24294

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Doyet A. Early, III Circuit Court Judge
The Honorable L. Casey Manning, Circuit Court Judge

Appellate Case No.: 2017-001899

RUSSELL L. BAUKNIGHT, as Trustee of The James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. II; Daryl J. Brown, individually and on behalf of his minor child, Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. And Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

And

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. II; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown, Respondents.

v.

Adele J. Pope, and Robert L. Buchanan, Jr., Defendants,

Of whom Adele J. Pope is Appellant.

RECORD ON APPEAL

VOLUME I OF V

W. H. Bundy, Jr. M. Brent McDonald Bundy McDonald, LLC 1516 Old Trolley Road, 2nd Floor Summerville, South Carolina 29485 888-552-1559 walter@bundymcdonald.com brent@bundymcdonald.com and Adam T. Silvernail Law Office of Adam Silvernail, LLC Post Office Box 7995 Columbia, South Carolina 29202 Telephone: (803) 779-1770 adam@silvernaillawfirm.com **ATTORNEYS FOR APPELLANT ADELE J. POPE**	Kenneth B. Wingate, Esquire Mark V. Gende, Esquire Sweeny, Wingate & Barrow, P.A. 1515 Lady Street Columbia, SC 29201 **ATTORNEYS FOR RESPONDENTS**
ALAN WILSON Attorney General ROBERT D. COOK Solicitor General J. EMORY SMITH, JR. Deputy Solicitor General S.C. Bar No. 5262 P.O. Box 11549 Columbia, SC 29211 **ATTORNEYS FOR RESPONDENT ATTORNEY GENERAL**	

INDEX
VOLUME I

I. ORDERS

Order of the Hon. Doyet A. Early, III, dtd. 8/2/17..... 1
Order of the Hon. Doyet A. Early, III, dtd. 6/23/17..... 3
Order of the Hon. Doyet A. Early, III, dtd. 6/23/17..... 3
Order of the Hon. Doyet A. Early, III, dtd. 5/31/17..... 19
Order of the Hon. Doyet A. Early, III, dtd. 3/9/17..... 25
Order of the Hon. Doyet A. Early, III, dtd. 3/9/17..... 27
Order the Hon. L. Casey Manning, dtd. 3/7/17..... 29
Order of the Hon. Doyet A. Early, III, dtd. 2/6/17..... 31
Order of the Hon. Doyet A. Early, III,dtd. 9/21/16 (Attorney General)..... 33
Order of the Hon. Doyet A. Early, III, 9/21/16 (Daryl & Tonya)..... 39
Order of Jg. Early dtd. 7/25/16..... 42
Order of Jg. Early dtd. 4/8/16..... 44
Order of the Hon. Donald W. Beatty, dtd. 3/24/16..... 46
Order of the Hon. L. Casey Manning, dtd. 3/02/16..... 47
Order of the Hon. L. Casey Manning, dtd. 10/13/15..... 49
Order of the Hon. L. Casey Manning, dtd. 10/13/15..... 51
Order of the Hon. L. Casey Manning, dtd. & filed 7/19/12..... 54
Order of the Hon. L. Casey Manning, filed 7/13/12..... 57
Order of the Hon. L. Casey Manning, dtd.7/5/12..... 59
Order of the Hon. Frank R. Addy, Jr., dtd.11/22/11..... 61
Order of S.C. Court of Appeals, filed 6/2/11..... 70
Order of the Hon.G. Thomas Cooper, dtd. 5/12/11..... 66
Order of the Hon. G. Thomas Cooper, dtd. 4/27/11..... 72
Order of the Hon. Jasper M. Cureton, filed 3/16/11..... 74
Order of the Hon. L. Casey Manning, dtd. 1/7/11..... 77
Order of the Hon. L. Casey Manning, dtd. 11/8/10..... 79
Order of the Hon. L. Casey Manning, dtd., 11/8/10..... 87
Form 4 Order of the Hon. L. Casey Manning, dtd. 8/30/10..... 93
Order the Hon. Amy W. McCulloch, dtd. 7/19/10..... 94
Order of the Hon. Roger L. Couch, dtd. 9/22/09..... 96
Order of the Hon. Doyet A. Early, III, dtd. 5/26/09..... 134

II. PLEADINGS AND MOTIONS

Complaint filed May 19, 2010, with Summons..... 176
w/ Affidavits of Service..... 189
Motion to Remove dtd. 6/11/10..... 191
Motion to Dismiss dtd. 6/22/10, w/ Attachments..... 193
Index of Attachments to Motion to Dismiss..... 204

Attachment 1: *Wilson v. Dallas* Ret. & Motion..... 205
Factual Addendum..... 221
Exhibit A: Agreement dtd/ 8/10/08..... 231
Attachment 2: of the Hon. Doyet A. Early, III, dtd. 1/8/08..... 235
Attachment 3: of the Hon. Doyet A. Early, III dtd. 1/9/08..... 239
Attachment 4: of the Hon. Doyet A. Early, III, dtd. 3/7/08..... 242
Attachment 5: of the Hon. Doyet A. Early, III dtd. 4/8/08..... 262
Attachment 6: Order of the Hon. Jasper W. Cureton, dtd. 7/14/08..... 312
Attachment 7: of the Hon. Doyet A. Early, III dtd. 7/25/08..... 315
Attachment 8: Corresp. Ct. Appeals 11/6/09..... 322
Attachment 9: of the Hon. Doyet A. Early, III dtd. 11/13/08..... 324
Attachment 10: of the Hon. Doyet A. Early, III, dtd. 3/15/10..... 327
Attachment 11: Order of the Hon. Doyet A. Early, III, dtd. 4/5/10..... 329
Motion to Transfer Venue dtd. 8/2/10..... 332
Motion to Strike Motion for Transfer of Venue dtd. 8/10/10..... 335
Answer and Counterclaim dtd. 9/30/10 w/cos..... 337
Motion to Strike Defendants' Affidavit in Support of Dismissal, dtd.10/1/10.... 371
Motion to Set Aside Entry of Default, dtd. 11/16/10..... 373
Exhibit 1: Affidavit of Wingate..... 376
Exhibit A: Kendall email dtd. 11/12/10..... 379
Answer to Counterclaim, dtd. 11/16/10 w/cos..... 380
Motion to Alter or Amend Order Filed 11/19/10..... 383
Exhibit A: Initial Brief of Appellants, dtd. 10/22/10..... 391
Addendum..... 444
Exhibit B: Affidavit of Williams..... 449
Complaint, *Cincinnati v.Buchanan*..... 452
Complaint, *Cincinnati v. Pope*..... 469
Motion to Strike dtd. 12/7/10..... 471
Notice of Appeal filed 2/16/11..... 474

INDEX
VOLUME II

II. PLEADINGS AND MOTIONS (Cont'd)

Motion to Disqualify and/or Enjoin and for related relief, dtd. 5/18/11..... 477
Return to Motion to Designate Complex, dtd. 5/18/11..... 481
Motion to Compel Discovery (Tommie Rae), dtd. 5/27/11..... 485
Motion for Protective Order (Tommie Rae) dtd. 5/31/11 493
Motion to Compel, dtd. 7/1/11..... 495
Exhibit A: Interrogatories & Requests for Production..... 498
Exhibit B: Answers to Interrogatories & Requests for Production..... 517
Motion to Compel (Fee Agreement) , dtd. 7/26/11..... 552
Exhibit A: Ltr. of Black dtd. 7/15/11..... 556

Motion for Protective Order (Fee Agreement), dtd. 8/9/11 558
Motion to Partially Amend Order dtd. 11/22/11, dtd. 11/29,11 568
Motion for Sanctions, dtd.12/9/11 568
Return in Response to Motion to Consolidate, dtd.2/9/12 575
Return and Memorandum Opposing Relief from Default, dtd. 4/10/12 577
Motion to Enforce Settlement Agreement, dtd. May 18, 2012 580
Exhibit A: Settlement Agreement, dtd. 5/4/12 582
Exhibit B: Settlement Agrmt. & Release 584
Return and Objection to Motion to Enforce, dtd. 5/21/12 592
Motion for Emergency Telephone Hearing, dtd. 7/18/12 596
Exhibit A: Motion for Protective Order (Dallas), dtd. 7/10/12 599
Corrected Offer of Judgment (Lindsey & Janise), dtd. 7/18/12 602
Motion to Strike Affidavit (Requesting Depositions), dtd. 7/18/12 606
Exhibit A: Affidavit of Pope, dtd. 7/1/12 608
Ltr. of Silvernail to the Hon. L. Casey Manning, dtd. 7/11/12 613
Motion to Vacate, Alter, Amend, etc. Order dtd. 7/5/12, dtd. 7/27/12 618
Exhibit A: Order of the Hon. L. Casey Manning dtd. 7/5/12 630
Offer of Judgment to Daryl Brown, dtd. 7/26/12 632
Offer of Judgment to Tonya Brown, dtd. 7/26/12 636
Offer of Judgment to Terry Brown, dtd. 7/30/12 639
Offer of Judgment to Jason Brown Lewis, dtd. 7/30/12 649
Offer of Judgment to the Estate of James Brown, dtd. 8/2/12 657
Offer of Judgment to Deanna Brown Thomas, dtd. 8/2/12 664
Offer of Judgment to Venisha Brown, dtd. 8/3/12 671
Offer of Judgment to Tommie Rae Hynie Brown dtd. 8/3/12 677
Offer of Judgment of Pope to Carrington L., a minor, dtd. 8/6/12 681
Offer of Judgment to Sydney L., a minor, dtd. 8/7/12 683
Motion to Strike Offers of Judgment, dtd. 8/13/12 687
Exhibit A: Offer of Judgment to Lindsey & Janise B., a Minor 690
Exhibit F: Offer of Judgment (Bauknight. T/ee, Legacy Trust) 696
Motion for Direction (Pretrial Publicity), dtd. 8/23/12 704
Exhibit. A: Media Binder Index of Attached Articles, etc 706
Exhibit 5: *SC Supreme Court Hears Brown Estate Feud 11/1/11* 712
Exibit11: *AG asked to Turn Over James Brown Docs.: 8/11/11* 714
Exhibit 12: *Wilson and trustee Double Efforts...:* 1/16/12 716
Exhibit 13: *AG Attempts to Exclude Affid* 718
Exhibit 17: *Dead or Alive-James Brown...*5/22/12 721
Exhibit 18: Father's*Day, Pappa Gets a Brand New Son:* 6/17/12 726
Exhibit 20: *Brown Charitable Fate Marinating in Confusion:*3/11/12 728
Exhibit 21 *James Brown's Son Regrets Contesting Will:* 7/1/12 730
Exhibit. 27: Images of a Group of Affidavits (Partial) 732
Affidavit of Mary Holmes dtd. 5/18/2008 732
Affidavit of J.B. Ross 734
Affidavit of Emma Austin dtd. 8/14/08 736
Affidavit of Andre Moses White dtd. 6/2/08 739

Exhibit 32: Images of *Motion for Sanctions* and Ltrs. 741
Exhibit 58: *Future of Private Philanthropy. at Stake in Case:* 11/10/11..... 742
Exhibit 75: *Attorneys Subpoena Inf. Ab. "Explosive" Diaries:* 5/14/12..... 744
Exhibit 81: *AG Wilson and Companion Stop Deposition:* 7/26/12..... 746
Exhibit 82: *Brown Son Pleads "Protect the Needy Children":* 8/1/12 750
Exhibit 87: *Years After Death, Battle for J. Brown Estate Rages:* 8/4/11.... 752
Exhibit 93:*James Brown Said it Loud:* 3/10-11/12..... 754
Exhibit 94: *Legal Battles over James Brown's Estate Continue:* 7/26/11.... 756
Exhibit 96: *South Carolina and the FOIA:* 4/24/12 758
Exhibit 98: *The Continued Dispute Over James Brown's Estate:* 760
Return to Motion (Pretrial Publicity), dtd. 8/28/12..... 762
Proof of ADR, Karl A. Folkens, Mediator, dtd. 10/19/12..... 768
Supp. Memo on Motion to Set Aside Entry of Default dtd.12/17/12..... 769
Exhibit A: Sworn Statement of Albert H. Dallas, 7/20/12..... 771
Return and Opposition to Motion (Judgment on Pleadings), dtd. 1/11/13..... 775
Motion to Compel (Document Review), dtd. 2/25/13..... 780
Motion for Protective Order (Deanna Deposition), dtd. 3/4/13..... 783
Exhibit A: Am. Notice of Deposition, dtd. 2/25/13..... 785
Motion for Summary Judgment (as to Estate/2000 Trust &AG), dtd. 3/11/13.. 787
Motion to be Dropped as a Party, dtd 3/25/13..... 790
Exhibit A: Ltr. of McMaster to Bauknight, dtd.5/18/10..... 793
Return and Opposition to Stay and Request for Expedited Hearing dtd.3/29/13..... 794
Exhibit A: Ltr. of Gende to Jg. Manning, dtd. 3/27/13..... 800
Status Report, dtd. 3/25/13..... 802
Exhibit A: Proposed Scheduling Order..... 806
Motion to be Relieved as Counsel (as to The AG Only), dtd.5/10/13..... 810
Motion to Stay, dtd. 4/22/14..... 821
Motion for Summary Judgment & Offset (as to Tonya, Daryl, Venisha), dtd. 5/28/15..... 814
Motion for Exception to Physical Presence at Mediation, dtd. 8/4/15..... 824
Return and Opposition to Motion (Stay & Expedited Hearing), dtd. 4/29/14.... 827
Motion to Alter, Amend and /or Vacate Order (Relief from Default), dtd.10/20/15..... 829
Proof of ADR, dtd. 10/30/15..... 834
Motion for Protective Order (Depositions), dtd. 2/18/16..... 836
Motion to Strike, dtd. 2/26/16..... 839
Motion to Alter and/or Amend Order dtd. 3/3/16..... 841
Motion to Consolidate Cases 4900 & 1337 for Purposes of Discovery, dtd. 4/11/16..... 846
Motion to Postpone Deposition (Tommie Rae), dtd. 4/25/16..... 848
Return and Opposition to Motion to Consolidate, dtd. 6/6/16 851
Notice Withdrawing Motion to be Relieved as Counsel, dtd. 6/7/16..... 854
Motion for Protective Order (Attorney General) dtd.7/18/16..... 856
Notice of Special Appearance, dtd. 8/11/16 861

Exhibit A: Order of the Hon. Doyet A. Early, III, dtd.10/4/07 864
Exhibit B: Order of the Hon. Doyet A. Early, III, dtd. 10/30/13..... 868
Exhibit C: Motion to be Dropped as Party, dtd 3/25/13 867
Exhibit A: Ltr. of AG McMaster dtd. 5/18/10..... 873
Exhibit B: Petition for Rehearing, dtd. 3/14/13..... 874
Exhibit A: Transcript 9/28/08..... 906
Transcript 11/25/08 909
Transcript 1/30/09..... 912
Transcript 4/6/09..... 920
Complaint, Case No. 2008-CP-02-322, filed 2/5/08..... 926
Exhibit G: Calculation of Proceeds, Proposed Transaction..... 927
Interim Acctg. #1A, 11/20/07 – 5/20/09..... 928
Ltr. AG McMaster to Bauknight, dtd. 5/18/10..... 942
Motion for Protective Order (McMaster) dtd. 8/25/16..... 943
Motion to Dismiss all Claims Under Rule 41(B) (Venisha), dtd. 9/14/16..... 946
Motion to Compel Discovery, dtd. 1/11/17..... 949
Return of (1337 Pl.) to Jt. Motion to Consolidate Expert Discovery, dtd. 1/17/17..... 953
Notice of Motion and Motion Pursuant to Rule 59(E) &Rule 60(B)(2), dtd. 3/24/17..... 956
Supplemental Return to Motion to be Dropped, dtd. 4/6/17..... 961
Reply to Supplemental Return, dtd. 4/7/17 964

INDEX
VOLUME III

Return to Motion Pursuant to Rule 59(e) and Rule 60(b)(2), dtd.4/20/17..... 969
Exhibit A: Order of the Hon. Doyet A. Early, III, dtd. 5/9/17..... 973
Exhibit B: Settlement Agreement, dtd. 3/8/17..... 976
Motion to Alter, Amend, etc. Order dtd. 6/23/17, dtd.7/13/17..... 983
Motion to Alter, Amend, Vacate &/or Reconsider Order dtd. 5/31/17 dtd.7/19/17 1054

III. TRANSCRIPTS

Transcript of Hearing held August 30, 2010..... 1108
Transcript of Hearing held January 11, 2012..... 1140
Transcript of Hearing held December 17, 2012..... 1144
Transcript of Hearing held May 17, 2016..... 1162
Transcript of Hearing held August 29, 2016..... 1177

IV. EXHIBITS AND OTHER MATERIALS AND DOCUMENTS

Agreement for Legal Services, dtd. 5/18/10..... 1235
Exhibit A: Litigation Retention Agreement (AG/Special Counsel)..... 1238

Ltr. AG McMaster to Bauknight dtd. 5/18/10..... 1250
Confirmation, Approval and Acknowledgment..... 1251
Affidavit of Service (Pope) dtd. 5/24/10 1254
Certificate of Transmittal as to Removal to Circuit Court dtd. 7/26/10..... 1255
Memorandum in Support of Dismissal of Complaint, dtd. 8/10/10..... 1256
Portion Richland County Public Index..... 1265
Supplemental Memorandum Supporting Dismissal of Complaint, dtd.8/25/10..... 1267
Exhibit A: Memorandum In Support of Dismissal, dtd. 8/10/10, *see*..... 1256
Exhibit B: Motion for Extension of Time, dtd. 8/13/1 w/cos..... 1300
Memorandum in Opposition to Motion to Dismiss, dtd. 8/27/10..... 1306
Acknowledgment (Principal Place of Business, 2000 Trust), dtd. 8/27/10..... 1322
Memorandum in Opposition to Motion to Change Venue, dtd. 8/27/10..... 1326
Exhibit A: Order of the Hon. Doyet A. Early, III, dtd. 5/26/09, p.1.*see* p.134..... 1333
Exhibit B: Order of the Hon. Roger L. Couch, dtd. 9/22/09, p.1, *see* p.96... 1334
Second Supp. Memorandum (Support of Dismissal of Complaint), dtd. 8/27/10..... 1335
List of Attachments to Memorandum..... 1339
Exhibit A: Return, Motion for Extension..... 1340
Exhibit B: Portion, Brief, Dallas appeal..... 1347
Exhibit C: Portion, Transcripts Jan. 2009, March 2009..... 1350
Exhibit D: Portion, Inventory & Appraisement, dtd. 11/15/07..... 1362
Exhibit E: Portion, Graham Windsor Presentation..... 1366
Ltr. TJBL to Buchanan & Pope (TPP), dtd. 3/27/08..... 1370
Ltr., TJBL to Buchanan & Pope, dtd. 3/27/08..... 1373
Affidavit of Buchanan & Pope in Support of Dismissal, dtd 9/21/10..... 1377
Index to Exhibits..... 1390
Exhibit 1: Excerpts, Memorandum Opp. Mot. Dismiss, dtd. 8/27/10.... 1393
Exhibit 2: Excerpts, Memorandum in Opposition, dtd. 8/27/10..... 1394
Exhibit 3: Certificate of Agreement of Trust..... 1395
Exhibit 4: Excerpt, James Brown POA..... 1397
Exhibit 5: Latham email to Levenson & others..... 1398
Exhibit 6: Minutes of Trustees' Meeting 12/27/06..... 1399
Exhibit 7: Minutes of Trustees' Meeting 1/3/07..... 1400
Exhibit 8: Memorandum & Representation Agreement (Levenson)..... 1401
Exhibit 9: Excerpts: Motion to Require Disclosure of Settlement..... 1403
Exhibit 10: Excerpts: Deposition of Forlando Brown..... 1405
Exhibit 11: Executive Summary, Lumar, Cox, others..... 1416
Exhibit 12: Prenuptial Agreement..... 1418
Exhibit 14: Email, Hammond to Pope and Babcock..... 1425
Exhibit 15: Powell Goldstein docs to transfer 2000 Trust to Georgia, etc..... 1428
Exhibit 16: Ltr. James Brown Legacy to Dallas & Bradley, dtd. 10/12/07..... 1436

Exhibit 17: Email Yount to Counsel, dtd. 11/10/07..... 1439
Exhibit 18: Statement, James Brown LLC Royalties..... 1440
Exhibit 19: Excerpt Ret. & Recommendations of SAs dtd. 11/14/07.... 1141
Exhibit 20: Excerpts, I & A, dtd. 11/15/07..... 1444
Exhibit 21 Excerpts, Transcript Hearing held 12/21/07..... 1447
Exhibit 22 Excerpts, Affidavit of Pope, dtd. 1/6/08 & 3/7/08 hearing.... 1459
Exhibit 23: Excerpts, Amendment to Forlando Brown Federal Complaint 1463
Affidavit of Beth Bauknight, dtd. 10/1/10..... 1464

INDEX
VOLUME IV

Affidavit of Beth Bauknight, dtd. 10/1/10 (Continued)
Exhibit A: Interim Accounting #1A, dtd. 5/20/2009..... 1465
Status of Creditors' Claims..... 1499
Valid Claim/Priority Expenses, etc..... 1500
Pending, Unresolved Claims (Partial)..... 1502
Exhibit B: Final Accounting, dtd. 6/24/09..... 1504
Exhibit 1 – Summary of Accountings..... 1509
Ltr. Wingate to Jg. Manning dtd. 10/1/10 (Venue) 1510
Ltr. Watson to Jg. Manning, dtd. 10/1/10..... 1511
Ltr. Scalamera to McBride, dtd. 11/10/10..... 1512
Affidavit of Default, w/cos dtd. and filed 11/10/10 1513
Exhibit A: Summons (& Complaint), filed 5/19/10, see p.176..... 1516
Exhibit B: Ans. & Counterclaim w/cos, dtd. 9/30/10, p.1, *see* p.337..... 1519
COS, Affidavit of Default..... 1522
Answers to First Interrogatories (McMaster),dtd. 11/12/10..... 1523
Witness List..... 1532
Affidavit of Wingate dtd. 11/16/10..... 1535
Exhibit A: Email Kendall to Counsel..... 1538
Answers to First Interrogatories (Pope) dtd. 11/16/10..... 1539
Memorandum in Support of Motion to Stay, dtd.5/12/11..... 1579
Affidavit in Support of Disqualification, dtd. 5/18/11..... 1581
Exhibit A: *Private Foundation, Copyright Heirs & Musical Millionaires..* 1589
Compilation, Copyrights..... 1601
Exhibit B: Chart 5 – Sale to Terry Brown at $12 million..... 1602
Exhibit C: Pinnacle Media & Entertainment, LLC, Exec. Summary..... 1603
Affidavit (Silvernail), dtd. 5/27/11..... 1605
Affidavit in Support of Motion to Compel (Tommie Rae), 6/2/11..... 1610
Affidavit in Support of Legacy Trust Production, dtd.8/1/11..... 1617
Exhibit A: Pinnacle Media Summary..... 1628
Exhibit B: Witness List..... 1630
Exhibit C: Ltr. of Black to Pope dtd. 7/15/11..... 1632
Brief in Support of Injunction, dtd. 9/14/2011..... 1634

Memorandum in Support of Motion to Set Aside Default, dtd.4/11/12..... 1666
Memorandum in Opposition to Disqualification, dtd.4/11/12 1673
Exhibit A: Order of Judge Couch, p.1, see p. 96..... 1688
Affidavit (Supporting Injunction; Opposing Relief from Default), filed 4/12/12.. 1689
Exhibit A: Ltr. of Pope to AG Wilson dtd. 3/5/12 1692
Order of the Hon. Doyet A. Early, III, dtd. 2/20/08..... 1696
Order (Diaries) of the Hon. Doyet A. Early, III, dtd.3/10/08... 1697
Second Order (Diaries) of the Hon. Doyet A. Early, III,..... 1698
Exhibit B: Ltr. of Pope to AG Wilson, dtd.4/1/12..... 1699
Ltr. of Pope to Cannon, Bauknight, 3/30/12..... 1703
Private Foundations, Copyright Heirs & Musical Millionaires..... 1708
Exhibit C: Status Report, dtd. 3/7/12, (Forlando Federal Suit)..... 1722
Exhibit D: Memorandum in Support of Mot. (Forlando Suit), dtd.4/3/12. 1728
Exhibit E: Memorandum in Support of Motion (Forlando), dtd,3/22/12.. 1737
Exhibit F. Affidavit dtd. 3/21/12 (Forlando Suit) 1742
Affidavit Requesting Deposition Prior to Injunction Hearing, dtd. 7/1/12..... 1744
Affidavit Supporting Dismissal (Daryl Brown) dtd 7/1/12..... 1749
Exhibit A: *Son Regrets Contesting Will*..... 1751
Affidavit of Related to Publicity Motion, dtd. 8/28/12..... 1755
Memorandum in Opposition to Motion to Alter, etc., dtd. 11/20/12..... 1765
Order. of the Hon. Marc H. Westbrook, dtd.10/25/02 1771
Exhibit A: Memorandum in Opposition to Motion to Disqualify..... 1773
Exhibit B: Motions for Sanctions..... 1775
Return to Motion to Intervene, 11/7/11..... 1781
Exhibit B: Affidavit Opp.Motion to Intervene (FOIA), dtd. 11/7/11 ... 1785
Exhibit C: Order of Jg. Addy..... 1788
Exhibit D: Motion to Partially Reconsider (FOIA), dtd.11/29/11..... 1790
Ltr. of Gende to Judge Manning, dtd. 3/27/13..... 1798
Status Report dtd. 3/25/13..... 1800
Exhibit A: Proposed Scheduling Order..... 1804
Affidavit Opp.Stay of FOIA case and Supporting Summ. Jmt., dtd. 4/29/14.... 1808
Exhibit A: Ltr. of Pope to AG Wilson, Sojourner, Bauknight, 4/3.14..... 1814
Motion to Dismiss or Stay Appeal,filed Ct. App. 9/13/12..... 1818
Exhibit B: Cephalon v. State of South Carolina Slides..... 1828
Exhibit C: Memorandum (Forlando Case) 1838
Supplemental Memorandum Opposing Motion to Set Aside Default, dtd. 02/06/15..... 1842
Exhibit A: Proposed Order..... 1844
Affidavit in Support of Damages, Offset, etc., dtd.5/28/15..... 1852
Exhibit A: Deposition, Daryl J. Brown..... 1856
Exhibit B: *Brown's Son Comments on Case*..... 1866
Exhibit C: Notice of Appearance (Bell for Tonya), dtd. 3/26/14..... 1869
Exhibit D: Deposition of LaTonya Brown Fegan..... 1871
Affidavit Supporting Compliance w/Mediation, dtd. 8/13/15..... 1883
Memorandum Opposing Motion to Alter, Amend, etc., dtd. 11/24/15..... 1892

INDEX
VOLUME V

Affidavit Supporting Motion to Alter or Amend Order of 3/3/16, dtd 3/7/16..... 1897
Exhibit A: Deposition of Russell L. Bauknight (Forlando Suit), dtd. 8/20/13. 1901
Memorandum in support of Motion to Amend Answer, etc., dtd. 5/2/16..... 1911
Affidavit of Pope in Supp. of Mot.to Strike (Consolidation Motion), dtd. 5/21/16..... 1924
Memorandum in Supp. of Motion to Consolidate Cases 4900 & 1337, dtd. 6/7/16..... 1931
Affidavit of Pope Supporting Deposition (Lindsey), dtd.8/22/16..... 1939
Schedule of Documents..... 1946
Exhibit A: Email Musgrove to Levenson, others, dtd. 3/26/07..... 1947
Exhibit B: Ltr. McGaughey to Dallas dtd. 7/10/07..... 1949
Exhibit C: Email of Forlando to Cannon, 10/2/07..... 1950
Exhibit D: Email Forlando to Dallas, 12/14/07..... 1951
Exhibit E: Email Jones to Various, dtd. 11/21/07..... 1952
Exhibit F: Ltr. Pope to Jones, dtd. 11/21/07..... 1953
Exhibit G: Ret. And Rec. of SAs..... 1955
Exhibit H Email Jowers to Various, 2/13/08..... 1959
Exhibit I: Order Re: Publication, dtd. 3/8/08..... 1960
Exhibit J: Various Emails..... 1964
Exhibit K: Email Forlando to Various, dtd. 4/3/08..... 1969
Exhibit L: Christie's Sale Summary..... 1971
Exhibit M: Ltr. Pope/Buchanan to AG McMaster, dtd.6/13/08..... 1972
Exhibit N: Portion James Brown Estate Tax Return (706)..... 1975
Exhibit O Ltr. Buchanan/Pope to AG McMaster, dtd. 3/16/09..... 1977
Exhibit P: Ltr. to Klett from Buchanan/Pope dtd. 6/24/09..... 1979
Exhibit Q: Email Medlin to Jowers, others dtd. 8/30/09..... 1983
Exhibit R: *James Brown's Son Regrets*..... 1984
Exhibit S: Email Pope to Levenson, others, dtd.11/5/12..... 1987
Exhibit T: Email, Forlando to Kenily, dtd. 9/27/13..... 1995
Memorandum in Support of Deposition of AG, dtd. 8/29/16..... 1996
Motion to Add William/Forlando Brown as Party, dtd. 2013..... 2039
Exhibit A: Confirmation and Amendment (Legacy Trust), dtd, 1/4/11.... 2041
Assignment from Terry Brown to Forlando, dtd.1/3/11..... 2047
Ltr. of Gende to Jg. Manning, dtd. 5/10/13..... 2048
Order concerning Motion for Continuance dtd. 7/5/12..... 2051
Plaintiff AG Responses to Interrogatories dtd. 10/10/16..... 2054
Memorandum in Support of Motion For Protective Order Filed 8/26/16..... 2059
RESERVED..... 2072
Supp. Memo in Opp.to Mot. SJ & in Supp. of Other Motions, dtd. 9/23/16..... 2076
Exhibit A: Ltr. of Bundy to Jg. Early dtd. 9/23/16..... 2079

Notarized Doc. of Daryl J. Brown, Janise & Lindsey Brown, dtd 10/26/12..... 2084
Exhibit B: Post of Tomirae Brown w/ comments dtd. 9/18..... 2086
Supp. Memorandum in Support of Motion to be Dropped, dtd. 4/3/17..... 2088
Ltr. of Smith to Judge Early, dtd. 5/23/17..... 2093
Affidavit of Harley D. Ruff, dtd. 6/23/17..... 2094
Ltr. of Smith to Jg. Early, dtd. 7/26/17..... 2097
Ltr. of S.C. Court Administrations to Silvernail, dtd. 7/26/17..... 2099
Opinion/Affidavit of Wm. Jeffrey Smith, dtd. 7/14/17..... 2100
Memorandum in Opposition to Motion to Alter June 23, 2017 Order, dtd.8/7/17..... 2211
Ltr. of Watson to Manning, dtd. 10/1/10..... 2213
Ltr. of Wingate to Jg. Manning, dtd. 10/1/10(Mot. Dismiss..... 2214
Ltr. of Wingate to Jg. Manning, dtd. 10/1/10 (Venue) 2215
Motion to Strike Portions of Defendants' Motion to Stay, dtd. 12/7/10..... 2216
Memorandum in Support of Motion to Set Aside Default dtd. 4/11/12..... 2219
Affidavit of Pope dated January 17, 2017 – **Filed Under Seal**..... 2227

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)
) FIFTH JUDICIAL CIRCUIT

Russell L. Bauknight, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. [redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

and

Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. [redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown,

Plaintiffs,

vs.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants.

Civil Action No.: 2010-CP-40-4900

RICHLAND COUNTY FILED
2017 AUG -7 PM 3:24
JEANETTE W. McBRIDE C.C.P. & G.S.

ORDER DENYING DEFENDANT POPE'S MOTION TO ALTER OR AMEND ORDER DROPPING ATTORNEY GENERAL AS A PARTY

THIS MATTER COMES before this Court upon the Motion of Defendant Pope for an order vacating, altering or amending the Order of this Court dated May 31, 2017, granting the Attorney General's Motion to be Dropped as a Party. This Court has reviewed that Motion and the letter return of the Attorney General and has determined that the Motion should be denied.

IT IS ORDERED THAT THE MOTION IS DENIED.

The Honorable Doyet A. Early, III
Presiding Judge

Bamberg, South Carolina

June 2, 2017

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH CIRCUIT

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted] and CARRINGTON L[redacted]R; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs

v.

Adele J. Pope,

Defendant

Civil Action No. 2010-CP-40-4900

2010 JUL -8 PM 5:20

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S COUNTERCLAIMS

003

#1

This matter came before the Court on Monday, August 29, 2016 on the Plaintiffs' Motion for Summary Judgment as to Defendant Pope's Counterclaims in the above-captioned action. Both parties submitted detailed memoranda on this Motion, and the Court heard oral arguments from Mark V. Gende on behalf of the Plaintiffs, and M. Brent McDonald on behalf of Mrs. Pope.

I. LEGAL STANDARD

Pursuant to Rule 56(c), SCRCP, a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000).

II. FACTS/BACKGROUND

Plaintiffs brought this action against Defendant Adele Pope by way of a Complaint filed May 19, 2010. Mrs. Pope, a former Personal Representative of the James Brown Estate and Trustee of the James Brown 2000 Irrevocable Trust, had previously been removed from her role as a fiduciary of the Estate and Trust by Order of this Court dated May 26, 2009. Plaintiffs' Complaint alleges causes of action for breach of fiduciary duty, breach of trust, and negligence. On September 10, 2010, Defendant Pope answered and asserted five counterclaims: Abuse of Process, Civil Conspiracy, Intentional Interference with Contract, Violation of S.C. Code § 62-1-106, and Attorney's Fees pursuant to S.C. Code § 62-7-1004. Plaintiffs filed this Motion for Summary Judgment as to Pope's counterclaims on April 19, 2016 on the grounds that the counterclaims are barred by the doctrine of collateral estoppel based on the Supreme Court's

opinion in Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013), which, *inter alia*, affirmed the May 26, 2009 order removing Pope from her role as a fiduciary of the Estate and Trust.

III. WILSON V. DALLAS

As part of its holding in Wilson v. Dallas, the South Carolina Supreme Court affirmed this Court's removal of Pope from her role as a fiduciary of the Estate and Trust. In particular, the Supreme Court found that "the circuit court did not violate the statutory provisions regarding the removal of personal representatives. *Notice and a hearing were provided, and the court had cause to remove [Pope] as it was in the best interests of the estate.*" Wilson v. Dallas, 403 S.C. at 448, 743 S.E.2d at 766 (emphasis added). In support of its determination, the Supreme Court cited the following specific examples as grounds for upholding Pope's removal:

> We are also aware that Appellants have sought $5 million in fees for their services as fiduciaries for a relatively short interval of time. In addition, [Defendant Pope] sought and obtained permission from the circuit court to sell iconic assets from Brown's estate in order to raise funds, and a large portion of the amount raised went first to pay Appellants' own attorneys' fees. [Defendant Pope] also unsuccessfully attempted to sell Brown's GRAMMY award at auction; the process was halted only because officials from the National Academy of Recording Arts and Sciences reclaimed the award after informing Appellants that it was a longstanding policy that the award could not be sold by recipients or anyone acting on their behalf. *These actions and the extreme discord between the parties convince us that Appellants' continued service as fiduciaries is not in the best interests of the estate.*

Id. at 448-49, 743 S.E.2d at 766-67 (emphasis added).

By virtue of this holding, Plaintiffs assert that Mrs. Pope is collaterally estopped from contesting the validity of her removal for cause, and that, as a result, her counterclaims fail as a matter of law. Therefore, the Court must first determine whether the elements of collateral estoppel are satisfied such that the issue of Mrs. Pope's removal for cause may not be relitigated in this action thereby mandating that the legal conclusions of the South Carolina Supreme Court

005

#3

in Wilson v. Dallas be applied in this matter to determining the viability of Mrs. Pope's counterclaims.

IV. COLLATERAL ESTOPPEL

"Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." Carolina Renewal, Inc. v. S. Carolina Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Id. "While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues." Id. (citing Snavely v. AMISUB of S.C., Inc., 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct.App.2008)).

In dispensing with the mutuality requirement, our courts have applied collateral estoppel only when the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue. Carolina Renewal, 385 S.C. at 555, 684 S.E.2d at 782. Under the doctrine of issue preclusion, if an issue of fact or law was actually litigated and determined and necessary to a valid and final judgment, the determination is conclusive in a subsequent action on that claim or a different claim. Laughon v. O'Braitis, 360 S.C. 520, 526, 602 S.E.2d 108, 111 (Ct. App. 2004).

One of the issues on appeal in Wilson v. Dallas was whether the circuit court erred in removing Mrs. Pope from her fiduciary position. The Supreme Court's detailed discussion of the

#4

grounds for Mrs. Pope's removal demonstrates that the issue was (1) actually litigated in Wilson v. Dallas and (2) directly determined by the Court in that action. Moreover, adjudication of the validity of Mrs. Pope's removal was (3) necessary to support the judgment in Wilson v. Dallas, which affirmed her removal for cause and established a protocol for the future appointment of fiduciaries. Additionally, our Supreme Court expressly determined that statutory requirements were met in conjunction with Mrs. Pope's removal, and that Mrs. Pope had notice and a hearing on the issue, which demonstrated that Mrs. Pope was afforded a full and fair opportunity to litigate the question of her removal for cause.

Given the foregoing, this Court finds that issues regarding Mrs. Pope's removal for cause were actually litigated, finally determined, and were necessary to support the Court's adjudication of the Wilson v. Dallas appeal. The Court further finds that Mrs. Pope was afforded a full and fair opportunity to litigate the issue of her removal for cause. Accordingly, it is conclusively established in this action that Mrs. Pope was validly removed from her fiduciary roles for cause, and that she is precluded by the doctrine of collateral estoppel from relitigating that issue in the instant case. See Wilson v. Dallas, 403 S.C. at 448, 743 S.E.2d at 766.

This Court is not persuaded by Mrs. Pope's argument that the doctrine of judicial estoppel precludes Plaintiffs' collateral estoppel arguments. Mrs. Pope bases her judicial estoppel argument primarily on various statements made by the Plaintiffs in conjunction with various filings in this Court some of which was filed years before the Supreme Court's decision in Wilson v. Dallas. One of the essential elements of judicial estoppel is that the inconsistent statements are made as part of an intentional effort to mislead the court. See Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004). The Court finds that Plaintiff's assertions were not made in an intentional effort to mislead the Court, but rather are consistent with the positions taken by

the Plaintiffs in this extremely complex matter. Mrs. Pope's judicial estoppel argument confuses Plaintiffs' positions as to its *claims* and Plaintiffs' position as to her *counterclaims*. For example, Plaintiffs argued in conjunction with their April 8, 2011 Motion to Stay that the outcome of Wilson v. Dallas had no bearing on the Plaintiffs' intention to pursue their *claims*. In this Motion for summary judgment, Plaintiffs assert that Wilson v. Dallas is dispositive of Pope's *counterclaims*. Thus, there is no inconsistency in Plaintiffs' positions.

Having determined that the elements required for the application of collateral estoppel are met, the Court now examines the effect of Wilson v. Dallas on Mrs. Pope's counterclaims in this action.[1]

V. COUNTERCLAIMS

A. Abuse of Process

Mrs. Pope's first counterclaim is for abuse of process. The essential elements of abuse of process are (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the conduct of the proceeding. Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions

[1] The Court is aware of an order granting summary judgment to Forlando Brown, a grandson of the entertainer, James Brown, in the federal matter styled Forlando J. Brown v. Adele J. Pope, Case No. 3:08cv00014-WOB (D.S.C. 2014). While Forlando Brown is not a litigant in this instant action, the federal court's Order granting summary judgment to Mr. Brown is instructive to this Court. *See* Court's Memorandum Opinion and Order, Id. As in the instant case, the Forlando Brown Order arises out of a claim for breach of fiduciary duty, *inter alia*, against Mrs. Pope regarding her activities while a personal representative and trustee of the Estate of James Brown. The Order also deals with the exact same counterclaims that Mrs. Pope has made in the instant case. The Order also discusses the ruling of the South Carolina state trial court removing Mrs. Pope as personal representative and trustee of the Estate of James Brown. The Order also discusses the South Carolina Supreme Court's holding in Wilson v. Dallas, affirming the state trial court's removal of Mrs. Pope. The Order ultimately grants summary judgment to Forlando Brown on all of Mrs. Pope's counterclaims. While the federal court's specific analysis of each cause of action necessarily differs from the instant action, in part because the plaintiffs are different, there are significant and relevant similarities. This Court finds the federal judge's statements of South Carolina law in the Order to be correct and his assessments of each cause of action to be persuasive.

#6

388 S.C. 394, 403, 697 S.E.2d 551, 555–56 (2010). "An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process. However, there is no liability when the process has been carried to its authorized conclusion, even though with bad intentions." First Union Mortgage Corp. v. Thomas, 317 S.C. 63, 74–75, 451 S.E.2d 907, 914 (Ct. App. 1994). "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself." Id. "Some definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process is required." Hainer v. Am. Med. Int'l, Inc., 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997).

Furthermore, "[a]n abuse of process action may lie if a party prosecutes an '*entire lawsuit*' for collateral purposes." Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 74, 567 S.E.2d 251, 255 (Ct. App. 2002) (emphasis added). Further, "liability exists not because a party merely seeks to gain a collateral advantage by using some legal process, but because the collateral objective was its *sole or paramount reason for acting*." Id. at 75, 567 S.E.2d at 256 (emphasis added).

Pope's Counterclaim alleges that she is "informed and believe[s] that Plaintiffs have maliciously commenced this legal action for an ulterior purpose of forcing Defendants to abandon or dismiss the appeal of the May 26, 2009 order of the Circuit Court of Aiken County approving a settlement desired by Plaintiffs." Counterclaim ¶ 78. However, Wilson v. Dallas confirms that the Plaintiffs had legitimate grounds for bringing suit against Pope. Specifically, the Supreme Court held that "the court had cause to remove [Pope] as it was in the best interests of the estate." Id at 448, 743 S.E.2d at 766. The Supreme Court also cited multiple specific examples in support of Mrs. Pope's removal which are quoted above, all of which demonstrate a legitimate legal basis for the Plaintiffs' commencement of this action. Notably, the findings by

the Supreme Court coincide with allegations in Plaintiffs' Complaint. See, e.g., Compl. ¶¶ 18.e., 18.h., 18.p.i-iii. Therefore, Wilson v. Dallas establishes as a matter of law that the Plaintiffs had ample legitimate grounds upon which to bring suit alleging breach of fiduciary duty against Mrs. Pope

Critical to the "willful act" element of Pope's claim for abuse of process is a "malicious misuse or perversion of the process for an end not lawfully warranted". Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 209, 153 S.E.2d 693, 695 (1967) (use of a warrant of arrest to extort money constitutes malicious use of process); see also Pallares v. Seinar, 407 S.C. 359, 373, 756 S.E.2d 128, 134 (2014) (filing a petition to seek the commitment of a neighbor to a mental institution without statutory authority constitutes malicious use of process). By contrast, "[t]he mere commencement of a civil action by the service of a summons, as required by the Code, cannot amount to the tort known as abuse of process." Russell v. Risher, 272 S.C. 182, 185, 249 S.E.2d 908, 909 (1978).

While Mrs. Pope claims that the Plaintiffs threatened this suit during negotiations prior to its filing in the hopes of obtaining Pope's abandonment of her appeal of the Court's May 26, 2009 Order, the South Carolina Supreme Court has found that it is not unusual for parties to demand more than they are entitled to receive during negotiations, or to try to resolve all outstanding claims at one time. See Russell v. Risher, 272 S.C. 182, 185, 249 S.E.2d 908, 909 (1978). Therefore, even if Mrs. Pope did prove Plaintiffs' sought though pre-suit negotiations to have her abandon her appeal, such a tactic, as matter of law, would not amount to the sort of willful act required to support an abuse of process claim. Moreover, as discussed above, the grounds enumerated by the Supreme Court for Mrs. Pope's removal for cause demonstrate that the Plaintiffs' pursuit of this action is not a willful act through which process has been

#8

misapplied or abused, but a legitimate action based on allegations that have been, in part, determined in the holding of Wilson v. Dallas.

Moreover, since it is a legal requirement that the collateral objective or ulterior purpose must be the *sole*, *paramount* or *primary* reason for bringing the action, as a matter of law Mrs. Pope is not able, under any factual scenarios, to meet this burden. See Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 75, 567 S.E.2d 251, 256 (Ct. App. 2002). Wilson v. Dallas provides ample legal justification for Plaintiffs' claims. Therefore, even if Plaintiffs had the motive of seeking to dissuade her from the appeal, that alleged ulterior purpose would not be the *sole*, *paramount*, or *primary* reason for Plaintiffs' claims because the South Carolina Supreme Court has confirmed that Plaintiffs have various legitimate concerns as to Mrs. Pope's administration of the Estate and Trust. It is these legitimate concerns, *inter alia*, that form the basis of Plaintiffs' claims.

Accordingly, the Court finds that summary judgment is appropriate as to Mrs. Pope's counterclaim for abuse of process.

B. Civil Conspiracy

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." Gordon v. Busbee, 397 S.C. 119, 136, 723 S.E.2d 822, 831 (Ct. App. 2011). The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 370 S.E.2d 711 (1988); Cowburn v. Leventis, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct.App.2005). It is essential that the moving party prove all of these elements in order to recover. Lyon v. Sinclair Refining Co., 189 S.C. 136, 200 S.E. 78 (1938). The "essential-consideration" in civil

#9

conspiracy "is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff." Lee v. Chesterfield General Hosp., Inc., 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct .App. 1986).

Initially, the Plaintiffs' prosecution of this suit for breach of fiduciary duty is not an "unlawful enterprise." In fact, as set forth above, Wilson v. Dallas establishes that the Plaintiffs have numerous good faith grounds for bringing this lawsuit.

Next, even if no unlawful enterprise exists, our Supreme Court has held that the tort of civil conspiracy can arise where one party to the alleged conspiracy has justifiable grounds for an action, but others join in the act who do not have the same justification. See Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719, 724 (1942) (noting that "where an act done by an individual, though harmful to another, is not actionable because justified by his rights, yet the same act becomes actionable when committed in pursuance of a combination of persons actuated by malicious motives and not having the same justification as the individual"). This Court finds that all of the Plaintiffs have the same justification for participating in this suit because, at the time this action was commenced, all of the Plaintiffs were parties to the same settlement agreement. Each named plaintiff is either included in the Settlement Agreement that was the subject of this Court's May 26, 2009 Order, or is an entity that was to be created by the agreement. Because the Plaintiffs were bound together by this agreement they necessarily had the same justification for bringing this suit against Defendant Pope. While Wilson v. Dallas ultimately abrogated the settlement agreement, that is irrelevant to this analysis because, at the time of the filing of this suit, all of the Plaintiffs had the same justification for suing Mrs. Pope, which was based on their participation in the agreement.

TMC #10

While a lawful act can become a civil conspiracy when pursued primarily to injure a third party, Wilson v. Dallas confirms that there are were justifiable grounds for each of the Plaintiffs to seek damages for Pope's alleged breaches of fiduciary duty. See Lee v. Chesterfield General Hosp., Inc., 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986) ("[T]he essential consideration is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the *primary purpose* or object of the combination is to injure the plaintiff.") (emphasis added). Thus, Wilson v. Dallas makes evident that the Plaintiffs' suit was not brought for the *primary purpose* of injuring or causing special damages to Mrs. Pope, but rather for the pursuit of the Plaintiffs' stated claims. Accordingly, summary judgment is appropriate as to Mrs. Pope's claim for civil conspiracy.

C. Intentional Interference with Contract

To establish a cause of action for tortious interference with contractual relations, a plaintiff must show: 1) the existence of a contract; 2) knowledge of the contract; 3) intentional procurement of its breach; 4) the absence of justification; and 5) resulting damages. Kinard v. Crosby, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993). To establish a cause of action for intentional interference with prospective contractual relations, a plaintiff must show: 1) intentional interference with prospective contractual relations; 2) for an improper purpose or by improper methods; and 3) resulting in injury. Eldeco, Inc. v. Charleston Cty. Sch. Dist., 372 S.C. 470, 480, 642 S.E.2d 726, 731 (2007). Pope's claim fails because her appointment as Personal Representative and Trustee was made pursuant to statute, and thus does not sound in contract. See S.C. Code § 62-3-701; -613; § 62-7-701; 812). Similarly, the Court's January 8, 2009 Order awarding her fees was grounded in South Carolina law, specifically citing Donahue v. Donahue, 299 S.C. 353, 384 S.E.2d 741 (1989). Thus, both Pope's tenure as a fiduciary of the Estate and

Trust and the Court's Order awarding her attorney's fees are unquestionably not contractual in nature, but are rather orders of the court grounded in the Court's authority pursuant to statute and case law.

Our Supreme Court, and other courts, has consistently held that "[c]ourts cannot create contracts for the parties". Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 472, 377 S.E.2d 343, 347 (Ct. App. 1988); see also Terminix Int'l, Inc. v. Rice, 904 So. 2d 1051, 1057 (Miss. 2004) ("A scheduling order is not a contract between the parties, but rather an order of the court."); Boston Prop. Exch. Transfer Co. v. Iantosca, 720 F.3d 1, 12 (1st Cir. 2013) (holding that an order assigning one party's legal claims to another "was not a contract" where the compelled assignor "did not bargain for, offer, or accept the assignment order, which was imposed on it over its strong objection."); Lueck's Home Imp., Inc. v. Seal Tite Nat., Inc., 142 Wis. 2d 843, 848, 419 N.W.2d 340, 342 (Ct. App. 1987) ("[A] restitution consent order is not a contract"); Goldberg v. Trakas, 206 F. Supp. 867, 869 (E.D.S.C. 1962) ([A]n order of the Court issued by consent of the parties is not to be deemed a contract"); Ketab Corp. v. Mesriani Law Grp., No. CV1407241RSWLMRWX, 2016 WL 911816, at 2 (C.D. Cal. Mar. 7, 2016) (dismissal of contract claims including intentional interference with contractual relations was appropriate where the claims were based on a settlement order because a "Settlement Order is a court order, and not a contract.").

Further, Pope's appointment by the court did not create a "contract" based on an attorney-client relationship. Ordinarily, the relationship between the attorney and client is one of contract, either express or implied. However, courts have differentiated between a traditional contractual attorney-client relationship and one based upon court appointment. See e.g., American Mut. Liab. Ins. Co. v. Superior Court, 113 Cal.Rptr. 561, 570 (1974) ("*Save where*

appointed by court, the relationship of attorney and client is created by contract.") (emphasis added). In Moore v. McComsey, 459 A.2d 841, 844 (1983), the Superior Court of Pennsylvania held that an inmate could not bring a breach of contract claim against his court-appointed public defender because "there was no contract of employment between [inmate] and trial counsel, for counsel had been court appointed." Similarly, in Grand Blanc Landfill, Inc. v. Swanson Environmental, Inc., 505 N.W.2d 46, 48–9 (1993), the court held that the court's act of appointing an expert did not give rise to a contract because the required contractual elements were not met.

In the present case, Mrs. Pope cannot prevail on an intentional or tortious interference with contract claim because no contract was created between Mrs. Pope and the Estate and Trust. Analogous to the Moore case, Mrs. Pope was appointed by the court; therefore, the relationship between Mrs. Pope and the Estate and Trust was not a contractual one. See 459 A.2d 841. Additionally, like the expert in Grand Blanc Landfill, Mrs. Pope's court-appointed status and the court order concerning fees do not adequately satisfy the elements required to form a valid contract. See 505 N.W.2d 46. As a result, Mrs. Pope did not have a contractual relationship with the Estate and Trust, and certainly not with the court, and, thus, her counterclaims for intentional and tortious interference with contract fail as a matter of law.

Given the foregoing, summary judgment is appropriate as to Mrs. Pope's claim for Intentional Interference with Contract.

D. Violation of 62-1-106 (Fraud and Evasion)

Section 62–1–106 of the South Carolina Code (2009) provides:

> Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any

> person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not, but only to the extent of any benefit received. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

Mrs. Pope's counterclaim under § 62-1-106 alleges that "all Plaintiff's had knowledge that the heirs of James Brown should be properly determined" and that "an improper determination of heirs would damage the Estate/2000 Trust under the Federal Copyright Act." Counterclaim ¶ 99-100. Pope's counterclaim alleges that the Attorney General failed to address the heirs issues, "leaving to Defendants the protection of the Estate/2000 Trust under the Federal Copyright Act." Counterclaim ¶ 101. It is further alleged that "the Attorney General and some of the Plaintiffs stipulated to what is, upon information and belief, an incorrect determination of heirs." Counterclaim ¶ 102. The counterclaim concludes that "Plaintiffs intended for this known incorrect determination to be relied on and acted on by the Court and the Court and others have relied on such representations, *proximately causing injury to the Estate, 2000 Trust, and Defendants.*" Counterclaim ¶ 104. While the counterclaims make a cursory mention of injury to the Defendants, it appears to the Court from the preponderance of the contentions of Mrs. Pope's Counterclaims cited above that her claims under § 62-1-106 are actually claims for damages to the estate and not to her as an individual.

Mrs. Pope unquestionably lacks standing to assert claims on behalf of the Estate and Trust following the South Carolina Supreme Court's decision in Wilson v. Dallas since she ceased to be a fiduciary of the Estate and Trust on May 26, 2009. Accordingly, her counterclaim under § 62-1-106 fails as a matter of law.

Additionally, Pope claims the Attorney General failed to address certain issues regarding the correct heirs to the Estate in Aiken County case 2008-CP-02-0872. According to Pope, the Attorney General entered into an agreement on August 10, 2008 regarding the identity of heirs. Pope claims this stipulation of heirs was incorrect. However, Pope's Counterclaim was filed on September 10, 2010, and therefore this cause of action, even if she was able to assert it, fails due to the operation of the two-year statute of limitations set forth in § 62-1-106.

Accordingly, summary judgment is also appropriate as to Pope's § 62-1-106 claim.

E. Attorney's Fees pursuant to S.C. Code § 62-7-1004

The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. Seabrook Island Prop. Owners' Ass'n v. Berger, 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct. App. 2005). S.C. Code Ann. § 62-7-1004 provides that "[i]n a judicial proceeding involving the administration of a trust, 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 trust that is the subject of the controversy."

This Court is not persuaded that this breach of fiduciary duty action is "a judicial proceeding involving the administration of a trust". While the Plaintiffs will seek to prove their allegations of beach of fiduciary duty in the alleged actions or inactions of Mrs. Pope during her period of administration, the action has nothing to do with the actual administration of a trust. No decision in this action will effect, change, or guide the administration of the Brown Trust and Estate. Therefore, as a matter of law, Mrs. Pope's 62-7-1004 claim is barred.

However, even assuming that this case could be construed broadly as one "involving the administration of a trust," Pope cannot show that an award of attorney's fees would be required by "justice and equity." Pope was removed from her fiduciary role by the court for cause and

such removal was upheld by the Supreme Court in Wilson v. Dallas. Therefore, justice and equity could not require Pope's attorney's fees to be paid in this matter pursuant to § 62-7-1004. Moreover, there are no considerations of justice or equity that outweigh the well-established American rule requiring Mrs. Pope to bear her own legal fees in her defense, just as the Plaintiffs must bear their own legal fees in the prosecution of their claims. See Smith v. Barr, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007)("It is well known that equity follows the law.").

Moreover, Mrs. Pope has claims pending in Aiken Case 1337, which seek the same relief in whole or in part and she cannot maintain actions for the same relief in two separate courts. See Rule 12(b)(8), SCRCP.

VI. CONCLUSION

Based on the foregoing, Mrs. Pope's counterclaims are barred by collateral estoppel based on the Supreme Court's holding in Wilson v. Dallas.

Therefore, it is ORDERED that the Plaintiffs' Motion for Summary Judgment as to Defendant Pope's counterclaims is hereby GRANTED.

IT IS SO ORDERED.

Doyet A. Early, III
Presiding Judge

June 23, 2017

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)
) FIFTH JUDICIAL CIRCUIT

Russell L. Bauknight, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. [redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

and

Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. [redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown,

Plaintiffs,

vs.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants.

Civil Action No.: 2010-CP-40-4900

2017 JUN 12 PM 3:11

ORDER GRANTING ATTORNEY GENERAL ALAN WILSON'S MOTION TO BE DROPPED AS A PARTY

THIS MATTER COMES before me on the Motion of Attorney General Alan Wilson to be Dropped as a Party to this action, filed on March 25, 2013. The Court held a hearing and heard arguments from counsel on August 29, 2016. Senior Assistant Deputy Attorney General C.H. Jones, Jr. appeared for the Attorney General, [1] and Walter H. Bundy, Jr., Esquire, and M. Brent McDonald, Esquire, appeared for Defendant Adele J. Pope. Based on the pleadings, documents, and arguments of counsel presented to the Court, the Court finds that the Motion to be Dropped should be granted. Accordingly, the Attorney General's Motion to be Dropped as a Party is granted, and the Court Orders as follows.

The Attorney General moved to be dropped as a party pursuant to Rule 21, SCRCP, which states that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." The Attorney General's Motion to be Dropped is consistent with Rule 21 and the language in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). Following the South Carolina Supreme Court's decision in *Wilson v. Dallas*, 2013 WL 697042 (filed February 27, 2013),[2] the Attorney General filed a Petition for Rehearing wherein he advised the Supreme Court that he would shortly be moving to have himself removed as a party to the 4900 case and that any further action in the case to protect the charitable beneficiaries could be pursued by the new Trustee. *See* Petition for Rehearing, page 26-27. The Supreme Court acknowledged the Attorney General's desire to withdraw in its opinion of May 2013, stating as follows in footnote 30: "[T]he AG has recently informed this Court, in petitions filed after this Court's initial opinion, that he is now

---

1 In an abundance of caution, the Attorney General filed a Notice of Special Appearance to avoid any dispute regarding who would be able to argue and handle the Motion to be Dropped.

2 The initial opinion was issued on February 27, 2013. The Court later withdrew and superseded this opinion with *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013).

withdrawing as a party in that lawsuit and his office will maintain a monitoring role." The Attorney General's role in this matter is to protect the charitable beneficiaries, and with the appointment of Russell Bauknight (Bauknight), as the trustee, that is being handled to the satisfaction of the Attorney General. Accordingly, there is no need for the Attorney General to remain in this action. He is also immune from suit by the counterclaims as set forth later in this order.

Regarding the Attorney General's role, the Complaint itself states that Henry Dargan McMaster[3] is in the action as a beneficiary plaintiff and "in his capacity as the Attorney General for the State of South Carolina[.]" See Complaint, paragraph 3(a). As noted by the general law, the Attorney General, in his *parens patriae* capacity, has the duty to protect the public interest and the authority to do so as granted to him by the state constitution, statutory law, and common law. Further concerning charitable trusts, the Attorney General has the duty to represent the interests of the unspecified charitable beneficiaries and the interests of the public at large. *Wilson v. Dallas*, 403 S.C. 411, 431, 743 S.E.2d 746, 757 (2013) ("[W]here the trust involves charitable entities, the trustee has a duty to defend the trust, and the AG has the duty to represent the unspecified charitable beneficiaries."); *see also* S.C. Code Ann. § 1-7-130 (2005) ("The Attorney General shall enforce the due application of funds given or appropriated to public charities within the State."); S.C. Code Ann. § 62-7-405(c) (2009) ("The settlor of a charitable trust, the trustee, and the Attorney General, among others may maintain a proceeding to enforce the trust."); *Epworth Children's Home v. Beasley*, 365 S.C. 157, 164 n.3, 616 S.E.2d 710, 714 n.3 (2005) ("The Attorney General is the proper party to protect the interests of the public at

3 Henry Dargan McMaster was Attorney General at the time the action was filed. Pursuant to Rule 25(d), SCRCP, Alan Wilson was substituted for Henry Dargan McMaster when he became Attorney General in January 2010.

021

large in the matter of administering or enforcing charitable trusts." (citing *Furman Univ. v. McLeod*, 238 S.C. 475, 482, 120 S.E.2d 865, 868 (1961))); see generally 15 *Am. Jur. 2d* Charities § 132 (2015) ("Because of the public interest necessarily involved in a charitable trust or gift to charity and essential to its legal classification as a charity, it generally is recognized that the state Attorney General, in his or her capacity as a representative of the state and of the public, is the, or at least a, proper party to institute and maintain proceedings for the enforcement of such gift or trust.").

As the Supreme Court explained in *Wilson v. Dallas*, "[I]t is axiomatic that a trustee is always under the direction and guidance of the court. . . . " (*Id.* (citing *Kingdom v. Saxbe*, 161 N.E.2d 461, 466 (Ohio, Ashtabula County Prob. Ct. 1958)). In addition to the Attorney General, it is also appropriate for an individual Trustee to protect the charitable trust, as explained in S.C. Code Ann. § 62-7-405. Because of the actions of Bauknight, who is under the direction and guidance of the Court, there is no need for the Attorney General to be involved. In *Wilson v. Dallas*, the Court explained that "[a]lthough the AG certainly has duties in regards to charitable trusts, if he believed Appellants, as trustees, were not good stewards, the remedy would be to seek their removal and replacement." The Attorney General has no concerns with the appointment of Bauknight and believes that the charitable beneficiaries will be protected while he is trustee.

Shortly after the Supreme Court's ruling, in addition to filing this Motion and consistent with what he informed the Court, the Attorney General sought to withdraw from several other Brown matters. This Court then issued an Order Withdrawing Attorney General dated October 30, 2013. In that Order, the Court explained that allowing the Attorney General to withdraw is appropriate, in light of *Wilson v. Dallas*; the appointment of Bauknight as Special Trustee by

022

Order dated June 13, 2013; the appointment of Bauknight as Special Administrator dated June 13, 2013; and the Attorney General's desire, pursuant to his statutory and common law authority, to have a monitoring role of the cases. Pursuant to this Order, the Attorney General withdrew from the following James Brown cases: 2007-CP-02-122, 2008-CP-02-1647, 2008-CP-02-872, 2009-CP-02-597, 2009-CP-02-1140, and 2009-CP-02-1810. I find the same reasoning applies in the present case and the Attorney General should be allowed to be dropped as a party.

This is a civil case, with causes of action including breach of fiduciary duty, breach of trust, and negligence. The Attorney General is a Plaintiff in the action to protect the interests of the charitable beneficiaries. Because Bauknight, as Trustee, is protecting these same interests, there is no need for the Attorney General to be a party and allowing him to be dropped will not prejudice any other Plaintiff.

The Attorney General's being a counterclaim defendant does not preclude his being dropped as a party because he is immune from suit as to those counterclaims for reasons set forth in his Supplemental Memorandum submitted herein.[4] *See, Williams v. Condon*, 553 S.E.2d 496, 509, 347 S.C. 227, 250 (S.C.App.,2001); *Butz v. Economou*, 438 U.S. 478, 516 (1978); *Vosburg v. Department of Social Services*, 884 F.2d 133, 138 (C.A.4 ,1989); *Ostrzenski v. Seigel*, 177 F.3d 245, 251 (C.A.4, 1999); *Mathis v. McDonough*, 2014 WL 3894133, at *11 (D.Md.,2014); *Metro Charities, Inc. v. Moore*, 748 F.Supp. 1156, 1163–64 (S.D.Miss.,1990); *State v. Superior Court In and For County of Maricopa*, 921 P.2d 697, 700, 186 Ariz. 294, 297 (Ariz.App. Div.

4 Immunity is an affirmative defense under South Carolina case law, but as discussed in the Attorney's General's Reply to Plaintiff's Memorandum, cases indicate that it may be covered by the affirmative defense of failure to state a claim or cause of action or raised in a later pleading after the answer. *See. Plyler v. Burns*, 647 S.E.2d 188, 195, 373 S.C. 637, 649 (2007); *Ramsey v. City of Forest Park*, 418 S.E.2d 432, 433, 204 Ga.App. 98, 99 (Ga.App.,1992); *Baker v. Sudo*, 240 Cal.Rptr. 38, 42, 194 Cal.App.3d 936, 942 (Cal.App. 4 Dist.,1987).

023

1,1996); *Dinsdale v. Com.*, 675 N.E.2d 374, 377, 424 Mass. 176, 180 (1997). Further, to allow the counterclaims to proceed against the Attorney General would not only be contrary to his immunity, they would override his discretion in the protection of charitable beneficiaries by bringing this suit and now trying to end his involvement since Bauknight continues to protect the charitable beneficiaries.

WHEREFORE, for the reasons set forth herein, the Court grants the Attorney General's Motion to be Dropped as a Party.

IT IS SO ORDERED.

The Honorable Doyet A. Early, III
Presiding Judge

Rock Hill, South Carolina

5-31, 2017

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH CIRCUIT
	)	
RUSSELL L. BAUKNIGHT, et. al.,	)	CASE NO.: 2010-CP-40-4900
and	)	
ALAN WILSON, et. al.	)	
Plaintiffs,	)	**ORDER REGARDING MOTION FOR PROTECTIVE ORDER AS TO TOMMIE RAE BROWN'S DEPOSITION**
v.	)	
ADELE J. POPE,	)	
Defendant.	)	

RICHLAND COUNTY
FILED
2017 MAR 21 AM 8:49
JEANETTE W. GRIFFITH
C.C.P. & G.S.

This matter is before the Court on a motion filed by Tommie Rae Brown for a protective order regarding her deposition taken on June 16 and 17, 2016 in the above referenced matter. A hearing was held on Monday, November 21, 2016. After reviewing Tommie Rae Brown's Deposition Transcript ("Tr."),[1] it is

ORDERED that all of Tommie Rae Brown's counsel's objections noted on pages 22 through 58, as well as page 81, lines 19-20 and page 82, lines 13-14, 18-19, and 21-22, regarding Tommie Rae Brown's marriages to Javed Ahmed and/or James Brown are sustained until the motion for protective order is heard.

IT IS ORDERED that the following objections are overruled: Tr. 63:10-11, 18-19; Tr. 83:8-12; and Tr. 86:19-20.

IT IS FURTHER ORDERED that the following objections are sustained: Tr. 59:17-19; Tr. 103:14-15; Tr. 103:25–104:1; Tr. 104:11; Tr. 112:23-24; Tr. 113:11-12; Tr. 147:11-17; Tr. 159:16-21; Tr. 213:6-7, 13-19; Tr. 265:4-6, 10, and 13; Tr. 271:20-22; Tr. 285:7-9, 13; Tr.

[1] The Court did not issue an order regarding counsel's objection at Tr. 366:1-4.

287:12-19; Tr. 288:4-7; Tr. 362:4-21; Tr. 364:19-21; Tr. 365:20-22; Tr. 370:22-24; and Tr. 378: 9-16.

AND IT IS SO ORDERED.

Doyet A. Early, III
Presiding Judge
Fifth Judicial Circuit

Bamberg, South Carolina
March 9, 2017

026

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH CIRCUIT

RICHLAND COUNTY FILED
2017 MAR 15 AM 9:03
JEANETTE W. WALKER C.C.P.

Civil Action No. 2010-CP-40-4900

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted]r and Carrington L[redacted]r; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted] and CARRINGTON L[redacted]R; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs

v.

Adele J. Pope,

Defendant

ORDER CONCERNING PLAINTIFFS' MOTION TO STRIKE A JANUARY 17, 2017 AFFIDAVIT OF DEFENDANT

027 DAG#1

Plaintiffs in Richland Case 4900 moved this Court for an Order striking the Affidavit of the Defendant that was filed by her on January 17, 2017. A hearing was held on the motion on February 6, 2017, at which time all parties were heard. After having considered the arguments, the Court orders as follows: (1) The subject Affidavit will be placed under seal; (2) All further Affidavits filed by the Defendant will be filed under seal; (3) A determination will be made at the time of trial which Affidavits will be used in the trial of this matter. This Order specifically makes no finding about the content of the January 17, 2017 Affidavit. Motions, which have previously been filed in this matter to strike other affidavits, will be heard by this Court, only after at least ten days notice.

IT IS SO ORDERED.

Doyet A. Early, III
Presiding Judge

March 9, 2017
Bamberg, South Carolina.

U28

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH CIRCUIT

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted]R and CARRINGTON L[redacted]R; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs

v.

Adele J. Pope,

Defendant

Civil Action No. 2010-CP-40-4900

10 SEP 13 AM 12:05

ORDER COMPELLING DEFENDANT'S PRODUCTION OF DOCUMENTS

U29

applicant

Plaintiffs in Richland Case 4900 moved this Court for an Order compelling the Defendant to produce certain documents identified in her discovery, including approximately 139 bankers boxes of documents and an undetermined number of compact disks containing electronically stored documents. A hearing was held on the motion on February 6, 2017, at which time all parties were heard. After having considered the arguments, the Court rules as follows: (1) Defendant shall produce the compact disks to plaintiff's counsel within ten (10) days, and plaintiff's counsel will have ten (10) days to duplicate the compact disks and return them; (2) The week of May 1, 2017 Defendant will make available at her office the approximately 139 bankers boxes of documents identified in her discovery. Counsel for both parties will review each document to determine whether the document is relevant or contains privileged information; and Defendant will prepare a privilege log concerning any documents over which she claims any privilege. The documents will then be made available for copying at Armfields School Supply in Whitmire, South Carolina. Should one week not be sufficient for the review contemplated in this Order, the plaintiffs will notify the Court early in the review process and seek guidance as to the enlargement of time for the review.

IT IS SO ORDERED.

Doyet A. Early, III
Presiding Judge

3-7, 2017
Bamberg, South Carolina.

U30

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Russell L. Bauknight, et al.

and

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; et al.

Plaintiffs

v.

Adele J. Pope,

Defendant

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH CIRCUIT

Civil Action No. 2010-CP-40-4900

ORDER DENYING MOTION TO CONSOLIDATE DEPOSITIONS OF EXPERTS

RICHLAND COUNTY FILED
2017 FEB 13 AM 8:56
JEANNETTE W. McBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Adele J. Pope,

Plaintiffs

v.

Estate of James Brown and The James Brown 2000 Irrevocable Trust,

Defendants

IN THE COURT OF COMMON PLEAS

FOR THE SECOND CIRCUIT

Civil Action No. 2013-CP-02-1337

ORDER DENYING MOTION TO CONSOLIDATE DEPOSITIONS OF EXPERTS

Plaintiffs in Richland Case 4900 and Defendants in Aiken Case 1337 moved this Court for an order consolidating the cases for the limited purpose of the depositions of certain experts jointly named by Case 4900 Plaintiffs and Case 1337 Defendants. A hearing was held on the motion on January 23, 2017, at which time all parties were heard. The Defendant in Case 4900 and Plaintiff in Case 1337 opposed the motion on various grounds. After having considered the arguments, the court denies the motion to consolidate the cases for the limited purpose of the depositions of the jointly named experts.

031

IT IS SO ORDERED.

Doyet A. Early, III
Presiding Judge

Feb 6, 2017
Bamberg, South Carolina.

[redacted]

032

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
Russell L. Bauknight, et al,	)	No. 2010-CP-40-4900
Plaintiffs,	)	
v.	)	**ORDER GRANTING MOTION FOR PROTECTIVE ORDER AS TO DEPOSITION OF ATTORNEY GENERAL**
Adele Pope,	)	
Defendant,	)	

RICHLAND COUNTY FILED
2016 OCT -3 PM 3:26
JEANETTE W. WALDEN C.C.P. & G.S.
RECEIVED
SEP 12 2017
SC Court of Appeals

This matter has come before this Court pursuant to the Motion for Protective Order of Attorney General Alan Wilson to bar the taking of his deposition in this case. After reviewing the memoranda of counsel concerning this Motion and considering the arguments about it in Bamberg on August 26, 2016, this Court grants this Motion because the taking of the Attorney General's deposition would pose an undue burden under Rule 26(c), SCRCP. for the following reasons

1. Alan Wilson, who took Office in January, 2011, was not the Attorney General when this suit was initiated and, therefore, lacks personal knowledge of all or most of the matters at issue in the suit. Defendant has deposed the former Attorney General who was in Office when this suit was brought.

2. All or most of any questions Attorney General Wilson might be asked would be subject to attorney client and work product privileges

3. Questioning of the Attorney General with objections thereto would likely take a

day or more of his time. Depositions of two lawyers on his staff in a related proceeding took nearly five days. A deposition of former Attorney General Henry McMaster took approximately four hours or more. Such a time consuming deposition would interfere with the Attorney General's handling of the important duties of his Constitutional Office.

The above concerns fit squarely within the often called *Morgan* rule that is well recognized by the Federal Courts and other states that have considered it. Under that rule or related authority, depositions should not be taken of high ranking government officials unless the party noticing the deposition shows that the information sought is essential, that it is not obtainable elsewhere, and that the deposition of the official would not interfere with his government responsibilities. *See* discussion below. Defendant cannot make such a showing for a deposition of the Attorney General for these reasons. The Attorney General did not witness the events that are the subject of the Complaint nor did he make the decision to institute suit. Questions related to the continuation of the suit since he took Office would be barred by attorney client and work product privileges. Therefore, a deposition of the Attorney General would be an unproductive, time consuming exercise that would be an undue burden on him in his execution of his responsibilities as a State Constitutional Officers.

The above referenced *Morgan* rule is based on a United States Supreme Court decision (*United States v. Morgan*, 313 U.S. 409, 422 (1941), that is widely accepted throughout the Federal Courts, including the Fourth Circuit Court of Appeals, and has been adopted by a number of states. *See below.* As stated 27 years ago by the Supreme Court of Vermont, "[t]he federal courts have uniformly held that a highly-placed executive branch governmental official should not be called upon personally to give testimony by deposition, at least unless a clear

034

showing is made that such a proceeding is essential to prevent prejudice or injustice to the party requesting it. The few states that have had occasion to reach this question have adopted this standard as well." *Monti v. State*, 563 A.2d 629, 631, 151 Vt. 609, 611-12 (Vt.,1989) (emphasis added).

Although apparently not all of the Federal cases have based the *Morgan* rule on Rule 26(c), FRCP, our State court rule is similar and would empower the Circuit Court to apply the rule based upon the undue burden that the deposition would impose on the Attorney General. The *Morgan* doctrine is certainly consistent with our Supreme Court's decision applying a similar rule to testimony of judges.

> The modern trend of courts [is of] not allowing a judge to testify regarding a case in which he previously presided unless the testimony is: 1) critical; and 2) can be obtained by no other means. *See United States v. Dowdy*, 440 F.Supp. 894 (W.D.Va.1977); *Commonwealth v. Ellis*, 10 Mass. L. Rptr. 333 (Mass.1999) available at 1999 WL 855196; State ex rel. Carroll v. Junker, 79 Wash.2d 12, 482 P.2d 775 (Wash.1971); Helmbrecht v. St. Paul Ins. Co., 117 Wis.2d 74, 343 N.W.2d 132 (Wis.Ct.App.1983. . . which he previously presided). . . ."

In re Whetstone, 580 S.E.2d 447, 448, 354 S.C. 213, 216 (2003). Defendant contends that the *Morgan* rule predates the South Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure, but the rule, its progeny and related cases has been applied in numerous jurisdictions since then[1], and *Whetstone*, although dealing with judicial testimony, is consistent. This Court finds that the *Morgan* rule should be followed in this case.

---

[1] *Bogan v. City of Boston*, 489 F.3d 417, 423-24 (C.A.1 (Mass.),2007)(deposition of Defendant mayor); *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211–12 (C.A.4,1991)(deposition of Director of Defendant Office of Thrift Savings); *In re McCarthy*, 636 Fed.Appx. 142, 143 (C.A.4,2015)(Deposition of EPA Admistrator in suit against EPA); *In re U.S.*, 197 F.3d 310, 313-14 (C.A.8,1999) (deposition of Attorney General Reno in a Federal prosecution).

The *Morgan* rule, its progeny and related cases apply similar requirements for the showing of "extraordinary circumstances,"(*Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211–12 (C.A.4,1991), *supra*) to depose a high ranking official such as the Attorney General. It makes clear that the burden is on the party seeking the deposition to make such a showing. At a minimum, the Defendant must show that the testimony is "critical" (*Whetstone. supra*), "can be obtained by no other means" (*Id.*), and will not interfere with his other responsibilities (*McNamee v. Massachusetts*, 2013 WL 1285483, at *3 (D.Mass.,2013), *supra*)(). As stated in *McNamee*, a deposition will not be allowed unless the party seeking the testimony shows that "(1) the information sought is essential (not merely relevant) to the case, (2) the information sought is not obtainable elsewhere, and (3) provision of the testimony will not interfere with the official's government responsibilities. . . . "

The Defendant has not shown extraordinary circumstances to justify the taking of Attorney General Wilson's deposition. The information sought is not "essential" or "critical," under the first criteria, *supra*, because Attorney General Wilson did not take Office until the year

---

In re F.D.I.C., 58 F.3d 1055, 1060- 1062 (C.A.5 (Tex.),1995)(Depositions of three FDIC directors in action in which the FDIC was not a party but deposition had already been quashed of them in an action in which the FDIC was a party); *McNamee v. Massachusetts*, 2013 WL 1285483, at *3 (D.Mass.,2013)(deposition of former chief of staff of legislator); *U.S. v. Northside Realty Associates*, Inc., 324 F.Supp. 287, 295 (D.C.Ga. 1971) (deposition of Attorney General in suit initiated by him on behalf of United States); *Hyland v. Smollok*, 349 A.2d 541, 543, 137 N.J.Super. 456, 460 (N.J.Super.A.D. 1975)(deposition of Plaintiff New Jersey Attorney General); *Johnson v. Clark*, 21 A.3d 199, 210, 199 Md.App. 305, 323 (Md.App.,2011)(deposition of county executive of county defendant); *State, Dept. of Health and Rehabilitative Services v. Brooke*, 573 So.2d 363, 371 (Fla.App. 1 Dist.,1991)(Deposition sought of Secretary of Defendant Department of Health and Rehabilitative Services); *Department of Agriculture and Consumer Services v. Broward County*, 810 So.2d 1056, 1058 (Fla.App. 1 Dist.,2002)(Deposition of agency head in challenge to agency rule); *State ex rel. Paige v. Canady*, 475 S.E.2d 154, 160, 197 W.Va. 154, 160-162 (W.Va.,1996)(deposition of Secretary / Tax Commissioner in FOIA action apparently against him); *State Board of Pharmacy v. Superior Court*, 78 Cal.App.3d 641, 644-45 (Cal.App.1.Dist)(deposition of California Attorney General regarding appropriate attorney's fees to be awarded against a state agency and the impact of the case). The Attorney General's Memorandum includes lengthy quotations from these cases.

after this suit was brought and lacks personal knowledge of the circumstances when this action was initiated. Defendant points to steps in the litigation of this case since then, but those matters involve the progression of the litigation rather than the evidence upon which the case is based. The Defendant has not shown that "the information sought is not obtainable elsewhere" under the second criteria. She has taken the deposition of former Attorney General McMaster who was holding Office when this suit was brought, and she has also taken the depositions of Senior Assistant Deputy Attorney General Sonny Jones and Assistant Deputy Mary Frances Jowers in a related case. This summer, she has served on the Attorney General requests to admit the authenticity of documents, interrogatories and production requests in this case. For these reasons, Defendant cannot show that the information sought "can be obtained by no other means"(*Whetstone*). She also cannot show that the "provision of the testimony will not interfere with the [the Attorney General's] government responsibilities . . ." (*McNamee*). The Jones and Jowers depositions took nearly five days and the questioning of former Attorney General McMaster took nearly four hours. Given that all or most questions would be subject to objection as going to privileged matter about litigation decisions, the deposition would be very unproductive and an undue burden. Under the *Morgan* rule all of these criteria must be met before a deposition of a high ranking official can be taken, and Defendant has not satisfied any of the criteria.

CONCLUSION

The *Morgan* rule and its progeny and related cases protect against depositions of high-ranking public officials except under extraordinary circumstances not present here. This deposition would be an undue burden for this reason and those others noted above. Therefore,

this Court issues a protective order barring the taking of the deposition of Attorney General Wilson in this case.

Therefore, THIS COURT ORDERS that the Motion of the Attorney General be granted and ORDERS that his deposition not be taken in this case.

AND IT IS SO ORDERED.

Sept 21, 2016

Bamberg, South Carolina

DOYET A. EARLY, III
Circuit Court Judge

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH CIRCUIT

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted] and CARRINGTON L[redacted]; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs

v.

Adele J. Pope,

Defendant

Civil Action No. 2010-CP-40-4900

RICHLAND COUNTY FILED
2016 SEP 27 PM 2:52
JEANNETTE W. McBRIDE
C.C.P. & G.S.

ORDER GRANTING PLAINTIFFS' MOTION FOR PROTECTIVE ORDER AS TO DARYL J. BROWN AND TONYA BROWN

033

This matter came before the Court on Monday, August 29, 2016 on Plaintiffs' Motion for Protective Order to prevent the retaking of Mr. Daryl Brown and Mrs. Tonya Brown's depositions. The Court heard oral arguments from Mark V. Gende on behalf of the Plaintiffs and M. Brent McDonald on behalf of Mrs. Pope. For the following reasons, the Court GRANTS Plaintiffs' Motion for Protective Order.

It is undisputed that Daryl and Tonya Brown were deposed in this matter by counsel for Mrs. Pope on December 21, 2012 and February 8, 2013, respectively. Rule 30(a)(2) of the South Carolina Rules of Civil Procedure provides, in part, that the "deposition of any party or witness may only be taken one time in any case except by agreement of the parties through their counsel or by order of the court for good cause shown." Counsel for Mrs. Pope asserts that good cause exists because Daryl and Tonya Brown have allegedly changed their positions in respect to some of the issues raised in the case. However, counsel for Mrs. Pope made only conclusory allegations of these allegedly changed positions, did not provide any evidence that the alleged changes related to any material issues in the case, and cited no authority to support the contention that such alleged changes amounted to good cause. Conclusory allegations of changed positions is not good cause to permit a second deposition of a party under Rule 30(a)(2). The opposing party will have full opportunity at trial to impeach any party or witness concerning any allegedly changed positions that are inconsistent with prior deposition testimony.

Furthermore, to the extent Mrs. Pope is relying on this Court's April 8, 2016 order stating that "discovery in the case shall begin anew" as grounds to retake Daryl and Tonya Brown's depositions, the Court clarifies that order. The discovery to which the Court is referring in its April 8, 2016 Order is the prior interrogatories and requests to produce between the parties,

which had become encumbered by a multitude of motions to compel and cross motions for protection. The Court intended only for written discovery to begin anew as a way to clear the docket of all the pending motions concerning written discovery. The Court did not intend that depositions that have been taken be re-taken.

Therefore, it is ORDERED that the Plaintiffs' Motion for Protective Order as to Mr. Daryl Brown and Mrs. Tonya Brown is hereby GRANTED.

IT IS SO ORDERED.

Doyet A. Early, III
Presiding Judge

Sept 21, 2016

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH CIRCUIT

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted] and CARRINGTON L[redacted]; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs

v.

Adele J. Pope,

Defendant

Civil Action No. 2010-CP-40-4900

RICHLAND COUNTY FILED
2016 AUG -5 PM 12:24
JEANNETTE W. MCBRIDE C.C.P. & G.S.

PROPOSED SCHEDULING ORDER

Pursuant to Rule 16 of the South Carolina Rules of Civil Procedure and the authority vested in this Court by March 24, 2016 Order of the Supreme Court of South Carolina, the Court enters the following Scheduling Order is entered in this case:

1. Plaintiffs must identify all experts by November 30, 2016

2. Defendant must identify all experts by January 15, 2017.

3. The Court will closely monitor the progress of this case and at an appropriate time will convene a status conference at which a date-certain trial will be set for the trial of Case 4900 either prior to or jointly with Case 1337.

IT IS SO ORDERED.

The Honorable Doyet A. Early, III

July 25, 2016

Aiken, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE FIFTH JUDICIAL CIRCUIT
	)	
COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
	)	
RUSSELL BAUKNIGHT, et al. Plaintiff,	)	2010-CP-40-04900
vs.	)	ORDER LIFTING THE STAY
	)	
ADELE POPE, et al., Defendant.	)	

RICHLAND COUNTY
FILED
2016 APR 11 AM 9:47

This Court has been assigned exclusive jurisdiction in the above-captioned civil matter by order of the South Carolina Supreme Court, dated March 24, 2016. A status conference was held in Aiken, South Carolina on April 5, 2016 with Plaintiffs' attorneys Mark Gende, Esq., Ken Wingate, Esq., and Mary Frances Jowers, Esq. attending. Also present were Defendant Adele Pope's attorneys William Bundy, Esq., Adam Silvernail, Esq., Daryl Williams, Esq., and Brent McDonald, Esq.

At the conclusion of the status conference, this Court concluded the pending stay in this case, established by the Order dated March 2, 2016 signed by the Honorable L. Casey Manning, shall be lifted and discovery in the case shall begin anew. This Court intends this case to move forward expeditiously.

Dated this 8 day of April, 2016

The Honorable Doyet A. Early, III
Circuit Judge, Second Judicial Circuit

STATE OF SOUTH CAROLINA	IN THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS
RUSSELL BAUKNIGHT, et al. Plaintiff, vs.	2010-CP-40-04900 ORDER LIFTING THE STAY
ADELE POPE, et al., Defendant.	

