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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
TEASA K. WEAVER, MASTER-IN-EQUITY

Appellate Case No.: 2021-000816

Vicki Lynn Vergeldt, individually and as
Successor Trustee of the John Vergeldt, Jr.
Revocable living Trust dated September 27, 1978, ...Respondent,

v.

John Edward Vergeldt, ...Appellant.

**RECORD ON APPEAL
VOLUME II OF III**

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Certificate of Counsel

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
CASE NO. 2016-CP-46-0820

VICKI LYNN VERGELDT,)
Petitioner,)

vs.)

JOHN EDWARD VERGELDT,)
Individually and as Successor Trustee of the)
John Vergeldt, Jr. Revocable Living Trust)
dated September 27, 1978, as amended.)

Respondent.)

**PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

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DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

To: Respondent and/or his counsel

YOU WILL PLEASE TAKE NOTICE that Plaintiff Vicki Lynn Vergeldt will move, ten (10) days after the service of this motion or as soon thereafter as she may be heard, at the York County Courthouse, 1 S. Congress Street, York, South Carolina, for an Order granting summary judgment on her cause of action for removal of John Edward Vergeldt as Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, as amended. The grounds of this motion are as follows:

1. Viewing the evidence in the light most favorable to Respondent, there is no genuine issue of material fact that John Edward Vergeldt has breached his fiduciary duties in at least the following ways:
 - a. Commingling Trust funds with Respondent's personal funds.
 - b. Failing to keep adequate records of Trust assets and transactions.
 - c. Improperly distributing funds to himself and Patti Vergeldt Downey, while reducing and/or failing to distribute funds to Plaintiff, who is an equal beneficiary of the Trust.
 - d. Failing to account for numerous cash and debit card transactions.
 - e. Failing to meet his duties of loyalty and impartiality to Plaintiff.
 - f. Refusing to allow Plaintiff reasonable access to the Vergeldt Cottage, as required by the terms of the Cottage Trust subtrust.

- g. Failing to preserve and protect Trust assets.
 - h. Threatening to disinherit Plaintiff if she did not abandon her efforts to understand the true nature and extent of her inheritance in the face of Respondent's failure to disclose adequate information on which she could do so.
2. As a result of Respondent's actions as Trustee, Plaintiff has suffered substantial damages, including:
- a. Substantial depletion of her inheritance – the true extent of which remains unknown – by Respondent's misappropriations, mismanagement and inappropriate distributions to Respondent and Patti Vergeldt Downey.
 - b. A years-long delay in Plaintiff's receipt of most of her inheritance.
 - c. Tens of thousands of dollars in legal fees and costs spent in Plaintiff's continuing effort to obtain adequate information on which to know the true extent of her inheritance.
 - d. The loss of use of Plaintiff's longtime family vacation home.
3. Pursuant to S.C. Code Ann. § 62-7-706, a removal of a Trustee is appropriate where the Trustee has committed one or more serious breaches of trust; where the trustee is unfit to serve; and/or where the Trustee has repeatedly failed to administer the Trust effectively.
4. Plaintiff submits that the undisputed facts set out above, even viewed in the light most favorable to Respondent, show serious breaches of trust, unfitness to serve and/or repeated failures to effectively administer the trust.
5. Plaintiff is entitled, pursuant to Rule 56, *South Carolina Rules of Civil Procedure*, to an Order immediately removing Respondent as Trustee of the subject Trust, as there is no genuine issue of material fact as to Respondent's breaches of fiduciary duty, unfitness and/or failures to effectively administer the Trust.

For the foregoing reasons, Plaintiff respectfully requests that this Court enter its Order granting Plaintiff partial summary judgment as to the removal of Respondent as Trustee. This motion is based on the *South Carolina Rules of Civil Procedure*, especially Rule 56; applicable statutory and case law; the Affidavits of Plaintiff and Kathleen Palinski, Esquire, attached hereto;

the entire record herein; and such additional affidavits and/or memoranda shall be presented prior to the hearing on this matter.



