compared the square footage of the house on Zillow to the 512 New Tarleton Way house and upgraded it to that amount of rent per square foot to yield a figure of –- (witness reviewing exhibit.) Bear with me a minute. The current monthly that house would rent today, the rental rate, would be according to the market $2,084 a month. Okay. There's a –- the Federal Reserve Bank of St. Louis publishes a Consumer Price Index for all urban consumers for rent of shelter in the south. It has indexes going back to the 1960s. And I applied that index going backwards to the original 2,084 number and came up with rental rates as I –- as I stated in paragraph 22 of my Report of $2,007 in 2020, $1,944 in 2019 and so on back to year 2013 of $1,637 and so on. They're all listed in paragraph 22. And then I on Appendix J I plugged those rental rates for each of the rent due dates starting in January of 2008. I started there because we knew the house by reference to the property tax records under Greenville County Website the house was built and occupied. Probably earlier than that, but at least by then so that's when I started. I plugged in year by year the amount of the monthly rents and added –- added those up in the second column of Appendix J and they added up to over that January 2008 to August 2020 they added up to $259,560. The pre-judgment interest that would be associated with that based on the days outstanding up to today would be $132,223.

Q. And can you read paragraph 22 of your affidavit and kind of basically summarize it?

A. Okay. Row 7 of Appendix D and that would also be Row 7 of Appendix K comprised accrued unpaid rent by Sterling Mensch, III, for his occupancy of Ms. Mensch's house at 512 New Tarleton Way from January of 2008 through August –- to August 2020. It was represented to me by Shauna Waddell that Sterling Mensch lived in Ms. Mensch's house from the time construction was completed sometime in 2007 until August of 2020. And I corroborated Shauna Waddell's statement by reference to the Greenville County tax records. During the time frame 2007 until her death in 2018, Ms. Mensch because of her dementia was confined to memory care units which provided her lodging, meals and personal care. Ms. Mensch herself never resided in the house. Based on the Bank of America bank account records provided to me of both and Ms. Mensch and Sterling Mensch, III no rent was paid by

Sterling Mensch, III to Ms. Mensch during the June 2012 to December 2019 time frame. And a note aside that time frame is the time frame for which I had bank account records available. Moreover Ms. Mensch's tax returns for each of the years made available to me, that is the years 2011 through 2018, showed no rental income. That would have had to have been shown on Schedule E of her Form 1040 for each one of those years if there was any rental income. Therefore, for the purposes -- for the purpose of this exercise I assumed Sterling Mensch, III paid no rent to occupy the house at 512 New Tarleton Way in any of the years 2008 through 2019, nor for the time frame of January through August 2020. I also determined by reference to published rental rates of similar properties in the area, as well as to the market value of the property per the Greenville County Property Tax Records that a current, that is August 2021, monthly rental rate of $2,084 for the house would be reasonable. Working backward in time I then assigned a monthly rental rate to each of the years in question using the statistic Consumer Price Index for all urban consumers rent of shelter in the south for each month during the years 2007 through 2020. That should read 2008 to 2020. As published by the Federal Reserve Bank of St. Louis. Those monthly rental rates for each year were then

computed as follows. Do I need to read all those?
Q. No, you don't.
A. As shown in Appendix J to this Report I then computed the accrued unpaid rent owed by Sterling Mensch, III for the time frame of January 2008 through August 2020 to be $259,560. Also as shown in Appendix J the associated pre-judgment interest on the accrued unpaid rent was computed to be $132,223.
Q. All right.
MR. MCLEOD:
And we'll end the proffer.
THE COURT:
Okay.
Q. On Appendix N let's go to your Row 7 --
A. Okay.
Q. -- of the Expert Report. Tell me what Row 7 is.
A. (Witness reviewing exhibit.) Okay.
Q. All right. Can you explain what Row 7 is?
A. Okay. This would also be Row 12 in my Appendix K. And that's why I'm having trouble finding this because my references are to Appendix K. I've found it now. Okay. These are losses that I've computed that were suffered by the Estate as a result of the failure of Sterling Mensch, III to diversify Ms. Mensch's assets. Okay. This line item, and I have a very extensive Appendix O.

Q. Yeah. And I'll hand you --
A. That explains this in great detail.
Q. Yeah.
A. I'm going to try to summarize.
Q. And first, John, I'll hand you what's been premarked as Exhibit 2 and I believe this has been stipulated into evidence. These are just GE Mutual Funds State Street statement. This statement is from UBS, State Street and GE Mutual Funds. So I'll hand you what's been marked as stipulated into evidence and marked as Exhibit 2.
THE COURT:
Thank you.
(Introduction of previously marked document, UBS, State Street, GE Mutual Fund Statements as Petitioner's Exhibit Number 2.)
Q. All right. And you said you have sort of an outline in your affidavit for analysis and I'm going to let you go through that and you can use Exhibit 2 as you need to explain certain things.
A. Okay. You want to turn to my Appendix O in my Report.
Q. Okay.
A. The proposition behind this is that Sterling Mensch was responsible as fiduciary for Ms. Mensch's retirement account investments. My contention is that he violated one of the foundational principles of investment

management. It's so well ingrained in investment management accounting, finance, economics it's just become common knowledge that the way you manage an account prudentially is to diversify the assets. I point out in here three different texts that were written decades ago that point out what a great tool this is to prudentially manage investments. One writer points out that this is the way that -- this is called the insurance principle, this is the way the insurance companies make money. They insure a large group of people or events and the laws of probability are that only a few of them will come to pass. That the more -- the more you spread out your investments is the safer they will be. I've even seen this applied in agriculture. I did a lot of work for a very large farmer in the Low Country or in the Pee Dee and he had his -- he had 7,000 acres of high-yield crops, but the acreage was stretched out over a 160 mile line so that if there were tornados, torrential rains he wouldn't be totally wiped out. It was a very prudent thing to do. He managed to acquire this -- these different tracts of property over time. Okay. So having established that diversification is just a foundational principle I then set out to see what would happen if Sterling Mensch had diversified Ms. Mensch's investment accounts at certain points in time. This is one of those things where it's difficult to pinpoint the exact amount of a loss. But to not recognize that there's a loss from lack of diversification is just by default to make it zero. So I felt like I had to approach it in a reasonable way to come up with some quantification of the amount of losses. So what I did -- well, first I should point out how -- how seriously undiversified Ms. Mensch's investments were. That at the end of the year 2015 her -- her retirement investment account 21 percent of it was in a mutual fund which by definition is diversified. The remaining 79 percent of her funds were in one spot, General Electric. At the end of 2016 nine percent of her holdings were in a mutual fund, diversified. And the remaining 91 percent was in one stock, General Electric. Then at the end of 2017 her portfolio, her investment portfolio, consisted of two percent of the dollars in a mutual fund, diversified, and the other 98 percent in one stock, General Electric. Now, over the last 150 years General Electric has been a very successful company, but there have been times during that 150 years that it didn't do so well. So, of course, the stock price dropped. But still you get back to the principle of diversification. It doesn't matter how good a company is, whether it's Coca Cola, or

General Electric, or General Motors, or Exxon, they've all been around for 100 years, it's still not a –- it's still a terrible idea to not diversify out of those holdings. So when I'm making value judgment on the viability of having investment in General Electric I just bypass that totally. I just said that as of an arbitrary date of where we had data available, December 31, 2015, that the General Electric stock would have been liquidated as of that date and since this is in a retirement account there's no current tax effect or capital gains liability attached to it and at that time the account would be rebalanced. Investment advisors call this being rebalancing the account into a –- into a fund that would be 60 percent equity securities and 40 percent very safe debt securities like Treasury Bonds. And so I used the Elfun Fund Mutual Fund, which she already had investments in and I had the share price already there. So I hypothetically put enough of the receipts from selling the General Electric shares at December 31, 2015 into additional shares of the Elfun Fund Mutual Fund to bring that segment of the portfolio to 60 percent equities. The remainder was put into hypothetically U.S. Treasury Bonds. Okay. And we set that dollar amount. Then I brought that portfolio forward to August 12th, 2021, which was the most recent

-- the most recent contemporaneous date to this day that I could find and revalued this portfolio. I assumed that the Treasury Bonds would not change in value. It would be like cash and it would just stay the same.