RICHLAND COUNTY
FILED
2016 APR -8 AM 9:42

This Court has been assigned exclusive jurisdiction in the above-captioned civil matter by order of the South Carolina Supreme Court, dated March 24, 2016. A status conference was held in Aiken, South Carolina on April 5, 2016 with Plaintiffs' attorneys Mark Gende, Esq., Ken Wingate, Esq., and Mary Frances Jowers, Esq. attending. Also present were Defendant Adele Pope's attorneys William Bundy, Esq., Adam Silvernail, Esq., Daryl Williams, Esq., and Brent McDonald, Esq.

At the conclusion of the status conference, this Court concluded the pending stay in this case, established by the Order dated March 2, 2016 signed by the Honorable L. Casey Manning, shall be lifted and discovery in the case shall begin anew. This Court intends this case to move forward expeditiously.

Dated this 8 day of April, 2016

The Honorable Doyet A. Early, III
Circuit Judge, Second Judicial Circuit

The Supreme Court of South Carolina

Russell Bauknight, et al. — Plaintiffs,

v.

Adele J. Pope, et al., — Defendants.

Richland County
2010-CP-40-04900

Adele J. Pope, — Plaintiff,

v.

Alan Wilson, et al., — Defendants.

Richland County
2012-CP-40-00350

RICHLAND COUNTY
2017 MAR 10 PM 4:10

ORDER

IT IS ORDERED that the Honorable Doyet A. Early, III be vested with exclusive jurisdiction to hear and dispose of the above cases. Judge Early shall decide all matters pertaining to these cases, and pursuant to this assignment shall retain jurisdiction over these cases regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard as to whether there is a term of court scheduled.

Pursuant to this assignment, he is to have and exercise all powers and duties appertaining to a Circuit Judge of the Fifth Judicial Circuit while presiding over these cases.

Donald W. Beatty
Acting Chief Justice

March 24, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH CIRCUIT

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES BROWN II; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY LUMAR and CARRINGTON LUMAR; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs

v.

Adele J. Pope,

Defendant

Civil Action No. 2010-CP-40-4908

2016 MAR -2 PM 2:49

RICHLAND COUNTY

ORDER GRANTING PLAINTIFFS' MOTION TO STAY

This case is stayed pending further notification of the Court.

IT IS SO ORDERED.

The Honorable L. Casey Manning
Circuit Judge, Fifth Judicial Circuit

Dated this 2 day of March 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH CIRCUIT

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James Brown II; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney Lucas and Carrington Lucas; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES BROWN II; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY LUCAS and CARRINGTON LUCAS; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs

v.

Adele J. Pope

Defendant

Civil Action No. 2010-CP-40-4900

2015 OCT 13 P

ORDER CONCERNING PLAINTIFFS' MOTION FOR EXCEPTION TO THE PHYSICAL PRESENCE RULE AT MEDIATION

TO: COUNSEL FOR THE PLAINTIFFS AND THE DEFENDANT:

This matter comes before the Court on Plaintiffs' Motion for an Exception to the Physical Presence Rule at Mediation.

The Court notes that it previously held a hearing on this same issue on October 4, 2012. As a result of that hearing, the Court issued an Order granting the Plaintiff's request for an exception to the physical presence rule at mediation for represented James Brown family members and minor children.

After considering the parties' arguments as to the instant motion as well as its prior ruling after extensive briefing and oral argument by the parties, the Court hereby finds and orders as follows:

1. The Court directs the parties to proceed with and participate in good faith in the mediation scheduled for October 22, 23, or 26, 2015.

2. Plaintiffs' motion is GRANTED to the extent it seeks an exception to the physical presence rule at mediation for represented James Brown family members, provided any absent family member is represented by counsel that is physically present.

3. Plaintiffs' motion is GRANTED to the extent it seeks an exception to the physical presence rule at mediation for all of the minor children and for a jailed adult family member. The court FINDS, under these facts and circumstances, that for this mediation there is no necessity to appoint any guardians *ad litem*.

AND IT IS SO ORDERED.

The Honorable L. Casey Manning
Circuit Judge, Fifth Judicial Circuit

Dated this 13 day of Oct, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH CIRCUIT

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted] and CARRINGTON L[redacted]; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs

v.

Adele J. Pope,

Defendant

Civil Action No. 2010-CP-40-4900

FILED
2011 JAN 13 PM 1:02

ORDER GRANTING PLAINTIFFS' MOTION TO SET ASIDE ENTRY OF DEFAULT

THIS MATTER COMES BEFORE THE COURT on Plaintiffs' Motion to Set Aside the Entry of Default in the above-referenced action. Having considered the Plaintiffs' Motion and Affidavit and after having heard and carefully considered the arguments set forth by both parties during a hearing on this matter on December 17, 2012, the Court hereby finds and orders as follows:

1. Defendants filed an Affidavit of Default on November 10, 2010 claiming that Plaintiffs had failed to serve a timely answer to their counterclaims.

2. Plaintiffs promptly filed a Motion to Set Aside Entry of Default and served an Answer to the Counterclaims upon receipt of the Affidavit of Default. Both the Motion and Answer to Counterclaims were filed and served on November 16, 2010.

3. Plaintiffs have presented evidence of a meritorious defense to the Counterclaims.

4. Defendants are not prejudiced by this Court setting aside the default.

5. Plaintiffs have demonstrated good cause for setting aside the entry of default, and the Court has considered each of the factors set forth in Wham v. Shearson Lehman Bros., 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989).

6. Therefore, the record in this case demonstrates that the Plaintiffs have shown good cause for failing to serve an answer on or before November 1, 2010 and the interests of justice will be served by vacating any entry of default.

7. As further evidence showing good cause for the Plaintiffs' failure to timely answer, and as a separate and independent grounds for setting aside any default, pursuant to Rule 55(a), SCRCP, the Plaintiffs were "otherwise defend[ing]" in this matter by actively contesting Defendants' Rule 12, SCRCP motions to dismiss and change venue in response to the Plaintiffs' Complaint.

8. Pursuant to Rule 55(e), SCRCP, the Attorney General was never in default. In any event, the foregoing analysis would apply to the Attorney General as well.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(a) the Entry of Default is set aside as to all Plaintiffs for good cause shown pursuant to Rule 55, SCRCP; and

(b) the Attorney General was never in default.

AND IT IS SO ORDERED.

The Honorable L. Casey Manning
Circuit Judge
Fifth Judicial Circuit

Columbia, South Carolina
Oct 13, 2015

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2010-CP-40-04900

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James Br[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted] and CARRINGTON L[redacted]; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiff

v.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants

ORDER TO CONDUCT MEDIATION

RICHLAND COUNTY
FILED
2012 JUL 18 PM 3:12
JEANETTE W. McBRIDE
C.C.P. G.S.

Pursuant to this Court's request, the parties to the above-captioned matter attended a Status Conference in Chambers on July 5, 2012. Present at the conference were Kenneth B. Wingate, Esq., Mark V. Gende, Esq., and Aaron J. Hayes, Esq., as attorneys for Plaintiffs. Representing the Defendant Robert L. Buchanan were J. Calhoun Watson, Esq. and Robin A. Braithwaite, Esq. Representing the Defendant Adele J. Pope was Adam T. Silvernail, Esq. Finally, J. Emory Smith, Jr., Esq. was present on behalf of the Attorney General with respect to certain Freedom of Information Act cases that have been brought before this Court and are consolidated with (or related to) this action. The Court conducted this conference in order to ascertain the status of this action since the parties were last before the Court at the motion hearing of April 12, 2012.

Summary of Status Conference

Mr. Gende reported that the Plaintiffs have conducted mediation with Defendant Buchanan on all outstanding issues between Plaintiffs and Defendant Buchanan, and have achieved a mediation agreement resolving all such issues. Messrs. Watson and Braithwaite confirmed Mr. Gende's assertion that the Plaintiffs and Defendant Buchanan were in the process of finalizing the settlement documents that will end all litigation between Plaintiffs and Defendant Buchanan. Mr. Gende noted that Defendant Pope refused to participate in this mediation, and continues to refuse to participate in this mediation as set forth in greater detail, below. Mr. Gende requested that the Court order Plaintiffs and Defendant Pope to participate in mediation before the case progresses any further.

Mr. Silvernail steadfastly objected to Mr. Gende's request for court-ordered mediation, and set forth Defendant Pope's position that further discovery should be conducted in this case before Plaintiffs and Defendant Pope attend a mediation. Specifically, Mr. Silvernail stated that Defendant Pope would like to take the depositions of Plaintiffs Tommie Rae Hynie Brown and Terry Brown

(among others) before mediation. Further, Defendant Pope would like additional discovery concerning the copious documentary evidence that exists in this case.

Findings and Order

The Court notes that this case is subject to mandatory mediation, since it is filed in Richland County. See Order of the South Carolina Supreme Court (Sept. 16, 2009). After carefully considering the arguments of Plaintiffs and Defendant Pope, the Court finds that it is appropriate that mediation occur in this matter as soon as possible. Therefore, it is hereby ORDERED that Plaintiffs and Defendant Pope attend mediation in this matter within ninety (90) days of the date of this Order. The Court will hold in abeyance all pending motions until after the parties apprise the Court of the outcome of the mediation.

AND IT IS SO ORDERED.

L. Casey Manning
Circuit Judge, Fifth Judicial Circuit

Date: July 19, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2010-CP-40-04900

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted] and CARRINGTON L[redacted]; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiff

v.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants

FILED
2012 JUL 13 AM 11:19
JEANETTE W. McBRIDE
C.C.P. & G.S.

ORDER OF DISMISSAL

ORDER of DISMISSAL

1. This Court is informed that Plaintiffs and Defendant Robert L. Buchanan, Jr., have reached a final settlement in this matter that resolves all claims between them;

2. The above-styled causes of action as well as any claim, cross claim, or counterclaim between the Plaintiffs and Defendant Buchanan are hereby dismissed with prejudice, waiving all rights of appeal;

3. Each party shall pay its own court costs and expenses associated with the above-referenced litigation.

NOW, THEREFORE, in consideration of the above and with the consent of Plaintiffs and Defendant Buchanan, this matter is dismissed with prejudice.

SO ORDERED, this, the 13 day of July, 2012.

The Honorable L Casey Manning

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2010-CP-40-04900

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]r; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted]R and CARRINGTON L[redacted]R; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,,

Plaintiff

v.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants

ORDER CONCERNING DEFENDANT ALELE POPE'S MOTION TO DISQUALIFY SWEENY, WINGATE AND BARROW, P.A. FROM REPRESENTING THE OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, ENJOINING RUSSELL BAUKNIGHT FROM PROPORTING TO SPEAK FOR THE OFFICE OF THE ATTORNEY GENERAL, AND OTHER RELIEF

2012 JUL 5 AM 10:58
RICHLAND COUNTY
FILED
CLERK OF COURT
C. McBRIDE
C.C.P.S.

At a Hearing before The Honorable L. Casey Manning on April 12, 2012, the Court heard Defendant Pope's Motion to Disqualify Sweeny Wingate and Barrow, PA from representing the Office of the Attorney General of South Carolina, enjoining Russell Bauknight from purporting to speak on behalf of the Office of the Attorney General of South Carolina, and for other miscellaneous relief.

Having considered the Memoranda of Law from Defendant Pope and Plaintiffs, hearing oral argument from both parities, and carefully considering the merits of the arguments of each party, this Court denies the relief sought by Defendant Pope in her Motion.

IT IS SO ORDERED.

THE HONORABLE L. CASEY MANNING
Circuit Judge, Fifth Judicial Circuit

Dated this 5 day of July, 2012

Columbia, South Carolina

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

ADELE POPE,
plaintiff,

-v-

ALAN WILSON, *in his capacity as* Attorney General,
defendant.

C.A. №
11-CP-36-379

ORDER

FILED
NEWBERRY COUNTY
2011 NOV 30 P 2:13
JACKIE S. BOWERS
CLERK OF COURT

THIS MATTER ORIGINALLY CAME BEFORE THE COURT for a hearing on October 26, 2011. Plaintiff moves this Court for summary judgment on her claim that she is entitled to the production of certain documents from the Defendant Attorney General under the State of South Carolina's Freedom of Information Act (hereinafter "FOIA"), S.C. Code Ann. § 30-4-10 *et seq.* Defendant opposes Plaintiff's motion and moves to dismiss the Plaintiff's complaint and to strike the attached affidavits. I find as follows:

FILED
NEWBERRY COUNTY
2011 DEC 12 P 10:47
JACKIE S. BOWERS
CLERK OF COURT

I. Facts of the Case.

Although not directly arising out of pending litigation, this matter is otherwise closely related to litigation already pending in Richland County[1]. *See Bauknight v. Pope*, 2010-CP-40-04900 (Richland 2010) (hereinafter "fiduciary litigation"). The fiduciary litigation arises out of the Plaintiff's fiduciary responsibilities in relation to the James Brown Legacy Trust. Furthermore, the fiduciary litigation is presently stayed pursuant to an oral order by the

[1] The defendant in this action is one of several plaintiffs in that action, wherein the plaintiff in this action is one of several defendants.

EXHIBIT
C

Honorable Casey L. Manning.[2] At the time of the stay, the parties to the fiduciary litigation (hereinafter "*McMaster* parties") were in the midst of claims and cross-claims regarding, among other things, the disqualification of the firm Sweeney Wingate & Barrow, P.A. (hereinafter "Sweeney").

During the pendency of the stay, the Plaintiff made an FOIA request for documents pertaining to, *inter alia*, Sweeney's fee agreement with the Defendant's office, documents outlining the Defendant's policies for retaining outside counsel, and documents dealing with the policy of outside counsel speaking on behalf of the Defendant. Because of Judge Manning's earlier ruling, Defendant understandably declined to disclose the requested documents. Thereafter, Plaintiff brought this action and, before the Defendant filed an answer, moved for summary judgment.

Plaintiff asseverates that she is entitled to production of these documents regardless of the status of the fiduciary litigation. Defendant contends that venue is not proper in Newberry County, that the Newberry Court is without subject matter jurisdiction to hear this matter, and that the Plaintiff may not avail herself of FOIA for the production of documents at issue.

---

[2] At the hearing on this matter, there was some dispute as to whether Judge Manning's ruling amounted to an absolute stay. According to the transcript of the hearing in question, the following transpired:

> Mr. Wingate: You Honor, just one clarification. When you say maintain the status quo, the status quo is that the case is effectively stayed at this point. [sic]
>
> The Court: Yes, I mean it might last for a week or so. I just need to go chitchat with Judge Lee and say, this is what I have done. How do you want to proceed from here. [sic] And she will either say, bring them back in or whatever. But the idea, if I were Judge Lee I would want her to do the same thing I am doing for my benefit. Thank you all very much.

Judge Manning's ruling will be considered and understood by this court as a stay of proceedings, although the exact legal effect of his comments may be subject to debate. Subsequent to the hearing before this court, the court contacted Judge Lee who informed this judge that she and Judge Manning had agreed that Judge Manning would be handling all the fiduciary litigation.

II. Subject Matter Jurisdiction & Rule 12(b)(8)

Because a court may not act without subject matter jurisdiction, *DeWitt v. S.C. Dep't of Pub. Transp.*, 274 S.C. 184, 187, 262 S.E.2d 28 (1980) (citing *State v. Funderburk*, 259 S.C. 256, 191 S.E. (2d) 520 (1972); *Ross v. Richland County*, 270 S.C. 100, 240 S.E. (2d) 649 (1978); *Ex parte Harte*, 186 S.C. 125, 195 S.E. 253 (1938), it is incumbent on the Court to first determine whether it has jurisdiction to resolve the matter before it. "The question of subject matter jurisdiction is a question of law for the court." *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631 (Ct.App.1993) (*citing Bargesser v. Coleman Co.*, 230 S.C. 562, 96 S.E.2d 825 (1957)). Defendant argues that because the Richland Court has exercised jurisdiction over the fiduciary litigation, principles of law preclude this Court from exercising subject matter jurisdiction. Accordingly, the Defendant contends that this Court should dismiss this action pursuant to Rule 12(b)(8), SCRCP. I disagree.

In support defendant's position, Defendant cites the cases of *Tucker v. Tucker*[3] and *Richardson, Plowden, Grier & Howser v. Pyle*.[4] These cases are not entirely on point with the issues in this case. Both *Tucker* and *Richardson* deal with the jurisdictional overlap between the Circuit Court and inferior courts over the same subject matter. *Tucker* involved the administration of a probate estate by two executors. *Tucker*, 264 S.C at 175. The plaintiff brought suit in the Circuit Court to remove the co-executor. *Id.* Citing provisions of the South Carolina Constitution and the South Carolina Probate Code, our Supreme Court held that once an administration of an estate was begun in the Probate Court, all other courts of concurrent jurisdiction were without jurisdiction to hear matters pertaining to that case. *Id.* at 175-78.

The issue in *Richardson* was whether the Fee Disputes Board held exclusive jurisdiction over a matter originally brought in the Circuit Court. *Richardson*, 322 S.C. at 372-73. In that case, after the plaintiff initiated the breach of contract action in Circuit Court, the defendant attempted transfer the case to the board. *Id.* Relying on Rule 2 of Rule 416, SCACR,[5] the

---

[3] 264 S.C. 172, 213 S.E.2d 588 (1975).

[4] 322 S.C. 371, 472 S.E.2d 232 (1996).

[5] This Rule states, in pertinent part, that

> Under no circumstances will the Board participate in: (1) a fee dispute involving an amount in dispute of $50,000 or more; or (2) *disputes over which, in the first instance, a court, commission, judge, or other tribunal has jurisdiction to fix the fee.*

Supreme Court found that the board could not take jurisdiction over the matter when the matter had already been submitted to the Circuit Court. *Id.* at 374. The Court further held that:

> [t]o allow a client to unilaterally remove a fee dispute to the Board when a contract action is pending in circuit court to collect attorney's fees would be inconsistent with the well-settled rule that where there is concurrent jurisdiction, the first tribunal to acquire jurisdiction has exclusive jurisdiction.

Id. (citing *McDonald v. McDonald*, 276 S.C. 573, 281 S.E.2d 109 (1981)). The present case does not involve any inferior court; rather, it involves two circuit courts addressing issues that concern one another. There is no case directly on point to address this issue.

The rule of law, as delineated by cases such as *Tucker* and *Richardson*, is that where the same parties litigate the same matter before courts of concurrent jurisdiction, the court which first takes jurisdiction has exclusive jurisdiction. *See McDonald*, 276 S.C. at 575 ("Here, actions involving the same parties, substantially the same issue (the parties' respective interests in the marital residence), were pending in the family court and circuit court, courts of concurrent jurisdiction."). This judicial principle a great resemblance to the Rule 12(b)(8) standard annunciated by the Court of Appeals in *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009). The rule stated in *Capital City* is that "[i]n South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim." *Id.* at 105. Thus, an analysis of the Rule 12(b)(8) case law, as applied to the defendant's *Tucker/Richardson* claims, leads me to find that this Court does, in fact, have subject matter jurisdiction.

The first two prongs of the *Capital City* test is met in this case. As already discussed, the fiduciary litigation remains pending in Richland County Circuit Court. Both this litigation and the fiduciary litigation involve many of the same parties, and the Plaintiff and the Defendant are both involved in the exact same capacities, albeit with adversarial roles reversed. In both instances, the Plaintiff is a party in her individual capacity and the Defendant is a litigant in his official capacity. Thus, the parties are the same. *See Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 321-22, 701 S.E.2 39, 44-45 (Ct. App. 2010) (stating that where the plaintiffs sue

---

Rule 416, SCACR (emphasis supplied).

defendants in their official capacities in one suit and in their individual capacities in another, then the identities of the parties are different, even when both suits center on the same set of facts).

However, this case fails to meet the third prong of the *Capital City* test in that the claims in this case and in the fiduciary litigation are not the same. In order for claims to be identical, they "must be *precisely or substantially the same in both proceedings* in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)." *Capital City*, 382 S.C. at 105-06 (emphasis supplied). In *Cricket Cove*, the plaintiffs sought a declaratory judgment and writ of *mandamus* against the defendant municipality and subsequently brought another suit against county officials in their individual capacities for civil conspiracy and injunctive relief. *Cricket Cove*, 390 S.C. at 317-18. Reversing the lower courts dismissal of the latter case under Rule 12(b)(8), the Court of Appeals found that the claims asserted in either action were not identical. *Id.* at 322-23. "Here, the cause of action for civil conspiracy is not covered in the first case, and the writ of mandamus cause of action in the present case seeks relief that is different from the relief sought in the causes of action in the first case." *Id.* at 323.

The *Cricket Cove* decision followed the then newly announced standard set forth in *Capital City*. The *Capital City* case concerned a dispute over a modifier to the plaintiff's worker's compensation coverage. *Capital City*, 382 S.C. at 96-97. There, while the modifier issue was on administrative appeal, the plaintiff brought suit against the defendant insurer for breach of contract and fraud. *Id.* at 97. Finding the lower court's dismissal improper, the Court of Appeals concluded that

> [h]ere, while we respectfully recognize that the administrative claim may have some relationship or impact upon the circuit court action, we also recognize that the administrative proceeding and the circuit court action are fundamentally and structurally different from each other.

Id. at 106.

The conclusions reached in *Capital City* and *Cricket Cove* are similar to that reached by this Court. The Defendant contends that this action is merely an extension of the discovery dispute in the fiduciary litigation. Looking at the law, this is not the case. Substantively, a FOIA request is a different animal than that of a discovery request. In some instances, a FOIA request may be proper in circumstances where a discovery request would be improper and *vice versa*. *See Columbia v. ACLU of South Carolina*, 323 S.C. 384, 388-89, 475 S.E.2d 747, 749-50 (1996)

(holding that where documents are the subject matter of FOIA litigation, these documents are not discoverable). Procedurally, discovery in civil actions is governed by Part V of the South Carolina Rules of Civil Procedure, whereas the process for obtaining public documents is defined under S.C. Code Ann. § 30-4-40 *et seq.* Looking at this distinction, production of documents under FOIA is statutorily guaranteed to "any person." S.C. CODE ANN. § 30-4-40. Discovery, on the other hand, is available only to litigants. *See* Rule 26(a), SCRCP(" Parties may obtain discovery by one or more of the following methods. . . ."). Moreover, the relief afforded under discovery is dissimilar to that of discovery. If an applicant is denied under FOIA, relief may only be achieved by bringing suit in the Circuit Court. S.C. CODE ANN. § 34-4-100(a). If a party is denied discovery, they must bring a motion to compel, which, if denied, may only appealed at the conclusion of the case. *Lowndes Products, Inc. v. Brower*, 262 S.C. 431, 434, 205 S.E.2d 184, 185 (1974). These are some, but not all, of the distinctions between FOIA and discovery, and for these reasons, the Court concludes the claims placed before this Court and the Richland County Court are not the same. Therefore, this Court has subject matter jurisdiction.[6]

III. Consolidation.

Finding that this Court is vested with subject matter jurisdiction, the Court declines to address any of the additional motions put before it. Already, the underlying subject matter of this case bears the imprimatur of four other courts.[7] Rule 1 of the South Carolina Rules of Civil Procedure state that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. It is therefore unnecessary and repugnant to interests of expedited justice for yet another court to become involved. For this reason, this case is to be consolidated with the currently pending case of *Bauknight v. Pope*, 2010-CP-40-04900 (Richland 2010), as per the instructions set forth below. *See* Rule 42(a), SCRCP ("When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the action."); *Creighton v. Coligny Plaza Limited*

[6] Given this analysis, Defendant's motion to dismiss pursuant to Rule 12(b)(8) is also denied.

[7] In addition to the fiduciary litigation, aspects of this case have been litigated in the Aiken Circuit Court as well as in federal district court. The Aiken matter is currently on appeal to the Supreme Court. I was subsequently informed that apparently another case in Newberry, 11-CP-36-364, involves apparently identical claims. While that case is currently not before this court and is therefore beyond the scope of this order, the court would strongly encourage all concerned to consent to consolidating that matter in Richland or for Plaintiff to dismiss that case, as it appears duplicative of issues addressed in this order.

Partnership, 334 S.C. 96, 119-20, 512 S.E.2d 510, 522 (Ct. App. 1998) ("Under Rule 42(a), a trial judge may order the consolidation of actions involving a common question of law or fact.").

IV. Conclusion.

It is the Order of the Court that:

1. The Defendant in this matter will answer Plaintiff's complaint;
2. At the conclusion of the pleadings phase of this case, this matter will be consolidated with *Bauknight v. Pope*, 2010-CP-40-04900 (Richland 2010);
3. Any motions and issues hereafter outstanding, including an oral motion to intervene by an arguably interested party, will thereby be taken up by Richland County Court; and
4. Any claim to attorney's fees, as permitted under the South Carolina Freedom of Information Act, will be preserved for resolution by the Richland County Court.

IT IS SO ORDERED.

Frank R. Addy, Jr.
Eighth Judicial Circuit

November 22, 2011
Greenwood, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)
) Case No.: 2010-CP-40-4900

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L[redacted]r, Carrington L[redacted]r, and Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown
and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN - LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children, SYDNEY L[redacted]R, CARRINGTON L[redacted]R, and TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,
Plaintiffs.

v.
Adele J. Pope and Robert L. Buchanan, Jr.,
Defendants.

RICHLAND COUNTY FILED
2011 MAY 12 PM 3:24
JEANETTE W. McBRIDE C.C.P. & G.S.

ORDER

This matter came before the Court for hearing April 18, 2011 on Defendants Adele J.

Pope and Robert L. Buchanan, Jr.'s Motion to Stay Proceedings. Defendants' Motion was filed November 30, 2010. Specifically, Defendants ask this Court to stay proceedings in this action until the resolution of declaratory judgment actions filed by Cincinnati Insurance Company in U.S. District Court. These cases seek a determination as to whether or not Defendants are entitled to insurance coverage in defense of the tort action against them for alleged wrongdoing during their service as Personal Representatives of the Estate of James Brown and Trustees of the James Brown Irrevocable Trust from November 20, 2007, until May 26, 2009.

Defendants inform the Court that this action is being handled by the Honorable William O. Bertelsman of the Eastern District of Kentucky and that discovery in the case will not be completed before January 13, 2012. Thus, the Plaintiffs would necessarily be delayed in this action until at least that date. South Carolina Rules of Civil Procedure encourage the "just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. Though this action may not be speedy or inexpensive, nevertheless, after careful consideration of the record in this case and the submissions of the parties, Defendants' Motion to Stay is hereby DENIED.

AND IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Fifth Judicial Circuit Court Judge

May 12, 2011
Columbia, South Carolina

2010CP4004900

The South Carolina Court of Appeals

Russell L. Bauknight, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child , James, B.; Daryl J. Brown, individually and on behalf of his minor child, Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L., Carrington L., and Tonya B.; Venisha Brown; Larry Brown; and Terry Brown

and

Alan Wilson, in his capacity as Attorney General of the State of South Carolina, Tommie Rae Brown, individually and on behalf of her minor child, James B.; Daryl J. Brown, individually and on behalf of his minor child, Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L., Carrington L. and Tonya Brown; Venisha Brown; Larry Brown and Terry Brown,

Respondents,

v.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants,

Of whom Adele J. Pope is the

Appellant.

FILED
CLERK OF COURT
2010 DEC -2 AM 10:18
CHARLESTON COUNTY
SOUTH CAROLINA

The Honorable L. Casey Manning
Richland County
Trial Court Case No. 2010-CP-40-04900

ORDER

Appellant petitions our Court to rehear the dismissal of the above-captioned appeal. After a careful consideration, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing or reinstating the appeal.

AND IT IS SO ORDERED.

H. Bruce Williams

A. Kl

Joseph M. Cureton A.J.

Columbia, South Carolina

cc: Adam T. Silvernail, Esquire
Daryl L. Williams, Esquire
Kenneth B. Wingate, Esquire
Everett A. Kendall, Esquire
J. Calhoun Watson, Esquire
Robin A. Braithwaite, Esquire

FILED
5/31

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

Case No.: 2010-CP-40-4900

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L[redacted], Carrington L[redacted], and Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN - LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children, SYDNEY L[redacted], CARRINGTON L[redacted], and TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs.

v.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants.

ORDER

RICHLAND COUNTY
FILED
2011 APR 28 AM 10:00
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter came before the Court for hearing on April 18, 2011 on Defendant Adele J.

Pope's Motion to Compel the individual plaintiff's verification of their Interrogatory responses.

Plaintiffs have offered to supply Verifications within thirty (30) days. Defendant Pope does not object to this and the Court deems it acceptable.

IT IS THEREFORE ORDERED that the Plaintiffs shall submit individual Verifications of their interrogatory responses to Defendant Pope within thirty (30) days of entry of this Order.

AND IT IS SO ORDERED.

G. Thomas Cooper
Presiding Judge
Richland County Court of Common Pleas

April 27, 2011
Columbia, SC

The South Carolina Court of Appeals

Russell L. Bauknight, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James, B.; Daryl J. Brown, individually and on behalf of his minor child, Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L., Carrington L., and Tonya B.; Venisha Brown; Larry Brown; and Terry Brown

and

Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B.; Daryl J. Brown, individually and on behalf of his minor child, Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L., Carrington L. and Tonya Venisha Brown; Larry Brown and Terry Brown; Respondents,

v.

Adele J. Pope and Robert L. Buchanan, Jr., Defendants,

Of whom Adele J. Pope is the Appellant.

The Honorable L. Casey Manning
Richland County
Trial Court Case No. 2010-CP-40-04900

ORDER

Appellant Adele Pope appeals from the orders of the circuit court (1) denying her motion to dismiss, (2) denying her motion to change venue, and (3) denying her Rule 59(e), SCRCP, motion. Appellant also petitions this court for a writ of prohibition to stop the circuit court and Attorney General from proceeding with the underlying law suit. Respondents move to dismiss the appeal arguing the orders are not immediately appealable.

After review, we find the orders challenged on appeal are not immediately appealable. See Breland v. Love Chevrolet, 339 S.C. 89, 529 S.E.2d 11 (2000) (order denying motion to change venue not immediately appealable); Huntley v. Young, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995) ("The denial of a Rule 12(b)(6) motion does not establish the law of the case nor does it preclude a party from raising the issue at a later point or points in the case. Since the order denying the Rule 12(b)(6) motion does not finally decide any issue, it is not directly appealable."). Accordingly, the appeal must be dismissed.

Because no appealable orders are before us, we do not have the authority to issue a writ of prohibition. Pursuant to section 14-8-220 of the South Carolina Code (Supp. 2010), this Court has the power "to issue such remedial writs as are necessary to give effect to its jurisdiction." Without an appealable order, the issuance of the writ requested is not necessary to give effect to our jurisdiction.

AND IT IS SO ORDERED.

Jasper M. Cureton A. J.

Columbia, South Carolina

cc: Adam T. Silvernail, Esquire
Daryl L. Williams, Esquire
J. Calhoun Watson, Esquire
Robin A. Braithwaite, Esquire
Kenneth B. Wingate, Esquire
Everett A. Kendall, Esquire

FILED
3/16/11

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2010-CP-40-4900

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James Br[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney Lu[redacted] and Carrington Lu[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted] and CARRINGTON L[redacted]; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,
Plaintiffs

v.

Adele J. Pope and Robert L. Buchanan, Jr.,
Defendants

FILED
2011 JAN 12 PM 12:05
JEANETTE W. McBRIDE
C.C.P. & G.S.

ORDER

This matter is before the Court upon the Defendants' Motions to Amend the Court's Orders of November 9, 2010. The two Motions filed pursuant to Rule 59(e) address the Court's

Order denying the Defendants' Motion to Dismiss and the Defendants' Motion to Change Venue.

Having considered the matters carefully, the Court finds no reason to alter or amend its previous Orders. **THEREFORE, DEFENDANTS' MOTIONS ARE DENIED.**

The Honorable L. Casey Manning
Circuit Judge

Signed this 7 day of Jan, 2011
at Columbia, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2010-CP-40-4900

RICHLAND COUNTY
FILED
2010 NOV -9 AM 9:21
RICHLAND COUNTY
CLERK OF COURT

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]I; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]I; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted]R and CARRINGTON L[redacted]R; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,
Plaintiffs

v.

Adele J. Pope and Robert L. Buchanan, Jr.,
Defendants

ORDER DENYING MOTION TO DISMISS

This matter is before the Court upon Defendant's Motion to Dismiss, filed in lieu of an Answer on June 22, 2010. A hearing was held on August 30, 2010 at which counsel for all parties were present. After hearing from both sides, reviewing the Memoranda and Affidavits submitted by both sides, and considering the matter thoroughly, I find that the Motion should be DENIED.

In this lawsuit, Plaintiffs seek redress for the alleged injury done to the Estate and certain trusts created by the late James Brown. This injury is alleged to be the result of acts and omissions of Defendants Adele Pope and Robert J. Buchanan, Jr., the former Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust.

Defendants assert ten bases for dismissal in their Motion to Dismiss. While not explicitly stated, most of these defenses arise under Rule 12(b)(6), (7) or (8) of the South Carolina Rules of Civil Procedure. Defendants also include certain affirmative defenses

Rule 12(b)(6) Motions

Bases 1 and 9 of the Motion to Dismiss are essentially grounded in Rule 12(b)(6), failure to state a claim. "In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999).

In basis 1, Defendants contend that Plaintiffs' suit should be dismissed because it is not accompanied by an expert witness affidavit required under **S.C. Code Ann.** § 15-36-100 (1976, as amended). This code section is inapplicable because Plaintiffs have not alleged professional

malpractice by Defendants. The Complaint alleges "Defendants provided services to the Estate and Trust apart from, and in addition to the requirements for the administration of the Estate and Trust. In doing so, Defendants were obligated to provide such services in a reasonable manner, consistent with the applicable standard of care." (Complaint at Para. 26.)

While Plaintiffs do make reference to the fact that both Defendants are attorneys, these allegations are under the heading of "Venue and Jurisdiction" and are appropriate in that context. (*See* Complaint at Paras. 7-8). Nowhere in the Complaint do Plaintiffs allege that the Defendants were engaged to provide or committed malpractice in providing legal services. Construing the allegations in the light most favorable to the Plaintiffs, I find that the pleadings are sufficient to support the causes of action alleged and therefore deny the Motion to Dismiss.

In basis 9, Defendants contend that they are not liable for injuries to the Plaintiffs because they have never served in a fiduciary capacity to the "Legacy Trust." A review of the Complaint shows that this fact was neither alleged nor necessary. Defendants have been sued as a result of their fiduciary relationships to the James Brown Estate and the James Brown 2000 Irrevocable Trust. Plaintiffs allege that they have interests derived from the Estate and Trust and that they have been injured as a result of the acts or omissions of the Defendants. Thus, construing the allegations in the light most favorable to the Plaintiffs, I find that the pleadings are sufficient to support the causes of action alleged and therefore deny the Motion to Dismiss.

Rule 12(b)(7) Motions

Basis 6 asserts a failure to join indispensible parties. Though not stated, this is presumably based on SCRCP 12(b)(7). Defendants contend that the failure to join Forlando and Romunzo Brown and the failure to secure the appointment of *guardians ad litem* (GALs) for the minor parties is fatal to this matter. I disagree.

Rule 12(b)(7) incorporates Rule 19, which defines an indispensible party as:

> (a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action . . if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Defendants' position reflects a mischaracterization of the nature of this action. According to the Complaint, the parties-plaintiff in this matter are the participants in a settlement entity created as a result of a private settlement among them and approved by Judge Early. The claims being pursued arise out of alleged injury to the assets each member of the settlement group is contributing to the settlement entity. None of the claims affect the rights or claims of those who did not participate in the settlement. I find that all members of the settlement entity are parties to this action.

Whether others should be members of the settlement entity, or whether GALs are required is an issue that has already been litigated and decided by Judge Early in his Order of May 26, 2009. (This Order has been placed in the record and is referred to herein as the "Settlement Order.") This Court is without authority to entertain a collateral attack on that decision.

Rule 12(b)(8) Motions

In bases 2 and 3, Defendants contend that this suit should be dismissed because "the matters alleged in this action are substantially the same as matters alleged in other cases pending in the State Court or the South Carolina Court of Appeals." (Mot. Dismiss, p. 3) Defendants do

not cite Rule 12(b)(8), SCRCP in their Motion to Dismiss, but the Court assumes it to be the basis for their motion.[1]

Defendants are unable to satisfy the requirements of Rule 12(b)(8) as interpreted by our Supreme Court.

> In South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim. . . . [W]e interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8).

Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 105-106, 674 S.E.2d 524, 531-32 (Ct.App.2009) (internal citations omitted). Very recently, the Court of Appeals, applying this precedent, overturned the trial court's ruling on a 12(b)(8) motion. *See* Cricket Cove Ventures, LLC v. Gilland, ___S.E.2d ___, 2010 WL 3396829 (Ct. App. Aug. 25, 2010). In doing so, the court clarified that suits where a person is sued in his individual capacity and in another in his representative capacity are not suits against the same party.

Comparing the allegations of the Complaint to the other proceedings relied on by the Defendants, I find that precise or substantial similarities to the present parties or claims are absent. In their Motion, Defendants contend that four cases are substantially similar to this case:

> McMaster v. Dallas, et al, 2009-CP-02-1647 ("Case 1647");
> McMaster v. Brown, et al, 2009-CP-02-1810 ("Case 1810");
> Thomas, et al v. Bradley, et al, 2007-CP-02-0122 ("Case 122"); and
> Brown, et al v. Pope, et al, 2008-CP-02-0872 ("Case 872").

First, it should be noted that none of these cases are currently pending. These cases were resolved by way of the Settlement Order. In their Supplemental Memorandum in Support, Defendants make reference to decisions reached by other courts that allegedly dispose of the

[1] To the extent that basis 3 actually relies on doctrines of collateral estoppel and *res judicata*, these are affirmative defenses and are incorporated in the analysis below.

issues raised in this suit. Again, because these other lawsuits are not currently pending, they are not relevant to a 12(b)(8) motion.[2] But even if they were, the "dispositive" orders have not been provided to this Court for comparison.

Second, although scores of captioned documents have been provided to the Court,[3] Defendants have not provided the Complaint/Petition relating to any of these matters from which the Court can determine the parties or the claims. However, the Settlement Order refers to these other pending matters and some inferences can be drawn therefrom. A review of this Order indicates that these cases are not similar in any significant respect to the case at bar. Not one of the lawsuits brought in relation to this Estate concerns the breaches of fiduciary duty by Adele Pope and Robert Buchanan in the management of the Estate.

Third, to the extent other claims were made, they were brought against Defendants in their representative capacity as P.R. or Trustee, while the claims in this case were brought against the Defendants individually.

Although other actions were pending that may have involved some of the same parties and appear to involve some of the same facts, there is nothing that indicates that either the parties or the claims are precisely or substantially the same.

Defendants submit that a series of Circuit Court and Appellate Court orders ratify the acts of Defendants in their service as administrators. I find that they do not. As referenced above, Defendants have not provided sufficient documentation to this Court to determine the precise nature of the claims brought in each of the lawsuits. In this closely related argument, Defendants have not provided information about the motions at issue giving rise to the various orders. In

---

[2] The doctrines of collateral estoppel and *res judicata* have not been raised by the Defendants.
[3] None of the documents have been properly certified or authenticated.

some instances, the context of the order bears no apparent relationship to the claims made in this suit.

Affirmative Defenses

In addition to 12(b) Motions, Defendants have included the following affirmative defenses in their Motion: standing of the parties (bases 4, 5, and 8); statute of limitations (basis 7); and charitable immunity (basis 10).

Affirmative defenses are generally not appropriate for consideration in pre-answer Motions. Spence v. Spence, 368 S.C. 106, 123 628 S.E.2d 869, 878 (2006). "This rule arises out of the notion that consideration of an affirmative defense usually requires reference to factual allegations and matters which are beyond the scope of allegations set forth in the complaint. Therefore, because the factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint, an affirmative defense usually must be pled in an answer and either resolved in later motions such as summary judgment or directed verdict or at trial." Id., citing 5 Wright and Miller, Federal Practice and Procedure Civil 3d, § 1277 (2004). This has been found to apply specifically to statute of limitations and lack of standing defenses. See Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 138 fn2 (1999). This same analysis applies to the defense of charitable immunity.

Because the allegations of the Complaint do not on their face compel the application of these defenses, the Motion to Dismiss on these bases must be denied.

U85

CONCLUSION

For the reasons set forth above, Defendants' Motion to Dismiss is DENIED.

The Honorable L. Casey Manning
Circuit Judge

Columbia, South Carolina
October 18, 2010

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2010-CP-40-4900

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted] and CARRINGTON L[redacted]; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,
Plaintiffs

v.

Adele J. Pope and Robert L. Buchanan, Jr.,
Defendants

2010 NOV -9 AM 9:21

ORDER DENYING DEFENDANTS' MOTION TO CHANGE VENUE

This matter came before the Court on August 30, 2010 for hearing on Defendants' Motion to Change Venue from Richland County to Aiken County. Counsel for all parties were

present. Other motions in this case were also heard on August 30 and separate Orders will issue with regard to those motions.

PROCEDURAL POSTURE

This is a judicial proceeding involving an irrevocable trust of James Brown dated August 1, 2000, as modified by a court-approved settlement agreement, whose sole, professional trustee administers the trust in Richland County, South Carolina. This irrevocable trust is distinguishable from the Estate of James Brown, the administration of which is in the Aiken County Probate Court.

The complaint alleges causes of action for breach of fiduciary duty, breach of trust, and negligence by former fiduciaries. Plaintiffs brought this action against Defendants by way of a Complaint filed May 19, 2010. Pursuant to Rule 8(a)(1), SCRCP, Plaintiffs asserted that jurisdiction was proper in the Richland County Probate Court. Pursuant to S.C. Code Ann. § 62-1-302(d) (1976, as amended), this matter was removed to the Court of Common Pleas of Richland County. Defendants filed a Motion to Change Venue to Aiken County.

FACTS

The original estate plan of James Brown included a Last Will and Testament which "poured over" the bulk of his estate to a separate, irrevocable trust known as the James Brown Irrevocable Trust that was created and funded on August 1, 2000. The James Brown Irrevocable Trust, by its terms, was to be divided into the Brown Family Educational Trust and the James Brown "I feel Good" Trust after his death.

After extensive litigation to determine the identification of beneficiaries, the ownership of assets, and the identification of fiduciaries, all beneficiaries of the estate and trust came to a global settlement and entered into a written settlement agreement. The Settlement Agreement is

attached to the complaint as Exhibit A. The Settlement Agreement was approved by the Honorable Doyet A. Early, III, on May 26, 2009, by an Order Approving Settlement Agreement, which is attached to the complaint as Exhibit B. Pursuant to the Settlement Agreement, the estate plan of James Brown was revised to create a "Settlement Entity" in which are vested all assets, including all royalties, tangible and intangible property of James Brown. The order provides that: "A charitable trust substantially similar to the August 1, 2000 Irrevocable Trust (hereinafter the "Charitable Trust") shall be created and/or maintained and shall be valid and enforceable." The order also affirmed the provision of the settlement agreement that a professional fiduciary, Russell Bauknight, would replace Buchanan and Pope as fiduciaries of both the Estate of James Brown and as trustees of the August 1, 2000, Irrevocable Trust of James Brown.

Plaintiffs are all of the beneficiaries of the settlement trust, including the South Carolina Attorney General. Defendants are former fiduciaries of Brown's estate and trust. This suit alleges mismanagement of the estate and trust by Defendants.

By Order of the Honorable Doyet A. Early, III, dated May 26, 2009, Russell L. Bauknight was named Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as well as Personal Representative of the Estate of James Brown. Management of the trust estate has taken place exclusively at Bauknight's offices at 1517 Gervais Street, Columbia, South Carolina, where all of the trust assets and trust records are maintained. This office is located in Richland County, South Carolina.

ANALYSIS

"The distinction between subject matter jurisdiction and venue is an important one in the law. The terms are not synonymous. Subject matter jurisdiction is 'the power to hear and

determine cases of the general class to which the proceedings in question belong.' On the other hand, venue is the place or geographical location of trial." Dove v. Gold Kist, Inc., 314 S.C. 235, 237-238, 442 S.E.2d 598, 600 (1994) (internal citations omitted). In South Carolina, venue refers to the county in which the action should be brought. In re Asbestosis Cases, 276 S.C. 579, 581, 281 S.E.2d 112, 115 (1981) (abrogated on other grounds by Whaley v. CSX Transp., Inc., 362 S.C. 456, 609 S.E.2d 286 (2005)). The Defendants allege that subject matter jurisdiction is improper. They confuse subject matter jurisdiction and venue. Subject matter jurisdiction over this suit is properly laid in the Circuit Court, having been originally filed in Probate Court and then removed from the Probate Court. See Order for Removal of July 19, 2010. Defendants also contend that venue should be in Aiken County. Plaintiffs assert that venue should remain in Richland County.

The South Carolina Trust Code has its own venue statute for proceedings involving trusts:

> Except as otherwise provided in subsection (b), venue for a judicial proceeding involving a trust is in the county of this State in which the **trust's principal place of administration** is or will be located and, if the trust is created by will and the estate is not yet closed, in the county in which the decedent's estate is being administered.

S.C. Code Ann. § 62-7-204(a) (1976, as amended) (emphasis added). As shown above, James Brown did not have a testamentary trust created under his will, but rather an inter vivos trust, so the last phrase about the county in which the estate is administered is inapplicable. Courts must turn to a separate section of the Trust Code to determine what constitutes a trust's "principal place of administration":

> Unless otherwise designated by the terms of a trust, the principal place of administration of a trust is **the trustee's usual place of business where the records pertaining to the trust are kept**, or at the trustee's residence if he has no such place of business. . .

S.C. Code Ann. § 62-7-108(a) (1976, as amended) (emphasis added). The statute designates the trustee's place of business, that is, the place where the records are kept, not the county of the trust settlor's residence or the county of residence of the trust beneficiaries, for a very practical reason. It is necessary for the courts in the place where the trust records are kept and the trust assets are held to deal with trust litigation. In the case at bar, the records of the trust are voluminous and occupy hundreds of bankers boxes.

The professional trustee in this matter is Russell L. Bauknight. Mr. Bauknight's usual place of business is at his accounting firm, Bauknight Pietras & Stormer, P.A., located at 1517 Gervais Street, Columbia, South Carolina 29201. The records pertaining to the trust are kept at this location, which is in Richland County, South Carolina. Further, the trust agreement itself does not designate a different principal place of administration.

Based on Sections 108(a) and 204(a) of the Trust Code, venue is proper in Richland County. Even if this Court were to determine that venue might be proper in either Richland or Aiken Counties, which it does not, the commencement of this proceeding in Richland County prior to any filing in Aiken establishes proper venue in Richland County. See S.C. Code Ann. § 62-7-204(c) (1976, as amended). This Court notes that the prior trustees, Pope and Buchanan, also administered the Irrevocable Trust in Richland County, as the August 10, 2007, order of Judge Early directed the trust records to be delivered to 1218 Taylor Street in Columbia, which was Pope's office.

Defendants argue that the matters raised in the complaint relate to an action previously filed in Aiken County. This Court disagrees. The complaint alleges causes of action which are completely distinct from the prior estate litigation among the beneficiaries and the former personal representatives of the estate. Section 62-7-201(b) of the South Carolina Trust Code

provides that "[a] proceeding under this section does not result in continuing supervisory proceedings." This trust litigation against the former trustees is unrelated to the prior litigation involving James Brown's estate or trust.

CONCLUSION

Venue is proper in Richland County because it is the principal place of administration for the trusts at issue in this litigation. Even if venue were also proper in Aiken County, the initial commencement of this action in Richland County requires that venue remain in Richland County.

IT IS THEREFORE ORDERED THAT Defendants' Motion to Change Venue is DENIED.

The Honorable L. Casey Manning
Circuit Judge

Signed this 8 day of NOV, 2010
at Columbia, South Carolina.

Form 4

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2010CP4004900

Russell Bauknight *vs.* **Henry Dargan McMaster**

Plaintiff Defendant

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: _____

2010 AUG 31 AM 9:45

☐ **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; ☐ Statement of Judgment by the Court:

Matter under advisement. Parties have 30 days to submit proposed orders

Dated at Columbia, South Carolina, this 30 day of August, 2010.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2010, and a copy mailed first class this _____ day of _____, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Kenneth B. Wingate

ATTORNEY(S) FOR THE PLAINTIFF(S)

Daryl L. Williams
Joseph Watson

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W. McBride

Clerk of Court

SCRCP APP-24/FORM 4

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
COUNTY OF RICHLAND)

Russell L. Bauknight, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMcaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. [redacted], Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown,

and

Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. [redacted], Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown,

Plaintiffs,

vs.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants.

Estate Number: 2010-GC-40-00073

FILED
2010 JUL 19 PM 3:38
AMY W. McCULLOCH
PROBATE JUDGE
RICHLAND COUNTY, S.C.

ORDER FOR REMOVAL

This matter is before the Court on the Motion of the Defendants pursuant to S.C. Code Ann. § 62-1-302(d) for an Order removing this matter to the Circuit Court. After review of the Complaint in this action, this Court finds and holds that the Motion is timely and that the Removal of this action is proper and required under S.C. Code Ann. § 62-1-302(d) because there is a right to jury trial, which has been demanded, the amount in controversy is at least $5,000 and because this is a matter related to Trusts.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this be, and hereby is, removed from this Court to the Richland County Court of Common Pleas

Amy W. McCulloch

Amy W. McCulloch
Richland County Probate Judge

July 19, 2010
Columbia, South Carolina

094

ENTERED JUL 2 2 2010

CERTIFICATE OF MAILING

The undersigned Clerk of Probate of the Richland County Probate Court hereby certifies that a Copy of this document on which this stamp appears was ✓ mailed (regular) ____ mailed (certified) ____ picked-up ____ hand-delivered to On 7-19, 20 10, to:

Kenneth Wingate
Daryl Williams
Everett Kendall, II
J. Calhoun Watson

Josie Fenderson
CLERK OF PROBATE

STATE OF SOUTH CAROUNA COUNTY OF SPARTANBURG STATE OF SOUTH CAROUNA *ex rel.* Henry McMaster, in his capacity as Attorney General of the State of South Carolina, Plaintiff, vs. ELI LILLY AND COMPANY, Defendant.	)	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT Case No. 2007-CP-42-1855 **ORDER**

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:00
MARC KITCHENS

THIS CAUSE is before the Court upon the Motion of Defendant Eli Lilly and Company (Lilly) to Disqualify Special Counsel filed on August 21, 2009. This matter was fully briefed by the parties, and was argued to the Court on August 31, 2009. After carefully considering all of the parties' written submissions and the oral arguments made by counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On July 19, 2006, for the purpose of pursuing litigation relating to the Lilly-manufactured drug Zyprexa, Attorney General McMaster entered into a "Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General" signed by three lawyers as "Special Counsel." The three lawyers were John S. Simmons, John Belton White, Jr., and F. Kenneth Bailey, Jr. According to his Affidavit submitted in this matter, Attorney General McMaster's aim in suing was to recoup state funds and penalties related to Lilly's alleged wrongful conduct in marketing Zyprexa.

EXHIBIT
B

Under the terms of the Special Counsel Appointment, the three signing lawyers agree to share fees (if any),[1] expenses and, subject to the Attorney General's overall control, responsibility for the work to be done. In effect, they agreed to function as de facto joint venturers, working together as a litigation team on behalf of the Attorney General and the State of South Carolina.

FILED
CLERK OF COURT
2009 SEP 22 PM 2:00
HARRY KITCHINGS

Under the Retention Agreement, Special Counsel will not be paid out of any award of State funds. They will be compensated, if at all, only out of a portion of such recovery as they are able to win for the State by their efforts. Meanwhile, under the Retention Agreement's terms, they have undertaken to pay all the costs of this lawsuit out of their own pockets. Thus, as part of their appointment by the Attorney General, Special Counsel have agreed to take on all the economic risk of the litigation, including the risk of a defense verdict, and give up to the State the lion's share (at least 77%) of any net recovery (after litigation costs) generated by the civil suit against Lilly. A copy of the Retention Agreement was produced to Lilly on May 22, 2009.

Since July of 2006 to the present, Special Counsel have pursued the investigation and prosecution of civil litigation against Lilly. The fact of appointment of Special Counsel in this matter has been known to Lilly from the time Special Counsel filed this lawsuit and served with the Summons and Complaint in the Spring of 2007, but an actual copy of the agreement was not given to Lilly until the date stated above.

When Lilly answered the Complaint on October 1, 2007, Lilly specifically objected to the Attorney General's use of a contingent fee arrangement in hiring Special

[1] If the lawsuit fails, all of the financial loss will fall on Special Counsel, no expenses will be borne by the State. Under Article V, ¶ B of the Retention Agreement, Special Counsel must look to the Attorney General to reimburse them for advance costs out of "the litigation's gross recovery," if any. The Attorney General, in his sole discretion may refuse to reimburse Special Counsel for "improperly documented, unnecessary, or unreasonable costs or expenses." *Id.*

Counsel. Lilly contended the retention of Special Counsel violated Lilly's due process rights and the separation of powers doctrine. Specifically, Lilly pleaded in its answer two affirmative defenses referencing the retention of Special Counsel on a contingent fee basis, to wit:

> The filing of this lawsuit by private counsel, retained on a contingent fee arrangement, violates the South Carolina Constitution's separation of the powers of the legislative and executive branches, in that the legislature has not appropriated funds for the payment of private counsel to prosecute this action in place of the Attorney General.
>
> The filing of this lawsuit by private counsel, retained on a contingent fee arrangement, violates the due process requirements of the United States Constitution and the South Carolina Constitution, as well as conflict-of-interest rules applicable to attorneys representing the State, by giving the State's counsel a personal financial interest in the outcome of this action.

FILED
CLERK OF COURT
2009 SEP 22 PM 2:00
MARY KUCHENS

Lilly filed a Motion to Disqualify Special Counsel and filed that motion on August 21 2009, with the case at that time being scheduled to go to trial on September 14, 2009. This motion is now before this Court.

ISSUES BEFORE THE COURT AND CONCLUSIONS OF LAW

LILLY'S DUE PROCESS ARGUMENTS

I. Does the Retention Agreement violate Lilly's Due Process Rights?

Lilly contends that the hiring of Special Counsel "violated Lilly's state and federal right to due process because it gave each of these lawyers a direct financial interest in the outcome of this litigation." Lilly Motion at 2. *See also id* at 8-13. Lilly's due process argument flows from Lilly's central premise that all government lawyers must always remain neutral, even in the context of tort litigation against an alleged wrongdoer. The Court is unable to find anything in the relevant Rules of Professional Conduct, statutes, or

controlling case law that supports this argument in the context of tort litigation such as this.

The notion that public officials and their lawyers (whether in-house or outside counsel) must be "neutral" or disinterested in the outcome of civil litigation they bring on behalf of the government is not only unsupported by any authority, it is unsupported in the context applicable here: tort litigation where the government is suing to collect money damages. As the United States Supreme Court explained in a unanimous opinion almost thirty years ago, the Court's "rigid" due process requirements, "designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. . . . Prosecutors need not be entirely neutral and detached. In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) (citations and internal quotation omitted); *see also Commonwealth v. Gullota*, 716 A.2d 663, 666 (Pa. Super. 1998) (rejecting argument that neutrality principles applied to adjudicative officials apply to prosecutors).

FILED
CLERK OF COURT
2009 SEP 22 PM 2:00
MARION COUNTY CLERKS

Indeed, as the Supreme Court held in *State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (2002), the Attorney General, as the chief lawyer for the State, may sue even the Governor- ordinarily his client- when the public interest demands it for the protection of the Legislature's right to appropriate funds in accordance with the state Constitution. See also, 7 Am Jur 2d Attorney General section 18 ("...it is the duty of the Attorney General to zealously advocate the public policy positions of his or her clients in pleadings, negotiations, and the courtroom to avoid even the appearance of impropriety by appearing to be in conflict with the desires of his or her client.")

Government lawyers have no heightened duty of neutrality when bringing civil tort lawsuits. Government officials have a duty to carry out the responsibilities of their positions and an obligation to ensure that funds appropriated for that purpose are not misused. In this lawsuit, the State of South Carolina contends that funds intended to pay for care of the elderly and the poor were misdirected by Lilly's allegedly wrongful acts. As a result, the State of South Carolina has brought suit to recover those funds. The Attorney General maintains that he owes an obligation as a public servant to prosecute this case to the best of his ability, and is doing so. Lilly has introduced no evidence demonstrating that the Attorney General has chosen attorneys that are not fully qualified and competent to handle the responsibilities which have been placed upon them in the Retention Agreement.

FILED
CLERK OF COURT
MARION OWENS
2009 SEP 22 PM 2:00

The lawyers representing the State of South Carolina in civil tort cases, whether in-house or outside counsel, have a duty to represent the State of South Carolina's interests to the fullest, advocating the State of South Carolina's position in the litigation brought to vindicate the State of South Carolina's rights and recover the funds expended because of a private party's alleged wrongdoing. Nothing in South Carolina's Rules of Professional Conduct suggests that the State's retained attorneys should have any other responsibility other than pursue their obligations under the agreement that was made between them. Indeed, Lilly specifically denied that it was making any claim of professional wrong doing against the Special Counsel and agreed that the State's legal counsel have not committed any violation of the Rules of Professional Conduct. This is a significant admission, since SCACR 407 Rule 8.4(e) makes it unethical to "engage in conduct prejudicial to the administration of justice." By agreeing that the State's lawyers

have behaved ethically as lawyers, Lilly has conceded that no conduct prejudicial to the administration of justice has occurred in this case. This admission casts a long shadow of doubt over Lilly's contentions that it is the victim of constitutional violations and illegality.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:00
MARC KITCHENS

In contending the State's counsel owe it an obligation to be "neutral," that is, less than unswervingly zealous in furthering the State's contentions, Lilly ignores the large body of controlling law that governs lawyer conduct in the State of South Carolina. It argues, without support in court rules, statutes, or case law that all government attorneys have a responsibility to act neutrally in all cases. In support of this argument, Lilly relies heavily on the contention that when the State of South Carolina acts in its *parens patriae* capacity, it must act as representative of all citizens, including (presumably) the State of South Carolina's adversaries in civil litigation. This argument is flawed for several reasons.

First, this is a tort action plain and simple. The State of South Carolina is out to recover actual damages it suffered from Lilly's allegedly tortious conduct. It is seeking damages for money it claims that Lilly wrongfully caused to be paid from the State treasury. This tort action is not significantly different than one brought by a private corporation or individual who suffered harm as a result of another person or entity's alleged wrongdoing.

Second, when the State of South Carolina does act in its *parens patriae* role, nothing about its duty to protect the public safety and general welfare requires it to ignore wrongdoing by a particular member of the public. Indeed, courts have held that the *parens patriae* role does not require that a state in a civil case be neutral. As one court

has noted, a state "acting in its role as *parens patriae*, has the right and the duty to act to protect its weaker members." *In re Terwilliger*, 304 Pa. Super. 553, 560, 450 A.2d 1376, 1380 (1982). In its *parens patriae* role, the State of South Carolina acts to protect children, charities, and other members of society who need special protection. See, e.g., Mr. T v. Ms. T, 378 S.C. 127, 662 S.E.2d 413 (S.C. App. 2008) ("South Carolina, as *parens patriae*, protects and safeguards the welfare of its children."). In cases where it is fulfilling its *parens patriae* role the State of South Carolina may be adversarial to allegedly abusive or neglectful parents, negligent charitable trustees, or other wrongdoers. This case is no different. The State of South Carolina is adverse to Lilly, and the State of South Carolina's lawyers (whether in-house or outside counsel) are obligated zealously to represent the interests of their client to vindicate its rights.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:00
MARC KITCHENS

Finally, Lilly's due process argument ignores the reality that the State of South Carolina has not ceded its *parens patriae* role to outside counsel. As Article III (D) of the Special Counsel Contract makes clear, the State of South Carolina retains overall control of the present litigation.[2] And there is no question that the Attorney General has

[2] The Retention Agreement in question here is replete with verbiage attesting to it being consistent with sound public policy, with control over this litigation being reposed firmly in the Attorney General's hands. Thus, the retention agreement states in the first recital clause that the litigation "is in the best interest of South Carolina." The third recital clause sets forth the premise (unchallenged by Lilly) that Special Counsel "has the skill, experience, expertise, and competence necessary for the meaningful prosecution" of the matter. The Agreement further states in Article II, ¶ A, that due to the "personal nature of the services rendered under this appointment, the Attorney General shall be the sole judge of the adequacy of those services," and that "[t]he Attorney General shall have final authority over all aspects of this litigation." To quote the Agreement,

> [t]he Attorney General shall have final authority over all aspects of this litigation. The litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General. The Attorney General at his sole discretion has the right to appoint a designated assistant . . . to oversee the litigation, which appointment the Attorney General may modify at will. *Id.* Art. II, ¶ A(1).

The Agreement expressly provides that "[t]he Attorney General reserves the right to terminate this Agreement at any time, in his sole discretion, and without cause or duty of explanation." Article VI, ¶ A. Special Counsel "may terminate its duties and obligations under the Appointment and this Agreement upon

authority to hire legal counsel to protect the State's interests. In order to effectuate the broad authority given to the Attorney General under the Constitution, statutes and common law, the General Assembly has empowered the Attorney General to appoint the Assistant Attorneys General. S.C. Code Ann. § 1-7-30. Indeed, the South Carolina Supreme Court has recognized that the Attorney General, as the State's chief legal officer, possesses the authority to appoint and approve private counsel to represent the State. *See* Cooley *v. S.C. Tax Comm.*, 204 S.C. 10, 28 S.E.2d 445 (1943).

Courts have almost universally recognized that Attorneys General possess broad authority to appoint private attorneys as special counsel on a contingent fee basis to assist in the representation of the public interest. Indeed, as was stated in *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. 2000) (en banc),

> [t]he statute that allows for the attorney general to hire assistants and to pay them from appropriations does not prohibit the attorney general in the exercise of his common law power from entering into contingency fee arrangements or agreements that otherwise provide for civil defendants sued by the State to pay attorneys fees directly to the State's outside counsel. In the absence of a statute to the contrary, we conclude that the attorney general does have the power to enter into this type of fee arrangement with his special assistant attorneys general.

And, in *State of Rhode Island v. Lead Industries Association, Inc.*, 951 A.2d 428, 474-475 (R.I. 2008), the Supreme Court of Rhode Island stated:

> [i]t is our view that the Attorney General is entitled to act with a significant degree of autonomy, particularly since the Attorney General is a constitutional officer and is an independent official elected by the people
>
> . . . .
>
> Although we are keenly aware of the gravity of the issue and of the fact that thoughtful and potent policy-based arguments have been made on both sides of the issue, in the end we have concluded that, in principle, there is nothing unconstitutional or illegal or inappropriate in a contractual

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:00
MARC HICKENS

thirty (30) days written notice to the Attorney General." Id. However, "[t]ermination on the part of Special Counsel shall not be effective if the Attorney General finds in his sole discretion that such termination prejudices or has a material adverse effect on the State of South Carolina." *Id.*

> relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain non-criminal matters. Indeed, it is our view, that the ability of the Attorney General to enter into such contractual relationships may well, in some circumstances, lead to results that will be beneficial to society results which otherwise not have been attainable. However, due to the special duty of attorneys general to seek justice and their wide discretion with respect to same, such contractual relationships must be accompanied by exacting limitations. In short, it is our view that the Attorney General is not precluded from engaging private counsel pursuant to a contingent fee arrangement in order to assist in certain civil litigation, so long as the Office of Attorney General retains absolute and total control over all critical decision-making in any case in which such agreements have been entered into.

FILED
CLERK OF COURT
2009 SEP 22 PM 2:00
MARC MITCHELL

The claim to proceeds by attorneys appointed by the Attorney General to represent the State on a contingent fee basis is not a "claim against the State." *People v. Philip Morris*, 759 N.E.2d 906 (Ill. 2001). *See, also,* ' 1-7-170 (agency may not *engage* on a fee basis an attorney at law except upon the written approval of the Attorney General and a fee must be approved by him").

Thus, should the State of South Carolina conclude that its purported obligation to act neutrally toward all parties (even the one that caused it harm) requires it to drop this lawsuit, the State of South Carolina through the Attorney General, not any outside law firms, will make that decision. *See also* SCACR 407, Rule 1.2, requiring that clients, not their legal counsel, make decisions as to the resolution of a matter. In short, there is nothing about the State of South Carolina's *parens patriae* role that requires its attorneys to act completely neutral instead of advocating zealously on behalf of their client.

Lilly's attempt to hold all government lawyers to the same neutrality standards as judges or neutral arbitrators is misguided and thus unavailing. Lawyers — even government lawyers — have never been treated as neutral parties in litigation. They are advocates. Judges, on the other hand, must be held to the highest standards of neutrality

and impartiality. See Code of Judicial Conduct Canon 2, requiring judicial independence. Thus, the longstanding jurisprudence invoked by Lilly in its brief (at 8-10), beginning with *Tumey v. Ohio*, 273 U.S. 510 (1927), and carrying through to the recent decision in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), stands for the proposition that the judicial officer who acts as the decision-maker in an adversarial proceeding must be neutral and impartial. But none of those cases extend the neutrality principle encompassed in the Due Process Clause to the lawyer representing one side of a contested issue, even if those lawyers happen to represent the government. See Motion to Disqualify at 10-11 (citing cases involving personal financial interest of "a judicial officer or administrative fact-finder or decision-maker").

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:00
MARC KITCHENS

The few cases Lilly cites not involving judicial or other neutral adjudicators either disprove its arguments or are easily distinguishable from the present situation. The first case, *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), involved a federal statute under which civil penalties collected by an agency of the Department of Labor for violations of the law were used to reimburse that agency for its costs of determining violations and assessing penalties. *Id.* at 239. A corporation that was assessed penalties under the statute challenged the statute on due process grounds, arguing that the assistant regional administrator who made the decision to assess the penalties had an improper incentive to find violations and assess penalties in order to increase revenues for the agency. *Id.* at 241-42. The Supreme Court unanimously rejected this argument:

> The assistant regional administrator simply cannot be equated with the kind of decisionmakers to which the principles of *Tumey* and [*Ward v. Village of Monroeville*, 409 U.S. 57 (1972)] have been held applicable. He is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a prosecutor or civil plaintiff. If the employer excepts

> to a penalty — as he has a statutory right to do — he is entitled to a de novo hearing before an administrative law judge. In that hearing the assistant regional administrator acts as the complaining party and bears the burden of proof on contested issues. . . . It is the administrative law judge, not the assistant regional administrator, who performs the function of adjudicating child labor violations.

Id. at 247-48 (citation and footnote omitted).

The same is true here. As in *Marshall*, the law firm here "performs no judicial or quasi-judicial functions [and] hears no witnesses and rules on no disputed factual or legal questions." *Id.* at 247.

Strong language from *Marshall* directly forecloses Lilly's attempt to rely on cases like *Tumey* and *Ward* for its due process argument:

> The rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a . . . plaintiff-like capacity. . . . The distinction between judicial and nonjudicial officers was explicitly made in *Tumey*, 273 U.S., at 535, where the Court noted that a state legislature "may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people."

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:00
MARION KITCHES

Id. at 248-49 (citation omitted).

The United States Supreme Court thus has approved precisely the situation that Lilly alleges is present here: the attorney for the State of South Carolina has an incentive to zealously advocate for its government client and seek to vindicate the government's interests against an alleged violator of the law. *Marshall*, a case relied on by Lilly, is directly on point and cuts against Lilly's due process argument.

Similarly, *Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787 (1987), relied on by Lilly at p. 10 of its brief, offers no support for Lilly's due process argument. In *Young*, the Supreme Court disapproved a federal trial court's appointment of counsel for an interested party to prosecute a criminal contempt proceeding against its

litigation opponent. *Id.* at 790. Notably, the Court based its holding not on the Due Process Clause, but on its supervisory powers over lower federal courts, *id.* at 802, 808-09, an issue not involved here.

In reaching its conclusion, the Supreme Court emphasized the criminal nature of the proceeding and the special protections afforded the accused criminal contemnor in such situations. Noting that the prosecutor in a criminal contempt proceeding "is appointed solely to pursue the public interest in *vindication of the court's authority*," the Court found an inherent conflict between the prosecuting attorneys' dual roles as advocate for one party in an ongoing civil dispute and criminal prosecutor of the opposing party "for affronts to the Judiciary." *Id.* at 804-05 (emphasis added).

FILED
CLERK OF COURT
GREENVILLE COUNTY
2009 SEP 22 PM 2:00
MARC KITCHENS

These principles have no application here. The team of Special Counsel employed by the Attorney General have not been appointed by the State of South Carolina to prosecute a criminal case against Lilly, or a criminal contempt action as the lawyers were appointed to do in *Young*. They have not been appointed to "vindicate the court's authority." They have been appointed to seek to recover money in a tort case. The underlying matter here is a civil action for damages, not a criminal contempt proceeding. Special Counsel are not acting to vindicate the court's authority or punish affronts to the judiciary. They are seeking only to recover damages for the State. Nor have the private law firms, operating as de facto joint venturers, been hired to represent the State of South Carolina in a dispute in which any venture member has a preexisting vested interest, as the prosecuting attorneys did in *Young*. Rather, Special Counsel's allegedly improper interest arises from the fact that, as in all contingent fee cases, the venture members will be paid only if it wins — and the larger the judgment in favor of its

client, the greater the possible fee to the firm. *Young* is thus readily distinguishable from this case.

Indeed, the key cases involving lawyer conduct relied on by Lilly involve lawyers acting as criminal prosecutors, a situation different from the one here. The criminal proceeding cases Lilly cites are simply inapposite here, where outside counsel has been hired not to prosecute Lilly criminally, but to bring a civil proceeding for recovery of damages. *See, e.g., Appeal of Nicely*, 130 Pa. 261, 270, 18 A. 737, 738 (1889) (noting the special duty of a criminal prosecutor to act impartially so that justice is done and commenting that, when private counsel aids a criminal prosecutor, he "should be governed by the same rules of propriety"); *Berger v. United States*, 295 U.S. 78, 88 (1935) (noting that the U.S. Attorney is the representative of a government whose interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done"); *Brady v. Maryland*, 373 U.S. 83, 88 (1963) (noting that a prosecutor in a criminal case should not be "an architect of a proceeding that does not comport with standards of justice").

FILED
CLERK OF COURT
CUMBERLAND COUNTY
2009 SEP 22 PM 2:00
MARC KITCHENS

The cases Lilly cites that involve non-criminal prosecutions are inapplicable (because they are decisions of lower federal courts or other state courts) and distinguishable. In *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45 (D.C. Cir. 1992), the court, in *dicta* (after vacating the administrative orders under review), condemned as uncivil the arrogant behavior of lawyers representing a federal agency. The other federal circuit court case relied on by Lilly, *Douglas v. Donovan*, 704 F.2d 1276 (D.C. Cir. 1983), is also distinguishable. The opinion in *Douglas* was written by the same judge that authored *Freeport* and also, as in *Freeport*, resulted in the vacatur of

the order under review (on mootness grounds). *Id.* at 1277. Once again in *dicta*, the court contended that government lawyers "have special responsibilities to both this court and the public at large." *Id.* at 1279. As in *Freeport*, the court's statement was made in the context of rebuking an arrogant, uncivil government lawyer; the court was upset it had not been informed of the settlement of the underlying dispute: "As officers of this court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation." *Id.*

In short, Lilly's due process argument finds no useful support in the well-established case law holding that judges and other decision-makers must be neutral and impartial, or gleaned from a handful of cases noting the special responsibilities of criminal prosecutors. Criminal prosecutors do owe special duties, but this is not a criminal prosecution. These cases do not apply here.

FILED
CLERK OF COURT
GREENVILLE COUNTY
2009 SEP 22 PM 2:00
MARC HUTCHENS

Here, in contrast, Special Counsel is representing a client in a civil case and should be held to the same high standards that all lawyers are held under the South Carolina's Rules of Professional Conduct. Lilly concedes those duties have all been discharged by the Attorney General and Special Counsel. The fact that the Special Counsel team's client is the State of South Carolina does not alter this analysis or require the Special Counsel to neglect the contractual and ethical duty to zealously represent its sovereign client and obtain the best recovery possible for that client in the underlying litigation here. The applicable ethics rules and the controlling case law compel this conclusion. Because Lilly's entire due process argument is based on the faulty premise that civil tort lawyers owe a duty of neutrality when suing for the sovereign, Lilly's main due process argument fails.

Lilly also contends that the use of contingent fee representation against it violates its due process rights. This argument is meritless. Even if government lawyers were generally held to a higher standard than private counsel and were required to act neutrally (rather than as advocates for their clients), Lilly's argument would fail. Indeed, given the high standard for finding a Due Process violation in this context (*see, e.g., Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009)), if Lilly is correct that a contingent fee lawyer's financial interest in a government case violates the Due Process Clause, then doubt would be cast on every contingent fee arrangement, even those involving private parties, because of their supposed improper influence on an attorney's incentives and motivations in representing his or her civil client. Yet, contingent fee contracts have been held proper for many years. *See, e.g., Perry v. Atlantic Coast Life Ins. Co.*, 166 S.C. 270, 164 S.E. 753 (1932) recognizing lawyers were "collecting compensation due them in cases where they are employed on a contingent basis." *See also*, SCACR Rule 407, Rule 1.5(d), allowing contingent fees generally, except for domestic cases and criminal cases, neither of which is involved here.

FILED
CLERK OF COURT
2009 SEP 22 PM 2:01
MARC KITCHENER

Lilly cites only a single decision adopting its view that contingent fee arrangements by government entities are improper, *People ex rel. Clancy v. Superior Court of Riverside County*, 705 P.2d 347 (Cal. 1985). In *Clancy*, a city attorney retained outside counsel on a contingent fee basis to bring an action to shut down an adult bookstore as a nuisance. *Id.* at 349. The bookstore's owner challenged the contingent fee arrangement, arguing that "a government attorney prosecuting such actions must be neutral, as must an attorney prosecuting a criminal case." *Id.* at 350. In accepting this argument, the court focused on the well-accepted principle that a prosecuting attorney in

a criminal case should not have a vested interest in the outcome of that case. *Id.* at 350-52. Relying on a handful of secondary authorities (primarily the same ABA Model Code provision cited by the D.C. Circuit in *Freeport* and *Douglas*), the court also found that in some non-criminal situations, government attorneys must be neutral as well. *Id.* at 352. Ultimately, the court concluded that an action to abate a public nuisance shared sufficient characteristics with criminal prosecutions to require such actions to be brought by attorneys without any interest in the outcome of the case. *Id.* at 352-53.

The California Supreme Court's decision in *Clancy*, which was not grounded in the Due Process Clause (or separation-of-powers concerns), stands alone in terms of case law supporting Lilly's contention that government attorneys in non-criminal actions may not be paid on a contingent basis. In presenting *Clancy* as precedent to be followed, Lilly failed to point out that as *Clancy* is read and applied in California, it "does not bar the public entities from engaging private counsel under a contingent fee arrangement to assist in [public nuisance] litigation, so long as the public entities' in-house counsel retain control over all decision-making." *County of Santa Clara v. Superior Court*, 161 Cal.App.4th 1140, 74 Cal.Rptr.3d 842, 853 (2008). Here, the *Santa Clara* test is met, for Attorney General McMaster has absolute control over the disposition of this case. Article III (D) of the Special Counsel agreement makes this clear:

> The Attorney General must approve in advance all aspects of this litigation and shall be included in any settlement discussions. Special Counsel agrees that any settlement in this case must receive the Attorney General's express prior approval in writing. Special Counsel shall confer with the Attorney General as early as practicable in any settlement negotiation process.

Contrary to Lilly's unsupported speculation, evidence in the record reflects that the State of South Carolina's Attorney General retains control and ultimate decision-making

FILED
CLERK OF COURT
SUPREME COURT
2009 SEP 22 P 2:01
MARC MITCHENS

authority over this litigation. Indeed, General McMaster's affidavit makes clear he personally has spoken directly with Lilly's counsel about possibly resolving this case.

Lilly's discussion of the interplay between contingent fees and due process also does not deal with persuasive adverse authority such as *State v. Hagerty*, 580 N.W.2d 139, 148 (N.D.1998) ("In view of th[e] long-standing acceptance of contingent fee arrangements and in view of the historical authority of the Attorney General, we believe she has the authority to employ special assistants attorneys general on a contingent fee agreement unless such agreements are specifically prohibited by statute."), and *State v. Lead Industries, Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008) (upholding the Rhode Island Attorney General's right to enter into contingent fee agreements with private counsel appointed to bring civil suits). *See also Philip Morris v. Glendening*, 709 A.2d 1230 (Md. 1998) (upholding a contingency fee agreement between private lawyers and the Maryland Attorney General in a civil case). As to the defendant's separation of powers claim, the court agreed with the Attorney General's conclusion that the situation was extraordinary and deemed his decision to hire contingent fee counsel non-reviewable; "[p]rinciples behind constitutional separation of powers place limits on a court's power to review or interfere with the conclusions, acts or decisions of a coordinate branch of government made within its own sphere of authority." *Id.* at 1239 (*quoting Hamilton v. Verdow*, 414 A.2d 914, 921 (Md. 1980)). For another example of a state court rejecting challenges to a contingency fee agreement, *see Kinder v. Nixon*, No. WD 56802, 2000 WL 684860 (Mo. App. W.D. 2000).

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:01
MARCH KITCHENS

In sum, Lilly's contingent fee due process/constitutional violation claim is rejected. At present, only "[a] few state attorneys general's offices, notably California's

make it a practice not to hire outside counsel on a contingent fee basis." Donald G. Giffort, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C.L. REV. 913, 964 n.323 (2008). In other words, if the practice of hiring private lawyers in special cases by States' Attorneys General was actually unconstitutionally improper, one would expect that some authoritative court would have definitively ruled that way by now. Instead, the evidence is to the contrary. See Richard O. Faulk & John S. Gray, *Alchemy in The Courtroom? The Transmutation of Public Nuisance Litigation*, MICH. ST. L. REV. 941, 968 n.140 (2007) ("the majority of state attorneys general [had] contingent fee arrangements in the tobacco litigation, the mayors of over thirty cities signed contingent fee contracts to sue gun manufacturers").

Lilly's purported due process constitutional challenge is inconsistent with South Carolina's Rules of Professional Conduct; and finds no support in the controlling case law of this Court or the United States Supreme Court.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:01
MARC KITCHENS

Thus, under the Contract and in fact, the Attorney General is in control of the litigation, both on an ongoing basis and in terms of its ultimate resolution. Special Counsel must follow the Attorney General's directions and cannot take important actions without the Attorney General's approval. Any claim that the State of South Carolina is not adequately controlling this litigation is contrary to evidence in the record. The hearing in this motion included reliance on an uncontradicted affidavit from the Attorney General testifying to his office's involvement in this case, plus oral argument from a lawyer on the Attorney General's staff. Both the Special Counsel Agreement and the actual conduct of this litigation make clear that the Attorney General is in charge of this case; its outside counsel is fulfilling the same role outside counsel for the State of South

Carolina always fulfills, regardless of how they are paid: assisting the State of South Carolina in vindicating or defending its rights. After due consideration of the parties arguments and the authorities they cite, the Court concludes there is nothing in the Attorney General's Special Counsel Appointment arraignment deprives Lilly of its right to due process.

LILLY'S SEPARATION OF POWERS ARGUMENTS

Lilly contends the separation-of-powers doctrine is violated on the ground that payment of fees to Special Counsel is unauthorized under S.C. Ann. § 1-7-150(B). The flaw with this argument is that the statute expressly authorizes payment of "the costs of litigation" out of litigation proceeds, and a "cost of litigation" is precisely what legal fees are. Lilly's separation-of-powers argument rests on case law from a single jurisdiction, Louisiana, which is readily distinguishable. The leading Louisiana case is *Meredith v. Ieyoub*, 700 So.2d 478, 482 (La. 1997), followed by *Ieyoub v. W R. Grace & Co.*, 708 So. 2d 1227 (La. Ct. App. 3d Cir. 1998). The statute under which those two cases were decided required that "all sums recovered" by suit or settlement "be paid into the state treasury." La. R.S. 30:2205. The Louisiana statute did not recognize the possible need to pay litigation costs; the South Carolina statute, under S.C. Ann. § 1-7-150(B) does. *See* Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 867 (2009) (listing "legal fees" as one of the "costs of litigation"). Thus, the Louisiana case law relied on by Lilly has no application here.

Another problem not mentioned by Lilly with its *Meredith* separation-of-powers precedent is that the Louisiana cases stand alone—they represent the only defense win on

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:01
MARCH ITOENKS

the point. Aside from Louisiana cases interpreting the narrow Louisiana statute, courts that have considered the issue uniformly have rejected Lilly's argument:

> [N]umerous courts have heard challenges to contingency fee arrangements based on the separation of powers doctrine, but the Supreme Court of Louisiana is the sole court that found it persuasive enough to overturn a contract. The doctrine has failed to gain any significant traction.

Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?* 42 COLUM. J.L. & SOC. PROBS. 587, 612 (2009) (citing as examples, *State v. Hagerty*, *supra* and *Kinder v. Nixon*, *supra*. In *Kinder*, the Court stated that "Appellants' fundamental contention is erroneous and the contract is not void.").

As part of its separation-of-powers argument, Lilly contends that, under the Retention Agreement, should the State recover of money from Lilly, the Attorney General would distribute the lawsuit proceeds in an unconstitutional way. This argument is speculative and it is not ripe for adjudication.

SC Code of Laws Section 1-7-150 gives the Attorney General the right to withhold certain funds (investigative costs and costs of litigation) from the proceeds of litigation such as this. There has been no recovery at this time and there is no showing that investigative costs will not exceed or be equal to the 10% of recovery provided for in the contract to be retained by the Attorney General's office. Additionally, it is the Court's finding that the Defense has not shown any evidence amounting to adverse prejudice as to this issue.

The tort case is yet to be tried. A judgment has yet to be entered against Lilly and, depending on the trial's outcome, may never be. Any contention that the Attorney General will act in an unconstitutional way is thus based on events that have yet to occur. Moreover, any provision of the Special Counsel Retention Agreement that would call for

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:01
MARC KITCHENS

the Attorney General to commit an illegal act is severable under the terms of Article VII (H) of the agreement. Hence, upon a timely and meritorious challenge, any offensive provision would simply be stricken without causing the entire agreement to fail. Lilly's attack on the Special Counsel Retention Agreement based on its separation of powers argument simply is not ripe at this time. Lilly's contentions are premised on alleged future wrongful acts by the Attorney General are hypothetical, lack substance, do not prove the Agreement's invalidity, and hence are rejected.

LILLY'S ILLEGALITY ARGUMENTS UNDER SECTION 1342

Citing S.C. Code § 8-13-1342, Lilly seeks a ruling that, in essence, the State's case must be derailed on the eve of trial because it is being advanced illegally by Special Counsel. The Court has carefully considered Lilly's argument on this novel point, and rejects it for multiple reasons.

FILED
CLERK OF COURT
2009 SEP 22 PM 2:01
MARC MITCHENSON

I. The Illegality Contention Has Not Been Affirmatively Pleaded

First, unlike Lilly's due process and separation of powers arguments, Lilly's illegality contentions have not been affirmatively pleaded in its answer. Illegality contentions by way of a defense or avoidance are required to be affirmatively advanced under SCRCP Rule 8(c). In *Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005), the South Carolina Supreme Court emphasized the "importance of the right to one's preferred attorney," noting that an order determining the "right to be represented by an attorney of one's choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case." The Court concludes that a

legal position premised on alleged illegality calculated to stymie a plaintiff's chosen path to trial represent a form of defense or avoidance that needs to be affirmatively pleaded under Rule 8(c).

Here, the campaign contribution data on which Lilly relies have long been in the public domain. Lilly has known from the start of this case about Special Counsel's appointment. In its answer filed in October of 2007, Lilly raised due process and separation of powers contentions attacking Special Counsel's appointment and the contingent fee arrangement under which Special Counsel was hired.

FILED
CLERK OF COURT
SAN FRANCISCO COUNTY
2009 SEP 22 PM 2:01
MARC KITCHENS

In view of the great importance attached to a party's right to counsel of one's choosing, and the possibility that, as stated in *Hagood*, losing counsel "could determine . . . or discontinue an action," the Court concludes that an attack seeking to disqualify counsel based on alleged illegality needs to be specifically pleaded under Rule 8(c). Lilly has not done so here. The instant motion was made on the eve of trial and only after the Court denied Lilly's motion for a continuance. Under the circumstances, the motion is not timely. Because it rests on a contention that has not been properly pleaded, and in view of the undue delay in raising the issue, Lilly's motion to disqualify based on section 1342 must be rejected.

It appears that no complaint has been filed with the State Ethics Commission by Lilly or its counsel concerning the post-retention political contributions by two of the Special Counsel lawyers. At the oral argument Lilly's counsel made clear that the only forum in which the question of compliance with section 1342 had been raised was in this case, and specifically in the context of the disqualification motion.

Further, it should be noted that it appears that all local counsel both for the State and Lilly have made similar contributions to the campaigns of the Attorney General.