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adam@silvernaillawfirm.com

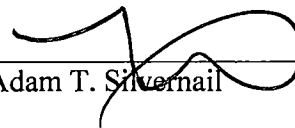
November 7, 2017

Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 7, 2017 he has served the foregoing document on all parties by depositing a copy of same in the U.S. Mail, first-class postage prepaid, to their counsel addressed as follows:

Daniel J. Ballou, Esquire
PO Box 707
Rock Hill, SC 29731



Adam T. Silvernail

FILED-RECEIVED
2017 NOV 10 PM 12:05
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

IN THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	CASE NO. 2016-CP-46-0820
	)	
VICKI LYNN VERGELDT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
JOHN EDWARD VERGELDT,	)	AFFIDAVIT OF VICKI LYNN VERGELDT
Individually and as Successor Trustee of the	)	
John Vergeldt, Jr. Revocable Living Trust	)	
dated September 27, 1978, as amended.	)	
	)	
Respondent.	)	
	)	

PERSONALLY APPEARED BEFORE ME Vicki Lynn Vergeldt, who, being duly sworn, deposes and says:

1. I am over the age of eighteen (18), competent to testify, and give this affidavit of my own personal knowledge.
2. I am the Plaintiff in this action for removal of my brother, John Edward Vergeldt, as Trustee of our father's Revocable Living Trust.
3. My brother has served as co-Trustee or Successor Trustee since 2009.
4. According to the terms of our father's Will and Trust, all of our father's assets were to be distributed to my father's three surviving children in equal shares.
5. My father suffered from Parkinson's disease and other ailments, and his health had declined substantially by 2008 when he moved into Henry Ford Village near his long-time home in Michigan.
6. Thereafter, in 2010, my father moved into my home for a period, during which I was his primary caregiver.
7. I am personally aware that my father did not manage his finances during that period. Indeed, due to Parkinson's-related dementia, he was unable to manage taking his medicine or even making a phone call without assistance. If I needed to address any financial matter (such as payment of my father's expenses), I contacted John. My father did not receive bank statements when he lived in my home. Nor did I ever see

John discuss our father's finances with him, either via phone or during one of my brother's infrequent visits to my home.

8. By 2010, I had begun making inquiries of John about our father's finances, because I was concerned about whether my father had adequate funds to ensure he was cared for comfortably.
9. John initially provided some informal reports, but they were very incomplete, and he became suspiciously aggressive when I followed up with questions.
10. Although John and I had always had a close and pleasant relationship, to my amazement, John's responses to my inquiries quickly became abusive, outrageously so in many instances.
11. In January 2012, John took my father ostensibly for a visit to John's home in South Carolina. In April 2012, John brought my father back to Michigan, only to return a month later and take my father back to John's home in South Carolina, where my father remained until his death in August 2013.
12. Startled by John's abusive communications and refusals to provide information regarding the Trust, I continued to try to find out what was going on with my father's finances, and indeed, with my father's health, and why John was so aggressive in refusing to disclose any information after years of relative transparency.
13. Prior to our father's death, John brought Guardianship and Conservatorship proceedings in York County. Based on the fact that John had both a Durable Power of Attorney and a co-trustee appointment from my father, plus John's alarming hostility in both refusing to provide basic information regarding the Trust assets and his similar conduct with regard to my attempts to visit our father, I engaged counsel to oppose John's petitions.
14. Our father passed away in the early stages of the Guardianship/Conservatorship action, and so there was no result from that matter.
15. After our father's death, I tried unsuccessfully to obtain information from John about how he had calculated the Total Trust Value and thus my inheritance.
16. Even after I engaged counsel to assist me with obtaining information, John refused to provide it. He instead wrote threatening letters to my attorney, indicating that he would unilaterally disinherit me if I pressed for information.