MR. PURIEFOY:

Your Honor, I apologize but I have to object. I believe we're getting so far into the realm of speculation at this point. This line of testimony I believe needs to be centered on whatever the value of the account was and its decrease in the value to the extent that we're now presenting testimony based on what could have been. The Courts have made clear that is by its very definition a speculative damage. For The Court to consider that I believe would be improper. I believe that Mr. Markel has indicated on a number of occasions that we're assuming we're using Treasury Bonds as the -- the -- just as the baseline for what could have been. I think that by it's very definition is speculative damages and cannot be testified to. He can certainly testify to the decrease in value that he alleges occurred to the GE Mutual Fund, but I think it's improper to testify about what could have potentially been had had the stars aligned in a perfect scenario.

THE COURT:

Mr. McLeod.

MR. MCLEOD:
I think Mr. Markel --
THE WITNESS:
I can speak to that.
THE COURT:
Excuse me, sir. Would you not speak while the attorneys are speaking. Thank you. Mr. McLeod.
MR. MCLEOD:
Yeah, I think he's getting a way to look at the damages. I think he's already said it is hard to quantify, but -- but he's offering his opinion on how to quantify it and he's an expert, so he can give that opinion. He's trying to give The Court a way to quantify the damages because like he said they're not zero. They're something. We have to quantify them somehow.
THE COURT:
Mr. Puriefoy, I'm going to overrule your objection. His testimony he has said what assumptions he's making as an expert witness. He can make certain assumptions. His testimony can be impeached on cross-examination and I have to determine the weight of that testimony, but it's very proper for him to discuss the Prudent Investment Rule which is the standard which The Court uses for all fiduciaries. So he is well familiar with this in his line of work. He's testified about his expertise, so

noting your objection I will overrule it.

MR. PURIEFOY:

Thank you, Your Honor.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. All right. You continue, John.

A. Yeah, I should have mentioned at the beginning that I based this on -- on methodology that's been approved in many court cases. It actually has a name. It's called the Yardstick Method of computing losses. And this is what I'm using. It's not something that John Markel made up. This is something that experts like me have been using for decades. It's published in -- the methodology is published in a number of learned treatises. In certain situations maybe the underlying facts are not as black and white as you would like to have them, but that doesn't mean that you can't make an estimate of losses based on reasonable assumptions and that's what the Yardstick Method is all about. It's widely used in such things as intellectual property damages, in commercial damages. It's absolutely not speculative.

Q. Okay. And explain the Yardstick Method a little bit more now that you said that term. Can you explain it one more time?

A. Well, if you take -- you take something -- you make an

assumption as I have about the –- about the composition of this portfolio and then you compare it to a Yardstick metric that's out there in the market. It's not made up. The actual market prices of these securities on a certain date for a certain security.
Q. Okay. And in your explanation can you –- there's a chart on page 42. I think you basically went through it.
A. Correct.
Q. I want to ask you about that.
A. Okay.
Q. So under percentage of total holdings you're detailing the amount that was held in GE stock and that the amount that was held in Elfun; is that true?
A. Yes.
Q. And can you tell me the date of the first block?
A. It's December 31, 2015. That was the date of the statements from Elfun and from General Electric.
Q. Okay.
A. I've got them right off of statements, which of course are part of Exhibit –- Trial Exhibit 2.
Q. Yeah. And where is that shown on Exhibit 2?
A. Okay. Okay. The total figure of $1,321,717.40 is shown on the very first page.
Q. Is that the GE stock?

A. Well, no, it's for both Elfun and GE.
Q. Okay.
A. It's all just right there on the first page.
Q. Okay. And that's Exhibit 2. What is the period for that statement?
A. The entire year of 2015. But this of course is as of one day.
Q. Okay.
A. December 31, 2015.
Q. Okay.
A. And then the statement of course shows transactions during that year.
Q. Okay. And then so below that it shows the Elfun Trust Fund and the GE stock. How much is the Elfun Trust Fund at that point?
A. As of December 31, 2015 it was $279,819.11.
Q. Okay. And, again, how much was the GE stock?
A. $1,041,898.28.
Q. Okay. And I'm back to page 42 of your Report. What is the percentage there between GE stock and the Elfun Mutual Fund?
A. It's 21.17 percent Elfun, 78.83 percent General Electric. The first page of Exhibit 2 has got a far right-hand column. It's very confusing. It says percent of holdings, 100 percent and 100 percent.

That's just wrong. You actually compute the holdings. They would be my percentages on shown on page 42 of my Report.
Q. Okay. And what are the number of shares of Elfun in December 1st, 2015?
A. There were 5,125.831 shares of Elfun.
Q. Okay. And how many shares of GE were there on December 1st?
A. 33,440 -- 33,447.778.
Q. Okay. Then the next column you have 12/30/2016.
A. Right.
Q. On Exhibit 2 where are those amounts shown?
A. Okay. It's not -- it's not directly -- can't you get directly off. You have to do some addition.
Q. Okay. Well, just tell us on your Report based on your review what is the number of shares on 12/30/2016?
A. If you add up -- if you go down to the bottom of the page for Elfun Trust they are listed in three different components. See down at the bottom there's three different account numbers?
Q. Right.
A. You add all those up. The number of shares of the market value equals what I've got in the second chart on page 42 of my Report.
Q. Okay. And if you total up the number of shares on that

Exhibit 2 page two?
A. A total of 1,659.735 shares of Elfun and the market value of as of that day was $88,347.69.
Q. And what is the market value of GE on that day?
A. Okay. For that –- for that you have to go to the next page, which is a UBS statement. Halfway through the year of 2016 the GE stock was transferred from its former resting place at GE Mutual Funds to UBS. And if you look about three-quarters of the way down the page it says common stock. And it's all General Electric, $889,715.20. And that consisted of 28,472 shares. So there have been some liquidating of both these accounts during the year 2016.
Q. And which one was liquidated more?
A. Well, percentage-wise it was Elfun Trust. It went from 5,100 shares to 1,660 shares.
Q. So the more diversified mutual funds were sold; is that correct?
A. Right.
Q. There was more of the Elfun Mutual Funds sold than the GE stock in 2016; is that correct?
A. Well, if you take percentage of the number of shares, yeah.
Q. Okay.
A. That's why the diversification of the portfolio declined

and falling so much.
Q. And at that point in 2016 what was the percentage of total holdings allocation between General Electric and Elfun Trust Mutual Funds?
A. About nine percent Elfun and about 91 percent General Electric.
Q. Okay. And then the next year 12/29/2017 how many shares of Elfun are there now?
A. 166.
Q. Okay. What's the total market value of those holdings?
A. $10,013.
Q. Okay. On 12/29/2017 how many shares of General Electric are there?
A. The same number as at the end of the prior year, 28,472.
Q. Okay. So again the more diversified mutual fund was sold; is that correct?
A. That's correct.
Q. And the General Electric stock was not sold; is that correct?
A. Right. So you had an even more egregious pattern of diversification or lack of diversification.
Q. What is your percentage of total holdings in 2017?
A. About two percent in Elfun and about 98 percent in General Electric.
Q. Is that a diversified portfolio?