II. Lilly Has Offered No Competent Evidence Of Actual Prejudice

The Court also rejects Lilly's motion to disqualify due to Lilly's failure to show that Lilly will suffer actual prejudice unless relief is granted. In *State v. Bell*, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007), the Court of Appeals analyzed what needs to be shown in order to win a disqualification motion against a solicitor. Bell's contention that the trial court erred in denying his disqualification motion was rejected on the ground that when making a disqualification motion attacking the State, the movant must demonstrate actual prejudice suffered due to the allegedly unethical conduct. The court in *Bell* explained that proof of actual prejudice is required in disqualification motions filed against the State:

> In *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), our supreme court addressed the standard for disqualification of a Solicitor's Office where an attorney in that office had been employed by the Public Defender's Office during the pendency of charges against the appellant. There, the court rejected the standard of a presumption of betrayal from mere allegation of successive adverse representation resulting in a per se disqualification. *Id.* at 518, 299 S.E.2d at 688. Instead, the court adopted the requirement of a showing of actual prejudice to the defendant's case. *Id.* at 518-19, 299 S.E.2d at 688. Finding no evidence that any secrets or confidences of Smart were revealed, the court affirmed the denial of Smart's motion for disqualification. Id. at 520-521, 299 S.E.2d at 689. Thereafter, in *State v. Chisolm*, 312 S.C. 235, 439 S.E.2d 850 (1994), our supreme court again articulated that an appellant who seeks disqualification of a Solicitor's Office must show actual prejudice. *Id.* at 238, 439 S.E.2d at 852.

Bell, 374 S.C. 141-42, 646 S.E.2d 891 (emphasis added).

Even assuming the validity of Lilly's illegality charge, it is clear that no actual prejudice whatever has been shown here. At the motion hearing, Lilly contended that it was suffering "actual prejudice" at the hands of Special Counsel due to their alleged

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:01
MARC KITCHENS

failure to comply with Lilly's discovery needs. No competent evidence was offered on this point, and the charge is at odds with Lilly's repeated admission during the hearing that Lilly was not asserting any violation of Special Counsel's professional obligations as lawyers. This is a significant concession by Lilly.

The Court notes that SCACR 407, Rule 3.4(d) makes it unethical for counsel "in pretrial procedure . . . [to] fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party." Lilly's concession that Special Counsel have acted ethically as lawyers in this matter disposes of its purported actual prejudice contention. In sum, the Court finds that in a disqualification motion under these circumstances, proof of actual prejudice must be shown by the movant. No showing of actual prejudice has been made here. Lilly's failure to prove that it would suffer actual prejudice but for disqualification of opposing counsel is an additional reason why Lilly's motion to disqualify based on section 1342 is overruled.

III. Lilly's Motion Cannot Not Reach Special Counsel Bailey

Lilly's illegality argument made under section 1342 does not rest on the contention that the Appointment of Special Counsel violated the statute when the Retention Agreement was entered into. Lilly appears to concede the Agreement did not violate section 1342 at the time of Special Counsel's appointment. Lilly also concedes that one of the three Special Counsel, F. Kenneth Bailey, Jr., never made any post-appointment contribution reached by section 1342. Thus, the statute can provide no justification for his disqualification at all.

FILED
CLERK OF COURT
SEARCY COUNTY
2009 SEP 22 PM 2:01
MARC KITCHENS

IV. Section 1342 Does Not Require Disqualification of Special Counsel

As for the two Special Counsel who did make post-appointment contributions to Attorney General McMaster, the Court finds, for the reasons set forth below, that their contributions are not made illegal by the statute and that, further, even if the contributions were covered by the statute, they still would not suffice to justify disqualification on the facts of this case.

It is well understood in South Carolina that a basic rule of statutory interpretation requires that, where possible, statutes receive a construction which will render them valid. *Last v. MSI Construction Co.*, 305 S.C. 349, 409 S.E.2d 334 (1991); *Mitchell v. Owens*, 304 S.C. 23, 402 S.E.2d 888 (1991) (statutes are presumed to be constitutional and will be construed so as to render them valid). "[A] statute must receive such construction as will make all of its parts harmonize with each other and render them consistent with its general scope and object . . . ." *Crescent Mfg. Co. v. South Carolina Tax Comm'n*, 129 S.C. 480, 493-94, 124 S.E. 761, 765 (1924); *Poinsett Constr. Co. v. Fischer*, 301 S.C. 343, 391 S.E.2d 875 (Ct. App. 1990). Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation. *Henderson v. Evans*, 268 S.C. 127, 232 S.E.2d 331 (1977).

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:01
MARCIA T. CHEEK

Applied here, this rule of statutory construction requires that this Court refrain from construing § 8-13-1342 as Lilly seeks to have it interpreted, namely as an ethical prohibition covering the practice of law and lawyer-client contractual dealings usable by adverse parties to drive a wedge between the Attorney General and his Special Counsel, appointed to represent the State in litigation.

120

p25

V. Control Over the Ethics of Lawyer-Client Dealings Rests with the Court

A major reason Lilly's illegality arguments fails is because neither the General Assembly nor the State Ethics Commission controls the subject of legal ethics in South Carolina. That function belongs to the Supreme Court. Lilly has repeatedly informed this Court that no Court-created ethics rule has been violated here.

At page 5 of its Motion to Disqualify, Lilly explains that the Campaign Reform Act "gave the State Ethics Commission . . . responsibilities over . . . ethical rules of conduct," with section 8-13-1342 prohibiting persons awarded contracts with the State from contributing to campaigns of officials in a position to act on those contracts." *Id.* Insofar as the statute regulates relationships outside the practice of law, it is unexceptionable. Insofar as the statute purports to impose unique and unfair obligations restraints on Special Counsel hired by the State, it raises grave constitutional questions which should be avoided by this Court.

FILED
CLERK OF COURT
CHARLESTON COUNTY
2009 SEP 22 PM 2:01
MARC KITCHENS

The General Assembly possesses no constitutional role in defining, regulating or punishing otherwise proper and ethical dealings between lawyers and their clients. Pursuant to Article 1, Section 5 of South Carolina's Constitution, the South Carolina Supreme Court possesses the ultimate responsibility for ruling on attorneys' ethical matters. *See In re Okpalaeke*, 374 S.C. 186, 193, 648 S.E.2d 593, 597 (2007); *citing In re Rushton*, 286 S.C. 543, 544, 335 S.E.2d 238, 238 (1985).

An express provision in the Rules of the Supreme Court Rule makes it clear that attorneys' ethics are determined by ethical rules established by the Court, not the General Assembly. See SCACR 407, Rule of Professional Conduct Preamble, ¶ 11, which declares: "To the extent that lawyers meet the obligations of their professional calling,

the occasion for government regulation is obviated." Lilly has conceded that plaintiff's lawyers here have met the obligations of their professional calling; nowhere does Lilly charge them with a violation of any provision of the Rules of Professional Conduct. Reading section 1342 to create unethical behavior in the attorney-client setting is improper.

When it comes to setting rules of behavior for Special Counsel appointed by the Attorney General, the General Assembly's regulatory power is limited. Thus, in *Williams v. Bordon's Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980), the Supreme Court struck down a statute aimed at guaranteeing continuances for lawyer-legislators while the South Carolina General Assembly was in session. The Court relied on separation of powers principles in holding the statute invalid, unequivocally rejecting the notion that the General Assembly has the right to assume control over the rendition of legal services. *Williams v. Bordon's Inc.*, 274 S.C. 275, 278, 262 S.E.2d 881, 883-84 (1980). Likewise, the authority to regulate the relationship and the dealings between Special Counsel and Special Counsel's client, the State *ex rel.* the Attorney General, fall within the inherent power of the Supreme Court to control all aspects of the practice of law in South Carolina. *See also, Gmerek v. State Ethics Commission*, 751 A.2d 1241 (Pa. 2000) (Lobbying Disclosure Act, though it applied to nonlawyers as well as lawyers, is unconstitutional in regulating the professional activities which are regulated solely by the judicial branch).

FILED
CLERK OF COURT
2009 SEP 22 PM 2:01
MARC KITCHENS

Because of the Supreme Court's special role in policing attorney-client relationships, and because such a specially regulated relationship is involved in the Attorney General-Special Counsel setting, the Court concludes the Legislature did not

intend to include such relationships within section 8-13-1342's sweep. The Court concludes that the proper way to avoid adjudicating the unconstitutionality of section 1342 is to construe it to be pre-empted by legal ethics rules to the extent it would apply to lawyers.

Pertinent case law supports this policy choice. In the words our Supreme Court used in *Hagood v. Summerville*, 362 S.C. 191, 196, 607 S.E. 2d 707, 710 (2005), "the attorney-client relationship . . . demands a confidential, trusting relationship that often develops over time." The Supreme Court's ethical rules have been written to "require attorneys to maintain the highest professional and ethical standards in their dealings with clients." *Matter of Conway*, 305 S.C. 388, 393, 409 S.E.2d 357, 360 (1991). The attorney-client relationship has long been viewed as sacrosanct. As was stated in *Martin v. Camp*, 219 N.Y. 170, 173, 114 N.E. 46 (1916),

> [n]otwithstanding the fact that the employment of an attorney by a client is governed by the contract which the parties make, the peculiar relation of trust and confidence that such a relationship implies injects into the contract certain special and unique features.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:01
MARC KITCHENS

As was stated in *Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53, 57 (Mo. 1982), the relation between a lawyer and his client is a delicate and exacting one, highly personal. (quoting *Craig v. Jo B Gardner*, 586 S.W.2d 316 (Mo. banc 1979) (quoting 7 AM.JUR.2D *Attorneys* at Law ' 92 at 105 (1963)). The Court concludes section 1342 has not application in the attorney-client setting.

VI. Section 1342 Yields an Unfair and Inequitable Result if Applied as Lilly Requests

Besides pre-emption of the regulation of attorneys by virtue of the separation-of-powers doctrine and Court Rule, another problem with section 1342, is the unfair result

the statute would yield, if Lilly's section 1342 argument prevails. According to Lilly the statute criminalizes campaign contributions made to a government official by lawyers he hires, but the statute turns a blind eye to campaign contributions made to the same official by lawyers for the other side. The lawyer who signed Lilly's motion to disqualify, and the political action committee for the local law firm representing Lilly have both made significant campaign contributions to the Attorney General within the last year, i.e., while this case is pending. The corrupting potential flowing from adverse lawyers' contributions is certainly no different from that flowing from payments by counsel hired by the government official in question.

It simply is bizarre to say that the lawyers an official is working with cannot show their support for the official (and exercise their First Amendment rights) by making a contribution to him or her, but the lawyers on the other side (who may be seeking from the official a favorable deal for their client) can make contributions calculated to further their client's agenda. The facts before this Court show this is not merely a hypothetical problem.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:01
MARC KITCHENS

A statute which prohibits a government official's litigation allies from contributing to him, but permits his litigation adversaries to do so is inordinately unfair. It is obvious that section 1342 was written without contemplating the practicalities of the litigation setting or the special role played by the Supreme Court in policing attorney-client relationships. This is another persuasive reason the statute should not be construed as applicable here. To the extent it discriminates against campaign contributors aligned in litigation with a government official, but allows contributions by the official's

adversaries, it is illogical and unfairly deprives the official's retained counsel of equal treatment, that is, equal protection under the law.

VII. An Ethics Commission Opinion Supports Reading § 1342 Narrowly

The Court notes in passing that even the State Ethics Commission tends to read section 1342 narrowly. Ethics Opinion SEC A092-019 (Dec. 18, 1991), analyzes Section 1342 and concludes:

> The Commission does not believe that the General Assembly intended to restrict campaign contributions to the extent that employees of companies that contract with the State would be prohibited from making a campaign contribution. Accordingly, the Attorney General's campaign may accept campaign contributions from lawyers and employees that receive contracts to provide legal services under the Attorney General=s Associate Counsel Program.

Special Counsel points out that under the Retention Agreement by which they were appointed, any fees received by the Special Counsel will be paid to them as joint venturers. There is some merit in this analysis, for if the suit succeeds, the Retention Agreement makes it clear Special Counsel will share the profits, if any, flowing from their work as co-venturers. The Retention Agreement evidences a joint undertaking by Special Counsel, subject to the Attorney General's overall control, of a single project (the Lilly lawsuit) for profit, a commitment to share profits as well as losses, a contribution of skills and property by the co-venturers, and a community interest and control over the subject matter of the enterprise. It appears that as a result of the Retention Agreement, Special Counsel did in fact form a joint venture to prosecute this case on behalf of the State in this case. *See Berger v. Mead*, 127 Mich. App. 209, 338 N.W.2d 919, 922 (1983). Under the Campaign Reform Act relied on by Lilly, joint ventures are covered persons. See S.C. St. Ann. 8-13-1300 (25) defining person to include a "joint venture."

FILED
CLERK OF COURT
2009 SEP 22 PM 2:01
MARY KITCHENS

The above-quoted 1991 Opinion rendered by the State Ethics Commission expresses the belief that the General Assembly did not intend "to restrict campaign contributions to the extent that employees of companies that contract with the State would be prohibited from making a campaign contribution." Opinion SEC A092-019 (Dec. 18, 1991), *supra.* Here, it is possible to view the "company" the Attorney General appointed as a de facto joint venture formed by Special Counsel for purposes of undertaking the Lilly case. This is significant, because the joint venture itself has never contributed anything to Attorney General McMaster; two of the joint venture's members, two of the members' firms, and employees of two members' firms have, but such contributions are plainly permitted under the Ethics Commission's ruling that "the Attorney General's campaign may accept campaign contributions from lawyers and employees that receive contracts to provide legal services."

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:01
MARC KITCHENS

Moreover, as noted above, it would be anomalous in the extreme to construe a statute to criminalize unsolicited campaign contributions by lawyers toiling on behalf of the State against a litigant like Lilly, while permitting Lilly's lawyers to make campaign contributions to the lawyer leading the attack against them and their client.

VIII. Appointment and Use of Special Counsel Is Properly Within the Attorney General's Powers and Unaffected by § 1342

The Attorney General is a constitutional officer, and is charged with the duties of the State's chief legal officer, possessing broad constitutional, statutory and common law authority to represent the State, to enforce the laws of South Carolina, and to protect "public rights." *State ex rel. Condon v. Hodges*, 349 S.C. 232, 240, 562 S.E.2d 623, 627 (2002). See also § 1-7-10 *et seq.*, including § 1-7-30 [Attorney General appoints assistants]; § 1-7-85 [Office of Attorney General may obtain reimbursement for attorneys

fees or investigative costs or costs of litigation awarded by court order or settlement]; § 1-7-170 [a "department or agency of state government may not engage on a fee basis an attorney at law except upon the written approval of the Attorney General and upon a fee as must be approved by him . . . ."] It is the Attorney General who is responsible "for vindicating wrongs against the collective citizens of the State." *Condon v. Hodges, supra.*

As the chief law officer of South Carolina, the Attorney General is authorized not only to appoint assistant attorneys general to carry out these duties, see § 1-7-30, *supra,* but to employ special counsel from the private sector "to represent and protect the interests of the state." *Cooley v. S.C. Tax Comm.*, 204 S.C. 10, 28 S.E.2d 445, 448 (1943). It is generally acknowledged that "[a] determination by the attorney general of the extraordinariness of a case calling for outside counsel is a decision within his or her discretionary authority ... and it has been stated there is no limit on the attorney general's ability to appoint a special prosecutor." 7 Am.Jur.2d, *Attorney General, § 14.*

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:01
MARC KITCHENS

In view of the great latitude given to decisions by the Attorney General in prosecuting and staffing cases, it is appropriate to read section 1342 narrowly. Section 1342 is best read to not reach the dealings between Special Counsel and the Attorney General relates to the unique role of the Attorney General as chief prosecutor of the State and as the state's chief legal officer. The Supreme Court has consistently recognized that certain constraints normally imposed by ethical requirements are inapplicable to the Attorney General's representation of the public interest. For example, in *State ex rel. McLeod v. Snipes*, 266 S.C. 415, 223 S.E.2d 853 (1976), the Court held that representation by the Attorney General of a public officer in a criminal case did not

ethically conflict with the Attorney General's role in prosecution of that case. As the Court noted,

> [w]e find no mandated conflict of interest in the role occupied by the Attorney General under the Constitution [as chief prosecutor] and the statute [requesting the Attorney General to defend public officers]. The Attorney General is not required to sit at both the prosecution and defense table in the prosecution of a public official, in the sense that he or all of his staff equally participate in the prosecution or defense .... [The Attorney General has] ample latitude to designate an individual or individuals who could independently represent the public official, if the Attorney General found that he could not do so because of a conflict with his duties as chief prosecuting officer.

223 S.E. 2d at 855. *See also, Langford v. McLeod*, 269 S.C. 466, 238 S.E.2d 161 (1977) (Attorney General's representation of municipal officials in criminal prosecution did not result in inherently conflicting or unethical duties upon Attorney General, including requirement that prosecuting officer not accept fees in civil action based upon same facts); *State ex rel. McLeod v. McInnis*, 266 S.C. 415, 223 S.E.2d 853 (1976) (Attorney General represented adverse parties in case brought to declare JARC statutes unconstitutional). Clearly, as the State's top lawyer, the Attorney General must shoulder special duties and responsibilities imposed by statute in order properly to represent the State in court and to oversee the State's litigation. With these provisions in mind, the Court does not believe that § 8-13-1342 is applicable to the situation here, a situation which involves the Attorney General's retention of private counsel in complex litigation to represent the State on a contingency fee basis.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:01
MARC KITCHENS

Examination of the precise language of § 8-13-1342 demonstrates the great difficulty in applying this statute in this instance. Section 8-13-1342 is expressly applicable to an award of a "contract with the state . . . ." However, as has been noted,

outside counsel's rights to the proceeds of the contingent fee for performance of his or her work is not a "claim against the state," but one against the fund paid by the defendants (if any). *People v. Philip Morris*, 759 N.E.2d 906 (2001). Moreover, courts have held that such proceeds are not state funds or "public funds" since they never are deposited in the State Treasury. *Conant v. Robins, et al.* 603 N.W.2d 143 (Minn. 1999).

Further, § 1-7-170 expressly authorizes the Attorney General to approve any engagement "on a fee basis [of any] attorney at law" to represent an agency or department of state government and to approve the fee of that private attorney or attorneys. This statute, which for many years appeared each year as a Proviso in the Appropriations Act, was codified by the General Assembly as § 1-7-170 in 2008, long after § 8-13-1342 was enacted in 1991 as part of the State Ethics Act. The Court notes that Section 1-7-170 gives virtually unlimited discretion to the Attorney General to approve private counsel and the fee arrangement for such counsel's services. Such would, of course, include a contingency fee arrangement with the Attorney General's own designated attorneys to act as special counsel on his behalf.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:0?
MARC KITCHENS

On the other hand, § 8-13-1342 imposes clear constraints upon the award of contracts with the State by requiring that no campaign contributions may be given to any person awarding a contract with the State. Under ordinary rules of statutory construction, § 1-7-170, a specific statute enacted later in time to the more general § 8-13-1342, would be deemed controlling. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000).

The Court also finds the Supreme Court's decision in *S.C. Coastal Council v. State Ethics Commission*, 306 S.C. 41, 410 S.E.2d 245 (1995) to be persuasive. In *Coastal Council*, the Ethics Commission had concluded that the Coastal Council was

governed by a provision in the Ethics Act forbidding any person from serving as a member of a body regulating business with which that person is associated. However, the Court concluded that such provision was inapplicable to the Coastal Council. In the Court's view, the separate body of statutory law governing the Coastal Council was controlling. According to the Supreme Court, "[a]fter reviewing the Act, which defines Coastal Council's regulatory duties, and after examining Coastal Council's regulations, we conclude that Coastal Council regulates the preservation and utilization of coastal resources." 410 S.E.2d at 247.

Likewise, the various statutes and common law relating to the powers and duties of the Attorney General bestow upon him broad discretion to appoint or engage attorneys to assist him in the representation of the State and to determine the fees for such representation rather than to award a contract with the State in the ordinary course of state business. Further, special ethics rules specifically tailored to policing the propriety of attorney-client dealings exist under the Rules of Professional Conduct and apply to the relationship between the Attorney General and the Special Counsel he appointed. Thus, based upon the same type of reasoning as in *Coastal Council*, the Court finds that § 8-13-1342 is inapplicable to the situation where the Attorney General appoints private counsel on a contingency fee basis to assist him in the representation of the State in this matter.

Finally, as an additional reason in support of the Court's finding that section 1342 offers no grounds for Lilly's disqualification motion, the Court notes that the special confidential fiduciary relationship embraced by the Retention Agreement falls outside the type of standard type of commercial contract award at which section 1342 is targeted. Unlike a normal state contract with a supplier or goods or a service-provider, here no

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:
MARC KITCHENS

payment has been made or will be made out of State funds to Special Counsel. They will be paid, if at all, purely out of any fund they are able to generate for the State's benefit. The fiduciary and adversary pressures involved in this case make the setting very different from that encountered in the standard commercial context. Without denying that there is a financial aspect to the dealings between Special Counsel and the Attorney General, the Court concludes that the appointment of Special Counsel by the Attorney General reflects a relationship different in kind and degree from the contract-award setting envisioned by section 1342. See, *Kinder v. Nixon*, 2000 WL 684860 (Mo. App. W.D. 2000) (Athe Attorney General has the authority to appoint special assistants unless the Legislature has expressly forbidden the exercise of that power.").

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:01
MARC KITCHENS

Stated differently, there are numerous huge differences between retainer agreements between Special Counsel and the Attorney General and commercial contracts between a municipality and its vendors. Supreme Court rules thoroughly regulate the former relationship not the latter. Intense, well understood fiduciary obligations permeate the former; the latter concerns mostly business as usual. Most importantly, the special attorney-client relation that arises when the Attorney General appoints a law firm or group of lawyers in whom he has absolute confidence is far different in scope and content from those generated when contracts are awarded to commercial entities by the State through other processes such as the State Procurement Code.

No provision of law expressly forbids the giving of a campaign contribution by a joint venture member to the Attorney General by whom he was appointed, unless there is a *quid pro quo* or some other unique circumstance. No such charge has been made here.

131

IX. A Balancing of Equities Supports Denial of the Motion to Disqualify

As noted above, Lilly has not presented competent evidence of any adverse prejudice it has suffered due to the behavior of Special Counsel. There has been no "meaningful showing that the trial process here will be tainted in any way" due to Special Counsel's participation. *See Reilly v. Computer Assoc. Long-Term Disability Plan*, 423 F. Supp.2d 5, 10 (E.D. N.Y. 2006). It is appropriate to weigh the foreseeable lack of taint against the hardship that disqualification in this very hard-fought and difficult case would place on plaintiff on the eve of trial. *Id.* Weighing the parties' relative hardship is appropriate here. *See In re Bohack Corp.*, 607 F.2d 258, 263 (2d Cir.1979) (stating in the bankruptcy context that "[t]he delay and additional expense created by substitution of counsel is a factor to which we have attached considerable significance in these cases."). A weighing of the parties' relative hardship provides further justification for denial of the motion to disqualify based on Lilly's § 1342 illegality claim. *See also*, SCACR 407, Rule 3.7(a)(3) (listing "substantial hardship on the client" as a factor to be evaluated in determining whether a lawyer-witness must be disqualified).

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:01
MARC KITCHENS

X. Administrative Remedies Have Not Been Exhausted

Lilly has invoked the Ethics Act and cited an opinion by the State Ethics Commission interpreting section 1342 in its brief. Conspicuously absent from the record is any sign that Lilly has presented its ethics charges based on section 1342 to the attention of the Ethics Commission for its consideration. This Court is disinclined to mete out severe punishment to lawyers and their client based on a novel application of a statute that even the Ethics Commission seems to agree needs to be narrowly construed.

132

In any event, to repeat, there has been no showing that there has been any prejudice to the Defendant and the court finds that the Special Counsel Retention Agreement contract does not constitute a denial of equal protection or due process in this case. If the Defendant wishes to complain about the behavior of Special Counsel in light of section 1342, it has access to the same Commission established to investigate and rule on such matters as any other citizen.

Alternatively, if Lilly wishes to test the legality of Special Counsel's service, the Court believes that subject should be more properly addressed in a declaratory judgment action, which has not been filed at this point, not through a motion to disqualify counsel filed at this late hour in this case. The Court's consideration of the matter on the eve of trial is particularly inappropriate since it is not an issue which has been presented to the court by pleading as required under Rule 8(c)..

SUMMARY

For all of the foregoing reasons, Lilly's Motion to Disqualify is hereby DENIED. AND IT IS SO ORDERED.

Roger L. Couch
Circuit Court Judge

September 22, 2009
Spartanburg, South Carolina

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 SEP 22 PM 2:01
MARC KITCHENS

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; DARYL J. BROWN, on behalf of his minor children, LINDSEY DELORES BROWN and JANISE VANISHA BROWN; DEANNA J. BROWN THOMAS, on behalf of her minor children, JASON BROWN LEWIS; YAMMA N. BROWN, on behalf of her minor children, SYDNEY L[redacted]R, CARRINGTON L[redacted]R, and TONYA BROWN; VANISHA BROWN; and LARRY BROWN; TOMMIE RAE HYNIE BROWN Petitioners, - vs- RUSSELL L. BAUKNIGHT, as Special Administrator and Special Trustee for The Estate of James Brown and The James Brown 2000 Irrevocable Trust, TERRY BROWN, ROMUNZO BROWN; FORLANDO BROWN; CINNAMON N.M. PARIS; LARHONDA PETITT; and JEANNETTE MITCHELL Respondents. *In Re*: The Estate of James Brown and The James Brown 2000 Irrevocable Trust u/a/d August 1, 2000	)	Case No.: 08-CP-02-1647 (Case No.: 07-CP-02-0122) (Estate of James Brown) (Case No.: 08-CP-02-00872) (Wills/Trust/Heirs Matter) **ORDER APPROVING SETTLEMENT AGREEMENT** FILED 5-26-2009 Liz Godard C.C.P.&G.S. Anita Knoepke 9:45 AM Deputy Clerk

This matter comes before the Court on a Motion for Approval of Settlement Agreement.

The Court commenced the hearing on January 30, 2009, and continued to conduct that hearing

DAC #1

134

EXHIBIT A

on March 4, 5, 6, 25, and 26, 2009, and concluded the hearing on April 6, 2009. The following counsel appeared at the hearing related to the Motion for Settlement Approval: (1) Louis Levenson, counsel for Deanna J. Brown, Larry Brown, Yamma N. Brown, individually and on behalf of her minor children Sydney Lumar and Carrington Lumar, Vanisha Brown, Daryl J. Brown, individually and on behalf of his minor children child Janise Vanisha Brown, Lindsey Delores Brown, Jason Brown Lewis, and Tonya Brown; (2) Robert N. Rosen, S. Alan Medlin, T. Heyward Carter, David L. Michel, M. Jean Lee, Andrew W. Chandler, and F. Patricia Scarborough, counsel for Tommie Rae Hynie Brown; (3) Tressa Hayes and James D. Bailey, counsel for Adele J. Pope and Robert L. Buchanan, Jr., (4) A. Peter Shahid, Jr., counsel for Guardian ad Litem Stephen M. Slotchiver; (5) Stephen M. Slotchiver, Guardian ad Litem for James Joseph Brown, II; (6) David B. Bell and Matt Bodman, counsel for Terry Brown, Forlando Brown, and Romunzo Brown; (7) C. Havird Jones, Jr., J.C. Nicholson, III, and Mary Frances Jowers, on behalf of the South Carolina Attorney General; (8) R. Wayne Byrd, counsel for Albert Dallas and Alfred Bradley; (9) James M. Griffin, counsel for LaRhonda Petitt and Cinnamon Paris; (10) Fred L. Kingsmore, Jr., counsel for Russell Bauknight; (11) Jan L. Warner and Max Pickelsimer, counsel for David Cannon; (12) William Barr, counsel for Jeanette Mitchell; (13) Sonja R. Tate, counsel for Albert Dallas; and (14) Kaymani D. West, counsel for Greenberg Traurig and Joel Katz.

I. Statement and History of the Case

A. Facts and Procedural History

This matter arises out of the Estate of James Joseph Brown, Jr. Mr. Brown died on December 25, 2006, a resident of Aiken County, South Carolina. Mr. Brown's will, dated August 1, 2000, was filed with the Aiken County Probate Court on January 18, 2007. His will

DAE #2

nominated three individuals as Personal Representatives, and they were appointed by the Probate Court by Order dated January 18, 2007: Albert H. Dallas, David G. Cannon, and Alfred A. Bradley. These same individuals were appointed Trustees of the Trust by the express terms of the Trust.

Mr. Brown's will named six children: Deanna J. Brown Thomas, Yamma N. Brown, Vanisha Brown, Daryl J. Brown, Larry Brown, and Terry Brown (collectively "named children"). Mr. Brown left "all [his] personal and household effects of every kind . . ." to these named children in equal shares per stirpes. All of the named children were alive at the time of Mr. Brown's death. Mr. Brown left the remainder of his Estate to the Trust created under his Irrevocable Trust Agreement dated August 1, 2000. The will provided that the remainder of his Estate would go to the Trust as a pour-over devise.

Mr. Brown's Irrevocable Trust Agreement created two trusts: the Brown Family Educational Trust and the James Brown "I Feel Good" Trust. The Brown Family Educational Trust provides for income to be paid for the benefit of each then-living grandchild who has not reached the age of thirty-five (35) for his education and related expenses. Upon termination of the Family Trust, the balance would be added to the "I Feel Good" Trust. The "I Feel Good" Trust is for the "tuition, educational expenses, and financial assistance of and for poor and financially needy children, youth, or young adults (Who are both qualified and deserving) who seek and have need of such assistance to obtain and further their education at the many educational entities and/or institutions in the State of South Carolina and Georgia." In addition to the three appointed Trustees, the Trust created an Advisory Board of three initial members. The Trust describes the powers of the Trustees, including the power to allocate up to 50% of the gross income from the Trust for the payment of administrative and managerial expenses. The

DAE #3

Trust provides for Trustee Succession. If the Trustee resigns, the Trust provides that he appoint a successor, or upon failure of that, the successor shall be determined by unanimous vote of the advisory board then existing. Failing this, the Court having jurisdiction shall select the successor Trustee. The Trust included a Schedule A listing initial funding of the following: (1) Fifty Dollars ($50.00); (2) all ownership in James Brown Enterprises, Inc.; and (3) ownership of Mr. Brown's primary residence at 430 Douglas Drive, Beech Island, South Carolina.

Mr. Brown's will was admitted to informal probate on January 18, 2007. On January 26, 2007, the Aiken County Probate Court removed the matter to the Court of Common Pleas. From this time forward, the Aiken County Probate Court continued to remove all matters filed in this Estate to the Court of Common Pleas.

On February 1, 2007, Tommie Rae Hynie Brown filed a Petition for Elective Share or Omitted Spouse's Share, asserting she is the widow of Mr. Brown. She and Mr. Brown were married on December 14, 2001, in Beech Island. She had previously been involved in a putative marriage ceremony with Javed Ahmed on February 17, 1997, in Texas. Mrs. Brown subsequently brought an action to annul her marriage to Ahmed, and the Charleston County Family Court found her marriage to Ahmed void *ab initio* by Order dated April 15, 2004. Among other conclusions, the Court found that Mr. Ahmed was married at the time he entered into his marriage with Mrs. Brown, and therefore he lacked capacity to marry her.

The six named children filed an Emergency Petition for Termination of Appointment of and Removal of Personal Representatives on January 24, 2007. On February 1, 2007, Tommie Ray Hynie Brown filed an Emergency Petition for Appointment of Special Administrator. The Court held a hearing on these Petitions on February 9, 2007. By Order dated February 20, 2007, the Court denied the Petition for Removal of the Personal Representatives and granted the

#4

Petition for Special Administrator. By Order filed March 12, 2007, the Court appointed Adele J. Pope and Robert L. Buchanan, Jr., as Special Administrators. At that time, the Special Administrators' duties were limited and included the power to "monitor, investigate, and oversee the performance by the general Personal Representatives of their duties, and present to the Court any appropriate issues regarding same." By Order filed June 25, 2007, the Court granted the Special Administrators "complete, direct and continuing access to all information, documents and records, in any form, related to James Brown, the Estate of James Brown, the James Brown 2000 Irrevocable Trust and all trusts created thereunder, and all Brown Entities or Interest, however titled."

In addition to the six named children, several other individuals have appeared and claimed rights as children of Mr. Brown: (1) James Joseph Brown, II; (2) Cinnamon Nicole Parris; (3) LaRhonda Petit; and (4) Jeannette Mitchell. James Joseph Brown, II seeks his rights as a pretermitted child, having been born on June 11, 2001, after Mr. Brown wrote his will. Steven Slotchiver was appointed Guardian ad Litem for James Joseph Brown, II, by Order filed June 13, 2007. James Joseph Brown, II filed a Petition for Adjudication of Paternity on August 24, 2007. LaRhonda Petitt filed an action on August 23, 2007. Cinnamon Nicole Parris filed an action on September 21, 2007. Jeannette Mitchell filed a motion on April 21, 2008.

On July 27, 2007, the Special Administrators filed a Motion and Recommendation of Special Administrators requesting the Court to remove one or more of the Personal Representatives and one or more of the Trustees. A hearing was held on this Motion on August 10, 2007. At the hearing, David G. Cannon resigned as Personal Representative of the Estate, Trustee of the Brown Trusts, and as director, officer, agent, and/or fiduciary of any kind as to

DAE #5

Mr. Brown, the Estate, the Brown Trusts, and all Brown Entities (except Seventh Decade Productions). Dallas and Bradley remained Personal Representatives and Trustees.

The Court held a hearing on September 24, 2007. At the hearing, the Court heard issues related to David Cannon's obligation to account to the Court. The Court found Cannon in contempt by Order filed October 2, 2007. A hearing to address whether Cannon's contempt was willful was held on November 15, 2007 and continued on November 20, 2007. By Order dated December 18, 2007, the Court found Cannon in willful contempt for failing to pay $373,00.00 as ordered, and for amending tax returns on behalf of Brown entities after being ordered to give up authority in regard to the Brown entities and for deliberately disobeying the order of this Court. The Court ordered him to confinement with the South Carolina Department of Corrections for six months, though he could purge himself of the confinement by payment of the $373,000.00, payment to the court of $50,000.00 to be applied towards various parties' attorney fees, and a fine of $10,000.00. Cannon appealed this Order, and as of the date of the present Order, the appeal is still pending.

The South Carolina Attorney General appeared at the hearing on September 24, 2007, and requested to intervene to enforce and protect the funds given or appropriated to any charitable trust created by the will or Trust of Mr. Brown, or any other assets of the Estate which may be impressed with a charitable trust. The Georgia Attorney General also appeared and requested to intervene. By Order filed October 11, 2007, the Court granted the Motions to Intervene. The South Carolina Attorney General continues to remain involved in the case. The Georgia Attorney General is no longer participating in the action, as discussed below.

At the hearing on November 20, 2007, Alfred Bradley and Albert Dallas submitted their resignation as Personal Representatives of the Estate and Trustees. By Order dated November

DNE
#6

20, 2007, the Court accepted their resignations, and immediately appointed Buchanan and Pope to serve as Personal Representatives and Trustees. The Court did not consult the Advisory Board regarding their appointment. By Motion dated November 30, 2007, Dallas and Bradley moved the Court to vacate its Order accepting their resignations, arguing the Court did not have authority to accept the resignations or authority to appoint Pope and Buchanan as Trustees. The Court heard this matter on February 20, 2008, and denied Dallas and Bradley's Motion by Order filed March 7, 2008. Dallas and Bradley appealed, and as of the date of the present Order, the appeal is still pending.

On December 20, 2007, Tommie Rae Brown filed Petitions to Set Aside the Will and Trust, alleging causes of action for undue influence, fraud, lack of intent, and illusory trust. On December 26, 2007, five of the six named children (all but Terry Brown)[1] filed Petitions to Set Aside the Will and Trust, alleging the same four causes of action.

On January 4, 2008, the Court held a hearing on the Motion for Recusal filed by Dallas and Bradley. By Order filed February 20, 2008, the Court denied this Motion.

The Court held a hearing on February 7, 2008. At that hearing, the Court granted the motion of the Levenson clients to revoke the pro hac vice admission of the Georgia Attorney General, though no written Order has been issued on this matter. The Georgia Attorney General became involved in this matter based on an understanding of the Trust that only students in South Carolina and Georgia qualify for benefits under the "I Feel Good" Trust. However, a careful reading revealed that students can be from anywhere; the only limitation is that they desire to attend a school in South Carolina or Georgia. The Court found that the South Carolina

[1] The six named children, and their children who are Mr. Brown's grandchildren, were all originally represented by Louis Levenson. David Bell was substituted as counsel for Terry Brown, Forlando Brown, and Romunzo Brown.

DAE #1

Attorney General was the appropriate party to adequately protect the interests of the charitable beneficiaries because the trust situs is in South Carolina.

Also arising out of the hearing on February 7, 2008, the Court issued an Order filed February 25, 2008, allowing the PR/Trustees to sell Mr. Brown's tangible personal property and his home in Beech Island. The PR/Trustees desired to sell the personal property through an auction, and hired Christie's Auction House to conduct the sale. Over objection by other counsel, the Court allowed the sale of personal property.

The Court held a hearing on March 7, 2008. At the hearing, the Court heard arguments on the Attorney General's Objection to the Appointment of Pope and Buchanan as Personal Representatives and Trustees, filed December 14, 2007. The Court heard testimony from Pope, Dallas, and Bradley in connection with the Objection. The Court overruled the objection by Order filed April 10, 2008. The Attorney General filed a Motion to Alter or Amend this Order on April 24, 2008, and subsequently, by Motion dated June 18, 2008, asked the Court to hold the Motion to Alter or Amend in abeyance. This request was based on the fact that the Motion relates to the appointment of successor Trustees, and the pending appeal of Dallas and Bradley also relates to the appointment of Trustees and its outcome may make the Motion moot. Because of the request to hold the matter in abeyance, the Court has not ruled on the Motion to Reconsider.

By Order filed March 10, 2008, the Court required service by publication of the Summons and Order in the case caption 07-CP-02-1222. The Notice was published in the Aiken Standard on April 19 and 26, 2008, and May 3, 2008. The published notice stated that it was "to determine all lawful heirs of James Brown, including lawful heirs at law who may be entitled to

DAE
#2

rights under state and federal laws." No additional parties have appeared as a result of the publication.

On August 10, 2008, the following parties participated in an informal mediation: Tommie Raye Hynie Brown; the named children and grandchildren represented by Louis Levenson; and the South Carolina Attorney General. The parties reached a settlement which was reduced to writing and signed by all of the participating parties.

At the hearing on August 19, 2008, the parties reported the partial settlement to the Court during an in-chambers conference. The parties also reported in open court that they had reached a resolution among themselves. At that time, the parties did not disclose their signed settlement document.

On September 29, 2008, the South Carolina Attorney General filed a Petition for Removal and Restraint of Trustees, asking that Dallas and Bradley be removed as Trustees, in the event they are Trustees. On November 7, 2008, the Attorney General and the other settling parties filed an Amended Petition for Removal and Restraint of Trustees Dallas, Bradley, and Cannon, and PR/Trustees Pope and Buchanan. The Court has not heard this matter pending the settlement approval. Also on November 7, 2008, the settling parties filed an Emergency Petition for Appointment of Special Administrator and Special Trustee.

During the pending settlement, Pope and Buchanan have filed numerous pleadings in the matter, including the following which were filed in addition to their Responses and Returns to other matters: (1) Motion for Partial Summary Judgment, dated September 12, 2008; (2) Supplemental Motion to Dismiss All "Spousal" Claims of Tommie Rae Hynie Brown, dated September 12, 2008; (3) Motion to Dismiss all Causes of Action to Set Aside the James Brown 2000 Irrevocable Trust, dated September 15, 2008; (4) Motion to Dismiss, dated October 9,

DAE #9

2008; (5) Motion to Intervene and Dismiss, dated October 24, 2008; (6) Motion to Dismiss Robert L. Buchanan, Jr. and Adele J. Pope as Individual Parties, dated November 14, 2008; (7) Motion to Disqualify C. Havird Jones, Jr. and Mary Frances Jowers as Counsel and Related Relief, dated November 14, 2008; (8) Emergency Motion to Quash Subpoena and Protect Evidence, dated November 14, 2008; (9) Motion to Realign, for Partial Summary Judgment and for Mediation after Proper Joinder of Parties and Discovery, dated January 9, 2009; (10) Motion to Alter or Amend Judgment, dated January 14, 2009; (11) Motion for Partial Summary Judgment, dated January 20, 2009; (12) Motion and Memorandum of PR/Trustees for Partial Summary Judgment that the AG and PR/Trustees have a Duty to Defend and Uphold the James Brown 2000 Irrevocable Trust; the Trust and Transfer to the Irrevocable Trust of Beech Island are Valid; and all Challenges to the Irrevocable Trust and the Deed of Beech Island to the Trust are Barred by Statutes of Limitation and Estoppel; and Petition for Mandatory Guidance under section 62-7-932(D), dated February 23, 2009; (13) Emergency Motion for Appointment of Special Administrator and Special Trustee, dated February 27, 2009; (14) Motion to Reconsider, Vacate, Set Aside, Alter and/or Amend and/or Clarify Orders, dated March 12, 2009; and (15) Supplemental Motion of PR/Trustees to Dismiss (where applicable), and for Partial Summary Judgment, dated March 17, 2009.

In addition, they also filed numerous affidavits after the settlement was announced to the Court, including the following; (1) Joint Affidavit of Robert L. Buchanan, Jr., and Adele J. Pope Supporting Demand for Due Process Hearing and Related Relief, dated November 24, 2008; (2) Joint Affidavit of Robert L. Buchanan, Jr. and Adele J. Pope, dated January 20, 2009; (3) Affidavit of Robert L. Buchanan, Jr. and Adele J. Pope in Support of Injunction and Damages for Intentional Interference, dated February 17, 2009; (4) Joint Affidavit of Robert L. Buchanan, Jr.

DAE #10

and Adele J. Pope, dated February 19, 2009; (5) Affidavit of Adele J. Pope Opposing Removal of PR/Trustees Buchanan & Pope; Denying Emergency; Supporting Stay and Proper Joinder Supporting Proper Notice of Hearings; Supporting Order Compelling parties to Appeal with records to Testify; and Seeking Ruling Under S.C. Trust Code section 62-7-932(D) Related to Principal and Income Charges Under Will/Trust *In Terrorem* Clauses, dated February 23, 2009; and (6) Affidavit of Robert L. Buchanan, Jr. and Adele J. Pope as PR/Trustees Supporting Emergency Motion for Appointment of Special Administrator and Special Trustee with Full Authority to Manage, Preserve and Protect Assets of the Estate of James Brown, the James Brown 2000 Trust, James Brown Enterprises, Inc. and other Brown Entities pending final resolution of all formal testacy/resignation/removal/appointment matters and challenges to the validity of the James Brown 2000 Trust.

The Court held a hearing on November 25, 2008, and at that time the settling parties disclosed the terms of the settlement on the record and reported they were ready to move forward with a hearing to approve the settlement. The Court scheduled a hearing for settlement approval on January 30, 2009. The Court continued to conduct that hearing on March 4, 5, 6, 25, and 26, 2009, and concluded the hearing on April 6, 2009.

By Order filed January 7, 2009, the Court appointed Russell L. Bauknight as Special Administrator and Special Trustee for the "sole limited and exclusive purpose of reviewing and providing input and recommendations to the Court as to the proposed Settlement Agreement among the Petitioners in this case." Ms. Pope and Messrs. Buchanan, Dallas, and Bradley appealed the Court's January 7, 2009 order to the Court of Appeals. The appeals were dismissed.

At the hearing on January 30, 2009, the settling parties reported that Terry Brown had joined the settlement. Thus, all beneficiaries of the Brown Estate/Trust were part of the

BAC #11

settlement agreement. The settlement agreement does not include Cinnamon Parris, LaRhonda Petitt, or Jeannette Mitchell. However, those parties each stated they have no objection to the settlement, pursuant to a stipulation with the settling parties that the settling parties do not intend for the settlement to in any way impact or affect their rights.

B. Related Litigation

While the above actions have been pending, there are numerous collateral matters pending in other jurisdictions. Forlando Brown sued Pope and Buchanan in South Carolina District Court on January 2, 2008. As a grandchild and beneficiary of the Family Educational Trust, Forlando Brown contends in the action that he has not received the scholarship money he is entitled to. His allegations against Pope and Buchanan include the following: (1) that they have irreconcilable conflicts of interest; (2) that they have breached their fiduciary duties; and (3) that they have disregarded the terms of the Trust. He seeks removal of Pope and Buchanan and injunctive relief. This action remains pending in the district court.

The CORBIS litigation is pending in Illinois. This action involves claims brought by Mr. Brown during his life for violation of rights of publicity, violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, and a claim for profiteering on the name and likeliness of Mr. Brown without his consent based on CORBIS' sale and offering for sale over the internet of Mr. Brown's photographs for commercial purposes. There is a pending settlement in the CORBIS litigation, and on March 24, 2008, Buchanan and Pope brought an action against the South Carolina Attorney General in Aiken County, asking the Court to approve the terms of the CORBIS settlement agreement.

The Pullman litigation is pending in New York. During his life, Mr. Brown sued the Pullman Group when he was unable to secure a loan from the Royal Bank of Scotland using

DNE
#12

future song royalties as collateral because Pullman Group claimed it had exclusive authority to broker the transaction. The Pullman Group filed a counterclaim, and this action remains pending against the Estate.

On April 6, 2009, Jacqueline Hollander filed an action in the Northern District of Illinois against Pope, Buchanan, and the State of South Carolina. She seeks a finding that she and Mr. Brown were partners and the "I Feel Good" Trust was an extension of the partnership, which she owns as the surviving partner.

C. Synopsis of Settlement Agreement

The settlement agreement dated August 10, 2008, and amended and restated on March 3, 2009, was entered into by and among Henry D. McMaster, Attorney General of South Carolina (the "Attorney General"), Tommie Rae Brown, individually and on behalf of her minor child, James Joseph Brown, II, Larry Brown, individually and on behalf of his minor child Janise Vanisha Brown, Lindsey Delores Brown, Venisha Brown, Deanna J. Brown, Jason Brown-Lewis, Yamma N. Brown, individually and on behalf of her minor children, Sydney Lumar and Carrington Lumar, Daryl J. Brown, and Tonya Brown, and Terry Brown (the "Settling Parties"). The salient points of the settlement agreement are as follows:

1. The purpose of the agreement was to settle any and all differences among the settling parties concerning the disposition, whether by will or otherwise, and/or transfer of any assets owned or controlled by James Brown, whether by will, intestacy, trust, or nonprobate means, state or federal law, and of substantial significance, to come together as a family to honor the legacy of Mr. Brown.

2. The settling parties intend for the agreement to be a binding private settlement agreement but also are seeking court approval of the settlement.

DAC #13

successors who are not parties to the agreement, section 62-3-912 evidences the legislative intent to recognize as valid settlements among some but not all of the successors to an estate. Moreover, the parties to the settlement agreement are all successors to the Estate. SCPC section 62-1-201(42) broadly defines "successors" to include "those persons, other than creditors, who are entitled to property of a decedent under his will or this Code." The charitable successors are properly represented by the Attorney General of South Carolina, as discussed below.

SCPC sections 62-3-1101 and 62-3-1102, authorizing a court to approve a settlement agreement, also recognize the validity of a settlement by fewer than all parties. Section 62-3-1102 requires that the settlement be signed by all competent persons whose beneficial interests or claims will or may be affected by the settlement. As with section 62-3-912 discussed above, section 62-3-1102 thus recognizes that a settlement agreement may be effectuated by fewer than all the interested persons in an estate; only those whose interests will or may be affected by the settlement must be signatories.

Section 62-3-1102 also provides that fiduciaries have an opportunity to be heard at a settlement approval hearing but do not have the authority to veto a settlement presented to the court for approval. Although section 62-3-1102 recognizes that a fiduciary may be a party to a settlement and even propose its approval to the court,[2] it provides that a fiduciary who is not a

[2] The ability of a fiduciary to agree to be a party to a settlement is recognized in *University of Southern California v. Moran*, 365 S.C. 270, 617 S.E.2d 135, (Ct. App. 2005), providing that when a trustee joins in the execution of a settlement agreement, a trust beneficiary, although given the opportunity to notice and to be heard, cannot veto the settlement. *Moran* does not apply to the matter *sub judice*, which deals with a different situation: the fiduciary did not join in the execution of this settlement agreement. In the case *sub judice*, section 62-3-1102 clearly provides that, because the fiduciaries did not join in the settlement agreement, this Court can nevertheless approve the settlement and direct the fiduciaries to join in the execution of the approved agreement.

DAE
#18

party to the settlement can be directed by the court to execute the agreement after it is approved by the court.

2. Even though fewer than all interested persons can enter into a private settlement agreement and a court can approve such an agreement, all necessary parties are represented in this matter.

The SCPC provides that personal representatives and trustees represent and bind their beneficiaries for purpose of notice and hearing. See SCPC sections 62-1-403, 62-7-301, and 62-7-303.

Ms. Pope and Mr. Buchanan, the personal representatives of the Estate, were appointed to represent any successor of the Estate, whether by any valid will of Mr. Brown or by intestate distribution. Thus, any successor who would take from the probate estate of Mr. Brown would be properly represented by Ms. Pope and Mr. Buchanan, who do not have a conflict of interest with any of the successors.

Similarly, any beneficiaries of the 2000 Irrevocable Trust, if valid, would be represented by Ms. Pope and Mr. Buchanan as trustees of that trust. Any beneficiaries of the 1999 Revocable Trust, if valid, would be represented by Messrs. Bradley, Cannon, and Dallas as trustees of that trust who participated in the settlement hearing.

There can be no other successor or beneficiary with an interest in the Estate of James Brown or in the 2000 Irrevocable Trust or the 1999 Revocable Trust. Any successor or beneficiary of the Estate or those trusts were represented by the appropriate fiduciaries. Moreover, minor children of the settling parties were also properly represented by their parents

who executed the agreement, and any charitable beneficiaries of the Estate and trusts were also properly represented by the South Carolina Attorney General.[3]

3. In addition to the notice and opportunity to be heard afforded by the representation discussed above, I find that any interested person also received notice and an opportunity to be heard pursuant to the publication of notice directed by order of this Court filed on March 10, 2008, as discussed above.

4. It is clear that the Attorney General in his *parens patriae* capacity has the authority to protect the public interest and to enforce the due application of those funds given or appropriated to any charitable trust, and the Attorney General is the proper party to protect the interests of the public at large in the matter of administering or enforcing charitable trusts. See *South Carolina Dep't of Mental Health v. McMaster, et al.*, 372 S.C. 175, 642 S.E.2d 52 (2007) (Attorney General is charged with the protection of public charities and is required to enforce the due application of fund given or appropriated to such charities); *Epworth Children's Home v. W. F. Beasley, et al.*, 365 S.C. 157, 616 S.E.2d 710 (2005); and *Furman Univ. v. McLeod*, 238 S.C. 475, 482, 120 S.E.2d 865, 868 (1961); also see S.C. Code Ann. §1-7-130 and S.C. Code Ann. § 62-7-405(c).

[3] Ms. Pope and Mr. Buchanan contend that notice and hearing opportunities should have been afforded Salkehatchie, Voorhees, and USC Aiken as beneficiaries of the 1999 Revocable Trust and to the members of the advisory board they attempted to appoint in their capacities as trustees. If these parties were interested, they were represented as discussed above. However, none of these three institutions of higher learning nor the advisory board members are interested persons. The colleges are not the beneficiaries of any trust: as noted by Mr. Buchanan in his testimony, it is the students who would attend those schools who are the beneficiaries, and they are already represented as discussed above. (If those three colleges would have to be parties to any action involving the 1999 trust, then by extension every educational institution in South Carolina and Georgia would have to be parties to any action involving the 2000 trust.) The advisory board members have no beneficial interest in the trust.

It is noted that section 62-7-405(c) also allows the settlor, trustee, and among others [i.e. parties with "special interests"] to enforce a charitable trust. The general law is that the purpose for providing authority pursuant to statute to allow other parties to bring an action to enforce charitable trusts was to provide assistance to the Attorney General because of that Office's lack of resources to be in all charitable trust cases. See Bogert *Trusts and Trustees* § 411 - "The attorney general as the protector, supervisor and enforcer of charitable trusts." However, when the Attorney General does appear in litigation involving a charitable trust either by motion for intervention or being brought in by an amendment to the pleadings, he has the right to take charge and control that portion of the litigation which relates to the charitable trust. *Kolin, et al. v. Leitch, et al.*, 99 N.E.2d 685, 687 (Ill. 1951). As previously stated, the South Carolina Attorney General's Motion to Intervene in this matter was granted by Order filed October 11, 2007.

This authority that allows the Attorney General to control the litigation also provides that the Attorney General has exclusive authority, in order to protect the public interest, to settle or compromise litigation.[4] See *Sarkeys v. Independent School Dist.*, 592 P.2d 529 (Okla. 1979).

In *Sarkeys*, the Court approved a settlement involving a charitable trust entered into by the parties and the Attorney General. Settlor's descendants appealed. The Court found that they did not have standing to appeal in the absence of an appeal by the Attorney General because the Attorney General was in control of the case. Similarly in *Application of Schlussel*, 89 N.Y.S.2d

[4] See 81 A.L.R. 124 (with updates, originally published in 1932), citing *Cooley v. South Carolina Tax Comm'n*, 204 S.C. 10, 28 S.E.2d 445 (1943) and *State v. Southern R. Co.*, 82 S.C. 12, 62 S.E.2d 116 (1908), at page 7: The general authority of the attorney general, at common law under the various constitutional and statutory provisions, to compromise or settle disputes in litigation in which the state is an interested party, and to direct dismissal of the proceedings, so far at least as the public interest is concerned, provided there is doubt and an honest dispute as to the state's rights and the compromise or settlement is a bona fide one, is well settled.

DAE #21

47 (1949), the Court stated as follows in regards to the Attorney General's authority to enter a settlement agreement: "Under the authorities, it is, therefore, within the competence of the Attorney General to bind the uncertain charitable beneficiaries by [a compromise]." Also see *In Re Estate of Smith*, 349 N.Y.S.2d 281 (N.Y. Surr. Ct. 1973), appeal dismissed, 355 N.Y.S.2d 994 (N.Y. App. Div. 1974), appeal denied, 321 N.E.2d 555 (N.Y.) (allowing Attorney General to enter into settlement agreement on behalf of charitable beneficiaries and over executor's objection; rejecting executor's contention that Attorney General did not have authority to compromise on behalf of charitable beneficiaries; observing that to delve too deeply into Attorney General's reasons to compromise could jeopardize charitable beneficiaries' ultimate case if not settled; nevertheless finding that the Attorney General had sufficient reason to enter settlement and was not making "gift"; noting that failure to settle risked charities ending up with nothing; observing that settlement of cases is desirable; holding that the Attorney General has the right and the power to enter into compromise on behalf of charitable beneficiaries, subject only to an abuse of discretion standard, which was not abused in this case.).

Therefore it is for the Attorney General, as the officer charged with the duty of protecting charitable beneficiaries, to exercise his discretion as to the appropriateness of a settlement. It is the responsibility of this Court in reviewing the record to determine if the Attorney General acted in good faith entering into this compromise agreement. Factors to be considered by the Court include whether the Attorney General has given careful consideration to his decision with relation to the compromise and whether the Attorney General's decision is based upon solid legal judgment and a full consideration of all the facts and circumstances available. It would be appropriate for the Attorney General to include in his review whether there was a possibility that the final outcome of this litigation was in doubt and the continued expense to the charitable trust

by additional litigation. See *In Re Estate of Smith*, supra at 283-4. These factors for my consideration are subsumed in the requirements of section 62-3-1102 that the settlement be in good faith and that it is just and reasonable. Therefore I find that the Attorney General has the power pursuant to his common law and statutory authority to protect the charitable beneficiaries, to control such litigation as to the charitable interests when he is a party, and to compromise and settle such interests where appropriate.

B. Standard for Approving Settlement

South Carolina Probate Code section 62-3-1102 provides that the Court shall approve the settlement and direct the fiduciaries to execute the agreement if it: (1) finds the contest or controversy is in good faith; and (2) the effect of the agreement on interested persons is just and reasonable.

1. Good faith controversy

Based on the history of matters involving the Estate and other issues related to James Brown, I find that it is incontrovertible that a good faith controversy exists. Any of the factors discussed hereinafter could constitute grounds for finding that a good faith controversy exists. The cumulation of these issues creates an overwhelming set of grounds for finding that a good faith controversy exists. Some of the more salient issues are as follows:

a. The Levenson clients and Tommie Rae Brown brought actions to contest the 2000 Will and the 2000 Irrevocable Trust. Although the contestants raised other reasons for the contest, a compelling argument was that Cannon, Dallas, and Bradley unduly influenced Mr. Brown into executing those documents. Without deciding whether the undue influence argument has merit, I find that argument certainly has a foundation in good faith. The 2000 Trust names Cannon, Dallas, and Bradley as trustees. The 2000 trust authorizes the trustees to expend up to

DAE #23

50% of gross income for management expenses.[5] Based on testimony from Ms. Pope and Mr. Ruff, the estate planning expert presented by Ms. Pope and Mr. Buchanan, such a provision is unprecedented, especially in a charitable trust. On behalf of the estate and trust, Ms. Pope and Mr. Buchanan have brought an action against Messrs. Cannon, Dallas, and Bradley, alleging inter alia that Messrs. Cannon, Dallas, and Bradley practiced undue influence on Mr. Brown and used various entities controlled by them to syphon off his assets, effectively under the guise of management expenses. Ms. Pope testified that Mr. Cannon told her he could get half of Mr. Brown's estate, if he wanted.

Moreover, the voluminous file of the drafter of the 2000 will and trust (and of the 1999 will and trust), Mr. Herring, is in evidence. That file contains a blank deed apparently signed by Mr. Brown and witnessed. There is no valid reason to create such a document, and its existence certainly adds additional credence to the argument against the validity of any document prepared for Mr. Brown by Mr. Herring. Upon questioning, Mr. Buchanan could testify to the existence of only one document that may be in that voluminous file that possibly represents direct correspondence between Mr. Herring and Mr. Brown. There is evidence in the file that Mr. Herring and Mr. Cannon are good friends.

Furthermore, the credibility of four principal witnesses to the validity of the 2000 will and trust is questionable. Mr. Herring is in jail for murder. The accuracy and veracity of the testimony in this matter by Messrs. Cannon, Dallas, and Bradley is suspect and at times

[5] Whether the 50% provision would be valid, in light of the charitable savings clause language in the trust, is irrelevant to the issue of undue influence. The issue is whether the alleged practitioners of undue influence believed at the time of preparation and execution of the 2000 will and trust that the 50% provision would be enforceable. Assuming they did, otherwise why would a known invalid provision be included, that could be evidence of undue influence.

DAE #24

153

contradictory. For example, Mr. Dallas testified that he signed a stipulation presented to this Court knowing it to be false because he did not want to lose his position as fiduciary. This is an astonishing admission that he did and would lie to this Court to protect his position as a fiduciary. The questionable credibility of the four witnesses most involved with the preparation and execution of the 2000 will and trust certainly supports the good faith basis of the contestants' claims.

If the 2000 will and trust were found to be invalid for undue influence, and the issue of whether the 1999 will and trust were valid was then raised, the same arguments as above could be asserted against the validity of the 1999 will and trust, and that controversy would also be in good faith.

In her testimony, Ms. Pope asserted that the case of *Russell v. Wachovia Bank, N.A.*,[6] was controlling. That case is not controlling. The issue before this Court is whether the proposed settlement agreement is the result of a good faith controversy and whether the agreement is just and reasonable. There was no settlement agreement in *Russell*. The gist of the *Russell* case was whether a federal appellate court judge still sitting on cases until a few weeks before his death was the victim of undue influence practiced by family members. The circumstances of Mr. Brown's execution of the 2000 will and trust documents are not the same as in the *Russell* case.

b. In addition to the controversy over the validity of any will and trust executed by Mr. Brown, a good faith controversy exists over what property if any was funded into the 2000 trust and what property if any would pass through the probate estate pursuant to the 2000 will.

[6] 370 S.C. 5, 633 S.E.2d 722 (2006); 353 S.C. 208, 578 S.E.2d 329 (2003).

DAE #25

Testimony demonstrates that records that would adequately prove the provenance of any trust or probate assets are either non-existent or too scanty to provide adequate proof. Moreover, testimony from the three original trustees is contradictory. They executed a stipulation representing that the only assets of the 2000 trust were the Beech Island real estate and 50 dollars. Subsequently, Mr. Dallas testified that the stipulation was incorrect and that he had joined in the stipulation to avoid losing his position as fiduciary. The fiduciaries ultimately sought to withdraw the stipulation.

More specifically, questions remain as to whether James Brown Enterprises, Inc. ("JBE, Inc.") was transferred to the trust during Mr. Brown's lifetime. Available documentation shows that any attempted transfer was incomplete. Furthermore, income tax returns filed on behalf of JBE, Inc. showed Mr. Brown, not the 2000 trust, as the owner. Nevertheless, the ownership of JBE., Inc is uncertain. Even if the ownership of JBE., Inc. could be confirmed, determining what assets if any JBE, Inc. owns is also problematic due to a dearth of documentation.

The ownership of the relevant assets as between the estate and the trust could affect the assets subject to the spousal share claims of Tommie Rae Brown, as discussed below, as well as the omitted child share claim of James Joseph Brown, II, as discussed below.

Any assets that would pass pursuant to the 2000 will would be subject to spousal share claims and omitted child claims. Also, a good faith argument exists for subjecting any assets of the 2000 trust to the elective share, pursuant to the *Seifert* and *Dreher* decisions,[7] and by analogy, to the omitted spouse and omitted child shares. Because testimony demonstrated that Mr. Brown retained control of the 2000 trust, it could be deemed a revocable trust, which would

[7] *Seifert v. Southern Nat. Bank of South Carolina*, 305 S.C. 353, 409 S.E.2d 337 (1991); *Dreher v. Dreher*, 370 S.C. 75, 634 S.E.2d 646 (2006).

155

DAE #20

be subject to the elective share and, by extension, to the omitted spouse share and omitted child share.

Moreover, certain assets, such as the copyright termination rights would not belong to the 2000 trust or to the probate estate, instead passing by federal law to the federal statutory heirs.

Further confusing the question of ownership is the question of the validity of the 1999 revocable trust. Mr. Dallas, one of the trustees of that trust, testified that he did not know if the 1999 trust had been revoked in accordance with its provisions. Nor was any evidence produced from Mr. Herring's file that the 1999 trust had been revoked. If that trust was valid and was not revoked, then ownership issues similar to the 2000 trust arise as to the 1999 trust. If the 1999 trust was valid and not revoked, then any assets owned by that trust might not be included in the 2000 trust or the probate estate. Furthermore, any assets owned by the 1999 revocable trust would clearly be subject to the elective share pursuant to *Seifert* and *Dreher* and, by analogy would be subject to the omitted spouse's share and the omitted child's share.

If the 1999 trust was valid, funded, and not revoked, then the trustees of the 2000 trust had no power or control over those assets.

c. A compelling factor in finding that a good faith controversy existed is the assertion of Tommie Rae Brown (Mrs. Brown) of elective share and omitted spouse's share claims. If Mrs. Brown qualifies as a surviving spouse, then she would clearly be entitled to an elective share and may well qualify for an omitted spouse's share. The elective share would be one-third of the probate assets plus any assets held by a revocable trust, pursuant to *Seifert* and *Dreher*. The omitted spouse's share would be one-half of the probate assets plus, by analogy to *Seifert* and *Dreher*, any assets held by a revocable trust. In addition, Mrs. Brown would have a

156

ONE
#27

claim as a surviving spouse under federal copyright law to receive one-half of the copyright termination rights.

Asserting the *Lukich* decisions,[8] the personal representatives and trustees have argued vigorously that Mrs. Brown does not qualify as a surviving spouse. They contended that she had an impediment to her marriage to Mr. Brown because she was already married at the time to Javed Ahmed. However, the evidence demonstrated that the Charleston County Family Court held as a finding of fact and a conclusion of law that Mrs. Brown had no impediment to her marriage to Mr. Brown because she was never previously married to Javed Ahmed as he had an impediment to that purported marriage: he was already married at the time. The family court order shows that Javed Ahmed was properly served by publication.

The *Lukich* decisions effectively held that an annulled marriage could not relate back to the time of the creation of the annulled marriage for purposes of removing an impediment to a subsequently attempted marriage. However, Mr. Buchanan admitted in his testimony that the *Lukich* decisions provided that its holding could not apply to a marriage that never had validity, as is the case with Mrs. Brown's putative marriage to Javed Ahmed, which according to the family court order was never valid because Javed Ahmed himself had an impediment to that putative marriage. Thus, rather than supporting the position of the personal representatives and trustees, *Lukich* supports the position of Mrs. Brown as Mr. Brown's surviving spouse.

Moreover, Mr. Buchanan also admitted in his testimony that *Lukich* held that a third party has no right to intervene in a marriage proceeding, such that Mr. Brown had no right to intervene in the proceeding brought by Mrs. Brown to determine that there was an impediment to her

[8] 379 S.C. 589, 666 S.E.2d 906 (2008); 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006).

DAE
#28

marriage to Javed Ahmed. Rather, the evidence demonstrates that Mr. Brown paid Mrs. Brown's legal fees to bring that action.

The personal representatives and trustees assert that Mr. Brown brought his own annulment action against Mrs. Brown. The record shows that action was commenced after the commencement of the Javed Ahmed action. Mr. Brown and Mrs. Brown mutually consented to a dismissal of the annulment action brought by Mr. Brown. Although the personal representatives and trustees assert that the consent order of dismissal includes a waiver by Mrs. Brown to ever claim any status as a common-law spouse, that waiver, even if valid under the law, is immaterial to the matter *sub judice*. Mrs. Brown is not asserting her claim as a common-law spouse but rather as a surviving spouse based on her ceremonial marriage to Mr. Brown and their South Carolina marriage license and certificate.

The evidence also demonstrates that, in his authorized autobiography, Mr. Brown represented that he was married to Tommie Rae Brown. Significantly, his autobiography was copyrighted and first published in 2005, after the conclusion of both family court matters discussed above.

Thus, based on *Lukich*, Mr. Brown (or any third party) did not have the right to intervene or contest the family court order holding that there was an impediment to the purported marriage between Mrs. Brown and Javed Ahmed. If he did not have that right, neither do his fiduciaries. Thus, as to the estate and any trust, that family court order, as well as the marriage license, constitute the law of the case as to that issue.

In the settlement agreement, the settling parties agree that Mrs. Brown is the surviving spouse of Mr. Brown, presumably spurred on by the compelling factors discussed above. Treating Mrs. Brown as the surviving spouse provides substantial benefit to the settling parties,

including the charitable beneficiaries. Her status as surviving spouse allows the estate to claim a marital deduction for those assets passing to her, which increases the net amount passing to the settlement entity, in which the charitable beneficiaries have a share and thereby benefit from that tax savings.

d. Another factor evidencing the existence of a good faith controversy is the omitted child's claim submitted on behalf of James Joseph Brown, II by his guardian ad litem. Pursuant to SCPC section 62-2-302, a child born after the execution of the testator's will is entitled to receive his intestate share if omitted from the will. The 2000 will was executed before the birth of James Joseph Brown, II. Although the personal representatives contested that James Joseph Brown, II was the biological child of Mr. Brown, substantial evidence would demonstrate that James Joseph Brown, II is indeed the biological child of Mr. Brown. Mr. Brown's describes James Joseph Brown, II as his son in his autobiography. Mr. Brown is listed as the father on the birth certificate. Mr. Brown obtained health insurance and social security benefits for James Joseph Brown, II by representing that he was his son;[9] he named him as his son in his medical directive. The guardian ad litem procured a DNA test demonstrating that there was a greater than 99 percent probability that they were father and biological son. James Joseph Brown, II is presumed to be the child of the marriage of Mr. Brown and Mrs. Brown because that marriage was valid, as discussed above. Even though James Joseph Brown, II was born before that marriage, the subsequent marriage of Mr. Brown and Mrs. Brown would legitimize James Joseph Brown, II, pursuant to SCPC section 62-2-109.[10] Although James Joseph Brown, II would not

[9] Thus, to find that James Brown II was not the son of Mr. Brown opens the door for a claim that Mr. Brown defrauded the health insurance carrier and social security.

[10] This would be true even if the marriage was not valid. SCPC section 62-109 legitimizes a child if his parents

DAE
#36

need to be legitimate to qualify under section 62-2-302 for his intestate share, it is an additional factor to consider.

James Joseph Brown, II is not automatically entitled to an omitted child's share merely because he is found to be Mr. Brown's son. One operative exception to the granting of the omitted child's share is if the testator specifically provides for overriding the statutory share. One might argue that language in Mr. Brown's 2000 will does specifically provide for such an override, but there is compelling authority to the contrary.[11] Ultimately, that issue would be decided by determining Mr. Brown's intent.

The settling parties agree that James Joseph Brown, II is the biological child of Mr. Brown. Treating him as a child provides substantial benefit to the settling parties, including the charitable beneficiaries. His status as a child allows him to claim, for the benefit of the settlement entity, a federal copyright termination rights share. Moreover, treating James Joseph Brown, II as the child of Mr. Brown does not detrimentally impact the settlement entity, including the charitable beneficiaries, because according to the settlement agreement his share is paid from Mrs. Brown's share.

e. Another factor indicating the existence of a good faith controversy involves the applicable time to contest the 2000 trust. Section 62-7-5 provides that a trust is voidable if it resulted from fraud, coercion, or undue influence — the gravaman of the contestant's actions to contest the trust. The fiduciaries contend that the statute of limitations to contest the 2000 trust

---

subsequently attempt to marry even in the attempted marriage is not valid.

[11] See, e.g., *Estate of Robbins*, 756 A.2d 602 (N.H. 2000); *Estate of Torregano*, 352 P.2d 505 (Cal. 1960). The estate would bear the burden of proof. *In re Estate of Hoigaard*, 360 N.W.2d 360 (Minn.App.1984).

DNG
#31

has run. However, for the reasons discussed below, the contestants would have viable arguments that no statute of limitations would bar their contest.

i. As to fraud

Assuming arguendo that the 2000 trust is irrevocable, South Carolina follows the discovery rule for fraud, which commences the running of the statute of limitations from discovery of the fraud itself or of such facts as would have led to the knowledge thereof, if pursued with reasonable diligence. *Burgess v. American Cancer Soc., South Carolina Div., Inc.*, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989). A suspicion alone is not sufficient to place a party on inquiry. *Beattie v. Pool*, 13 S.C. 379 (1880); *Hunt v. Smith*, 202 S.C. 129, 24 S.E.2d 164 (1943). The burden would be on the fiduciaries to show that the contestants had knowledge of the fraud or of such facts as would have led to knowledge if pursued with reasonable diligence. *Grayson v. Fidelity Life Ins. Co.*, 114 S.C. 130, 103 S.E. 477 (1920); *Means v. Feaster*, 4 S.C. 249 (1873); *Richardson v. Mounce*, 19 S.C. 477 (1883). The contestants would also assert that the fraud was continuing, so that any applicable statute of limitations did not commence any sooner than Mr. Brown's death.

The original trustees would be the alleged perpetrators of the fraud. The commission of a fraud or an intentional misrepresentation therefore estops the trustees from asserting any statute of limitations. *See R WE NUKEM Corp. v. ENSR Corp.*, 644 S.E.2d 730 (2007); *Hunter v. American General Life and Acc. Ins. Co.*, slip copy (D.S.C. 2004) (2004 WL 5231631); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). Moreover, even if the trustees did not engage in fraud or make intentional misrepresentations, they are estopped from asserting any statute of limitations because the settling parties reasonably relied on the words and conduct of the trustees in allowing any limitations period to expire. *See Regions Bank v. Schmauch*, 582 S.E.2d 432 (Ct.

DAE #32

App. 2003); *Hedgepath v. American Telephone and Telegraph Co.* ,*559* S.E.2d 327 (Ct. App. 2001); *Kleckley v. Northwestern Nat. Cas. Co.*, *526* S.E.2d 218 (2000); *Harvey v. South Carolina Dept of Corrections*, *527* S.E.2d 765 (Ct. App. 2000); *Brown v. Pearson*, 483 S.E.2d 477 (Ct. App. 1997).

The fiduciaries assert that the recordation of the certificate of trust commenced the running of the statute of limitations. However, recordation of a deed will not, by itself, be sufficient notice to put a party on inquiry as to the existence of a fraudulent conveyance. *Tucker v. Weathersbee*, 98 S.C. 402, 82 S.E. 638 (1914); *Means v. Feaster*, 4 S.C. 249 (1873).

ii. As to undue influence

Statute of limitations for fraud would not apply to the contestants' claims for undue influence because undue influence is an action in equity. *Dixon v. Dixon*, 362 S.C. 388, S.E.2d 849 (2005).

iii. Tolling as to minors

To the extent that any statute of limitations would apply to the trust contests, the contestants would assert that the statute of limitations would be tolled for a minor, such as James Joseph Brown, II.

iv. If the trust is deemed revocable, then SCPC section 62-7-604 provides that the trust contests were timely commenced.

f. One additional salient factor demonstrating the existence of a good faith controversy involves the issue of the ownership of federal copyright termination rights. Federal copyright law provides a termination right to a songwriter who has assigned some or all of his

DAE #33

copyright rights to a third party, such as a publisher.[12] Testimony revealed, Mr. Brown assigned at least a substantial number of his copyrights to one or more publishers and he assigned to one or more third party entities the remaining rights to a substantial number of his copyrights. Federal copyright law allows a songwriter who is alive after a certain number of years pass from any assignment of some or all of his copyrights to terminate, or revoke, that assignment, thereby regaining control of the assigned right with the freedom to negotiate a new assignment.[13] However, if the applicable time period for that song has not expired before the songwriter dies, that termination right passes by federal law to the statutory heirs (the surviving spouse and children) regardless of the songwriter's attempt to otherwise transfer the termination right. See 17 U.S.C.A. §§ 203, 304; Ann Bartow, *Intellectual Property and Domestic Relations: Issues to Consider When There Is an Artist, Author, Inventor, or Celebrity in the Family*, 35 Fam. L.Q. 383.

Under the settlement agreement, those settling parties who would qualify as statutory heirs for federal copyright law termination rights purposes have contributed their termination rights, and any proceeds therefrom, to the settlement entity, which includes the charitable beneficiaries. If it were not for this contribution to the settlement entity, there is no way that the charitable beneficiaries could receive any benefits from the federal copyright termination rights.

---

[12] Typically, the publisher's share of any royalties is 50 percent of the total and the songwriter's share is 50 percent.

[13] For songs copyrighted before the 1976 copyright act, the time period before the termination rights can be asserted is 56 years from the date copyright was secured. For songs copyrighted after the 1976 copyright act, that time period is 35 years from the assignment.

DAE
#34

2. Just and Reasonable

Including those discussed above, there are many reasons supporting the conclusion that the proposed settlement is just and reasonable. The key issue is how the charitable beneficiaries fare under the proposed settlement. I find that the settlement is just and reasonable and provides a just and reasonable result for the charitable beneficiaries.

From the perspective of the charitable beneficiaries, the risks of not approving the settlement agreement are substantial. As discussed above, significant arguments can be made that the 2000 will and trust are not valid. If the 2000 will and trust are overturned, essentially the same arguments can be made that the 1999 will and trust are invalid. If the contestants would prevail in these contests, an intestacy would result and the charitable beneficiaries would get nothing — a substantial risk.[14]

Even if the 2000 will and trust (or the 1999 will and trust) are upheld, significant arguments can be made to recognize Mrs. Brown's spousal share claims, as discussed above. No matter Mr. Brown's intent, she would be entitled to one-third of the probate assets plus one-third of the assets in any revocable trust. And unless Mr. Brown demonstrated an intent to override SCPC section 62-2-301 (the omitted spouse's share), which is questionable, Mrs. Brown would be entitled to one-half of the probate estate[15] and likely one-half of the assets of any revocable trust. If Mrs. Brown would prevail in her claims, the charitable beneficiaries' share of the

[14] The risk for the charitable beneficiaries would be enhanced by the burden of proof. Because Messrs. Cannon, Dallas, and Bradley, the original personal representatives and trustees, are the alleged perpetrators of the fraud and undue influence resulting in Mr. Brown's execution of the 2000 will and trust documents, the burden of proof would fall on the proponents of the will and trust because Messrs. Cannon, Dallas, and Bradley were in a confidential relationship with Mr. Brown. Dixon v. Dixon , 362 S.C. 388, S.E.2d 849 (2005).

[15] As discussed above, determining the proper ownership of probate and nonprobate assets will be difficult if not impossible.

DAE
#35

probate estate and any revocable trust would be reduced by either one-half or one-third — a substantial risk.

Even if the 2000 will and trust (or the 1999 will and trust) are upheld (and even if Mrs. Brown is not entitled to any spousal share), significant arguments can be made to recognize James Joseph Brown, II's omitted child claim, as discussed above. Unless Mr. Brown demonstrated an intent to override SCPC section 62-2-302 (the omitted child's share), which is questionable, James Joseph Brown, II would be entitled to his intestate share of the probate estate[16] and likely the same share of the assets of any revocable trust. If James Joseph Brown, II would prevail in his claims, the charitable beneficiaries' share of the probate estate and any revocable trust would be reduced by his intestate share — a substantial risk.

Even if the 2000 will and trust are upheld and the spousal and omitted child's claims are unsuccessful, the time and expense to litigate through appeal all of these and other issues would be extraordinary. The cost to the estate and trust for fees and costs and related expenses are substantive. It has taken more than two years of estate administration and millions of dollars of fees and costs just to get to the point of considering a settlement. The time and expense necessary to carry out all litigation to completion and appeal boggles the mind.

The Court has been apprised as to the distribution of the settling parties' interest as more fully set forth in the settlement agreement, and the settlement agreement has been made a part of the record. The percentages assigned to each settling party are fair and reasonable. The Attorney General's Office has ensured a substantial portion of the Estate will be dedicated to the specific intent of James Brown, that is providing an educational trust. The Court has also considered and

[16] As discussed above, determining the proper ownership of probate and nonprobate assets will be difficult if not impossible.

DAE #360

is satisfied that the minor child, James Joseph Brown II, will receive his share of the estate assets as distributed through his Mother's share and that he will receive another equal portion from his Mother in the form of a second trust.

The protection of a public trust is of paramount concern to the Court and the Court is satisfied that through the diligent efforts of the Attorney General's Office, the assets to fund the public trust will now be available. Furthermore, any issues as to the protection of the minor child's interest have been preserved through this agreement.

Consideration of these factors demonstrates that the allocation of the proposed settlement is just and reasonable. However, an additional, and perhaps substantial additional benefit to the charitable beneficiaries is the contribution by the other settling parties of their federal copyright termination rights. As discussed above, these rights may have considerable value and, without the settlement, the charitable beneficiaries could derive no benefit from these rights.

Replacement of the currently serving fiduciaries is also just and reasonable. The propriety of their appointment as trustees is currently on appeal, and their replacement should moot that issue. Moreover, both fiduciaries testified that they intended to appeal the approval of the settlement; that action would place them in the position of an irreconcilable conflict of interest.

The settling parties propose that Mr. Russell Bauknight be appointed as the replacement personal representative and trustee. I find that he is qualified and willing to serve and suffers from no conflict of interest because the settling parties have all consented to his appointment and, because the settlement agreement places all possible probate estate and trust assets into the same settlement entity, he has no conflict of interest by serving as both personal representative

BAE
#37

and trustee. Pursuant to Mr. Bauknight's testimony, I find that no transition period is necessary before the appointment of Mr. Bauknight to replace Ms. Pope and Mr. Buchanan.

C. Tax Issues

1. Charitable Exemption Concerns

I find that the Settling Parties have carefully considered the impact of the Settlement Agreement and participation in the Settlement Entity and the James Brown Legacy Trust on the tax exempt status of the 2000 "I Feel Good" Trust.

As the Trustee of the 2000 "I Feel Good" Trust will be selected by, and can be removed for any reason by, the South Carolina Attorney General, the Settling Parties believe there is no private inurement problem. Additionally, all transactions between the Brown family members, the 2000 "I Feel Good" Trust, and the James Brown Legacy Trust are at fair market value. The provisions of the James Brown Legacy Trust effectively grant the 2000 "I Feel Good" Trust a veto over major decisions, allowing the 2000 "I Feel Good" Trust sufficient control over the settlement entity to prevent the Settling Parties from conducting the business of the James Brown Legacy Trust in such a manner as to allow them to use the assets or income of the "I Feel Good" Trust for their own private benefit.

Marital Deduction – In order to receive the marital deduction, Tommie Rae Brown must have been the spouse of James Brown. The Attorneys for Mrs. Brown strongly believe that they have sufficient evidence to prevail in a trial on the merits as to whether Tommie Rae Brown was the spouse of James Brown. The other Settling Parties agree that Mrs. Brown has a material chance of success, as they are willing to settle with Mrs. Brown and recognize her status as surviving spouse.

167

ONE
#38

Charitable Deduction – The Settling Parties recognize that the charitable deduction will be limited to the amount that the 2000 "I Feel Good" Trust actually receives, per Regulation §20.2055-2(d) and Reed v. U.S., 26 AFTR 2d 70-6042 (DC Ill. 1970), and that the amount of the charitable deduction cannot exceed the amount the 2000 "I Feel Good" Trust otherwise would be entitled to under the terms of the Will, per Terre Haut First National Bank v. U.S., 67 AFTR 2d 91-1217 (DC Ind. 1991).

I find that the Settling Parties took the issues discussed above into account in drafting the Settlement Agreement, and, other than the loss of the charitable deduction for assets passing to heirs/devisees other than the 2000 "I Feel Good" Trust, the Settling Parties have planned to preserve the Estate's right to a charitable deduction for the value of the assets passing to the 2000 "I Feel Good" Trust.

The specific concerns of the Personal Representatives/Trustees, as expressed by their expert witness, Harley Ruff, Esquire, are addressed below.

Attorneys' Fees – According to the settlement agreement, each party is ultimately responsible for his or her own attorneys' fees. These fees are therefore not additional costs to the charitable beneficiaries. These attorneys' fees may be deductible for estate tax purposes. Treasury Regulation §20.2053-3(c)(3) provides "[a]ttorneys' fees incurred by beneficiaries incident to litigation as to their respective interests are not deductible if the litigation is not essential to the proper settlement of the estate within the meaning of paragraph (a) of this section. An attorney's fee not meeting this test is not deductible as an administration expense under section 2053 and this section, even if it is approved by a probate court as an expense payable or reimbursable by the estate." This regulation allows attorneys fees incurred by beneficiaries to be deductible for estate tax purposes if they were incurred in litigation that was

essential to the proper settlement of the estate. The Settling Parties plan to contend that the majority of their legal fees have been incurred in litigation essential to the proper settlement of the Estate and, thus, are deductible by the Estate. By providing a pro-rata reduction of the elements of the Estate which are subject to estate taxes, the net amount to be received by the Settling Parties, including the charitable beneficiaries, would be increased.

The Settling Parties plan to assert that the payment of the Settling Parties' legal fees are deductible as an estate administration expense under §2053. The Settling Parties' legal fees were necessary in determining the proper distribution of the estate due to (i) the alleged undue influence asserted against Mr. Brown, and (ii) establishing Tommie Rae Brown as the spouse of James Brown, and her entitlement to either the elective share or the omitted spouse share. Additionally, the efforts of the Settling Parties, Pope and Buchanan, and their counsel uncovered the mismanagement and misappropriation by the initial fiduciaries and led to their resignation. Pending the outcome of additional litigation, these efforts may lead to the Estate's recovering substantial sums.

Due Diligence – The Settling Parties are aware that it is in the best interest of all beneficiaries of the Estate of Mr. Brown, whether Settling Parties or not, that the Estate minimize any potential estate tax due by Mr. Brown's estate. For that reason, the Settling Parties assert that they have carefully examined the potential estate tax consequences of the Settlement Agreement and are confident that they have drafted the Agreement in such a way as to preserve the charitable and marital deduction to the greatest extent possible in line with the provisions of the settlement.

Effect of Settlement on Charitable Deduction – Mr. Ruff expressed concerns that the structure of the Settlement Agreement and the James Brown Legacy Trust would jeopardize the

DAE
#410

charitable deduction because it results in a non-qualified split interest trust under §2055(e)(2). The Settling Parties disagree that a non-qualified split interest trust is created, and, even if it was, assert that the form of the James Brown Legacy Trust can be revised to satisfy the split interest trust rules of §2055(e)(2).

The Settlement Agreement provides that each Settling Party will receive a specified percentage of the Estate assets. These assets are first distributed to and/or are owned by the Settling Parties outright. The Settling Parties have contractually obligated themselves to then contribute these assets to the James Brown Legacy Trust for consolidated management and marketing of the "James Brown assets." The assets do not pass directly from Mr. Brown's estate to the James Brown Legacy Trust. The assets pass directly to the Settling Parties, who in turn contribute these assets to a co-investment entity, the James Brown Legacy Trust. Such co-investment between charitable and non-charitable beneficiaries is specifically permitted by Section 4943 of the Internal Revenue Code.