17. John's threats culminated in his eventual demand that I accept an unsubstantiated and low amount as my entire inheritance, as well as releasing him from all claims, and dismiss my attorney, or he would make no further distributions to me. Because John had provided only general and inconsistent information about the Trust assets, and due to the surrounding circumstances, I could not do so.
18. All of John's conduct before and after our father's death left me extremely concerned about what John was hiding. Despite John's threats, I felt compelled to try to find out what had happened to our father's assets during the time John had been secretly managing them. I am personally aware that my father worked hard, earned very well, lived within his means, saved money, invested carefully, had no debt including mortgage debt, and inherited a very considerable sum when his mother died in 2000.
19. I brought an action in York County in 2014, seeking a declaration as to whether John had to provide me with accountings and/or give me access to the Trust's books and records.
20. That case took more than two years to complete, and John refused to turn over any financial information in discovery.
21. Despite John's lack of cooperation, we were able to obtain (via subpoena) statements of several First Citizens Bank accounts titled to my father, the Trust and/or John, which showed large amounts of money had been transferred to accounts which were not titled to my father or the Trust. These statements also showed a great number of debit card transactions that could not possibly have benefited my father in any way.
22. After a multi-day trial before the Honorable S. Jackson Kimball, III, in July 2015, the Court found that I was entitled to see the books and records of the Trust.
23. My attorney immediately requested that John allow us access to the books and records, but John refused that access, indicating that he had no further records to show me.
24. Because of John's refusal to allow me the access to that which Judge Kimball found I was entitled, as well as the alarming suggestion that John might actually not have retained substantial records of the Trust's assets, I brought this action seeking his removal as Trustee.

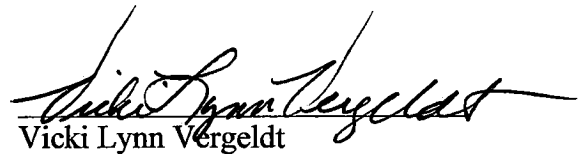
25. In the course of discovery in this case, John sporadically provided additional financial records which actually multiplied my concerns about how the Trust assets were managed and what had happened to substantial amounts of our father's money.
26. During discovery, John and I entered into an agreement to retain a third-party to obtain documentation and prepare an accounting of the Trust's assets from 2008 through 2016.
27. I have received and reviewed the report produced by Kathleen Palinski, Esquire, which confirms that John had made many transfers between our father's accounts and accounts titled to John and/or John's wife, as well as substantial funds that were placed in a certificate of deposit titled jointly between John and our father (from which at least \$43,000 was never deposited into any of our father's accounts after the certificate matured) and tens of thousands of dollars of cash withdrawals and unexplained debit card transactions. Moreover, Ms. Palinski pointed out that the funding sources were unidentifiable in a number of instances. In this respect, it's noteworthy that John and my father had the same first and last names.
28. Ms. Palinski's report was prepared at a cost of more than \$10,000, and she notes that there was no existing accounting produced by John, including such basic records as checking-account registers. She also had to obtain statements and check copies from multiple banks, as the Trust's records were incomplete.
29. I believe that there are missing funds and assets beyond those set out in Ms. Palinski's report, including a \$100,000 Phoenix Bank account for which I personally reviewed a statement in John's home in the last few years of my father's life, but for which Ms. Palinski was unable to obtain any documentation from my brother.
30. Additionally, John, as Trustee, manages the Vergeldt Cottage in Au Gres, Michigan. This is a modest vacation home that my extended family enjoyed for many years. However, since my father's death, my brother has refused to permit me to visit it, even changing all of the locks in 2015 and refusing me keys. Despite this, I made a trip to check on the outside of the cottage and property during August of 2017, and I found that the cottage and its appurtenances have severely deteriorated since my father's death, despite a fund of \$50,000, which my father left for its care and from

which my brother has made repeated undocumented withdrawals and evidently spent the fund down to zero during 2016 and 2017.