A. Absolutely not.
Q. What is the amount of the GE stock in 2017?
A. The dollar amount?
Q. The dollar amount, market value of holdings?
A. $496,836.40.
Q. Okay. And tell me again what was it in 2015?
A. Well, in --
Q. On December 1st, 2015?
A. It was a different number of shares.
Q. Okay. Well, what's the market value of holdings on 2015?
A. $1,041,898.
Q. Okay. What's the market value in 2017 again?
A. $496,836.
Q. Okay. So it went -- nearly got cut in half; is that correct?
A. Right.
Q. Okay. Can you calculate, probably not in your head, you need a calculator, but the difference between 1,041,898.28 minus 496,836.40?
A. (Witness pausing.)
Q. I know you need paper and pen. I'm not going to do that to you, but I think it's 545,061.88. Does that sound right?
A. That should be pretty close.

THE COURT:
Mr. McLeod, I'm going to interrupt right now. I don't how much longer you have but it's getting close to lunchtime or a little past. Do you know how much longer you need this witness before we can break for lunch?
MR. MCLEOD:
It might be a little longer, but I can close out this pretty quickly.
THE COURT:
Okay. Why don't you do that and then we can break for lunch and come back?
MR. MCLEOD:
All right.
THE COURT:
Okay.
MR. MCLEOD:
So I'm just going to hand him an exhibit. This is Discovery Responses.
EXAMINATION RESUMED BY MR. MCLEOD:
Q. All right. John, I'm going to had you Exhibit 20, which we've stipulated to, Discovery Responses.
MR. MCLEOD:
And this has been stipulated into evidence.
THE COURT:
All right. Thank you, sir.

MR. MCLEOD:
And that's Exhibit 20.
(Introduction of previously marked document, Respondent's Responses to Petitioner's First Set of Interrogatories as Petitioner's Exhibit Number 20.)
Q. All right. John, can you read, there's no page numbers on this, but it's number -- these are –- can you tell me what this is first?
A. It's labeled Respondent's Responses to Petitioner's First Set of Interrogatories.
Q. Okay. Can you read number 23, Interrogatory 23?
A. It says, "Describe in detail the reason you kept a large proportion of Florence Mensch's assets in GE stock; provide an explanation why the stock was never sold as it continued to decline; and list all financial advisors, accountants or any other advisor that you sought financial advice from concerning the GE stock or as to Florence Mensch's assets."
Q. And can you please read the response to Interrogatory 23?
A. "Florence Mensch's assets were always in the General Electric Pension Fund. General Electric discontinued controlling pension funds and transferred all of the General Electric funds to the UBS account where UBS had

control over the General Electric Pension Fund. Respondent tried numerous times to sell the General Electric Pension Fund, but was stopped by UBS because he was not Florence Mensch. Respondent called UBS numerous times and produced his Power of Attorney to UBS, but UBS refused to sell the stocks because he was not the listed account holder Florence Mensch Respondent did not seek financial advice from UBS or any other investors because UBS was in charge of the account and Respondent thought UBS would act in a way that was best for the account."

Q. Okay. In your experience does a financial institution prevent you from selling stock?

MR. PURIEFOY:

Objection. Objection, Your Honor, that is speculation. Unless he's able to ask a question as to whether or not Mr. Markel has personal knowledge as to how this particular account was managed his general knowledge about how some accounts are oftentimes run is speculation and cannot be permitted for purposes of this line of testimony.

THE COURT:

You need to lay some foundation as to how he knows this information, Mr. McLeod.

MR. MCLEOD:

Thank you, Your Honor.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. Were you aware that Sterling Mensch had a Power of Attorney?

A. Yes.

Q. Have you ever seen that Power of Attorney?

A. Yes.

Q. Does it contain the power to sell her assets?

A. I don't recall.

Q. You don't recall. Okay.

A. But I could refer to it I mean.

Q. Yeah. I don't have it right off the bat, but let me see.

A. I have a copy in my work papers.

Q. (Counsel looking for Power of Attorney.)

THE COURT:

Mr. McLeod, are you looking for the Power of Attorney?

MR. MCLEOD:

Yes, ma'am.

THE COURT:

I've got one right here.

MR. MCLEOD:

You've got one. Can we refer to that?

THE COURT:

Let Mr. Puriefoy see that. I've got one little paragraph highlighted in the back.

MR. MCLEOD:

Thank you, Your Honor.

MR. PURIEFOY:

Your Honor, before we get too far down this road I just want to ensure –- again to renew my objection insomuch as the Power of Attorney speaks to the ability to sell assets. The question presented was are you familiar with how this particular –-

THE COURT:

Yes. He's got show how he knows –- if you're going to get him to dispute what the Respondent has said in the Interrogatories you've got to show how he knows –- how he knows –- if he is disputing that he's got to show how he knows what UBS can or can't do either based on some accounting principle or some law or some –- you know, some sort of financial regulations or something that would –- he could testify to since that's his area of expertise to say this institution can't refuse someone who has authority to do this based on regulation number so and so, so and so. But I think we all know that the Power of Attorney gives Mr. Sterling Mensch the authority to manage her property in very broad terms. The question here is whether or not the management was done in a prudent fashion. And so if you're going to use this response by the Respondent to question about his management of her portfolio and he's in his response is shifting the –- he is saying it's not my fault. It's UBS. They wouldn't honor the Power of Attorney and they wouldn't let me do and they wouldn't let me do that. And if you're trying to get your expert to say, "Well, no, that's not true," you've got to lay some foundation of how he knows that UBS can't do what Mr. Mensch has said that they would not permit him to do.

MR. MCLEOD:

Okay.

MR. PURIEFOY:

Thank you, Your Honor.

MR. MCLEOD:

Okay. So we don't need to reference it. I think we all know that.

THE COURT:

All right. It's here if you need it.

MR. MCLEOD:

All right.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. On the GE –- can you turn to Exhibit 2? The GE Mutual Funds on the first page. The first page of Exhibit 2.

A. Okay.

Q. Do you know what type of account this GE Mutual Funds account is?

A. I don't know anything other than what's written on this page.

Q. Okay. Is it an ESOP account?

MR. PURIEFOY:

Objection, Your Honor. I believe he just testified he does not know.

THE COURT:

Yeah.

MR. MCLEOD:

Okay.

THE COURT:

Mr. McLeod, try not to lead him.

MR. MCLEOD:

All right.

THE COURT:

If you don't know, Mr. Markel, just say you don't know. That's okay.

MR. MCLEOD:

That's fine.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. But these are the GE Mutual Funds were they were received as a result of Ms. Mensch's husband's employment? Are you aware of that?

A. I don't know.

Q. You don't know. Okay. All right. After your review of the accounts were some of the GE Mutual Funds sold prior to -- at any time? Did he ever sell any of the GE stock, was any of it sold?

A. Well, I think what we just went through a few minutes ago some shares were sold. During 2016 the number of shares declined from 33,000 to 28,000 and something.

Q. So some shares were sold of the GE stocks?

A. Yes.

Q. Okay.

MR. MCLEOD:

Your Honor, it's probably a good time to break if you want.

THE COURT:

Okay. All right. It's about 20 minutes till 2:00 so you want to come back about -- we can either come back at a quarter to 3:00 or 3:00?

MR. PURIEFOY:

That's fine, Your Honor.

THE COURT:

Okay. Let's say a quarter to 3:00. Okay.

MR. MCLEOD:

All right.

THE COURT:

All right. We'll be in recess.

Off the Record: 13:38:18.0

On the Record: 14:58:25.0

THE COURT:

Okay. We'll go back on the record. Mr. Markel, you can step up and you've already been sworn so you're still under oath.