Even if the IRS or a federal court were to disregard the distribution of assets to the Settling Parties and their subsequent contribution to the James Brown Legacy Trust, and treat the assets of the Estate of James Brown as passing directly to the James Brown Legacy Trust, the Settling Parties could amend the structure of the James Brown Legacy Trust (as they are required under the settlement agreement to do if necessary to preserve the charitable deduction) to allow the contribution to qualify for the charitable deduction. In *Galloway v. U.S.*, 99 AFTR2d 2007-3412, the case cited by Mr. Ruff in support of his opinion that the charitable deduction would not be allowed if the Settlement Agreement were approved, the Court emphasized that there was a single Trust that did not divide until distributions were to be made some years in the future. The Settling Parties believe that amending the James Brown Legacy Trust to provide for a charitable

DAE #41

share, to which the 2000 "I Feel Good" Trust assets would be contributed, and a non-charitable share, to which all other "James Brown assets" would be contributed, is one option that would resolve the issue of the non-qualified split interest trust, if necessary.

2. Self Dealing

Mr. Ruff alleged that the right of first refusal granted to Terry Brown in the Settlement Agreement would constitute self-dealing and would generate an excise tax and/or a loss of charitable exemption for the 2000 "I Feel Good" Trust.

The Settling Parties opine that the granting of the right of first refusal and the exercise of the right of first refusal (presuming such exercise is done while the estate is still open for federal income tax purposes) fall within the "estate administration" exception to self-dealing found in Regulation §53.4941(d)-1(b)(3). If the right of first refusal does not fall within the "estate administration" exception to self-dealing, the Settling Parties could propose that the 2000 "I Feel Good" Trust become a public charity (such as a Supporting Organization supervised and controlled by the South Carolina Attorney General's Office), which is not subject to the self-dealing prohibition.

If the right of first refusal does not meet the "estate administration" exception, and the 2000 "I Feel Good" Trust cannot be converted to a public charity, the Settlement Agreement provides that "[i]f any time any federal or state agency determines that any part of this Addendum shall endanger the tax-exempt status of the Charitable Trust, and that decision becomes final and non appealable, then the parties shall take such curative action as is necessary to prevent any such loss of tax-exempt status by the charitable trust." This type of curative language is used by planners as the ultimate safeguard to prevent charitable exemption problems.

DAE
#42

3. Marital Deduction

Mr. Ruff addressed the case of *Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967)*, and its impact on the marital deduction. In *Bosch*, the issue of whether the estate was due a marital deduction was dependent on the interpretation of state law (i.e. whether the widow's purported release of a power of appointment was valid). The Supreme Court of the United States ruled that only an opinion of the state's highest court as to a state law issue is binding on federal authorities when applying federal law.

Bosch does not directly affect whether or not the Estate of James Brown will be entitled to a marital deduction for assets that pass to his wife, Tommie Rae Brown. *Bosch* simply states that the IRS and the federal courts are not required to accept a South Carolina court's ruling that Tommie Rae Brown is the spouse unless that ruling comes from the South Carolina Supreme Court. As is the case with any surviving spouse, nothing in *Bosch* prevents the Estate of James Brown from arguing the merits of Tommie Rae Brown's claim that she was the wife of James Brown. If the Estate prevails on the merits of that claim, it will be entitled to a marital deduction for assets that pass to Mrs. Brown, despite the lack of a Supreme Court ruling that she is the wife of Mr. Brown.

4. Private Letter Ruling

The Settling Parties have not yet sought a Private Letter Ruling ("PLR"). *Revenue Procedure 2009-1* states that a PLR is issued only to a "taxpayer" and must be signed by the taxpayer or an "authorized representative." In this case, the Settling Parties have no authority to act on behalf of either the estate or the 2000 "I Feel Good" Trust.

DAE #4|3

172

The Settling Parties anticipate that an independent professional fiduciary appointed by this Court will carefully consider whether or not to apply for a PLR on one or more issues, after consulting with the Settling Parties, especially the Attorney General.

Thus, after conducting substantial due diligence with the advice of highly-regarded tax lawyers, including a number of certified tax specialists, the Settling Parties assert that the Settlement Agreement does not disqualify the charitable exemption, cause excise tax problems, or prevent the Estate from receiving a charitable deduction for property passing to the 2000 "I Feel Good" Trust. However, to the extent that there may be a problem, the Settling Parties have a number of options. They can pursue the estate administration exception. They can pursue the conversion of the private foundation to a public charity (which they may choose to do for nontax reasons as well). If such options fail to protect the charitable exemption, the Settling Parties are required by the Settlement Agreement to take whatever curative action is necessary to protect the charitable exemption, which would be enforced by the Attorney General.

IV. Conclusion

Based on the foregoing, I find as follows:

1. All necessary parties are properly joined;
2. Notice has been provided to all necessary parties;
3. The settlement agreement has been executed by all persons having beneficial interests which are affected by the compromise;
4. The controversy is in good faith; and
5. The settlement is fair, equitable, and reasonable.

I therefore Order as follows:

1. The settlement is approved;

DAE
F44

2. Adele J. Pope and Robert L. Buchanan, Jr., are directed to execute the agreement; and

3. Russell L. Bauknight is immediately appointed as Personal Representative of the Estate and Trustee of the James Brown 2000 Irrevocable Trust in replacement of Ms. Pope and Mr. Buchanan.

AND IT IS SO ORDERED.

The Honorable Doyet A. Early, III

May 26, 2009

Aiken, South Carolina

2010CP4004900

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE PROBATE COURT

Civil Action No. 2006C4000073

FILED
10 MAY 19 PM 1:06
ANN [illegible]
PROBATE JUDGE
RICHLAND COUNTY, S.C.

SUMMONS

FILED
2010 JUL 26 AM 11:47
JEANETTE W. McBRIDE
C.C.P. & G.S.

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted] and CARRINGTON L[redacted]; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs

v.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants

TO: THE DEFENDANTS, ADELE J. POPE AND ROBERT L. BUCHANAN, JR.:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.

/s Kenneth B Wingate

Kenneth B. Wingate
Everett A. Kendall, II
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

ATTORNEYS FOR THE PLAINTIFFS

Columbia, South Carolina
May 19, 2010

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE PROBATE COURT

Civil Action No.

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted] and CARRINGTON L[redacted]; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,
Plaintiffs

v.

Adele J. Pope and Robert L. Buchanan, Jr.,
Defendants

COMPLAINT
(Jury Trial Demanded)

FILED
2010 JUL 26 AM 11:47
ANN [illegible]
PROBATE JUDGE
RICHLAND COUNTY, SC
FILED
10 MAY 19 PM 1:08
JEANNE [illegible] McBRIDE
C.C.P. & G.S.

COME NOW THE PLAINTIFFS who, for their claim for relief against the Defendants, allege and will show as follows:

PARTIES

1. Russell L. Bauknight is the court-appointed Trustee of the James Brown 2000 Irrevocable Trust and the Trustee of the James Brown Legacy Trust. Bauknight is also the court-appointed Successor Personal Representative of the Estate of James Brown, the celebrated entertainer, who died on December 25, 2006, a resident of Aiken County, South Carolina. Bauknight serves in each of these capacities pursuant to a Settlement Agreement approved by Order of the Aiken County Circuit Court dated May 26, 2009.

2. Bauknight brings this action as Trustee of the James Brown 2000 Irrevocable Trust (hereinafter "the Trust") and as Trustee of the James Brown Legacy Trust, and as Personal Representative of the Estate of James Brown (hereinafter "the Estate"), and on behalf of the beneficiaries of the Estate and the Trusts. Bauknight is hereinafter referred to as "Trustee Plaintiff."

3. The following are parties to this action by virtue of their being beneficiaries of the Estate of James Brown and/or the James Brown 2000 Irrevocable Trust and/or the James Brown Legacy Trust. These Plaintiffs will hereinafter be referred to as the "Beneficiary Plaintiffs" and include:

a. Henry Dargan McMaster in his capacity as the Attorney General for the State of South Carolina;

b. Tommie Rae Brown, individually and on behalf of her minor child, James Brown II;

c. Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown;

d. Lindsey Delores Brown;

e. Venisha Brown;

f. Deanna J. Brown Thomas;

g. Jason Brown-Lewis;

h. Yamma N. Brown, individually and on behalf of her minor children, Sydney Lumar and Carrington Lumar;

i. Larry Brown;

j. Tonya Brown; and

k. Terry Brown

4. Defendants were formerly Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust.

JURISDICTION AND VENUE

5. The Estate of James Brown is being probated in Aiken County, South Carolina.

6. The principal place of the administration of the Trust is Richland County, South Carolina. The Trustee maintains his usual place of business in Richland County, South Carolina. The records pertaining to the Trust are kept in Richland County, South Carolina.

7. Defendant Adele J. Pope is, upon information and belief, a resident of Newberry County. At all times pertinent to the matters alleged herein, Pope was a licensed attorney with her law office located in Richland County, South Carolina. During the time she served as a co-trustee of the James Brown 2000 Irrevocable Trust, she maintained her office and kept all documents relating to the Trust and the Estate in Richland County.

8. Defendant Robert L. Buchanan, Jr. is, upon information and belief, a citizen and resident of Aiken County, South Carolina. At all times pertinent to the matters alleged herein, he

was a licensed attorney. During the time he served as a co-trustee and co-personal representative of the Estate, Buchanan transacted substantial business in Richland County and derived substantial income from the administration of the Estate and the Trust in Richland County and participated in the maintaining of the Trust and Estate documents in Richland County.

9 The Probate Court has exclusive jurisdiction over the matters raised herein pursuant to **S.C. Code Ann.** §§ 62-1-302 and -7-201.

10. Venue in this matter is proper in Richland County, South Carolina pursuant to **S.C. Code Ann.** §§ 62-7-108 and -204.

FACTUAL ALLEGATIONS

11. A document purporting to be Mr. Brown's Last Will and Testament ("Will"), dated August 1, 2000, was filed with the Aiken County Probate Court on January 18, 2007. The Will nominated three individuals as Personal Representatives, namely, Albert H. Dallas, David G. Cannon, and Alfred A. Bradley, and they were appointed by the Probate Court by Order dated January 18, 2007. These same individuals were also appointed Trustees under a document purporting to create the James Brown 2000 Irrevocable Trust ("Trust").

12. Thereafter, a number of actions were filed in the Aiken County Probate Court in connection with the Will and Trust, all of which were removed to the Aiken County Circuit Court.

13. On or about September 24, 2007, the South Carolina Attorney General intervened in the Circuit Court actions to represent the interests of the charitable beneficiaries of the Trust.

14. On August 10, 2007, the Aiken County Circuit Court accepted Cannon's resignation as, *inter alia*, Personal Representative and Trustee. On November 20, 2007, the Aiken County Circuit Court accepted the resignations of Dallas and Bradley as Personal

Representatives and Trustees and appointed the Defendants Robert L. Buchanan, Jr. and Adele J. Pope as substitute Personal Representatives and Trustees.

15. Following additional litigation in the Aiken County Circuit Court, the Beneficiary Plaintiffs entered a comprehensive settlement resolving all their disputes and ending the litigation between them, which agreement was, after an extensive hearing, approved by the Aiken County Circuit Court by an Order entered on May 26, 2009. That Order also removed the Defendants as the substituted Personal Representatives and Trustees.

FOR A FIRST CAUSE OF ACTION
(Breach of Fiduciary Duty)

16. All allegations set forth above are incorporated herein.

17. As Personal Representatives and Trustees of the Estate of James Brown and the James Brown 2000 Irrevocable Trust, the Defendants owed fiduciary duties to the Estate, Trust and the beneficiaries of each (collectively "The Affected Parties"), including a duty of care, of impartiality, and of loyalty as well as a duty to prudently administer the probate and trust estates.

18. Upon information and belief, during their appointment as substitute Personal Representative and Trustee, the Defendants repeatedly and chronically breached their fiduciary duty to the Affected Parties in multiple ways, including but not limited to the following particulars:

a. Failing to properly manage the estate and trust;

b. Failing to engage necessary advisors and appropriate assistance to manage the estate and trust, causing, upon information and belief, millions of dollars of lost opportunities for the estate and trust;

c. Failing to use due diligence in pursuing business opportunities for the estate and trust;

d. Failing to use due diligence in determining the value of the estate, thereby making the estate vulnerable to millions of dollars in unnecessary and incorrect tax liability;

e. Mishandling an auction of personal property at great cost to the estate and trust;

f. Failing to timely settle the debts of the estate;

g. Failing to keep accurate accounting records for the estate and trust;

h. Engaging in self-dealing by paying themselves hundreds of thousands of dollars in fees, which left the estate and trust with a solvency crisis;

i. Failing to sell the assets of the estate and trust at a prudent time, for example, by failing to accept an offer to buy the estate and trust for $100 million in November 2007, as demonstrated by their own testimony under oath, while, upon information and belief, the current value of the estate is now worth tens of millions of dollars less;

j. Taking improper adversarial positions to the settlement entered into by the beneficiaries of the Estate and Trust and approved by the Circuit Court;

k. Failing to account to the Attorney General as required by law;

l. Wasting time and estate and trust assets engaging in federal court litigation which was personal to the Defendants rather than necessary to the administration of the estate and trust;

m. Refusing to follow the Circuit Court's instructions in executing the settlement agreement and fighting the settlement agreement despite their lack of standing and the fact that the settlement was approved by the Circuit Court as being in the best interest of the Estate;

n. Acting in bad faith, as evidenced by such actions as

i. filing a lengthy motion opposing the settlement even before they were informed of the terms of the settlement ;

ii. providing to the Internal Revenue Service a road map of the settling parties' plan to deal with tax issues, for no apparent purpose other than to sabotage the settlement agreement;

iii. Taking inconsistent legal positions for their own personal interests, such as asserting their right to continue as fiduciaries pending their appeals despite having taken the contrary position when their predecessors appealed, insisting that the settling parties give notice to noninterested persons when Defendants refused to do so whenever they sought relief (such as the payment of their fees), and contesting the settling parties' contention that the estate was in an emergency situation when they themselves had asserted that position shortly before;

iv. Despite being judicially estopped by the South Carolina Court of Appeals, asserting they have a right to prosecute the Trust's and Estate's claims against Dallas, Cannon, and Bradley.

o. Being unequipped and/or unwilling to conduct the administration of the estate, as they admitted by seeking the appointment of a special administrator to handle the administration because the estate was in an "emergency" situation, as further demonstrated by such breaches as:

i. Failing to understand the fundamentals of the operation of the music business, which constitutes the essential value of the trust and estate, and

failing to obtain proper advice, under the pretext of not being able to afford such advice despite paying themselves hundreds of thousands of dollars in fees;

ii. Failing to understand the basic operation of federal copyright law and its impact on the estate and its valuation, including but not limited to tax valuation;

iii. Failing to timely conduct due diligence, as demonstrated by their own testimony under oath that "2009 was the year of due diligence."

p. Engaging in conflicts of interest, such as

i. Paying themselves hundreds of thousands of dollars in fees while leaving the estate and trust virtually insolvent;

ii. Serving as both Personal Representatives and Trustees while a significant issue in the administration of the trust and estate was whether the trust or the estate owned certain assets.

iii. Continuing to conduct a vicious attack on the proposed settlement, upon information and belief, for the purpose of padding their own fees, which they claim to be $5 million.

q. By misrepresenting or presenting inaccurate statements under oath to the Court;

r. By failing to file appropriate tax returns;

s. By allowing statutes of limitations to run, thereby preventing opportunities for the estate and trust to receive reimbursement for music rights misappropriated by others;

t. By failing to comply with the requirements of the South Carolina Uniform Prudent Investor Act, including but not limited to the failure to implement an investment policy for the trust; and

u. Artificially inflating the reported value of the estate, without any substantiation, and without any consistency, for the purpose of justifying their claim for approximately $5 Million in fees.

19. Despite the terms of the Order of May 26, 2009, removing the Defendants as Personal Representatives and Trustees, the Defendants have nevertheless continued to breach their fiduciary duties to the Affected Parties by continuing to take actions harmful to the estate and trust and the interests of the Affected Parties, including but not limited to contesting the settlement by filing multiple appeals and objecting to substitution, all to the detriment of the Affected Parties and in violation of their fiduciary duty to the Affected Parties.

20. As a result of Defendants' breach of their fiduciary duties to the Affected Parties, the Plaintiffs are entitled to judgment against the Defendants for actual and punitive damages in such sums as may be proved at trial, together with prejudgment interest and interest on the judgment as provided by law, for attorney fees and the costs of this action, and for such other and further relief as may be provided by law.

FOR A SECOND CAUSE OF ACTION
(Breach of Trust)

21. All allegations set forth above are incorporated herein.

22. The acts and omissions of the Defendants constitute a breach of trust pursuant to **S.C. Code Ann.** § 62-7-1001(a).

23. As a result of Defendants' breach of trust, Plaintiffs are entitled to an order

a. compelling Defendants to redress the breach of trust by paying money, restoring property, or by other means as may be required to remedy the breach;

b. ordering the Defendants to account for all property of the Estate and Trust;

c. denying compensation to the Defendants for all services provided by them for work on behalf of the Estate or Trust;

d. such other relief as may be necessary to remedy the breach.

24. As a result of Defendants' breach of trust, Plaintiffs are entitled to judgment against the Defendants for damages in such sums as may be proved at trial, together with prejudgment interest and interest on the judgment as provided by law, for attorney fees and the costs of this action, and for such other and further relief as may be provided by law.

FOR A THIRD CAUSE OF ACTION
(Negligence)

25. All allegations set forth above are incorporated herein.

26. Defendants provided services to the Estate and Trust apart from, and in addition to the requirements for the administration of the Estate and Trust. In doing so, Defendants were obligated to provide such services in a reasonable manner, consistent with the applicable standard of care.

27. The acts or omissions of the Defendants in providing these services were careless, negligent, grossly negligent, willful, wanton, reckless, and in conscious disregard of the rights of the Affected Parties.

28. As a result of the Defendants' acts or omissions, the Affected Parties have incurred actual damages in the form of:

(a) loss, waste, or spoliation of the assets of the Estate and Trust;

(b) diminution in the present value and income generation of the Estate and Trust;

(c) diminution in the future stream of profit and income from the corpus of the Estate and Trust.

29. As a result of Defendants' negligent and grossly negligent acts and omissions, the Plaintiffs are entitled to judgment against the Defendants for actual and punitive damages in such sums as may be proved at trial, together with prejudgment interest and interest on the judgment as provided by law, for attorney fees and the costs of this action, and for such other and further relief as may be provided by law.

WHEREFORE, The Plaintiffs pray for a judgment against the Defendants for, relief as set forth above, actual and punitive damages in such sums as may be proven at trial, together with prejudgment interest and interest on the judgment as provided by law, for attorney fees and the costs of this action, and for such other and further relief as may be provided by law.

PLAINTIFFS DEMAND A JURY TRIAL.

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.

/Kenneth B Wingate

Kenneth B. Wingate
Everett A. Kendall, II
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

ATTORNEYS FOR THE PLAINTIFFS

Columbia, South Carolina
May 19, 2010

File No:

State of South Carolina
County of Richland

In the Court of
Common Pleas
Family
Probate
Magistrate
U.S. District

Russell L. Bauknight, etal xxxxxx

vs.

Adele J. Pope, Robert L. Buchanan, Jr.

Affidavit Of Service Docket #
2010-GC-4000073

FILED
10 MAY 27 AM 11:59
RICHLAND COUNTY, S.C.

The Undersigned Bobbie Backman
Who Being Duly Sworn, Says That He/She Served The Forgoing:

Summon xxxxxxx
Complaint xxxxxxx
Civil Cover
Lis Pendens
Mechanics Lien
Rule/ Show

Action on: Robert L. Buchanan, JR
Served: Robert L. Buchanan, JR

Time Serv 10:03am Leaving with Him/~~Her~~) Copies of the Same At
212 Newberry Street, Aiken, SC 29802

On this 24th Day of May 2010, and that he know the person so served to be the defendant mentioned and described in the Pleadings served and that the deponet is not a party to Nor interested in the Action,

Is the Defendant in the US Military : IS NOT

Served: Bobbie P. Backman

Sworn this 24th Day of May 2010

Steven W Smith

Commission expires January 11th 2017

This is a : N/A

STATE OF SOUTH CAROLINA)
COUNTY OF Richland)

Russell L. Baukknight, etal)
)
)
Plaintiff (s)

(vs.)

Adele J. Pope and)
Robert L. Buchanan, Jr.)
)
Defendant (s)

IN THE COURT OF
___COMMON PLEAS
___FAMILY
✓ PROBATE
___MAGISTRATE
___U.S. DISTRICT

FILED
10 MAY 27 AM 11:59
RICHLAND COUNTY, S.C.

AFFIDAVIT OF SERVICE
DOCKET NUMBER
2010-GC-40-00873

FILED
2010 JUL 26 AM 11:47
JEAN H. TOAL
C.C.P. & G.S. RICHLAND

THE UNDERSIGNED Cecil McRacken
WHO BEING DULY SWORN, SAYS THAT HE SERVED TH FORGOING:

✓ SUMMONS
✓ COMPLAINT
___CIVIL COVER SHEET
___LIS PENDENS
___MECHANICS LIEN
___RULE

ACTION ON Adele J. Pope
served:
Adele J. Pope (at her residence)

TIME SERVED 10:00 AM LEAVING WITH ~~him~~/her (1) COPY (IES) OF THE SAME AT:

1228 Walnut St. Newberry SC 29108

ON THIS 24 DAY OF May 2010, AND THAT HE KNOW THE PERSON SO SERVED TO BE THE DEFENDANT MENTIONED AND DESCRIBED IN THE PLEADING (S) SERVED AND THAT THE DEPONET IS NOT A PARTY TO NOR INTERESTED IN THE ACTION, THE DEFENDANT ___IS, OR
✓ IS NOT IN THE UNITED STATES MILITARY

Sworn to before me this 24th day of
May 2010

Notary republic for South Carolina
Commission expires 1-11-2017

(SIGNED) Cecil McRacken

THIS IS A HOUSE_____ THIS IS A MOBILE HOME_____

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Esate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L[redacted], Carrington L[redacted], and Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES BR[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN - LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children, SYDNEY L[redacted], CARRINGTON L[redacted], and TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs.

v.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants.

IN THE PROBATE COURT

Case No.: 2010-GC-4000073

FILED
10 JUN 11 PM 4:41

MOTION TO REMOVE

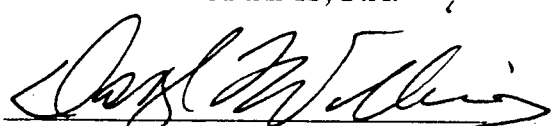
TO: ALL PLAINTIFFS AND THEIR ATTORNEY:

YOU WILL PLEASE TAKE NOTICE that ten (10) days after service hereof or as soon thereafter as counsel may be heard, and subject to their Motion to Dismiss and other motions filed or to be filed herein, Defendants, through their undersigned counsel, will move before the Honorable Amy McCullough, Probate Judge for Richland County, at her chambers in the Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina pursuant to Section 62-1-302(d) of the South Carolina Probate Code for an Order removing this matter to the Circuit Court.

Removal of this action is proper because there is a right to jury trial, which has been demanded, the amount in controversy is at least $5,000 and this is a matter related to Trusts.

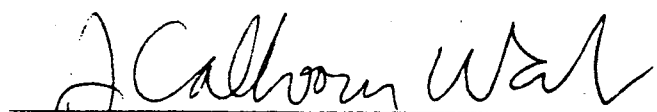
This Motion is based on the pleadings in this matter and on the applicable law.

JETER & WILLIAMS, P.A.



By: Daryl L. Williams.
1204 Main Street, Suite 200
Post Office Box 7425
Columbia, South Carolina 29202
Telephone: (803) 765-0600
Facsimile: (803) 765-0619
Attorneys for Defendant Adele J. Pope,

SOWELL GRAY STEPP & LAFFITTE, L.L.C.



By: J. Calhoun Watson
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
Telephone: 803-929-1400
Facsimile: 803-231-7889
Attorneys for Defendant Robert L. Buchanan, Jr.

June 11, 2010

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
COUNTY OF RICHLAND)

Russell L. Bauknight, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMcaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. [redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

AND

Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. [redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown,

Plaintiffs,

vs.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants.

Civil Action No.: 2010-GC-40-00073

FILED
2010 JUL 26 AM 11:47
JEANE [illegible] McBRIDE
C.C.P. & G.S.

MOTION TO DISMISS OF DEFENDANTS ROBERT L. BUCHANAN, JR. AND ADELE J. POPE

FILED
10 JUN 22 PM 3:55

TO PLAINTIFFS AND THEIR COUNSEL:

Pursuant to Rules 12(b) and 19 of the South Carolina Rules of Civil Procedure and subject to Defendants' Motion to Remove to Circuit Court, filed June 11, 2010, Defendants Robert L. Buchanan, Jr. and Adele J. Pope move the Court for an Order dismissing this matter on the grounds specified below. This Motion is supported by South Carolina case law and statutory law, the South Carolina and United States Constitutions, and the orders, pleadings, motions, and other exhibits, including those attached to this Motion, and Memorandum of Law to be submitted prior to the hearing.

BACKGROUND

This case is nothing more than a repeat chapter in Plaintiffs' long-standing efforts to acquire the assets of legendary singer, James Brown and to dismantle his estate plan. The issues raised by Plaintiffs in this case are simply a new attempt to circumvent rulings, orders, and inconsistent positions they have taken in multiple – and ongoing – matters pending or resolved in the Aiken County Probate and Common Pleas Courts ("State Court"), the South Carolina Court of Appeals, and the South Carolina Supreme Court. Defendants' Memorandum of Law will detail these duplicative matters, including the State Court rulings that have already addressed the issues raised in this case or the issues pending before the Supreme Court and other courts that duplicate the issues now raised by Plaintiffs. Moreover, and for the many reasons detailed below, the South Carolina Attorney General's participation in this private tort suit as a Plaintiff far exceeds any of his recognized statutory or constitutional authority.

Not surprisingly, for a multitude of legal and jurisdictional reasons, Plaintiffs' tactic of filing this case in the Richland County Probate Court is improper and, as a result,

the case must be dismissed. Therefore, for the following multiple reasons, this case must be dismissed.

GROUNDS FOR DISMISSAL

1. **This matter must be dismissed on the grounds that Plaintiffs have failed to comply with S.C. Code Ann. § 15-36-100 for claims alleging negligence of an attorney.**

S.C. Code Ann. § 15-36-100 requires a plaintiff to "file as part of the complaint [alleging professional negligence] an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." Because Plaintiffs did not attach "as part of the complaint" the required affidavit of an expert witness, Plaintiffs failed to comply with this essential statutory requirement. Because this requirement is mandatory and not permissive, the Complaint is defective and must be dismissed for failure to comply with the statutory mandate.

2. **In the alternative, this matter must be dismissed because another action is pending between the parties for the same claims.**

As demonstrated by the following Orders, pleadings, motions and other matters on file in State Court, the matters alleged in this action are substantially the same as matters alleged in other cases pending in the State Court or the South Carolina Court of Appeals:

a. James Brown Case 2009-CP-02-1647 ("Case 1647") and Case 2009-CP-02-1810 (Case 1810) consolidated for appeal and pending in the Supreme Court of South Carolina:

1) Return and Opposition to Motion to Dismiss Appeal, with supporting factual affidavit.

2) Return of David G. Cannon dated 10/17/08, including prayer seeking damages against Buchanan/Pope for failure to sell assets, other allegations of impropriety.

3) Amended Petition for Removal and Restraint dated 11/7/08, including but not limited to, ¶¶ 15, 16, 17, 18, 19, 20 related to estate tax issues, failure to support August 10 Agreement and other issues.

4) Answer, Counterclaim, Cross-Claim and Return of Buchanan/Pope dated 11/21/08, seeking declaratory judgment as to Estate Tax Return and other issues.

5) Answer of Terry and Romunzo Brown dated 12/22/08 opposing settlement.

6) Motion of Buchanan/Pope for Partial Summary Judgment and other relief dated January 9, 2009

7) Motion of Buchanan/Pope for Partial Summary Judgment dated January 20, 2009.

b. James Brown Case 2007-CP-02-0122 ("Case 122"), with portions still pending in the Circuit Court for Aiken County, portions resolved in the Cannon Appeal decision set out below; and portions pending in the Dallas/Bradley appeal, transferred to the Supreme Court of South Carolina:

1) Order dated January 5, 2008 approving counsel to investigate and bring suit for losses to Estate, Trust, James Brown Enterprises, Inc and other Brown Entities from January 1, 1999 to the present. (Circuit Court)

2) Order dated January 8, 2008 approving fees of Special Administrators Buchanan/Pope and providing for partial payment of commissions, for work as PR/Trustees with costs and interest. (Circuit Court)

3) Order dated February 20, 2008, approving Christie's auction sale and approving emergency plan of action of Buchanan/Pope. (Circuit Court)

4) Order Dated March 7, 2008 denying Dallas/Bradley attempt to withdraw resignations.

5) Order dated April 1, 2008 directing execution of Christie's auction contract and providing continuing jurisdiction over auction sale. (Circuit Court)

6) Order dated April 8, 2008 denying all motions to reconsider appointment of Buchanan/Pope as PR/Trustees and approving all actions of Buchanan/Pope to date.

7) Respondents' Return to Motion of Attorney General to Intervene dated July 14, 2008. (Dallas/Bradley Appeals, Ct. Appeals)

8) Order of the Honorable Jasper C. Cureton dated July 14, 2009 approving Christie's auction sale. (Dallas/Bradley Appeal)

9) Motions of PR/Trustees for Costs related to Interference with Christie's auction dated July 22, 2008.

10) Decision of S. C. Court of Appeals dated November 6, 2009. (Cannon Appeal)

c. James Brown Case No. 2008-CP-02-0872 ("Case 872")

1) Return Related to Motion, Education Trust benefits, dated August 13, 2008.

2) Memorandum of Terry, Forlando, and Romunzo Brown Opposing Settlement and asserting *In Terrorem* clause, dated January 20, 2009.

Certain of the documents from the cases referenced above are attached as Exhibits to this Motion.

3. **In the alternative, this case should be dismissed because the alleged wrongful acts of Defendants Buchanan and Pope with respect to Estate/2000 Trust management have previously been approved by Orders of the Honorable Doyet Early, III which Plaintiffs did not appeal.**

a. By Order dated January 8, 2008, not appealed by any Plaintiff, Defendants Buchanan and Pope were awarded $317,000 SA fees, plus costs, plus a deposit towards their full commissions as PR/Trustees, with interest.

b. By Order dated April 8, 2008 in Case 122, not appealed by any Plaintiff, all acts of Defendants Buchanan/Pope from March 7, 2007 through April 8, 2008 were found to be ethical and appropriate.

c. By Orders of the Circuit Court dated February 20 and April 1, 2008 and of the Court of Appeals dated July 14, 2008, with the support of the Plaintiff Attorney General, the Christie's auction, was specifically approved by the Court.

d. By Order of the Court of Appeals dated November 5, 2009, Defendants Buchanan and Pope were relieved of fiduciary responsibility in the administration of the Estate/2000 Trust pending the outcome of the Case 1647 appeal, effective May 26, 2009.

4. **In the alternative, this case must be dismissed because the allegations in this case far exceed the Attorney General's statutory and constitutional authority to act.**

a. Because the Attorney General is a Plaintiff in this suit, private counsel does not have statutory authority to represent the State of South Carolina pursuant to S.C. Code Ann. § 1-7-40 which requires that the Attorney General shall appear for the State in the trial and argument of civil causes in which the State is a party or interested.

b. Because the Attorney General is a Plaintiff in this suit, private counsel's attempted representation of the State of South Carolina while simultaneously representing private individuals to obtain funds for themselves is void as violating the constitution of South Carolina, the separation of powers of the State Constitution, the requirements for the engagement of Special Counsel for the State; the public trust; and Ethical Rules for Public Officials; and the Supreme Court requirements for legal representation.

c. Because the Attorney General is a Plaintiff in this suit, the Complaint violates the Due Process rights of Defendants Buchanan and Pope and others because the Attorney General may not legally participate in or control a private tort action in which the proceeds will go to individual plaintiffs the Attorney General has neither a duty nor right to attempt to protect.

d. Because the Attorney General is a Plaintiff in this suit, the Attorney General's authority to engage special counsel from the private sector is limited to matters which represent the interests of the State of South Carolina in special situations and complex litigation.

e. The Complaint neither alleges nor presents any constitutional, statutory or common law basis for the Attorney General to participate, nor any public right to be protected. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 240, 562 S.E.2d 623, 627 (2002). *See also* S.C. Code Ann. § 1-7-10 et seq.

f. The purported joint engagement of counsel by private citizens and the Attorney General violates S. C. Code Ann. § 1-7-40, as well as the public trust held by the Attorney General.

g. The South Carolina Supreme Court Rules of Professional Conduct and South Carolina law require that the contract to engage outside counsel be declared

void because counsel cannot serve the public interest and be under the direction of the Attorney General of South Carolina while representing:

i. Sydney L. and Carrington L and Janice B., minor beneficiaries without a guardian ad litem who are beneficiaries of the James Brown 2000 Trust.

ii. James B. II, a minor, specifically excluded from the Will and 2000 Trust of James Brown, who has a guardian ad litem in other Brown cases.

iii. Tommie Rae Hynie Brown, specifically excluded from the Will and 2000 Trust of James Brown.

h. Because the Attorney General is a Plaintiff in this suit, the Complaint violates the Due Process rights of Buchanan/Pope because it seeks funds from them which, if recovered, would be required by §1-7-150 to be deposited in the general fund of the State of South Carolina which does not own, and is not entitled to any funds of Buchanan, Pope, the Estate of James Brown or the James Brown 2000 Trust.

i. Plaintiff Bauknight fails to allege any constitutional, statutory or regulatory basis for the assertion in the caption that he is the agent of the Attorney General of South Carolina.

j. The Attorney General has no beneficial interest in James Brown's private Estate Plan and is prohibited by law from having an interest as a beneficiary of Bauknight's Legacy Trust.

k. The Complaint violates Art. I, § 8 of the Constitution of South Carolina which states that "the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other," on the grounds that, the Attorney General, by seeking funds on behalf of the State of South Carolina from Defendants Buchanan and Pope to be paid to private individuals, usurps the legislative function by the executive branch.

l. The Attorney General, by entering into a private contract with Hynie Brown and Terry Brown, has violated Section 8-13-1342 of the South Carolina Ethics, Government Accountability, Campaign Reform Act (the Campaign Reform Act"), which provides that:

> No person who has been awarded a contract with the State...other than contracts awarded through competitive bidding practices, may make a contribution after the awarding of the contract or invest in a financial venture in which the public official has an interest if that official was

in a position to act on the contract's award. [Emphasis supplied.]

m. This matter must be dismissed because South Carolina Code Ann. § 1-7-130 limits the Attorney General's authority as follows:

> The Attorney General shall enforce the due application of funds given or appropriated to public charities within the State, prevent breaches of trust in the administration thereof and, when necessary, prosecute corporations which fail to make to the General Assembly any report or return required by law.

n. Nothing within South Carolina Code Ann. § 1-7-130 allows or permits the Attorney General to interfere with the operation of the Estate, private non-charitable trust or private foundation of James Brown, none of which is a public charity.

5. **In the alternative, the Complaint must be dismissed because private counsel's representation of the Attorney General exceeds statutory and constitutional authority.**

6. **In the alternative, the Complaint must be dismissed because Plaintiffs have failed to join indispensable parties.**

a. This matter must be dismissed because Plaintiffs failed to join necessary parties Forlando and Romunzo Brown, two of the seven designated potential Qualified Beneficiaries of the Brown Family Education Trust. In prior matters pending in State Court between the same parties, Forlando and Romunzo Brown assert, as a result of the In Terrorem clause, that they are the only beneficiaries of the Education Trust.

b. No GALs have been appointed for the minor parties, whose conflict with their parents is evident in the Complaint and 2000 Trust.

7. **In the alternative, this action must be dismissed because the claims asserted against Defendants Pope and Buchanan are barred by applicable statutes of limitations and/or estoppel.**

This action is barred by statutes of limitation and the equitable doctrine of estoppel because the Attorney General and any other Plaintiffs with standing at the relevant time to help enforce the 2000 Trust or Will of James Brown had knowledge, as defined in § 62-7-104 of the S. C. Trust Code, of all actions of

Buchanan/Pope and, as demonstrated by the record, either approved the actions or failed to notify the Probate Court and/or the Circuit Court in Case 122 and/or Case 872 of the allegations contained in the Complaint.

8. **In the alternative, the Complaint must be dismissed because certain Plaintiffs lack standing to bring this action.**

a. This matter must be dismissed because Plaintiffs Deanna, Terry, Larry, Daryl, Yamma and Venisha (the "Deanna Group"), not beneficiaries of the 2000 Trust, asserted the beneficiary status of their children under Brown's Estate Plan to bring Case 122, on January 24, 2007. The Deanna Group later challenged the 2000 Irrevocable Trust, violating Article XXI of the Irrevocable Trust which provides:

ARTICLE XXI

> **Provision as to any Contest of Grantor's Estate Plan.** Should any beneficiary under this Irrevocable Trust or Grantor's Will dated after or of even date with this Trust and as referred to herein, become an adverse party in a proceeding for the probate of Grantor's Will or in any manner contest the validity of Grantor's Irrevocable Trust, such beneficiary shall forfeit his or her entire interest thereunder and such interest shall pass to such other beneficiaries as would be entitled to take as if such beneficiary predeceased Grantor. Furthermore, any person not provided for in this Irrevocable Trust, Grantor's Will or other such instrument, whether or not claiming to be a beneficiary, party in interest, or otherwise shall not have standing or be qualified to contest, claim an interest in or otherwise dispute the disposition of Grantor's estate as he herewith disclaims and disinherits any such person. Any such alleged claim shall be considered an affront to the Grantor's wishes and shall be vigorously challenged as such by his fiduciaries. [Emphasis supplied.]

b. Because the Deanna Group lacks standing to pursue this claim, their role as Plaintiffs exposes minors Sydney, Carrington and Venisha to the In Terrorem forfeiture clause and loss of a $285,000 education benefit each under the Brown Family Education Trust, which creates a conflict requiring the appointment of a guardian ad litem ("GAL")

c. All adult plaintiffs have voluntarily subjected themselves to Article XXI, forfeiting standing to pursue this action.

9. **In the alternative, to the extent Plaintiff Bauknight is bringing this matter as Trustee of the Legacy Trust, this action must be dismissed because Defendants have never served as Trustees of and do not have, and have never had, any fiduciary duty or obligation to Bauknight's Legacy Trust or its beneficiaries.**

10. **In the alternative, South Carolina Code Ann. § 33-56-180 bars recovery in this case.**

The Complaint must be dismissed because Plaintiffs at all times were acting within the scope of their authority as agents for The James Brown "I Feel Good" Trust, a 501(c)(3) private foundation. The "I Feel Good" Trust and its agents, are accorded protections given to charitable organizations under South Carolina Code Ann. § 33-56-180. The Complaint fails to state any specific willful, reckless or grossly negligent acts which caused specific damage to any Plaintiff, requiring dismissal of the Complaint.

CONCLUSION

For any or all of the bases set forth above, Plaintiffs case must be dismissed. This Motion will be supported by a MEMORANDUM OF LAW which will be submitted to the Court prior to a hearing on this matter.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: _____

J. Calhoun Watson
Elizabeth Van Doren Gray
Robert E. Horner
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Defendant Robert L. Buchanan, Jr.

202

JETER & WILLIAMS, P.A.

By: Daryl L. Williams

1204 Main Street, Suite 200
Post Office Box 7425
Columbia, South Carolina 29202
(803) 765-0600

Attorney for Defendant Adele J. Pope

Columbia, South Carolina
June 22, 2010

ATTACHMENTS TO MOTION TO DISMISS DATED JUNE 22, 2010

1. Return and Opposition to Motion to Dismiss dated March 16, 2010, Case 1647 Appeal, with Factual Addendum and Exhibit A, August 10, 2008 Agreement;

2. Order Directing Payment of Fees and Costs of Special Administrators and Other Relief dated January 8, 2008, Case 122;

3. Order Approving Engagement of Counsel dated January 9, 2008, Case 122;

4. Order Denying Motion to Alter, Amend or Vacate Order Approving Resignation and Granting Related Relief dated March 7, 2008, Case 122;

5. Order Denying Motion to Reconsider Appointment of Successor Personal Representatives and Trustees and Granting Related Relief dated April 8, 2008, Case 122;

6. Order of The South Carolina Court of Appeals dated July 14, 2008 (Dallas/Bradley Appeal);

7. Order Approving and Setting Conditions of Interim Payments of Educational Benefits dated July 25, 2008, Case 872;

8. Correspondence of South Carolina Court of Appeals dated November 6, 2009 (Case 1647 Appeal);

9. Final Order Dismissing Petition and Remanding to Probate Court dated November 13, 2008 (Pullman Group, Case 122);

10. Order for Release of Information Related to Attorneys' Fees and Other Compensation dated March 15, 2010 (Case 1647/1810 Appeal);

11. Order Substituting Parties and Amending Order Granting Motion to Sever and Proceed Separately dated April 5, 2010 (Case 322)

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Honorable Doyet A. Early, III Circuit Court Judge

Case No. 2008-CP-02-01647
Case No. 2009-CP-02-01810

In Re: The Estate of James Brown and
The James Brown 2000 Irrevocable Trust u/a/d August 1, 2000

Ex Parte: Robert L. Buchanan, Jr., and Adele J. Pope,
as Personal Representatives of the Estate of James Brown
and Trustees of the James Brown 2000
Irrevocable Trust, ... Appellants

Henry Dargan McMaster, in his capacity as Attorney
General of the State of South Carolina; Daryl J. Brown,
on behalf of his minor children, Lindsey Delores B.
and Janise Vanisha B.; Deanna J. Brown Thomas,
on behalf of her minor children, Jason Brown
L.; Yamma N. Brown, on behalf of her minor children,
Sydney L., Carrington L., and Tonya B.;
Vanisha Brown; and Larry Brown; Tommie Rae Hynie
Brown,.....Respondents

v.

Albert H. Dallas, Alfred A. Bradley, and David G. Cannon,
Individually and as (purported) Trustees of the James
Brown 2000 Irrevocable Trust; Russell L. Bauknight, as
Special Administrator and Special Trustee for the Estate of
James Brown and the James Brown 2000 Irrevocable Trust,
Terry Brown; Romunzo Brown; Forlando Brown; Cinnamon
N.M. Paris; LaRhonda Petitt; and Jeannette Mitchell,
also.....Respondents

RETURN AND OPPOSITION TO MOTION TO DISMISS

OVERVIEW

On the order of fifty million dollars of scholarship money has been taken from future students of South Carolina and Georgia by the doings below. The testator's

carefully crafted estate plan has been shredded. The respondents — the Attorney General, in league for some unknown reason with the disinherited members of the Brown family — are anxious to avoid appellate review of what has been done here. Hence, they have devised an extraordinary motion to dismiss, seeking premature adjudication of the question of standing. The claim that one's adversary lacks standing is a time-honored shield, of course. The thousands of students deprived of these millions of dollars over many years in the future are not parties to this case, and so there is no one to complain, say the respondents.

The place to challenge an appellant's standing is in the respondent's brief, where the flexible concept of standing can be measured in the light of a full record. *See, e.g., Home Medical Systems, Inc. v. South Carolina Dept. of Revenue,* 382 S.C. 556, 558, 677 S.E.2d 582, 584 (2009), where the Supreme Court "deferred ruling on the motion to dismiss until after full briefing on the issue and oral argument." Especially is this traditional procedure needed in the context of this unique litigation. To avoid the light of a full record upon the story of this litigation, the respondents present the question in the abstract, by motion with no Record. The issue deserves resolution in light of a concrete record, not in the abstract.

For this reason, appellants submit that the question of standing should be resolved in the traditional way, after the appeal has been fully briefed and the Record filed, so that the Court can address this issue with full knowledge of all the facts.

FACTS

Because this dispositive motion has been filed before the Record on Appeal has been gathered and filed, the appellants accompany this Return with an affidavit summarizing the machinations which led to the dismantling of the testator's estate plan in the proceedings below.

The respondents, by contrast, have submitted nothing but a copy of the main

order under appeal, the order of May 26, 2009. The respondents quote selected factual findings and dicta of that order as though they were unchallenged. A party cannot prevent appellate review of an order by reciting the findings of the very order which is the subject of the appeal. Many factual findings of that order will be challenged in this appeal. For example, the respondents recite statements in the order characterizing as massive and complex the claims made against the testator's will and his plan. **On the contrary, those claims were routine and in the chief instance frivolous.** The very idea that an estate plan which took four years to evolve under expert guidance, and which left perhaps 99% of the estate to the cause of education, was the product of undue influence is absurd on its face. The courts of this state could try that claim a thousand times, and if the contestant ever survived a directed verdict motion, no jury in South Carolina would uphold such a silly claim. All the lesser claims against this estate were of a kind expected to surface where a wealthy testator has left his estate to educational purposes instead of to his family. These were all claims of a sort routinely tried and resolved in the courts of this state. There was no "flood" of claims or "nightmare" of litigation. The only thing unusual about the administration of this estate was its size. It is of course a complicated estate.

In the absence of a Record, appellants respectfully refer to their affidavit. Pertinent facts will be mentioned in the context of the argument sections below, and a Summary of Facts is appended to this Return as an Addendum and incorporated herein.

ISSUES ON APPEAL

The respondents ask the Court to determine the question of standing in a vacuum, before the issues on appeal have even been framed. Those issues will not be solidified until the appellants' brief is written, but obviously at the heart of this appeal is the question of whether the Attorney General exceeded his authority by entering Case

122 to assist with the enforcement of James Brown's private foundation, but then expanded that role by setting aside the duly acting fiduciaries; contracting to dismantle the private foundation; transferring about half the assets of the Irrevocable Trust to unintended beneficiaries; and placing not only the private foundation but also Mr. Brown's noncharitable trust and his estate under the AG's control. Even if the Attorney General has such authority, the appellants will show that he acted without proper joinder of parties, notice and opportunity for challenge.

The appellants will assert that the Attorney General violated Sections 62–7–410 through 62–7–415 of the Trust Code, the due process clause, and the provisions of the Irrevocable Trust and other estate planning documents when he placed the estate and the Trust under his direct control.

The appellants will further assert that the Attorney General may not contract with nonbeneficiaries to defeat the provisions of the Irrevocable Trust, then approve, over objection and without review, the estimated $12–$14 million in contingency fees of the attorneys for the claimants for their work in dismantling the Trust.

Appellants expect to assert that because of his conflict of interest as the nominee of the Attorney General and as the trustee for Hynie Brown and Terry Brown, Mr. Bauknight could not give an independent evaluation of the AG's settlement proposal, so that it was error for the court to accept his recommendation that the settlement be approved.

As well, the appellants may question the Attorney General's authority to take over the estate's functions as he did, such as determining the heirs.

The appellants will assert that the circuit court erred in compelling them, as improperly removed fiduciaries, to sign documents they know to be false and damaging to the estate plan, requiring them not to criticize the actions of the Attorney General and to speak only through their lawyers.

The fundamental question is whether properly managed private foundations — not public charities — are subject to being taken over by the Attorney General's office.

It is simply unthinkable that *no one* has standing to seek appellate review of these important questions.

ARGUMENT

I. Untested legal issues should not be resolved on an insufficient record.

The duly appointed and acting fiduciaries of this trust and estate were dealing in a normal manner with claims of undue influence, pretermitted child, and omitted spouse when the Attorney General of the State stepped in and took over, holding talks from which the fiduciaries were excluded, and giving away roughly half of Brown's assets in settlement of these claims. The Attorney General did this by claiming that the chief beneficiary of the estate was a charitable trust, and the Attorney General has the power to take over a charitable trust in his discretion, set aside the trustees, and speak for the trust. He then agreed with the disinherited members of the Brown family to unseat the duly appointed PRs/trustees without cause, replacing them with a nominee of their mutual choice, and obtaining a court order requiring the ousted PRs/trustees to signify their consent to all this.

There is not a case in the country that we have found — and certainly none has been cited by the respondents — holding that the ousted fiduciaries lack standing to appeal an order approving events such as these. The great mass of cases cited by the respondents in their motion are from foreign jurisdictions. None is in point. The few South Carolina cases cited are not even closely in point.[1] Nothing like this has ever

[1] For example, in *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710 (2005) (decided under the former §62-7-503), the Court held that where a testatrix has established a valid testamentary trust, the courts must enforce it. *Epworth* involved facts opposite to those here: the trustees wished to terminate the trust in a manner that would have violated the testatrix/settlor's intent. The AG intervened to protect the charitable trust from being destroyed. In the case at bar, the appellants were

been seen in the caselaw of South Carolina, so far as we know.

It is a familiar principle of South Carolina jurisprudence that novel legal questions should not be decided until the facts have been fully explored. The most frequent application of that rule occurs when a motion to dismiss a complaint is lodged (under the former practice, a demurrer), asserting that South Carolina does not take the plaintiff's view of the law and will not do so in the future. *See, e.g., Evans v. State,* 344 S.C. 60, 67-69, 543 S.E.2d 547, 551 (2001). Here, the facts have indeed been fully developed at trial. When this Court has the benefit of a Record of that trial and the other events which transpired in the court below, the Court will be in a position to give a full and mature consideration of the question of standing under these unprecedented facts.

Time after time in recent years our courts have reiterated that "the rule [of standing] is not an inflexible one." *Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse,* 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976). *Accord: Sloan v. Wilkins,* 362 S.C. 430, 608 S.E.2d 579 (2005); *Davis v. Richland County Council,* 372 S.C. 497, 642 S.E.2d 740 (2007). Standing is assessed under all the facts and circumstances of the particular case.

The unique and unprecedented facts of the case at bar make it all the more important to await a full Record before assessing this important question. The motion should therefore be denied, and the question of standing addressed in due course, in briefing and oral argument.

* * * * *

Our Supreme Court has identified the sources of standing, as follows:

> Standing may be acquired: (1) by statute; (2) through the

---

appropriately defending the terms of the valid 2000 Trust as the persons expressly authorized to do so when the AG intervened, engineering a radical alteration of the terms of the trust and crippling the testator's estate plan.

rubric of "constitutional standing;" or (3) under the "public importance" exception.

ATC South, Inc. v. Charleston County, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

The appellants have acquired standing in all three ways.

II. The appellants have standing and authority under the 2000 Trust and the default trust code provisions.

The first place to look for an authoritative answer to the question of standing is the Code of Laws. *See, e.g., Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006) (FOIA confers standing upon citizens).

The applicable code — the South Carolina Trust Code ("SCTC") — is primarily a "default statute." The terms of a trust prevail over any trust code provision, with eleven exceptions. These exceptions do not include the authority to settle or compromise claims against the trust. S.C. Code Ann. § 62–7–105(b). Thus, the Trust Code confers upon a settlor the authority to appoint those who may defend the trust against attack and those who may settle claims against it. The Court must therefore look to the terms of the Irrevocable Trust Agreement of James Brown dated August 1, 2000 ("2000 Trust") before looking to the statute, in order to determine who has authority to defend the trust and to settle claims against it.

A. The Trust Agreement confers upon the trustees the authority to defend the trust.

The private, partially charitable 2000 Trust expressly gives authority and fiduciary discretion to its trustee to "compromise, adjust, mediate, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the Trust Estate as the Trustee shall deem best." [2000 Trust, Art.X(19).] There is no provision or just reason for the Attorney General to substitute his judgment for the fiduciary discretion of a properly serving trustee. There is no provision or just reason for beneficiaries and nonbeneficiaries to attempt to veto or override the fiduciary discretion of a properly serving trustee. There is no provision or just reason for a court to substitute the

preference of the Attorney General for the fiduciary discretion of a properly serving trustee. This is what occurred in this case.

At all pertinent times before and during the seven-day hearing of the motion to approve the partial settlement, the duly appointed and properly serving trustees were Buchanan and Pope. They were also the duly appointed and properly serving personal representatives of Mr. Brown's estate. They were the only persons authorized to settle claims against the 2000 Trust or Mr. Brown's estate prior to the Order of May 26, 2009, approving the settlement agreement and replacing them with Mr. Bauknight.

The circuit court did not hear the settling parties' unfounded petition for removal for cause prior to the settlement proceedings. Rather, on January 7, 2009, while the settling parties' frivolous November 7, 2008 petition for emergency restraint and removal for cause was pending, the circuit court appointed Bauknight as limited SA/ST for the "sole, limited and exclusive purpose of reviewing and providing input and recommendations to the Court as to the proposed Settlement Agreement among the Petitioners in this case" — over the objection of Buchanan and Pope — while also ordering Buchanan and Pope to "continue to serve in their capacity as previously ordered by this Court and [they] will continue to be responsible for all estate and trust matters, except for the limited duty" of Bauknight. [Order dtd 01/07/09.]

The court deviated from the controlling terms of the 2000 Trust without setting forth any reasons for doing so. There was no evidence that Buchanan and Pope had abused their discretion or breached any duties. There was no reason to override their authorized fiduciary discretion in favor of persons not authorized by the 2000 Trust. After nearly two years of service and experience — during which time the court praised their service and found it to be ethical and appropriate — Buchanan and Pope's fiduciary discretion, supported by expert testimony, was given less weight than the self-serving recommendation of Mr. Bauknight, developed during his 23-day-period of

service. In their capacity as the only persons duly authorized to settle the claims at issue, the trustees have standing to complain when their authority is usurped in this manner.

In addition to being unauthorized to settle or compromise claims against the estate and 2000 Trust, each and every settling party with any possible default statutory standing waived it by attacking and attempting to dismantle the valid 2000 Trust which provides, in similar fashion to the valid Will of same date:

> Should any beneficiary . . . contest the validity of Grantor's Irrevocable Trust, such beneficiary shall forfeit his or her entire interest ... [f]urthermore, **any person not provided for in this Irrevocable Trust**, Grantor's Will or other such instrument, whether or not claiming to be a beneficiary, party in interest, or otherwise **shall not have standing or otherwise be qualified** to contest, claim an interest in **or otherwise dispute the disposition of Grantor's estate** as he herewith disclaims and disinherits any such person. Any such alleged claim shall be considered an affront to the Grantor's wishes and shall be vigorously challenged as such by his fiduciaries.

[2000 Trust, Art. XXI.][Emphasis added.] Article XXI confers standing upon appellants to challenge the Attorney General's contract to transfer more than $40 million from the Trust.[2] Under the Trust Code's default provisions, S. C. Code Ann. § 62–7–105 (a) and (b), this trust provision has the force of a statute.

Although the settling parties initially challenged the Will and 2000 Trust, they stipulated that the same were valid when the Attorney General offered them 50% of the assets devised to and in the 2000 Trust, in consideration of their agreement to file a joint motion to remove the appellants and to join the AG in creating a new trust giving the AG full authority to appoint, control, and remove trustees at his pleasure. This new entity, ironically dubbed the "James Brown Legacy Trust," was created not by James Brown but by the AG and by Mr. Brown's disinherited family members. But the settling

---

[2] The August 10, 2008 contract appeared to take only about $42 million from the Trust. Subsequent amendments by the Attorney General required the Trust and Estate to pay $12 - $14 million of secret attorneys' fees and other taxes and payments, increasing the loss to more than $50 million.

parties at that time had already forfeited any potential interest by continuing to pursue frivolous undue influence claims beyond the point of any reasonable bona fide inquiry, if cause for one ever existed. *See: Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (2006) (no contest clause enforceable where contestant proceeded beyond reasonable inquiry); *Russell v. Wachovia Bank*, 353 S.C. 208, 578 S.E.2d 329 (2003) (summary judgment properly granted as to validity of will where contestants failed to meet heightened standard of unmistakable and convincing evidence of undue influence). The settling parties then stipulated to the validity of the documents they had contested. Their stipulation that the above Trust terms are valid is inconsistent with their failure to concede that Buchanan and Pope properly fulfilled their duty to defend the terms of the valid Will and 2000 Trust against all attacks. As the persons with standing to object, Buchanan and Pope are the persons with standing to appeal those matters.

All other fiduciaries forfeited any standing by either resigning and consenting to Buchanan and Pope's successor appointment where no Advisory Board existed, as provided in the 2000 Trust terms (Cannon, Dallas, and Bradley); or were improperly appointed without authority under the controlling 2000 Trust, where Buchanan and Pope did not resign or consent to successor appointment (Bauknight); or were improperly appointed under the default statute where Buchanan and Pope did not resign and were not removed for cause (Bauknight). Nonfiduciaries — the settling parties, including the AG — waived any applicable default statutory standing to settle or compromise any claims by forfeiting any potential interest in said claims before reaching an unauthorized settlement that was erroneously approved by the circuit court.

B. Even if the Trust Agreement appointed no one to defend the trust, so that the default provisions of the Trust Code came into play, those provisions would confer upon the duly appointed trustees the authority to defend the trust.

There is no reason for this Court to look beyond the terms of the 2000 Trust

because it is valid. The parties stipulated to its validity. However, if the provisions of the default statute did come into play, the result would be the same: the duly appointed and acting trustees have standing to defend the trust. The appellants did not resign or consent to Bauknight's appointment; they did not abuse their authority or breach any duty; they were not removed for cause; and the result of the settlement agreement, approved over their objection, is an unjust evisceration of Mr. Brown's 2000 Trust.

Under the default statute, the Attorney General is only one of several persons who may maintain a proceeding to **enforce** the 2000 Trust. S.C. Code Ann. §62–7–405©). These include the settlor, the trustee, and others. The AG, as chief law enforcement officer, appropriately intervened when Buchanan and Pope discovered and reported their predecessor Cannon's $900,000 taking, but he thereafter exceeded his authority by taking control of the administration of the testator's estate and the 2000 Trust.

Because this appeal is in the nature of a proceeding to enforce the trust, the Trust Code would confer standing upon the trustees to bring this appeal, even if the trust itself were silent.

Moreover, two other provisions of the Probate Code lend standing to the appellants. Under § 62–1–308, appellants are Interested Persons injured by their improper removal as fiduciaries. And the appellants have statutory standing to appeal for benefit of the "I Feel Good" Trust and Education Trust as statutory beneficiaries and representatives of the Settlor under §62–7–410 through §62-7-416 of the Trust Code.[3]

Under Probate Code §62-1-308, as the persons with a duty to defend the

---

[3] Obviously the appellants are not beneficiaries of the "I Feel Good" Trust in the traditional sense. Their statutory inclusion in the category of "Beneficiary" was intended by the General Assembly to confer upon them the right to enforce the trust. Appellants' predecessors, Dallas and Bradley, waived this right by resigning. Appellants preserved their standing to appeal by objecting to Mr. Bauknight's appointment in all fiduciary capacities.

estate plan, appellants are interested persons injured by their improper removal as fiduciaries and actions which diminish their defense of the estate plan.

More importantly, the South Carolina Trust Code is a largely a default code, giving the Trust terms the force of law except under limited circumstances. Thus under §62-7-105 (a) and (b) the terms of the Irrevocable Trust, including the standing and withdrawal of standing provisions of the Irrevocable Trust, govern and grant standing to appellants to take all steps necessary to reverse the $50 million "affront to [his] wishes." During the pendency of this appeal of their improper replacement as fiduciaries, they have standing as interested "others" to vigorously challenge the attempts of these non-beneficiaries of the Irrevocable Trust to take tens of millions of dollars from the Trust.[4] S.C. Code Ann. §62-7-405(c).

Under the same provisions, both the Attorney General, by his August 10 contract, and his appointee Bauknight, have forfeited standing to enforce, including standing to appeal, any matter related to the Irrevocable Trust by their proposal to transfer $50 million from the trust to non-beneficiaries.

Appellants, for themselves and others (including those not properly joined as parties to Case 1647) have statutory standing as representatives of the Settlor James Brown under §62-7-410 through §62-7-416 of the S. C. Trust Code to challenge the Court's amendment to the Trust, including the dismantling of its succession provisions without consent of either its properly serving trustees or the Advisory Board, incorporated by reference into the Trust, by placing this private trust under the direct control of the Attorney General, and allowing him to deviate from its provisions as he chooses.[5]

---

[4] The amount to be taken from the irrevocable 2000 Trust is believed to exceed $50 million.

[5] No Advisory Board existed when predecessors Dallas and Bradly resigned. An Advisory Board did exist when the appellants were replaced without cause by the circuit

The suggestion that the settlement is "global" or that all the beneficiaries of the Education Trust joined in it is both incorrect and troublesome. Appellants' accompanying affidavit dated March 12 outlines the omitted necessary parties for a global settlement, including those who were neither served nor noticed with the subject orders under appeal.

Appellants have statutory standing, as Trustees, as Personal Representatives, individually, and on behalf of all non-settling parties, non-noticed parties, creditors and taxing authorities, to appeal.

III. The appellants have "constitutional standing".

The appellants have been ousted without cause from their fiduciary positions. The corpus of the estate and of the trust which they have a fiduciary duty to protect has been cut in half. They have been compelled to signify their agreement with the order which ousts them and which decimates the estate and the trust.[6]

These wrongs give the appellants standing under the three-part test of constitutional standing:

> First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical'". "Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

ATC South, Inc., supra, quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61.

Each of the injuries suffered by the appellants is concrete and actual. Each is

---

court, but the Board was not consulted.

[6] The Court's later oral modification that appellants may annotate the documents with their disagreements as freely as they choose does not diminish the threat.

directly attributable to the order approving the decimation of the testator's estate plan, entrusted to their care, and ousting them without cause from their positions. *See, e.g., Davis v. Richland County Council,* 372 S.C. 497, 642 S.E.2d 740 (2007) (Recreation Commissioners had standing to challenge the constitutionality of a statute authorizing their removal from office); *Smiley v. South Carolina Dept. of Health & Envir. Control,* 374 S.C. 326, 649 S.E.2d 31 (2007) (recreational jogger had standing to challenge permit for removal of sand from beach).

III. This a case of public importance.

The "public importance" exception to traditional rules of standing is firmly seated in the jurisprudence of this state. *See, e.g., Sloan v. School Distr. of Greenville County,* 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000); *Sloan v. Greenville County,* 356 S.C.531, 590 S.E.2d 338 (Ct. App. 2003); *Baird v. Charleston County,* 333 S.C. 519, 5111 S.E.2d 69 (1999); *Sloan v. Stanford,* 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Department of Transportation,* 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Hardee,* 371 S.C. 495, 640 S.E.2d 457 (2007).

The case at bar is of large public significance on two levels.

First is the impact of the order of May 26, 2009 on the private foundation which Mr. Brown created for the education of South Carolina and Georgia students. This order eviscerates the 2000 Trust. This case involves a tremendous sum of money diverted from the purpose intended by the settlor, and handed to those whom he expressly intended to omit. In none of the public importance cases yet seen in this state has such a thing happened. Some of them have involved large sums of public money, but never with a claim of unlawful diversion or loss. This case raises the question of whether literally thousands of college students in the decades ahead will be deprived of the scholarship benefits intended for them by the settlor. Given the importance of education in our pantheon of values, it is scarcely debatable that this is a matter of great

public importance.

On a second level of public importance is the question of whether the Attorney General has the legal authority to take over the administration of an estate and the operation of a private trust, settling claims against the estate as he sees fit, and ousting protesting fiduciaries without cause. This conduct by the Attorney General is unprecedented. The public interest requires an authoritative judicial review of these actions and a determination of the limits of power in this office.

Settlors contemplating creating private foundations, and counsel advising them, should know whether the Attorney General serves as a threat to their vehicle for making a valuable, but personal, tax-favored contribution to society.[7] Private philanthropy in South Carolina would be chilled if a settlor's funds could be diverted from the settlor's chosen class of recipients to the Attorney General's chosen class. If this is the law of South Carolina, the Bar and many others need to know it.

Private foundations like the "I Feel Good" foundation/trust are not public charities. They are an expression of private philanthropy sanctioned by this State and by the Internal Revenue Code. Under the laws of this state they are allowed to receive certain tax benefits in exchange for dedicating their assets for charitable, educational or scientific purposes which they select.

The State of South Carolina, through its Attorney General, has limited interests in private foundations. The Attorney General has a duty is to enforce the crirninal laws

---

[7] *See, e.g.*, Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts and Corporate Control: Evidence from Hershey's Kiss-off*, 108 COLUM. L. REV. 749, 781–2 (2008)(authors evaluate concerns regarding underfunding, overburdening, and conflicting political interests of state attorneys general); Carl J. Schramm, *Law Outside the Market: The Social Utility of the Private Foundation*, 30 HARV. J. L. & PUB. POLICY 355 (2006)(regarding concerns about state action to convert private foundations into public funds); Marion R. Fremont-Smith, *Governing Nonprofit Organizations, Federal and State Law and Regulation* 301 (2004)(attorney general has a duty to enforce in a broad sense but does not have a right to regulate or a right to direct either the day-to-day affairs of the charity or the action of the court).

— at play here because of the confirmed taking by Cannon. If the Attorney General's authority over private foundations is as draconian as is claimed here, the Bar and the public should know it.

[Factual Addendum attached hereto with supporting Joint Affidavit of appellants, both incorporated herein.]

Respectfully submitted,

James B. Richardson, Jr.
1229 Lincoln Street
Columbia, South Carolina 29201
Telephone: 803-799-9412
Facsimile: 803-799-9628

Tressa T. H. Hayes
Shipley & Hayes, P.C.
445 Meeting Street
West Columbia, South Carolina 29169
Telephone: 803-794-7588
Facsimile: 803-739-2024

By: James B. Richardson, Jr.
James B. Richardson, Jr.

March 16, 2010

Attorneys for Buchanan and Pope

FACTUAL ADDENDUM

In a carefully considered estate plan envisioned for more than 20 years and crafted with the help of a certified specialist over a four-year period, celebrated entertainer James Brown dedicated his entire entertainment empire to two private trusts created solely for education.[8] The primary components of the James Brown assets are his image and persona ("publicity right") and royalties to more than 700 published and certain unpublished songs, these two components having approximately equal value. [Cox doc. 6/07]

Mr. Brown's 1999 estate plan consisted of a *revocable* trust, will and power of attorney ("POA"). [1999 Will, POA, Trust dtd. 6/15/99]

The 1999 Trust provided lifetime discretionary support for Brown. At his death it divided into the Brown Family Education Trust (the Grandchildren's Trust) and "I Feel Good" Trust,[9] to provide scholarships for needy and deserving students at Voorhees, U.S.C. Aiken and U.S.C.Salkehatchie. [Trust dtd. 6/15/99, Art. V.][10]

Trustees of the 1999 *revocable* Trust were David Cannon, Albert Dallas, Alfred Bradley (the "Cannon Group"), Freida Carter, Willie Glenn, Ella Overton and Linda Ware, all of whom except Cannon executed the 1999 Trust. PRs under the Will were the Cannon Group and Deanna. [Trust dtd. 6/15/99, pp. 1, 14-16]

Linda Ware witnessed the Will and Trust and Carter served as Notary. [Will dtd.

---

[8] Brown's will devises his personal and household effects ("PHE") to Terry, Larry, Daryl, Deanna, Yamma and Venisha Brown, four of whom are presumed to be heirs. Brown's will and the 2000 Trust exclude all past and future spouses and other claimed heirs. [Will, Intro.; Trust, Art. XVIII.]

[9] The maximum size of the Education Trust under the 1999 and 2000 Trusts is tied to a federal estate tax formula, the maximum available generation skipping exemption. It provides possible education benefits of approximately $285,000 to the following seven beneficiaries: Romunzo, Forlando, Lindsey, Janise, Jason, Carrington and Sydney.

[10] Brown's 1999 will gave PHE to certain children. He gave the entire residue to the Trust. [1999 Will, Item I, II.]

6/15/99]

Attorneys in fact under the POA were Deanna and the Cannon Group. [POA, p. 1]

The following year James Brown executed his final estate plan. It contained only minor revisions to the 1999 version. The principal change was that James Brown made the 2000 Trust irrevocable. On August 1, 2000 Brown executed the 2000 Irrevocable Trust, the advisory board document, and his pour-over will. Daughter Venisha and companion Tommie Rae Hynie were witnesses to the Advisory Board document. Brown's POA was not changed.

The 2000 *Irrevocable* Trust, like the 1999 Trust, was dedicated solely to education. The Grandchildren's Trust was the same. The "I Feel Good" Trust, still for scholarships for needy and deserving students, was expanded to include students attending schools at all levels in Georgia and South Carolina.

Like the 1999 Will, the 2000 Will contained a pour-over provision incorporating the Trust by reference. This insured that Brown's entire estate would be dedicated to education, either by transfer before his death or under his will.

The Irrevocable Trust was established and funded on August 1, 2000. Brown deeded his home estate and assigned all of the shares of his wholly-owned company, James Brown Enterprises, Inc.("JBE, Inc.") to the Irrevocable Trust. Memoranda of Trust were filed in two states; and the Trust bought a bank building.[11] Brown's valid will leaves his entire entertainment empire to the Irrevocable Trust.[12]

---

[11] The building was sold.

[12] Under the Will, Terry, Larry, Daryl, Venisha, Deanna and Yamma each get 1/6 of Brown's personal and household effects, less Estate Taxes on what they get. The James Brown assets consist principally of his image and persona rights ("Publicity Rights") and royalties to more than 700 published songs ("Royalties"). At his death on December 25, 2006 the assets, reduced by a debt secured by a pledge on most Royalties (the TIAA debt"), were valued at about $85 million. Royalties paid to TIAA for the first half of 2009 were about $2.25 million.

The Irrevocable Trust is dedicated solely to education The noncharitable Education Trust provides about $285,000 in education benefits for each of seven designated grandchildren. None of Brown's claimed twelve or more children is a beneficiary. All past and future wives are specifically excluded as beneficiaries.

This estate plan was carefully designed over a four-year period, beginning in 1996. Involved in frequent litigation himself, Brown took all reasonable measures to ensure that all his assets were dedicated to education.

In his estate plan executed on June 15, 1999, Brown included *In Terrorem* forfeiture clauses in both the will and trust, and a spendthrift clause in the trust.

A year later, on August 1, 2000, when Brown made small changes in his estate plan, and made his trust irrevocable, the *In Terrorem* forfeiture and spendthrift clauses remained in both the Will and the Trust.

Article XXI of the Irrevocable Trust provides:

ARTICLE XXI[13]

> **Provision as to any Contest of Grantor's Estate Plan.** Should any beneficiary under this Irrevocable Trust or Grantor's Will dated after or of even date with this Trust and as referred to herein, become an adverse party in a proceeding for the probate of Grantor's Will or in any manner contest the validity of Grantor's Irrevocable Trust, such beneficiary shall forfeit his or her entire interest thereunder and such interest shall pass to such other beneficiaries as would be entitled to take as if such beneficiary predeceased Grantor. Furthermore, any person not provided for in this Irrevocable Trust, Grantor's Will or other such instrument, whether or not claiming to be a beneficiary, party in interest, or otherwise shall not have standing or be qualified to contest, claim an interest in or otherwise dispute the disposition of Grantor's estate as he herewith disclaims and disinherits any such person. Any such alleged claim shall be considered an affront to the Grantor's wishes and shall be vigorously challenged as such by his fiduciaries. [Emphasis supplied.]

On November 20, 2007 Appellants were appointed under the 2000 Estate Plan.

Undisputed lay and expert testimony in the hearing which commenced January

---

[2] This Article is taken from the Trust, but the Will has a substantially identical provision.

30, 2009, confirmed that the proposal, now revised, transferred more than $50 million to non-beneficiaries, their attorneys (estimated $12–$14 million) and for their estate taxes; dismantled James Brown's estate plan; violated its purposes and provisions; and disqualified the "I Feel Good" private foundation. The settlement also reduces the share of beneficiaries of the private Education Trust from about $285,000 per person to an undetermined but substantially smaller amount.

On March 26, after the close of petitioners' case, documents represented to be the final settlement agreement were filed. They consisted of the August 10 Contract; an addendum; the unsigned Legacy Trust and a Contribution Agreement.

With no showing or existence of cause for their removal, the circuit court replaced appellants with Russell Bauknight, already a trustee for Hynie Brown, Terry Brown and others. The 2000 Trust's Advisory Board (nonexistent when Dallas and Bradley resigned) was not consulted.[14] The Trust provisions were not followed; and James Brown's private trust and estate were placed under the control of the Attorney General.

In August the Attorney General obtained two more emergency *ex parte* orders, with no showing of emergency. These violated an "heirs" stipulation the Attorney General had made with Mitchell, Parris, and Pettit on January 30th which caused them to withdraw from participation in Case 1647. The *ex parte* orders found incorrectly that petitioners were the only Interested Persons in the estate and trust.

The circuit court declined to vacate the *ex parte* orders.

---

[14] Even Ella Overton, longtime companion of James Brown and James Brown's deceased wife, Adrienne Rodriguez, an original designated a member of James Brown's Advisory Board who had never acted before, came forward, seeking to become an active member and to defend the estate plan of James Brown. The Attorney General's office, which had previously asserted appellants' appointment was defective because the Advisory Board was not consulted, now asserted that the Board was unnecessary. The Court's stay of the James Brown cases from August 2008 until now prevented Overton's deposition prior to her untimely death.

No Probable Cause to Contest Will

A year and a day after their father's death, and with knowledge[15] of the validity of his 2000 estate plan (Irrevocable Trust and Will) and his 1999 backup plan, five of James Brown's children challenged his Trust which had been functioning for more than seven years.[16] ("Case 872".) Four months later they served an amended complaint on some of the parties.

Four months later, on August 10, 2008, with motions to dismiss pending, the Attorney General and some of the children, with Hynie Brown, signed the August 10 Contract. The Attorney General asserts his right to contract for the Irrevocable Trust without knowledge or consent of proper trustees, to give about more than $40 Million to these nonbeneficiaries of the 2000 Trust. Their lawyers, who contested the valid estate plan on their behalf, would be paid contingency fees estimated to be $12 Million, from James Brown's assets.[17]

The Irrevocable Trust specifically omits Brown's children and any past or future spouse. No part of the Irrevocable Trust, including the "I Feel God" private foundation, is dedicated for any public purpose

The Irrevocable Trust embodies James Brown's lifelong philosophy that needy

---

[15] "Knowledge" is defined in Section 62-7-104 of the SC Trust Code

[16] The challenge came after they had spent a year of the Court's time affirming Brown's estate plan and seeking to enforce the Irrevocable Trust in Case 122 on behalf of its minor beneficiaries. Appellants assert that their representation to *enforce* the Irrevocable Trust on behalf of minors was permissible, while an action to defeat it was not.

[17] Original Trustee Cannon has always asserted that JBE, Inc. was transferred to the Trust in 2000. In August 2007 Trustee Dallas knowingly filed false documents with the Court asserting that JBE, Inc. was never transferred to the Trust. Dallas has since admitted these filings were false, and were intended to prevent his removal as Trustee. Thus all original Trustees now confirm that they promptly implemented James Brown's August 1, 2000 assignment, JBE, Inc. resolution and stock power by transferring and and accepting JBE, Inc. as part of the Trust, where it has remained since 2000, JBE, Inc. holds about 2/3 of Brown's royalties. These, with Beech Island, had a value at Brown's death of as much as $35 million.

and deserving people need a "way out not a handout". That way out is education. It also provides education benefits of approximately $285,000 each to certain grandchildren.[18] The "I Feel Good" private foundation, authorized under IRC § 501(c)(3), is dedicated solely to providing education scholarships to needy and deserving students attending school in South Carolina and Georgia.[19]

Between 2000 and 2007 the Irrevocable Trust provided education benefits to adult grandchildren Forlando and Romunzo Brown and minor grandchildren Sydney and Carrington L.[20]

By order dated October 11, 2007 the Attorney General of South Carolina entered James Brown Case 122 to help *enforce* the "I Feel Good" private foundation, part of the Irrevocable Trust. Case 122 was brought to remove the Cannon Group as fiduciaries. By November 20. 2007 all had resigned.[21]

---

[18] See Article VI. While generous, the Brown Family Education Trust, sometimes called the Grandchildren's Trust, is a private, non-charitable Trust.

[19] The 1999 Trust provided similar scholarships, but only to those attending Voorhees, U. S. C. Aiken and U. S. C. Salkehatchie. [1999 Trust, Article V]

[20] Shortly after appellants discovered Cannon's $900,000.00 misappropriation in July of 2007, numerous other missing items were uncovered. By the fall of 2007 about $6 million in direct misappropriations between 1999 and 2007 had been confirmed. In February 2007 appellants filed suit to recover from Cannon, Dallas and others more than $12 million misappropriated from James Brown, the Irrevocable Trust and JBE, Inc., between 1999 and 2007.

During the same 1999–2007 period Brown's daughter, Deanna, held a filed joint POA for Brown with Cannon, Dallas and Bradley, giving her full access to Brown's financial dealings. In December 2006 Deanna also briefly accepted a position as Trustee of the Irrevocable Trust with Cannon and Dallas. The three asserted she was replacing Bradley. Daughter Yamma accepted a position as executive assistant to the Irrevocable Trust. Son Daryl traveled with Brown and the Cannon Group to a business meeting in Atlanta in the fall of 2006.

There is no evidence that Deanna, Yamma or Daryl knew of the Cannon Group misappropriations until after Brown's death. Terry Brown and his son Forlando became joint venturers with Cannon, Dallas and Bradley after it was known that the Cannon Group sought options or a "kickback" from an asset sale, and after Cannon's cashing of the $5 million "check to nobody" had been uncovered.

[21] All later sought to return as Trustees, but not as PRs. Cannon's attempts were unsuccessful. See SC Ct. Appeals Opinion No. 4570, filed June 23, 2009, refiled

Beginning November 21, the Attorney General 's office began asserting it had authority to take over all litigation related to the Irrevocable Trust, as well as James Brown's estate.

On November 21, 2007 the Attorney General's office asked Appellants to resign as trustees. Appellants declined, explaining that it would return the Trust and estate to the chaos they had just inherited. The Attorney General's office armed to replace them.[22]

The record and orders, including those dated January 8, February 20, March 7, and April 8, are filled with recitations of the accomplishments of the appellants.

On July 30, 2008 the Attorney General acknowledged that appellants were appropriate trustees. They were planning to work together to appoint a third trustee.

Eleven days later, on August 10, 2008, without appellants' knowledge the Attorney General's office met with several nonbeneficiaries of the Irrevocable Trust. The Attorney General executed a contract to seek removal of appellants and replace them, and to give 50% of the Irrevocable Trust's assets and inheritance to nonbeneficiaries. [August 10 Contract, Exhibit A.]

On September 28 the Attorney General brought Case 1647. On November 7,

---

November 6, 2009. Dallas & Bradley's appeal of the Court's refusal to allow them to withdraw their resignation is pending in this court.

[22] The Attorney General's communication was with Bill Hammond, former counsel to the Cannon Group, who described Cannon's $900,000 taking from the Irrevocable Trust as a "mistake". Hammond also had information which helped to confirm Cannon's improper cashing in 1999 of the $5 million "check to nobody" — a $5 million check with no payee that Cannon cashed at a local bank. The Attorney General's office told Hammond on November 27, 2007 that they were "arming to proceed." The Attorney General's office then used affidavits of wrongdoer trustee Dallas and of Hammond in an unsuccessful attempt to have the court reverse the trustee appointment of appellants. The Attorney General never objected to the appointment or service of appellants as PRs, and did not timely appeal the April 8, 2008 order finding all of their service both appropriate and ethical.

2008 the petition was amended to name and seek "emergency" removal of appellants.[23]

Appellants, all fiduciaries of James Brown, and others raised appropriate and continuing objections to the lack of due process; improper parties; lack of notice and other procedural and substantive errors in Case 1647, as well as to the terms and form of the proposed partial settlement after its approval was sought on January 27, 2009.[24] Appellants and former trustees Cannon, Dallas and Bradley all asserted that the trustees were essential parties to any settlement agreement entered into by the Irrevocable Trust.

Appellants testified at the hearing to consider the Attorney General's contract. They also called Harley Ruff as an expert witness. Both Pope and Ruff, without objection, were qualified as experts. All testimony other than Mr. Bauknight's[25] was to the effect that there was no probable cause to contest either the 2000 Trust or the Will; that statutes of limitation prevented a contest of the irrevocable 2000 Trust of which the

---

[23] The Attorney General incorrectly asserts that appellants were not parties to Case 1647. Appellants were named by the AG as parties in Case 1647 on November 7, 2008, and filed pleadings as parties to Case 1647. On January 27, 2009 the Attorney General filed with the court in Case 1647 a motion to approve settlement, with a signed August 10, 2008 Contract. He admitted he intentionally did not serve appellants. The motion unilaterally altered the caption of Case 1647 by omitting the names of the appellants and James II, although they had not been dismissed. Without motion or order, the AG added to the Case 1647 caption the case numbers of Case 122 and Case 872. The parties to those cases were not served or given notice of the motion or pleadings in Case 1647. Appellants objected to the incorrect caption, improper notice, and lack of service.

[24] The "final" version of the "settlement agreement" was filed on March 26, 2009, after the close of the Attorney General's evidence, three months after the AG had filed a motion seeking to approve the settlement. It added to the August 10 Contract and Addendum, a contribution agreement; and the unsigned Legacy Trust (with Bauknight's name omitted).

[25] Mr. Bauknight acknowledged that he knew nothing about the litigation or James Brown's desires for his estate plan, and thought the $83 million estate tax problem and federal Copyright Act issues were beyond the scope of his engagement.

entire family had knowledge,[26] and likewise demonstrated, with other facts, that there was no cause to contest the will dated the same day; that Brown, knowledgeable about litigation, had carefully designed two estate plans over four years — both with the express intention to exclude family except for minor and education benefits.[27]

By January 7, 2009, the Attorney General had requested, and the circuit court had granted, the appointment of Bauknight as the "independent" fiduciary to review the proposed partial settlement. In seven days of hearings, all the evidence except Bauknight's was that the proposal was unreasonable and dismantled Brown's estate

---

[26] See §62-7-104, which provides that a person has "knowledge" of a fact when the person:

(1) has actual knowledge of it;
(2) has received a notice or notification of it; or
(3) from all the facts and circumstances known to the person at the time in question, has reason to know it.

[27] In addition to testimony regarding the $40 million of unnecessary estate taxes and interest the settlement generated, Pope testified that it violated the Spendthrift clause, the *In Terrorem* clauses of both the will and the 2000 Trust; that the criteria set out in §§ 62–7–411 through –416 were neither addressed nor met in the settlement, which violated the Settlor's tax objectives; and was wholly inconsistent with the Settlor's intentions, both charitable and noncharitable (Grandchildren's Trust); that the settlement was directly contrary to, and dismantled, the Settlor's purposes, provisions and intention; and that maintaining the Trusts for education, without beneficiary interference, was the overwhelming material purpose.

Pope also testified extensively about Brown's actions around the time of the execution of both the 1999 and 2000 estate plans. She confirmed that most of the children and both original adult grandchildren were already on record as confirming the validity of the estate plan — with Terry, Romunzo and Forlando Brown insisting on enforcement of the *In Terrorem* clauses.

Pope testified that there was abundant evidence that the $100 million offers made by the Cox Group were an accurate reflection of the date-of-death value of the assets before taking into consideration the TIAA debt. This was true despite the fact that the Cannon Group sought to pay themselves about $16.5 million and get options or a kickback from a sale.

On March 25 no settlement agreement had been filed. Appellants moved to dismiss after the close of petitioners' evidence — consisting solely of Buchanan and Pope's testimony and that of Bauknight. Not one settling party testified. It was announced that Bauknight had been selected as PR/Trustee in addition to trustee of the Legacy Trust. The settlement documents were filed on March 26, 2009.

plan. The circuit court approved the appointment of Bauknight to serve at the pleasure of the Attorney General, and approved a partial settlement which takes more than $50 million from the Irrevocable Trust, including an estimated $12–$14 of contingency legal fees for the attorneys for those who have dismantled the Irrevocable Trust.

Among the errors which led to the orders under appeal are that the Court ignored the undisputed testimony that there is no probable cause to contest the Irrevocable Trust or the Will and that all children and Hynie Brown have ratified both the Trust and the Will. The evidence shows that a transfer of more than 65% of the Irrevocable Trust to these nonbeneficiaries is unjust and unreasonable. The trustees of the Irrevocable Trust having been enjoined by the January 7 Order appointing Mr. Bauknight as SA/ST, they were prevented from protecting James Brown's estate plan.[28]

After removing appellants without cause, the circuit court ordered them, as PRs, to sign the settlement documents. Among other things, the settlement documents require parties not to say anything negative about the settlement agreement and to speak only through their lawyers or in court.

On August 1, 2009 the Attorney General's office sought *ex parte* "emergency" orders naming Bauknight as ST and SA. There was no emergency. The unverified *ex parte* applications and orders submitted by the Attorney General incorrectly described the petitioners as the sole Interested Persons in the Irrevocable Trust and estate, and the sole beneficiaries. [See Orders dtd. 8/3/09, 8/6/09.] The circuit court refused to vacate the *ex parte* orders.

Cases 1647 and 1810 were consolidated in this appeal.

---

[28] Appellants and the 2000 Trust were deprived of due process in this matter. The January 7th order made no finding of cause for substituting Bauknight's recommendations in place of the fiduciary discretion of the properly serving trustees and the Advisory Board.

EXHIBIT A

This agreement made this 10th day of August, 2008, by and among the Attorney General of South Carolina, Larry Brown (natural child of the deceased), Daryl J. Brown (natural child of the deceased), individually and on behalf of his minor children Lindsey Delores Brown (age 17) and Janise Vanisha Brown (age 12), Venisha Brown (natural child of the deceased), Deanna J Brown Thomas (natural child of the deceased), individually and on behalf of her minor child Jason Brown-Lewis (age 17), Yamma N. Brown Lumar (natural child of the deceased), individually and on behalf of her minor children Sydney L[redacted] (age 8) and Carrington L[redacted] (age 6), Tonya Brown (grandchild of James Brown) individually, and Tommie Rae Brown (hereinafter "Tommie Rae") individually and on behalf of her minor child James B[redacted].