31. Since 2014, John has refused to distribute to me any funds or property from the Trust. He has nonetheless distributed to himself and our sister Patti what he claims to be their shares of the Trust.
32. Those distributions have left only a portion, if anything, of both my share of the Trust and the funds which are supposed to be used to maintain the cottage, from which John has spent tens of thousands of dollars on legal fees to avoid allowing me to know what happened to my father's assets and my inheritance.
33. Additionally, I have been forced to spend more than \$45,000 of my own funds in attorneys' fees and costs on litigation which was necessitated by John's refusal to turn over any complete or reliable documentation regarding the Trust's assets. Because John distributed what he considered to be his and Patti's shares of the Trust, my share has borne all of the more-than \$39,000 in legal fees John has incurred in his protracted attempts to avoid providing me information about the Trust.
34. Ms. Palinski's report is the first time I have ever had any reasonable understanding of how the Trust's assets were managed, although I believe it still doesn't cover additional assets for which John provided no documentation to Ms. Palinski. For example, it is concerning to me that he provided no income tax returns for our father for the years 2008 and 2009, despite the fact that John has repeatedly testified that he prepared our father's income taxes from the 1990s through my father's death, and I'm aware that John was audited by the IRS during the timeframe in question.
35. Ms. Palinski's report does, however, show that well over \$100,000 of Trust money either disappeared; was transferred into John's own bank account; or was spent through unexplained debit card transactions, as well as payments he has made to himself.
36. I am informed and believe that if John is not removed and replaced as Trustee, I will never understand what my true inheritance should have been, much less receive it.
37. Although the missing and mis-used funds have depleted my own inheritance, I believe that the Trust itself has a claim against John on behalf of all its beneficiaries.

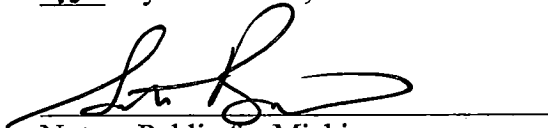
Because John cannot and will not negotiate or litigate a claim against himself, I ask that the Court remove him for cause and appoint a neutral, professional Trustee to complete the accounting; consider and pursue any claim(s) against John; and distribute and terminate the Trust.

FURTHER DEPONENT SAYETH NOT.


Vicki Lynn Vergeldt

SWORN TO BEFORE ME THIS

13 day of October, 2017


Notary Public for Michigan
My Commission expires: 2-9-21

SCOTT BROWN
Notary Public, State of Michigan
County of Macomb
My Commission Expires Feb 09, 2021
Acting in the County of Orleans

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
CASE NO. 2016-CP-46-0820

VICKI LYNN VERGELDT,)
Petitioner,)

vs.)

JOHN EDWARD VERGELDT,)
Individually and as Successor Trustee of the)
John Vergeldt, Jr. Revocable Living Trust)
dated September 27, 1978, as amended.)

Respondent.)

AFFIDAVIT OF KATHLEEN PALINSKI

PERSONALLY APPEARED BEFORE ME Kathleen Palinski, who, being duly sworn,
deposes and says:

1. I am over the age of eighteen (18), competent to testify, and give this affidavit of my own personal knowledge.
2. I was appointed as Limited Special Trustee of the John Vergeldt, Jr. Revocable Living Trust by Order of the York County Circuit Court, for the limited purpose of obtaining information and assembling an accounting of the Trust from January 1, 2008 through December 31, 2016.
3. I have produced the most complete accounting of each known asset which I am able to produce, based on the information I could obtain during 2017.
4. Attached as Exhibit 1 is a true and correct copy of my report, as Limited Special Trustee, with Exhibits A and B attached thereto.
5. The final report which I produced was organized by tabs in a notebook and delivered to counsel for Vicki Lynn Vergeldt and John Edward Vergeldt.
6. Attached as Exhibit 2 is a true and correct copy of "Tab 4," which is entitled Transactions from and to John Edward Vergeldt.

FURTHER DEPONENT SAYETH NOT.


Kathleen Palinski

SWORN TO BEFORE ME THIS
6th day of November, 2017.