THE WITNESS:

Okay.

THE COURT:

Before we resume with direct examination I want to go ahead for the record rule on the accrued judgment interest issue that was argued earlier in the case. I have reviewed the Dixie Bell case and a string of cases emanating from this case and based on this case I am going to grant the motion of Mr. Puriefoy. Specifically the case says that the Pleadings must be clear and specific to include a claim for pre-judgment interest and it names several other cases and one was Goodson versus Carolina Container Corporation. The Hopkins versus Hopkins case says that if no request for pre-judgment interest, and that was highlighted and bolded, is made in the Pleadings it cannot be recovered on appeal or by a motion for pre-judgment interest post trial. So with that sort of specific language I am going to grant that motion. So any reference to pre-judgment interest either in the testimony or the Report of Mr. Markel won't be considered by The Court.

MR. PURIEFOY:

Thank you, Your Honor.

MR. MCLEOD:

Your Honor, can I just state something?

THE COURT:

Yes.

MR. MCLEOD:

Because I read that same case and it does say right above request for pre-judgment interest must be pled, it says in South Carolina interest may also be awarded in equity cases, conversion cases, and property cases.

THE COURT:

Right.

MR. MCLEOD:

So --

THE COURT:

And you pled like -- you've pled interest in your Pleadings and if you could produce evidence to show interest -- for instance, testimony or evidence to show that interest that the funds were earning at the time they were removed by Mr. Mensch, but the way I read this case is if you want to collect pre-judgment interest it has to be in your Pleadings and it has to say pre-judgment interest.

MR. MCLEOD:
Even if you define it basically? And I basically defined it. I said interest at the time -- the exact words it seems like are even clearer than just stating pre-judgment. So I'm basically defining it.
THE COURT:
All I read -- all I referred to was the section in your Pleadings that you pointed out where it talks about including interest and appreciation I think was the phrase you used.
MR. MCLEOD:
Well, can I read it for you one more time?
THE COURT:
You sure can. I don't want to -- I'm -- I want to hear what you have to say. I just thought you had made all your arguments before.
MR. MCLEOD:
Yeah, I haven't seen that case or had a motion before so I went during lunch and just researched and pulled a case noticed that.
THE COURT:
Okay.
MR. MCLEOD:
So I thought that took care of the contract issue because we were kind of saying it was only a contract

issue, but the statute basically says any amount. Let me see. It has a statute.

THE COURT:

Well, while you're looking for it the way I read it's is it's sort of two different requirements. One is it has to be pled and the other is it has to be a sum certain. And a sum certain doesn't mean that it can't be contested. It just means that it has to be able to be reduced to a sum certain and at a time when it was either payable upon demand or payable by operation of law. I don't think I get to that because I'm stopping at the fact that it wasn't pled. And the case also draws the distinction between liquidated and unliquidated claims, which again I don't think I have to rule upon that because the way I'm reading this is pre-judgment interest has to be pled and if you have a different case or something that –- or something that tells me in your Pleadings that you –- yes, sir.

THE DEPUTY:

The alarms are going off.

THE COURT:

Okay. Does that mean we have to –- are we closing building?

THE DEPUTY:

I'll have to see what the alarm is but they are going off outside.

THE COURT:

Okay. We'll go off the record until you get back and let us know. Okay.

Off the Record: 15:03:39.6

On the Record: 15:30:07.0

THE COURT:

All right. We'll go back on the record. Mr. McLeod.

MR. MCLEOD:

Yes, Your Honor. The case Hurst verse Sumter that was actually part of my Motion in Limine and it basically says that you can define –- you can either plead it or you can state facts which define instead of actually pleading the exact words. I think my Number 70 says that, "Petitioner's request to The Court order Sterling Mensch to restore the value of the principal's property to what it would have been had the violations not occurred pursuant to Section 62-8-117 of the South Carolina Probate Code including any interest and appreciation that should have accrued from the date –- or from the time of the violation." When I was writing that I was literally thinking from the time. So each one of these transfers interest should accrue from that time. I was thinking of pre-judgment interest and basically defined it. It doesn't say the word pre-judgment interest, but that's exactly what I intended and I think that's how I read it. And I think in light of Rule 8(a) and how Pleadings should be liberally construed and, you know, substance over form, I think you could read very easily that that's exactly what it says. Interest from the time of the violation. So each payment that was or each transaction, you know, from that time when it hit Sterling's account that's when you would calculate the interest. That's exactly what I intended when I filed the Complaint. And the statute on it is very clear as well if I can find it again. It's Section 34-31-20, Legal Rate of Interest. "In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum. A money decree or judgment of a court enrolled or entered must draw interest according to law. The legal rate of interest is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually." It says in all cases of accounts stated and all cases wherein any sum or sums of money shall be ascertained. And, again, Your Honor, this Hurst case that I can pass up to you if you'd like. And, again, and also this was included in John Markel's Report so it's not like this was surprise and we argued it at the Summary Judgment Hearing and there was no objection then that I can recall. I have the transcript but I don't recall an objection to it then. So that was in March I believe. We filed this in February. It's now August so there is no surprise. There is no prejudice to Respondent. They've known about the whole –- they had plenty of time to prepare their argument against pre-judgment interest. So I think there's cases that also say that, you know, the goal of excluding it would be if there was some prejudice to the Respondent.

THE COURT:

Okay.

MR. MCLEOD:

They've had six months since John Markel's Report, which included pre-judgment interest just like it does today.

THE COURT:

Well, I understand the argument and it may be that I think the way I read this case the best –- the best that I can do is –- what I'm struggling with is to make a final ruling on this perhaps –- I don't know what the outcome of the case is going to be or what the ruling is going to be. We don't even know if there's going to be a judgment. There could be, there couldn't be. We don't know. It's going to be something, you know. And so maybe having that in hand would help determine this question. I'm not sure about that. But this Dixie Bell case is so specific as to the requirement of pleading this that my -- I mean I --

MR. MCLEOD:

Can I pass Hurst verse Sumter to you?

THE COURT:

You sure can.

MR. MCLEOD:

Okay.

THE COURT:

And this Dixie Bell case goes through the whole history of pre-judgment interest and how it was always very severely limited and then it got more liberalized until then now we have statute that governs. If I'm -- I think we had a Petition -- your Petition was filed. You had an original Petition and you amended your Petition at least once, maybe twice. I can't remember. And I'm thinking from if I'm the Respondent and I get served Pleadings and it says that I'm asking for interest and appreciation, Mr. Puriefoy filed kind of general denial to everything. Is he on notice through your Pleading at that point when you filed that Pleading that the interest you're asking for is pre-judgment interest? You intended it to be that, but is he on notice if it's that if you don't specifically say you're demanding pre-judgment interest? And is –- the Dixie Bell case if you read it the way the plain language is you must specifically plead it. Like request for pre-judgment interest must be pled. Triple Crown and its principals claimed the trial court erred in awarding Dixie Bell pre-judgment interest on the jury verdict because Dixie Bell did not request pre-judgment interest in its Pleadings. And then it quotes the Town of Bennettsville's case. The Supreme Court found pre-judgment interest should not be included in the judgment because it was not pled in the Complaint or prayer. And then Hurst. Let's see. Hurst was when? A '39 case. This case was 2007, Dixie Bell. Let's see. Is this Hurst about pre-judgment interest?

MR. MCLEOD:

It's about pleading –-

THE COURT:

Or is just about interest?

MR. MCLEOD:

It's about pleading.

THE COURT:

Okay.