The purpose of this agreement is to settle any and all differences among the parties above whose signatures appear below concerning the disposition, whether by will or otherwise, and/or transfer of any assets owned or controlled by James Brown, whether by will, intestacy, trust, or nonprobate means, state or federal law, and based on this, the parties hereto agree as follows:

1. All parties who sign below hereby recognize and stipulate, for all purposes and matters, that Tommie Rae was the legal wife of James Brown, during his lifetime and at the time of his death, and qualifies as his surviving spouse, and agree not to contest any claim by Tommie Rae by virtue of her status as surviving spouse and to file any and all appropriate pleadings and documents recognizing and stipulating said status as spouse.

2. All parties who sign below hereby recognize and stipulate, for all purposes and matters, that the children and grandchildren who sign below were and are the lawful and/or legitimate biological issue and heirs of James Brown during his lifetime and were in life at the time of his death, and qualify as his surviving issue, and all parties agree not to contest any claim by any child or grandchild by virtue of his or her status as lawful and/or legitimate issue or as an heir of James Brown and agree to file any and all appropriate pleadings recognizing and stipulating said status of the children and grandchildren named as lawful and/or legitimate issue.

3. All parties agree to say nothing negative in public or to any representative of the media about any of the parties hereto or about the terms of any settlement reached herein, whether about their roles in this litigation or their relative positions or status as an heir, child, issue, spouse, or as a grandchild and will further speak only through counsel or in Court about any matters relative to this case affecting or pertaining to each other or to this settlement. This agreement does not prevent any parties from publicly discussing events in court or Orders issued by the Court, so long as the parties are not critical of each other, nor does this agreement prevent any party from giving interviews or publishing books or articles about their lives, so long as they are not critical of each other nor commenting upon the terms of the settlement or the negotiations that lead thereto. The parties consent to an Order of the Aiken County Court of Common Pleas or to any appropriate Court to require the parties to comply with the terms of this paragraph of this agreement.

4. Tommie Rae, all children, and all grandchildren (if possible as to the grandchildren) agree to meet in person at a convenient time as soon as reasonably possible to reaffirm in person their mutual support and cooperation as a united group in support of the legacy of James Brown and in

231 LJB

further support of the agreements made herein

5. It is noted that all parties to this agreement have filed, at separate times, pleadings objecting to the validity of the August 1, 2000 Will of James Brown and the August 1, 2000 Irrevocable Trust. Tommie Rae, the children and grandchildren and the Attorney General of South Carolina (hereinafter the parties) have additionally agreed as follows:

a) that a joint motion or other pleading will be filed seeking the removal of Mr. Robert Buchanan and Ms Adele Pope as Personal Representatives of the Estate of James Brown and as Trustees of the the August 1, 2000 Irrevocable Trust of James Brown, deceased and will mutually agree upon persons to appoint as successor representatives of the estate and trust pursuant to the provisions of applicable law;

b) that a charitable trust substantially similar to the August 1, 2000 Irrevocable Trust (hereinafter the "Charitable Trust") shall be created and/or maintained and shall be valid and enforceable, including but not limited to the possibility of amendment to the August 1, 2000 Irrevocable Trust by agreement of all the parties hereto. The trustees of the trust shall include at all times one representative selected by the parties hereto who are clients of Levenson and one representative selected by Tommie Rae The trust shall also include an advisory board that shall include some member(s) selected by the parties hereto who are clients of Levenson and one representative selected by Tommie Rae.

c) that there shall be no DNA testing of any children or grandchildren (or their issue) who are parties to this agreement and all such motions for same will be withdrawn or dismissed by consent of all parties hereto.

d) that the parties hereto will create an entity (the "settlement entity") that will receive any and all assets and or proceeds payable to any of the parties, now or in the future, by virtue of any rights of James Brown, any of the entities of James Brown, the Estate of James Brown, the August 1, 2000 James Brown Irrevocable Trust, the Charitable Trust, and/or any rights the parties hereto have as heirs, devisees, and/or successors to James Brown for any purpose, including not limited to copyright, royalty, persona, image, likeness, etc. The parties will divide any and all such assets and or proceeds in the following proportions for as long as such assets and proceeds are paid into said entity or any successor entity thereto: (1) 50% to Charitable Trust; (2) 25% to Tommie Rae Brown, which includes any share attributable to James Brown II; and (3) 25% to all parties hereto represented by Louis Levenson as they agree among themselves Tommie Rae hereby waives any spousal right she may have to such assets to the extent that they might otherwise exceed 25% thereof. The parties hereto represented by Levenson waive any right they may have to such assets to the extent that they might otherwise exceed 25% thereof

e) All parties hereto waive any claim or right to seek forfeiture against any party pursuant to any in terrorem and/or no-contest clause under any will or trust of James Brown, and specifically agree that any and all contests that were brought were brought in good faith

23 JB DBT DBT for JB DBT for HB L. B.

and with probable cause.

f) The promissory note and security deed currently due from the parties hereto represented by Levenson to the Estate of James Brown (with respect to the property known as Pops house, which is the home of the father of James Brown) will be marked satisfied and paid in full by the settlement entity for no additional payment being due.

g) In the event that any party brings to the settlement entity any offer culminating in a contract to purchase property and/or rights from the settlement entity, if such party's efforts are disclosed to the estate or trust or the settlement entity acting for said estate or trust, then such party shall be entitled to a finder's or broker's fee as shall be negotiated to the extent reasonable and appropriate under applicable law.

h) In the event that the property at 430 Douglas Drive, Beech Island, SC, is sold by the settlement entity, the parties hereto who are clients of Levenson shall have the right of first refusal to purchase said property at the Aiken County Tax Assessor's appraised value therefor as of the most recent assessment before the purchase. In the event the parties hereto who are clients of Levenson shall decline to exercise such right and close the sale within 120 days of the giving of the notice of the right of first refusal, then Tommie Rae shall have a right of next refusal for the next 120 days on the same terms as set forth above after she receives notice thereof.

i) The parties agree that a trust similar to the Brown Educational Trust under the 2000 Irrevocable Trust will be established for the grandchildren of James Brown, and their issue, for as long as allowed under the applicable Rule Against Perpetuities, but in no event lasting for a period longer than 90 years from December 25, 2006. This Brown family educational trust shall be funded with a principal amount of $2 million, which shall be carved out from the share of assets and proceeds payable to the Charitable Trust. Upon the termination of this Brown family educational trust, the remaining principal and any undistributed income shall be distributed to the charitable trust.

j) The parties agree that any and all will and trust contests will be dismissed

k) The parties agree to use their best efforts to extinguish any other outstanding interests or claims by any potential heir, devisee, or successor and to the extent the termination of such interest or claim requires payment, for such payment to be made from the settlement entity, which of necessity would be allocated among the parties to the settlement entity pro-rata in aliquot shares

l) The parties agree that the settlement entity and/or the parties will endeavor to create an appropriate and respectful museum or other memorial burial place acceptable to the settlement entity in which to maintain the remains of James Brown, preferably at 430 Douglas Drive, Beech Island, if feasible. If such is not accomplished within 7 years from date, then in that event the remains will be interred in the cemetery where the parents of James Brown currently are located in Augusta, GA, with the settlement entity paying

LJB DBT
233 DBT JonB
DBT JBH TB

expenses of relocation. Parties hereto represented by Levenson, Tommie Rae, and James Brown II shall all have reasonable opportunities to visit privately the gravesite upon reasonable notice. The parties hereby waive any right to otherwise direct the location of the gravesite as a result of their status under law. The parties consent to an Order of the Aiken County Court of Common Pleas or to any appropriate Court to require the parties to comply with the terms of this paragraph of this agreement.

6. This agreement is a private binding agreement among the parties hereto. Although the parties hereto may agree to ask the Court to approve this agreement, this agreement remains binding among the parties and applies to personal representatives and trustees even if not approved by the Court.

7. This agreement is binding on the heirs, successors, and assigns of the parties hereto.

LPB

Attorney General

Tonya Brown

Deanna Brown Thomas

Deanna Brown Thomas for

Deanna Brown Thomas for

Vernita Brown

Deanna Brown Thomas for

Tonya Brown

Tom

8/10/08

8/10/08

8/10/08

STATE OF SOUTH CAROLINA COUNTY OF AIKEN IN RE: THE ESTATE OF JAMES BROWN A/K/A JAMES JOSEPH BROWN	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT CIVIL ACTION NO. 2007-CP-02-0122 ORDER DIRECTING PAYMENT OF FEES AND COSTS OF SPECIAL ADMINISTRATORS AND OTHER RELIEF

FILED
2010 JUL 26 AM 11:49
JEANNE C. [illegible]
C.C.P. & G.S.

This matter comes before me on Motion of Robert L. Buchanan, Jr. and Adele J. Pope, as Personal Representatives of the Estate of James Brown; Trustees of the James Brown 2000 Irrevocable Trust; and former Special Administrators of the Estate of James Brown. They seek an order approving payment of fees of $317,000.00 and costs for their services as Special Administrators for the period from March 7, 2007 through November 20, 2007. They also seek approval of continued payments on a "time plus costs" basis while they serve as Personal Representatives and Trustees. Their unreimbursed costs for the period are $2,415.38. They ask that the "time plus costs" payments be a deposit towards, and without prejudice to, their right to receive full commissions as Personal Representatives and Trustees.

The motion was supported by affidavits of Robert L. Buchanan, Jr. and Adele J. Pope, with detailed attachments outlining their work as Special Administrators for the period from March 7, 2007 through November 20, 2007, and as Personal Representatives and Trustees since that time. For the 8 ½ month period they served as Special Administrators, the two attorneys worked more than 950 hours. Their staffs and law clerks worked more than 680 hours.

Since, by limitation in this Court's earlier Orders, the Special Administrators were not fiduciaries during the period before November 20, 2007, the Court finds it appropriate to apply guidelines for

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing is a true, exact and complete copy of the original document which same I have in my office.

235 JAN 09 2008

Liz Godard
C.C.P. & G.S. Aiken County, S.C.

Deputy Clerk

1-9 8.

8.30

determining reasonableness of fees for attorneys is an appropriate standard by which to measure their request as Special Administrators. The factors to be considered are:

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;
6. Customary legal fees for similar services. See Donahue v. Donahue, 299 S.C. 353, 384 S.E.2d 741 (1989).

Considering such factors, the Court finds that the fees and costs requested by Mr. Buchanan and Mrs. Pope are fair and reasonable. Both Mr. Buchanan and Mrs. Pope are attorneys with substantial experience. This has been an extremely difficult case, and has required that they devote a large portion of their day almost every day to the task. Their discovery of the inappropriate August, 2006 deposit of $900,000, which should have been applied to Mr. Brown's debt at M&T Bank, alone, has been of substantial value to the Estate. With the help of family members and their counsel, the Special Administrators investigated numerous areas of concern. As Personal Representatives and Trustees, they are continuing their work.

In addition to their own work, the Special Administrators were required to use staff in a way which was not anticipated at the time of their appointment. Mr. Buchanan's office became the home address of the James Brown Estate, the James Brown 2000 Irrevocable Trust, and the Brown Entities. Mrs. Pope's office became the repository for more than 80 boxes of documents. With the assistance of the staff of former counsel for the Personal Representatives, after August 10, 2007, Mrs. Pope and her staff made documents and records available to counsel for all Interested Parties, as well as for the work of the Estate.

The payment requested by Mr. Buchanan and Mrs. Pope is also consistent with their standing and services performed by other counsel of similar standing. They are consistent with the hourly rate of other lawyers in this case, as demonstrated in various filings.

With respect to their request to receive periodic payments on a "time plus costs" basis, with right to receive full commissions as Personal Representatives and Trustees, I find that it is entirely reasonable under the circumstances. Based on their affidavits, it is clear that the work of Mr. Buchanan and Mrs. Pope has approximately doubled since they became Personal Representatives and Trustees. In less than a month of service, they have filed the Application for Recognition of the James Brown "I Feel Good" Trust as a 501(c)(3) charitable educational organization. They have also begun to address the substantial tax issues facing the Estate, the Trust, and Brown Entities. Further, they are now actively involved in both the administration of Mr. Brown's assets and entities and also the defense of his Estate Plan.

Under these circumstances this Court finds it appropriate for Mr. Buchanan and Mrs. Pope, as Personal Representatives and Trustees, to continue to receive fees and costs on an hourly basis, as a deposit only, to any full commissions to which they may be entitled as Personal Representatives and Trustees. I specifically find that such payments are reasonable and should be made without prejudice to (but as a deposit toward) their full commissions.

I find it premature to determine whether such fees should be charged to the Estate, the 2000 Irrevocable Trust, or James Brown Enterprises, Inc. A glance at the claims filed against the Estate of James Brown shows that more than twenty attorneys (in at least 4 law firms) performed services for Mr. Brown, James Brown Enterprises, Inc., and the Trust. Most did so without attempting to allocate the services among them. Further, there is litigation pending in at least three states (Illinois, New York and South Carolina) which is and must be conducted

simultaneously by the Estate and one or more of James Brown Enterprises, Inc., the 2000 Irrevocable Trust and other Brown Entities.

The Personal Representatives and Trustees under Mr. Brown's Estate Plan, have abundant authority to make a reasonable allocation, at the appropriate time, of their commissions. Should any party prevail in the challenges now pending to the Estate Plan of Mr. Brown, or any other circumstances dictate, it may become the duty of the Court to review any such allocation.

Based on the foregoing, IT IS ORDERED, ADJUDGED AND DECREED:

1. Robert L. Buchanan, Jr. and Adele J. Pope shall be paid $317,000 plus costs, for service as Special Administrators from March 7, 2007 through November 20, 2007.

2. Robert L. Buchanan, Jr. and Adele J. Pope shall receive continuing payment on a "time plus costs" basis for themselves and their staff, commencing November 21, 2007. This shall be a deposit toward, and without prejudice to, their full commissions as Personal Representatives and Trustees.

3. To the extent not paid within 60 days, the above amounts shall be subject to interest at the legal rate.

4. Robert L. Buchanan, Jr. and Adele J. Pope shall be reimbursed for all costs as shown, and all reasonable costs in the future.

AND IT IS SO ORDERED.

Doyet A. Early, III
Resident Judge, Second Judicial Circuit

January 8, 2008
Aiken, South Carolina

FILED
2010 JUL 26 AM 11:49
JEANNE C. BRIGHT
C.C.P. & G.S.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN)	
)	CIVIL ACTION NO. 2007-CP-02-0122
)	
)	
)	
IN RE:)	ORDER APPROVING ENGAGEMENT OF COUNSEL 1-16 2008
)	
THE ESTATE OF JAMES BROWN)	Liz Godard
A/K/A JAMES JOSEPH BROWN)	C.C.C.P.&G.S.
)	Anita Smith 30
)	Deputy Clerk

This matter comes before me on motion of Robert L. Buchanan, Jr. and Adele J. Pope, successor Personal Representatives of the Estate of James Brown and Successor Trustees of the James Brown "I Feel Good" Trust. Moving parties and their proposed counsel, J. Kendall Few, Esquire, and James R. Gilreath, Esquire, ask the Court to approve a representation contract by which Messrs. Few and Gilreath will represent the Estate of James Brown, the James Brown Irrevocable Trust, James Brown Enterprises and other Brown Entities, as appropriate, as their interests may appear, in connection with matters occurring on and after January 1, 1999.

This proposal to engage counsel was first considered by the Court at a hearing held on November 15, 2007. The motion was originally made by the Special Administrators because this was a matter as to which the then-Personal Representatives, Alfred A. Bradley and Albert H. Dallas, Esquire could not act as provided in this Court's Order of August 10, 2007. Thereafter it was considered at a hearing held on December 21, 2007.

Present and participating in person or through counsel at one or both of the hearings on this matter were: all devisees of the Will of James Brown, dated August 1, 2000; numerous non-devisees claiming to be heirs of Mr. Brown; the Trustees and all Qualified Beneficiaries of the James Brown 2000 Irrevocable Trust; the Attorney General of South Carolina, the Attorney General of Georgia; Manufacturers & Traders Bank, and others.

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for said County, State of South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this
JAN 16 2008
Liz Godard
C.C.C.P. & G.S., Aiken County, S.C.
Anita Smith
Deputy Clerk

It was confirmed that former Personal Representatives and Trustees Alfred A. Bradley and Albert H. Dallas took no part in the selection of counsel because the proposed engagement will focus on a period during which they served in one or more fiduciary capacities with respect to Mr. Brown, the 2000 Irrevocable Trust, Mr. Brown's Estate and/or other Brown Entities.

The parties, other than the attorneys general, unanimously urged the Court to proceed with the engagement on the proposed basis. The attorney general of South Carolina agreed with the competency and appropriateness of selected counsel, but raised concerns about the size of the contingency fee arrangement.

South Carolina Probate Code Sections 62-3-715(19) and 62-7-816(24) authorize the Personal Representatives and Trustees to select counsel of their choice upon reasonable terms. Further the James Brown 2000 Irrevocable Trust, Article X, sections (19),(20), and (24) specifically empowers the Trustees to select and retain counsel, and the informally probated will also allows such selection pursuant to item VI. Thus the Personal Representatives, formerly the Special Administrators, pursuant to this Court's Order dated August 10, 2007 and the documents, have full authority to select and retain counsel.

The Personal Representatives and selected counsel have chosen, however, to seek Court approval as to both the selection of counsel and terms.

I find that both the counsel selected and the contract terms, as contained in Exhibit A, attached hereto, are fair and reasonable.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. The Engagement Contract proposed by the Estate, Trust, James Brown Enterprises, Inc., and James Brown, LLC, is hereby approved.

240

2. The Personal Representatives and Trustees are authorized to retain counsel as set out therein.

3. The Order shall not limit in any way the right of the parties to modify the contract as appropriate to developing circumstances.

AND IT IS SO ORDERED.

Doyet A. Early, III
Resident Judge, Second Judicial Circuit

January 9, 2008
Aiken, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this
MAR 07 2008
C.C.C.P. & G. S., Aiken County, S.C.
Deputy Clerk

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN) SECOND JUDICIAL CIRCUIT
)
) CIVIL ACTION NO. 2007-CP-02-0122
)
IN RE:) ORDER DENYING MOTION
) TO ALTER, AMEND OR VACATE
THE ESTATE OF JAMES BROWN) ORDER APPROVING RESIGNATION
A/K/A JAMES JOSEPH BROWN) AND GRANTING RELATED RELIEF
)

FILED
2010 JUL 26 AM 11:49
JEAN H. TOAL
C.C.C.P. & G.S. AIKEN

This matter came before me on February 20, 2008 on Motion of Alfred A. Bradley and Albert H. Dallas to alter, amend or vacate this Court's Order of November 20, 2007 accepting the resignation of Bradley and Dallas; appointing successor Personal Representatives (PRs) of the Estate of James Brown (the "Brown Estate"), deceased; and appointing successor Trustees of the James Brown 2000 Irrevocable Trust (the "2000 Trust") and its subtrusts.

For reasons set forth in detail below, the motion is DENIED. This Court finds:

1. On November 20, 2007, Bradley and Dallas voluntarily, immediately and permanently resigned as PRs of Mr. Brown's Estate; as Trustees of the 2000 Trust and its subtrusts; as fiduciaries of all Brown Entities (other than Geronimo Music Ltd., LLC); and as directors, officers, agents and/or fiduciaries of the Estate, the Brown Trust or any Brown Entity.[1]

2. The facts, together with applicable documents and law, made their resignation both appropriate and necessary in order to avoid removal.

3. Because their service in all capacities as PR/Trustees permanently and finally terminated on November 20, 2007, Bradley and Dallas are not Interested Persons as to the appointment and service of successor fiduciaries.

[1] As confirmed in the record, the Brown Entities to which the immediate and permanent resignation applies include James Brown Enterprises, Inc.; James Brown, LLC; James Brown Royalty Venture I SPC; James Brown Bum Lounge, LLC; Seventh Decade Productions, Inc.; and each and every entity in which James Brown and/or the Estate of James Brown has an interest (other than Geronimo Music, LLC)

JURISDICTION AND PARTIES

Two separate actions for removal of David G. Cannon, Bradley and Dallas as fiduciaries were commenced in the Probate Court for Aiken County. The first was filed on January 24, 2007 by six children and eight grandchildren of Mr. Brown.[2] The Second was commenced by Tommie Rae Brown.[3] On April 16, 2007 the children/grandchildren also brought an action for an accounting of the PR/Trustees.

All actions were removed to the Circuit Court by orders of the Honorable Sue H. Roe pursuant to S. C. Probate Code Section 62-1-302 (d).

The original defendants (respondents) were the PR/Trustees Cannon, Dallas and Bradley.

After March 7, 2007, Robert L. Buchanan, Jr. and Adele J. Pope, the Special Administrators (SAs) were joined. Other Interested Parties now part of this proceeding are certain putative children and the Attorney General of South Carolina.

Since February 13, 2007 this Court has held more than ten hearings, each of which was (among other matters[4]) related to the removal of Cannon, Dallas and Bradley as PR/Trustees, and the petition for accounting.

---

[2] Terry Brown, Larry Brown, Daryl J. Brown, Vanisha Brown, Deanna J. Brown Thomas, Yamma N Brown; Lindsey Delores Brown, Janise Vanisha Brown, Jason Brown Lewis, Sydney Lumar, Carrington Lumar, Tonya Brown, Romunzo Brown, and Forlando Brown.

[3] Ms. Brown asserts that she is the spouse of Mr. Brown.

[4] Also pending are various proceedings related to determination of heirs; contests of Decedent's 2000 Will and 2000 Trust ("Estate Plan") and other matters.

RESIGNATIONS OF BRADLEY AND DALLAS AND SUBSEQUENT TRANSACTIONS

On November 20, 2007, Bradley and Dallas resigned as PRs, Trustees of the Brown 2000 Trust, as Trustees of the Brown 2000 Trust's subtrusts, and as director, officer, agent and/or fiduciary of the Estate, the Brown Trusts and all Brown Entities (with the exception of Geronimo.)[5] The resignations were on the record in open court. That day this Court issued its Order Accepting Resignation and Appointing Personal Representatives and Trustees.[6] On that same day, Probate Judge Roe also issued a certificate of appointment of Buchanan and Pope.

On November 30, 2007 Bradley and Dallas filed a Motion to Vacate, Amend and Reconsider the November 20, 2007 Order. It was supported by affidavits of Dallas and Bradley dated November 29, 2007. The thrust of the Affidavits was that Dallas and Bradley's resignations were coerced by actions of this Court. On the same day, the Attorney General of Georgia served a Motion and amended Motion to set aide the Court's November 20, 2007 Order. It, also, was supported by the November 29th affidavits of Dallas and Bradley, as well as an affidavit of attorney William F. Hammond.

On December 28, 2007 certain children and grandchildren of James Brown filed a response to Dallas and Bradley's Motion to Vacate, Alter or Amend. They asserted that the Order properly accepted the termination of Bradley and Dallas, and properly appointed Buchanan and Pope.

---

[5] Geronimo Music, LLC, is partially titled in the names of Cannon and Dallas.

[6] Appointing Buchanan and Pope as PRs and as Trustees, with all powers and duties as if they had been appointed under the Will and 2000 Trust, with the exception of the requirement that a third Trustee be appointed.

On January 6, 2008 Buchanan and Pope served a response to all motions to alter or amend. It was supported in part by affidavits of Buchanan and Pope. They requested:

1. That the Court proceed with, and deny, all attempts of Dallas and Bradley to set aside their permanent resignations;

2. That the Court order Bradley and Dallas to fully account for, and deliver to them as Successors, a complete accounting for the Estate and the 2000 Trust; and

3. That the Court conduct a full hearing on the propriety of their appointment and grant certain additional relief.[7]

On December 13, 2007 and January 28, 2008, Bradley and Dallas filed Supplemental Motions to Alter, Amend or Vacate. The supplemental Motions assert, in part, that this Court lacked jurisdiction to accept the resignations and appoint a successor.

Pope and Buchanan responded to the Supplemental Motions, asserting that they were not timely. Additional testimony, affidavits[8] and filings were made a part of the record at the hearing.

---

[7] Buchanan and Pope, among other things, asked the Court to find:

a. Because of the damage caused to James Brown, the James Brown 2000 Trust, and the Brown Entities by Messrs. Cannon, Dallas and Bradley, it was both proper and in the best interest of the Estate to appoint PRs and Trustees to serve in both capacities. Separating those functions would cause unnecessary duplication and hinder the Estate Plan of James Brown.

b. Buchanan and Pope ethically and properly performed their service as SAs and their claim for past services was properly ordered by the Court.

c. Buchanan and Pope, or other properly designated fiduciaries, may ethically serve simultaneously as PRs and Trustees under Mr. Brown's Will and the 2000 Trust, and Buchanan and Pope have properly done so since November 20, 2007.

[8] Including the Affidavits of Buchanan and Pope, with attachments, served on January 18, 2008.

The Motions to Alter, Amend or Vacate of Dallas and Bradley were heard before me on February 20, 2007.[9]

FACTS RELATED TO RESIGNATION

Bradley and Dallas assert that their resignation was involuntary and procured under improper judicial or other influence. They assert numerous technical defects. And they challenge this Court's authority to issue the Order. The SAs and those opposing the return of Dallas and Bradley assert that they repeatedly violated this Court's orders, often secretly; made false statements in affidavits and in court testimony; and encouraged or allowed others to make false representations to the court. They further assert that by November 15, 2007 the removal of Dallas and Bradley was imminent and inevitable. They assert that Dallas, a lawyer himself, and Bradley followed the sound advice of their counsel to immediately and permanently resign in all capacities related to the Brown Estate, 2000 Trust and related entities. The facts in the record support this view.

[9] The hearing on reconsideration of the immediate and permanent removal of Bradley and Dallas was originally scheduled for January 9, 2008. Before the hearing Bradley and Dallas moved the undersigned to recuse himself. That motion was orally denied after a hearing on January 4, 2008. On January 9, 2008 Bradley and Dallas appeared with new counsel, R. Wayne Byrd, Esquire. After a brief delay requested by new counsel, the Court's Order denying the motion for recusal was issued on February 18, 2008.

On August 1, 2000 Cannon, Dallas and Bradley were appointed Trustees of the 2000 Trust and named PRs in Mr. Brown's last known executed Will.[10]

James Brown died on December 25, 2006.

On December 26, 2006, Atlanta attorney Joel Katz of Greenberg Traurig (GT) formed the James Brown Music Education Foundation, a Delaware non-profit organization. This entity purports to usurp some of the functions of the 2000 Trust.

On December 28, 2006 PR/Trustee Cannon received $350,000.00 from the bank account of the 2000 Trust.

At some time after Mr. Brown's death, and before January 3, 2007, Dallas created a new, post-death document entitled "SCHEDULE B - IRREVOCABLE TRUST AGREEMENT OF JAMES BROWN". The new Schedule B represented that virtually all of Mr. Brown's assets, including his copyright and publishing rights, and image and persona had been transferred to the 2000 Trust.[11]

On January 3, 2007, Trustee Bradley applied in his individual name for the rights to "Soul Brother #1." This name belonged to Mr. Brown.[12] Neither Dallas nor Bradley informed the SAs of these events.

---

[10] Throughout the proceedings described herein certain heirs and the claimed spouse of Mr. Brown have reserved the right to challenge the 2000 Will and Trust. After the resignation of Bradley and Dallas, several actions have been filed for that purpose.

[11] More than a year later, on February 7, 2008 Mr. Dallas testified that it was merely a list of what he thought had been transferred prior to Mr. Brown's death. Both Dallas and Bradley testified that the new Schedule B was prepared with the assistance of counsel Cam Lewis and/or Strom Thurmond, Jr. The new Schedule B was, however, prepared before Bradley signed an acceptance as Trustee on January 3, 2007, and before either attorney was engaged.

[12] On March 5, 2007, Bradley agreed to return those rights to the 2000 Trust.

On January 3, 2007 Cannon filed a $912,000 judgment in Aiken County against Mr. Brown and the 2000 Trust.

On January 18, 2007, the Will was informally admitted to probate and Cannon, Bradley and Dallas were appointed PRs. Under the 2000 Will, Mr. Brown named six children as devisees of certain items of tangible personal property. The residue of his estate is devised to the 2000 Trust. If for any reason the gift to the 2000 Trust is invalid, the terms of the 2000 Trust are incorporated by reference in the Will, and Cannon, Dallas and Bradley named as Trustees.[13]

Two Petitions for removal of Cannon, Dallas and Bradley were filed by February 1, 2007. At an emergency hearing on February 9, 2007 the PR/Trustees appeared with three of their then-attorneys, Mr. Peeples, Mr. Thurmond and Mr. Miller. The Court did not allow examination of the PR/Trustees or other testimony. The PR/Trustees, through counsel, however made a number of representations to the Court, including:

1. Mr. Cannon and Mr. Dallas were not creditors of Mr. Brown's Estate (Tr.2/9, p.54)[14]

2. The only assets of the Estate were approximately $208,000. All other assets, including Mr. Brown's home and his company James Brown Enterprises, Inc. (JBE, Inc.), were transferred to the 2000 Trust. (Tr 2/9/07, p 71)[15]

---

[13] More than a year after Mr. Brown's death, and seven years after the 2000 Trust was signed, Cannon, Dallas and Bradley have not filed any statement showing assets of either Mr. Brown=s estate or the 2000 Trust as of Mr. Brown's death, despite numerous demands, notwithstanding an attempt made by Bradley and Dallas to identify some of the assets.

[14] Mr. Thurmond further stated, "If they're creditors, they are creditors of the trust. That's not before Your Honor."

[15] Among the documents which the PR/Trustees used to support their contention that the Estate had no assets was a copy of the Post-death Schedule B. They did not disclose that it was created after Mr. Brown's death.

On January 23, 2007, the Trustees' minutes reflect a meeting with Atlanta Attorney Bill Shearer of Powell Goldstein. On February 19, 2007 this Court issued an Order for appointment of an SA. The Court ordered that the "Personal representatives shall inform the Special Administrators of all matters that concern the administration of the Estate." On March 5, 2007 the PR/Trustees met with Joel Katz of the firm of GT in Atlanta. They voted that control of the 2000 Trust would be by majority action of Katz, Cannon, Bradley, Dallas, and Frank Copsidas. Neither Katz nor Copsidas was named in Brown's documents.[16] Specifically, they determined that

> "[g]oing forward decisions on the Trust's behalf are to be decided by the committee comprised of Buddy Dallas, David Cannon, Al Bradley, Frank Copsidas and Joel Katz. In the event of two dissenters, the members have agreed to further good faith discussion with the majority winning."

At the same meeting, the Trustees (with Katz and Copsidas) also decided to provide copies of "all Schedules B" to GT and to attorney Bill Hammond and William Shearer (Powell Goldstein), to determine the "next steps". Hammond and Shearer were described as "the Trust's other legal counsel with respect to estate planning matters."

On March 7, 2007, by supplemental order, Buchanan and Pope were appointed SAs. Their duties were limited to oversight. Where they were unable to reach consensus with the PR/Trustees, the SAs were directed to seek court intervention. Except for prohibitions against transfers and the duty of full disclosure, administration of the Estate remained in the hands of the

[16] This decision was never communicated to the Court, the SAs, or the beneficiaries. The SAs learned of it shortly before the Nov. 15, 2007 hearing.

original PRs. The SAs were never told of the March 5 events described above, even though a detailed report was issued to the Trustees on March 13, 2007.

On March 14, an attorney for the PR/Trustees provided the SAs with what was represented to be Mr. Brown's Will, Trust, "Schedule B to the Trust," and several basic documents. The PR/Trustees failed to tell either their counsel, Keith Babcock, or the SAs that the "Schedule B to the Trust" was created after Mr. Brown's death.

Between March and June, 2007 Cannon, Dallas and Bradley refused to allow the SAs to review tax returns and other critical documents, although they asked them to approve a sale of Mr. Browns music catalogue and royalties without due diligence to determine whether it was best for the Estate/Trust.

On April 13, 2007 the Court, in camera, encouraged the PR/Trustees to give the SAs all documents appropriate to an understanding of the Estate and affairs of Mr. Brown.

On June 13, 2007, after a formal motion of the SAs confirming that documents were not being provided, the Court ruled that the SAs must be given full access to the books, records and tax returns of the Estate, the 2000 Trust and Brown Entities. An Order to that effect was issued on June 25, 2007.

In June of 2007, the SAs also filed a motion questioning the propriety of GT=s remaining as counsel in certain litigation in the State of New York.[17] Cannon, Bradley and Dallas asserted that GT should remain. They did not tell the Court or the SAs of their March 5, 2007 vote to

[17] The SAs were concerned that GT and the PR/Trustees were relying on a document known as the "October 18th letter" by which GT, Dallas, Cannon, and others would receive a substantial portion of any future sale or refinance of Mr. Brown's royalties and other rights. They believed GT had a conflict in the representation.

make Katz one of five decision makers for the 2000 Trust. The Court determined that other counsel should be retained for the New York litigation.

On June 25, 2007, the SAs issued a first "Quarterly Report" to the PR/Trustees. Their primary areas of concern were the lack of access to information and the potential conflict of the PR/Trustees in promoting a sale of Mr. Brown's assets which would benefit themselves, but might be harmful to the Estate/Trust.

On June 26, 2007, the PR/Trustees still refused access to the records. Cannon asserted that he would not produce any records, despite the Court's June 25 Order, unless instructed to do so by attorney William Hammond. The SAs were later asked to return after the 4th of July. They did so at the earliest date the PR/Trustees would schedule, July 17, 2007.

Meanwhile, on July 10, 2007, a member of Powell Goldstein, Mr. Shearer's law firm, delivered to PR/Trustee Dallas documents for Cannon, Bradley and Dallas to sign and to change the situs of the 2000 Trust to Georgia. The SAs did not learn of this until November, 2007.

On July 17, 2007, the SAs reviewed the Trust's bank account for the first time, and discovered that $900,000 which should have been applied to Mr. Brown's debt at M&T Bank, had been partially misappropriated. Between August 1, 2006 and December 28, 2006, $720,000 had improperly passed through the Trust's checking account and been disbursed by Cannon.

Throughout the period from March to November, discovery was ongoing as to whether Cannon, Dallas and Bradley should be removed as PR/Trustees.

On July 27, 2007 the SAs filed documents asserting that one or more PR/Trustees should be removed because of the alleged $900,000 misappropriation.

On or about August 10, 2007 Cannon wired $866,000 to Honduras.[18] That same day he filed a document with the Probate Court attempting to resign as PR only. In open court, however, he immediately and permanently resigned as PR, Trustee, and as officer, director, and fiduciary of any Brown Entity.[19] He also restored $350,000 from the M&T funds. Attorney Hammond appeared at the hearing along with Mr. Babcock and other attorneys for the PR/Trustees.

On August 10, 2007, Dallas and Bradley, along with the SAs, asked the Court to approve an Agreement by which Bradley and Dallas would temporarily remain as PR/Trustees, subject to greater restrictions. The Court approved the Agreement in an Order dated that same day. At the time of the Agreement, neither the SAs nor the Court knew of attempts to remove the Trust from the state; the creation of the post-death Schedule B; or the events of the March 5, 2007 meeting. Further, Bradley and Dallas, as remaining PR/Trustees, asserted that they knew nothing of the $900,000 transaction.

[18] Cannon alleges that the money was his wife's or jointly his and his wife's.
[19] Except Seventh Decade Productions.

The August 10, 2007 Agreement was read into the record and approved by Dallas, Bradley and Cannon. Based on this Agreement, the hearing on the removal of Dallas and Bradley was delayed. Attorney Hammond and other attorneys, accountants and advisors to the Estate and Trust were terminated by the August 10th Order. The address of the Estate and Trust were changed to Buchanan's Aiken address. Cannon, Dallas and Bradley were directed to deliver all documents of the Estate and Trust, including files of terminated attorneys and accountants, to a central location. In addition, terminated accountant Phillip Farr[20] continued to work and communicate with Cannon, Dallas and Bradley.

On August 31, 2007, PR/Trustees Bradley and Dallas filed a motion to have JBE, Inc. declared an asset of the Estate, rather than of the 2000 Trust. The SAs did not join in the motion.

Bradley and Dallas attached various exhibits to support their position. They asserted that Mr. Brown, rather than the Trust, was the sole owner of JBE, Inc. They asserted the transfer never took place because the stock certificates were not executed. Importantly, they asserted that the JBE, Inc. Tax returns for 2000 - 2005, prepared by Mr. Farr, were the highest evidence that JBE, Inc. was never transferred to the trust because they were filed under penalties of perjury. Returns for those six years showed Mr. Brown, individually, to be the owner JBE, Inc.

[20] Farr's earlier tax returns for JBE, Inc. and Mr. Brown were acknowledged to be incorrect.

Phillip Farr testified in Court on November 15, 2007 that he was not advised of his termination as CPA. On September 5, 2007 Cannon's attorney, James B. Huff, directed Farr to conduct an audit of the Brown Entities and 7th Decade.[21]

Without the knowledge or consent of the SAs Farr's audit continued until shortly before the November 15, 2007 hearing.

In September, 2007, Dallas and Bradley filed a stipulation with the Court in which they again asserted that JBE, Inc. was an asset of the Estate and not the 2000 Trust.[22] Again, the SAs did not join in that stipulation.

On or about September 6, 2007 Cannon, Dallas and Bradley filed claims against the Estate which appear to exceed 15% of its value. Their claims were directly contrary to the representation they made on February 9, 2007 that they had no claims against the Estate.

At the hearing held on September 24, 2007, Bradley and Dallas, through counsel, vigorously argued that JBE, Inc. belonged to the Estate. Again they asserted that the income tax returns, prepared by terminated accountant Phillip Farr, were the best evidence that JBE, Inc. was owned by the Estate.

By October 16, 2007, without the knowledge or consent of the SAs, Phil Farr had prepared, signed and filed tax returns for JBE, Inc. for the years 2004, 2005 and 2006. These

---

[21] Seventh Decade was a company titled in the name of Cannon, into which Mr. Brown's monies were deposited. In testimony, Cannon claimed that Brown was his employee, and entitled to a salary only if he properly performed according to contract. In such case he was entitled to $100,000 per month. Mr. Brown's performances grossed $18 Million between 2003 and his death.

[22] This stipulation was also consented to by Tommie Rae Brown, Terry Brown, Larry Brown, Daryl J. Brown, Vanisha Brown, Deanna J. Brown Thomas, Yamma N Brown; Lindsey Delores Brown, Janise Vanisha Brown, Jason Brown Lewis, Sydney Lumar, Carrington Lumar, Tonya Brown, Romunzo Brown, and Forlando Brown.

returns asserted that JBE, Inc. was owned by the 2000 Trust, and not by the Estate. The SAs learned of the returns after their filing.

Various matters related to the termination and failure to account of Cannon were taken up on September 24, 2007. The SAs, who had not been told of the March 5 meeting; the new Schedule B; the ongoing Phillip Farr audit; the engagement of Powell Goldstein; or the July attempt by Bradley, Cannon and Dallas to move the Trust to Georgia, agreed with Dallas and Bradley that there should be a delay in the hearing on their removal. Pope and Buchanan both asserted that they were attempting to help Bradley and Dallas, as remaining PR/Trustees to focus on various administrative functions of the Estate and Trust which the August 10, 2007 Order had directed needed to be completed.

According to the affidavits of Pope and Buchanan, by early November of 2007 they had learned of the considerations by Dallas and Bradley to move the Trust from South Carolina. They were also aware of the problems caused by the Phillip Farr returns; the failure of the PR/Trustees to prepare inventories or perform other administrative functions; and other issues. Many of these problems were addressed in Court on November 15, 2007.

At the November hearing Cannon testified that after resigning as PR/Trustee he had instructed Phil Farr to prepare the returns in order to save the Estate/Trust $39 Million dollars. He asserted that the SAs would not file such returns. He gave no explanation for why he had not notified Bradley and Dallas or the Court. Cannon, on cross examination about various financial matters - including the $18 Million which Mr. Brown's road shows generated between 2003 and 2006 - exercised his fifth amendment rights against self-incrimination.

Also at the November 15, 2007 hearing Phil Farr testified that he prepared, signed and filed amended income tax returns for 2004, 2005, 2006 for JBE, Inc.,[23] based on information he had received in February of 2007. He testified that he had not had contact with the PR/Trustees during the period. He further testified that he prepared, signed and filed 3 years of JBE, Inc. income tax returns because he had a fiduciary duty to do so. He testified that filing the returns did not save millions of dollars. He gave no explanation why he changed the ownership of the company on the returns from Mr. Brown to the 2000 Trust. Dallas and Bradley assert that Farr never represented the James Brown Estate, merely James Brown individually before his death.

As Keith Babcock, litigation counsel for the PR/Trustees, later testified, it was clear by the afternoon of November 15, 2007 that Bradley and Dallas were to be subjected to substantial scrutiny on November 20, 2007. Even before their testimony, their failure to prepare any Inventory & Appraisement was troublesome. Mr. Cannon had testified that Bradley and Dallas knew of Cannon's payments to himself in early February, 2007. They had never reported it to the Court, and the alleged $900,000 misappropriation remained undiscovered for five months until disclosed by the SAs. Further, in violation of the August 10, 2007 Order, they had not instructed Phillip Farr to deliver his file and discontinue work for the Estate, Trust and Brown Entities.

The Court's suggestions on November 16, 2007 were related to two matters. First, the Court suggested that attorney David Bell might want to withdraw a filing by Velma Brown asserting that she was still married to James Brown. [The record had revealed that she had divorced him.] The second was a suggestion that Bradley and Dallas consider resigning.

---

[23] And a 2006 return.

With the advice of counsel, they elected to resign instead of facing removal. Their resignation was immediate, permanent and complete. It was read into the record. Bradley and Dallas asserted that they had resigned so as not to damage the legacy of James Brown. The immediate and permanent resignation of Bradley and Dallas was accepted by all Interested Parties with respect to the Brown Estate/ the 2000 Trust and the Brown Entities.

THE RESIGNATION OF DALLAS AND BRADLEY WAS VOLUNTARY

Abundant evidence in the record supports that Bradley and Dallas voluntarily resigned. They had advice of competent counsel. They were not pressured by the Court or the SAs.

Although the Court was cognizant of certain evidence from the record, it was unaware of the full extent of the evidence likely to be presented on November 20, 2008, which it has since learned of.

The resignations were voluntary. They occurred before the full evidentiary hearing. Evidence revealed in response to the assertion of Bradley and Dallas that their resignation were coerced, however, shows that there was a substantial likelihood of their removal had they proceeded with the hearing.

Dallas and Bradley have voluntarily produced to the Court and parties the written advice of counsel that they resign, without waiving any attorney/client privileges. That advice was sound in light of the facts which had been uncovered by November 15, 2007, and which were likely to be brought out at the hearing, and as corroborated by evidence in subsequent hearings.[24]

[24] For example, Dallas testified on February 7, 2008 that he knowingly directed his attorney to file documents with the Court related to the Trust's ownership of JBE, Inc. He stated that he authorized the filing of these documents to prevent his removal as PR/Trustee.

Having resigned, as did Cannon, with no notice, the PR/Trustees have no grounds to complain about technical notice requirements, if any, of the statute or the governing documents related to resignation. Equity would not prevent the resignation of PR/Trustees who have breached their duty or acted improperly. The notice requirements of both the governing documents and the statutes are twofold. They protect PR/Trustees who do not voluntarily resign. And they prevent a gap in administration.

The resignation of Dallas and Bradley as Trustees could have been accomplished without the Court's intervention. Dallas and Bradley, as resigned PR/Trustees still have a duty to account for and deliver the assets of the Estate and Trust to the successors. Other than that, they have no further part in the administration of the Estate and Trust or the selection of a successor.

It is clear that multiple proceedings for the removal of Cannon, Dallas and Bradley were commenced in the Probate Court for Aiken County and removed to Circuit Court on motion of the Honorable Sue H. Roe. Once removed to Circuit Court pursuant to 62-1-302(d),[25] the various matters have been heard together.

[25] Formerly 62-1-302(c)

LAW AS TO SUBJECT MATTER JURISDICTION

This Court did not lack subject matter jurisdiction to consider motions to remove Movants. Movants contend that any removal action is a civil action that must be commenced by a summons and complaint under Rules 2 and 3 of the South Carolina Rules of Civil Procedure ("SCRCP"). However, South Carolina Probate Code ("SCPC") section 62-1-304 recognizes exceptions to the application of the SCRCP to matters within the scope of the SCPC: if the SCPC specifically provides to the contrary or the SCRCP is inconsistent with the provisions of the SCPC, then the SCRCP rules do not apply. Section 62-7-706 of the South Carolina Trust Code ("SCTC"), which is contained within the SCPC, provides that a trustee may be removed upon request of a settlor, co-trustee, or beneficiary or "by the court on its own initiative." Because the SCTC specifically contemplates the removal of a trustee by the court sua sponte, a summons and complain cannot be required for a trustee's removal. Otherwise, that Court would have to serve a summons and complaint on the trustee who was the subject of its removal action. The SCPC provisions are therefore inconsistent with the SCRCP on this issue and, consequently, a summons and complaint was not required to commence the removal actions in this case.[26]

A consistent reading of SCPC section 62-1-302 and SCTC section 62-7-201 gives the Probate Court exclusive jurisdiction over matters involving the internal affairs of trusts.[27] The removal of a trustee would fall within the exclusive jurisdiction of the probate court. However, trust matters may be removed from the probate court to the circuit court pursuant to section 62-1-

[26] Even if a summons and complaint was required, any such requirement was waived by appearance and participation.

[27] SCPC section 62-1-302 grants the probate court "exclusive original jurisdiction" over trusts; SCTC 62-7-201 grants the probate court "exclusive jurisdiction" over the internal affairs of trusts.

302(d)(4).[28] Actions to remove the trustees were commenced in the probate court and properly removed to this Court.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. The Motion of Bradley and Dallas to alter, amend or vacate this Court's Order of November 20, 2007 accepting the resignation of Bradley and Dallas; appointing successor Personal Representatives (PRs) of the Estate of James Brown (the "Brown Estate"), deceased;

---

[28] Movants argue that, despite SCPC section 62-1-302(d)(4), SCTC section 62-7-201 somehow precludes removal because SCTC section 62-7-201 does not itself provide for removal of trust actions. However, as with any legislative act, the provisions of the SCPC, which includes the SCTC, must be read as consistent when reasonably possible. It would be inconsistent to read section SCTC 62-7-201 as somehow precluding removal of a trust matter from the probate court to the circuit court, merely because it is silent on that issue, when SCPC section 62-1-302(d)(4) specifically permits the removal of trust matters from the probate court to the circuit court. Moreover, SCTC section 62-7-201 is specifically subject to SCPC section 62-1-302(c) [sic], which was the applicable subsection governing removal before the insertion by the legislature of a new subsection (c) C reconciling jurisdiction over relationship issues between the family and probate courts C in 2005, redesignating former subsection (c) as subsection (d). SCTC section 62-7-201, contained in 2005 Act # 66, was enacted on May 23, 2005, with an effective date of January 1, 2006. SCPC section 62-1-302(c) was redesignated as (d) by 2005 Act #132, enacted on June 3, 2005, and effective on that date. Thus, the SCTC was enacted before the redesignation of SCPC section 62-1-302(c) as (d). The clear intent of the legislature was to make the subject matter jurisdictional provisions of SCTC section 62-7-201 subject to the removal provisions of what is now SCPC section 62-1-302(d).

and appointing successor Trustees of the James Brown 2000 Irrevocable Trust (the "2000 Trust") and its subtrusts is DENIED.

2. Their appointments having been permanently terminated, Bradley and Dallas have no further interest in these proceedings except to account for their actions and deliver the assets of the Estate and Trust to their successors.

3. Bradley and Dallas shall deliver to this Court their final accounting of their acts as Personal Representatives and Trustees within ninety (90) days and shall immediately deliver to the Successor PR/Trustees all assets, books and records of the Estate, Trust and Brown Entities not previously delivered.

AND IT IS SO ORDERED,

Doyet A. Early, III
Resident Judge, Second Judicial Circuit

March 7, 2008
Aiken, South Carolina

FILED
2010 JUL 26 AM 11:50
JEANNE H. BRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT (On Removal from Probate Court) CIVIL ACTION NO. 2007-CP-02-[illegible]
IN RE: THE ESTATE OF JAMES BROWN A/K/A JAMES JOSEPH BROWN	ORDER DENYING MOTION TO RECONSIDER APPOINTMENT OF SUCCESSOR PERSONAL REPRESENTATIVES AND TRUSTEES AND GRANTING RELATED RELIEF

This matter came before me on March 7, 2008 on motion of the former PR/Trustees of the Estate of James Brown and the James Brown 2000 Trust and others for reconsideration of this Court's Order dated November 20, 2007 as it relates to the appointment of Robert L. Buchanan, Jr. and Adele J. Pope as Personal Representatives ("PRs") of the Estate of James Brown, deceased, and as Trustees of the James Brown 2000 Irrevocable Trust (the "2000 Trust") and its subtrusts.

In addition to Buchanan and Pope, other parties to this proceeding present in person or represented by counsel were the original petitioners Daryl J. Brown, Vanisha Brown, Larry Brown, Deanna J. Brown Thomas, Yamma N. Brown, Terry Brown, Tonya Brown, Lindsey Delores Brown, Janise Vanisha Brown, Jason Brown Lewis, Sydney Lumar, Carrington Lumar, Romunzo Brown, Forlando Brown and Tommie Rae Brown.[1] Also present or represented by counsel were James Joseph Brown II, Cinnamon Nicole Memickle Paris and LaRhonda Petitt;[2]

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing is a true and correct copy of the [illegible] original document which have been filed in my office this

APR 14 2008

C.C.C.P. & G.S., Aiken County, S.C.

Deputy Clerk

[1] These are all acknowledged children of [illegible] Mr. Brown's claimed spouse.

[2] These persons claim to be children of James Brown.

262

C. Havird Jones, Jr., Esquire, Senior Assistant Attorney General for the State of South Carolina; and former PR/Trustees David G Cannon, Alfred A. Bradley and Albert H. Dallas.

Prior to the hearing, all parties received this Court's Order dated March 7, 2008 denying reconsideration of the portion of the November 20 Order accepting the resignations of Bradley and Dallas as PR/Trustees.[3] That Order outlines certain facts related to the resignations of Cannon, Bradley and Dallas which are incorporated herein by reference.

The March 7, 2008 hearing related to reconsideration of the portion of the November 20, 2007 Order appointing Buchanan and Pope as Successor PR/Trustees.[4] There appears to be no viable challenge to the appointment of Buchanan and Pope as PRs, as Bradley and Dallas confirm their resignation as PRs and do not contest the appointment of Buchanan and Pope. The only challenge is to the appointment of Buchanan and Pope as Trustees.

---

[3] And officers, directors and/or agents of any Brown Entity other than Geronimo Music, LLC.

[4] The appointment Order was followed by a Certificate of Appointment issued that same day by the Honorable Sue H. Roe, Probate Judge for Aiken County. The November 20 Order gave the Successor PR/Trustees all of the authority and duties granted in the governing documents, other than the requirement of appointing a third PR/Trustee.

On November 29, 2007 the Attorney General of Georgia filed a motion to set aside the November 20, 2007 Order on various jurisdictional and constitutional grounds. I find that such motion should not be considered.[5]

On November 30, 2007, Bradley and Dallas moved to vacate, amend and reconsider the November 20 Order. They later filed various amendments which the PR/Trustees objected to as not timely.

On December 14, 2007 the Attorney General for South Carolina filed an Objection to the Appointment of the SAs as PRs and Trustees.

[5] Grace Evans Lewis, assistant Attorney General for Georgia, was admitted pro hac vice to assist the Attorney General of South Carolina. The status of the Attorney General of Georgia was later revoked as improvidently granted because it was issued with the misunderstanding that the James Brown "I Feel Good" Trust, a South Carolina Charitable Trust, was for the protection of needy children of South Carolina and Georgia. This South Carolina charitable Trust's beneficiaries are not so limited.

On January 6, 2008 Buchanan and Pope served a response to all motions opposing the November 20 Order appointing them.[6] They requested that the Court conduct a full hearing on the propriety of their appointment and make the following findings:

1. Because of the damage caused to James Brown, the 2000 Trust, and the Brown Entities by Messrs. Cannon, Dallas and Bradley, it is both proper and in the best interest of the Estate Plan to have PRs and Trustees serving in both capacities. Separating those functions would cause unnecessary duplication and hinder the Estate Plan of James Brown.

2. Buchanan and Pope ethically and properly performed their service as Special Administrators ("SAs") and their claim for past services was properly ordered by the Court.

3. Buchanan and Pope (or other properly designated fiduciaries) may ethically serve simultaneously as PRs and Trustees under Mr. Brown's Will and the 2000 Trust, and Buchanan and Pope have properly done so since November 20, 2007.

After review of the entire record, this Court makes the following findings:

1. All motions to reconsider or set aside the appointment and service of Buchanan and Pope as PRs and Trustees should be denied.

2. Buchanan and Pope have served properly to date in the capacities of SAs, and later PR/Trustees. They should continue as PRs and Trustees, subject to the right of the PR/Trustees, the Court or any other Interested Persons to seek the appointment of a Special Administrator (SA), a Special Trustee, or both, if appropriate.

3. Cannon, Dallas and Bradley, having permanently resigned as PR/Trustees, have no further interest in matters related to the Estate and Trusts of James Brown other than to deliver to the successor PR/Trustees and to account.

4. So that this Removal/Appointment/Accounting matter is appropriately distinguished from other pending matters, all parties should be directed to

[6] Buchanan and Pope supported their position with their own affidavits and that of Rita Cullum, a certified specialist in Estate Planning and Probate Law.

use the caption attached as Exhibit A as the caption for all future filings in this case.

The basis[7] of this decision is set out below.

FACTS AND PROCEDURAL HISTORY

On August 1, 2000, James Brown executed a Will and Irrevocable Trust. Attached to the 2000 Trust were Schedules A, B and C describing the property "[g]rantor transfers and delivers to the Trustees . . ." [Trust, Article I]. By their terms these documents create the Estate Plan of Mr. Brown, the bulk of which will ultimately pass to the 2000 Trust, to be divided into a charitable and non-charitable trust.[8] The Will and Trust designated Cannon, Dallas and Bradley as PR/Trustees.

Cannon has an accounting degree. Dallas is a Georgia attorney. And Bradley is a former magistrate.

---

[7] Also see facts in this Court's Order dated March 7, 2007 and earlier orders.

[8] The Estate Plan will be effective if the current challenges to the Will and 2000 Trust are unsuccessful. Item X of the Will and Article XXI of the Trust refer to the Will and Trust as Mr. Brown's Estate Plan. The Will is a "pour over" will which, after a devise of personal and household effects ("PHE") to 6 named children, devises the residue to the 2000 Trust [Item II]. If for any reason the pour-over to the 2000 Trust is invalid, the Will creates a Trust identical to the 2000 Trust [Item III]. After Mr. Brown's death, the 2000 Trust divides into the noncharitable Brown Family Education Trust, for the education of certain designated grandchildren under age 35, and the charitable James Brown "I Feel Good" Trust. Schedules A, B and C were signed by Mr. Brown.

Bradley asserts that he refused to serve as a Trustee until certain conditions were met; and did not receive a copy of the Trust until after Mr. Brown's death.[9]

About October 18, 2006 a letter from the Atlanta law firm of Greenberg Traurig (GT) (the "October 18 Letter") was generated which set out a proposed division of proceeds upon a sale or refinance of Mr. Brown's royalties.[10]

James Brown died on December 25, 2006, a resident of Aiken County.

On December 26, 2006 GT formed a Delaware Corporation which, in its internet postings, purports to compete with the 2000 Trust.[11]

On December 25, 2006 the 2000 Trust's bank account contained approximately $288,706. Deposits were made on December 26 and 28, 2006.[12]

---

[9] Tr., Hearing 2/7/08, pp. 243-245, 249 and Exhibit 9. Bradley also asserts that the conditions he required to serve are set out in the claim he later filed against the Estate.

[10] The October 18 Letter proposed various payments exceeding $2 Million plus 10% of proceeds to Cannon (DGC) and Dallas upon a sale or refinancing of certain of Mr. Brown's assets. The October 18 Letter later became part of Cannon's claim against the Estate.

[11] The entity, known as The James Brown Music Education Foundation, LLC, was discovered by Buchanan and Pope in the spring of 2007.

[12] Motion & Recommendation dtd. 7/27/07.

On December 28, 2006 $350,000.00 was paid to Cannon from the 2000 Trust's bank account.[1]

On January 1 or 2, 2007 Dallas, consulting with Cannon, created a document entitled "Schedule B, Irrevocable Trust of James Brown" ("Dallas Schedule B"). Read with Article I of the Trust, Dallas Schedule B asserts that the following assets were transferred and delivered to the 2000 Trust:

> All copyrights and all rights to income from any copyright or publishing rights to musical compositions of James Brown the entertainer, artist, composer and creator of musical works and video graphic and sound images including the likeness, image and persona of James Brown a/k/a The Godfather of Soul and any other stage or performance work now in existence or hereafter created by James Brown; the rights to any book, movie, narrative or illustration of the life and the works of James Brown in any form, including, but not limited to the attached more definitive list of intellectual work product of James Brown, which is ever continuing and which work product may or may not be registered with the Library of Congress, ASCAP or BMI.

[1] This check was not reported to the Court, interested parties, or SAs. It was discovered by the SAs on July 17, 2007.

Dallas did not advise the Court or the SAs of his post-death authorship of Dallas Schedule B until after November 20, 2007.[14]

On January 2, 2007 Bradley wrote Cannon and Dallas asserting that he was ready to serve as Trustee. He asked for a copy of the Trust and an accounting.[15]

On January 3, 2007, according to Bradley, Dallas and Cannon named Deanna Brown as Trustee. The appointment was either not accepted or revoked.

On January 5, 2007 Bradley signed an acceptance as Trustee and was given a copy of the Will and Trust which were the "same documents filed with the Probate Court". This included Dallas Schedule B.[16]

---

[14] At some time after September 24, 2007, Dallas told the S.C. Attorney General that he had created Dallas Schedule B after Mr. Brown's death.

[15] No accounting was ever given. [Tr., Hearing 2/7/08 pp. 247-250, Exhibit 9.]

[16] Tr. Hearing 2/7/08 p.252, Exhibit 5. Affid. Pope dtd 2/18/08, Exhibit D.

On January 11, 2007, the PR/Trustees read the Will in the Aiken County Court House and delivered the Will and the 2000 Trust, with Dallas Schedule B, to family members.[17]

On January 18, 2007 Brown's Will was informally admitted to probate, and Cannon Bradley and Dallas were appointed PRs.[18]

On January 24, 2007 all of Brown's acknowledged children and grandchildren filed an Emergency Petition for Termination of Appointment and Removal of PRs and for Emergency Restraining Order.[19]

On February 1, 2007 Tommie Rae Hynie Brown filed an Emergency Petition for Appointment of Special Administrator (SA).

The January 24 and February 1 proceedings were removed to the Circuit Court by Order of the Honorable Sue H. Roe, Probate Judge.

On February 9, 2007 this Court held an emergency hearing on the two Petitions. Cannon, Bradley and Dallas, as PR/Trustees, appeared at the hearing with four attorneys.[20] As

---

[17] Tr. Hearing 2/9/07, p. 69. See Levenson statement on February 9 that under the Trust presented to the children "...every single thing owned on earth by James Brown was purported to have been transferred to the Trust in the year 2000." See Tr. Hearing, 2/9/07, p. 78.

[18] A majority of the children and grandchildren, along with the putative spouse and other claimed children, are now contesting the validity of the Will and the 2000 Trust.

[19] On January 31, 2007 Tommie Rae Brown filed a separate Omitted Spouse; & Elective Share proceeding claiming to be the surviving spouse. As of this Order, that matter is still pending.

[20] Rodney A. Peeples, Esq., David W. Miller, Esq., J. Strom Thurmond, Jr., Esq. and Wm. Ray Massey, Esq. appeared for the PR/Trustees.

PRs. and also as Trustees of the primary devisee of the Will, the 2000 Trust, Cannon, Dallas and Bradley were necessary parties to the proceedings for removal and appointment of an SA.[21]

At the emergency hearing, Petitioners sought an accounting for the six years the Trust had been in existence. The Court did not allow testimony as to the requested removal and accounting. The Trustees however, through counsel, explained in detail their assertion that various allegations as to their wrongful actions as Trustees were incorrect. They also sought certain relief related to Mr. Brown's home (which is an asset of the Trust) and their administration.[22]

On February 9, among other representations, Cannon, Dallas and Bradley asserted that they were not creditors of the Estate.[23]

---

[21] The PR/Trustees appeared at all subsequent hearings in both capacities with counsel. In later hearings, they also had various individual counsel.

[22] As PR/Trustees, Cannon, Dallas and Bradley, through counsel, made various representations about the Estate, the Trust, and their actions as Trustees.

[23] They asserted they might be creditors of the Trust, but that Georgia counsel had represented that this was not unusual.[Tr. Hearing 2/9/07, pp. 54-55]

On February 19, 2007 this Court issued its Order denying emergency removal of the PRs. The Court's decision rested primarily on its deference to Mr. Brown's selection of Cannon, Dallas and Bradley as PR/Trustees. The Court did, however, decide to appoint an SA.[24]

Extensive discovery on issues related to the removal and accounting of Cannon, Dallas and Bradley commenced shortly after February 19, 2007 and continued until all three resigned.[25]

The February 19 Order set out guidelines for the service of the SA, including the requirement that:

> The Personal Representatives shall inform the Special Administrator of all matters that concern the administration of the Estate.

The PRs were also restrained from selling or pledging any asset of the estate or a corporation or entity owned by the estate, without the consent of the SA.

[24] The parties were urged to reach agreement as to the SA. They were unable to do so.

[25] Cannon, Dallas and Bradley, as PR/Trustees, actively participated in such discovery.

On March 5, 2007 Cannon, Dallas and Bradley met in Atlanta with GT attorneys. They decided that the Trustees would provide "all schedules B" to GT attorney Steve Sidman who, working with William Hammond and Bill Shearer, could determine the "next steps".[26] The Trustees also decided that the 2000 Trust would be controlled by a majority of GT attorney Joel Katz, Frank Copsidas, Cannon, Dallas and Bradley. These actions were not revealed to the Court until 2008.[27]

On March 7, 2007 this Court appointed Buchanan and Pope as SAs. The March 7 Order reaffirmed the February 19th Order, but set additional guidelines, including a requirement of full disclosure.

On March 7, 2007 Hammond sent an email to Cannon and Dallas advising them not to change Schedule B of the Trust. Hammond said that as much as possible should remain in the Estate.[28]

By March, 2007 most of the original counsel for the PR/Trustees had been terminated. Beginning in March, 2007, the PR/Trustees were represented in this proceeding by Keith Babcock and others of Lewis & Babcock, LLP (L&B); Hammond's firm, Hull Towill; and Rodney A. Peeples, Esquire.

---

[26] See Affid. of Buchanan, dtd. 2/18/08, Exhibit B.

[27] William Shearer of Powell Goldstein (PG), Atlanta, was mentioned in the Trustee meeting of January 2007, and William (Bill) Hammond of Hull, Towill appears in March. They are described as estate planning attorneys for the Trust. (Affid. of Buchanan, dtd. 2/18/08, Exhibit E.)

[28] The email said "Leave Schedule B as is without modification unless there is some writing indicating an intention on Mr. Brown's part to complete transfer of his intangible rights to the Trust prior to his death." Tr. Hearing 2/7/08, p. 228.

On March 14, 2007 a member of L&B provided the SAs with a copy of Mr. Brown's Will; the 2000 Trust (with schedules A, B and C); and the Dallas Schedule B. The SAs were not told that the Dallas Schedule B was created by Dallas after Mr. Brown's death.[29]

On March 26, 2007 the PR/Trustees, with Hammond and other counsel, first met with the SAs. The PR/Trustees asked the SAs to approve a sale of Mr. Brown's royalties for $26 Million, but would not allow Buchanan and Pope access to records to conduct due diligence with respect to the proposed sale. They proposed to distribute the sale proceeds in accordance with the October 18 Letter.[30] Buchanan and Pope would not approve the sale without due diligence to determine if it was in the best interest of the Estate to enter into the sale.

On March 26, 2007 Hammond, according to his affidavit, advised Cannon, Dallas and Bradley that they were "sitting ducks" for removal as PR/Trustees.[31]

On April 10, 2007, various parties moved to modify the Order Appointing SAs, to give the SAs greater authority and control.

On April 25, 2007 the SAs and PR/Trustees appeared at a hearing.

---

[29] Keith Babcock of L & B testified that he did not know the Dallas Schedule B had been created by Dallas after Mr. Brown's death. Tr. Hearing 2/20/08, pp .]

[30] The October 18 Letter, at a sale of $26 Million, would have paid about $20 Million on the M&T debt; more than more than $2 Million to Cannon; more than $1 Million to Dallas; more than $500,000 to GT; and other amounts. [Affid. A. Pope., dtd. 12/14/07]

[31] Hammond's affidavit asserts that the first meeting with the SAs was March 23. Buchanan and Pope assert it was March 26. [Affid., Hammond, dtd. 11/30/07; Affid., Buchanan dtd. 12/17/07.]

On April 25, 2007 various children and grandchildren of Mr. Brown commenced another action in Probate Court for an accounting by Dallas, Bradley and Cannon. It was removed to the Circuit Court by Order of the Honorable Sue H. Roe, and was consolidated with other proceedings related to the removal and accounting of Cannon, Dallas and Bradley as PR/Trustees.

On May 30, 2007 Bradley, Dallas and Cannon, as Trustees, served a Return to the Petition for Accounting.

Between March and June, 2007 Buchanan and Pope's primary challenges as SAs were the refusal by the PR/Trustees to grant access to records and the PR/Trustees' insistence on a sale of Mr. Brown's Royalties in accordance with the October 18 Letter. The SAs' 1st Quarterly report to the PR/Trustees, issued June 22, 2007, states, in part:

> . . .
> During the first 3 months of their service, the SAs have identified a number of areas in which the PRs and SAs will need to work to achieve the goal of consensus. They are primarily in the areas of preservation and management of the James Brown royalties and songs, and the preservation and protection of Mr. Brown's image and persona. . . . The intention is to explore issues of concern early in the process of deliberation in the hope that differences can be resolved by PRs, Trustees and SAs without court intervention.
>
> SUMMARY OF FIRST QUARTER
>
> . . .
> The primary challenge to the PRs during the first quarter was obtaining information necessary to oversee the preservation and protection of assets belonging to, or claimed by, the Estate. . .
>
> 3. CLAIMS AND POTENTIAL CLAIMS AGAINST THE ESTATE
>
> . . . 3. The PRs should disqualify themselves from the evaluation of claims in which they have an interest in the outcome ...[to] include claims related to the GT October letter...Geronimo and any other contracts or claims they have to the

Estate. Trust or entity funds.) See Probate Code Section 62-3-713 [Affid., Pope 12/14/07.]

By June 5, 2007, the SAs believed that GT could not continue to serve as counsel for the Estate and James Brown Enterprises, Inc. ("JBE, Inc.")[32] in certain litigation in New York (the "NY Litigation"). They filed a motion to engage new counsel.[33]

On June 5, 2007 the SAs also filed a motion to gain access to all books and records of the Estate, Trust and Brown Entities.

On June 12, 2007 the SAs prepared and filed a report related to the NY Litigation.

On June 13, 2007 a hearing was held on various matters. This Court orally directed the PR/Trustees to produce for continuing access the books and records of the Estate, the 2000 Trust and various Brown Entities.

On June 22, 2007 this Court directed the SAs to select new counsel for the NY Litigation.[34]

---

[32] JBE, Inc. is owned either by the Estate, the 2000 Trust, or both. Under Mr. Brown's Estate Plan, like all assets other than his PHE, it will pass to the 2000 Trust.

[33] The February 19 Order directed the SAs to try to reach consensus with the PRs where possible, and to file a motion where agreement could not be reached. Under the October 18 letter, GT was to receive 5% of any "new transaction". GT also required that the Estate approve $327,000 of bills, including $149,912.28 for the NY Litigation (in which they had only filed a complaint and opposed Defendant's motion to disqualify them) as a condition to continuing service.

[34] Matthew Ballenger, Esquire, of Hogan & Hartson (H&H) was engaged.

On June 22, 2007 this Court issued its Order directing Cannon, Dallas and Bradley as PRs/Trustees and in any capacity which they held with respect to Brown Entities, to give to the SAs:

> ". . . complete, direct and continuing access to all information, documents and records, in any form, related to James Brown, the Estate of James Brown, the James Brown 2000 Irrevocable [Trust]...and any Brown Entities or interest, however titled."

On June 26, 2007 SA Pope traveled to Barnwell to Cannon's office to review documents. The Trustees refused to allow Pope access to any documents. Cannon advised Pope that he didn't care what the Order said, that he wasn't showing her anything until Hammond told him to do so. (Affidavit Pope, 12/14/07). The Trustees later told Pope the SAs could return after the 4th of July.

Buchanan and Pope tried to return as soon as possible after July 4th, but were told scheduling prevented their return until July 17, 2007.

Before July 10, Cannon and Dallas met in person and/or by phone with a member of the firm of Powell Goldstein. On July 10, 2007, a Powell Goldstein attorney sent Dallas documents purporting to transfer the situs of the 2000 Trust from South Carolina to Georgia. The draft documents did not contain draft notices necessary to comply with the requirements of the South Carolina Trust Code as it relates to changing the situs of a Trust.[35]

On July 17, 2007 Buchanan and Dallas traveled to Barnwell; reviewed the 2000 Trust's checkbook for 2006; and found that $900,000.00 payable to M&T Bank[36] had been deposited

---

[35] In testimony given on November 15, 2007 Cannon asserted that Powell Goldstein was never hired by the former PR/Trustees, and documents to transfer the Trust to Georgia were never signed. As set out below, Trustees Dallas and Bradley testified on March 7, 2008 that such documents were signed.

[36] This money should have been applied to Mr. Brown's 1999 royalty-backed security debt to TIAA.

into the 2000 Irrevocable Trust's account on August 1, 2006. $720,000 of the amount was misappropriated between August 1, 2006 and December 28, 2006, three days after Mr. Brown's death.[37]

On July 27, 2007 Buchanan and Pope moved the Court for an Order removing one or more PR/Trustees as a result of the serious breach of trust related to the $900,000.00 check and misappropriation. The motion was scheduled for August 10, 2007.[38]

On July 26 or 28, 2007, Cannon, along with Dallas and Bradley, met with attorneys Stanley Jackson and Hammond. According to Dallas and Bradley,[39] they signed the following documents that day:

a. A document to remove the situs of the Trust to Georgia;[40]

b. A document by which Cannon resigned as Trustee;[41]

---

[37] Cannon returned $350,000.00 of the $720,000.00 when he resigned on August 10, 2007.

[38] Motion and Recommendation of SAs dtd. 7/27/07 with supporting documentation.

[39] This was testified to for the first time on March 7, 2008. Cannon stipulated that if he were asked the same questions he would assert his 5th Amendment rights.

[40] Such document has never been shown to the Court, SAs or Interested Parties, and Cannon testified under oath that it was never signed.

[41] Such document has never been shown to the Court, SAs or Interested Parties.

c. A document by which Hammond was appointed Trustee.[42]

[42] Such document has never been shown to the Court, SAs or Interested Parties.

On August 2, 2007, Hammond wrote M & T Bank.[43] Hammond asserted that Cannon's misappropriation of the $900,000.00 was accidental, and that Cannon's disbursements, including Cannon's payments to himself, were authorized by Mr. Brown. [Affid. A. Pope, 2/18/08].[44]

On August 3, 2007 attorney Jackson filed notice of his appearance as counsel for Dallas and Bradley. In later filings and statements he confirmed that he was representing them both individually and as PR/Trustees.

On August 3, 2007 Dallas and Bradley filed with this Court affidavits related to the $900,000.00 transaction in the 2000 Trust's account. Each said "[i]t is my intention to provide the [SAs] with all records in my possession related to James Brown, and to the best of my knowledge I have done so." Both asserted they did not know of the misappropriated $900,000.00 check. Neither Affidavit mentioned the Trust's events of July 26 - 28, 2007.

On August 3, 2007 Cannon filed an affidavit asserting that the other Trustees, Dallas and Bradley, had no knowledge of the $900,000.00 transaction. [Affidavit Cannon, dtd. July 22, 2007].

---

[43] M & T Bank was the payee for the $900,000.00 check which was misappropriated on August 1, 2006 and placed in the 2000 Trust checking account.

[44] According to Dallas' testimony on March 7, 2008, Hammond would have written this letter after Cannon resigned and Hammond was purportedly appointed a Trustee. Hammond's letter did not disclose his purported appointment.

On August 7, 2007 most of the children and grandchildren served a Return to the SAs' Motion and Recommendation asserting that all three PRs and all three "alleged Co-Trustees" should be permanently removed for breaches of Trust. They also sought related relief.

On August 8, 2007 the Rev. Larry Fryer, a Lincolnton, Georgia minister, moved to intervene in this proceeding on behalf of beneficiaries of the James Brown "I Feel Good" Trust.[45]

On August 9, 2007, Cannon signed and filed another Affidavit.[46]

On or about August 10, 2007 Cannon wired $866,000 to Honduras. [Tr. Hearing 11/15/07, pp. 80-81].

At the hearing on August 10, 2007, Cannon announced his immediate and permanent resignation as PR/Trustee and as director, officer and/or fiduciary of any kind as to the Estate, the Brown Trusts and all Brown Entities.[47] Upon Cannon's resignation on the record in open Court "[a]ll persons confirmed in open Court that they consent[ed] to the resignation . . . " Bradley and Dallas; on the record in open Court, recited the terms of an Agreement[48] they, as PR/Trustees, had reached with the SAs. The Agreement and Order resulted in a delay in the hearing on the removal of Dallas and Bradley as PR/Trustees.

---

[45] The motion was later abandoned.

[46] The August 9, 2007 Affidavit was similar to Cannon's July 22 Affidavit, but also asserted that "[he] never discussed with Mr. Dallas or Mr. Bradley the deposits or checks written by me nor did they ever see the check register until they were disclosed to the [SAs]" [Affid., Cannon 8/9/07]

[47] With the exception of Seventh Decade Productions, Inc.

[48] Tr. Hearing 8/10/07, p. 6, l.2 – p. 29, l.16

After the August 10, 2007 Agreement was recited on the record it was reduced to an Order dated that same day. All counsel, including counsel for Bradley and Dallas, remained at the Courthouse and worked on the proposed language for the Order.

The August 10, 2007 Order, in part, stated that "[r]emaining PRs and/or Remaining Trustees shall mean Alfred A. Bradley and Albert H. Dallas." As PR/Trustees, Dallas and Bradley agreed not to take action for the Estate and/or Trusts and/or any Brown Entity without the written consent of the SAs. Hammond was present at the August 10, 2007 hearing.[49]

The August 10 Agreement and Order, in addition to confirming Cannon's resignation, provided:

> . . . 1. To the extent not terminated prior to the date of this Agreement, the service of all attorneys, accountants and/or financial advisors engaged by the Estate, the Brown Trusts and the Brown Entities is hereby terminated and the remaining PRs and Trustees shall secure and deliver to [a central location], all files of James Brown, the Estate, the Brown Trusts and/or the Brown Entities from such attorneys, accountants and/or financial advisors. The new accountant for the Estate, the Brown Trusts and all Brown Entities shall be William E. Sellars, Jr., CPA.[50]
>
> 2. This Court orders and directs the delivery to [a central location] of all files and documents in the possession of all attorneys, accountants and other financial advisors whose service has been terminated as set out herein, and who have rendered prior service to James Brown, the Estate of James Brown, any Brown Entity, and/or any Brown Trust.[51]

---

[49] Tr. Hearing 11/20/07; pp. 325, 326.

[50] Certain attorneys, including L& B, were excepted from the termination.

[51] On the same day the Court entered its Order Confirming Engagement of Counsel for All Plaintiffs in NY Case. That action is being pursued, and the counterclaim defended, by the Estate, JBE, Inc. and The New James Brown Enterprises, Inc. [sic], a d/b/a used by Mr. Brown. The suit was commenced in 2006 prior to Mr. Brown's death. The Trust is not a party.

The August 10 Agreement and Order also set out certain administrative functions to be performed by the PR Trustees within the following 3 months, many of which related to tax and accounting matters. As stated above, William Sellars, CPA was designated CPA for the Estate, the 2000 Trust and all Brown Entities.[52]

[52] Among the functions to be completed within 3 months of August 10, 2007 was the Application for Recognition of the charitable status of the James Brown "I Feel Good" Trust by the Remaining Trustees. This was not completed when Dallas and Bradley resigned. It was filed by Buchanan and Pope on December 5, 2007 after they became Trustees. [Affid. Pope, dtd. 12/14/07]

On August 10, 2007 this Court issued a separate Order confirming Engagement of Counsel for all Plaintiffs in the NY Litigation.[53]

By August 15, 2007, more than 80 boxes were delivered by Cannon, Dallas, Bradley and L&B to the central location set out in the Agreement and Order of August 10. They were represented to be the entire files of Cannon, Dallas and Bradley related to James Brown, the Estate, the Trust and the Brown Entities. Hammond, as one of the terminated attorneys, delivered what was represented to be his entire file.[54] The PR/Trustees, the SAs, and other counsel[55] were given free access to the boxes, which were designated as the "Brown Historical Documents."

---

[53] The August 10th Order confirming counsel in the NY Litigation recited that "it is believed the owner of [JBE, Inc.] is either the Estate of James Brown or the [2000 Trust] or both." It also said that the PRs, Trustee of the 2000 Trust and SAs had ratified the engagement of H&H but that, despite this, GT had not signed a consent to substitution. [Order Counsel dtd. 8/10/07.]

[54] None of the purported July 26/28, 2007 documents about which Dallas and Bradley testified on March 7, 2008 were delivered. Nor were the files of GT and Powell Goldstein delivered. The Court notes that they still have not been delivered, but should be. Both appear to contain important information about the period prior to August 10, 2007.

[55] With certain exceptions related to purported privileged documents.

On August 22, 2007 L&B as "[c]ounsel for Remaining [PR s] and Trustees"[56] filed with the Court documents seeking to obtain relief related to not assisting Cannon. The purported Hammond appointment and situs issue were not mentioned.

On August 27, 2007 Dallas and Bradley, as "[PRs] and Trustees of the 2000 Trust" moved this Court for an accounting by Cannon.[57]

On August 31, 2007 this Court issued the requested Order confirming that L&B, as counsel for the Remaining PR/Trustees, should not assist Cannon in discovery matters.

---

[56] Bradley and Dallas

[57] The purported July 26/28 Hammond appointment and situs issue were not mentioned.

On August 31, 2007 Dallas and Bradley, as Remaining PR/Trustees, filed a Motion asking the Court to declare that JBE, Inc. was an asset of the Estate - not of the 2000 Trust. Buchanan and Pope did not join in the motion or make any similar motion. No reference was made to the events of July 26/28.[58]

On September 7, 2007, Dallas and Bradley as PR/Trustees, supplemented their Motion to require Cannon to account.

On September 7, 2007 Bradley filed a claim against the Estate for Compensation as PR of the Estate and Trustee of the 2000 Trust, plus a percentage of a large number of other projects and assets.[59]

On September 7, 2007 Dallas filed a claim against the Estate for Compensation as PR of the Estate and Trustee of the 2000 Trust, plus $624,876 and other amounts.[60]

---

[58] In testimony given on February 7, 2008 Dallas stated that he believed the representation of JBE, Inc., ownership by the Estate to be false.

[59] Celebrity Duck 10% of Revenues; Doll Deal 5% of 300,000;Georgia-Lina record 6%; Godfather of Soul Publishing now Geronimo Music, L.L.C. 6% of revenues; 10% of any revenues earned due to blank tapes sold by Alliance of Artists and Recording Companies for Brown recordings; 10% of any revenues earned due to the marketing and/or exploitation of master recordings; 5% of the royalties received from the "James Brown Doll" [Claim of Bradley filed 9/7/07, Affid. A. Pope dtd. 12/14/07 Exhibit I]

[60] The claim was based on a purported oral contract by which Mr. Dallas asserts he would receive "5% of Mr. Brown's and his enterprises' gross revenue"; 5% of revenues from Teddy Bear Productions as agent for Hakuhdo Advertising Agency; 25% of royalties received from the "James Brown Doll"; 10% of revenues from God Father of Soul Publishing, 5% of Global Gaming revenue; 5% of revenues from the sale of Mr. Brown's writer's share music, and 5% revenues from the 1991 pay-per-view recording. [Claim of Dallas filed 9/7/07, Exhibit B].

On September 12, 2007 Buchanan and Pope, as SAs, joined Dallas and Bradley in a recommendation that there be further delay in any hearing on the removal of Dallas and Bradley.[61]

On September 14, 2007 Cannon filed a Motion to Alter or Amend the Order related to his return of the remaining $373,000 belonging to M&T Bank (for application to the TIAA debt).

On September 17 and 26, 2007 terminated accountant Phil Farr, in communication with terminated Hammond and Cannon, prepared, signed and filed amended Income Tax Returns for JBE, Inc. for the year 2006. The Amended Returns purported to change ownership of JBE, Inc. from Mr. Brown to the 2000 Trust. [Tr. Hearing 11/20/07, pp. 246-247, Ex. 19 & 20.]

On September 17, 2007 attorneys Eric S. Bland and Ronald L. Richter, Jr., filed a Notice of Appearance on behalf of Cannon in this matter.

On September 20, 2007 the Attorney General of South Carolina moved to intervene in this proceeding. No objection was made to his intervention.

On September 20, 2007 attorney Stephen L. Brown filed a notice of appearance herein on behalf of M & T Bank under Indenture of Teachers Insurance and Annuity Association ("TIAA"), to whom the $900,000.00 check was payable.

On September 20, 2007 Cannon filed a Return to Motion for Accounting.

---

[61] Active discovery on the issue of removal and accounting of Cannon, Dallas and Bradley as PR/Trustees had been ongoing. This Court issued several Orders related to discovery, including commissions for out-of-state depositions. At the time the SAs did not know of the July attempt to move the situs of the Trust to Georgia. Nor did they know of the post-death Dallas Schedule B to the 2000 Trust, or that Dallas and

On September 24, 2007 this Court issued a confidentiality Order related to Cannon's financial statements.

At the hearing on September 24, 2007 in open court, Dallas and Bradley, "individually and as Co-Trustees of the Trust and Personal Representatives of the Estate" entered into evidence a Stipulation through their counsel Jackson [Tr. Hearing 9/24/07, Ex. 3]. They asserted that they were the remaining PRs and Trustees. They asserted that:

> . . . the only assets belonging to the Trusts as of the date of death of James Brown were (a) all ownership interests in the residence of the deceased, James Brown, including all land of approximately 60 acres, improvements and its fixtures located at ... Beech Island [SC] and (b) possibly the sum of fifty ($50) dollars. **No other assets had been properly transferred and accepted by the Trustees as trust assets.**
>
> 2. [JBE, Inc.] is an asset of the Estate and not presently of the Trusts. [emphasis supplied]

Cannon had filed a motion related to JBE, Inc. that Dallas knew to be false.

Buchanan and Pope, as SAs, refused to join in the stipulation.[62]

Cannon was Ordered by the Court to repay the additional $373,000.00 he had misappropriated. He has not done so.

At the September 24th, 2007 hearing Dallas and Bradley, as PR/Trustees, argued vigorously that JBE, Inc. was an asset of the Estate of James Brown, not of the 2000 Trust. As Trustees, they asserted that the stock had never been transferred to them. They cited the tax returns as the best evidence JBE, Inc.[63] was never transferred to the 2000 Trust. [Tr. Hearing 9/24/07, pp. 45-46].

On September 25, 2007 the initial Estate Tax Returns and payments were due for the Estate. No payments were made by Bradley and Dallas with the Extension Request. No date-of-death Inventory of assets of the Estate or Trust was completed by Cannon, Bradley or Dallas.

[62] On February 7, 2008 Dallas testified that the assertions in the Stipulation were false. Dallas asserts that he was coerced into filing the August 31 motion and the September 24 Stipulation by Pope and Buchanan. There is simply no evidence to support this conclusion.

[63] The 2000 - 2005 Tax Returns of JBE, Inc. showed Mr. Brown as the sole owner.

On September 26, 2007 Cannon filed claims against the Estate seeking more than $1 Million and a percentage of past and future revenues.[64]

On October 2, 2007 this Court issued its Order that Cannon had failed to account, as required.

By Order dated October 4, 2007 the South Carolina and Georgia Attorneys General were granted permission to intervene in this matter to represent and protect the interests of any beneficiaries of any Charitable trust created by the Will or 2000 Trust.[65]

On October 15, 2007 Dallas wrote Phil Farr, CPA, a letter confirming Farr's termination as of August 10, 2007.