Notary Public for South Carolina
My Commission expires: 3/10/2026

John Vergeldt, Jr. Trust
Report of Limited Special Trustee (LST)



UPDATED 9/25/2017

The income and assets of John Vergeldt, Jr. or the John Vergeldt, Jr. Trust dated September 27, 1978, were investigated and resulted in a review of twelve accounts, eleven depository accounts in financial institution and one retirement account administered through First Allmerica. In addition transactions were noted which involved another account at First Citizens Bank Account [REDACTED] titled in the names of John E Vergeldt or Terry Shaw Vergeldt. Also John Vergeldt's personal income tax returns for 2010, 2011, 2012, and 2013 were reviewed, as were the Vergeldt Trust fiduciary income tax returns for 2014, 2015, and 2016.

Statements for each account were available from January 2008 for those accounts open before that date or from the date of the opening of the account if the account had been opened after January 2008. From the statements, check registers were prepared for each account so that transactions could be reviewed. Apparently no registers were prepared contemporaneously by the Trustee.

There were frequent transfers from one account to another. Some transfers could be confirmed by descriptions on the statements. In other cases, the dates and amounts matched so it was identified on the check registers as a transfer between two accounts.

A list of funds deposited and disposition of withdrawals which could not be identified are listed on Exhibit A of this Report. Copies of deposits and checks are only available for the last seven years. Therefore, the transactions occurring more than seven years ago cannot be conclusively resolved unless the Trustee can provide documentation of other information about the source or application of the funds. In addition, the scope of authority for the LST did not provide access to the First Citizen Account [REDACTED], which would probably be helpful in resolving some of the items.

1. What has been accounted for:

- a. All Social Security benefits from January 2008 through date of death were deposited into accounts of John Vergeldt, Jr. (Credit Union ONE) or the Vergeldt Trust (First Citizens Account [REDACTED])
 - b. All retirement benefits paid by First Allmerica from January 2008 through date of death were deposited into Credit Union ONE account of John Vergeldt, Jr.
 - c. All withdrawals from the Old Mutual Financial/Fidelity and Guaranty Life annuity from January 2008 through date of death were deposited into accounts of John Vergeldt, Jr. (Credit Union ONE) or the Vergeldt Trust (First Citizens Account [REDACTED])
- [REDACTED] The death benefit was deposited into First Citizens Account [REDACTED]; book value of annuity was reduced by surrender fees due under the fixed income

ROA 000506

contract as evidenced by correspondence and the Form 1099 from Fidelity and Guaranty Life.

- d. Statements or other records of all the accounts at the financial institutions reported to have paid interest or dividends on Schedule B of the various income tax returns were found, and check registers have been prepared and included in the Trust Accounting.
- e. The proceeds from the sale of the Berwyn Road house were deposited into the Credit Union ONE account via a wire transfer.
- f. John Vergeldt, Jr.'s, purchase of 800 shares of Biowatch Medical, Inc. is of no value as the company filed for Chapter 7 bankruptcy in February 2015 and was discharged from bankruptcy in March 2017.
- g. Of the \$168,000 purchase of the condo unit in Henry Ford Village was financed partially through a non-interest bearing promissory note in the amount of \$151,200. This note was paid off by a check from the Credit Union ONE account. The two refunds from Henry Ford Village were deposited into First Citizens Account [REDACTED] and First Citizens Account # [REDACTED], respectively.

2. What items or issues are not resolved:

- a. Through the use of First Citizens Account [REDACTED] the Trustee co-mingled the funds of John Vergeldt, Jr. with the Trustee's funds. A number of deposits into the various accounts were from Account [REDACTED] and there were numerous withdrawals from accounts of John Vergeldt, Jr. into Account [REDACTED] (See Tab 4 in the Trust Accounting Notebook.)
- b. The source of a number of deposits into accounts of John Vergeldt, Jr. or the Vergeldt Trust could not be identified. These are listed on Exhibit A of this report. Likewise, the application of some funds withdrawn could not be identified from the records available. These are also listed on Exhibit A of this report.
- c. Numerous checks were written to "Cash" from First Citizens Account [REDACTED] beginning in early 2012 and continuing through August 2013. These checks for which copies were available are listed on Exhibit B of this report, which was updated up receipt of check copies from First Citizens Bank.
- d. No file copies of income tax returns from 2008 and 2009 were provided to the LST.
- e. It appears that John Vergeldt, Jr., would have had to make some cash payment in January 2008 when he purchased the condominium at Henry Ford Village, as the purchase price was \$168,000 and the promissory note was for \$151,200.