MR. MCLEOD:
I think it was about pleading actually offset because it was part of my Motion in Limine and it talks about you can either plead it directly or you can just include enough facts to describe it.
THE COURT:
Well, there is a rule, I think it's Rule 8 under the Rules of Civil Procedure that if you try a case and nobody objects and evidence is admitted on a Cause of Action not pled you can make a motion to make your Pleadings conform to the evidence. But Mr. Puriefoy has objected to anything, any testimony about pre-judgment interest. Well, I don't want to spend all afternoon doing this.
MR. MCLEOD:
Your Honor, can I state my motion for my Pleadings to conform to the evidence based on how we basically we had in Summary Judgment it was a part of that? I argued it in that. There was no objection.
MR. PURIEFOY:
Well, Your Honor, I will take issue with that. As The Court knows the discovery –- the Summary Judgment case is not the trial case. And at the time of the Summary Judgment This Court is permitted to consider evidence that would not otherwise be admissible at a trial

including hearsay evidence. And, therefore, no objections were made to the introduce of that evidence at the Summary Judgment phrase because it was would have been improper. We did not waive our objection to introduce that evidence at the trial simply by failing to raise that objection at the Summary Judgment phase. Again, I believe the Petitioners are relying on discovery to disclose their intent to attempt to recover pre-judgment interest as opposed to the plain language of not only the Dixie Bell case, but also Rule 9 of the Rules of Civil Procedure which it specifically states special damages –- excuse me, that pre-judgment interest has to be pled with specificity and I think that is so important. Mr. McLeod has indicated on a number of occasions that it was his subjective intent for that to be pre-judgment interest, the interest that he made reference to. But Dixie Bell says very clearly it must be pled specifically for this exact reason so when we're at trial we're not debating about whether or not this comes as a surprise to the Respondent. There are certainly additional defenses that would have been raised had it been part of the Pleadings, but I don't have to form my answer to discovery that is being produced throughout the case, Your Honor.

MR. MCLEOD:

Your Honor, he denied it –- he denied it in his Answers. I mean how else would he have answered his –- answered that.

THE COURT:

Did his answer deny and raise –- did he deny that you're entitled to pre-judgment interest?

MR. MCLEOD:

I think he just denied that paragraph 7.

THE COURT:

Right. I think the point is that pre-judgment interest is separate and apart from general interest like compound interest or the appreciation of property. So I'm not sure how Hurst can help me with this. The other thing is even if you ignore the fact that it says you have to specifically plead this then you get to is this liquidated or unliquidated damages. And that would be the next hurdle and this is clearly one that the damages is the whole reason we're having this trial as to determine exactly what the Estate –- how the Estate has been harmed. So I don't –- I think clearly the first threshold you have to meet is the pleading part of this. So I noted your objection, Mr. McLeod, but that's my ruling on the pre-judgment interest and so with that you can continue your examination of Mr. Markel.

MR. MCLEOD:

All right. At I'm going to hand you what's been stipulated as Exhibit 3.

THE COURT:

Okay.

(Introduction of previously marked document, Notebook of Bank of America Statements as Petitioner's Exhibit Number 3.)

EXAMINATION RESUMED BY MR. MCLEOD:

Q. All right. This is Exhibit 3. This is the Bank of America Statements produced pursuant to Judge Jennings Order dated September 30th, 2020 and produced by Respondent on January 1st, 2021.

THE COURT:

Are you introducing that entire notebook? Okay.

MR. MCLEOD:

Yes, I would like to introduce this entire notebook as Exhibit 3.

THE COURT:

And that's been previously stipulated on; is that correct?

MR. PURIEFOY:

It has, Your Honor.

THE COURT:

Okay.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. John, have you seen this notebook before?
A. No.
Q. Have you seen the contents of the notebook before? Have you reviewed the contents of it? Take a few minutes and review it, please.
A. (Witness reviewing exhibit.) It appears to be copies of bank statements from Bank of America.
Q. And whose Bank of America account is this?
A. Let's see 3259. It looks like it's all 3259, which is Sterling's account.
Q. Okay. And are there certain highlighted items in the bank statements?
A. Yes.
Q. Does that refresh your recollection on what this is?
A. Yes.
Q. Okay. And what is it?
A. It looks like it's bank statements from account number 3259 from -- I've only seen these in an online version so it looks a little different.
Q. Yeah.
A. From August of 2013 all the way up to December of 2018.
Q. And are there certain highlighted items in the statements?
A. Yes.
Q. And is there a key in the front of yours? Do you see a

key?
A. These are the yellow and purple highlighted items.
Q. Okay.
A. But I don't remember which –- I guess yellow refers to the house and purple refers to payments for the care of Florence Mensch.
Q. There is a key I think in the very front. It should be.
A. Well, I remember the key, but I don't see a key here, but I remember there were yellow and purple highlights and just by the content of the yellow highlighted items they relate to the house and by the content of the purple highlighted items they refer to the care of Florence Mensch.
Q. Okay. Well, that's correct. The key should be in the very front. That's the actual one that was produced by them.
A. Okay.
Q. There you go. It looks like this. Turn to the first page.
A. Well, this is the first page.
Q. Well, I'll hand you the key that was produced.
A. Okay.
Q. Can you read that?
A. (Witness reviewing exhibit.)
Q. Can you read it out loud for me?

A. Okay. "Account transactions that were used for the care of and costs associated with the death of Florence P. Mensch are highlighted in the bank statement with a purple highlight. In addition the funds associated with 512 New Tarleton Way are also noted. In such cases where funds were used for the property they are highlighted with a yellow highlight."
Q. Okay. And in your Report I think you referenced these bank statements in the highlighted portions?
A. Yes.
Q. I'm looking for the number. (Counsel reviewing documents.) Okay. Number 23 and 24.
A. Okay.
Q. Can you read 23 and 24 for me?
A. "January 13, 2021 I was contacted by Tyler McLeod, legal counsel for the Petitioners in this case. Mr. McLeod informed me that in response to Court Orders Sterling Mensch, III had recently produced a notebook containing copies of bank statements for his bank account –- Bank of America account number 3259. The bank statements cover the time frame August 2013 to through October 2018. Mr. McLeod provided me with digital copies of the notebook contents and asked me to scrutinize them." Upon reviewing –- number 24. "Upon reviewing the notebook contents I noted that on his bank statements

for the August 2013 through October of 2018 time frame Sterling Mensch, III had highlighted certain cash disbursement line items. Sterling Mensch, III alleges that those highlighted line items represent disbursements that were made from his bank account for the benefit of his mother, Florence Mensch. He alleges that the highlighted line items fall under two general categories. A, disbursements made for the physical care of Ms. Mensch and B, disbursements made to maintain Ms. Mensch's real estate located at 512 New Tarleton Way in Greer, South Carolina. In highlighting the bank statements line items Sterling Mensch used a color-coded system. He alleges that line items highlighted in purple represent disbursements made for the physical care of Ms. Mensch. While line items highlighted in yellow represent real estate related disbursements."

Q. Okay. I believe it continues on 25 and 26 you detail the amounts that you found in each of those?

A. Yes.

Q. Okay. Can you please read that?

A. Okay. Number 25. "As a first alternative approach to quantifying the Estate's net losses from the misappropriations. Despite the lack of supporting documentation submitted to date by Sterling Mensch, III. Mr. McLeod asked me to consider the underlying character of several line items in the statements of his Bank of America account number 3259."

Q. Okay. Can you read 26?

A. Okay. Number 26. "To that end I scrutinized all available Bank of America account number 3259 bank statements which encompassed the time frame June 2012 through December 2019 and identified 15 cash disbursements totaling $3,984. Because the payee and the associated dollar amount were obviously directly linked to Ms. Mensch's care and maintenance I also computed pre-judgment interest associated with the 15 line items. That was $1,970. Appendix L shows in detail the 15 line items and the computation of the pre-judgment interest so that they may be considered as potential credits to the monetary losses suffered by the Estate."