About October 16, 2007 Farr signed and filed amended tax returns he prepared for three years for JBE, Inc. The amended tax returns again claimed the 2000 Trust - not Mr. Brown - was the owner of JBE, Inc.[66]

---

[64] The claim of Cannon seeks Five percent (5%) of all revenue generated by gross bookings, royalties and any other funds generated by James Brown Enterprises, Inc. from whatever source and two and one-half percent (2.5%) for the handling of vintage revenue... ongoing claim for all revenue earned and not paid prior to death and all revenue earned since date of death and all future revenues of James Brown Enterprises, Inc. [Claim of Cannon filed 9/26/07; Affid., A. Pope 12/14/07,Exhibit J]

[65] The subsequent pro hac vice admission of Grace Evans Lewis, Georgia Assistant Attorney General, was later revoked.

[66] Mr. Cannon, in testimony on November 15, 2007, said he directed the preparation of the returns to save the Estate $39 Million. Neither Farr nor Cannon adequately explained the ownership change. Cannon has exercised his 5th Amendment rights in all hearings after November 15, 2007.

On November 2, 2007 the SAs (acting without Bradley and Dallas) petitioned for an Order to allow engagement of J. Kendall Few, Esquire and James Gilreath, Esquire to represent the Estate and/or the 2000 Trust in connection with losses by Cannon and others from 1999.[67]

On November 9, 2007 Bradley and Dallas as PR/Trustees amended their motion related to JBE, Inc., asking the Court to determine whether JBE, Inc. was an asset of the Estate or Trust.

On November 12, 2007 most of the acknowledged children and grandchildren of Mr. Brown amended their Petition for Removal of Personal Representatives to seek immediate removal of Bradley and Dallas.

On November 13, 2007, the South Carolina Attorney General opposed the motion to engage counsel to seek redress for losses by Cannon and others since 1999.

On November 15, 2007 a hearing took place in Bamberg, South Carolina. After a full day, it was continued on Tuesday, November 20, 2007. Jackson appeared on behalf of the PR/Trustees, as did attorneys from L&B. At the hearing, testimony was take by Cannon, Farr and Hammond. None of the three mentioned the events of July 26-28.

By November 15, 2007, Cannon had refused to repay the remainder of the wrongfully misappropriated funds.

---

[67] The authorization request included any subtrust of the 2000 Trust, including the James Brown "I Feel Good" Trust and the Brown Family Education Trust and/or James Brown Enterprises, Inc. and/or James Brown, LLC and/or James Brown Royalty Venture, SPC and/or any other entity owned or controlled by any one of them, as their interests appear. As cited in the motion, in accordance with their inability to act under the August 10 Agreement and Order because of conflict, Bradley and Dallas did not participate in the motion or selection or engagement of counsel.

At the hearing Cannon repeatedly asserted his Fifth Amendment rights. He was ordered to produce a financial statement within 10 days.[68]

On November 20, 2007, prior to the hearing on their removal, Bradley and Dallas immediately and permanently resigned as PR/Trustees and as director, officer, agent and/or fiduciary of the Estate, the Brown Trusts and all Brown Entities.[69] The Court appointed Buchanan and Pope as PRs and Trustees.[70] Bradley and Dallas then surrendered to Buchanan and Pope the bank accounts, home estate and various assets. They have not yet accounted, and have been ordered to account separately as both PRs and Trustees.

On November 27, 2007 this Court received and sealed the financial statement of Cannon.

On November 30, 2007 Dallas and Bradley sought reconsideration of the November 20, 2007 Order. They attached to their Motion a purported copy of the Will and Trust. Attached as part of the Trust was the Dallas Schedule B.[71] The Motion was supported by Affidavits of Bradley, Dallas and Hammond.[72] The affidavits asserted that an Advisory Board was appointed

---

[68] Cannon also asserted that Cannon's company was entitled to the proceeds from $18 Million of Mr. Brown's bookings from 2003-2006, and that Mr. Brown was paid $1.2 Million a year only. [Tr. Hearing 11/15/07, pp. 200, 201]

[69] With the exception of Geronimo, LLC.

[70] Buchanan and Pope were given all of the duties and authority set out in the Will and Trust, but were not required to appoint a third PR/Trustee.

[71] In later testimony, Dallas confirmed that he had created Schedule B after Mr. Brown's death. He said he did so with the advice of counsel. But a copy of the Trust given by Cannon and Dallas to Bradley on January 5, 2007 contained the Dallas-created, post-death Schedule B. Dallas testified that the Dallas Schedule B was simply a listing of assets of JBE, Inc., and should not have been filed with the Court as part of the 2000 Trust. [Tr. Hearing 2/07/08, pp. 150-151, 155-156; Affid. Pope dtd 2/18/08, Exhibit D]

[72] The affidavits assert that Buchanan and Pope caused Trust, Estate and other funds to be improperly commingled. This Court has since found and held that the financial condition of the Estate and Trust was deplorable when Buchanan and Pope took over on November 20, 2007, and that funds were needed from

in January 2007 and all five members accepted the appointment.[73] No one of these five has appeared in person or by affidavit in the fifteen months this matter has been pending.

On December 14 and 17, 2007 Buchanan and Pope served affidavits outlining the reasons for their belief that Bradley and Dallas should not return to any fiduciary capacity, and why the same person(s) needed to serve as both PR and Trustee to protect and defend Mr. Brown's Estate Plan.

On December 18, 2007, Pope and Buchanan withdrew the former PR/Trustees' Motion Related to Ownership of JBE, Inc.

On December 20, 2007, Bradley and Dallas filed a motion for recusal addressed to this Court. The motion was orally denied after hearing on January 9, 2008. The oral Order denying recusal was followed by a written order dated February 19, 2008.

---

all sources merely to provide security for the home estate (owned by the Trust) in which assets belonging to both the Estate and Trust are located.

[73] This conflicts with the testimony of Pope on March 7, 2008, that she was advised by Dallas and Bradley in the fall of 2007, while they were working on the application for The James Brown "I Feel Good" Trust, that no Advisory Board existed.

Between December 20 and 26, 2007 Tommie Rae Hynie Brown and most of the acknowledged children and grandchildren of Mr. Brown filed multiple suits challenging the validity of both the Will and the 2000 Trust.[74]

On December 28, 2007, most of the acknowledged children and grandchildren of James Brown served a Return to Motions to Vacate, Alter or Amend, asserting that Buchanan and Pope's appointment should be confirmed and Dallas and Bradley not allowed to return.

[74] These matters are still pending. The three beneficiaries who support the validity of the Trust are 21-year-old grandson Forlando Brown, his brother Romunzo and his father, Terry Brown. Forlando Brown testified under oath that he believed that Cannon, Dallas and Bradley have done nothing wrong, and should not have resigned.[Tr. Hearing 2/7/08 p. 23.]

On or about January 2, 2008 Forlando Brown, represented by Powell Goldstein, former counsel to the 2000 Trust, filed suit in the Federal District Court for South Carolina for a declaration that Buchanan and Pope have no authority to serve as Trustees of the 2000 Trust.[75]

On January 9, 2008 Bradley and Dallas participated in hearings before this Court related to the Will and Trust.[76] Dallas and Bradley both testified before this Court. Neither advised the Court of the events of July 26-28, 2007 or the purported appointment of Hammond.

On January 9, 2008 this Court approved the engagement of counsel to recover losses to the Estate/Trust and Brown Entities by Cannon and others from 1999.

On February 5, 2008, through Mr. Few and Mr. Gilreath, Buchanan and Pope as PR/Trustees brought an action against Cannon, Dallas, Bradley, Joel Katz, GT and Enterprise Bank. The suit seeks actual and punitive damages in connection with more than $12 million in alleged losses since January 1, 1999.[77]

---

[75] By its terms the James Brown 2000 Irrevocable Trust, upon the death of James Brown, will divide into 2 Trusts, the James Brown "I Feel Good" Charitable Trust and the Brown Family Education Trust. Neither subtrust was funded on November 20, 2007 when Buchanan and Pope became PR/Trustee. Because of the contest to the validity of the Will and Trust, they cannot now be funded.

[76] In December and January Forlando Brown, Terry Brown and Romunzo Brown sought certain relief related to their interest in the 2000 Trust. Others sought relief related to the intervention of the Georgia Attorney General in this and other matters related to the 2000 Trust.

[77] Even if they returned as Trustees, Cannon, Dallas and Bradley could not pursue these claims on behalf

On March 5, 2008, Bradley and Dallas each filed suit against Buchanan and Pope as PRs of the Estate. They seek payment of the amounts set forth in their claims. Those cases have been removed to this Court.

On March 7, 2008 the hearing in this matter was held.

of the Estate or Trust against themselves.

On March 9, 2008, Cannon[78] filed a suit against the Estate seeking payment from the Estate as set out in his claims. That case has been removed to this Court pursuant to 62-1-302(d).

On March 13, 2008, prior to the entry of this Order, Dallas and Bradley filed a Motion for Relief from this Court's Order dated August 10, 2007 as it relates to the Trustees serving on that day.[79] They ask that the August 10 Order, which memorializes the Agreement read into the record, not apply to the Trustees.

LAW AS TO SUBJECT MATTER JURISDICTION

This is a consolidation of several actions commenced in the Probate Court relating to the removal, appointment and accounting of PRs and Trustees. The actions are clearly removable under § 62-1-302(d), as set out in the removal Orders of the Probate Court and this Court's earlier Orders. The several cases were properly removed by the Probate Judge on her own motion. Any failure of a party to attach a Summons, if required, was waived by appearance of the PR/Trustees and other parties. Parties were added and deleted.

Under § 62-7-202 Bradley and Dallas accepted the Trusteeship of a Trust having its principal place of administration in South Carolina and submitted personally to the jurisdiction of the Courts of this state regarding all matters involving the Trust.

---

[78] Represented by Angela M. Kirby, Esquire and Thomas E. Lydon, Esquire

[79] "to the extent that it is applicable to the [2000] Trust or the Trustees serving thereunder."

Bradley and Dallas, at a minimum, did not exercise reasonable care to prevent a co-Trustee from committing a serious breach of trust after the death of Mr. Brown. Bradley and Dallas never dissented to Cannon's actions. In fact, it now appears they may be seeking his return as Trustee. Equity could not allow the return of a Trustee who exercises his Fifth Amendment rights when questioned about his financial dealings with the Trust.

This Court finds that under § 62-1-106 of the S.C. Probate Code statements have been filed and made by Cannon, Bradley and Dallas which have been used to circumvent the provisions and purposes of the Probate Code as enumerated in § 62-1-102.

This Court finds that Bradley and Dallas admit that they have violated § 62-7-810 by not keeping adequate records of the administration of the 2000 Trust. Over a period of a year, Bradley and Dallas have made conflicting and changing statements and filings, including statements under oath and by Stipulation. They have changed what they assert are the assets of the 2000 Trust. The same is true with respect to the assets of the Estate.

Dallas and Bradley have not complied with § 62-7-813 to keep the qualified beneficiaries of the 2000 Trust reasonably informed. The copy of the Trust provided to the qualified beneficiaries pursuant to § 62-7-813(c) (and to the SAs) now appears to have been created in part by one or more Trustees after Mr. Brown's death.

On November 20, 2007 Dallas and Bradley were faced with what (it is now known) was a great possibility of removal as PR/Trustees. They had faced it before on August 10, 2007. On August 10, 2007 they entered into an Agreement. On November 20, 2007 they resigned.

By their agreement to resign Bradley and Dallas were spared possible removal; and the SAs and all qualified beneficiaries consented not to have the hearing. They sought, and obtained, this Court's approval of the resignation, as well as that of the beneficiaries.[80]

On November 20, 2007, Bradley and Dallas sought the protection of the Court and the agreement of the qualified beneficiaries, as well as the South Carolina Attorney General, to resign without nominating a Successor. This offer was accepted by the Court in a proceeding in which Dallas, Cannon and Bradley, as PR/Trustees have been parties for months. The jurisdiction of the Court to accept the consent resignation and appoint a Successor is clear.

SERVICE OF POPE AND BUCHANAN AS PERSONAL REPRESENTATIVES AND TRUSTEES

At the March 7, 2008 hearing, Pope testified that having separate PRs and Trustees under the facts of the Brown Estate and Trust would complicate the efforts of the PR/Trustees to alleviate the problems caused by Cannon, Dallas and Bradley. She testified that the Estate/Trust was unable to meet its obligations, and could not bear the additional expense. Further, she asserted that she and Buchanan believed that they could not carry out their fiduciary duty to properly administer the assets and defend the Estate Plan if they did not hold both the PR and Trustee positions. Pope testified that she and Buchanan defined these duties as:

1. Preventing the return of Cannon, Dallas and Bradley to any position of authority or control of the Estate/Trust or Brown Entities.

2. Defending the Estate Plan of James Brown against all challenges to the Will and Trust and the claim of Tommie Rae Hynie Brown.

---

[80] See § 62-7-410 et seq. for the various combinations of qualified beneficiaries, fiduciaries and others who may modify trust terms, including service of trustees, with and without Court permission.

3. Resolving and defending the approximately $35 Million of claims against the Estate.

4. Preserving assets of the Estate/Trust.

Buchanan and Pope, without objection, introduced the affidavit of attorney Rita B. Cullum, a certified specialist in Estate Planning and Probate law. Ms. Cullum's affidavit supports the position of Buchanan and Pope that it is customary and appropriate for the same persons to serve both as PRs and as Trustees in a unified Estate Plan such as Mr. Brown's.

The Will and Trust of Mr. Brown clearly contemplate that the same persons will be both PRs and Trustees. They set out broad powers for the interaction of the two. For example, Article XXV (25) says "[t]he fact that the Grantor's personal representative and the Trustee are the same shall in no way affect the validity [of a right in the Trustee to purchase or sell to the Estate]."

In summary, the service by Buchanan and Pope as both PRs and Trustees is appropriate, efficient and contemplated by the documents.

The extraordinary twists and turns which this Estate/Trust has taken suggest that there may be a need for a special administrator and/or special trustee at some time in the future. This Court finds that Buchanan and Pope were properly appointed; have properly performed; and should continue in both capacities. This does not prevent them, or any other Interested Person, from seeking the appointment of a special fiduciary when and as needed.

NO ADVISORY BOARD

The provisions of Mr. Brown's Will and 2000 Trust with respect to succession of PR/Trustees upon a resignation are similar but not identical. Since no challenge has been made

to the appointment of Buchanan and Pope as PRs. the minor differences are not discussed herein.[31]

[31] See Item IV of the Will.

2000 Trust Articles VIII(6) and XIII relate to the possible role of an Advisory Board in the selection of a Successor Trustee. Article VIII(6) says the Advisory Board shall have three (3) initial members, to be "designated in/or by a separate writing, reference thereto being craved and to be given effect as if such Advisory Board Members were set forth herein." There is, however, no provision for succession of the Advisory Board itself.[82]

A document dated August 1, 2000 and entitled Advisory Board recites that James Brown appointed an Advisory Board of Willie Glenn, Ella Overton and Deanna J. Brown Thomas. None were serving as of the November 20, 2007 resignation.

Pope testified that she was aware that Trustee Dallas had mentioned names of certain prominent persons as Advisory Board members. She testified, however, that Dallas had confirmed in the fall of 2007 that no Advisory Board existed. Pope testified that the issue came up in the context of work on the Application for Charitable Recognition of The James Brown "I Feel Good" Trust. She asserted that one or both of Dallas and Bradley confirmed to her and to the accountant, William Sellars, that no Advisory Board existed. Neither Dallas nor Bradley denied this.

Although Dallas and Bradley testified that they, and Cannon, had designated certain persons to be members of the Advisory Board after Mr. Brown's death, no documents were presented to show either how the original Advisory Board was deconstituted or how any successor Advisory Board was formed or functioning.

---

[82] The Trustee(s) may consider but are not obligated to follow advisories as propounded by the Advisory Board, See Article VIII(6)

It is unclear from the 2000 Trust whether the original three members of the Advisory Board even have the authority to select a Successor Trustee. This Court does not have to reach that question, since there was no evidence that the persons selected by Cannon, Dallas and Bradley had ever served or functioned as an advisory board.

More than sixty (60) days have elapsed since the well-publicized resignation of Bradley and Dallas, and no person has stepped forward to assert status as a member of the Advisory Board on November 20, 2007.[83]

This Court finds that the provisions of the Trust related to the role of an Advisory Board in the selection of successor Trustees are not applicable here. Even if one existed, Cannon, Dallas and Bradley as resigned PR/Trustees would have no standing to challenge how it functioned. This Court, in appointing Buchanan and Pope, complied with S.C. Trust Code 62-7-704 as well as Article XIII of the Trust (and Item IV of the Will).

NO APPOINTMENT OF SUCCESSOR TRUSTEE

Article XIII of the 2000 Trust provides that a resigning Trustee may appoint a Successor. No such appointment[84] was ever made.[85]

---

[83] Dr. Leonard McIntyre and Ms. Inez Tenenbaum were appointed to the Advisory Board by Buchanan and Pope after November 20, 2007.

[84] Except for the possible secret attempted Hammond appointment in July, 2007 discussed below.

[85] When Cannon resigned as PR/Trustee on August 10, 2007, the remaining PR/Trustees did not attempt to implement the nomination/Advisory Board succession procedure.

Under the 2000 Trust, if a resigning Trustee, fails to appoint a Successor, "then the Court having jurisdiction over this Trust shall select the successor Trustee." That is what happened in this case.

Upon their resignation, Dallas and Bradley surrendered bank accounts, the Estate home and control to the Successors on November 20, 2007. All individual beneficiaries of the Trust, heirs and devisees ratified the resignations and the appointment of Buchanan and Pope as successor PR/Trustees. Buchanan and Pope accepted the appointments. Under Article XIII of the Trust Buchanan and Pope now "... succeed to and have all the rights, powers and duties, authority and responsibility conferred upon the Trustee originally named herein."[86]

PURPORTED APPOINTMENT OF WILLIAM HAMMOND AS TRUSTEE

The testimony of Dallas and Bradley on March 7, 2008 that they had taken secret action on July 26 or July 28, 2007 to appoint Hammond as Trustee and to remove the situs of the Trust to Georgia raises numerous disturbing issues. The failure to disclose raises issues under the first Order for Appointment of SAs dated February 19, 2007, which directed the PRs to inform the Special Administrator of all matters that concern the administration of the Estate. Surely the appointment of a Trustee and an attempt to transfer the situs of the Estate's primary devisee to another State would qualify as essential information.

Dallas and Bradley, through attorneys Stan Jackson, Keith Babcock and others, filed numerous documents between August 10, 2007 and November 20, 2007, in which they represented themselves to be sole remaining Trustees. They represented to this Court since August 10, 2007 that they were the remaining Trustees. On August 10, 2007, as the sole

[86] The only exception is their right not to appoint a third PR/Trustee.

remaining PR/Trustees, they asked this Court to approve an Agreement by which they would not be immediately removed. They supported the Agreement and this Court's August 10, 2007 Order with their representations and affidavits confirming full disclosure.

PROPRIETY OF ACTIONS OF SPECIAL ADMINISTRATORS

This Court has reviewed the record of Buchanan and Pope and found that their service in light of the emerging facts related to the former PR/Trustees has been outstanding. As required by this Court's Orders of February 9, 2007 and March 7, 2007, Buchanan and Pope made every effort to reach consensus with the PR/Trustees where possible. Only after nearly three months of refusal of access to documents did they seek Court guidance to obtain access to records.[87]

Upon discovery of the $900,000.00 which was payable to M&T Bank, Buchanan and Pope did not accuse all three Trustees. Instead, they sought immediate removal only of those responsible for the misappropriation. Buchanan and Pope gave Bradley and Dallas the benefit of the doubt. Bradley and Dallas, however, did not accord Buchanan and Pope the same treatment. They did not inform Buchanan and Pope of attempts to change either Trustees or the situs of the Trust.[88]

---

[87] The Court's Order of February 19, 2007, which, it is now apparent, was repeatedly violated by Cannon, Dallas and Bradley, directed the PRs to keep the SAs fully informed of all matters that concern the administration of the Estate.

[88] The Court notes that the Trust's attorneys, Frank S. MacGaughey, III and William B. Shearer, Jr. of Powell Goldstein, sent papers to remove the Trust to Georgia on July 10, 2007, just days before the misappropriated $900,000.00 was discovered by Pope and Buchanan on July 17, 2007. According to Dallas and Bradley, they were then signed just after the discovery. Then a week later Dallas and Bradley filed affidavits saying they knew nothing of the $900,000 misappropriation until after it was discovered by the SAs.

Jackson filed notice that he represented Bradley and Dallas on August 3, 2007. He later filed numerous documents and made representations to the Court that he represented Dallas and Bradley as the remaining PRs and Trustees. Neither he nor they mentioned Hammond or the purported situs change. Jackson was with Bradley and Dallas when they recited the August 10, 2007 Agreement they had reached with the SAs to prevent an immediate hearing on their removal as PRs and Trustees. Jackson filed on their behalf, as PRs and Trustees, the motion to declare JBE, Inc. an asset of the Estate, rather than the Trust. In short, during the more than three months from August 10, 2007 until their resignation neither Bradley nor Dallas gave any indication of the purported secret appointment of Hammond. Nor did they, Jackson or Hammond advise the Court, or anyone, of the purported (but ineffective)[89] situs change.

The actions of Hammond himself are wholly inconsistent with his election as Trustee. He appeared in Court on August 10, 2007 while Cannon was resigning and the Agreement was recited by which Dallas and Bradley temporarily remained as PR/Trustees. Pursuant to the Agreement and Order, he turned over what was supposed to be his entire file, to be retained with Historical Documents. Along with other members of his firm, Hammond filed a claim against the Estate of James Brown for services rendered up to the time of his termination by the August 10, 2007 Order.[90]

On November 30, 2007 Hammond signed an affidavit, filed with this Court stating that he believed Mr. Brown's net estate to exceed $85 million. He did not tell the Court he had ever

---

[89] Dallas admitted that the statutory requisites for transferring the situs of a Trust out of state were not met. [Tr. Hearing 3/7/08, pp.].

[90] The Court takes judicial notice that the claim and accompanying documents give no indication of Hammond's purported appointment as Trustee.

been appointed a Trustee. He asserted that "false charges" were asserted against Cannon, Dallas and Bradley. He asserted that the Trust assets have been valued at over $20 million, and "may be worth more than $80[million] if [JBE, Inc.] owns the rights to James Brown's image and persona".

Hammond asserts that after the first meeting with Buchanan and Pope on March 23[91] he advised Cannon, Dallas and Bradley that they were "sitting ducks" for attempted removal because of high (5%) fees payable to "Personal Administrators" in South Carolina. Hammond's affidavit did not disclose that he was purportedly a Trustee. Nor did he address the more than 10% claimed by Dallas, Cannon and Bradley. The Court notes that Hammond, Jackson and Dallas are all attorneys and officers of the Court who understand the consequences of false and misleading representations.

The Court is deeply concerned with the revelations of March 7, 2008. For purposes of this Order, however, they are important only to confirm that the appointment of Buchanan and Pope should be affirmed, and that Cannon, Dallas and Bradley should not return to any position of trust and confidence with respect to the Estate of James Brown or the 2000 Irrevocable Trust.

Based on the foregoing, it is ORDERED, ADJUDGED AND DECREED:

1. All motions to reconsider, revoke and/or modify the appointment of Robert L. Buchanan, Jr. and Adele J. Pope as Person Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust and its subtrusts, deceased, are hereby DENIED.

2. This matter is remanded to the Probate Court for Aiken County for the sole purpose of issuing a certificate of appointment, and such additional certificates of appointment as shall be requested, confirming that pursuant to the Orders of this Court dated August 10, 2007, November 20, 2007, March 7, 2008 and this Order,

[91] Buchanan and Pope assert that their first meeting with Hammond was on March 26, 2007.

the said Robert L. Buchanan, Jr. and Adele J. Pope were appointed Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust on November 20, 2007, and that such appointments remain in full force and effect.

3. The costs of this action, including reasonable attorneys' fees, shall be equitably charged to Cannon, Bradley and Dallas, pursuant to South Carolina Trust Code § 62-7-1004. Such amounts shall be determined by affidavits and brief arguments (without testimony) at the hearing to be held on May 9, 2008.

4. Without affecting the validity or finality of the appointment of the PR/Trustees, the Attorney General of South Carolina or any Interested Person may bring an action in the appropriate Court to determine the effect, if any, on the 2000 Trust of the July 26/28 documents, if found.

5. All future filings in connection with this matter shall bear the caption attached as Exhibit A.

AND IT IS SO ORDERED.

Doyet A. Early, III
Resident Judge, Second Judicial Circuit

April 8, 2008
Bamberg, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	) (On Removal from Probate Court)
	)
DARYL J. BROWN, individually and on behalf of his minor children, LINDSEY DELORES BROWN and JANISE VANISHA BROWN, VANISHA BROWN, LARRY BROWN, DEANNA J. BROWN THOMAS, individually and on behalf of her minor child JASON BROWN LEWIS, YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY LUMAR and CARRINGTON LUMAR and TONYA BROWN; TERRY BROWN, ROMUNZO BROWN and FORLANDO BROWN,	) CIVIL ACTION NO. 2007-CP-02-0122
and	
TOMMIE RAE HYNIE BROWN,	
and	
ROBERT L. BUCHANAN, JR. and ADELE J. POPE as Personal Representatives and Trustees	
Plaintiffs,	
v.	
DAVID G. CANNON, ALBERT H. DALLAS, ALFRED A. BRADLEY, as former Personal Representatives and former Trustees; and other Interested Persons: HENRY DARGAN McMASTER in his capacity as Attorney General of the State of South Carolina; MANUFACTURERS & TRADERS BANK; JAMES JOSEPH BROWN II, CINNAMON N.M. PARIS, LARHONDA PETITT and JEANETTE MITCHELL, as potential heirs of James Brown,	
Defendants	
IN RE: ESTATE OF JAMES BROWN AND THE JAMES BROWN 2000 IRREVOCABLE TRUST	

The above caption represents the status of the parties as of March 7, 2008.

The South Carolina Court of Appeals

In Re: The Estate of James Brown, a/k/a James Joseph Brown, Albert H. Dallas and Alfred A. Bradley, Trustees of the Irrevocable Trust Agreement of James Brown, Appellants

v.

Adele J. Pope and Robret L. Buchanan, Jr., Putative Trustees of the Irrevocable Trust Agreement of James Brown, Respondents

The Honorable Doyet A. Early, III
Aiken County
Trial Court Case No. 2007-CP-02-00122

ORDER

Appellants appeal from three orders issued by Judge Early: a November 10, 2007 order purporting to accept their resignation as personal representatives of James Brown's Estate and as trustees to the James Brown 2000 Irrevocable Trust, and appointing Respondents as the new personal representatives and trustees; a February 19, 2008 order denying Appellants' motion to recuse Judge Early from the case; and a March 7, 2008 order denying Appellants' motions to alter, vacate or amend the November 10, 2007 order. Since Respondents have been appointed as the personal representatives and trustees, they have sought the trial court's assistance and permission to auction off certain items that once belonged to James Brown in order to generate funds to protect the assets of both the Trust and the Estate. On February 20, 2008, the circuit

court issued an order directing the auction take place, if possible, by August 1, 2008. Subsequently, the Respondents negotiated a deal with Christie's and again, sought the circuit court's approval before going forward. On April 1, 2008, the circuit court directed Respondents to execute the consignment agreement with Christie's. No party has appealed from this order or the February 20, 2008 order. The Christie's auction is scheduled for Thursday, July 17, 2008.

On July 9, 2008, a mere eight days prior to the auction, Appellants filed a "Motion to Enforce the Automatic Stay," arguing Respondents are not allowed to dispose of property while the order appointing them as personal representatives/trustees is being appealed. Respondents have filed a return along with a motion requesting that the stay (if any) be lifted. Appellants filed a return to Respondents' motion to lift the stay as well as a reply to Respondents' return. Christie's has also filed a motion to appear as amicus curiae, and the South Carolina Attorney General's Office has filed a motion to intervene.

We grant Christie's motion to appear as amicus curiae and the Attorney General's motion to intervene. All documents filed with this Court have been carefully considered, and after review, we find that regardless of whether Rules 205 and 225, SCACR, provide for an automatic stay, this Court elects to lift the stay. The auction may take place as scheduled, and for practical purposes, Respondents may continue to act as trustees while this appeal is pending. We decline to require Respondents to post a bond, despite Appellants' request. With proper accounting, the funds generated from the auction can be tracked, and to the extent there may be some dispute about whether the proceeds from the auction belong to the Estate or to the Trust, an accounting will allow the dispute to be sorted out at a later date.

Finally, we order this appeal be expedited. From this date forward, no extensions will be granted absent extraordinary circumstances.

AND IT IS SO ORDERED.

Joseph M. Crosby, A.J.

Columbia, South Carolina

July 14, 2008

FILED

cc: R. Wayne Byrd, Esquire
Audrey M. Byrd, Esquire
R. Hawthorne Barrett, Esq.
Curtis Ott, Esq.
James Daniel Bailey, Esquire
Tressa T.H. Hayes, Esquire
Senior Assistant Attorney General C. Havird Jones, Jr.
James B. Richardson, Jr., Esquire

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) CASE NUMBER: 2008-CP-02-872
COUNTY OF AIKEN)

FILED 8-1 2008
Liz Godard
C.C.C.P.&G.S.
Anita Knowles SASR
Deputy Clerk

1. DARYL J. BROWN, individually and on behalf of his minor children, LINDSEY DELORES BROWN and JANISE VANISHA BROWN, 2. VANISHA BROWN, 3. LARRY BROWN, 4. DEANNA J. BROWN THOMAS, individually and on behalf of her minor child JASON BROWN LEWIS, 5. YAMMA N. BROWN, individually and and on behalf of her minor children SYDNEY L[redacted]R and CARRINGTON L[redacted]R and 6. TONYA BROWN

Plaintiffs,

v.

ADELE POPE as Personal Representative of the Estate of James Brown and as Trustee of the purported Irrevocable Trust of James Brown dated August 1, 2000, ROBERT L. BUCHANAN, JR. as Personal Representative of the Estate of James Brown and as Trustee of the purported Irrevocable Trust of James Brown dated August 1, 2000, TOMMIE RAE BROWN, as the potential heir of James Brown, JAMES [redacted] BR[redacted] as the potential heir of James Brown, CINNAMON NICOLE MERNICKLE PARIS as the potential heir of James Brown, LARHONDA PETITT as the potential heir of James Brown, JEANETTE MITCHELL, as the potential heir of James Brown, TERRY BROWN, as the potential heir of James Brown, ROMUNZO BROWN as the potential heir of James Brown, FORLANDO BROWN, as the potential heir of James Brown, HENRY DARGAN MCMASTER in his capacity as ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA, JANE DOE and JOHN DOE numbers I, II, III, IV as potential heirs and/or devisee and/or beneficiaries of James Brown and as representatives of all other persons known or unknown claiming to be an heir and/or devisee and/or beneficiary of of James Brown.

Defendants.

ORDER APPROVING AND SETTING CONDITIONS OF INTERIM PAYMENTS OF EDUCATIONAL BENEFITS

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

AUG 0 1 2008

Liz Godard
C.C.C.P. & G. S., Aiken County, S.C.
Anita Knowles
Deputy Clerk

315

This matter was scheduled for hearing on June 6, 2008 in connection with the request of Robert L. Buchanan, Jr. and Adele J. Pope, Personal Representatives of the Estate of James Brown (the "PRs"), for guidance with respect to circumstances which have developed since this Court's Order dated August 10, 2007[1]. The August 10, 2007 Order provided, in part, that the Estate of James Brown, if and when funds are available, should be allowed to advance tuition payments for qualified beneficiaries of the Brown Family Education Trust who ratify the Trust.

The PR/Trustees, upon receipt of the net proceeds of the Christie's sale, anticipate that for the first time the Estate/Trust may have adequate funds to advance certain tuition payments. They seek Court guidance as to the following questions:

1. When funds become available, may the Estate/Trust advance tuition payments to qualified beneficiaries of the Brown Family Education Trust who ratify the Trust even though Tommie Rae Hynie Brown, 5 of Mr. Brown's 6 acknowledged children, 7 grandchildren and certain purported heirs have, since the August 10 Order, contested the validity of both the 2000 Will and the 2000 Trust in this proceeding?

[The PR/Trustees ask the Court to confirm that they may.]

2. May the PR/Trustees make tuition payments for Forlando Brown despite his challenge in Federal Court to the authority of the PR/Trustees to act? Is the same true of other beneficiaries who challenge their status as Trustees?

[The PR/Trustees ask the Court to find that they may make such payments.]

3. Do the limitations on distributions and forms and assurances obtained and proposed by the PR/Trustees in making limited tuition payments during the pendency of this and other actions adequately protect the interest of creditors of the Estate/Trust and potential heirs while preventing the beneficiaries from possible permanent loss of educational benefits?

[The PR/Trustees ask the Court to find that they do.]

---

[1] Consideration of this matter was delayed as a result of concerns raised by the Order of the Honorable Jasper M. Cureton, S. C. Court of Appeals, dated May 28, 2008 in Case No. 2007-CP-02-0122. This was resolved by subsequent Order of Judge Cureton dated July 14, 2008.

Without specific objection from any party or creditor, the Court, based on the facts set out below, answers each of the questions in the affirmative.

HISTORY OF BROWN FAMILY EDUCATION TRUST

The Will of James Brown and the James Brown 2000 Irrevocable Trust were created on August 1, 2000. The validity of both are currently being challenged by Plaintiffs and others, and the recitation of facts prior to the death of James Brown on December 25, 2006 is without prejudice to those positions.

At the death of James Brown the 2000 Trust provides for division into two Trusts, as follows:

1. The non-charitable Brown Family Education Trust (about $2 Million)
2. The James Brown "I Feel Good" Trust (charitable Trust, expected to be much larger.)

The Education Trust, upon its creation, divides into shares providing a fund of approximately $220,000 from which each designated grandchild may receive benefits **prior to reaching age 35.** On the grandchild's 35th birthday, his/her share goes to the "I Feel Good" charitable Trust.

Before Mr. Brown's death the then-Trustees David G. Cannon, Albert H. Dallas and Alfred A. Bradley (the "Former PR/Trustees") had the authority under Article IV of the 2000 Trust to make distributions to or for the benefit of beneficiaries of the Education Trust. None were made.

After Mr. Brown's, death, on April 5, 2007, the Former PR/Trustees created a bank account in the names of the "I Feel Good" Trust [Regions Bank Acct.#3900199613]. The name was, however, erroneous, because the majority of the funds were not used for any charitable purpose, but for the Brown Family Education Trust. The account transactions were:

PRIMARY TRANSACTIONS – REGIONS BANK ACCOUNT I/N/O I FEEL GOOD TRUST OF JAMES BROWN

April 5, 2006	Deposit	$6,000.00	[From Irrevocable Trust's account]
April 9, 2006	W'drawal	($5,201.14)	[Paid by Trustee Dallas , Tuition, children of Darren Lumar.]
June 6, 2007	Deposit	$870.00	[Tribute to Mr. Brown.]
August 8, 2007	W'drawal	($1,581.06)	[Transfer by former Trustees to James Brown Enterprises, Inc.]
Balance since August 8, 2007		**- 0 -**	

On or about May 10, 2007 the PR/Trustees, who were then Special Administrators (SA s) began working with the Former PR/Trustees to develop a procedure, and seek Court approval, to make tuition advances from the Estate for student grandchildren who were potential beneficiaries of the Education Trust if and when funds were available. College students and older grandchildren would be given priority because of the termination of benefits at age 35

On August 10, 2007 this Court adopted the recommendations of the Former PR/Trustees and SA s, making it a part of the Order accepting the resignation of David Cannon. [See Order dtd. 8/10/07, p. 9]

In order to qualify for benefits, the August 10, 2007 Order required that a designated grandchild student must ratify the validity of the 2000 Trust.

There are nine members of the class of grandchildren who are potential recipients of scholarship benefits under the Education Trust.

From August 10, 2007 to the present, the Estate/Trust has lacked funds to make any tuition payments.

On November 20, 2007 the Former PR/Trustees Cannon, Dallas and Bradley resigned, and Buchanan and Pope became PR/Trustees.

Between December 20 and 26, 2007, seven of the nine potential eligible recipients of Education Trust benefits, and others, challenged the validity of the 2000 Trust. This made them

ineligible to receive tuition benefits under the guidelines established by both the current and Former PR/Trustees and the August 10 Order.

Shortly after the filing of the contests to the 2000 Will and 2000 Irrevocable Trust, Buchanan and Pope as PR/Trustees notified the grandchildren that they would seek Court approval of tuition payments in accordance with the earlier plan when funds are available if the parent who would potentially take an intestate share if the Will and Trust were set aside agreed to indemnify the PR/Trustees.

The only 2 grandchildren who currently confirm the validity of the 2000 Trust and are potential recipients of the Education Trust benefits are Romunzo Brown and William Forlando Brown.

On December 31, 2007 William Forlando Brown verified a complaint which asserted that Trustees Buchanan and Pope were improperly and illegally appointed Trustees of the 2000 Trust and its subtrusts. The suit was filed about January 2, 2008.

Since January 2, 2008 both Forlando Brown and Romunzo Brown have sought tuition assistance, and their father, Terry Brown, has agreed to the indemnity conditions, but the Estate/Trust lacks funds to pay any tuition at this time.

Between June, 2008 and September 2008 the PR/Trustees will be dealing with the more than $45 Million pending claims against the Estate.

Upon receipt of the Christie's sale proceeds, which are expected by the fall of 2008, the PR/Trustees expect to pay initial Estate Taxes (now overdue) and priority expenses of administration. Thereafter, they expect to have funds to pay moderate tuition expenses for grandchildren/students over 21 who otherwise qualify. They anticipate that the payments, expected to be less than $80,000 per year, will not substantially impair the PR/Trustee's ability

to defend the Estate Plan and contest claims of creditors (provided the Christie's proceeds are at least the expected amount).

On or about May 12, 2008, the PR/Trustees gave informal notice of their intent to request Court approval to all heirs, devisees, and potential heirs of James Brown, as well as to creditors who have filed claims against the Estate. None has filed written objection to the request.

This Court finds that under the circumstances set out below it would be appropriate for the PR/Trustees to advance future tuition payments for beneficiaries 21 and older. Upon receipt of the Christie's sale proceeds, and after payment of initial Estate Taxes, with interest, and payment of all court-ordered priority expenses of administration, the PR/Trustees should be allowed (if funds are available) to make limited tuition advances for acknowledged grandchildren upon the following conditions:

1. Tuition payments may be made from the net proceeds of the Christie's sale only after the above payments are made.

2. Tuition payments shall be made only for children of acknowledged children who are students and who are 21 or older.

3. Tuition payments shall be made directly to the educational institution, and shall not exceed $20,000 per student per semester.

4. The PR/Trustees shall not be required to make any such advances, and may, in their sole discretion, discontinue payments at any time based on the financial condition of the Estate/Trust.

5. Tuition payments may be made only for the benefit of those students who acknowledge the validity of the 2000 Trust and who, along with their parent, have executed all reasonable receipt and indemnity forms requested by the PR/Trustees.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the PR/Trustees, upon receipt of the net proceeds of the Christie's sale are authorized to make payments as aforesaid.

320

AND IT IS SO ORDERED.

Doyet A. Early, III
Resident Judge, Second Judicial Circuit

July 25, 2008
~~Aiken~~, South Carolina

The South Carolina Court of Appeals

JEANETTE F. BARBER
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734-1890
FAX (803) 734-1839
www.sccourts.org

November 6, 2009

James Richardson, Jr., Esquire
1229 Lincoln St.
Columbia, SC 29201

Re: McMaster, Henry v. Bauknight, Russell
Case Tracking #: 2009142286

Dear Mr. Richardson:

Enclosed is a copy of an Order of the Court in regards to the above case.

All parties are advised that the matters referred to in the accompanying order will be consolidated under the case tracking number as bolded above. The caption for all future documents filed in this matter shall include the case caption as it appears below:

In Re: The Estate of James Brown and The James Brown 2000 Irrevocable Trust u/a/d August 1, 2000

Ex Parte: Robert L. Buchanan, Jr. and Adele J. Pope, as Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust, Appellants,

Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Daryl J. Brown, on behalf of his minor children, Lindsey Delores B. and Janise Vanisha B.;Deanna J. Brown Thomas, on

behalf of her minor children, Jason Brown L.; Yamma N. Brown, on behalf of her minor children, Sydney L., Carrington L., and Tonya B.; Vanisha Brown; and Larry Brown; Tommie Rae Hynie Brown, Respondents,

v.

Albert H. Dallas, Alfred A. Bradley, and David G. Cannon, Individually and as (purported) Trustees of the James Brown 2000 Irrevocable Trust; Russell L. Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and The James Brown 2000 Irrevocable Trust, Terry Brown, Romunzo Brown; Forlando Brown; Cinnamon N.M. Paris; Larhonda Petitt; and Jeanette Mitchell also **Respondents.**

Very truly yours,

CLERK

JFB/ec

cc: Tressa T.H. Hayes, Esquire
C. Havird Jones, Esquire
Fred L. Kingsmore, Jr., Esquire
H. Wesley Kirkland, Jr., Esquire
James Mixon Griffin, Esquire
Jan L. Warner, Esquire
Max N. Pickelsmer, Esquire
Louis Levenson, Esquire
Matthew Day Bodman, Esquire
R. Wayne Byrd, Esquire
Robert N. Rosen, Esquire
T. Heyward Carter, Jr.,Esquire
S. Alan Medlin, Esquire
David L. Michel, Esquire
Thornton Morris, Esquire
William Joseph Barr, Esquire
Albert Shahid, Jr., Esquire

STATE OF SOUTH CAROLINA COUNTY OF AIKEN The Pullman Group, LLC, Plaintiff, vs. Robert L. Buchanan, Jr. and Adele J. Pope, Personal Representatives of the Estate of James Brown, Defendant.	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT CASE NO. 2007-CP-02-122 FINAL ORDER DISMISSING PETITION AND REMANDING TO PROBATE COURT

This matter came before me at a hearing held on October 23, 2008 on cross-motions of the Parties. Plaintiff seeks to stay the proceeding on its petition for allowance of claim. Defendants seek to dismiss the action pursuant to Rule 12 (b)(3), (6) and (8). Present were: James Drennan, III, Esquire, attorney for Plaintiff; James D. Bailey, Esquire, attorney for Defendants; and Defendants Robert L. Buchanan, Jr. and Adele J. Pope, Personal Representatives.

Plaintiff supported his motion for stay with an Affidavit. The Court has also taken judicial notice of the Probate file of the Estate of James Brown, Aiken County Case No. 2007-ES-02-0056 and portions of the file of the proceeding pending in New York.

The parties' recitation of the nature of the claim, as well as the procedural status of this case and the New York litigation discussed below is essentially the same.

Petitioner admits by Affidavit that his claim against the James Brown Estate is based solely upon his rights, if any, under Paragraph 7 of a February 24, 1999 "Engagement Letter" between Pullman and James Brown, which was attached first to Statement of Claim filed in the Probate Court for Aiken County, and later the Plaintiff's Petition for allowance of claim. On its

face, the "Engagement Letter" provides that any enforcement must be in the courts of the State of New York.

In 2006, prior to the death of James Brown, Mr. Brown, James Brown Enterprises, Inc. And James Brown, LLC filed an action against Plaintiff in the Supreme Court of New York. Pullman counterclaimed seeking certain relief under Paragraph 7 of the "Engagement Letter".

After the death of Mr. Brown, his Estate was substituted as a party, and the action proceeded. It was first under the auspices of David G. Cannon, Albert H. Dallas and Alfred A. Bradley, the original Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust ("PR/Trustees"). Since the resignation of the last of the three original PR/Trustees on November 20, 2007, the litigation has proceeded under their successors.

Defendants assert, and the Court agrees, that this Court lacks subject matter jurisdiction and personal jurisdiction based upon paragraph 12 of the "Engagement Letter", which provides that New York law is to govern the Agreement, and that any litigation must be commenced in the courts of New York.

Defendants also assert, and Plaintiff and the Court agree, that all claims against the Estate of James Brown not encompassed in the New York proceeding pending at Mr. Brown's death, in which his Estate is a party, are forever barred by applicable statutes of limitation.

Whether considered under Rule 12 or Rule 56, based on Plaintiff's affidavit, this Court concludes that this matter must be dismissed for lack of subject matter jurisdiction. Since the Estate of James Brown, among others, is a party to the litigation pending in New York, the Estate of James Brown cannot be closed.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED:

1. The Petition for allowance of claim filed by the Pullman Group against the Estate of James Brown is dismissed.

2. A certified copy of this Order shall be filed in the Probate Court as evidence that such claim is void.

3. This Order cannot, and does not, affect the outcome of the claim pending against James Brown in the New York case on December 25, 2006, the date of his death, in which the Estate of James Brown, James Brown Enterprises, Inc. and James Brown, LLC are defending the Pullman claims.

AND IT IS SO ORDERED,

Doyet A. Early, III
Resident Judge, Second Judicial Circuit

November 13, 2008
~~Aiken~~, South Carolina
Columbia

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III Circuit Court Judge

Case No. 2008-CP-02-01647 - original
Case No. 2009-CP-02-01810 - cert/copy

In Re: The Estate of James Brown and
The James Brown 2000 Irrevocable Trust u/a/d August 1, 2000

Ex Parte: Robert L. Buchanan, Jr.; and Adele J. Pope,
as Personal Representatives of the Estate of James Brown
and Trustees of the James Brown 2000
Irrevocable Trust, ... Appellants

Henry Dargan McMaster, in his capacity as Attorney
General of the State of South Carolina; Daryl J. Brown,
on behalf of his minor children, Lindsey Delores B.
and Janise Vanisha B.; Deanna J. Brown Thomas,
on behalf of her minor children, Jason Brown
L.; Yamma N. Brown, on behalf of her minor children,
Sydney L., Carrington L., and Tonya B.;
Vanisha Brown; and Larry Brown; Tommie Rae Hynie
Brown, ... Respondents

v.

Albert H. Dallas, Alfred A. Bradley, and David G. Cannon,
Individually and as (purported) Trustees of the James
Brown 2000 Irrevocable Trust; Russell L. Bauknight, as
Special Administrator and Special Trustee for the Estate of
James Brown and the James Brown 2000 Irrevocable Trust,
Terry Brown; Romunzo Brown; Forlando Brown; Cinnamon
N.M. Paris; LaRhonda Petitt; and Jeannette Mitchell, also ..... Respondents.

ORDER FOR RELEASE OF INFORMATION RELATED TO
ATTORNEYS' FEES AND OTHER COMPENSATION

FILED 3-15 2010
CCCP&GS 9:30 Am
Deputy Clerk

This matter comes before me on motion of defendants/appellants Robert L. Buchanan, Jr. and Adele J. Pope asking the Circuit Court to deliver and/or direct the Clerk of Circuit Court to deliver all documents related to attorneys' fees, costs and/or compensation presented to the Circuit Court in this matter, including but not limited to, the contingency fee contract of Louis Levenson, Robert Rosen and the fees of the Guardian ad Litem for minor James B:

This Court has made no findings for necessity for confidentiality.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that this Court is filing with the Clerk of Circuit Court, and the Clerk is hereby directed, to deliver to Robert L. Buchanan, Jr., Adele J. Pope and/or their counsel, any and all documents related to attorneys' fees and/or compensation, and/or costs, and/or fees of guardians ad Litem and their counsel presented to this Court in the above cases.

AND IT IS SO ORDERED.

Doyet A. Early, III
Resident Judge, Second Judicial Circuit

March 17, 2010
Aiken, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF AIKEN Russell L. Bauknight, as Personal, Representative of the Estate of James Brown, Deceased, and as Trustee of the James Brown 2000 Irrevocable Trust, and James Brown Enterprises, Inc. Plaintiffs, v. David G. Cannon, Albert H. Dallas, Judge Alford A. Bradley, Joel Katz, Greenburg Traurig, LLP and Enterprise Bank of South Carolina, Defendants.	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT CIVIL ACTION NO. 2008-CP-02-0322 ORDER SUBSTITUTING PARTIES AND AMENDING ORDER GRANTING MOTION TO SEVER AND PROCEED SEPARATELY

FILED 4.8 2010 1:30 PM
C.C.P.&G.S.
Deputy Clerk

This matter came before me on March 29, 2010 at 1:30 p.m. in Bamberg, South Carolina. Plaintiff named above moved to be substituted for Robert L. Buchanan, Jr. and Adele J. Pope herein, and to have all matters related to Albert H. Dallas severed.

This Court orally granted the severance on March 29 *sua sponte* without ruling on the substitution. The severance was confirmed by Order of this Court dated March 30, 2010.

Upon review of the record, this Court finds that confusion and potential prejudice to the parties may result from the severance of the Dallas claims and counterclaim - made on motion of Russell Bauknight - without first substituting Mr. Bauknight as the fiduciary herein. Based on the Court of Appeals Order dated November 6, 2009 in Case 2007-CP-02-0122 ("Case 122") this Court *sua sponte*, and pursuant to Rule 21, grants the substitution of Bauknight for Buchanan and Pope herein, and modifies its severance order dated March 30, 2010 as set out below.

APR - 8 2010
C.C.C.P. & G.S., Aiken S.C.

Background

Buchanan, Pope, Bauknight and Dallas all participated in the appeal of David G. Cannon in Case 122, and are bound by the holding of the South Carolina Court of Appeals therein dated November 6, 2009.

On November 6, 2009, prior to its final decision in the Cannon appeal, the Court of Appeals mandated that pending the appeal of Bauknight's appointment:

> . . .
>
> [A]t the same time the circuit court relieved P&B of their duties, it also placed upon Bauknight the fiduciary duty to manage and control the Estate and Trust. Thus, Bauknight should be substituted because the liability for mismanagement of the Estate or the Trust now falls on him, not P&B.
>
> . . .

Buchanan and Pope have expressed in the record their consent to the substitution pending the appeal under the above Order.

The Counterclaim of Albert H. Dallas against Plaintiffs filed prior to the replacement of Buchanan and Pope, states:

> . . .
>
> 3. Albert H. Dallas served as a Trustee to said Trust from the time of its creation to his wrongful removal as a Trustee in November 2007
>
> 4. Shortly after the death of James Brown on December 25, 2006 Plaintiffs conspired to engage in an intentional, tortious campaign to interfere with Dallas' existing and future relationship with the Trust without justification.
>
> 5. Plaintiffs tortious interference with Dallas' existing and prospective relationship with the Trust has continued to the present, resulting in damages to him, including attorney's fees.

Pursuant to this Court's order dated January 9, 2008 and their contract of engagement, Messrs. Few and Gilreath replied to Mr. Dallas' counterclaim against Plaintiffs and seek to dismiss it.

Irreparable harm could result to Plaintiff named above, as well as Buchanan and Pope, if Bauknight is not substituted so that Bauknight may properly prosecute all

claims and defend the counterclaim of Albert H. Dallas, which is against the Estate, the 2000 Trust, and JBE, Inc., and not Buchanan and Pope, individually.

Based on the foregoing, by *sua sponte* action of this Court, it is ORDERED, ADJUDGED AND DECREED:

1. Russell L. Bauknight is hereby substituted for Robert L. Buchanan, Jr. and Adele J. Pope herein, pursuant to the terms and conditions of the Order of the South Carolina Court of Appeals dated November 6, 2009.

2. As shown above, the name of Russell L. Bauknight shall replace that of Buchanan and Pope in this and all subsequent pleadings.

3. The Order of the Court dated March 30, 2010 in this case is amended to reflect the correct caption and as otherwise stated herein.

4. All claims against Albert H. Dallas as well as his counterclaims against Plaintiff, shall continue to be defended by Messrs. Few and Gilreath pursuant to this Court's Order dated January 9, 2008.

5. Except as modified herein, the Conclusion and Order dated March 30, 2010 shall remain in full force and effect.

5. Any party aggrieved by this Order shall have ten (10) days to object to same.

AND IT IS SO ORDERED.

Doyet A. Early, III
Resident Judge, Second Judicial Circuit

April 5, 2010
Aiken, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)
) Case No.: 2010-CP-40-4900
RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James Br[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L[redacted]r, Carrington L[redacted]r, and Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown
and
HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN - LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children, SYDNEY L[redacted]R, CARRINGTON L[redacted]R, and TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,
Plaintiffs.
v.
Adele J. Pope and Robert L. Buchanan, Jr.,
Defendants.

MOTION TO TRANSFER VENUE

TO: ALL PLAINTIFFS AND THEIR ATTORNEY:

JEANNETTE W. GRAHAM
C.C.P. & G.S.
2010 AUG -2 PM 12:54

YOU WILL PLEASE TAKE NOTICE that ten (10) days after service hereof or as soon thereafter as counsel may be heard, and subject to their Motion to Dismiss and other motions and/or pleadings filed or to be filed herein, Defendants, through their undersigned counsel, will move before the Presiding Judge of the Richland County Court of Common Pleas, at her chambers in the Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina, pursuant to Rule 12(b)(3) of the South Carolina Rules of Civil Procedure and Chapter 7 of Title 15 of the South Carolina Code of Laws, for an Order transferring this matter to the Aiken County Court of Common Pleas.

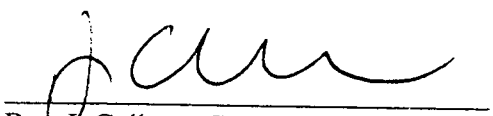
This Motion is based on the pleadings in this matter, the attached Affidavit of Adele J. Pope and on the applicable law.

JETER & WILLIAMS, P.A.



By: Daryl L. Williams.
1204 Main Street, Suite 200
Post Office Box 7425
Columbia, South Carolina 29202
Telephone: (803) 765-0600
Facsimile: (803) 765-0619
Attorneys for Defendant Adele J. Pope,

SOWELL GRAY STEPP & LAFFITTE, L.L.C.



By: J. Calhoun Watson
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
Telephone: 803-929-1400
Facsimile: 803-231-7889
Attorneys for Defendant Robert L. Buchanan, Jr.

August 2, 2010

The undersigned hereby affirms that he has attempted to communicate with opposing counsel without success in an effort to resolve this matter.

JETER & WILLIAMS, P.A.

By: _____
Daryl L. Williams

Suite 200, 1204 Main Street
P.O. Box 7425
Columbia, SC 29202
Telephone: (803) 765-0600

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2010-CP-40-4900

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James Br[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted] and CARRINGTON L[redacted]; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs

v.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants

JEANNETTE W. WALKER
C.C.P. & G.S.
2010 AUG 11 AM 11:34

MOTION TO STRIKE
DEFENDANTS'
MOTION TO TRANSFER VENUE

TO: DEFENDANTS AND THEIR ATTORNEYS:

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs above-named, by their undersigned attorneys, will move before the Presiding Judge of the Richland County Court of Common Pleas at the Richland County Judicial Center at 9:00 a.m. on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an Order to strike Defendants' Motion to Transfer Venue. Defendants, upon information and belief, have omitted from an earlier-filed Motion to Dismiss any defense or objection then available to them which Rule 12 of the South Carolina Rules of Civil Procedure permits to be raised by motion and not provided for in Rule 12(h)(2), SCRCP. Namely, Defendants failed to include the defense of improper venue in their Motion to Dismiss, served on June 22, 2010. Therefore, Defendants have waived the defense of improper venue and their motion for transfer of venue should be stricken. See Rule 12(h)(1), SCRCP.

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.

Everett A. Kendall, II

Kenneth B. Wingate
Everett A. Kendall, II
Ryan C. Holt
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

ATTORNEYS FOR THE PLAINTIFFS

Columbia, South Carolina
August 10, 2010

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)
) FIFTH JUDICIAL CIRCUIT

Russell L. Bauknight, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMcaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. [redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

AND

Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. [redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown,

Plaintiffs,

vs.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants.

Civil Action No.: 2010-CP-40-4900

RICHLAND COUNTY
FILED
2010 SEP 30 PM 1:06
JEANETTE W. McBRIDE
C.C.P. & G.S.

ANSWER AND COUNTERCLAIM OF ROBERT L. BUCHANAN, JR. AND ADELE J. POPE

(Jury Trial Demanded)

Defendants Robert L. Buchanan, Jr. and Adele J. Pope, subject to their Motion to Dismiss and any Motion filed or to be filed for a change of venue, answer the Complaint of Plaintiffs and Counterclaim against Plaintiffs, as follows:

FOR A FIRST DEFENSE
(Qualified General Denial)
As to Parties

1. (a) The following general allegations are incorporated by reference in Defendants' responses to each and every allegation contained in the Complaint, including the prayer for relief:

(i) Henry Dargan McMaster ("McMaster"), the Attorney General of South Carolina ("AG") brings this private tort suit on behalf of persons disinherited in James Brown's carefully crafted estate plan. The Attorney General's duty is to serve the public interest, not private interests.

(ii) On August 10, 2008, McMaster and some of the Plaintiffs met to divide what Mr. Brown did not give them. As part of their plan, Plaintiffs agreed that the Defendants, who were dutifully defending Mr. Brown's estate plan, should be removed as PR/Trustees.

(iii) The plan agreed to give Tommie Rae Hynie Brown, who had been disinherited, more than $20 million. It further provided that five of Mr. Brown's dozen or more children would receive approximately $4 million each.

(iv) Five months later on January 30, 2009, McMaster entered into an agreement with Mr. Brown's son Terry, who did business with discredited former trustee Dallas and now-indicted former trustee Cannon, in which Terry received a 10-year right to buy all of James Brown's assets. This not only destroyed the value of Mr. Brown's assets, it threatened loss of the IRS qualification of Mr. Brown's "I Feel Good" Trust, which is part of the 2000 Trust (the "Trust").

(v) When the dealing was done, McMaster and the other Plaintiffs had stripped about 65% of Mr. Brown's $85 million music empire from his estate plan. Upon information and believe, Plaintiffs had placed under McMaster's control not only Mr. Brown's "I Feel Good" private foundation but also Mr. Brown's estate and the Brown Grandchildren's Education Trust, which is also a part of the Trust. Furthermore, the plan gave McMaster the right to remove and replace personal representatives and trustees.

(vi) The circuit court's approval of Plaintiffs' actions is on appeal to the Supreme Court. The Supreme Court will determine if Plaintiffs can do all this. The Supreme Court will determine if after removing Defendants, the lower court, at McMaster's request, may require them, under penalty of contempt, to sign documents which they cannot sign while properly performing their duty to James Brown. The Supreme Court will determine if the lower court, at McMaster's request, will require Defendants to agree to say nothing bad about McMaster's deals or about McMaster himself.

(vii) Upon information and belief, James Brown anticipated trouble with his estate

plan, and he stated what he expected of his fiduciaries:

> "... any person not provided for in this Irrevocable Trust, Grantor's Will or other such instrument...shall not have standing or be qualified to contest, claim an interest in or otherwise dispute the disposition of Grantor's estate as he herewith disclaims and disinherits any such person. Any such alleged claim shall be considered an affront to the Grantor's wishes and shall be vigorously challenged as such by his fiduciaries." [Tr. Art. XXI; See Will Item X for similar provision. Emphasis Supplied.]

(viii) Mr. Brown's clear intention was to dedicate his entire music empire solely to the education of certain grandchildren and needy and deserving students:

> "Except as otherwise provided...I have intentionally failed to provide for any other relatives or other persons, whether claiming, or to claim, to be an heir of mine or not. Such failure is intentional and not occasioned by accident or mistake... It is the Grantor's intention that the trust estate be available only to the beneficiaries and not to the Grantor's past or future spouse. The Trustee(s) are directed to enforce this provision." [Emphasis supplied.] [Will, p1; Tr. Art XVIII, XXII.]

(ix) James Brown intended to establish what may be South Carolina's largest private foundation dedicated solely to the education of needy students. The Supreme Court will decide whether to uphold Plaintiffs' contracts to dismantle that foundation. Whatever the Court may decide, Defendants' record of service proves that Defendants properly managed the 2000 Trust and Mr. Brown's estate. As directed by Mr. Brown, Defendants vigorously defended his estate plan.

(x) Upon information and belief, $50 million loss to Mr. Brown's estate and the 2000 Trust, as well as significant damages to Defendants have been inflicted upon them by Plaintiffs and by others acting in Plaintiffs' behalf.

(xi) Upon information and belief, Defendants allege that Plaintiffs have combined in their efforts to establish an unrealistically low value of the assets of James Brown as much for the purpose of interfering with Defendants' commissions, thereby causing them special harm, as for the purpose of enabling a purchasing entity, in which one or more Plaintiffs or their family members will own an interest, to acquire assets worth $80-to-$100 million or more for as little as $12 million.

(b) More specifically with respect to the allegations of paragraph 1 of the Complaint, Defendants allege as follows:

(i) Defendants admit that James Brown was a celebrated entertainer who died on December 25, 2006, a resident of Aiken County, South Carolina.

(ii) Defendants admit that Bauknight serves as court-appointed Trustee of the James Brown 2000 Irrevocable Trust and as Personal Representative of the Estate of James Brown, with the qualification that his service is based only on a settlement between McMaster and some of the Plaintiffs, none beneficiaries of the 2000 Trust; Defendants further admit that the lower court appointed Bauknight and approved the settlement, with the qualification that Defendants were not removed for cause and the order is not final and is on appeal before the Supreme Court.

(iii) Defendants admit, upon information and belief, that Bauknight is the Trustee of the Legacy Trust to which Mr. Brown gave nothing, which was created solely by contract of Plaintiffs Bauknight, McMaster, Hynie Brown and the Brown Family LLC; further, the Defendants allege the Legacy Trust is not a part of Mr. Brown's estate plan, and the lower court order approving the contract and appointing Bauknight is not final and is on appeal before the Supreme Court.

(iv) Except for the qualified admissions above, the allegations of paragraph 1 of the Complaint are denied.

2. With respect to the allegations of paragraph 2 of the Complaint:

(a) Defendants deny having any duty to the Legacy Trust or its beneficiaries.

(b) Defendants admit that Bauknight brings this action as PR/Trustee of the Estate and Trust of James Brown based solely on a settlement approved by the lower court, which is now on appeal to the Supreme Court.

(c) Defendants allege that Bauknight's interests conflict with the interests of the beneficiaries of the Estate and Trust.

(d) All allegations of paragraph 2 of the Complaint that are contrary to or inconsistent with the Defendants' aforesaid allegations are denied.

3. With respect to the allegations of paragraph 3 of the Complaint, Defendants allege as follows:

(a) With respect to McMaster, Defendants deny: (i) that McMaster has standing or is authorized to bring a private tort suit against or concerning a 501(c)(3) private foundation or its agents to benefit the family at the expense of the needy and deserving children

desiring an education for the reasons hereinafter more fully alleged; (ii) that McMaster has standing or is authorized to dismantle the grandchildren's education trust, especially as some grandchildren have expressly objected to the settlement; (iii) that McMaster has standing or is authorized to take over the estate of a decedent; (iv) that McMaster has standing or is authorized to commence an action to recover money damages for private individuals; (v) that Bauknight has standing or is authorized to commence a lawsuit for McMaster under any circumstances, and especially, as here, where McMaster cannot act, and (vi) that private counsel for private parties may simultaneously represent McMaster in this action.

(b) With respect to Tommie Rae Hynie Brown and James B[redacted],

(i) Defendants deny Tommie Rae has standing because she was not included in Mr. Brown's estate plan; she is limited by a pre-nuptial agreement she signed before the 2001 marriage ceremony with Mr. Brown; she was married to another man when she conducted the marriage ceremony with Mr. Brown in 2001; after a 2004 annulment of the marriage pursuant to Mr. Brown's claim to void their marriage, she contracted never to claim to be Mr. Brown's common law wife, which was incorporated into an Aiken County Family Court order; she did not marry Mr. Brown after the annulment; she is not listed as Mr. Brown's spouse on his death certificate.

(ii) Defendants deny James II has standing because he is specifically excluded from Mr. Brown's estate plan even if a child; he has refused to undergo the official Estate and Trust DNA protocol to demonstrate paternity; he is a minor and has a guardian ad litem ("GAL") in other court proceedings related to the Estate and Trust, but he has no GAL in this litigation; he cannot be represented by his mother in this case because of her conflict of interest.

(c) With respect to Daryl J. Brown, and his minor child Janise:

(i) Defendants deny that Daryl has standing because he is not a beneficiary of the 2000 Trust, and, on information and belief, his 1/6 interest in personal and household effects under the Will is subject to forfeiture under its *In Terrorem* clause because of his attack on the estate plan.

(ii) Defendants deny that Janise has standing because, as one of the seven beneficiaries of the Brown Family Education Trust (the Grandchildren's Education Trust), she has a potential education fund of about $285,000.00, and the appointment of a guardian ad litem ("GAL") for her is necessary because her father's settlement eviscerates this educational benefit and his attack on the estate plan as her representative may subject her to forfeiture under the *In Terrorem* clause as well.

(d) With respect to Lindsey Delores Brown: Defendants deny that Lindsey has standing because she is not a beneficiary under the Will, and they are informed and believe her interest under the Trust is subject to forfeiture under its *In Terrorem* clause because of her attack on the estate plan.

(e) With respect to Venisha Brown: Defendants deny that Venisha has standing because she is not a beneficiary of the 2000 Trust, and Defendants are informed and believe that her 1/6 interest in personal and household effects under the Will is subject to forfeiture under its *In Terrorem* clause because of her attack on the estate plan.

(f) With respect to Deanna J. Brown Thomas; Defendants deny that Deanna has standing because she is not a beneficiary of the 2000 Trust, and Defendants are informed and believe that her 1/6 interest in personal and household effects under the Will is subject to forfeiture under its *In Terrorem* clause because of her attack on the estate plan.

(g) As to Jason Brown-Lewis: Defendants deny that Jason has standing because he is not a beneficiary under the Will, and they are informed and believe his interest under the Trust is subject to forfeiture under its *In Terrorem* clause because of his attack on the estate plan.

(h) As to Yamma N. Brown and her minor children, Sydney L. and Carrington L.:

(i) Defendants deny that Yamma has standing because she is not a beneficiary of the 2000 Trust, and Defendants are informed and believe that her 1/6 interest in personal and household effects under the Will is subject to forfeiture under its *In Terrorem* clause because of her attack on the estate plan.

(ii) Defendants deny that Sydney and Carrington have standing because, as two of the seven beneficiaries of the Brown Family Education Trust (the Grandchildren's Education Trust), each has a potential education fund of about $285,000.00, and each needs a guardian ad litem ("GAL") because their mother's settlement eviscerates this educational benefit and her

attack on the estate plan as their representative may subject them to forfeiture under the *In Terrorem* clause.

(i) As to Larry Brown: Defendants deny that Larry has standing because he is not a beneficiary of the 2000 Trust, and Defendants are informed and believe that his 1/6 interest in personal and household effects under the Will is subject to forfeiture under its *In Terrorem* clause because of his attack on the estate plan.

(j) As to Tonya Brown: Defendants deny that Tonya has standing because she is specifically excluded from the estate plan, she failed to timely commence an action to be declared an heir, and she has filed documents admitting she is not an heir.

(k) As to Terry Brown: Defendants deny that Terry has standing because he is not a beneficiary of the 2000 Trust, and Defendants are informed and believe that his 1/6 interest in personal and household effects under the Will is subject to forfeiture under its *In Terrorem* clause because of his attack on the estate plan.

(l) Defendants deny that the Legacy Trust and its beneficiaries, who to date cannot be ascertained from the filed settlement documents, have standing to bring a suit against Defendants, who owe them no duty.

(m) Defendants deny that Bauknight has standing because:

(i) Bauknight has a conflict of interest under provisions of the 2000 Trust and Mr. Brown's Will and under applicable law because Bauknight has a duty to protect the "I Feel Good" private foundation, part of the 2000 Trust, pending the outcome of the Case 1647 appeal under the November 6, 2009 Court of Appeals Order.

(ii) Bauknight has a conflict of interest in purporting to represent the minor grandchildren beneficiaries while serving Tommie Rae, Terry and other beneficiaries of his Legacy Trust, which dismantles the Grandchildren's Education Trust.

(iii) Bauknight may not serve as an agent for McMaster to achieve a private purpose.

(n) Defendants allege there are other necessary parties who are absent,

namely, grandchildren Romunzo and Forlando, because (i) they have taken the position in the Circuit Court of Aiken County that all Plaintiffs have forfeited any interest under the *in terrorem* clauses, (ii) they have objected to the settlement, and (iii) they are beneficiaries of the Grandchildren's Education Trust, which is being dismantled by the very settlement that is on appeal in the Supreme Court.

(o) All allegations of paragraph 3 that are contrary to or inconsistent with the Defendants' aforesaid allegations are denied.

4. Defendants admit the allegations of paragraph 4 of the Complaint.

As to Jurisdiction and Venue

5. Defendants admit the allegations of paragraph 5 of the Complaint.

6. With respect to paragraph 6 of the Complaint, Defendants lack information or knowledge sufficient to form an opinion or belief as to the location where Bauknight maintains his usual place of business or where he maintains records. Based on unsigned documents related to the Legacy Trust, an Aiken County Circuit Court order dated August 10, 2007, the location of James Brown's home place in Aiken County, which is owned by the trust, and the various Estate and Trust issues that are pending in or on appeal from the courts of Aiken County, the Defendants are informed and believe that Aiken County remains the principal place of the administration of the Trust, not Richland County. All allegations of paragraph 6 of the Complaint that are contrary to or inconsistent with the Defendants' aforesaid allegations are denied.

7. With respect to paragraph 7 of the Complaint, Defendants admit that Pope is a licensed attorney residing in Newberry County; Defendants admit that prior to September 30, 2009, Pope's law office was located in Richland County; that pursuant to orders of the Aiken

County Circuit Court, the Estate and Trust documents were located at relevant times in Aiken, Barnwell, Greenville and Richland Counties. All allegations of paragraph 7 of the Complaint that are contrary to or inconsistent with the aforesaid allegations are denied.

8. With respect to paragraph 8 of the Complaint, Defendants admit Buchanan is a licensed attorney residing in Aiken County; Defendants allege Buchanan has received very little, if any, income for administering the Estate and Trust, and to the extent any payments were related to his service as PR/Trustee, they were properly made from an Aiken bank pursuant to an Aiken County Circuit Court order dated January 8, 2008; Defendants allege Buchanan transacted business in the administration of the Estate and Trust during relevant times within and outside of South Carolina, and particularly in Aiken, Barnwell, Bamberg, Beaufort, Charleston, Darlington, Florence, Greenville, Kershaw, Lee, Lexington, Greenville and Richland Counties, South Carolina, but mostly in Aiken County; Defendants allege that 212 Newberry Street, NW, Aiken, S.C. 29801 was the formal address and principal location of the Estate and Trust during relevant times; that pursuant to orders of the Aiken County Circuit Court, the Estate and Trust documents were located at relevant times in Aiken, Barnwell, Greenville and Richland Counties. All allegations of paragraph 8 of the Complaint that are contrary to or inconsistent with the aforesaid allegations are denied.

9. Defendants deny the allegations of Paragraph 9 of the Complaint.

10. Buchanan and Pope deny the allegations of paragraph 10 of the Complaint, and allege that venue in Aiken County is proper.

As to Factual Allegations

11. With respect to paragraph 11 of the Complaint, Defendants admit that James Brown executed a Will on August 1, 2000, in which Mr. Brown nominated Albert H. Dallas

("Dallas"), David G. Cannon ("Cannon") and Alfred A. Bradley ("Bradley") as Personal Representatives of his Estate, and that on January 18, 2007, the Will was admitted to probate in Aiken County, and Dallas, Cannon and Bradley were appointed Personal Representatives of the Estate; Defendants further admit that James Brown executed a Trust on August 1,2000, in which Mr. Brown appointed Dallas, Cannon and Bradley as Trustees. All allegations of paragraph 11 of the Complaint that are inconsistent with or contrary to Defendants' aforesaid allegations are denied.

12. With respect to paragraph 12 of the Complaint, Defendants admit that approximately twenty cases were filed in various courts, with some moved to circuit court. All allegations of paragraph 12 of the Complaint that are inconsistent with or contrary to Defendants' aforesaid allegations are denied.

13. With respect to paragraph 13, Defendants admit the Attorney General of South Carolina ("AG") appeared on or about September 24, 2007, and was allowed to intervene in Civil Action No. 2007-CP-02-0122 ("Case 122"). All other allegations of paragraph 13 of the Complaint that are inconsistent with or contrary to Defendants' aforesaid allegations are denied.

14. Defendants admit the allegations of paragraph 14 of the Complaint and allege the Court conferred upon them all authority as if originally appointed by Mr. Brown.

15. With respect to the allegations of paragraph 15 of the Complaint, Defendants allege that on August 10, 2008, McMaster, through his agents, and some Plaintiffs executed the August 10th contract which they described as a "private binding Agreement" and valid without court approval. Upon information and belief, from August 10 through January 30, 2009, they, Terry Brown and others entered into additional contracts. On May 26, 2009, the lower court approved the contracts and removed Defendants as PRs and Trustees. The order is on appeal in

the Supreme Court. All allegations of paragraph 15 of the Complaint that are inconsistent with or contrary to Defendants' aforesaid allegations are denied.

AS TO THE FIRST CAUSE OF ACTION

16. All allegations made above are incorporated herein where relevant.

17. With respect to paragraph 17 of the Complaint:

(a) Defendants deny having a fiduciary duty to Hynie Brown, James II, Tonya, the Brown Family, LLC and Bauknight's Legacy Trust or its beneficiaries.

(b) Defendants deny having any duties related to the management and administration of the Estate and Trust from May 26, 2009 to date.

(c) Defendants deny having duties other than such duties of care, impartiality and loyalty as are required and limited by the specific terms of the 2000 Trust, the Will, the S. C. Probate Code, the S. C. Trust Code, valid final court orders and other relevant South Carolina law.

(d) Subject to the above, Defendants admit they have or have had the following fiduciary duties:

1. To administer the Estate in accordance with the terms of the Will and applicable law, including defending the Will as directed by Brown.

2. To enforce the terms of the 2000 Trust, including defending it as directed by Brown.

3. To uphold the Will, which leaves Brown's entire residuary estate to the 2000 Trust.

4. As to the Estate, subject to the In terrorem clause, to deliver to each of the named children 1/6 of Brown's personal and household effects, or the net proceeds, reduced by applicable Estate Taxes, and to deliver the remainder, after debts and expenses, to the 2000 Trust.

5. As to Terry, their fiduciary duty, on information and belief, ended on January 30, 2009 when Terry knowingly violated the *In Terrorem* clause after demanding it be enforced.

6. As to the 7 Grandchildren Beneficiaries, subject to the *In Terrorem* and Spendthrift clauses, to defend and create an education trust share of about $285,000 each for Janise, Lindsey, Jason, Sydney, Carrington, Romunzo and Forlando, as set out in Articles V and VI of the 2000 Trust.

7. To seek court guidance where appropriate, as they have done as evidenced by numerous written Orders.

All allegations of paragraph 17 of the Complaint that are inconsistent with or contrary to the Defendants' aforesaid allegations are denied.

18. Defendants deny the allegations of paragraph 18 of the Complaint.

19. Defendants deny the allegations of paragraph 19 of the Complaint.

20. Defendants deny the allegations of Paragraph 20 of the Complaint.

AS TO THE SECOND CAUSE OF ACTION

21. All allegations made above are incorporated herein where relevant.

22. Defendants deny the allegations of paragraph 22 of the Complaint.

23. Defendants deny the allegations of paragraph 23 of the Complaint.

24. Defendants deny the allegations of Paragraph 24 of the Complaint.

AS TO THE THIRD CAUSE OF ACTION

25. All allegations made above are incorporated herein where relevant.

26. With respect to paragraph 26 of the Complaint, Defendants admit they properly served as court-appointed, non-fiduciary Special Administrators of the Estate ("SAs") from March 7, 2007 until November 20, 2007. The remaining allegations of paragraph 26 of the Complaint are denied.

27. Defendants deny the allegations of paragraph 27 of the Complaint.

28. Defendants deny the allegations of paragraph 28 of the Complaint.

29. Defendants deny the allegations of Paragraph 29 of the Complaint.

AS TO THE PRAYER FOR RELIEF

30. Defendants deny that Plaintiffs are entitled to any relief against Defendants alleged in their prayer for relief.

AS TO ALL ALLEGATIONS OF THE COMPLAINT

31. All allegations of the Complaint, including the allegations contained in the prayer for relief, not hereinabove admitted, qualified or explained are denied and strict proof demanded thereof.

FOR A SECOND DEFENSE AS TO ALL CAUSES OF ACTION
(Absence of Standing)

32. All allegations previously set forth herein are incorporated herein.

33. All Plaintiffs lack standing to bring this action under the Article IV of the Will, and Item XXI of the 2000 Trust, and as otherwise alleged in paragraph 3 above, and the case should be dismissed with costs taxed to Plaintiffs.

FOR A THIRD DEFENSE AS TO ALL CAUSES OF ACTION
(AG's Exceeding and Abusing Authority)

34. All allegations made above are incorporated herein where relevant.

35. Defendants are informed and believe that McMaster has a duty to defend the "I Feel Good" private foundation and its agents from private tort suits intended to dissipate Brown's scholarship funds for needy and deserving students.

36. McMaster's private contracts and acts and omissions related to the contracts and this litigation serve no public purpose; exceed and/or abuse his constitutional and statutory

authority; and violate the due process and First Amendment rights of Defendants and all other fiduciaries and beneficiaries of the 2000 Trust and Will other than Bauknight, who serves at McMaster's pleasure; and generally constitute bad faith and violate the public trust; the case should be dismissed with costs taxed to Plaintiffs.

FOR A FOURTH DEFENSE AS TO ALL CAUSES OF ACTION
(Absence of Affidavit Required by S.C. Code Ann. §15-36-100 (Supp. 2005))

37. All allegations made above are incorporated herein where relevant.

38. Plaintiffs failed to file as part of the Complaint an affidavit of an Expert Witness specifying at least one negligent act or omission claimed to exist and the factual basis therefore, as a result of which the case should be dismissed for failure to state a claim.

FOR A FIFTH DEFENSE
(Charitable Immunity for Private 501(c)(3) Foundations)

39. All allegations previously set forth herein are incorporated herein.

40. Defendants are informed and believe their actions as agents protecting the "I Feel Good" private foundation, a 501(c) (3) private foundation, have the same statutory immunity and protection from private tort suits as agents of public charities to ensure: (a) that qualified trustees, like Defendants, will accept such positions without fear of financial ruin of the very kind Plaintiffs are attempting to inflict by this lawsuit, and (b) the scholarship funds of the "I Feel Good" private foundation will not be depleted directly or indirectly in the defense of those who properly protect and serve it.

41. Defendants are informed and believe this lawsuit must be dismissed with prejudice and with costs taxed to Plaintiffs.

FOR A SIXTH DEFENSE AS TO ALL CAUSES OF ACTION
(Improper Venue, Rule 12(b)(3), SCRCP)

42. All allegations previously set forth herein are incorporated herein.

43. Pursuant to S.C. Code Ann. §§ 15-7-40, 62-1-303, 62-3-201 and 62-7-204, on information and belief, venue with respect to the within-captioned action is exclusively within the Aiken County Circuit Court, and this action should be dismissed.

FOR A SEVENTH DEFENSE AS TO ALL CAUSES OF ACTION
(Absence of Subject Matter Jurisdiction, Rule 12(b)(1), SCRCP)

44. All allegations previously set forth herein are incorporated herein.

45. Pursuant to S.C. Code Ann. §§ 62-1-303, 62-3-201 and 62-7-204, on information and belief, subject matter jurisdiction was exclusively within the Aiken County Court, and this action should be dismissed.

FOR A EIGHTH DEFENSE TO ALL CAUSES OF ACTION
(Joinder of Persons Needed for Just Adjudication, Rule 19, SCRCP)

46. All allegations made above are incorporated herein where relevant.

47. Defendants are informed and believe that certain parties hereinafter identified must be joined in that they are subject to service of process, their joinder will not deprive the Court of jurisdiction, in their absence complete relief cannot be accorded among those already parties, they claim an interest in the subject of the action whose absence may impede their ability to protect that interest, and/or that Defendants are subject to a substantial risk of double, multiple or inconsistent obligations by reason of their absence. The parties include:

(a) Minor Plaintiffs have no GALs, and those speaking for them are giving away their educational benefits under the Grandchildren's Education Trust;

(b) Forlando Brown and Romunzo Brown are adult grandchildren whose interests under the Grandchildren's Education Trust are eviscerated by the settlement, and they have objected to the settlement in the Aiken County Circuit Court;

(c) The Brown Family LLC is an entity with some relationship to the

settlement, and it is not a party to this action.

48. Defendants are informed and believe that in the absence of their joinder, the case should be dismissed.

FOR A NINTH DEFENSE TO ALL CAUSES OF ACTION
(Estoppel)

49. All allegations made above are incorporated herein where relevant.

50. Plaintiffs have engaged in conduct during relevant times which was calculated to convey the impression that the facts were otherwise than and inconsistent with those they now seeking to assert, including at least the following conduct:

A. AS TO AG McMASTER:

(i) On July 30, 2008, AG McMaster, personally, wrote a letter to Defendants supporting their service as PRs and Trustees.

(ii) AG McMaster has ratified the Will and Trust which Defendants seek to uphold.

B. AS TO TOMMIE RAE BROWN:

(i) Prior to her 2001 ceremonial marriage to Mr. Brown, she executed a Pre-Nuptial Agreement in which she waived all rights as a spouse to share in or make any claim against the estate of Mr. Brown; all rights as a spouse in the property of Mr. Brown; any spouse's right of election or claim as an omitted spouse against Mr. Brown's estate under the law of any state; and any right to serve as a fiduciary under Mr. Brown's estate.

(ii) During Mr. Brown's 2004 action against her to void the marriage, Tommie Rae contracted never to claim to be Mr. Brown's common law spouse.

(iii) She admits and has complained that after the 2004 annulment, Mr. Brown would not marry her again.

(iv) She claims to have been a member of the Advisory Board to the Trust that Defendants are seeking to uphold.

(v) She has otherwise ratified the Will and Trust which Defendants seek to uphold.

C. AS TO DEANNA J. BROWN THOMAS AND YAMMA BROWN:

(i) Deanna and Yamma have affirmed under oath their status as beneficiaries under the same Will Defendants are seeking to uphold.

(ii) Deanna accepted a position as Trustee of the Trust, and Yamma accepted a position as Executive Assistant to the Board of the Trust, the same Trust Defendants are seeking to uphold.

(iii) Deanna and Yamma acknowledged in the 2002 lawsuit they filed against their father, James Brown, that they were not a part of his estate plan (though actually they were devised a share of personal and household effects).

(iv) Deanna J. Brown Thomas has acknowledged that the devise of personal and household effects to the named children in the Will was what her father wanted, the same Will Defendants are seeking to uphold.

(v) Deanna and Yamma, with other Plaintiffs, have advised the Court in a Memorandum submitted in this case that James Brown is one of South Carolina's most famous and generous icons and that the establishment of a Trust intended to provide financial assistance to deserving students who seek an education in South Carolina "was the often-stated and well known desire of James Brown." (Plaintiffs' Memorandum dated and filed August 27, 2010, p. 2).

(vi) They have otherwise ratified the Will and Trust which Defendants seek to uphold.

D. AS TO DARYL BROWN:

(i) He has affirmed under oath his status as a beneficiary under the same Will the Defendants are seeking to uphold.

(ii) He has otherwise ratified the Will and Trust which Defendants are seeking to uphold.

E. AS TO TERRY BROWN:

(i) He alleged Attorney Levenson, the attorney for Daryl, Deanna and Yamma, had engaged in unethical activity by contesting Mr. Brown's Will and Trust which Defendants are seeking to uphold.

(ii) He has consistently ratified the validity of the Will and Trust which Defendants are seeking to uphold, even claiming after the announced August 10, 2008 settlement, until as late as February 2009, that he was then the devisee of all of Mr. Brown's personal effects, asserting that Daryl, Deanna and Yamma, his co-Plaintiffs, had forfeited their share under the *In Terrorem* clauses of the Will and Trust.

F. AS TO ALL PLAINTIFFS:

(i) All Plaintiffs have acquiesced in, actively supported and/or failed to challenge the material findings of the orders of, as well as the documents presented and representations made by Plaintiffs in, the Aiken County Circuit Court and/or the South Carolina Court of Appeals, approving, after review, many actions taken by Defendants that are the subject of Plaintiffs' Complaint in this case, including at least:

(a) Orders characterizing the condition of the Estate and Trust as deplorable when Defendants began serving as PRs and Trustees;

(b) Orders providing for bank accounts;

(c) Orders providing for accounting;

(d) Orders concerning the protection of Mr. Brown's estate plan;

(e) Orders approving the service of Defendants as PRs of the Estate and as Trustee of the Trust;

(f) Orders characterizing the service of Defendants as excellent;

(g) Orders with respect to the Christie's sale;

(h) Orders with respect to Estate and Trust property not sold at Christie's;

(i) Orders providing for payment of fees, commissions and costs to Defendants and for their staff;

(j) Orders concerning the Grandchildren's Education Trust;

(k) Orders with respect to taxes;

(l) Order addressing mismanagement on or after May 26, 2009;

(m) Orders, as well as the briefs and representations of Plaintiffs to the Court, related to the value of the James Brown assets;

(ii) All Plaintiffs failed to seek a global settlement of all issues by inviting Defendants and others, who were necessary parties to a settlement, to their mediation, but instead conducted a private mediation with no notice to or knowledge of Defendants. All Plaintiffs knew or should have known that Defendants would be left in the position of defending the estate plan as well as other interested parties whose rights were eviscerated as a result of the mediation.