However, there is no check or other debit in the amount of \$16-17,000 from an account open at that time.

- f. The \$50,000 Fifth Third Bank certificate of deposit was funded by a check from the Credit Union ONE account, and interest accrued in the amount of \$7,969.87 at the maturity date of September 22, 2011. The certificate of deposit was titled as John Vergeldt or John E. Vergeldt. Within two months of the maturity date a deposit of \$15,000 was made into the Duke Energy PremierNotes account; a withdrawal in this amount was not found in any of the other Vergeldt Trust accounts.
- g. For the Duke Energy Premier Notes account, \$59,983 was deposited and \$506.00 in interest was earned. This account was titled as John Vergeldt, Jr. and John E. Vergeldt JT Ten. Of this, \$40,000 was later deposited into the Edward Jones account on a Duke Energy check signed by John E. Vergeldt. A second deposit of \$10,400 was made into the First Citizens account [REDACTED]. This leaves \$89 as not accounted for.
- h. For the Yadkin Valley Bank money market account, \$75,430.14 was deposited by transfers from accounts of John Vergeldt, Jr. or the Vergeldt trust. Several other small deposits were made and interest in the amount of \$286.00 was earned. From this account, a deposit of \$10,000.00 was made into the First Citizen Account # [REDACTED]. The remaining balance of \$66,379.52 was deposited into First Citizens Account # [REDACTED].
- i. A debit card for First Citizens Account [REDACTED] was used on a regular basis from the opening of the account in July 2010 through July 2013, when John Vergeldt, Jr., passed away. It was not unusual for there to be fifteen to twenty purchases each month, and it was not possible to determine whether any or all of these purchases were for the benefit of John Vergeldt, Jr.

Respectfully submitted,


Kathleen Palinski

Limited Special Trustee

September 25, 2017

ROA 000509

DATE	AMOUNT	DESCRIPTION	UPDATED INFORMATION
FIFTH THIRD BANK CERTIFICATE OF DEPOSIT			
WITHDRAWALS			
09/22/11	\$58,213.11	No record of application of funds via deposit into other account; some may have funded Duke Energy account	Not conclusively resolved. Redemption was to be \$58,213.11. There is a deposit of \$15,000 into Duke Energy PremierNotes which may have been from this CD which matured on 9/22/11. These funds did not come out of any other Vergeldt Trust account.
FIRST CITIZENS #9309			
DEPOSITS			Because of date of transactions, copies not available from bank.
10/25/08	\$30,111.51	opening deposit	
12/29/08	\$3,500.00	"customer deposit"	
06/01/09	\$10,000.00	"customer deposit"	
WITHDRAWALS			Because of date of transactions, copies not available from bank.
12/05/08	\$23,500.00	appears to be intra bank transfer	
06/08/09	\$2,000.00	cashiers check 736554	
FIRST CITIZENS #1209			
DEPOSITS			
05/07/10	\$9,025.00	Customer Deposit	Because of date of transaction, copy not available from bank
		Note: this was at the same time as John Vergeldt, Jr., was purchasing a 2010 Ford Fusion.	
FIRST CITIZENS #4009			
WITHDRAWALS			
	\$15,000.00	Check #1292	Not deposited into other Vergeldt Trust Account; was listed on statement that had been missing and recently received from First Citizens Bank
FIRST CITIZENS #1409			
DEPOSITS			
09/20/11	\$11,000.00	customer deposit	Transfer from First Cit [REDACTED]
08/03/12	\$10,400.00	customer deposit	check # 1002 from Duke Energy PremierNotes