Q. All right. And then 27.

A. "Also in regard to item number 25 preceding I made certain assumptions as follows: A, there were 61 separate cash disbursements adjusted to eliminate late charges and totaling $100,674 to Park Sterling Bank made from the Bank of America account number 3259 of Sterling Mensch, III during the time frame June 2012 through April 2018 be considered as credits to the imputed rent for the 512 New Tarleton Way house. B, there are 16 separate cash disbursements adjusted to eliminate late charges in total $26,090 to South State Bank made from the Bank of America account 3259 by Sterling Mensch, III during the time frame June 2018 through November 2019 be considered as credits to the imputed rent for the 512 New Tarleton Way house. C, six separate cash disbursements were adjusted to eliminate late charges in total $40,508 for Greenville County property tax paid from Bank of America account 3259 of Sterling Mensch, III during the time frame February 2014 through April 2019 be considered as credits to the imputed rent for the 512 New Tarleton Way house. Computation of the potential credits and the associated credits to pre-judgment interest are shown at Appendix M. Under the first alternative approach quantifying the Estate's net losses from the misappropriations my findings for losses and pre-judgment interest are summarized in Appendix K. Note that Rows 1 through 5 of Appendix K are identical to Rows 1 through 5 in Appendix D. For the explanation of the content of Rows 1 through 5 of Appendix K please refer to paragraph 17 through 21 preceding. Also note that Row 7 of Appendix K is identical to Row 7 of Appendix D. For an explanation of the content of Row 7 on Appendix K please refer to paragraph 22 preceding."

Q. All right. Thank you. And when you reviewed these

statements were you able to discern for the highlighted items which ones were for the benefit for Florence Mensch? I think you mentioned the dollar amount.
A. That goes back to my paragraph 26 where I found that 15 line items totaling $3,984 appeared to be for the care of Florence Mensch.
Q. And as to the other items he highlighted what was the issue? Why couldn't you determine whose benefit they were for?
A. Because they were disbursements to Home Depot, CVS, Publix. They were such a generic nature and there was no description provided of what was purchased it could have been for just about anything. There was no compelling evidence that told me that they were for the care of Florence Mensch or not. Therefore, I couldn't include them. That would be speculating.
Q. In these -- in the contents of this notebook were there any receipts at all?
A. Not any that I saw.
Q. Can you turn to -- let's see. And this is in Exhibit 3, which is the notebook that Sterling Mensch produced, can you turn to the April 2015 statement?
A. Okay.
Q. And can you turn to the second page of that statement? It's identified with a Bates number Mensch 02579 and

there are two highlighted items in yellow.
A. I'm not --
Q. Oh, you're not there. Okay.
A. I don't see -- I don't see a Bates number.
Q. Okay.
A. We're referring to?
Q. The April 17th, 2015 statement.
A. Okay. I found that.
Q. Okay. And then the second page of that statement.
A. Okay. Under Withdrawals and Other Subtractions?
Q. Yeah.
A. Okay. There's two line items at the bottom of the page. The first is a disbursement to Home Depot on April 18, 2015 for $22.14. And one below that, a disbursement to Classic Ace HA. I assume that's Ace Hardware on April 18, 2015 in the amount of $42.29.
Q. Okay. And can you turn to the next page?
A. Okay. There's four line items at the top of the page highlighted in yellow. And they are following the same pattern. They are just disbursements to Classic Ace -- Ace Hardware and Home Depot.
Q. Okay. And there's two highlighted in purple and we said purple was for the care of Florence Mensch; is that correct?
A. Right. And the first -- the first one is a disbursement

to Bi-Lo Grocery on April 18 in the amount of $28.94 and the second one is WM SuperC Wall- on April 19 for $42.51.

Q. Okay. So out of that little sample of transactions is that fairly consistent throughout?

A. There were a lot like that. They were just unidentifiable missing transactions. It could have been for -- the yellow items could have been for the house. They could have been for bird seed, or tools, or whatever else of the thousands of things they sell at Ace Hardware and Home Depot. And the same with Bi-Lo Grocery 28.94. That could have been anything. We don't know whether it was --

Q. Can you turn to page 5 of 10 of that same statement?

A. Yes.

Q. All right. Do you see 5/4/15 Bi-Lo Grocery? It's not highlighted.

A. 5/14 Bi-Lo Grocery.

Q. It's actually 5/4/15. Do you see the date?

A. Yeah, a lot of purple. Okay.

Q. There's a lot on 5/4 but --

A. May 4.

Q. The Bi-Lo Grocery one.

A. Right.

Q. And it's?

A. 61.84.
Q. Yeah. Is that one highlighted?
A. No.
Q. Okay. Is there any difference between the one –- the Bi-Lo that was highlighted and that Bi-Lo to whether you can tell whether it's for Ms. Mensch or for Sterling?
A. No, there's nothing. I mean it gives the date and what's apparently a receipt number, and the store number, and the location of the store, but it doesn't provide any description of what was purchased.
Q. Can you go to May 17th, 2017?
A. (Witness reviewing exhibit.) Okay. I'm at May 17, 2017.
Q. Okay.
A. And there are no highlighted items on this page.
Q. On the page 4 of 8 there's one highlighted item. Do you see the line in yellow?
A. On May 30?
Q. Yeah, May 30, '17.
A. Right. Well, $471.70 paid to Lowe's Number 667 in Greer, South Carolina.
Q. Okay. Can you read the next six or seven below that row? Read 5/31/17 for me.
A. 5/31/17.
Q. The date. Yeah.

A. The first is --
Q. Well, yeah, there's actually a bunch of them. There's one to Lowe's.
A. Right. It's to Lowe's, the same Lowe's Store 667 on May 31 of 25.42, but it's not highlighted.
Q. And how about the next two to Home Depot?
A. The next two are to Home Depot. One for 16.23 and the other for 162.81, but they're not identified as to what was purchased.
Q. How about on 6/5/17? Can you read that line? There's actually four on that line. The one that's to Smith & James.
A. Smith & James number 1?
Q. Yeah.
A. $583.
Q. All right. How about 6/2/17 Ruth's Chris?
A. (Witness reviewing exhibit.)
Q. Do you see that one? Right above it. It's about three above it.
A. Okay. May 31 charges made to Ruth's Chris Greenville?
Q. Yep.
A. For $140.
Q. All right. And then a couple below 6/5/17 Sobo's? Right above Smith & James. Well, actually right in between the two Smith & James.