(iii) All Plaintiffs failed to present evidence to the Court that the settlement was reduced to writing; was signed by all parties affected thereby; does not violate the provisions and purposes of the Trust; protects the heirs and devisees not made parties; does not violate the First Amendment and Due Process rights of non-parties; protects all other rights of non-settling parties; protects the beneficiaries of the 2000 Trust; protects the needy and deserving students; and protects all creditors and taxing authorities; but instead, Plaintiffs called (other than Defendants) only Bauknight – who by their agreement now serves, *inter alia*, as PR of the Estate and as Trustee of the Trust – and who admittedly had not investigated material issues regarding the settlement and had no opinion on them, including the tax and federal copyright implications. Plaintiffs knew or should have known that their failure to determine the heirs of James Brown; their failure to honor the desires of James Brown; their grant to Terry Brown of the 10-year right of first refusal; and their efforts to devalue the James Brown assets to the detriment of needy students and for the benefit of disinherited persons left Defendants in the position of having to appeal the order to zealously protect the estate plan and its beneficiaries as directed by the Will and Trust.

51. When Plaintiffs engaged in said conduct, they expected it would be acted upon by others, including Defendants.

52. Defendants are now informed and believe that Plaintiffs well knew they would subsequently engage in inconsistent conduct as circumstances permitted and when necessary or appropriate to advancing their own, personal agendas rather than the estate plan of Mr. Brown.

53. At the time Plaintiffs engaged in the original conduct or took the original positions, Defendants had no knowledge or means of knowing that Plaintiffs would subsequently behave inconsistently or assert inconsistent positions, and Defendants are prejudiced by Plaintiffs' inconsistent conduct and their assertion of inconsistent positions.

54. As a result, Plaintiffs' case should be dismissed with prejudice, with costs taxed to Plaintiffs.

FOR A TENTH DEFENSE TO ALL CAUSES OF ACTION
(Waiver)

55. All allegations made above are incorporated herein where relevant.

56. To the extent Defendants breached any duties in the management and administration of the Estate and Trust, which is denied, Plaintiffs have intentionally relinquished

known rights by, *inter alia*:

(a) Their interference with Defendants' management and administration in an effort to preserve and maximize opportunities for their own personal gain and to minimize or abate actions planned or taken to preserve, protect and enhance Mr. Brown's estate plan;

(b) Their failure to appeal final orders of the Aiken County Circuit Court authorizing and directing Defendants to take actions for which Plaintiffs are now suing;

(c) Their refusal to help with many matters of administration and management that required attention after they announced a settlement, notwithstanding Defendants' invitation to Plaintiffs that they assist with such matters in light of the announced settlement, about which they now complain and for which they are suing;

(d) Their attacks on the validity of Mr. Brown's Will and Trust without probable cause;

(e) Their intentional violations of the *In Terrorem* clauses of Mr. Brown's Will and Trust;

(f) In knowingly failing and refusing to comply with requirements of the South Carolina Trust and Probate Codes and other applicable law by forcing the approval of a settlement which adversely affects interested persons who were not a part of the settlement and others who were incapable of protecting themselves; and

(g) In intentionally ignoring provisions of the Trust Code applicable to a settlement, contending at the hearing to approve the settlement there was no valid Trust, yet basing this lawsuit on the Trust.

57. The Plaintiffs' case should be dismissed with prejudice, with costs taxed to Plaintiffs.

FOR AN ELEVENTH DEFENSE TO ALL CAUSE OF ACTION
(Unclean Hands)

58. All allegations made above are incorporated herein where relevant.

59. Defendants are informed and believe that in early January 2007, certain Brown family members (all Plaintiffs in this case) met with lawyers in Atlanta, GA and formulated a plan to sabotage Mr. Brown's carefully created estate plan with the objective of acquiring assets he expressly declined to give them; contemporaneously, Tommie Rae assembled a team of at least six lawyers to attempt to take up to half of Mr. Brown's assets, to which she was not entitled.

60. Defendants are further informed and believe that in early January 2007 Dallas and Cannon and others, who had their own pecuniary agenda, began manipulating evidence as to the ownership of assets in an effort to preclude or minimize the opportunities of the family and Tommie Rae.

61. Within those dynamics, the family and Tommie Rae sued in or around January 2007 to remove Dallas, Cannon and Bradley as fiduciaries, many relying on the estate plan they now seek to dismantle for their standing.

62. Defendants are further informed and believe that in approximately March of 2007, Dallas and Cannon successfully solicited Forlando Brown, a grandson of Mr. Brown who plans to own the James Brown assets and had participated in the family meeting in Atlanta in January and February, to abandon the family and join them. His brother, Romunzo Brown, and his father, Terry Brown, joined Forlando in abandoning the family and aligning themselves with Dallas and Cannon.

63. Within these dynamics, in an effort to calm all parties, the Aiken County Circuit Court appointed Defendants as non-fiduciary SAs of the Estate on March 7, 2007, with limited

authority.

64. Almost immediately, the family, Tommie Rae and Dallas and Cannon undertook to promote their own individual interests; and though adverse to one another in other respects, the family and Tommie Rae were united in their opposition to Dallas, Cannon and Bradley. As a result, Dallas and Cannon became defensive and uncooperative, and they began to resist Defendants' scrutiny.

65. Despite the resistance of Dallas and Cannon, on July 17, 2007, Defendants discovered Cannon's $900,000 misappropriation from the Trust. Nevertheless, Cannon resigned on August 10, 2007 from all positions, fiduciary and otherwise, with the Estate, the Trust and most Brown business entities.

66. Eventually, Dallas and Cannon undertook, individually and through certain agents, to falsely convince the AG that Defendants were bad. The Office of the AG was receptive to the efforts of Dallas and Cannon.

67. As a result of continuing scrutiny and pressure, Dallas and Bradley resigned as Estate and Trust fiduciaries at a hearing on November 20, 2007, rather than defend against the case for their removal.

68. Immediately upon the resignation of all three fiduciaries and with no advance notice, the Court appointed Defendants as substitute PRs and Trustees. All Plaintiffs except for Bauknight and the AG supported and encouraged the appointment.

69. By their appointment, Defendants were charged with the legal duty of upholding Mr. Brown's Will and Trust. Brown's Will and Trust were contrary to the interests of the family and Tommie Rae.

70. By November 21, 2007, Dallas, Cannon and Bradley were experiencing second

thoughts about their resignations, and Assistant AG Jones had communicated with Pope, insisting that Defendants resign immediately as PRs and Trustees or risk removal proceedings. They, and the other Plaintiffs, thereafter engaged in the following activities:

(a) Accusing Buchanan and Pope of impropriety in November 2007 after having just represented to the Court that Defendants' behavior was extraordinary;

(b) Threatening Buchanan and Pope with grievances, harm and liability for not agreeing with the settlement;

(c) Asserting Buchanan and Pope should have obtained appraisals after having reviewed and acquiesced in or adopted Defendants' proposal to value assets without an appraisal;

(d) Sabotaging the Christies' auction in violation of court orders;

(e) Falsely accusing Defendants of impropriety with intent to damage their professional standing.

71. Such inequitable conduct touched Defendants personally, touched the subject matter of this litigation and prejudiced or injured Defendants as hereinafter more fully alleged, as a result of which this litigation should be dismissed with prejudice, with costs taxed to Plaintiffs.

FOR A TWELFTH DEFENSE
(Comparative Negligence/Recklessness/Willfulness)

72. All allegations previously set forth herein are incorporated herein.

73. To the extent that Plaintiffs are entitled to anything, and to the extent Defendants were careless, negligent, grossly negligent, willful, wanton or reckless in any particular, which is denied, Plaintiffs were more than fifty percent (50%) negligent, grossly negligent, negligent *per se*, careless, reckless, willful and wanton in the particulars hereinabove alleged, and as to certain Plaintiffs in the following additional particulars, which upon information and belief, include the

following:

(a) AS TO AG McMASTER:

(i) In failing to determine the heirs of James Brown.

(ii) In unreasonably attempting to agree with others as to the identity of the heirs of James Brown to the exclusion of real heirs, and with insufficient understanding or inquiry into the negative impact this incorrect finding has on the Estate and Trust's rights under the Federal Copyright Act.

(iii) In unreasonably executing three different settlement contracts (August 10, 2008, the Legacy Trust and the January 29, 2009 contract), with insufficient understanding that they exposed an estate that would pay no estate taxes under the estate plan to between $10 and $40 million of estate taxes.

(iv) In unreasonably executing the Legacy Trust with insufficient understanding that it would disqualify the "I Feel Good" private foundation under 501(c)(3) of the IRC, exposing the estate and 2000 Trust to millions of dollars of estate and income taxes.

(v) In unreasonably failing to recover for the Estate and Trust $12+ million from Dallas and Cannon and others, which Defendants began in Case 322 pending in Aiken County.

(vi) In failing to timely seek dismissal of the Dallas appeal, and in failing to seek the recovery of costs of Case 122 from Dallas and Cannon.

(vii) In joining or acquiescing in Terry Brown's and David Cannon's attempt to devalue the James Brown assets for the benefit of their joint venturers and diminishing the charitable gift.

(viii) In failing to accept the Corbis/GreenLight proposal, causing loss and devaluation of the James Brown assets.

(ix) In unreasonably interfering with a proposed right of first offer, thereby damaging and devaluing the James Brown assets.

(x) In failing to properly protect the Federal Copyright Act rights of the Estate and Trust.

(xii) In unreasonably contracting to give Tommie Rae approximately $20 million where the overwhelming evidence demonstrated there was no basis in fact or law for such a contract.

(xiii) In unreasonably substituting his judgment for that of properly performing fiduciaries, then unreasonably exercising such judgment.

(xiv) In unreasonably agreeing to give Dallas/Cannon joint venturer Terry Brown $4 million and a right of first refusal, destroying Mr. Brown's estate plan and the value of his assets, causing irreparable harm and exposure to millions of additional dollars of taxes.

(xv) In unreasonably attempting to cover up their negligent acts or omissions by attacking properly serving fiduciaries who are entitled to reasonable compensation and reimbursement for the defense of this action.

(xvi) In unreasonably joining in a private tort suit to damage the "I Feel Good" private foundation and its agents for the personal benefit of private individuals.

(xvii) In unreasonably appointing and controlling Bauknight, including his reckless recommendation that the court approve the AG's actions with no due diligence, resulting in a loss to the Estate and Trust, if not overturned, of at least $50 million.

(xviii) In unreasonably executing the August 10 contract without consulting with, and excluding, the court-appointed accountant and PR/Trustees, and without adequate knowledge of the Estate Tax impact on the Estate and Trust, or the income tax impact on Brown Entities.

(xix) In unreasonably refusing to participate with the court-appointed accountant and PR/ Trustees in preparing the Estate Tax Return, notwithstanding the PR/Trustees' invitation for the AG to participate.

(xxii) In unreasonably contracting on August 10 to defeat the interests of the beneficiaries and fiduciaries of Mr. Brown's estate plan who did not attend the secret mediation.

(b) AS TO BAUKNIGHT:

(i) In unreasonably recommending and ratifying the above actions of the AG.

(ii) In unreasonably failing to approve the GreenLight 2-year Publicity Rights contract which, but for his failure to approve the contract, could have been in place in May 2009 and would have enhanced the value of the James Brown assets.

(iii) In unreasonably making false and unsupported allegations against Defendants after testifying to the contrary.

(iv) In unreasonably failing to disclose to the Court that he had already undertaken a fiduciary duty to Tommie Rae and Terry Brown, while purporting to make an independent recommendation as to whether the settlement should be approved.

(v) In unreasonably failing to complete the claims litigation.

(vi) In unreasonably failing to ascertain, categorize and pay valid debts and claims of

the 2000 Trust and Estate, including the proper expenses for the defense of the estate plan.

(vii) In unreasonably recommending a $50 million transfer from Brown's assets with insufficient understanding of Brown's estate plan.

(viii) In unreasonably recommending a $50 million transfer from Brown's assets with insufficient understanding of the tax implications.

(ix) In unreasonably recommending a $50 million transfer from Brown's assets with insufficient understanding of likely outcomes regarding allegations related to the issues related to spousal claims, capacity and/or undue influence.

(x) In unreasonably recommending the proposed determination of heirs with insufficient understanding of the federal copyright law implications.

(xi) In unreasonably recommending the proposed settlement which Defendants are informed and believe result in more than $50 million of damage to the Estate and Trust, taking more than 65% of Brown's assets from Brown's estate plan.

(c) AS TO THE REMAINING PLAINTIFFS:

(i) In unreasonably interfering with the Christie's sale, which Defendants are informed and believe would have provided liquidity for the management and administration of the Estate and Trust, and causing financial detriment to the Estate and Trust and to the value of the James Brown assets.

(ii) In unreasonably, purposely chilling the Christie's sale by their individual acts and those of their duly authorized agents for the purpose of rendering the Estate and Trust unable to compensate Defendants, in an attempt to force Defendants to quit or abdicate their duties under the Will and Trust.

(iii) In unreasonably interfering with the Defendants' proposed GreenLight contract, which Defendants are informed and believe would have enhanced the value of all James Brown assets and would have provided liquidity for management and administration purposes.

(iv) On information and belief, in unreasonably forming alliances with Dallas and Cannon, whom they initially opposed for good reason, so they could all get paid at the expense of Mr. Brown's estate plan and at the expense of the Defendants as properly performing fiduciaries.

74. As a direct and proximate of one or more of Plaintiffs' aforesaid negligent, grossly negligent, negligent *per se*, careless, reckless, willful and wanton acts or omissions, which Defendants are informed and believe render Plaintiffs 51% or more at fault, Plaintiffs are

barred from recovery; if, however, Plaintiffs are 50% or less at fault, Defendants are entitled to a setoff against any Plaintiff's verdict, the entitlement to which Defendants deny, equal to the percentage of Plaintiffs' fault.

FOR A THIRTEENTH DEFENSE
(Intervening Acts of Others)

75. All allegations made above are incorporated herein where relevant.

76. Defendants respectfully allege that the intervening negligent, grossly negligent, negligent *per se*, careless, reckless, willful, wanton and intentional acts or omissions of third parties interfered with the management and administration of the Estate and Trust and proximately caused Plaintiffs' damages, if any (which are denied).

FOR A FOURTEENTH DEFENSE AND FIRST COUNTERCLAIM
(Abuse of Process)

77. All allegations made above are incorporated herein where relevant.

78. Defendants are informed and believe that Plaintiffs have maliciously commenced this legal action for an ulterior purpose of forcing Defendants to abandon or dismiss the appeal of the May 26, 2009 order of the Circuit Court of Aiken County approving a settlement desired by Plaintiffs.

79. Plaintiffs' commencement of this action is not a legitimate use of process in that, assuming Plaintiffs succeed in the lawsuit (their entitlement to which is denied), Plaintiffs' improper and collateral objective cannot be accomplished.

80. As a direct and proximate result of Plaintiffs' abuse of process, Defendants have sustained actual damages in such amount as they shall prove at trial, for which they are entitled to judgment against Plaintiffs.

81. Defendants are informed and believe they are entitled to judgment against

Plaintiffs for punitive damages in such amount as a jury shall find to be fair, reasonable and just.

FOR A FIFTEENTH DEFENSE AND SECOND COUNTERCLAIM
(Civil Conspiracy)

82. All allegations made above are incorporated herein where relevant.

83. Defendants are informed and believe that all Plaintiffs agreed and combined with each other and with third parties for the purpose of injuring Defendants, and acted in furtherance of the conspiracy, which has caused Defendants special damages as hereinafter and otherwise alleged in this Answer and Counterclaim.

84. Upon information and belief, Defendants allege that in early January 2007, various family members and/or their agents (Plaintiffs in this case) met with lawyers in Atlanta, GA and formulated a plan to sabotage Mr. Brown's carefully created estate plan with the objective of acquiring assets he expressly declined to give them. (Forlando, Romunzo and Terry Brown later switched their allegiance to Dallas and Cannon.) Relatively contemporaneously with the family's undertaking, Tommie Rae assembled a team of at least six lawyers to attempt to take up to half of Mr. Brown's assets, to which she was not entitled.

85. In furtherance of these schemes, the family and Tommie Rae separately filed lawsuits attacking the validity of the Will and Trust, and, in addition, Tommie Rae asserted she was entitled to relief as a surviving spouse.

86. Upon information and belief, Defendants allege that by not later than November 20, 2007, in light of the resignations of Dallas and Cannon and the court appointment of Defendants as PR/Trustees, Dallas, Cannon, Forlando, and Terry realized that their scheme to sell the James Brown assets at a low value to an entity owned by one or more of themselves, with a kickback to one or more of themselves, and which also included a plan to pay the fiduciary-related claims of Dallas and Cannon from the sale(s) proceeds, was in substantial jeopardy.

Accordingly, upon information and belief, they jointly agreed to undertake a course of action, individually and through certain duly authorized agents, to demean, discredit, attack and otherwise harm Defendants in order to neutralize Defendants' efforts to administer and manage the Estate and Trust and to keep their personal agenda alive at the expense of Mr. Brown's estate plan.

87. In furtherance of this agreement, in addition to the aforesaid acts, Forlando sued Defendants in federal court, in which he mostly sought to paralyze the Trust by enjoining Defendants from acting as Trustees, as well as returning Dallas and Cannon as Trustees.

88. In furtherance of this agreement, Defendants allege that the Attorney General refused to protect the Trust by intervening in or taking other action with respect to the federal lawsuit, and he used the federal lawsuit as evidence in his effort to assist Dallas in having the state court reconsider its appointment of Defendants as Trustees and also in seeking the appointment of a special Trustee.

89. Upon information and belief, by July or August of 2008, the family and Tommie Rae realized, in light of their idea of what a settlement should include and knowing of Defendants' commitment to vigorously defend Mr. Brown's estate plan or achieve a settlement consistent with it, Defendants constituted an obstacle that had to be removed.

90. As a result, Tommie Rae and the family (excluding Forlando, Romunzo and Terry Brown) and Assistant AG Jones, attended a mediation conference without notice to Defendants, after which they announced a settlement.

91. Notwithstanding the announcement, Tommie Rae, the family and the Attorney General continued to seek a settlement until late January 2009, when they joined with Terry Brown, and, on information and belief, directly or indirectly with his joint venturers, in an

agreement which provides, *inter alia*, that they would seek removal of Defendants as fiduciaries and oppose Defendants' request for any commission.

92. Defendants are informed and believe that Bauknight has joined the remaining Plaintiffs in the agreement and is acting in furtherance thereof.

93. As a direct result of Plaintiffs' improper agreement and their many acts and intentional omissions in furtherance of the agreement, Defendants have sustained special damages for which they are entitled to judgment, including, but not limited to (a) the expenditure of Defendants' personal money in fulfilling the duty of protecting, defending and enhancing Mr. Brown's estate plan, (b) the loss of business and income from Defendants' ordinary law practices, both of which are seriously crippled, while dealing with Plaintiffs' attempt to overwhelm Defendants and thereby force a resignation or the abdication of Defendants' responsibility under the Will and Trust; and (c) the further expense and time involved in collecting their claimed commission, which is fair and reasonable and customary for performing the usual and customary duties of fiduciaries in like circumstances, and insufficient for the extraordinary duties performed by Defendants under these circumstances.

94. Defendants are informed and believe they are entitled to recover punitive damages in such amount as a jury shall find to be fair, reasonable and just.

FOR A SIXTEENTH DEFENSE AND THIRD CAUSE OF ACTION
(Intentional Interference with Contract)

95. All allegations made above are incorporated herein where relevant.

96. Pursuant to their authority under the Will/2000 Trust and unappealed Order of the Court dated January 8, 2008, Buchanan and Pope were parties to an approved agreement to be paid as SAs, and for partial payment of their fiduciary commissions as approved by the Court, with interest on unpaid amounts. Plaintiffs were aware of this agreement.

97. Plaintiffs have intentionally interfered with Defendants' contract with the Estate/2000 Trust, causing it to be breached and Defendants to be damaged. As a result, Defendants are entitled to compensation for all damages resulting from Plaintiffs' interference with their contract for SA's fees, partial commissions and costs, with interest.

FOR A SEVENTEENTH DEFENSE AND FOURTH CAUSE OF ACTION
(Violation of §62-1-106)

98. All allegations made above are incorporated herein where relevant.

99. The term "heirs" has been used freely, and at times incorrectly, by Plaintiffs, but by March 28, 2008 all Plaintiffs, on information and belief, had knowledge that the heirs of James Brown should be properly determined, even though most were entitled to nothing under Brown's Estate Plan.

100. On information and belief, Plaintiffs had knowledge that an improper determination of heirs would damage the Estate/2000 Trust under the Federal Copyright Act.

101. The Attorney General's answer in Case 2008-CP-02-0872 did not specifically address the "heirs" issues, leaving to Defendants the protection of the Estate/2000 Trust under the Federal Copyright Act.

102. On August 10, 2008, however, without consulting with Defendants, the Attorney General and some of the Plaintiffs stipulated to what is, upon information and belief, an incorrect determination of heirs.

103. Thereafter, in numerous representations and filings with the Court, said Plaintiffs have been presented to the Court as the sole and correct heirs of James Brown, a determination which upon information and belief is false, material, and known by Plaintiffs to be false.

104. On information and belief, said Plaintiffs intended for this known incorrect determination to be relied on and acted on by the Court and the Court and others have relied on

such representations, proximately causing injury to the Estate, 2000 Trust and Defendants.

105. On information and belief such representations circumvented the provisions and/or purposes of the South Carolina Probate Code, including 62-1-102(b)(2), which purpose is to discover and make effective the intent of the decedent in the distribution of his property and (4) to facilitate use and enforcement of certain Trusts and have benefitted from the statements and filings; having been injured thereby, Defendants, on information and belief, are entitled to appropriate relief.

FOR AN EIGHTEENTH DEFENSE AND FIFTH CAUSE OF ACTION
(Attorneys' Fees)

106. All allegations made above are incorporated herein where relevant.

107. On information and belief, Plaintiffs are entitled to recover the costs of this action, including attorneys' fees, under South Carolina Probate Code Section 62-7-1004 and other applicable law.

WHEREFORE, Defendants pray that the Court inquire into the matters set forth herein and (a) dismiss the Complaint in its entirety, with prejudice, and with all costs taxed to Plaintiffs; (b) award actual damages to Defendants in such amount as they shall prove to a jury; and (c) award punitive damages to Defendants in such amount as a jury shall find to be fair, reasonable and just.

DEMAND FOR JURY TRIAL

Defendants demand a jury trial as to all legal defenses and causes of action pursuant to Rule 38, SCRCP; and Defendants request the Court, of its own initiative, try any and all equitable issues by the same jury sitting as an advisory jury pursuant to Rule 39(c), SCRCP.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: _____

J. Calhoun Watson
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Defendant Robert L. Buchanan, Jr.

JETER & WILLIAMS, P.A.

By: _____

Daryl L. Williams
1204 Main Street, Suite 200
Post Office Box 7425
Columbia, South Carolina 29202
Telephone: (803) 765-0600
Facsimile: (803) 765-0619

Attorney for Defendant Adele J. Pope

Columbia, South Carolina
September 30, 2010

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Sowell Gray Stepp & Laffitte, L.L.C., attorneys for *defendant Robert L. Buchanan, Jr.*, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by hand delivering a copy of the same, to the following address(es):

FILED
2010 SEP 30 PM 1:06
JEANETTE W. McBRIDE
C.C.P. & G.S.

Pleadings:

ANSWER AND COUNTERCLAIM OF ROBERT L. BUCHANAN, JR. AND ADELE J. POPE (Jury Trial Demanded)

Counsel Served:

(VIA HAND DELIVERY)
Kenneth B. Wingate, Esquire
Everett A. Kendall, II, Esquire
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Columbia, SC 29201
(803) 256-2233
Attorneys for Plaintiffs

Christine L. Skalamera

September 30, 2010

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted] and CARRINGTON L[redacted]; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,
Plaintiffs

v.

Adele J. Pope and Robert L. Buchanan, Jr.,
Defendants

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2010-CP-40-4900

FILED
2010 OCT -1 PM 3:42
JEANETTE W. McBRIDE
C.C.P. & G.S.

MOTION TO STRIKE DEFENDANTS' AFFIDAVIT IN SUPPORT OF DISMISSAL

TO: DEFENDANTS AND THEIR ATTORNEYS:

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs above-named, by their undersigned attorneys, will move before the Presiding Judge of the Richland County Court of Common Pleas at the Richland County Judicial Center at 9:00 a.m. on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an Order to strike Affidavit of Buchanan and Pope in Support of Dismissal Based on Statutes of Limitation. Defendants served this Affidavit on Plaintiffs on September 21, 2010. The Affidavit should be stricken as untimely in accordance with Rule 6 of the South Carolina Rules of Civil Procedure which provides that the Affidavit should have been served with the Motion to Dismiss on June 22, 2010. The Affidavit should also be stricken as one or more of its forty-two Exhibits have not been sworn or certified as required in Rule 56(e), SCRCP. The Affidavit should be further stricken as it contains statements that are not based on personal knowledge, are not relevant, or contain hearsay. The inclusion of these statements violates Rule 56(e) which requires that affidavits set forth only those facts which are admissible in evidence.

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.

/s/ Kenneth B. Wingate

Kenneth B. Wingate
Everett A. Kendall, II
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

ATTORNEYS FOR THE PLAINTIFFS

Columbia, South Carolina
October 1, 2010

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 10-CP-40-4900

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted] and Carrington L[redacted]; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted] and CARRINGTON L[redacted]; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs

v.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants

MOTION TO SET ASIDE ENTRY OF DEFAULT

RICHLAND COUNTY
FILED
2010 NOV 16 PM 4:45
JEANETTE W. McBRIDE
C.C.P. & G.S.

TO: J. CALHOUN WATSON, JR. AND DARYL L. WILLIAMS, ATTORNEYS FOR THE DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE the undersigned, as attorney for the Plaintiffs above named, will move before the Presiding Judge of the Richland County Court of Common Pleas, at the Richland County Courthouse, on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an Order setting aside the entry of default. This Motion is made pursuant to South Carolina Rules of Civil Procedure 55(c). The Motion is based on the following grounds:

(1) Defendants filed an Affidavit of Default on November 10, 2010 claiming that Plaintiffs had failed to serve a timely answer to their counterclaims.

(2) Defendants contend that the Answer and Counterclaims were served by hand-delivery on September 30, 2010. Defendants contend that the response to the counterclaims was due November 1, 2010.

(3) Plaintiffs will demonstrate good-cause for its failure to serve an answer on or before November 1, 2010.

(4) Plaintiffs served an Answer to the Counterclaims promptly upon receipt of the Affidavit of Default. The Answer to Counterclaims was filed and served on November 16, 2010.

(5) Plaintiffs have and have asserted a meritorious defense to the Counterclaims.

(6) Defendants are in no way prejudiced by setting aside the default.

These grounds are supported by the Affidavit of Kenneth B. Wingate, attached hereto and made a part hereof. This Motion may be further supported by additional affidavits and a Memorandum of Law.

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.

Kenneth B. Wingate
Everett A. Kendall, II
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

ATTORNEYS FOR THE PLAINTIFFS

Columbia, South Carolina
November 16, 2010

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 10-CP-40-4900

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted]r and Carrington L[redacted]r; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted]R and CARRINGTON L[redacted]; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,
Plaintiffs

v.

Adele J. Pope and Robert L. Buchanan, Jr.,
Defendants

AFFIDAVIT OF
KENNETH B. WINGATE

RICHLAND COUNTY
FILED
2010 NOV 16 PM 4:45
JEANETTE W. McBRIDE
C.C.P. & G.S.

EXHIBIT
1

PERSONALLY APPEARED BEFORE ME, the undersigned, Kenneth B. Wingate, who after being duly sworn, deposes and says:

1. I am Kenneth B. Wingate. I am an attorney licensed to practice law in the State of South Carolina. The statements contained herein are true and correct based upon my personal knowledge.

2. I am counsel of record for the Plaintiffs in this litigation.

3. I have received and reviewed the Affidavit of Default filed by Defendants on November 10, 2010. This Affidavit was received at my office on November 15, 2010, through the United States Postal Service.

4. At some previous date, a copy of the Defendants' Answer and Counterclaim was delivered to my office. Through my investigation, I have not been able to determine when or how it was received.

5. I have reviewed the time records since September 30, 2010, and can find no reference to the receipt or review of the Answer and Counterclaim.

6. On or about September 30, 2010—the date Defendants claim to have served the Answer and Counterclaim—we were in the process of preparing proposed Motions for Judge Manning in response to Defendants' Motions to Dismiss and Motions to Change Venue. Both sides submitted these to Judge Manning on October 1, 2010.

7. I have no memory of receiving the Answer and Counterclaim. However, the single copy in our file has my handwriting on it instructing my staff to file the document in the Brown litigation file. I can only surmise that this document was among the others that were being exchanged at or about this time, that I did not recognize it as a counterclaim, and simply sent it to be filed.

8. I had no reason to suspect that an Answer and/or counterclaim would be filed during that period of time. In response to the Summons and Complaint, Defendants filed a Motion to Dismiss in lieu of an Answer. Defendants also filed a Motion to Change Venue. On August 30, 2010, hearings were held before Judge Manning on these motions. As stated previously, proposed orders were due to Judge Manning on October 1, 2010. At no time between the hearing and October 1, 2010, did Defendants withdraw their Motions.

9. On November 12, 2010, I received a copy of Judge Manning's Orders denying the Motions to Dismiss and to Change Venue. Copies of these Orders were sent to the attorneys for the Defendants by email stating that we "look forward to receiving your Answer on or before November 29, 2010." A copy of this email is attached at Exhibit A, hereto.

10. Between September 30, 2010, and today, I have had no communication with the attorneys for the Defendants regarding the filing of this Answer and Counterclaim. Defendants' attorneys made no effort to contact me prior to filing the Affidavit of Default. Upon receipt of the Affidavit, my staff investigated and found the copy that had been filed at my instruction.

FURTHER AFFIANT SAYETH NOT.

Kenneth B. Wingate

SWORN TO and subscribed before me
This 16 day of November, 2010

Notary Public for South Carolina

My Commission Expires: 9/17/20

Rett Kendall

rom: Rett Kendall
Sent: Friday, November 12, 2010 4:15 PM
To: 'cwatson@sowellgray.com'; 'dwilliams@jeterandwilliams.com'
Cc: Ken B. Wingate
Subject: 4077-7389: Bauknight, et al. v. Buchanan and Pope

Attachments: Order Denying Defendants' Motion to Dismiss.



Order Denying Motion to Dismis...

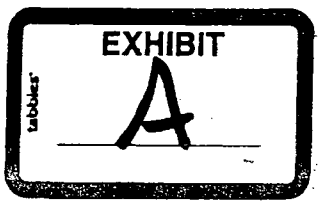
Cal and Daryl,

In the event your street mail is as slow as ours, I am providing you notice of the entry of Judge Manning's Order denying the Defendants' Motion to Dismiss.

If this is your first notice, I look forward to receiving your Answer on or before November 29, 2010.

Rett

Everett A. Kendall, II
Sweeny, Wingate & Barrow, P.A.
P.O. Box 12129
1515 Lady Street (29201)
Columbia, SC 29211
03) 256-2233
eak@swblaw.com



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]I; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted]r and Carrington L[redacted]r; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]I; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted]R and CARRINGTON L[redacted]R; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs

v.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 10-CP-40-4900

ANSWER TO COUNTERCLAIM

RICHLAND COUNTY
FILED
2010 NOV 16 PM 4:47
JEANETTE W. McBRIDE
C.C.P. & G.S.

TO: J. CALHOUN WATSON, JR. AND DARYL L. WILLIAMS, ATTORNEYS FOR THE DEFENDANTS:

COME NOW the Plaintiffs, who hereby answer the allegations of the Counterclaim of the Defendants, subject to all applicable motions, affirmative defenses, and other pleadings as follows:

1. In answering Paragraphs 1 – 76, Plaintiffs deny all factual allegations contained therein which are or may be construed to be inconsistent with the allegations in the Complaint.

2. In answering Paragraph 77, Plaintiffs incorporate all allegations and defenses set forth herein to the extent not inconsistent herewith.

3. Paragraphs 78 – 81 are denied.

4. In answering Paragraph 82, Plaintiffs incorporate all allegations and defenses set forth herein to the extent not inconsistent herewith.

5. Paragraphs 83 – 94 are denied.

6. In answering Paragraph 95, Plaintiffs incorporate all allegations and defenses set forth herein to the extent not inconsistent herewith.

7. Paragraphs 96 and 97 are denied.

8. In answering Paragraph 98, Plaintiffs incorporate all allegations and defenses set forth herein to the extent not inconsistent herewith.

9. Paragraphs 99 – 105 are denied.

10. In answering Paragraph 106, Plaintiffs incorporate all allegations and defenses set forth herein to the extent not inconsistent herewith.

11. Paragraph 107 is denied.

FOR A FIRST DEFENSE

(Failure to State a Claim)

12. The allegations contained in paragraphs 1 through 11 above, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.

13. Pursuant to S.C.R.C.P., Rule 12(b)(6), the allegations contained in the Counterclaim fail to state a claim upon which relief may be granted against these Plaintiffs.

FOR A SECOND DEFENSE

(Waiver and Estoppel)

18. The allegations contained in paragraphs 1 through 13 above, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.

19. The Plaintiffs would show that Defendants' Counterclaim is barred by the doctrine of waiver and estoppel.

FOR A THIRD DEFENSE

(Unclean Hands)

22. The allegations contained in paragraphs 1 through 19 above, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.

23. Plaintiffs would show, upon information and belief, that Defendants' claims are barred by the doctrine of unclean hands.

FOR A FOURTH DEFENSE

***(res judicata*/collateral estoppel)**

24. The allegations contained in paragraphs 1 through 23 above, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.

25. Plaintiffs would show, upon information and belief, that Defendants' claims are barred by the doctrines of *res judicata* and/or collateral estoppel.

WHEREFORE, having fully answered the Defendants' Counterclaim, subject to any motions or other pleadings, and having asserting these affirmative defenses, Plaintiffs, pray that the Defendants' Counterclaim be dismissed with prejudice and that Plaintiffs be awarded the costs and reasonable fees associated with this matter and other such relief as the Court may deem just and proper.

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.

Everett A. Kendall, II

Kenneth B. Wingate
Everett A. Kendall, II
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

ATTORNEYS FOR THE PLAINTIFFS

Columbia, South Carolina
November 16, 2010

382 A

CERTIFICATE OF SERVICE

I, the undersigned assistant of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for Plaintiffs hereby certify that I have served a copy of the foregoing ***Motion to Set Aside Entry of Default*** in connection with the above-referenced case by ***hand delivery*** to the following address:

RICHLAND COUNTY
FILED
2010 NOV 16 PM 4:45
JEANETTE W. McBRIDE
C.C.P. & G.S.

Daryl L. Williams, Esq.
Jeter & Williams, P.A.
1204 Main Street, Suite 200
Post Office Box 7425
Columbia, SC 29202
Attorneys for Defendant Adele J. Pope

J. Calhoun Watson, Esq.
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211
Attorneys for Defendant Robert L. Buchanan, Jr.

Susie M. Dock

Columbia, South Carolina
November 16, 2010

382 B

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

Case No.: 2010-CP-40-4900

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L[redacted], Carrington L[redacted], and Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN - LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children, SYDNEY L[redacted], CARRINGTON L[redacted], and TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs.

v.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants.

NOTICE OF MOTION AND MOTION PURSUANT TO SCRP 59(e) TO ALTER OR AMEND ORDER DENYING MOTION TO DISMISS

2010 NOV 19 PM 3:57

JEANETTE W. [illegible]
C.C.P. & G.S.

TO: ALL PLAINTIFFS AND THEIR ATTORNEY:

YOU WILL PLEASE TAKE NOTICE that the Defendants, by and through their undersigned counsel, will move before the Honorable L. Casey Manning, judge of the Richland County Court of Common Pleas, at ten o'clock a.m. (10:00) on the tenth (10th) day after service hereof at his chambers in the Richland County Judicial Center, Columbia, South Carolina, or at such other time and places as may designated, for an Order pursuant to SCRCP 59(e) to alter or amend the Order Denying Motion to Dismiss entered November 9, 2010 and notice of entry of which was first received by counsel on November 9, 2010 in the following particulars:

1. Failure to consider or decide whether the Plaintiff Attorney General lacks constitutional and statutory authority to join with private plaintiffs in this action;

2. Failure to consider or decide whether Plaintiff Bauknight lacks constitutional and statutoru authority to act as the agent for the Plaintiff Attorney General;

3. Failure to consider or decide whether the Plaintiff Attorney General lacks constitutional and statutory authority to bring a private action for tort damages;

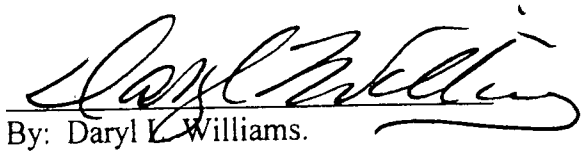
4. Failure to consider or decide whether any Plaintiffs are beneficiaries of the 2000 James Brown Irrevocable Trust and therefore have standing to bring this action;

5. Failure to consider or decide whether the Plaintiff Attorney General may proceed in this action with private counsel without appearance by staff attorney;

6. Failure to consider or decide whether the same issues involved in this action are before the South Carolina Supreme Court in the appeal of Case No. 1647.

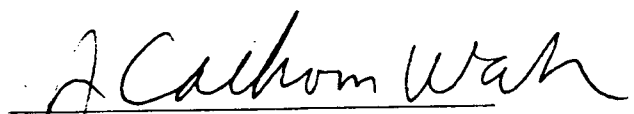
This motion is based on the pleadings and orders entered in this action and on the applicable law.

JETER & WILLIAMS, P.A.



By: Daryl L. Williams.
1204 Main Street, Suite 200
Post Office Box 7425
Columbia, South Carolina 29202
Telephone: (803) 765-0600
Facsimile: (803) 765-0619
Attorneys for Defendant Adele J. Pope

SOWELL GRAY STEPP & LAFFITTE, L.L.C.



By: J. Calhoun Watson
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
Telephone: 803-929-1400
Facsimile: 803-231-7889
Attorneys for Defendant Robert L. Buchanan, Jr.

November 19, 2010

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF RICHLAND)
)
) Case No. 2010-CP-40-4900
RUSSELL L. BAUKNIGHT, as Trustee of)
the James Brown 2000 Irrevocable Trust and)
the James Brown Legacy Trust, as Personal)
Representative of the Esate of James Brown,)
and on behalf of Henry Dargan McMaster, in)
his capacity as Attorney General of the State)
of South Carolina; Tommie Rae Brown,)
individually and on behalf of her minor child,)
James B[redacted]I; Daryl J. Brown, individually)
and on behalf of his minor child Janise)
Vanisha Brown; Lindsey Delores Brown;)
Deanna J. Brown Thomas; Jason Brown-)
Lewis; Yamma N. Brown, individually and) MOTION TO STAY PROCEEDINGS
on behalf of her minor children, Sydney)
L[redacted]r, Carrington L[redacted], and Tonya Brown;)
Venisha Brown; Larry Brown; and Terry)
Brown)
and)
)
HENRY DARGAN MCMASTER, in his)
capacity as Attorney General of the State of)
South Carolina; TOMMIE RAE BROWN,)
individually and on behalf of her minor child,)
JAMES B[redacted]I; DARYL J. BROWN,)
individually and on behalf of his minor child)
JANISE VANISHA BROWN; LINDSEY)
DELORES BROWN; DEANNA J. BROWN)
THOMAS; JASON BROWN - LEWIS;)
YAMMA N. BROWN, individually and on)
behalf of her minor children, SYDNEY)
L[redacted]R, CARRINGTON L[redacted], and)
TONYA BROWN; VENISHA BROWN;)
LARRY BROWN; and TERRY BROWN,)
Plaintiffs.)
)
v.)
)
Adele J. Pope and Robert L. Buchanan, Jr.,)
Defendants.)
)

RICHLAND COUNTY
FILED
2010 NOV 30 AM 10:25
JEANETTE W. McBRIDE
C.C.P. & G.S.

TO: THE PLAINTIFFS AND THEIR COUNSEL:

YOU WILL PLEASE TAKE NOTICE that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, Defendants Robert L. Buchanan, Jr. and Adele J. Pope, by and through their undersigned counsel, will move for an Order staying all proceedings until the resolution of the declaratory actions filed by Cincinnati Insurance Company ("Cincinnati") on November 17, 2010, which seek a judgment that Defendants are not entitled to insurance coverage in the defense of this matter.

The grounds and facts supporting this Motion are the following:

1. On May 19, 2010, Terry Brown and the other Plaintiffs commenced this action in the Circuit Court for Richland County.

2. This tort suit seeks money damages against Defendants Buchanan and Pope for the benefit of Terry Brown, a son of entertainment icon James Brown, and a number of individual and other Plaintiffs, some of whom are residents of the State of Georgia and other states.

3. Terry Brown and others allege wrongdoing on the part of Defendants Buchanan and Pope during their service as Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust ("PR/Trustees") from November 20, 2007, until May 26, 2009.

4. Terry Brown is a joint venturer with indicted former PR/Trustee David G. Cannon and former Trustee Albert H. "Buddy" Dallas in a venture to sell/purchase the James Brown Assets, and create an initial public offering ("IPO") with options or a "kickback" to Cannon and Dallas from the purchasers.

5. In addition to the above, Former PR/Trustee Dallas asserted in his September 17, 2010 Bankruptcy proceeding that his primary asset was a $6 Million claim against the Estate/2000

Trust.

6. As is demonstrated by the Initial Brief of Defendants dated October 22, 2010, a copy of which is attached hereto as Exhibit A, numerous and substantial issues are before the Supreme Court of South Carolina related to the James Brown Cases, including questions related to the actions of Terry Brown.

7. Defendants were both insured by Cincinnati during pertinent periods, and upon information and belief, Defendants are entitled to a defense and insurance coverage.

8. Between May 19, 2010 when this suit was filed and November 17, 2010, Cincinnati neither denied nor accepted its obligations to Defendants under the Cincinnati policies.

9. On November 17, 2010 Cincinnati filed two separate lawsuits in Federal Court seeking a judgment that Defendants are not entitled to insurance coverage in this matter. Copies of the lawsuits are attached as Exhibit B.

10. On information and belief, all matters in this action should be temporarily stayed until the earlier of the following:

a. Cincinnati's unconditional agreement to provide representation to Defendants; or

b. A determination in the Federal Suits, or by other final Order, of Cincinnati's obligations to Defendants.

This motion is based on the Affidavit of Defendants' counsel, attached hereto, Exhibits A and B attached hereto, and all other filings, affidavits, and exhibits filed previously by these Defendants in this matter. This Motion may also be supported by a Memorandum of Law, affidavits, and other documents that will be filed prior to or at the time of the hearing.

The undersigned counsel affirms that consultation with Plaintiffs' counsel would have served no useful purpose.

J. Calhoun Watson
Sowell, Gray, Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
Telephone: 803-231-7839
Facsimile: 803-231-7889

Attorney for Defendant Robert L. Buchanan, Jr.

Daryl L. Williams
Jeter & Williams, P.A.
1204 Main Street, Suite 200
Post Office Box 7425
Columbia, South Carolina 29202
Telephone: (803) 765-0600
Facsimile: (803) 765-0619

Attorney for Defendant Adele J. Pope

November 30, 2010

EXHIBIT A

THE STATE OF SOUTH CAROLINA
IN THE Supreme COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Case No. 2008-CP-2-1647

Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Daryl J. Brown, on behalf of his minor children, Lindsey B. and Janise B.; Deanna J. Brown Thomas, on behalf of her minor child, Jason L.; Yamma N. Brown, on behalf of her minor children, Sydney L., Carrington L., and Tonya B.; Vanisha Brown; Larry Brown; Tommie Rae Hynie Brown; and James B., through his Guardian ad Litem, ... Respondents,

v.

Albert H. Dallas, Alfred A. Bradley, and David G. Cannon, Individually and as (purported) Trustees of the James Brown 2000 Irrevocable Trust; Adele J. Pope and Robert L. Buchanan, Jr., Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust; Terry Brown; Romunzo Brown; Forlando Brown; Cinnamon N. M. Paris; LaRhonda Petitt; Jeanette Mitchell; and Russell L. Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and The James Brown 2000 Irrevocable Trust,

of whom Robert L. Buchanan, Jr., and Adele J. Pope, as Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust are , ... Appellants,

and Albert H. Dallas, Alfred A. Bradley, and David G. Cannon, Individually and as (purported) Trustees of the James Brown 2000 Irrevocable Trust; Terry Brown; Romunzo Brown; Forlando Brown; Cinnamon N. M. Paris; LaRhonda Petitt; Jeanette Mitchell; and Russell L. Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and The James Brown 2000 Irrevocable Trust are ..... Respondents.

In re: The Estate of James Brown and The James Brown 2000 Irrevocable Trust u/a/d August 1, 2000.

INITIAL BRIEF OF APPELLANTS

James B. Richardson, Jr.
1229 Lincoln Street
Columbia, South Carolina 29201
(803) 799-9412

Tressa T. H. Hayes
Post Office Box 5329
Columbia, South Carolina 29250
(803) 603-8583

Attorneys for Appellants.

TABLE OF CONTENTS

Table of Authorities ii

Statement of Questions Presented vii

Statement of the Case 1

Statement of Facts 3

Argument:

I. The settlement agreement was not eligible for court consideration for two reasons. First, the Trust did not agree to it. Second, it was not a compromise of a *bona fide* challenge to the will. But even if the settlement were eligible for consideration by the court, it did not meet the statutory standard required to nullify the testator's estate plan. 7

A. The Trust's share of the estate could not be cut in half without the Trust's consent. The Attorney General had no authority to speak for the Trust. The Trust did not agree to the reduction. The court had no authority to order the Trust to accept a reduction. 10

B. It was unjust and unreasonable to forfeit 28.75% of the foundation's bequest in order to settle the claim of undue influence. 24

II. The circuit court erred in removing the appellants from their duties because they opposed the settlement agreement, and then ordering them to sign the agreement after their removal. .. 42

CONCLUSION 43

Addendum A-1

TABLE OF AUTHORITIES

Cases: Page:

Altemeier v. Harris,
335 Ill.App. 130, 81 N.E.2d 22 (1948) 27

In re Estate of Anderson,
381 S.C. 568, 674 S.E.2d 176 (Ct. App. 2009) 34

Banker v. Hendricks,
24 S.C. 1 (1885) 35

In re Boston Reg. Med. Center,
328 F.Supp.2d 130 (D.Mass. 2004) 18

Brown v. Ryan, Attorney General,
338 Ill.App.3d 864, 788 N.E.2d 1183 (2003) 15, 23

Bunch v. Hurst,
3 Des. 273 (1811) 35

Calhoun v. Calhoun,
277 S.C. 527, 290 S.E.2d 415 (1982) 36

Commonwealth ex rel. Ferguson, Attorney General v. Gardner,
327 S.W.2d 947, 74 A.L.R.2d 1059 (Ky. 1959) 17

Copeland v. Wheelwright,
230 Mass. 131, 119 N.E. 667 (1918) 26

First Citizens Bank v. Inman,
296 S.C. 8, 370 S.E.2d 99 (1988) 36

Fleisch v. First American Bank,
305 Ill.App.3d 105, 710 N.E.2d 1281 (1999) 29

Gaddy v. Douglass,
359 S.C. 329, 597 S.E.2d 12 (Ct. App. 2004) 35

Gaston v. Bennett,
30 S.C. 467, 9 S.E. 515 (1888) 35

In re Gebbie's Will,
33 A.D.2d 1093, 307 N.Y.S.2d 1002 (1970) 16

Gilbert v. McLeod Infirmary,
219 S.C. 174, 64 S.E.2d 524 (1951) 10

Hairston v. McMillan,
387 S.C. 439, 692 S.E.2d 549 (Ct. App. 2010) 34

Hay v. LeBus,
317 Mich. 698, 27 N.W.2d 309 (1947) 26

In re Healy's Estate,
247 Minn. 205, 76 N.W.2d 677 (1956) 27

Hodge v. Shea,
252 S.C. 601, 163 S.E.2d 82 (1968) 35

Holt v. Holt,
304 N.C. 137, 282 S.E.2d 784 (1981) 25, 37

In re Estate of Horton,
11 Cal.App.3d 680, 90 Cal.Rptr. 66 (Ct. App. 1970) 16

Kolin v. Leitch,
343 Ill.App. 622, 99 N.E.2d 685 (1951) 21

Lefkowitz v. Lebensfeld,
51 N.Y.2d 442, 434 N.Y.S.2d 929, 415 N.E.2d 919 (1980) 17, 18, 19

Lukich v. Lukich,
379 S.C. 589, 666 S.E.2d 906 (2008) 40

Midkiff v. Kobayashi,
54 Haw. 299, 507 P.2d 724 (1973) 14, 41

Mock v. Dowling,
266 S.C. 274, 222 S.E.2d 773 (1976) 34

Murphrey v. Dalton,
314 S.W.2d 726, 67 A.L.R.2d 1278 (Mo. 1958) 17

O'Neil v. O'Neil,
271 N.C. 106, 155 S.E.2d 495, 500 (1967) 25

Owens v. Sweat,
227 S.C. 112, 86 S.E.2d 886 (1955) 35

Page v. Lewis,
209 S.C. 212, 39 S.E.2d 787 (1946) 35

Parker v. Bowen,
156 S.C. 381, 153 S.E. 346 (1930) 35

Parris v. Cobb,
5 Rich.Eq. 450 (1853) 33, 35

Russell v. Wachovia Bank,
353 S.C. 208, 578 S.E.2d 329 (2003) 34, 36

Sarkeys v. Independent Sch. Distr. #40,
592 P.2d 529 (Okla. 1979) 20

In re Schlussel,
195 Misc. 1008, 89 N.Y.S.2d 47 (Sup. Ct. 1949) 19

Estate of Schroeder,
441 N.W.2d 527 (Minn. 1989) 26

In re Smith's Estate,
75 Misc.2d 895, 349 N.Y.S.2d 281 (Surr. Ct. 1973) 19

Last Will and Testament of Smoak v. Smoak,
286 S.C. 419, 334 S.E.2d 806 (1985) 34

Spang v. Cleveland Trust Co.,
134 N.E.2d 586 (Ohio Comm. 1956) 17

Strauss v. Marlboro County Gen. Hosp.,
85 S.C. 425, 194 S.E. 65 (1937) 13

Takabuki v. Ching,
67 Haw. 515, 695 P.2d 319 (1985) 17

Trustees of Dartmouth College v. Woodward,
17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1822) 13

University of Southern California v. Moran,
365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005) 23

In the Matter of the Estate of Ward,
200 Ariz. 113, 23 P.3d 108 (2001) 29, 41

Watson v. Wall,
229 S.C. 500, 93 S.E.2d 918 (1956) 18

Way v. Central Union Life Ins. Co.,
61 S.C. 501, 39 S.E. 742 (1901) 36

Wille v. Wille,
57 S.C. 413, 35 S.E. 804 (1900) 35

Statutes:

S.C. Code Ann. § 62–3–1101 ..... *passim*

S.C. Code Ann. § 62–3–1102 ..... *passim*

S.C. Code Ann. § 62–7–301 13

S.C. Code Ann. § 62–7–405(c) 14

S.C. Code Ann. §§ 62–7–410, –416 22

S.C. Code Ann.§§ 62–7–611 42

S.C. Code Ann.§§ 62–7-614 42

S.C. Code Ann.§§ 62–7-616 42

S.C. Code Ann. § 62–7–704 ..... 42, 43

S.C. Code Ann. § 62–7–706 42

Treatises:

2 BLACK ON RESCISSION (1929) 36

DOBBS, HANDBOOK ON THE LAW OF REMEDIES (1973) 36

DUKEMINIER, SITKOFF, ET AL., WILLS, TRUSTS, AND ESTATES (7th ed. 2005) 15, 23

FISHMAN AND SCHWARZ, NONPROFIT ORGANIZATIONS (1995) 18

FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS (2004) 15

Fremont-Smith, *Trends in Accountability and Regulation of Nonprofits*, in THE FUTURE OF THE NONPROFIT SECTOR (Hodgkinson et al. eds. 1989) 18

4A A. SCOTT & W. FRATCHER, TRUSTS (4th ed. 1989) 15, 23, 29

Law review articles:

Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 974 (2004) 15, 16

Crimm, *Why All is Not Quiet on the "Home Front" for Charitable Organizations,* 29 N.M. L. REV. 1 (1999) 18

Green, "Fraud, Undue Influence and Mental Incompetency: A Study in Related Concepts," 43 COL. L. REV. 176 (1943) 34

Henry Hansmann, *Reforming Nonprofit Corporation Law,* 129 U. Pa. L. REV. 497 (1981) 18

Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility,* 73 HARV. L. REV. 433 (1960) 18

Klick and Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off,* 108 COL. L. REV. 749 (2008) 15

Komoroski, Note, *The Hershey Trust's Quest to Diversify: Redefining the State Attorney General's Role When Charitable Trusts Wish to Diversify,* 45 WM. & MARY L. REV. 1769 (2004) 16

Kosaras, *A Conversation with Marion R. Fremont-Smith,* FOUND. NEWS AND COMMENT Sept.-Oct. 2004 15

Note, "Undue Influence in Intervivos Transactions," 41 COL. L. REV. 707 (1941) 35, 36

Patton, *The Queen, the Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform,* 11 U. FLA. J.L. & PUB. POL'Y 131, 165 (2000) 15

Schramm, *Law Outside the Market: The Social Utility of the Private Foundation,* 30 HARV. J. LAW & PUB. POL'Y 355 (2006) 10, 15

Sidel, *The Struggle for Hershey: Community Accountability and the Law in Modern American Philanthropy,* 65 U. PITTS. L. REV. 1 (2003) 14

STATEMENT OF QUESTIONS PRESENTED

I.

Where the Attorney General set aside the trustees of a charitable trust and negotiated the settlement of a will contest in behalf of the trust, and where there was no evidence of a *bona fide* controversy about the validity of the will and charitable trust, was the settlement agreement negotiated by the Attorney General eligible for consideration by the court under S.C. Code Ann. § 62–3–1102?

II.

Where there was no evidence that the will and charitable trust were void as the product of undue influence, and where the settlement agreement replaced the testator's estate plan with a fundamentally different plan, did the circuit court err in finding that the settlement was just and reasonable?

III.

Did the circuit court err in removing the appellants as trustees of the charitable trust and as personal representatives of the estate solely because they opposed the settlement agreement negotiated by the Attorney General?

STATEMENT OF THE CASE

James Brown died on December 25, 2006. The month after his death his will dated August 1, 2000 was admitted to probate in Aiken County, where the deceased resided. He left his personal and household effects ("PHE") to named adult children. The balance of his estate poured over into his 2000 Irrevocable Trust ("the 2000 Trust") created the same day as his will was executed. Mr. Brown's primary assets were his publicity rights and the right to royalties from more than 800 published and unpublished songs. Upon his death the 2000 Trust divided into two subtrusts: a family educational trust funded with a maximum amount of $2,000,000 for the education of the issue of named children and their issue; and the James Brown "I Feel Good" Trust (hereafter, "the charitable trust" or the "I Feel Good Trust") for the education of needy and deserving students at South Carolina and Georgia schools.

In December 2007, Tommie Rae Hynie Brown (hereafter, "Tommie Rae") filed in probate court a challenge to the validity of the will and the 2000 Trust on the ground of undue influence. On December 26, 2007, the last day for contesting the will, a will contest was filed on the same ground by six of the Mr. Brown's adult children. The two will contests were removed to circuit court, as were all other matters filed in connection with the estate.

The Attorney General of South Carolina, the Honorable Henry D. McMaster, was joined as a party defendant in September 2007 in Case No. 122, which involved claims for the removal of Messrs. Dallas, Bradley, and Cannon as personal representatives and trustees.

Appellants were appointed trustees of the 2000 Trust and personal representatives of the estate ("PR/Trustees") on November 20, 2007. They replaced Albert Dallas, David Cannon and Alfred Bradley, who resigned from those positions.

By motion dated January 20, 2009, the Attorney General, Tommie Rae Hynie Brown, and five of the testator's adult children filed a motion requesting court approval under S.C.

Code Ann. § 62–3–1102 of a settlement agreement reached on August 10, 2008.[1] In its essential features, the settlement agreement reduced the share of the charitable trust in the residuary estate from 100% (less $2,000,000 for the grandchildren's trust) to 50% and distributed the amount of this reduction, half to Tommie Rae and half to the adult children participating in the settlement. A new trust was created, to be controlled by the Attorney General. The Attorney General negotiated the settlement and agreed to it on behalf of the 2000 Trust. The appellants as trustees were not informed of the negotiations leading to the agreement and did not participate.

The motion came on for hearing before the Honorable Doyet A. Early, III, Resident Judge of the Second Judicial Circuit, beginning January 30, 2009. Hearings continued on March 4, 5, 6, and 25, and April 4 and 6. On March 26, the proponents of the settlement filed modified documents evidencing modifications of the settlement agreement. By the end of the hearings another adult son had joined in the settlement in consideration of the grant of a right of first refusal to buy the assets of the estate, and the share of the charitable trust was further reduced to 47.5%. The charitable trust was agreed to be replaced with a new trust, called "the Legacy Trust," the trustee of which would be named by the Attorney General, who would control the new trust. Expenses and taxes of the Legacy Trust were assigned as follows: Tommie Rae, 25%; the Brown Family, LLC, 25%; and the "I Feel Good" Trust, 25%.

By order dated May 26, 2009 Judge Early approved the settlement and removed the appellants as PRs/trustees, replacing them with Russell Bauknight. This appeal followed,

---

[1] Attached to the motion were three documents:
1. An unsigned "Compromise and Agreement",subtitled "Terms of Private Settlement Agreement Dated August 10, 2008," with signature lines for Henry D. McMaster, Attorney General of South Carolina; Tommie Rae Brown; Larry Brown; Venisha Brown; Deanna J. Brown Thomas; Yamma N. Brown;Daryl J. Brown; and Tonya Brown.
2. An undated, unsigned "Addendum to Agreement", also entitled "Contribution Agreement" with the same signature lines; and
3. An undated, unsigned "James Brown Legacy Trust" with Settlors Tommie Rae, AG McMaster and the Brown Family, LLC. [Mot. Dtd. 1/16/09.]

and was consolidated with the appellants' appeal of subsequent orders appointing and reappointing Mr. Bauknight in various fiduciary capacities.[2]

The consolidated appeals were transferred from the Court of Appeals to the Supreme Court, and this appeal followed.

STATEMENT OF FACTS

Throughout his lifetime, entertainment legend James Brown advocated the value of education. He determined to leave the great bulk of his estate to that cause. Ten years before he died, he engaged counsel and began planning The James Brown "I Feel Good" private foundation. By early 1999, the components of a complete estate plan — including a will, a revocable trust and a durable power of attorney — were ready for Brown's signature. These were executed on June 15, 1999, four days after Brown completed a $26 million financing transaction for himself and his wholly-owned company, James Brown Enterprises, Inc. ("JBE, Inc.") in New York (the "TIAA debt").

The will of 1999 gave Brown's entire residuary estate to the trust, which at Brown's death was to be divided as follows: one-half for the education of the seven grandchildren, with a cap of $2 million;[3] and one-half for the "I Feel Good" private foundation, providing scholarships for students at Voorhees, U.S.C. Aiken, and U.S.C. Salkehatchie. [1999 Will, Item II; 1999 Trust, Article V.]

Brown specifically excluded all past and future spouses and all children and other claimed heirs from inheriting his music empire. *In terrorem* forfeiture clauses required his fiduciaries to vigorously defend any challenge to Brown's estate plan as an affront to his

---

[2] On August 3 and 6, 2009, the Attorney General and some respondents sought and obtained *ex parte* orders appointing Mr. Bauknight as special PR and special trustee. Requests to reconsider and vacate these orders were consolidated as Case 2009-CP-02-1810 ("Case 1810"), and denied.

[3] The cap was tied to the Generation Skipping Tax exemption available at Brown's death. [1999 Trust, Article V.] Subject to the *in terrorem* forfeiture clauses and the spendthrift clause, each of the seven grandchildren had an education fund of about $285,000.00 by virtue of the 1999 will and revocable trust.

wishes. [1999 Will, Item X; 1999 Trust, Article XIX.] A spendthrift clause confirmed that all funds would be used solely for education. [1999Trust, Article XIX.]

Under the 1999 estate plan, Brown named as his fiduciaries: daughter Deanna; attorney Dallas; accountant Cannon; road manager Bradley; friends Willie Glenn and Ella Overton; and office assistant Freida Carter. NationsBank of South Carolina was named backup PR and trustee. [1999 Will, Item II; 1999 Trust, Articles I, VI.]

The following year, on August 1, 2000, Brown made minor modifications to his estate plan. [2000 Trust, Article VII.] He expanded the scholarships to include needy and deserving students attending schools in South Carolina and Georgia. He made the Trust irrevocable and funded it with a deed to his 60-acre home estate at Beech Island, in Aiken County, and with his stock in JBE, Inc., which held about two-thirds of the royalties to Brown's more than 800 published songs.[4] Like the 1999 estate plan, the 2000 will and 2000 Trust contained *in terrorem* forfeiture clauses, and the Trust included a spendthrift clause.

Mr. Brown died at age 73 on December 25, 2006. The part of his music empire that was not already in the 2000 Trust was devised to it. It appeared that Brown had created possibly South Carolina's largest individual private foundation dedicated solely to educating the needy.[5]

---

[4] As a result of Dallas' conflicting statements to the courts, the question of who owns JBE, Inc. — the estate or the 2000 Trust — was uncertain for some time. Cannon confirmed that JBE, Inc. has been owned by the Trust since its inception. In September 2007 Dallas filed a knowingly false stipulation asserting that JBE, Inc. had never been transferred to the Trust. Dallas told AG Jones that he was forced to agree to the false stipulation. He later testified he authorized the false stipulation in order not to be removed. [Order dtd. 4/8/08.] In their appeal brief in the Court of Appeals, Dallas and Bradley finally confirmed, as Cannon had always asserted, that Brown transferred, and the trustees accepted, JBE, Inc., into the Trust in 2000. [Brief, Resp. Dallas/Bradley appeal.]

[5] The Estate/Trust's original tax counsel valued James Brown's assets at $80–$120 million with at least $20 million already in the 2000 Trust. [E-mail from Hammond to Jones, dtd. 11/27/07.] On June 15, 2008 Atlanta investor and branding executive Dr. Terry Cox estimated the total value of the assets at about $100 million, with $40–50

(continued...)

Like the 1999 will, the 2000 will contained a "savings clause," incorporating the trust so that both the grandchildren's education trust and the "I Feel Good" Trust would be created even if the 2000 Trust were not in existence when Brown died. The practical effect of these savings clauses was that four separate documents directed that Brown's music empire go to the Brown Family Education trust and the "I Feel Good" private foundation — the two subtrusts of, first, the 1999 (revocable) trust, and second, the 2000 (irrevocable) trust.

Like the 1999 estate plan, Brown's final estate plan acknowledged as his heirs four of his five legitimate children, as well as two of his more than six claimed children not presumed to be heirs. Among those excluded were three heirs who have qualified as children under the estate's DNA protocol, established by original counsel after Brown's death.[6] [99 Will, Intro; 99 Tr.; Will, Intro; Trust Art. XXII]

For the next seven years the 2000 Trust, of record in two states, operated Brown's home estate at Beech Island. The 2000 Trust also bought and sold a bank building in Augusta and paid education benefits for four of the seven grandchildren. [Tr. Hg. 2/9/08, #122, pp. 18-19.]

By 2007 Dallas and Cannon had ransacked at least $13 million of Brown's assets. [Amended Compl., Case 322.] It appears that neither Brown nor Deanna and Bradley, co-fiduciaries with Dallas and Cannon for seven years, knew of the massive pre-death

---

[5](...continued)
million assigned to publicity rights (image/likeness) and $36–45 million to royalties for Brown's more than 800 published and unpublished songs. [Cox, Grahm Windsor proposal, 6/07.]

[6] Those claimed and presumed heirs specifically excluded by the language of both the 1999 and 2000 estate plans are Deon (incarcerated); Lisa (born of first marriage); Jeanette (DNA protocol); LaRhonda; (DNA protocol); Cinnamon (DNA protocol); James II (orally directed to take, but refused, a prepaid DNA protocol through GAL); Tonya (claimed grandchild, but no DNA and her counsel filed a statement omitting her as an heir). [See Order dtd. 3/7/08, Case 872; Petition and related documents, Deon

misappropriations as they were taking place.[7]

In December 2007, immediately after their appointment on November 20, appellants filed the long-overdue application for IRS recognition of the "I Feel Good" Trust, making small technical amendments to the Irrevocable Trust, as allowed by the Trust, to assure IRS approval.[8] By March they had assembled an Advisory Board for the 2000 Trust, including some of the distinguished leaders Dallas and Cannon had named but never called to serve.[9]

In the final ten days of December 2007, the will and the 2000 Trust were challenged by some of the children and by Tommie Rae Hynie Brown on the ground of undue influence. In March 2008, an amended complaint of some of the children was filed, but it failed to allege any facts to support the claim that Brown's 2000 Trust or the will were the product of undue influence. [Amended Complaint][10]

No discovery took place, and pending dispositive motions were never heard. Having been impleaded in an earlier action, the Attorney General took over as spokesman for the 2000 Trust and settled the undue influence claim and the omitted spousal claim of Tommie Rae in a mediation to which the appellants, as trustees of the 2000 Trust, were not invited

---

[7] Brown never used the funds he had intended for retirement not only because they were misappropriated, but also because he continued to be "the hardest working man in show business" until just before his death at 73. Brown grossed about $6 million per year in road appearances the last three years of his life. Most of Brown's approximately $3 million per year in royalties was pledged to bring down the TIAA royalty-backed debt. The TIAA debt had been reduced from about $17 million the summer before Brown's death to about $11 million when appellants' service was terminated on May 26, 2009.

[8] Like most private foundations, the "I Feel Good" Trust, although irrevocable, gave the Trustees the authority to amend the Trust solely to assure IRS compliance.

[9] Appointed were: Dr. Leonard McIntyre, Interim President of S. C. State University; Ms. Inez Tenenbaum, former S. C. Superintendent of Education; Ret. Judge Walter Williams; and Ms. Ann Carmichael of U. S. C. Salkehatchie. Ms. Tenenbaum resigned yo accept a federal post. [See Affidavits, Carmichael, Williams]

[10] By administrative directive Case 872, which was originally filed with Case 122, was segregated by the Clerk about May 14, 2008. Earlier documents bear the civil action number of Case 122.

to attend. The Attorney General took over for the 2000 Trust and agreed for it to relinquish roughly half its devise in settlement of these claims. Instead of about 98% of assets after expenses, with no estate taxes, the 2000 Trust would receive 47.5% percent after estate taxes, but then further reduced by $2 million — the amount required to fund the grandchildren's education trust.[11] The only expert testimony offered at the hearings below on the subject of taxation was to the effect that the settlement would cause the loss of the estate tax deduction, resulting in about 50% taxes and interest, and moreover that the "Legacy Trust", created by the settlement, would likely cause the "I Feel Good" Trust to be disqualified as a Section 501(c)(3) private foundation, resulting in income taxation problems in addition to the estate tax generated. [Tr. 4/6/09: 25.]

The proponents of the settlement offered no witnesses to support the contention that the claim of undue influence, allegedly voiding the will and the 2000 Trust, was supported by any evidence. The circuit court did not purport to find merit in the claim of undue influence, but found that the claim was brought in good faith. The court found that the Attorney General was entitled to control and speak for the 2000 Trust, not the trustees, and that the Attorney General was empowered to settle the will contest and omitted spousal claim in its behalf. The settlement negotiated by the Attorney General was found to be just and reasonable.

[11] *See* the charts used at trial and reproduced in the Addendum to this brief for a depiction of the effect of the settlement.

ARGUMENT

I.

The settlement agreement was not eligible for court consideration for two reasons. First, the Trust did not agree to it. Second, it was not a compromise of a *bona fide* challenge to the will. But even if the settlement were eligible for consideration by the court, it did not meet the statutory standard required to nullify the testator's estate plan.

The settlement agreement at issue takes away more than half the testator's bequest to his private foundation for the education of needy and deserving students and gives that share to his adult children, whom he intended to get no part of his musical empire, and to the woman with whom he lived, who had agreed not to claim common law wife status after his death. It consigns control of his estate and his foundation to the Attorney General, operating with advice of the disinherited children and the omitted spouse claimant.

All this was done on the back of a claim that the estate plan, developed over a four-year period and embodied in a will and irrevocable trust six years before death, leaving almost everything to education, was the product of undue influence. The Attorney General set aside the trustees of the testator's private trust, purported to speak for the trust, and agreed to this settlement of the will contest, replacing the testator's estate plan with one he would have detested.

How such a breathtaking chain of events could possibly have happened requires a review of an obscure part of the probate code seen only once or twice in the appellate jurisprudence of this State.

Two sections of the Uniform Probate Code deal materially here with settlements of rights in an estate. The first is Section 3–1101, codified in South Carolina as S.C. Code Ann. § 62–3–1101 (hereafter, "Section 1101").[12] The second is Section 3–1102, codified

---

[12] **SECTION 62-3-1101. Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons.**

(continued...)

here as S.C. Code Ann. § 62–3–1102 (hereafter, "Section 1102").[13]

Section 1101 states the *effect* of a court-approved settlement, while Section 1102 does two things. First, it prescribes the *elements* which a settlement must have to make it eligible for consideration by the court. Second, it sets the standard essential for court approval of such a settlement. Section 1102 is the key statute. It is the statute which allows a court under extraordinary circumstances to do something which the courts of this State and all others have often said is contrary to our policy, with some exceptions, of allowing citizens to leave their property as they see fit. Section 1102 allows a court to change the estate plan of the deceased, perhaps fundamentally, despite the testator's plainly expressed intentions.

---

[12](...continued)

A compromise of a controversy as to admission to probate of an instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of a probated will, the rights or interests in the estate of the decedent, of a successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties including those unborn, unascertained, or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it. A compromise approved pursuant to this section is not a settlement of a claim subject to the provisions of Section 62-5-433.

[13] **SECTION 62-3-1102. Procedure for securing court approval of compromise.**

The procedure for securing court approval of a compromise is as follows:

(1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.

(2) Any interested person, including the personal representative or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.

(3) After notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

These statutes deal with the settlement of all manner of claims and controversies but only two are at issue here: the claim that Mr. Brown's will is invalid as the product of undue influence, and the claim that the person with whom he lived is his widow. These two claims were settled by the Attorney General in a single package.

* * * * *

The agreement at issue here was joined in by the Attorney General, the disinherited adult children, and the woman who agreed not to claim to be Mr. Brown's common law wife. [Tr. 3/25/09: 253.] Conspicuous by its absence from the signators is the private foundation — the 2000 Trust — to which Mr. Brown left the overwhelming bulk of his estate.[14] The Attorney General purported to speak for the foundation but he had no authority to do so in South Carolina law.

Nor was this agreement the compromise of a *bona fide* challenge to Mr. Brown's will. The proponents of the settlement did not even ***try*** to offer the court any testimony that the will contest had any basis in fact.

But even if the agreement had met these two prerequisites for consideration by the court — (1) unanimity of all holders of beneficial interests and (2) the compromise of a *bona fide* challenge to the will — it was not just and reasonable by any standard which the court might apply. The court erred in approving it.

A. <u>The Trust's share of the estate could not be cut in half without the Trust's consent. The Attorney General had no authority to speak for the Trust. The Trust did not agree to the reduction. The court had no authority to order the Trust to accept a reduction.</u>

---

[14] In the scholarly literature and in much of the caselaw, entities such as the charitable subtrust of the James Brown 2000 Irrevocable Trust are commonly called foundations. The organizational form — whether trust or corporation — is immaterial. *See, e.g., Gilbert v. McLeod Infirmary*, 219 S.C. 174, 185, 64 S.E.2d 524 (1951) ("'The directors or other members of the managing board are sometimes called trustees. Their legal position is the same no matter by what name they are called, whether directors, trustees, or governors.' 1 BOGERT ON TRUSTS 61."). There are approximately 65,000 such private foundations in the United States. Carl Schramm, *Law Outside the Market: The Social Utility of the Private Foundation*, 30 HARV. J. LAW & PUB. POL'Y 355, 383 n.113 (2006).

James Brown devised to his adult children only his personal effects, and nothing to Tommie Rae Hynie Brown (hereafter "Tommie Rae").[15] He devised his entire residuary estate, which included almost everything, to his 2000 Irrevocable Trust. [Will, ITEM 2.] The Trust contains two subtrusts. One is a private trust for the education of named grandchildren. The other — and by far the larger — is a private charitable trust for the education of needy students. [Trust, Article V.]

Four months after having been brought into one of the pending actions, the Attorney General convened a mediation in Augusta, Georgia, to which the trustees of the 2000 Trust were not invited. [*See* Tr. 1/30/09: 22; 91.] Claiming the right to negotiate and speak for the Trust, the Attorney General agreed that the adult children should receive 25% and Tommie Rae should receive 25% of the residuary estate in settlement of the will contest and the claim to a spousal share. [Document dated 8/10/08, ¶ 2(d).] This reduced the Trust's devise from virtually everything to half of the residuary estate.[16] The residuary estate was to pass to a new entity — ironically dubbed "the Legacy Trust" — run by a trustee selected by the Attorney General, advised by the adult children and Tommie Rae. [Document dated 8/10/08, p. 2; Addendum ¶ 11(A).] Thus, the testator's foundation will henceforth be controlled by the Attorney General of South Carolina[17] and by the very people whom he disinherited.

Asked to approve this agreement, the circuit court was offered two quite different rationales for the Attorney General's authority to take charge of the Trust, to negotiate for it, to settle these disputes in its behalf, to change the estate and trust documents, and to

---

[15] Tommie Rae and the adult children who contested the will are sometimes referred to hereafter as the contestants.

[16] By the time the hearings below concluded, the Trust's share had shrunk from 50% to 47.5% as the terms of the settlement agreement twisted and turned. Even now, there is no single document constituting "the settlement agreement." It is a collection of different papers signed at different times by various parties.

[17] The settling parties told the circuit court that the trustee of the new "Legacy Trust" would be "controlled completely" by the Attorney General. [Tr. 4/6/09: 107.]

replace the testator's Trust with a new one deemed more suitable by the Attorney General; and then for the court's authority to approve what the Attorney General had done, to remove objecting fiduciaries, and to order the removed fiduciaries to signify their consent, following their removal.

The Attorney General's rationale was simple. The AG contended that, by authority of common law and statute, once he has entered any lawsuit to which a private charitable trust is party, he has authority to control and settle the litigation in behalf of the trust as though he were the trust itself. As the Attorney General's counsel often claimed: "The general law is when the AG appears, he controls the litigation." [Tr., 4/6/09, 149/15–16.] "The Attorney General has exclusive authority over charitable trusts." [Tr. 4/6/09: 181/18 - 182/7.]

The Brown contestants gave lip service to the AG's claim to such authority when asked to do so, but their rationalization for the outcome here was more sophisticated. It centered upon the provision in Section 1102 which allows the court to approve an agreement altering an estate plan over the objection of trustees if agreed upon by *all holders of beneficial interests in the estate*. The Brown contestants contended that where a charitable trust holds a beneficial interest in the estate, this statute gives the court authority to *compel* the trust to agree to an alteration in the estate plan by *ordering* the trustees to sign the agreement, once approved by the court as just and reasonable. When the court approves as just and reasonable the agreement of the other participants to alter the estate plan, the trust's consent is compulsory and the trustees are ordered to sign as a ministerial act, so the argument goes.

Neither of these theories can be sustained. The Attorney General has no right to set aside the trustees of a private charitable trust and to put himself in the position of super-trustee, managing the affairs of the trust in his discretion and settling a will contest as he sees fit. The fact that a will contest is pending gives him no authority not otherwise possessed, and the AG possessed no such authority to act for the trust. The Attorney

General is one person among others with authority to "enforce" charitable trusts (a term of art), not to take them over and speak for them. No agreement exists under the Probate Code for the court to consider approving unless and until *all* the holders of a beneficial interest in the estate have joined in that agreement. The 2000 Trust was overwhelmingly the chief holder of a beneficial interest in this estate, yet it was not represented in the settlement and did not agree. There was no agreement for the court to consider.[18]

> 1. *The Attorney General is one of the persons authorized to enforce a trust. This is a police power to ensure that the trust is administered according to its terms. The Attorney General's power to enforce a trust gives him no authority to set aside the trustees, administer the trust, and settle its disputes.*

The charitable subtrust of the 2000 Irrevocable Trust is at the same time a charity and a private trust. Its property is not public property but private. The nature of a charity administered by a private party was explained by the Court in *Strauss v. Marlboro County Gen. Hosp.*, 185 S.C. 425, 194 S.E. 65 (1937). In that case a physician who was denied privileges at a private hospital sued to have the hospital declared a public corporation bound to admit him to practice because the hospital served the public. Relying upon "the celebrated case of the *Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518, 671, 4 L.Ed. 629", the Court found that the hospital, although a charity, was a private entity in charge of its own affairs. 194 S.E. at 65.

James Brown's legacy to his Trust is the private property of that foundation, not public property subject to control by the Attorney General. It is as true today as when Daniel Webster argued it to the Court in the *Dartmouth College* case: "That all property, of which the use may be beneficial to the public, belongs therefore to the public is quite a new doctrine. It has no precedent, and is supported by no known principle. . . . In such a case, no lawyer would or could say, that the legislature might divest the trustees,

---

[18] Grandchildren Romunzo and Forlando did not join in the settlement agreement but filed objections to it as well since their share of the family education trust was reduced. [Objection to Settlement.] *See* S.C. Code Ann. § 62–7–301(c) (representative's consent not effective where beneficiary objects).

constituted by deed or will, seize upon the property, and give it to other persons, for other purposes." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) at 573 (1822).

The Attorney General of South Carolina, like the attorneys general of all the States, has common law and statutory authority to enforce trusts domiciled in the State. The General Assembly has conferred identical authority upon other actors as well. S.C. Code Ann. § 62–7–405(c). Thus, the Attorney General's enforcement authority is not exclusive. This authority to enforce a trust is the authority to police the administration of the trust so as to detect and cure fraud and the like on the part of the trustees, and to ensure that the trustees are administering the trust as intended by the settlor. The Hawaii court emphasized the difference between enforcement and displacement in this way:

> The function of the attorney general, as *parens patriae* of charitable trusts, is to oversee the activities of the trustees to the end that the trust is performed and maintained in accordance with the provisions of the trust document, and to bring any abuse or deviation on the part of the trustees to the attention of the court for correction. * * * The authority of the attorney general over charitable trusts does not extend beyond the performance of that function. M. R. FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT, 198 (1965).

Midkiff v. Kobayashi, 54 Haw. 299, 507 P.2d 724, 745 (1973) (citations omitted). "In the case of charitable trusts, traditional doctrine has generally limited the attorneys general to ascertaining that trustee actions are permitted by, and not inconsistent with, the underlying trust instrument, and safeguarding against fraud." Mark Sidel, *The Struggle for Hershey: Community Accountability and the Law in Modern American Philanthropy*, 65 U. PITTS. L. REV. 1, 2 (2003).

The role of the state in the regulation of private foundations such as the charitable subtrust of the 2000 Trust is summarized by Professor Schramm in this way:

> The private foundation is, of course, subject to regulation by state attorneys general and the Internal Revenue Service. In general, though, government oversight is premised on a view of nonintervention in the substantive decision-making and operations of foundations. The law's proper role is thus limited to two responsibilities:

> [To ensure] that each charitable organization is carrying out the purposes for which it was established, and that its managers are not obtaining personal benefits from their positions at the expense of the charity. With few exceptions, the law neither attempts to control the decisions of managers, made in good faith, as to how the purposes will be achieved, nor how their organizations will be administered.
>
> Generally, a state attorney general can pursue legal action against foundations in cases where charitable assets are in jeopardy (thus possibly violating donor intent), and in cases involving illegal actions.

Carl Schramm, *Law Outside the Market: The Social Utility of the Private Foundation*, 30 HARV. J. LAW & PUB. POL'Y 355, 372 (2006).[19] In the exercise of his enforcement authority, the attorney general must not be allowed to "step over the line between oversight and management." Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 974 (2004). *Accord:* MARION FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 301 (2004) ("[A] duty to enforce implies a duty to supervise (or oversee) in its broader sense. *It does not, however, include a right to regulate, or a right to direct, either the day-to-day affairs of the charity or the action of the court.*" Emphasis added.); Jonathan Klick and Robert Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COL. L. REV. 749, 780–81 (2008), *quoting* JESSE DUKEMINIER, ROBERT SITKOFF, ET AL., WILLS, TRUSTS, AND ESTATES 750 (7th ed. 2005); Carl Schramm, *Law Outside the Market: The Social Utility of the Private Foundation*, 30 HARV. J. LAW & PUB. POL'Y 355, 386 (2006) ("[T]he attorney general is not a 'super' member of the board.").

In the case of a charitable trust, "the beneficial interest is not given to individual beneficiaries, but instead for purposes beneficial to the community." *Brown v. Ryan*,

---

[19] *Quoting* A. Kosaras, *A Conversation with Marion R. Fremont-Smith*, FOUND. NEWS AND COMMENT, Sept.-Oct. 2004, at 21–22. *See also* David Patton, *The Queen, the Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POL'Y 131, 165 (2000).

Attorney General, 338 Ill.App.3d 864, 788 N.E.2d 1183, 1191 (2003), *citing* 4A A. SCOTT & W. FRATCHER, TRUSTS § 391, at 357 (4th ed. 1989). "Thus, the community has an interest in enforcing the trust and the Attorney General represents the community in seeing that the trust is properly construed and that the funds are applied to their intended charitable uses." *Id.* at 1191. That is the sum total of the attorney general's authority.

In re Estate of Horton, 11 Cal.App.3d 680, 90 Cal.Rptr. 66 (Ct. App. 1970), is a typical case rejecting an attorney general's claim that the authority to enforce is the authority to control:

> We are cited no statutory or case law authority placing the Attorney General in the position of a super administrator of charities with control over, or right to participate in, the contractual undertakings of the charities. He has undoubted standing to seek redress in the courts of contracts entered into by charities which are collusive, tainted by fraud or which demonstrate any abuse of trust management.

90 Cal.Rptr. at 68.

The attorney general's lack of authority to control, speak for, or act for a charity is expressed by Professor Brody, a frequently quoted scholar on the subject, in these terms:

> Where discretion is conferred on a charity's board, proper state enforcement action over fiduciary decisionmaking reduces to a single rule: The role of the attorney general and courts is to guard against charity fiduciaries' wrongdoing, and not to interfere in decisionmaking carried out in good faith. To this end, an attorney general is vested with the authority to seek to correct breaches of fiduciary duty that have not otherwise been remedied by the board. *However, the attorney general is not a "super" member of the board.*

Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement,* 79 IND. L.J. 937, 976 (2004) (emphasis added). "In other words, an attorney general does not have the authority to act as co-trustee of a charitable trust." Jennifer Komoroski, Note, *The Hershey Trust's Quest to Diversify: Redefining the State Attorney General's Role When Charitable Trusts Wish to Diversify,* 45 WM. & MARY L. REV. 1769, 1784 (2004). *Accord: In re Gebbie's Will,* 33 A.D.2d 1093, 307 N.Y.S.2d 1002, 1004 (1970).

Not only is the Attorney General not authorized to act as trustee of a charitable trust, he is not authorized to act as *attorney* for the trustee in a will contest, as the Missouri court held in the leading case of *Murphrey v. Dalton,* 314 S.W.2d 726, 730–31, 67 A.L.R.2d 1278 (Mo. 1958). The court held that the attorney general's authority to intervene in a will contest gave him no right to represent a charitable trust in that contest. The Kentucky court denies the attorney general the right even to intervene in a will contest since he has no proper role to play. *Commonwealth ex rel. Ferguson, Attorney General v. Gardner,* 327 S.W.2d 947, 74 A.L.R.2d 1059 (Ky. 1959). The court observed:

> . . . . The question presented is a new one in this jurisdiction. It is significant that no record has been produced of any attempt by an attorney general, during the entire 167 years of the Commonwealth, to intervene in the many contests about the validity and establishment of wills involving charities. . . .

327 S.W.2d at 948. As in Kentucky, it is no accident that the South Carolina Reports appear to reflect no previous instance of the Attorney General intervening in a will contest and attempting to take over the role of trustee. *See also: Spang v. Cleveland Trust Co.,* 134 N.E.2d 586 (Ohio Comm. 1956) (The AG is not a necessary party to a will contest where the will, if valid, created a mixed charitable/noncharitable trust, since the object of the will contest was to determine whether the will was valid, not to terminate a charitable trust.).