A. So Soby's on June 3, 2017 $389.
Q. I think that's actually June 5.
A. Well, there's -- it cleared the bank on June 5th. The charge was made on June 3rd.
Q. Okay. Okay. How about go to page 5 of 8. And go to 6/12/17.
A. Okay. Which one?
Q. Okay. Let's see. The Ruth's Chris one. See the second one from the top.
A. Oh, okay. On June 10, 2017 a charge was made to Ruth's Chris Greenville $121.
Q. All right. How about 6/15/17 Hals Chophouse? It's right above Spinx and Patio Imports.
A. Right. Charge made on June 14, 2017 Hals Chophouse Greenville $204.
Q. Can you go to June 17th, 2017?
A. I don't see anything for June 17th. Oh, I see the account starts on June 17, but I don't see any charges on June 17.
Q. Can you go -- are you on page 4, 4 of 8?
A. Yeah, the bank statement goes from June 17 to July 17 of 2017.
Q. Okay. Can you read 6/19/17 Bank of America withdrawal at the very top?
A. Right. Bank of America ATM withdrawal at Bay Colony in

Ft. Lauderdale, Florida $500.
Q. Okay. Can you go to July 18th, 2017 to August 17th, 2017?
A. Okay.
Q. Okay. Go to page 3 of that statement.
A. Okay.
Q. All right. Can you read the first five entries starting 7//20/17 to 7/24/17?
A. The first one is $100 at Ruth's Chris Greenville. The second is to Rick Erwin's Eastside Greenville $153. The third one is a withdrawal at Thornblade $403. The next one is Chophouse 47 $58. And the next one is Rivera's Greer, South Carolina $199.
Q. I'm going to take you back a little bit, but I'm not going to go too many more, but January 18, 2017 to February 13, 2017.
A. Okay.
Q. All right. So you're on page 1. Flip to page -- let's see. We'll start with 3, 3 of 10.
A. Okay.
Q. The next page. Can you read January 23rd, '17 the Wells Fargo?
A. Wells Fargo Bank withdrawal, Thornblade $1,003.
Q. Can you read 1/23/17, Rick Erwin's?
A. Rick Erwin's Westend, Greenville $1,300.

Q. That's one thousand, three hundred; is that right?
A. Right.
Q. Can you turn to page 4 of 10? On January 25th, '17 Greenville Matchmakers. Can you read that line and tell me the amount?
A. Greenville Matchmakers, Greenville, South Carolina $8,000.
Q. Okay. Can you go down to 1/30/17, Bogari, LLC?
A. Bogari ,LLC, Greenville, South Carolina $1,454.32.
Q. Go to 2/2/17 Madi Boutique, Greer.
A. Madi Boutique, Greer, $382.66,
Q. And right above that on 2/1/17 Greenville County Tax?
A. Greenville County Tax, Greenville, South Carolina $449.98.
Q. Is that highlighted?
A. No.
Q. Let's go to October 18, 2018.
A. Okay.
Q. On the first page there, page 1 of 8, October 18th, 2018 to November 15th, 2018. What is the ending balance on November 15th, 2018?
A. $4,318.42.
Q. And is this the account the 820,000 has been transferred into?
A. Yes.

Q. And you said earlier that Ms. Mensch's care was mostly covered by her Social Security; is that right?
A. That's my understanding.
Q. And her account 7059 did you see a lot of expenses paid directly to the assisted living that she was at?
A. I'd have to look at the record. It would have to be because I don't -- I haven't seen many in Sterling's account. (Witness reviewing exhibit.)

MR. MCLEOD:
This has been stipulated as Exhibit 7.

(Discussion between Counsel McLeod and Counsel Puriefoy.)

MR. MCLEOD:
I have one of you, Your Honor.

THE COURT:
Thank you.

MR. MCLEOD:
Judge, I'd like to submit this as Exhibit 7 into evidence. It's been stipulated.

THE COURT:
All right. Do you need to keep that one or do you have a copy for me?

MR. MCLEOD:
I think I am missing one copy?

THE COURT:
That's okay. Go ahead.

MR. MCLEOD:
I'll hand it to.
(Introduction of previously marked document,
Copies of Checks as
Petitioner's Exhibit Number 7.)
EXAMINATION RESUMED BY MR. MCLEOD:
Q. And can you identify this Exhibit 7 for me?
A. (Witness reviewing exhibit.) The first?
Q. The first page of it.
A. The first page of it is a check written to Rolling Green Village on February 5, 2013 in the amount of $5,160 out of Florence Mensch's 7059 Bank of America account.
MR. MCLEOD:
I'm sorry, Judge. An emergency alert.
THE COURT:
Is that another one?
MR. MCLEOD:
I don't know if that was for one from earlier.
MS. THOMASON:
There is another one.
MR. MCLEOD:
Sometimes when you turn your watch on it's like whatever happened before might –- because I just pressed it to see a time. We should be okay.
THE COURT:

Okay. You go ahead and maybe the Deputy will find out.
MR. MCLEOD:
All right.
EXAMINATION RESUMED BY MR. MCLEOD?
Q. So you said this is from Florence Mensch's account; correct?
A. Right.
Q. And it's a check to Rolling Green Village; correct?
A. Right.
Q. Which is –- is that where she was residing in 2013?
A. I don't –- I assume so. He certainly paid the rent that month.
Q. Okay.
A. But I don't have any direct knowledge of that.
Q. All right. Well, you can turn to page 2 and tell me what that is?
A. Okay. It's a check written a month later on March 4, 2013 for $2,580.
Q. Is that –- sorry.
A. Out of her 7059 account.
Q. Okay. And the third page?
A. It's a check written on April 4, 2013 for the same amount, $2580.
Q. Okay. And how about the next page?
A. The next one May 14, 2013 $2,580 to Rolling Green

Village.
Q. Okay.
A. The next one June 7, 2013 the same amount, $2,580 to Rolling Green Village.
Q. And the next one?
A. The next one is July 5, 2013 to Rolling Green Village $2,580.
Q. Okay. Can you flip to the Bank of America statement for ending balance on October 6, 2015? It's identified at the bottom of Exhibit 4, page 725. It's actually a part of this Exhibit 7.
A. Right. I see it.
Q. Okay. On the next page identified as page 4 of 8 at the bottom.
A. Yes.
Q. It's 9/9/15. Can you read that for us?
A. 9/9/15 Royal Senior Care, DES, Greenville, IDF Mensch $4,555.
Q. Okay. And right below that what are those two entries below?
A. Those are two transfers out of her account and into Sterling Mensch's account 3259. The first one September 18 was $2,000. The second on September 23rd for $3,349.39.
Q. Okay. Can you flip a couple of pages over to the ending

balance November 3rd, 2015?
A. Yes.
Q. On that second page, page 4 of 8.
A. Yes.
Q. The entry on 10/14 -- or could you just read all four, all those entries under Other Subtractions?
A. Okay. The first on October 13, 2015. It was an online banking transfer to Sterling's account 3259 in the amount of $904.56. Then there was -- this first one on October 14, 2015 to Royal Senior Care for $4,515. Then on October 16 there was a transfer to Sterling's account 3259 for $2,485. And another one on October 19, 2015 for $3,000. And another transfer to Sterling's account 3259 on October 29, 2015 for $2,000.
Q. And it continues on the next page, Exhibit 4, page 7772. Can you read those for me?
A. Okay. The first item dated November 9, 2015 a transfer to Sterling's account 3259 for $2,904.27. The next is a disbursement on November 10, 2015 to Royal Senior Care for $4,515. And then next five items are transfers to Sterling's account number 3259 in the amounts of $3,485, $2,000, $1,000, $9,000, and $2,916.77.
Q. Okay. The next page under Other Subtractions can you read those?
A. There was a disbursement to Royal Senior Care for

$4,515.
Q. What's the date of that one?
A. December 10, 2015.
Q. Okay.
A. And the next one was on December 14. It was a transfer to Sterling's account 3259 in the amount of $4,167.27. The next one was on December 21. Another transfer to Sterling's account 3259 in the amount of $10,000. The next transaction was a cash withdrawal in the amount of $800. And then the next one was again on December 21 a transfer to Sterling's account 3259 in the amount of $2,200.
Q. And then it continues on the next page. Can you read those for me?
A. Okay. On January 8, 2016 there was a transfer to Sterling's account 3259 in the amount of $5,284.88. The next one was a disbursement on January 8, 2016 to Royal Senior Care for $4,535. And then the next was on January 15, 2016 a transfer to Sterling's account 3259 in the amount of $3,000. And, again, on January 19 another transfer to Sterling's account 3259 in the amount of $4,000.
Q. Okay. And it continues on the next page.
A. Okay. On February 5, 2016 online banking transfer to Sterling's account number 3259 in the amount of

$6,819.13. The next disbursement on February 9, 2016 to Royal Senior Care in the amount of $4,550. Then we have the next four items are transfers to Sterling's account 3259 on February 10, February 18, February 22, and March 7 and they were in the amounts of, in order, $2,450, $3,000, $14,000, and $4,000. And the last disbursement was on March 8, 2016 to Royal Senior Care in the amount $4,515.

Q. Okay. And can you go to page 4 of 6, Exhibit 4, page 870 under Other Subtractions.

A. Okay. The first three are transfers to Sterling's account 3259 on March 14, March 24 and April 5, 2016 in the amounts, in order, of $9,849.26, $4,200, and $5,618.55. Then the last is a disbursement on April 6th, 2016 of $4,650 to Royal Senior Care.

Q. Okay. It continues on the next page.

A. On May 6, 2016 there was a transfer to Sterling's account 3259 in the amount of $3,819.03. Then on May 10, 2016 a disbursement to Royal Senior Care in the amount of $4,650. $4,650. Then there were three transfers to Sterling's account 3259. Two on May 23 and one on May 26 in the amounts of $2,350, $1,000, and $4,000. And then June 7, 2016 a disbursement to Royal Senior Care in the amount of $4,650.

Q. Okay. It continues on page 4 of 8. It's Exhibit 4,

page 960, but it's still in Exhibit 7.
A. Okay. A disbursement on July 7, 2016 to Royal Senior Care in the amount of $4,685. Followed by three transfers to Sterling's account 3259 on July 11, July 25, and August 4 in the amounts $2,315.78, $2,000, and the last one for $75,000.
Q. What was the date of that last one?
A. August 4, 2016.
Q. And that was for $75,000; is that right?
A. $75,000.
Q. Okay. And the next page it's got a Bates Number Exhibit 4, page 97. Ending balance on September 7, 2016. What's the balance?
A. $12,988.41.
Q. Okay. And there's some transfers on the next page, Exhibit 4, 988. Can you read those first two?
A. Okay. This is under Deposits?
Q. Under Deposits and Other Additions.
A. Okay. On August 29, 2016 there was a transfer into Florence's account 7059 from Sterling's account number 3259 in the amount of $7,000.
Q. Okay. Read 9/1/16 for me.
A. General Electric Pension in the amount of $1,414.55. And on September 2nd, 2016 a Social Security check in the amount of $1,404.

Q. Okay. And under Other Subtractions 8/10/16 Royal Senior Care?
A. Royal Senior Care on August 10, 2016 in the amount of $4,450.
Q. And then on the next page 9/12/16?
A. A payment to Royal Senior Care on September 12, 2016 in the amount of $4,670.
Q. And then Deposits and Other Additions on 10/3/16, those two entries. Can you read those for me?
A. Okay. At the top of the page General Election Pension $1,414.55. Social Security on the same day, October 3, 2016 of $1,404.
Q. On Exhibit 4 page 1030 can you read the Other Subtractions 10/12/16?
A. A payment to Royal Senior Care of $4,725.
Q. Can you read Deposits and Other Additions on that 10/13/16, the first entry?
A. Right. It's a wire transfer origin US Bank NA, in the amount of $82,440.90.
Q. And the two entries below that?
A. General Electric Pension on November 1, 2016 in the amount of $1,414.55. And Social Security payment on November 3, 2016 of $1,404.
Q. And then below that the Other Subtractions, can you read those?

A. (Witness pausing.)
Q. You can just do the 11/8/16, starting there.
A. You're talking on the next page?
Q. Yeah, the next page.
A. $1,056?
Q. $1,056 at the bottom.
A. Okay. There's a payment to Royal Senior Care on November 8, 2016 for $4,650. And then the next item is a transfer to Sterling's account 3259 in the amount of $5,025.25. And then the last item is on December 6, 2016 payment to Royal Senior Care in the amount of $4,685.
Q. Okay. So then on 1106 under Other Subtractions?
A. On the next page?
Q. On the next page, 1106 at the bottom.
A. This is on page 1156?
Q. It should be Exhibit 4 at the bottom page 1106.
A. Okay. Okay. What was the date again?
Q. 1/9/17 Other Subtractions?
A. Okay. On January 9, 2017 a payment was made to Royal Senior Care of $4,745. The next and last four items are payments –- were transfers to Sterling's account 3259 on January 17, January 24, January 30, and again on January 30. And those amounts, in order, were $7,414.30, $11,000, $5,000 and $2,000.

Q. And it continues on the next page 1126 under Other Subtractions?
A. Okay. There was a transfer on February 6, 2017 to Sterling's account 3259 in the amount of $1,637.42. Then a payment on February 7, 2017 to Royal Senior Care in the amount of $4,678. Then that was followed by transfers on February 8, 2017 and February 21, 2017, both to Sterling's account 3259 in the amounts of $12,996.03 and $4,925.69. Then the last item is -- was on March 7, 2017, a payment to Royal Senior Care in the amount of $4,824.
THE COURT:
You've got five minutes, Mr. McLeod till we have to -- they close the building at 5:00.
Q. Does it appear from these statements that her assisted living facility charges were being paid from Ms. Mensch's account? I thought there were a number of them.
A. Yes, a number of them.
Q. Over a number of years?
A. Yes.
Q. Okay. And does it appear that the General Electric Pension Fund is coming into her account?
A. Yes.
Q. And she's receiving Social Security?

A. Right And I was incorrect earlier when I said that those two things covered her –- her memory care. At least during this time frame it was insufficient by close to $2,000 per month.
Q. Okay. (Counsel reviewing documents.)
MR. MCLEOD:
All right. Your Honor, I'm pretty close to being done with Mr. Markel's questions. Let me check. (Counsel reviewing documents.)
Q. And, John, can you go to your Appendix N of your Report now?
A. Okay.
Q. Can you quickly summarize again what each line item, Row 1 through 8 are? You don't need to go over pre-judgment interest. Just that under losses.
A. You mean you just want me to read the numbers into the record?
Q. Yeah.
A. Okay. For Row Number 1 the losses were $820,382. For Row 2 the losses were $163,420. For line –- for Row 3 the losses were $13,820. For Row 4 the losses were $24,559. For Row 5 the losses were $40,314. Subtotal at Row 6 is $1,062,495. Row 7 the loss was $400,000. And then Row 8 represents total losses, not including any pre-judgment interest, of $1,462,495.

Q. All right.

MR. MCLEOD:

I think that's all I have, Your Honor.

THE COURT:

We will start back in the morning. What time is your hearing in Anderson? I forgot.

MR. PURIEFOY:

Your Honor, it's at 2:00.

THE COURT:

At 2:00. Okay.

MR. PURIEFOY:

So I anticipate being able to complete at least Mr. Markel's cross-examination way before I would have to leave for that. And I believe Ms. Thomason will be handling the remainder of the case.

THE COURT:

Okay.

MR. PURIEFOY:

I'll be here.

THE COURT:

Okay. We will break and be recessed until in the morning at 9:00. Thank you.

Hearing Recessed at 16:59:48.8.

CERTIFICATE OF REPORTER

I, RACHEL H. WOOD, a Notary Public in and for the State of South Carolina, do hereby certify that the foregoing hearing was taken before me on the date and at the time and location stated on page 1 of this transcript.

That the witnesses was duly sworn to testify to the truth, the whole truth, and nothing but the truth.

That I am not related to nor the employee of any of the parties hereto, nor related to or employed by any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

____

Rachel H. Wood, Reporter
Notary Public for South Carolina
Commission Expires: 02/13/2029