As settlor, James Brown conferred upon the Trust, acting through its trustees, and upon his estate, acting through his personal representatives, the power to compromise claims. Trust, Article X(19), and Will, ITEM VI. *See: Takabuki v. Ching,* 67 Haw. 515, 695 P.2d 319, 327 (1985); *Lefkowitz v. Lebensfeld,* 51 N.Y.2d 442, 446–47, 434 N.Y.S.2d 929, 415 N.E.2d 919 (1980);[20] *In re Boston Reg. Med. Center,* 328 F.Supp.2d 130, 146 (D.Mass. 2004). State attorneys general "do not have the power to manage the daily affairs of a charitable organization." Nina Crimm, *Why All is Not Quiet on the "Home Front" for*

[20] The *Lefkowitz* case involved a charitable corporation, but the form of the entity makes no difference in the law of charities.

Charitable Organizations, 29 N.M. L. REV. 1, 1–2 n.3 (1999), and authorities cited.[21]

The proper role of the attorney general in a case of will *construction* is seen in *Watson v. Wall,* 229 S.C. 500, 93 S.E.2d 918 (1956), where the AG intervened to contend that a renounced devise would then pass, not by intestacy but to the residuary legatee, a charitable trust. By contrast, the Attorney General has no substantive role to play in a will *contest.*

The circuit court cited several examples in South Carolina's jurisprudence of the Attorney General's duty to enforce charitable trusts. [Order of 5/26/09, p.20.] The court interpreted these traditional enforcement cases to mean that "when the Attorney General does appear in litigation involving a charitable trust . . . , he has the right to take charge and control of that portion of the litigation which relates to the charitable trust." *Id.* at 21. The court then reasoned that the power "to take charge and control" includes the power to set aside the trustees, speak for the trust, and settle its disputes in his discretion. No South Carolina cases even come close to suggesting such a power in the office of the Attorney General.

The circuit court cited four cases from other jurisdictions to support the claimed authority of the Attorney General to act as he did. These cases provide no more support than do the South Carolina cases upon which the court relied. Two of these were trial court decisions in New York — one by a probate judge (in New York, a "surrogate") and the other by a trial judge (in New York, a "supreme court judge"). First was a 1949 decision of a New York trial judge in the case of *In re Schlussel,* 195 Misc. 1008, 89 N.Y.S.2d 47 (Sup. Ct. 1949). The Attorney General consented to a settlor's revocation of a trust where an indefinite contingent beneficiary was a charity, and replaced it instead with a noncontingent

[21] The authorities cited include JAMES FISHMAN AND STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS 246–47 (1995); Marion Fremont-Smith, *Trends in Accountability and Regulation of Nonprofits,* in THE FUTURE OF THE NONPROFIT SECTOR 75–76 (Hodgkinson et al. eds. 1989); Henry Hansmann, *Reforming Nonprofit Corporation Law,* 129 U. Pa. L. REV. 497, 600–01 (1981); and Kenneth Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility,* 73 HARV. L. REV. 433, 449–60 (1960).

gift. The trial judge relied upon another trial court decision holding that if a charity were to compromise its rights, and the Attorney General assented to the compromise, the court could approve it. From this the judge reasoned that "it could be true, then, that where indefinite charities with interests wholly contingent are concerned," the Attorney General might act to secure an absolute right for a specific charitable beneficiary in lieu of a contingent right for an indefinite beneficiary.

The second New York case relied upon by the circuit court was *In re Smith's Estate,* 75 Misc.2d 895, 349 N.Y.S.2d 281 (Surr. Ct. 1973), a decision of the probate judge of Rockland County, New York. His Honor stated with no citation of authority that Attorney General Lefkowitz had the authority to compromise a will contest where the testator left $25,000.00 to charity. Several years later the New York Court of Appeals put a stop to Attorney General Lefkowitz' assertion of authority to control litigation involving charities. The case was *Lefkowitz v. Lebensfeld,* 51 N.Y.2d 442, 446–47, 434 N.Y.S.2d 929, 415 N.E.2d 919 (1980), where the court stated:

> . . . If the Attorney-General were suing to obtain actual enforcement of a disposition, or to require that it be applied for a stated or proper charitable purpose, there would thus be little question of his standing.
>
> The problem here, however, is that the Attorney-General does not seek to attain any of these goals. Rather, he is attempting to enforce obligations purportedly owing to charitable organizations . . . . In effect, the Attorney-General is stepping into the shoes of the charity without first making a demand upon the corporation or satisfying the other procedures normally associated with a derivative action. He is endeavoring, not to enforce a gift or a trust, but to enforce rights that arise from the ownership of charitable property originally received as a gift.
>
> No authority has been furnished to this court that would sanction such an expansive reading of [the enforcement statute,] EPTL 8-1.1 (subd. (f)). That provision was enacted in response to a particular problem and, although now broader than at its inception, it does not authorize a large scale incursion into the everyday affairs of charitable corporations. Indeed, in these circumstances, to confer standing upon the Attorney-General under [the enforcement statute] would be to grant all but unlimited and uncontrolled power to act as the alter ego of the charitable organization. Since most charitable holdings probably originated as gifts, as did the shares

> involved here, virtually all obligations owed a charity would be independently enforceable by the Attorney-General. Such a result would require a strained interpretation of [the enforcement statute], a statute designed primarily to ensure that there is a party available to enforce charitable trusts on behalf of the ultimate beneficiaries.

415 N.E.2d at 931–32. In New York, the Attorney General has no authority to do what the South Carolina Attorney General did here.

The circuit court cited the Oklahoma case of *Sarkeys v. Independent Sch. Distr. #40*, 592 P.2d 529 (Okla. 1979). In that case the Attorney General was requested by the visitors of a charitable corporation to intervene in his traditional capacity as charitable enforcer in an action to determine whether the charity's sale of stock constituted "indirect self-dealing" by the trustees. The action was settled by the plaintiffs, the charity's trustees, and the charity's co-receivers. The Attorney General joined the trustees and co-receivers, together with the plaintiffs, in asking the court to approve the settlement, which it did. Denying standing to a visitor, the court observed:

> It is generally held that the Attorney General has a preclusive right to maintain proceedings to protect the trust and to prevent a misuse of property devoted to a public charity. A number of states have statutes which expressly provide that the Attorney General may enforce charitable trusts.
>
> In Oklahoma, the authority of the Attorney General to enforce charitable trusts as parens patriae is derived from the common law and inferred from the statutory language of 60 O.S.1971 § 175.18(B) which requires notice to the Attorney General and provides the Attorney General may intervene in an action concerning performance of a charitable trust. It has long been recognized at common law that the Attorney General has the duty of representing the public interest in securing the enforcement of charitable trusts.

592 P.2d at 533. The *Sarkeys* case is an example of the Attorney General's traditional enforcement authority — the authority to ensure that a charity's trustees are administering the trust properly. The Attorney General in the *Sarkeys* case did not take over the administration of the trust, speak for it, or purport to settle its claims.

Finally, the circuit court relied upon the 1951 Illinois case of *Kolin v. Leitch*, 343

Ill.App. 622, 99 N.E.2d 685 (1951). The plaintiffs, asserting status as beneficiaries of a charitable foundation, brought an action to enforce the charity. They joined the Attorney General as a party defendant. The Attorney General moved to dismiss on the ground that the plaintiffs lacked standing to enforce the charity, but the Attorney General also answered denying that the directors of the foundation were acting in violation of the trust. Like *Sarkeys*, this is a traditional charitable enforcement case. This case does not remotely stand for the claim that the Attorney General may take over litigation involving a trust and settle the litigation as he sees fit.

The inability of the Attorney General to marshal any appellate authority for his unprecedented claim to power in this matter is obvious.

The Attorney General had no right to exclude the trustees and to speak for the Trust in regard to settlement of the will contest or the claim of the alleged widow.

2. *The Trust was the sole beneficiary of the residuary estate. The Trust was not a party to the settlement agreement. The only parties were non-beneficiaries of the residuary estate, who agreed among themselves to divide it up and to leave to the Trust less than half of what the testator intended. There was no Section 1102 agreement for the court to consider. The Trust's consent to the agreement could not be manufactured by court order, after the fact, by ordering the removed trustees to sign.*

The settling parties characterize these proceedings as a mere alteration of an estate plan to which all holders of a beneficial interest consent. It is nothing of the kind. It is the settlement of a will contest and a claim to an omitted spouse's share, brought by persons to whom the testator left nothing of substance — a settlement to which neither the chief beneficiary of the estate nor the personal representatives agreed.

Section 1102 allows such a settlement over the objection of the personal representatives and trustees only when *all* holders of a beneficial interest in the estate agree and where the settlement is just and reasonable. The overwhelming bulk of the testator's estate was in the residue, and the sole beneficiary of that residue was the Trust. The Trust did not agree to this settlement. The contestants persuaded the circuit court that the Trust, as sole beneficiary of the residue, in the person of its trustees could

be ordered to agree to the settlement, **after the fact**, by an order compelling the removed trustees/PRs to sign the agreement as a ministerial act. Their *post hoc*, court-ordered signatures, then, would supply the agreement essential to a virtual destruction of the testator's estate plan. That was the theory.

As noted, the contestants' contention is based upon a provision of the Uniform Probate Code, enacted here as S.C. Code Ann. § 62–3–1102. If the court finds that an agreement altering the estate plan has been signed by all those holding a beneficial interest and is just and reasonable, it may order trustees to sign. This provision was written to deal with the case where all the beneficiaries of an estate have agreed to the settlement, along with all beneficiaries of any testamentary trust created under the will, but the personal representative or the trustee of the testamentary trust objects. In this situation it is possible that the personal representative or trustee may be obstructing a just and reasonable settlement to which all holders of a beneficial interest — including the beneficiaries of the trust — subscribe. This wise provision of the uniform act was never intended to apply where the beneficiary is *a charitable trust which has no beneficiaries in the usual sense and which does not itself agree to the reduction of its devise.* Moreover, the provisions applicable to modification of a *trust* were not followed, nor was there any evidence that would have satisfied these requirements. S.C. Code Ann. §§ 62–7–410, –416.

It is settled law that a charity has no identifiable beneficiaries as that term is known in the law of trusts. In the case of a charitable trust, "the beneficial interest is not given to individual beneficiaries, but instead for purposes beneficial to the community." *Brown v. Ryan, Attorney General,* 338 Ill.App.3d 864, 788 N.E.2d 1183, 1191 (2003), *citing* 4A A. SCOTT & W. FRATCHER, TRUSTS § 391, at 357 (4th ed. 1989). The members of the public who may one day benefit from the trust are not identifiable. JESSE DUKEMINIER, ROBERT SITKOFF, ET AL., WILLS, TRUSTS, AND ESTATES 750 (7th ed. 2005). They are represented and spoken for by the trust itself, and the trust is represented and

spoken for by its duly appointed and acting trustees. The holder of the beneficial interest in a devise to a trust is the trust itself. In the agreement before the Court today, not only did ***all*** the holders of a beneficial interest in Mr. Brown's residuary estate **not** agree to the settlement — ***no holder*** of a beneficial interest agreed.

In *University of Southern California v. Moran,* 365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005), our Court of Appeals correctly determined that where a trust is beneficiary of a devise, it is the trust, acting through its trustee, which alone has statutory authority to participate in a Section 1102 settlement agreement.

Sections 1101 and 1102, read together, were meant to authorize a change — even, as here, a *drastic* change — in the testator's estate plan only when the holders of *all* beneficial interests concurred, if and only if the settlement agreement is just and reasonable. Here, a charitable trust was the sole holder of a beneficial interest in the testator's residuary estate, which comprised almost everything. The authors of the uniform act, and our General Assembly, could not possibly have intended to empower the court to strip a charitable trust of most of its bequest upon a finding that it is "just and reasonable" to do so, compelling the trust in the person of its removed trustees to consent to this relinquishment after the fact as a ministerial act. Yet that is the effect of the order under appeal.

Because the court lacked authority to reduce the bequest to the Trust without the Trust's consent, and because there was no such consent, the order should be reversed.

B. It was unjust and unreasonable to forfeit 28.75% of the foundation's bequest in order to settle the claim of undue influence.

Two claims against the estate were settled by the Attorney General, purporting to act for the Trust. The first was a claim that the will and the Trust were the product of undue influence and hence void. The second was the claim of Tommie Rae to an omitted spouse's share or at least an elective share of the estate. In compromise of

those two claims, the Attorney General ultimately agreed to pay to the claimants 52.5% of the value of the residuary estate — 28.75% to those who claimed that the will was void as the product of undue influence, and 23.75% to Tommie Rae, who claimed to be a widow.[22]

After days of testimony during which the settling parties had offered no evidence that the undue influence claim had any merit, Judge Early wondered aloud what the standard of reasonableness of a settlement might be, the settling parties having suggested no test. His Honor directed his inquiry, not to the settling parties but to Mr. Buchanan, one of the trustees who opposed the settlement. His Honor wondered whether a settlement might be deemed reasonable if it were shown that the claim being settled was supported by enough evidence to get to a jury. [Tr. 3/4/09: 561.] As would any experienced trial lawyer, Mr. Buchanan responded that such a showing would **not** be enough to judge the reasonableness of a proposed settlement. One would need to know the ***strength*** of the claim. [Tr. 3/4/09: 53. Tr. 3/25/09: 69; 71.] The contestants responded to the court's query by saying, on the contrary, that the challenge to the will should be settled without knowing the evidence. [Tr. 3/4/09: 69.] Having been asked to produce any evidence of undue influence, the settling parties produced none. [Tr. 3/25/09: 49.] Knowing that there was no evidence of undue influence but only their alleged suspicions, the contestants took the position that the burden of proof rested upon those ***objecting*** to the settlement agreement to prove a ***lack*** of undue influence, instead of the proponents being required to prove the existence of a *bona fide* controversy. [Tr. 3/25/09: 48. Tr. 4/6/09: 163/16-19.]

Even if this settlement had been negotiated by the trustees of Mr. Brown's foundation and not by the Attorney General acting without authority, it should not have

---

[22] The claimants agreed to contribute any copyright rights which might come to them in the future. There is no evidence of what value these rights may have. [Tr. 1/30/09: 117.]

been approved. There was no *bona fide* controversy. Even if one had existed, this agreement was unjust and unreasonable by *any* standard.

Section 1102 is part of a uniform act. The hope always is that the jurisprudence which unfolds across the country in the train of such an act will indeed create a uniform national fabric. This has happened with Section 1102 and the statutes which inspired it. Decisions from North Carolina, Minnesota, Illinois, Michigan, Massachusetts, and Arizona show that agreements settling a challenge to the will and altering the clearly stated estate plan of the testator must meet a high standard of review under Section 1102. Most emphatically, the proponents of such agreements must show by **evidence** that the challenge to the will is substantially meritorious and that the settlement is reasonable in relation to the strength of the claim.

In *Holt v. Holt,* 304 N.C. 137, 282 S.E.2d 784 (1981), the court said:

> "The mere fact that a [will contest] has been filed, standing alone, is not sufficient ground for modification of the dispositive provisions of the will. The outcome of the litigation must be in doubt to such extent that it is advisable for persons affected to accept the proposed modifications rather than run the risk of the more serious consequences that would result from an adverse verdict."

282 S.E.2d at 787, *quoting O'Neil v. O'Neil,* 271 N.C. 106, 112, 155 S.E.2d 495, 500 (1967).

> This requirement that the outcome of litigation over the will be in doubt, most often expressed in terms of the need for a *bona fide* dispute, permeates our case law on family settlements.

282 S.E.2d at 788.

> Whether there is a *bona fide* dispute depends, furthermore, not on what any particular party to the alleged compromise may subjectively believe about it, but whether the *bona fides* of the disagreement may, under all the facts and circumstances of the case, be reasonably found to exist by the trier of fact.

Id. The court held that "there must appear from all the facts and circumstances a reasonable basis upon which to challenge the validity of a testamentary instrument . . . ." *Id.* at 790.

The provisions of the Michigan Code, from whence Sections 3-1101 and 3-1102 of the Uniform Probate Code derived, were at issue in *Hay v. LeBus,* 317 Mich. 698, 27 N.W.2d 309 (1947). Disapproving a settlement agreement, the court there stated "that to approve the settlement agreement and distribute the . . . estate accordingly is to do nothing more or less than to make a new will for [the] deceased, which in very material respects would alter the disposition he by his will made of his estate. . . . [T]he statute providing for settlement agreements is not operative; and the statute cannot be used to defeat the lawful will of a deceased in the absence of compelling circumstances to the contrary." 27 N.W.2d at 313. The court approved the observations of the Massachusetts supreme court, construing a similar statute:

> The statute does not confer power to make a new will or to render the allowance of a will subject to approval as to the wisdom of its terms by interested parties and the court. That is not its scope. The statute imposes a duty of the most scrupulous care to see that the compromise, *viewed with reference to the basis for contest*, is just and reasonable in all its aspects . . . .

Copeland v. Wheelwright, 230 Mass. 131, 119 N.E. 667, 669 (1918) (emphasis added).

Construing the provisions of the Minnesota settlement agreements act, materially identical to the provisions of the Uniform Probate Code, the court in the case of *In re Estate of Schroeder,* 441 N.W.2d 527 (Minn. 1989), dealt with a case very like the case at bar. The testatrix died nine years after making her will. (Here, it was six.) Two beneficiaries challenged the will on the grounds of revocation, mistake, and undue influence. The testatrix had provided for the income from a trust to be paid to a beneficiary for life, with the corpus to go under certain circumstances to a charity. Without the agreement of the trustee, the contestants agreed to abolish the trust so that the beneficiary would receive the bequest free of trust, with certain restrictions. The

charity was to receive an immediate lump sum payment, which it agreed to accept. No evidence of revocation, mistake, or undue influence was offered to the lower court, which nonetheless found that a good faith will contest existed and that the settlement agreement was just and reasonable.

Reversing, as an initial matter the Minnesota Court of Appeals found that the personal representative/trustee who objected to the settlement had standing to appeal since a personal representative "'is under a duty to see that the assets constituting the testator's estate are not diverted from the course prescribed by the testator.'"[23] 441 N.W.2d at 529, *quoting In re Healy's Estate,* 247 Minn. 205, 209, 76 N.W.2d 677, 680 (1956). *Accord: Altemeier v. Harris,* 335 Ill.App. 130, 81 N.E.2d 22 (1948).

> If a personal representative cannot appeal, no one remains who can challenge a settlement agreement which aids the beneficiaries, yet emasculates the testator's intent. To hold otherwise would mean that nominated executors and testamentary trustees do not have standing to challenge orders which are in derogation of their fiduciary responsibilities.

441 N.E.2d at 529. Moving on to the merits and citing Minnesota's version of Section 1102, the court noted that the statute provides that

> a court must approve a settlement agreement if (1) the will contest or controversy is in good faith, and (2) the effect of the agreement upon the interests of the parties represented by fiduciaries is just and reasonable. Both parts of this two-part test must be satisfied to approve a settlement agreement.

Id. The court of appeals noted that the lower court's finding that a good faith contest existed and that the settlement agreement was just and reasonable was not based upon **evidence** but upon the representations of the settling parties — just as happened in the case at bar. "The trial court's determinations are thus legal conclusions which are not binding upon this court." *Id.* Addressing the question of whether the will contest was

---

[23] In the case at bar the respondents object to the appellants' standing. When the respondents have raised this point in their briefs, the appellants will reply.

bona fide, the court of appeals began by observing that "[t]he decedent was a competent testatrix who executed her will with all the requisite formalities. Her will is thorough and professional." *Id.* "Respondents nevertheless objected . . . on the grounds of revocation, mistake, and undue influence." The court articulated the obvious — that "[t]o constitute a good faith will contest, such objections must have legal merit." Reviewing the objectors' attempt to show the grounds for their objections, the court rejected them one by one:

> The respondents' objection based on revocation is meritless. . . . The respondents' objection based on mistake is also meritless. . . . The decedent's independence, coupled with the very limited and modest devise to [the alleged undue influencer], clearly demonstrates no undue influence was exercised.
>
> The decedent's will is unquestionably valid. Because respondents' objections are meritless, the will should have been admitted to probate. To deny probate on such frivolous grounds threatens the fundamental principle that wills executed with the requisite formalities will be admitted to probate. The will settlement agreement statute was not intended to allow circumvention of this principle . . . . *We will not undermine this principle by allowing a valid will to be set aside based on meritless objections.*

Id. at 531–32 (emphasis added). Next, the court observed that the second prong of the test — the justice and reasonableness of the settlement agreement — "is not reached unless there is a determination that the contest or controversy is in good faith. Although we hold that no good faith contest existed here, we nevertheless choose to address the 'just and reasonable' requirement." *Id.* at 532. The court approved Professor Scott's conclusion that the beneficiaries cannot "vary the terms of a trust under the guise of a compromise agreement merely because they wish to do so." *Id., quoting* FRATCHER, IV SCOTT ON TRUSTS § 337.6 (4th ed. 1989). The court concluded:

> We will not give our imprimatur to an estate plan which so flagrantly violates a testator's intent. . . . We therefore hold that the estate plan in the settlement agreement was not just and reasonable. . . . This was a "mere moot case trumped up for the purpose of getting collusive destruction of the trust." Bogert, *Trusts* § 152 (6th ed. 1987). To approve such

> a settlement agreement threatens to unravel two fundamental principles of probate law: (1) the paramount importance of carrying out the intention of the testator, and (2) the requirement that a testator express his intention with the requisite formalities. We cannot approve such a settlement agreement.

Id. at 533–34.

The Arizona Court of Appeals considered a similar case in *In the Matter of the Estate of Ward,* 200 Ariz. 113, 23 P.3d 108 (2001). The personal representative/trustee appealed a finding that a settlement agreement "constituted a valid 'compromise' of a 'good faith contest or controversy'" under Arizona's versions of Sections 1101 and 1102.

> We find that it does not and accordingly reverse, principally because the heirs' Family Settlement Agreement eviscerates the essence of the law of wills and trusts.

23 P.3d at 109.

> This case presents a textbook example of abuse of the estate plan procedure described in [Arizona's sections 1101 and 1102]. The heirs' initial petition . . . affirmatively admitted that Ward's will was validly executed, and was indeed her last will, and that they were unaware of any instrument revoking it. Despite these admissions, which they later contradicted, the heirs sought to have the probate court override her will so that her assets would pass to them free of the limitations and delays entailed by Ward's planned pour-over to the trust. . . .
>
> The heirs urge the existence of a "controversy." The one that does exist now is entirely of their own making, namely, whether the heirs' Family Settlement Agreement qualified as a "compromise" under [sections 1101 and 1102]. A controversy born only of their impatience with the will's provisions does not approach the good faith envisioned by [section 1102].

23 P.3d at 112. The court added this comment:

> It is ironic that the heirs fault the Trustee for expending attorneys' fees when they themselves began this dispute lacking good faith. The Trustee could have easily capitulated to the heirs' settlement agreement. Doing so would have sacrificed Ward's testamentary intent and breached the Trustee's fiduciary responsibility to her, although in such a way as likely to escape complaint from anyone living.

Id.

In Illinois, the Court of Appeals applied a trust settlement statute in *Fleisch v. First American Bank,* 305 Ill.App.3d 105, 710 N.E.2d 1281 (1999). The court began its review of the proposed settlement agreement, rejected by the lower court, by observing that such settlement agreements "are subjected to close scrutiny to determine whether the disputes they purport to resolve are genuine or simply ill-conceived threats concocted to subvert the settlor's intent." 710 N.E.2d at 1283–84. Reviewing the ground offered to dispute the trust, the court concluded:

> It is apparent to us, as it was to the trial court, that there is no reasonable or substantial basis for finding a *bona fide* family dispute in this case.

Id. at 1284.

These cases from Minnesota, North Carolina, Illinois, Michigan, Massachusetts, and Arizona share common threads, variously expressed in the carefully considered opinions of these courts. The same themes appear again and again. "[T]he statute cannot be used to defeat the lawful will of a deceased in the absence of compelling circumstances to the contrary." "The statute imposes a duty of the most scrupulous care to see that the compromise, viewed with reference to the basis for contest, is just and reasonable in all its aspects . . . ." Such settlements "are subjected to close scrutiny to determine whether the disputes they purport to resolve are genuine or simply ill-conceived threats concocted to subvert the settlor's intent." Beneficiaries — much less, *nonbeneficiaries* — cannot "vary the terms of a trust under the guise of a compromise agreement merely because they wish to do so." "We will not give our imprimatur to an estate plan which so flagrantly violates a testator's intent." "A controversy born only of [the beneficiaries'] impatience with the will's provisions does not approach the good faith envisioned by [section 1102]." The will contest must be **objectively** *bona fide,* whether subjectively brought in good faith or not — although if brought in subjective bad faith (i.e., concocted or trumped up), that is the end of the

inquiry. A *bona fide* dispute about the validity of the will must be demonstrated by **evidence**, not merely by the claims of counsel. The proponent of the settlement must demonstrate by evidence — and not simply by the lawyers saying so — that the grounds of challenge to the validity of the will are substantial. "The outcome of the litigation must be in doubt to such extent that it is advisable for persons affected to accept the proposed modifications rather than run the risk of the more serious consequences that would result from an adverse verdict". The challenge to the will "must have legal merit".

1. The circuit court was offered no evidence of undue influence.

James Brown had little formal education and knew that his success in life was due to his hard work and artistic genius — a gift bestowed upon only a few. He was devoted to the cause of education. He decided to leave his fortune almost solely to that cause. He would leave to his children his personal effects only. [Will, ITEM I.] He would leave nothing to the woman with whom he lived.[24] He would provide generously for the education of his grandchildren. [Trust, Article VI.] But the vast bulk of his estate he would leave to the private foundation he created in 2000. The endowment of this foundation would be used for the education of needy students at South Carolina and Georgia schools.

To help him craft his estate plan he employed an attorney certified as an expert in that field. [*See* Appellants' Brief dated 4/23/09, pp. 7–10.] By 1999 his plan was complete and was embodied in a will in that year, accompanied by the creation of a revocable trust. [Tr. 3/25/09: 230.] The plan was refined in its details the next year with a new will and the creation and initial funding of the James Brown 2000 Irrevocable Trust, of which the foundation is a subtrust. The 2000 will, in effect upon Mr. Brown's

[24] She had agreed to make no claim as common law wife. [Consent Order Dismissing Annulment Action.] In the event that an earlier ceremonial marriage were found to be valid, her share would be limited by a prenuptial agreement. [Prenuptial Agreement.]

death six years later, is nine pages long. The 2000 Trust document is 21 pages long. These are sophisticated, complex documents, befitting the size of the testator/settlor's estate and the generosity of his estate plan.

The contestants of the will include some but not all the adult children of the testator. Their father had made his estate plan — and their virtual disinheritance — known to all for years before his death.[25] During his lifetime there was never a suggestion that their father had been unduly influenced to leave his fortune to education rather than to them. [*See* Appellants' Brief dated 4/23/09, pp. 7–10.] On the last day before the statute of limitations would have run on contesting the will, some of the disinherited children, represented by an Atlanta firm, came forth with a claim that the will and the Trust were the product of undue influence. [Tr. 3/25/09: 206.]

In explaining to the court the basis for their challenge to the will, the contestants stated that they had "a **suspicion** . . . that there was undue influence . . . ." [Tr. 3/4/09: 62 (emphasis added).] They further explained their suspicion that Mr. Brown's three agents ". . . **may have unduly influenced** . . ." him in order to procure a single provision in the estate plan, namely, that these three would be named trustees of the foundation. [Tr. 3/25/09: 161 (emphasis added).] The trustees were limited to expending no more than 50% of the *income* (not the principal) of the trust in management expenses — not a grant of authority but a *limiting* provision. [Trust, Article X(2).] The contestants' theory apparently was that these three initial trustees would be in a position to embezzle or at least to milk the foundation to that extent, following Mr. Brown's death. For example, if the foundation were eventually funded with one hundred million dollars, it might earn something on the order of $2,500,000 income annually.[26]

---

[25] Tr. 3/25/09: 222. The 2000 Trust document was executed on August 1, 2000 and filed for record in Aiken County six days later. Tr. 3/25/09: 215.

[26] Some idea of the potential income to be generated by the trust's principal is gleaned from the interest obtainable on long term treasury bills — the gold standard of any

(continued...)

Under this hypothetical, the trustees would then have the opportunity, one way and the other, to feather their own nests with up to $1,250,000 annually in management expenses. Hence, the contestants suspected that these people might have unduly influenced Mr. Brown to set up his foundation, willing it almost everything, and to name them as initial trustees. Therefore, the will is void. That was the claim.

(a) The law of undue influence placed insuperable obstacles in the path of the claimants.

A client and its attorneys faced with a claim of testamentary undue influence, and receiving a demand for many millions — perhaps tens of millions — in settlement, obviously would begin to assess that demand in light of the law by which the claim would be judged. There is no sign in the proceedings below that any such assessment was made. After assessing the law, the party defending the will would then evaluate the strength of the evidence of undue influence, measuring that evidence in light of the legal standard.

Chancellor Dunkin's early summary of the meaning of undue influence is unchanged today. *Parris v. Cobb,* 5 Rich.Eq. 450, 458 (1853). The question is not one of intent. In undue influence cases the question is not whether the weaker party intended to enter into the transaction. Rather, it is ***how*** that intention was induced. *See:* Green, "Fraud, Undue Influence and Mental Incompetency: A Study in Related Concepts," 43 COL. L. REV. 176 (1943).

Successful challenges to a will on the ground of undue influence are rare, with good reason. The law places upon the party seeking to destroy a will on this ground one of the most onerous burdens known to the civil law:

---

[28](...continued)
conservatively managed trust. At the date of the first hearing below, January 30, 2009, the long term real average rate on treasury bills was 2.50%. http://www.ustreas.gov/offices/domestic-finance/debt-management/interest-rate/real_ltcompositeindex_historical.shtml (last visited September 27, 2010).

> For a will to be invalidated for undue influence, the influence must be the kind of mental coercion which destroys the free agency of the creator and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition. *Last Will and Testament of Smoak v. Smoak,* 286 S.C. 419, 334 S.E.2d 806 (1985). Undue influence must be shown by unmistakable and convincing evidence, which is usually circumstantial. *Id.* The evidence must show that the free will of the testator was taken over by someone acting on testator's behalf. *Id.* Undue influence is demonstrated where the will of the influencer is substituted for the will of the maker. *Id.* Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship. *Hembree v. Estate of Hembree,* 311 S.C. 192, 428 S.E.2d 3 (Ct.App.1993). The "mere existence of influence is not enough to vitiate a Will . . . . A mere showing of opportunity and even a showing of motive to exercise undue influence does not justify a submission of that issue to a jury, unless there is additional evidence that such influence was actually utilized." *Last Will and Testament of Smoak, supra,* at 424, 334 S.E.2d at 809.

Russell v. Wachovia Bank, 353 S.C. 208, 578 S.E.2d 329, 333 (2003). *Accord: Last Will and Testament of Smoak v. Smoak,* 286 S.C. 419, 334 S.E.2d 806 (1985) (testator was bedridden; beneficiary drove testator to attorney's office for will signing; directed verdict against contestant should have been granted); *Mock v. Dowling,* 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976) (for will to be void due to undue influence, "[a] contestant must show that the influence was brought directly to bear upon the testamentary act."); *Hairston v. McMillan,* 387 S.C. 439, 692 S.E.2d 549 (Ct. App. 2010); *In re Estate of Anderson,* 381 S.C. 568, 674 S.E.2d 176 (Ct. App. 2009).

"Dominion," "imposition," and "weakness" are words often seen in South Carolina's undue influence jurisprudence. Almost always present is some degree of mental weakness on the part of the testator or grantor. *See, e.g., Gaddy v. Douglass,* 359 S.C. 329, 597 S.E.2d 12 (Ct. App. 2004). Undue influence is the process of unfair persuasion by which an individual is made to do something which he or she would not have done in the exercise of unfettered judgment. The victims of such unfair persuasion are almost always lacking in the normal amount of mental ability and self-

reliance. The Court has never tired of quoting Justice Story's observation that "[t]he acts and contracts of persons of weak understanding and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning artifice or undue influence."[27]

> Almost without exception in these cases the one allegedly subjected to "undue influence" possessed an abnormal personality of some sort — most commonly, senile dementia — was weak in body or mind or both, or presented other indicia of mental or emotional subnormality. Such circumstances would seem reasonably to increase the probability that any "undue influence" exercised was yielded to.

Note, "Undue Influence in Intervivos Transactions," 41 COL. L. REV. 707, 708 (1941).[28]

A circumstance to which the courts of this State have always given great weight is whether the testator or grantor acted with the aid of the competent and independent advice of a disinterested third party. *See, e.g., Way v. Central Union Life Ins. Co.*, 61

---

[27] Quoted in: *Owens v. Sweat*, 227 S.C. 112, 123, 86 S.E.2d 886 (1955); *Page v. Lewis*, 209 S.C. 212, 242, 39 S.E.2d 787 (1946); *Gaston v. Bennett*, 30 S.C. 467, 473, 9 S.E. 515 (1888); *Wille v. Wille*, 57 S.C. 413, 427, 35 S.E. 804 (1900); *Banker v. Hendricks*, 24 S.C. 1, 12 (1885); *Parris v. Cobb*, 5 Rich.Eq. 450 (1853).

[28] The courts of South Carolina have described the grantor's mental condition in typical undue influence cases in terms such as these: "We are firmly persuaded that Ms. M's dementia, chronic and progressive in nature, clearly rendered her incapable of possessing contractual capacity . . . ." *Gaddy v. Douglass, supra*, 597 S.E.2d at 21; "the [grantor's] mental faculties were at least so impaired at the time of the transaction as to subject him to the undue influence which the record reflects." *Owens v. Sweat, supra*, 227 S.C. at 116; "[The grantor] was of such a weak understanding that she could be easily induced to shower her affections upon most any of her relatives," *Parker v. Bowen*, 156 S.C. 381, 386, 153 S.E. 346 (1930); "great mental weakness, not amounting to incapacity to execute a valid deed," *Hodge v. Shea*, 252 S.C. 601, 608, 163 S.E.2d 82 (1968); "a very weak man, though capable of understanding the ordinary transactions of life," *Bunch v. Hurst*, 3 Des. 273 (1811); "his mind was enfeebled by age and other causes," *Wille v. Wille*, 57 S.C. 413, 426, 35 S.E. 804 (1900); "a person of such weak intellect as to render him liable to imposition," *Gaston v. Bennett, supra*, 30 S.C. at 478; "considerable mental weakness on the part of this aged man," *Page v. Lewis, supra*, 209 S.C. at 227.

S.C. 501, 504, 506, 39 S.E. 742 (1901) *Accord:* Note, *supra*, at 720; 2 BLACK ON RESCISSION § 244 (1929); DOBBS, HANDBOOK ON THE LAW OF REMEDIES 677 (1973).

Lastly, even in those cases where the testator might have been unduly influenced, the effect of any undue influence is deemed to have dissipated where a long time has passed since the execution of the will, during which time the testator could have made a new will.[29]

In the context of these legal principles, the claim of an unduly influenced will to charity by James Brown was to be measured.

(b) The payment of more than a quarter the estate's value to settle the undue influence claim was unreasonable by any standard.

There was no showing that James Brown was weak of mind, nor could there have been. There was no showing that he was dominated by his agents, nor could there have been.[30] There was no showing that the testator failed to have independent advice, nor could there have been. He had the advice of a certified estate planner who helped him to develop and perfect his thoughtful and generous estate plan over a period of four years. [Tr. 3/25/09: 226.] There was no showing that his financial advisors influenced him to create a private foundation as the vehicle for his largess, or to leave

---

[29] Where the testator has an unhampered opportunity to revoke a will or codicil subsequent to the operation of undue influence upon him, but does not change it, the court as a general rule considers the effect of undue influence destroyed. *Smith v. Whetstone*, 209 S.C. 78, 39 S.E.2d 127 (1946), as quoted in *Estate of Cumbee*, 333 S.C. 664, 511 S.E.2d 390 (Ct. App.1999).

Russell v. Wachovia Bank, 353 S.C. 208, 578 S.E.2d 329, 333–34 (2003). *Accord: Calhoun v. Calhoun*, 277 S.C. 527, 290 S.E.2d 415 (1982) (testator was confined to nursing home in feeble condition yet continued to conduct business affairs for three years after execution of will; directed verdict should have been granted); *First Citizens Bank v. Inman*, 296 S.C. 8, 370 S.E.2d 99 (1988) (testator "exhibited a pattern of changing her will over the years . . . . [S]he went through a consistent procedure of talking with her lawyer . . . . [I]t appears she was the ultimate decision maker." Directed verdict was proper.).

[30] By definition, embezzlement is committed by people who are ***unable*** to dominate the victim. Embezzlement is done in the dark, without the victim's knowledge.

almost everything to charity by means of the foundation, or to appoint them as initial trustees, or to insert a provision *limiting* the portion of annual income which could be used to manage the trust, or to do anything else. Satisfied with his plan, the testator left it unchanged for six years until his death, during which time he had access to many lawyers. [Tr. 3/25/09: 241.]

Neither the Attorney General nor the claimants made any effort to demonstrate to the circuit court that there was any **evidence** to support the claim of undue influence. The mere ***existence*** of this claim was the only basis for settling it with an enormous payoff. The circuit court disclaimed any finding that "the undue influence claim has merit . . . ." [Order, p. 23.] Instead the court pointed to seven "circumstances" which led it to conclude — **not that the undue influence claim had merit** — but that the claim "has a foundation in good faith."[31] *Id.* First was the provision limiting managerial expenses to 50% of the trust's income. Second was the fact that the PRs had sued Cannon, Dallas, and Bradley for stealing money from Mr. Brown during his lifetime, and in that action had alleged, in shotgun-style, fraud, undue influence, or other wrongs. If they may have unduly influenced him once, reasoned the court, they may have done it again. Third, Cannon was said to have claimed that "he could have half of Mr. Brown's estate, if he wanted." *Id.* at 24. Fourth, during his lifetime Mr. Brown signed a blank deed, for which there was no apparent explanation, thereby evidencing that any document prepared for him by his estate planner might be invalid. Fifth, only one bit of correspondence between Mr. Brown and his estate planner had been found. Sixth, there was evidence that Mr. Brown's estate planner was "good friends" with Cannon. Seventh, the credibility of four witnesses "to the validity of the 2000 will and trust is questionable." Three of these were identified by the court as Dallas, Cannon, and Bradley, "whose veracity . . . is suspect and at times contradictory." *Id.* at 24–25. How

[31] Subjective good faith, even if it were present — which assuredly it is not — is irrelevant. *Holt v. Holt,* 304 N.C. 137, 282 S.E.2d 784, 788 (1981).

these three might be witnesses "to the validity of the 2000 will and trust" is not explained.

If the 2000 will and Trust were void as the product of undue influence, then the very similar 1999 will and Trust would take their place. The court reasoned that if the 2000 will and Trust were void, then so might be the 1999 will and trust.

All this is the sheerest speculation. None of these seven circumstances, singly or together, provide the slightest evidence that the will was the product of undue influence. As the court acknowledged, it made no finding that the claim of undue influence had merit. Without such a finding, and an evaluation of the strength of such a claim, the court lacked authority to approve an agreement destroying this testator's estate plan.

Experienced clients and litigators know that unsupported claims — if settled at all — are settled to avoid litigation costs. Here, more than a quarter of this massive estate was forfeited to avoid the cost of defending a frivolous will contest. The cost of defending the claim, although potentially large in dollars, would have been small in relation to the size of the estate. The sponsors of this settlement made no effort to show otherwise.[32]

Where the proponents of the settlement offered no evidence to show that the undue influence claim had substance, by *any* standard the circuit court erred in finding that the claim was *bona fide* and that the settlement was just and reasonable.

2. The only evidence is that the settlement was likely to have disastrous tax consequences for the foundation.

The only evidence is that the settlement agreement is likely to have catastrophic tax consequences for the foundation. [Tr. 3/25/09: 34/10-35/2; 37/6-9.] The newly coined "Legacy Trust" agrees in the settlement agreement, per the Attorney General, to

---

[32] *See* Tr. 3/25/09: 268. The contestants suggested that more than $10,000 in legal fees might be incurred in conducting discovery on the question of undue influence. [Tr. 3/4/09: 74.]

pay half of the estate taxes which will become due as a result of the settlement.[33] [Tr. 1/30/09: 121/13-16.] Part of the problem arises because one of the testator's children was given a right of first refusal in the sale of the estate's assets.[34] Like the rest of this agreement, giving one of his disinherited children such a right would cause the testator to turn over in his grave. Of more practical concern, however, are the provisions of the Internal Revenue Code which forbid self-dealing by a tax-exempt charity. The 2000 Trust will likely pay a catastrophic price for this concession, added to the mix at literally the last minute to achieve unanimity among the testator's children as they strove to defeat his will.

The settling parties offered no evidence to refute the evidence of a likely tax disaster. Instead, their counsel reassured the court that they had been told that this disaster could be averted and that they were "dedicated" to preventing it. [Tr. 4/6/09: 79-80.] They assured the court that they would try whatever it took to prevent a loss of the charitable deduction as, for example, by converting the 2000 Trust or "the Legacy Trust" — they weren't clear which — from a private foundation to a public charity. [Tr. 4/6/09: 82/24 - 83.] The lengthy discussion of tax consequences in the Order of May 26th (pp. 38–44) is based upon no evidence, since the proponents of the settlement presented none. It was put together by the contestants at the order-writing stage.

---

[33] With the Attorney General speaking for the Trust, "[t]hat suited the charity to do that". [Tr. 1/30/09: 140/7-8.]

[34] [Tr. 3/25/09: 37/10-38/6.] The negotiation for this provision was apparently completed in the hallway of Aiken County Courthouse minutes before the hearings below began on January 30, 2009. [Tr. 1/30/09: 16.] The terms of the agreement continued to shift as the hearings went along. [*See* Tr. 1/30/09: 15/10-11; 17; 19.] When the hearings began, the agreement was for the Trust to receive 50% of the residuary estate. [Tr. 1/30/09: 145/7-8.] By the end of the hearings, the number was down to 47.5%. [*See* Tr. 1/30/09: 118-20.] Late in the hearings, the contestants told the court that some of the settlement documents were still not finished. [Tr. 3/4/09: 528.]

The probable tax consequences of the settlement alone precluded a finding that the settlement was just and reasonable, even if the will contest had been *bona fide* and substantial.

3. *The Attorney General agreed to pay too much to settle the alleged widow's claim, but there is no need to reach that question. The settlement was unitary. If half of it was unreasonable, the entire settlement must fail.*

Tommie Rae claimed an omitted spouse's share or in the alternative an elective share as the alleged widow of the testator.

Mr. Brown obtained from her an agreement not to claim a common law marriage. [Consent Order Dismissing Annulment Action.] After his death, indeed she did *not* claim a common law marriage **but a ceremonial one.** Although married to another when she married James Brown, her contention was that the earlier marriage had been annulled following her marriage to Mr. Brown, thereby legitimating her ceremonial marriage to him. Her counsel contended that her claim would survive the decision of the Supreme Court in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008) (annulment of Marriage #1 does not retroactively validate bigamous Marriage #2) because of a footnote in the earlier decision of the Court of Appeals. That footnote disappeared in the Supreme Court's opinion.

The Attorney General on behalf of the Trust agreed to pay nearly a quarter of the value of the estate to settle this claim. This was in the range of half and perhaps three-quarters of the amount which the claimant would have realized if she had prevailed in her claim.[35]

---

[35] An omitted spouse's share would have been half the value of the estate. An elective share would have been one-third. [*See* Tr. 3/25/09: 153-54.] If married to the testator, her prenuptial agreement limited her claim. [Prenuptial agreement.] Because the will specifically omits her, her maximum claim would be one third of the net estate. The Attorney General agreed to give her nearly one-quarter of the value of the Estate in settlement.

Whatever the merits of this claim and the Attorney General's open-handed settlement of it, there was no need for the circuit court to decide whether the settlement of this claim was reasonable. The settlement agreement was a unitary package, presented to circuit court for approval as a whole and not in pieces. Since there was no semblance of merit to the undue influence claim, it was error to approve the settlement agreement as a whole. *See Midkiff v. Kobayashi*, 54 Haw. 299, 507 P.2d 724, 744 (1973) ("Inasmuch as the [first] agreement and the [second] agreement were negotiated as a single package, our holding on the former has sealed the fate of the latter.").

* * * * *

The order of May 26, 2009 shows that the circuit court was motivated by one factor more than any other in approving this agreement. The circuit court was persuaded to find that the Brown estate was embroiled in controversy and that this settlement would end it. This settlement would end the claims resulting from the contestants' groundless challenge to the will and the omitted spousal claim. Surely it was wrong — unjust and unreasonable, in the phrase of the statute — to allow the contestants to create this imbroglio, then offer this settlement as a means of freeing the estate from its effects. *See: In the Matter of the Estate of Ward*, 200 Ariz. 113, 23 P.3d 108, 112 (2001). Controversies about the content of property in an estate, or the identity of heirs, or the omission of a spouse, or the pretermission of a child are resolved in the administration of estates far smaller than this one. There is nothing "mind boggling," as the circuit court found, about the task of resolving estate controversies of this nature. But regardless of whether such issues are routine or extraordinary, they cannot be avoided by simply rejecting the testator's estate plan and replacing it with another. The desire to simplify the administration of an estate cannot justify the rejection of the testator's estate plan and the dividing-up of the estate by those to whom the testator intended to leave little or nothing. In the absence of a genuine controversy

about the validity of the will and the Trust on the ground of undue influence, these secondary issues are never reached.

There was no good faith controversy about whether the will and Trust were valid. Even if such a controversy existed, it was not just and reasonable to shred the testator's estate plan and replace it with one which would have been anathema to him.

II.

The circuit court erred in removing the appellants from their duties because they opposed the settlement agreement, and then ordering them to sign the agreement after their removal.

The settlement agreement calls for the removal of the appellants as personal representatives of the estate and as trustees of the 2000 Trust. They are to be replaced by persons chosen by the Attorney General and the contestants of the will. [Document dated 8/10/08, p. 2.] This was done, without complying with S.C. Code Ann.§§ 62–7-611, –614, or –616. No statutory ground was claimed or found for removing the appellants as trustees. *See* S.C. Code Ann. § 62–7–706 ("Removal of trustee"). They were removed because theirs were the sole voices raised in opposition to the shredding of the testator's estate plan. Since their removal was part and parcel of the approval of the settlement agreement and without good cause, this part of the order of May 26th should be reversed if the Court reverses the approval of the settlement itself.

The appellants moreover submit that it was error to order them to sign the settlement agreement. They were deemed removed the moment that the circuit court's order was entered. If anyone should have been ordered to sign the agreement, it was Mr. Bauknight, the appellants' replacement, chosen by the Attorney General and the contestants, who was glad to sign.[36] Moreover, the settlement agreement contains

---

[36] If the approval of the settlement agreement is reversed, then Mr. Bauknight's fiduciary appointment in the Order of May 26, 2009 and in subsequent appealed orders should also be vacated. The appointment of a successor trustee must follow the terms of the trust on that subject, S.C. Code Ann. § 62–7–704, but that was not done here. On (continued...)

many provisions immaterial to the substance of the settlement, such as a contractual promise not to speak out against the settlement. [Document dated 8/10/08, p. 1.] Surely the statute which allows the court to require fiduciaries ministerially to sign an approved settlement agreement was never intended to force persons being removed to agree to such personal *contractual* terms as these, with which they personally and adamantly disagree.

The Trust Code provides amply for the ways and means to remove fiduciaries for good reason. Those methods are always available. It is a myth propagated by the settling parties that the appellants hungered for the task assigned to them by the circuit court in this estate, which assuredly they did not seek. Their professional careers have been severely damaged by this service.[37] The court could replace them at any time for good cause — but opposition to this unbelievable settlement is not a good cause.

CONCLUSION

The case at bar is a case in equity, as the Attorney General often affirmed to the circuit court. [Tr. 1/30/09: 39. Tr. 3/4/09: 8/4-5.] But it makes no difference whether the procedure devised by Section 1102 is characterized as equitable or at law. The settlement agreement at issue here fails the statutory test at every stage by any measure. The Trust is not a party to this agreement. The claim that this will and this Trust were the product of undue influence is frivolous. The proponents of the settlement made no effort to carry their burden of proving by evidence that there was any factual basis for the claim. This record is utterly devoid of any evidence tending to demonstrate that this will was signed or this trust was created by James Brown acting as the mere puppet of others. For six years after he completed his complex and generous estate

---

[36](...continued)
remand, the circuit court would be free to determine all issues regarding the service of fiduciaries in this matter as may arise.

[37] *See, e.g.*, Tr. 3/4/09: 175.

plan — four years in the making — the testator/trustor left his estate plan in place and untouched until his death. The very notion that a will leaving perhaps 98% of one's estate to a mostly charitable trust of one's own creation is the product of undue influence is preposterous on its face.

The only conclusion which this record will bear is that the settlement agreement did not spring from a good faith controversy about the validity of the will or the Trust. Even if it did, it was not just and reasonable by any test which could measure that standard.

For these reasons the appellants urge the Court to reverse the approval of the settlement agreement and related orders.

Respectfully submitted,

James B. Richardson, Jr.
1229 Lincoln Street
Columbia, South Carolina 29201
(803) 799-9412

Tressa T. H. Hayes
Post Office Box 5329
Columbia, South Carolina 29250
(803) 603-8583

Attorneys for Appellants.

October 22, 2010.

ADDENDUM

Chart 1
James Brown's INTENTIONS in his Last Will & Trust (2000)

2/09

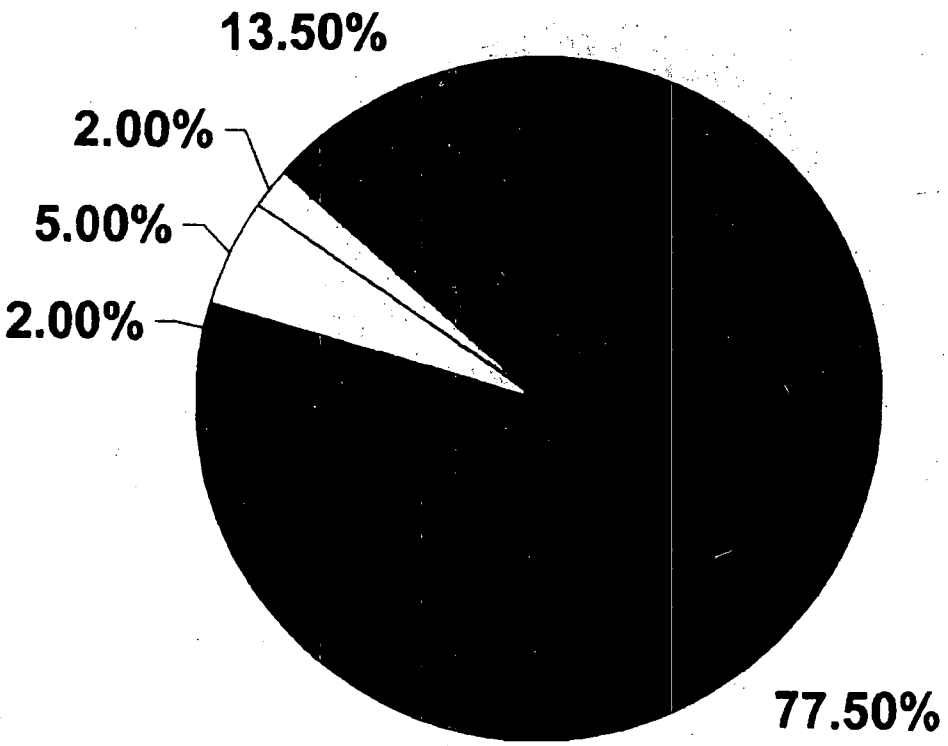


Chart 3

HOW THE PROPOSED "SETTLEMENT"

DESTROYS/IGNORES JAMES BROWN'S INTENTIONS

James Brown Estate/Trust Settlement Proposal
(Hynie Brown/AG/8 of 13+ potential Heirs)
(Over objection of PR/Trustees Buchanan and Pope)
(2/09)

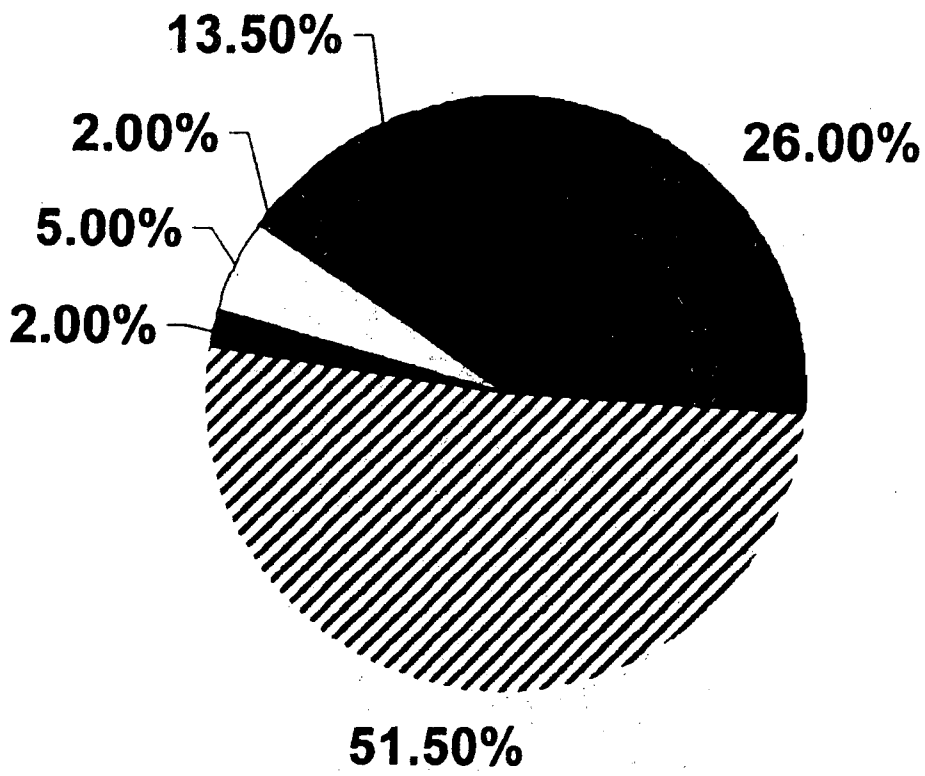
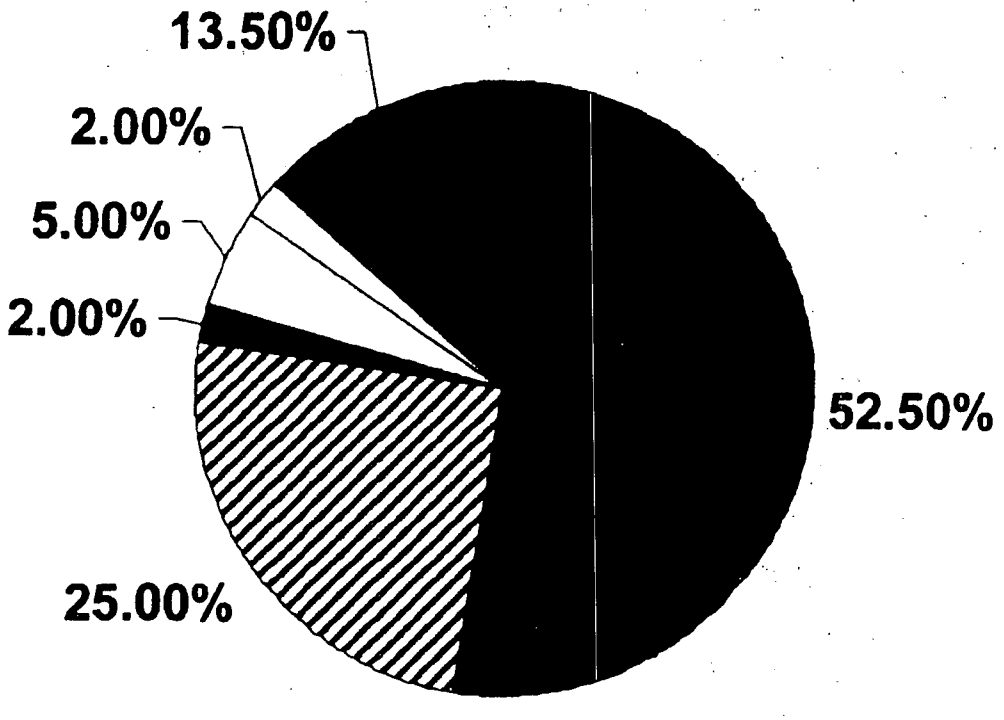


Chart 4

WHAT THE "SETTLING" PARTIES WOULD GET IF THEY SET ASIDE BROWN'S INTENTIONS EXPRESSED IN HIS 2000 & 1999 WILLS/TRUSTS

2/09



Division of 25% "Heirs" receive if 2000 and 1999 Wills and Trusts declared void:

If no spouse and 12 "Heirs":

Each "Heir" receives 2.08% of Estate/Trust

If spouse and 12 "Descendant/Heirs":

1. Hynie Brown receives 12.5%
2. Each Descendant/Heir receives 1.04%

Possible Descendant/Heirs (Parties to Case 872, and Parties not joined):

1. Daryl Brown
2. Larry Brown
3. Terry Brown
4. Deanna Thomas
5. Vanisha Brown
6. Yamma B. Lumar
7. Tonya Brown
8. James Brown II
9. LaRhonda Petit
10. Cinnamon Parris
11. Jeanette Mitchell
12. Deon Brown – not joined
13. Doe Defendants

EXHIBIT B

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)
) Case No.: 2010-CP-40-

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Esate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L[redacted], Carrington L[redacted], and Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN - LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children, SYDNEY L[redacted], CARRINGTON L[redacted], and TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs.

v.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants.

) AFFIDAVIT OF DARYL L. WILLIAMS

PERSONALLY APPEARED BEFORE ME, Daryl L. Williams who, being duly sworn, deposes and says:

I am counsel for Defendant Adele J. Pope in the above-captioned action.

Attached hereto are true copies of the Complaints in two declaratory judgment actions filed on November 17, 2010 by The Cincinnati Specialty Underwriters Insurance Company. One names Buchanan Law Office, P.A. and Robert L. Buchanan as Defendants (Civil Action No. 3:10-cv-02986); the other names Adele J. Pope as Defendant (Civil Action No. 3:10-cv-2987). Both actions are now currently pending un the United States District Court for the District of South Carolina. I obtained these copies from the PACER electronic document filing system of the United States District Court and they are true copies of documents available through that system.

FURTHER DEPONENT SAYETH NOT.

Daryl L. Williams

SWORN TO BEFORE ME this 30th
Day of November, 2010

Vicki L. Morse

Notary Public for South Carolina
My commission expires: 9/1/2019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
RICHLAND DIVISION

The Cincinnati Specialty Underwriters Insurance Company, Plaintiff, v. Buchanan Law Office, P.A., and Robert L. Buchanan, Defendants.	)	**DECLARATORY JUDGMENT COMPLAINT (Non-Jury)** 3:10-cv-02986-JFA

Plaintiff The Cincinnati Specialty Underwriters Insurance Company ("Cincinnati"), complaining of Defendants Buchanan Law Office, P.A., and Robert L. Buchanan (collectively referred to herein singularly as "Buchanan"), would respectfully show this Court:

1. Cincinnati brings this declaratory judgment action pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2201, *et seq.*, to determine the rights of the parties under a Lawyer's Professional Liability policy Cincinnati issued to Buchanan. Specifically, Cincinnati seeks a declaration that it is not obligated to defend or indemnify Buchanan for the claims made against him in the Underlying Action (as defined below).

BACKGROUND

2. On Christmas Day 2006, James Brown, the noted entertainer and "Godfather of Soul," passed away in Atlanta, Georgia.

3. In January 2007, the purported Last Will and Testament of James Brown was filed in the Probate Court of Aiken County, South Carolina, which set off a firestorm of litigation between the initial trustees and personal representatives of the Trusts and Estate of James Brown;

the recognized and alleged family members of James Brown; and the Attorney General of South Carolina, among others.

4. The recognized and alleged family members of James Brown immediately contested the initial appointment of three lifelong friends of James Brown—Cannon, Dallas, and Bradley—as personal representatives of the Estate of James Brown.

5. As a result, in March 2007, the underlying state court appointed Adele J. Pope ("Pope") and Buchanan to serve as Special Administrators of the Estate of James Brown to "monitor, investigate and oversee" the personal representatives, and to report any issues to the underlying state court.

6. In June 2007, the underlying state court granted Pope and Buchanan the authority to monitor the Trusts of James Brown in addition to the Estate of James Brown.

7. In July 2007, Pope and Buchanan requested the underlying state court remove one or more of the trustees and personal representatives of the Trusts and Estate of James Brown.

8. In August 2007, Cannon resigned as trustee and personal representative of the Trusts and Estate of James Brown.

9. In November 2007, the remaining two trustees and personal representatives of the Trusts and Estate of James Brown, Dallas and Bradley, resigned and the underlying state court appointed Pope and Buchanan as the sole trustees and personal representatives of the Trusts and Estate of James Brown.

10. In May 2000 – based on a settlement agreement between James Brown's wife, the named children and grandchildren of James Brown, and the South Carolina Attorney General – the underlying state court removed Pope and Buchanan as trustees and personal representatives of the Trusts and Estate of James Brown.

11. The underlying state court also immediately appointed Russell L. Bauknight as the trustee and personal representative of the Trusts and Estate of James Brown.

12. A year later, in May 2010, Buchanan was sued in the Probate Court for Richland County, South Carolina, for wrongful acts or omissions he allegedly committed while serving as the trustee and personal representative of the Trusts and Estate of James Brown.

13. Buchanan tendered this suit to Cincinnati and Cincinnati now brings this declaratory judgment action.

JURISDICTION ALLEGATIONS

14. Cincinnati is a Delaware corporation, with its principal place of business in Ohio.

15. Upon information and belief, Robert L. Buchanan is a resident of Aiken County, South Carolina, and the Buchanan Law Office, P.A., is principally located in Aiken County, South Carolina.

16. Subject matter jurisdiction is proper in this Court under 28 U.S.C. § 1332, as there is complete diversity between the parties, and the matter in controversy exceeds $75,000.

17. Personal jurisdiction is proper in this Court.

18. Venue is proper in this Division under Local Rule 3.01(A)(1), as a substantial part of the events or omissions giving rise to the claim occurred in this Division.

POLICY LANGUAGE

19. A true and accurate copy of policy CSU0012864, which Cincinnati issued to Buchanan, is attached hereto as **Exhibit A** ("Policy").

20. The Policy contains the following provisions, exclusions, conditions, and definitions:

THIS IS A CLAIMS MADE POLICY AND APPLIES ONLY TO CLAIMS FIRST MADE AND REPORTED IN WRITING TO US DURING THE POLICY PERIOD.

Various provisions in this Coverage Part restrict coverage. Read the entire Coverage Part carefully to determine rights, duties and what is and what is not covered.

***

SECTION I – COVERAGES

COVERAGE A. LAWYER'S PROFESSIONAL LIABILITY

1. Insuring Agreement

a. We will pay on your behalf those sums, in excess of retention, that the insured becomes legally obligated to pay as "damages" as a result of any injury caused by a "wrongful act" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those "damages", including the right to select defense counsel. However, we will have no duty to defend the insured against any "suit" seeking "damages" to which this insurance does not apply. We may, at our discretion, investigate any "wrongful act" and settle any claim or "suit" that may result.

***

b. This insurance applies to injury only if:

***

(3) The "wrongful act" did not occur before the Retroactive Date, if any, shown in the Declarations or after the end of the policy period; and

(4) A claim for "damages" because of the "wrongful act" is first made against any insured in accordance with Paragraph c. below, during the policy period . . .

c. A claim by a person or organization seeking "damages" will be deemed to have been made at the earlier of the following times:

(1) When notice of such claim is reported in writing and received by us; or

(2) When we make settlement in accordance with Paragraph a. above.

Any claims for "damages" because of a "wrongful act" to the same person or organization will be deemed to have been made at the time the first of those claims is made against any insured.

2. Exclusions

This insurance does not apply to:

***

o. Expected or Intended Injury

Any liability or "damages" which may reasonably be expected to result from the intentional or criminal acts of an insured or which is in fact expected or intended by the insured, even if the injury or damage is of a different degree or type than actually expected or intended.

***

q. Financial Representations

Any loss or "damages" caused by or arising out of:

(1) The co-mingling of or inability or intentional failure to pay, collect or safeguard money;

(2) Representations made or opinions rendered by an insured in connection with the performance or non performance of securities, tax shelters, mutual funds, real estate or other investments;

(3) A loan or investment where reliance was made on any report, audit, balance sheet, or other financial, accounting, or related schedule, exhibit, statement or report prepared, signed or certified by an insured; or

(4) Any claim against an insured acting as a beneficiary or distributee of any trust or estate.

***

t. Known or Prior Injury

Any "wrongful act" that:

(1) is alleged to have first occurred or been committed prior to the Retroactive Date of this policy;

(2) is alleged to be in the process of occurring or being committed prior to the Retroactive Date of this policy;

(3) is in the process of settlement, adjustment or "suit"; or

(4) is alleged to have been committed with the knowledge that it was a "wrongful act".

***

y. Punitive Damages

Any claim of indemnification for punitive or exemplary "damages", including any costs or interest attributable to punitive or exemplary "damages".

***

bb. Unjust Enrichment, Profit or Advantage

Any liability or "damages" arising out of any gain, enrichment, profit or advantage to which any insured is not legally entitled.

***

SECTION VII – CONDITIONS

1. Allocation

If a claim or "suit" is made that includes both covered and non-covered matters, or a claim or "suit" is made against insured and non-insured parties, we and the insureds shall use all reasonable efforts to achieve a fair and reasonable allocation based upon such exposure of covered and non-covered matters and/or the proportionate fault of such insured and non-insured parties. We shall advance all "defense costs" incurred with respect to such claim or "suit" prior to the final disposition of such claim of "suit"; provided, however, that the foregoing shall not preclude us from subsequently allocating pursuant to this provision.

***

4. Duties in the Event of Wrongful Act, Claim or Suit

***

c. You and any other involved insured must:

***

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation, settlement or defense of the claim or "suit". . .

d. No insureds will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense without our written consent.

e. No insured will admit any liability, consent to any judgment, or settle any claim or "suit" without our prior written consent.

***

7. Other Insurance

This insurance is excess over, and shall not contribute with any other insurance or self-insurance, whether primary, excess, contingent or on any other basis. This condition will not apply to insurance specifically written as excess over this Coverage Part. We will have no duty to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit".

***

SECTION VIII – DEFINITIONS

***

5. "Damages" mean:

a. Any compensatory monetary amount you shall be legally required to pay because of judgments, arbitration awards rendered against you or settlements negotiated by us.

b. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

c. Prejudgment interest awarded against the insured on that part of the judgment we become obligated to pay and which falls within the applicable limit of insurance. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest that is based on the period of time after the offer.

d. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

***

15. "Professional services" means legal services performed or legal advice given by an insured or on your behalf for others in the conduct of your practice as a:

a. Lawyer;

***

g. Administrator, conservator, executor, guardian, trustee, receiver, or in any other similar fiduciary capacity; and

provided that such services as described in Paragraphs b. through g. above are connected with and incidental to an insured's profession as a lawyer and are performed on your behalf.

***

19. "Wrongful act"

a. Means any actual or alleged negligent act, error or omission in the rendering or failing to render "professional services" for others by an insured . . .

All claims resulting from the same or related "wrongful act" shall be considered a single claim regardless of the time frame over which such "wrongful act" occurs.

FACTUAL ALLEGATIONS

21. On May 19, 2010, a lawsuit was brought against Buchanan in the Probate Court of Richland County, South Carolina, with the civil action number of 2010-GC-4000073; a copy of which is attached hereto as **Exhibit B** ("Underlying Action"). For purposes to this action,

Cincinnati assumes all allegations against Robert L. Buchanan in the Underlying Action arises as a result of his employment of, or ownership of, the Buchanan Law Office, P.A.

22. The Underlying Action was brought by Russell L. Bauknight, as Trustee of the James Brown 2000 Irrevocable Trust, as Trustee of the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster in his capacity as Attorney General for the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, J.B.; Daryl J. Brown, individually and on behalf of his minor child J.B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children S.L. and C.L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown.

23. On March 12, 2007, Buchanan was appointed to serve as the Special Administrator to the Estate of James Brown.

24. On November 20, 2007, Buchanan was appointed to serve as the trustee and personal representative of the Trusts and Estate of James Brown.

25. Buchanan served as the trustee and personal representative of the Trusts and Estate of James Brown until May 26, 2009, when the underlying state court removed him as the trustee and personal representative of the Trusts and Estate of James Brown.

26. As of May 26, 2009, Buchanan was relieved of any duty, fiduciary or otherwise, he owed to the Trusts and Estate of James Brown.

27. The Underlying Action alleges a cause of action against Buchanan for committing breach of fiduciary duty during his appointment as trustee and personal representative of the Trusts and Estate of James Brown.

28. The Underlying Action alleges a cause of action against Buchanan for committing breach of trust in violation of Section 62-7-1001(a) of the South Carolina Probate Code during his appointment as trustee and personal representative of the Trusts and Estate of James Brown.

29. The Underlying Action alleges a cause of action against Buchanan for negligence during his appointment as trustee and personal representative of the Trusts and Estate of James Brown.

30. The Underlying Action prays for punitive damages from Buchanan.

31. The Policy period began August 16, 2009.

32. The Policy period ended on August 16, 2010.

33. The Policy has a Retroactive Date of August 16, 2009.

FIRST CAUSE OF ACTION
(Declaratory Judgment – Claims Not First Made During the Policy Period)

34. The foregoing allegations are incorporated herein and made a part hereof by reference.

35. The claims made against Buchanan in the Underlying Action were first made against him prior to the Retroactive Date of the Policy, and were therefore not first made against him during the Policy period.

36. Even assuming a claim made against Buchanan in the Underlying Action was first made against him during the Policy period, Cincinnati is nevertheless not obligated to indemnify Buchanan for claims made against him in the Underlying Action that were not first made against him during the Policy period.

37. This Court should declare that the Policy does not cover the claims made against Buchanan in the Underlying Action and, therefore, Cincinnati is not obligated to defend or indemnify Buchanan in the Underlying Action. In the alternative, even assuming a claim made

against Buchanan in the Underlying Action was made against him during the Policy period, this Court should determine each claim made against Buchanan in the Underlying Action that was first made against him prior to the Retroactive Date of the Policy, and should declare that Cincinnati is not obligated to indemnify Buchanan for each such claim.

FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment – No "Wrongful Act" Committed During the Policy Period)

38. The foregoing allegations are incorporated herein and made a part hereof by reference.

39. No "wrongful act," as defined by the Policy, was committed by Buchanan during the Policy period.

40. Even assuming a "wrongful act" was committed by Buchanan during the Policy period, Cincinnati is nevertheless not obligated to indemnify Buchanan for claims that do not constitute a "wrongful act" under the Policy.

41. This Court should declare that no "wrongful act" was committed by Buchanan during the Policy period and, therefore, Cincinnati is not obligated to defend or indemnify Buchanan in the Underlying Action. In the alternative, even assuming a "wrongful act" was committed by Buchanan during the Policy period, this Court should determine each claim that does not constitute a "wrongful act" during the Policy period, and should declare that Cincinnati is not obligated to indemnify Buchanan for each such claim.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment – Exclusion for Expected or Intended Injury)

42. The foregoing allegations are incorporated herein and made a part hereof by reference.

43. Even assuming a claim made against Buchanan in the Underlying Action was first made against him during the Policy period, and even assuming a "wrongful act" was committed by Buchanan during the Policy period, the Policy does not apply to claims arising out of the intentional acts of Buchanan.

44. Therefore, even assuming a claim made against Buchanan in the Underlying Action was first made against him during the Policy period, and even assuming a "wrongful act" was committed by Buchanan during the Policy period, this Court should determine each claim based on the intentional acts of Buchanan, and this Court should declare that Cincinnati is not obligated to indemnify Buchanan for each such claim.

FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment – Exclusion for Financial Representations)

45. The foregoing allegations are incorporated herein and made a part hereof by reference.

46. Even assuming a claim made against Buchanan in the Underlying Action was first made against him during the Policy period, and even assuming a "wrongful act" was committed by Buchanan during the Policy period, the Policy does not apply to financial representations made by Buchanan.

47. Therefore, even assuming a claim made against Buchanan in the Underlying Action was first made against him during the Policy period, and even assuming a "wrongful act" was committed by Buchanan during the Policy period, this Court should determine each claim based on financial representations made by Buchanan, and this Court should declare that Cincinnati is not obligated to indemnify Buchanan for each such claim.

FOR A FIFTH CAUSE OF ACTION
(Declaratory Judgment – Known or Prior Injury)

48. The foregoing allegations are incorporated herein and made a part hereof by reference.

49. Even assuming a claim made against Buchanan in the Underlying Action was first made against him during the Policy period, and even assuming a "wrongful act" was committed by Buchanan during the Policy period, the Policy does not apply to a "wrongful act" that occurred or was committed prior to the Retroactive Date of the Policy, or that was in the process of occurring or being committed prior to the Retroactive Date of the Policy, or was in the process of settlement, adjustment, or suit, or was committed with the knowledge that it was a "wrongful act."

50. Therefore, even assuming a claim made against Buchanan in the Underlying Action was first made against him during the Policy period, and even assuming a "wrongful act" was committed by Buchanan during the Policy period, this Court should determine each claim that occurred or was committed prior to the Retroactive Date of the Policy, or that was in the process of occurring or being committed prior to the Retroactive Date of the Policy, or was in the process of settlement, adjustment, or suit, or was committed with the knowledge that it was a "wrongful act," and this Court should declare that Cincinnati is not obligated to indemnify Buchanan for each such claim.

FOR A SIXTH CAUSE OF ACTION
(Declaratory Judgment – Exclusion for Punitive Damages)

51. The foregoing allegations are incorporated herein and made a part hereof by reference.

52. The Underlying Action prays for punitive or exemplary damages from Buchanan; however, the Policy does not apply to punitive or exemplary damages.

53. Therefore, this Court should declare that Cincinnati is not obligated to indemnify Buchanan for any punitive or exemplary damages recovered against him in the Underlying Action.

FOR A SEVENTH CAUSE OF ACTION
(Declaratory Judgment – Exclusion for Unjust Enrichment, Profit, or Advantage)

54. The foregoing allegations are incorporated herein and made a part hereof by reference.

55. Even assuming a claim made against Buchanan in the Underlying Action was first made against him during the Policy period, and even assuming a "wrongful act" was committed by Buchanan during the Policy period, the Policy does not apply to claims based on any gain, enrichment, profit or advantage to which Buchanan is not legally entitled.

56. Therefore, even assuming a claim made against Buchanan in the Underlying Action was first made against him during the Policy period, and even assuming a "wrongful act" was committed by Buchanan during the Policy period, this Court should determine each claim that based on any gain, enrichment, profit or advantage to which Buchanan is not legally entitled, and this Court should declare that Cincinnati is not obligated to indemnify Buchanan for each such claim.

FOR AN EIGHTH CAUSE OF ACTION
(Declaratory Judgment – Allocation of Covered and Non-covered Claims)

57. The foregoing allegations are incorporated herein and made a part hereof by reference.

58. Even assuming a claim made against Buchanan in the Underlying Action was first made against him during the Policy period, and even assuming a "wrongful act" was committed by Buchanan during the Policy period, the Policy does not apply to non-covered matters.

59. Therefore, even assuming a claim made against Buchanan in the Underlying Action was first made against him during the Policy period, and even assuming a "wrongful act" was committed by Buchanan during the Policy period, this Court should determine each non-covered matter, and should declare that Cincinnati is not obligated to indemnify Buchanan for each such non-covered matter.

FOR A NINTH CAUSE OF ACTION
(Declaratory Judgment – Other Insurance Clause)

60. The foregoing allegations are incorporated herein and made a part hereof by reference.

61. Under the Policy, Cincinnati is not obligated to provide Buchanan a defense to the Underlying Action if any other insurer has a duty to defend Buchanan.

62. Upon information and belief, at least one other insurer has a duty to defend Buchanan in the Underlying Action, and is presently defending Buchanan in the Underlying Action.

63. Therefore, this Court should declare that Cincinnati is not obligated to defend Buchanan in the Underlying Action.

FOR A TENTH CAUSE OF ACTION
(Declaratory Judgment – Duties Owed by Insured)

64. The foregoing allegations are incorporated herein and made a part hereof by reference.

65. Under the Policy, Buchanan is obligated to authorize Cincinnati to obtain records and other information; to cooperate with Cincinnati in the investigation, settlement, or defense of

the Underlying Action; to refuse to voluntarily make a payment, assume any obligation, or incur any expense without Cincinnati's written consent; or to consent to any judgment or settle any claim in the Underlying Action without Cincinnati's prior written consent.

66. Therefore, if this Court should declare that Cincinnati is obligated to defend or indemnify Buchanan, then it should declare that Buchanan is obligated to authorize Cincinnati to obtain records and other information; to cooperate with Cincinnati in the investigation, settlement, or defense of the Underlying Action; to refuse to voluntarily make a payment, assume any obligation, or incur any expense without Cincinnati's written consent; or to consent to any judgment or settle any claim in the Underlying Action without Cincinnati's prior written consent.

67. Cincinnati further requests this Court declare that any breach of any of the above obligations by Buchanan entitles Cincinnati to disclaim coverage for such breaches under the laws and statutes of South Carolina.

FOR AN ELEVENTH CAUSE OF ACTION
(Reservation)

68. The foregoing allegations are incorporated herein and made a part hereof by reference.

69. Additional facts or other information may arise during or after discovery, and Cincinnati reserves the right to raise any coverage or other defenses in the future, including but not limited to Policy conditions, exclusions, endorsements, conditions, or other limitations that have not been raised in this pleading.

WHEREFORE, Plaintiff having fully complained against Defendant, respectfully requests this Court make the above declarations, as applicable; for the costs and disbursements of

this action; and for such other and further relief as this Court deems just and proper under the circumstances.

s/ Steven E. Farrar
Steven E. Farrar (Fed. I.D. 770)
Jason D. Maertens (Fed I.D. 10144)
Smith Moore Leatherwood LLP
300 East McBee Avenue, Suite 500 (29601)
Post Office Box 87
Greenville, SC 29602
(864) 240-2433
(864) 240-2475 (fax)
Steve.Farrar@smithmoorelaw.com
Jason.Maertens@smithmoorelaw.com

Attorneys for Plaintiff

November 17, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
RICHLAND DIVISION

The Cincinnati Specialty Underwriters Insurance Company,	)	
Plaintiff,	)	**DECLARATORY JUDGMENT COMPLAINT (Non-Jury)**
v.	)	
Adele J. Pope,	)	
Defendant.	)	3:10-cv-02987-JFA

Plaintiff The Cincinnati Specialty Underwriters Insurance Company ("Cincinnati"), complaining of Defendant Adele J. Pope ("Pope"), would respectfully show this Court:

1. Cincinnati brings this declaratory judgment action pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2201, *et seq.*, to determine the rights of the parties under a Lawyer's Professional Liability policy Cincinnati issued to Pope. Specifically, Cincinnati seeks a declaration that it is not obligated to defend or indemnify Pope for the claims made against her in the Underlying Action (as defined below).

BACKGROUND

2. On Christmas Day 2006, James Brown, the noted entertainer and "Godfather of Soul," passed away in Atlanta, Georgia.

3. In January 2007, the purported Last Will and Testament of James Brown was filed in the Probate Court of Aiken County, South Carolina, which set off a firestorm of litigation between the initial trustees and personal representatives of the Trusts and Estate of James Brown; the recognized and alleged family members of James Brown; and the Attorney General of South Carolina, among others.

FOR AN ELEVENTH CAUSE OF ACTION
(Reservation)

68. The foregoing allegations are incorporated herein and made a part hereof by reference.

69. Additional facts or other information may arise during or after discovery, and Cincinnati reserves the right to raise any coverage or other defenses in the future, including but not limited to Policy conditions, exclusions, endorsements, conditions, or other limitations that have not been raised in this pleading.

WHEREFORE, Plaintiff having fully complained against Defendant, respectfully requests this Court make the above declarations, as applicable; for the costs and disbursements of this action; and for such other and further relief as this Court deems just and proper under the circumstances.

s/ Steven E. Farrar
Steven E. Farrar (Fed. I.D. 770)
Jason D. Maertens (Fed I.D. 10144)
Smith Moore Leatherwood LLP
300 East McBee Avenue, Suite 500 (29601)
Post Office Box 87
Greenville, SC 29602
(864) 240-2433
(864) 240-2475 (fax)
Steve.Farrar@smithmoorelaw.com
Jason.Maertens@smithmoorelaw.com

Attorneys for Plaintiff

November 17, 2010

470

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B[redacted]l; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney L[redacted]r and Carrington L[redacted]r; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES B[redacted]I; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY L[redacted]R and CARRINGTON L[redacted]R; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs

v.

Adele J. Pope and Robert L. Buchanan, Jr.,

Defendants

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2010-CP-40-4900

RICHLAND COUNTY
FILED
2010 DEC -9 AM 9:57
JEANETTE W. WALDRIDE
C.C.P. & G.S.

MOTION TO STRIKE PORTIONS OF DEFENDANTS' MOTION TO STAY PROCEEDINGS

TO: DEFENDANTS AND THEIR ATTORNEYS:

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs above-named, by their undersigned attorneys, will move before the Presiding Judge of the Richland County Court of Common Pleas at the Richland County Judicial Center at 9:00 a.m. on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an Order to strike portions of the Defendants' Motion to Stay Proceedings according to Rule 12(f), SCRCP.

Under the guise of a Motion to Stay, Defendants are attempting to engage in a character assassination wholly irrelevant to the relief they seek. Moreover, Defendants seek to clutter and confuse the record with allegations, conjecture and insult in an effort to create a parallel reality extant only in mind of the Defendants and the files of this Court. The specific grounds and facts supporting this Motion to Strike are the following:

1. Defendants' contend that the basis for their Motion to Stay is the existence of pending declaratory judgment actions in Federal Court. However, the grounds and facts cited by Defendants in support of their motion are centered on Terry Brown, one of more than a dozen Plaintiffs in this action. The references to Terry Brown are "redundant, immaterial, impertinent or scandalous" as described in the Rules of Civil Procedure and should be stricken from Defendants' Motion.

2. Specifically, "Terry Brown and the other" should be stricken from Paragraph 1 of Defendants' Motion.

3. "Terry Brown, a son of entertainment icon James Brown, and" should be stricken from Paragraph 2 of Defendants' Motion.

4. "Terry Brown and others" should be stricken and replaced with "Plaintiffs" in Paragraph 3 of Defendants' Motion.

5. Paragraph 4 should be stricken in its entirety from Defendants' Motion.

6. Paragraph 5 should be stricken in its entirety from Defendants' Motion as it refers solely to the assertions of Albert Dallas which have no relation to the Motion for Stay before the Court.

7. The phrase "including questions related to the actions of Terry Brown" should be stricken from Paragraph 6 of Defendants' Motion.

8. Defendants' Motion includes two exhibits. Exhibit A should be stricken as it constitutes "redundant, immaterial, impertinent or scandalous" material.

This Motion to Strike may be supported by a memorandum of law.

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.

Everett A. Kendall, II

Kenneth B. Wingate
Everett A. Kendall, II
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

ATTORNEYS FOR THE PLAINTIFFS

Columbia, South Carolina
December 7, 2010

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2010-CP-40-4900

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B.; Daryl J. Brown, individually and on behalf of his minor child Janise B., Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L., Carrington L., and Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

and

ALAN WILSON,[1] in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child,JAMES B.; DARYL J. BROWN, individually and on behalf of his minor child JANISE B.; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children, SYDNEY L., CARRINGTON L., and TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN.....Plaintiffs,

v.

Adele J. Pope and Robert L. Buchanan, Jr.....Defendants.

OF WHOM:
Adele J. Pope is the .....Appellant.

NOTICE OF APPEAL

---

[1] Pursuant to Rule 265(d), Petitioner has updated the caption to reflect the new Attorney General. It is unclear whether Russell L. Bauknight, who is designated in the complaint as acting "on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina" has been authorized to act on behalf of Attorney General Wilson.

Appellant Adele J. Pope appeals the following Orders of the Honorable L. Casey Manning in the above matter:

1. Order Denying Motion to Dismiss, dated November 8, 2010;

2. Order Denying Motion to Change Venue, dated November 8, 2010; and

3. Order Denying Defendants' Motions to Alter or Amend, dated January 7, 2011 and filed January 12, 2011.

The Order Denying Defendants' Motions to Alter or Amend was received by Appellant on January 18, 2011.

A copy of each of said Orders is attached hereto and made part of this Notice of Appeal.

Daryl L. Williams
Jeter & Williams, P.A.
1204 Main Street, Suite 200
Post Office Box 7425
Columbia, South Carolina 29202
Telephone: (803) 765-0600
Facsimile: (803) 765-0619

Adam T. Silvernail
Law Office of Adam T. Silvernail, LLC
1218 Taylor Street
Post Office Box 1898
Columbia, South Carolina 29202
Telephone: (803) 779-1770
Facsimile: (803) 403-8092

February 16, 2010

Attorneys for Appellant

Other Counsel of Record:

Kenneth B. Wingate, Esquire
Everett A. Kendall, Esquire
Sweeney, Wingate & Barrow, P.A.
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
Telephone: (803) 256-2233

Attorneys for Plaintiff-Respondents.

J. Calhoun Watson, Esquire
Robin A. Braithwaite, Esquire
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211

Attorneys for Respondent Robert L. Buchanan, Jr.