ROA 000509

DATE	AMOUNT	DESCRIPTION	UPDATED INFORMATION	ROA 000510
		YADKIN VALLEY BANK MM #8283		
WITHDRAWALS				
07/22/11	\$10,000.00	Check # 1001, unable to trace into other account	Traced into First Cit [REDACTED]	
		DUKE ENERGY PREMIER NOTES		
DEPOSITS				
11/18/11	\$15,000.00	May be from maturity of Fifth Third CD because of timing of deposit	Not conclusively resolved but likely to be from Fifth Third CD	
12/22/11	\$34,983.00	May be from maturity of Fifth Third CD because of timing of deposit	This deposit was made from 1st Cit [REDACTED]	
	\$49,983.00	Total deposits		
WITHDRAWALS	\$50,400.00		Deposits made into Edward Jones and 1st Cit #1409 the amount of \$50,400 from this account.	

ROA 000510

Date	Check #	Amount	Payee	ROA 000511
2/17/2012	1088	\$50.00	cash	
3/1/2012	1089	\$50.00	cash	
10/10/2012	1095	\$780.00	cash	
10/12/2012	1096	\$50.00	cash - "Ipod"	
10/19/2012	1097	\$100.00	cash	
10/25/2012	1098	\$1,100.00	cash	
11/8/2012	1100	\$1,040.00	cash	
11/14/2012	1102	\$50.00	cash	
11/21/2012	1103	\$1,110.00	cash	
12/5/2012	1106	\$1,440.00	cash	
12/13/2012	1107	\$400.00	cash	
12/20/2012	1109	\$950.00	cash	
1/10/2013	1115	\$605.00	cash	
1/16/2013	1116	\$675.00	cash	
1/24/2013	1118	\$675.00	cash	
1/31/2013	1119	\$725.00	cash	
2/8/2013	1120	\$675.00	cash	
4/23/2012	1133	\$440.00	cash	
5/31/2012	1142	\$100.00	cash	
6/1/2012	1143	\$50.00	cash	
6/7/2012	1144	\$200.00	cash	
6/29/2012	1146	\$280.00	cash	
7/20/2012	1147	\$180.00	cash	
2/17/2013	1152	\$675.00	cash	
2/28/2013	1156	\$440.00	cash	
2/28/2013	1157	\$50.00	cash	
3/7/2013	1158	\$685.00	cash	
3/14/2013	1158	\$690.00	cash	
3/15/2013	1160	\$50.00	cash	
3/21/2013	1162	\$675.00	cash	
3/28/2013	1164	\$606.00	cash	
4/4/2013	1165	\$535.00	cash	
4/10/2013	1170	\$675.00	cash	
4/10/2013	1171	\$100.00	cash	
4/19/2013	1172	\$675.00	cash	
5/2/2013	1177	\$780.00	cash	
5/2/2013	1178	\$12.00	cash	
5/10/2013	1179	\$595.00	cash	
5/16/2013	1180	\$640.00	cash	
5/30/2013	1181	\$275.00	cash	
5/30/2013	1182	\$500.00	cash	
6/6/2013	1183	\$508.00	cash	
6/11/2013	1187	\$810.00	cash	ROA 000511

Date	Check #	Amount	Payee	ROA 000512
6/19/2013	1188	\$675.00	cash	
6/26/2013	1189	\$675.00	cash	
7/8/2013	1198	\$475.00	cash - endorsed by T. Shaw Vergeldt	
8/6/2013	1208	\$23.00	cash	
7/11/2013	1201	\$1,485.00	cash	
2/21/2013	324112	\$540.00	cash	
12/4/2012	324969	\$50.00	cash	
1/13/2013	324976	\$665.00	cash	
5/23/2013	570688	\$675.00	cash	
6/11/2012	734411	\$115.00	cash	
5/25/2012	734525	\$50.00	cash	
		\$27,129.00	Total	

ROA 000512



DATE	Deposits	Withdrawals	DESCRIPTION
			First Citizens [REDACTED]
12/5/08		\$23,500.00	transfer - John E. is referenced on withdrawal slip
			First Citizens [REDACTED]
2/19/10		\$1,800.00	check #823265 payable to cash endorsed by John
			First Citizens [REDACTED]
9/29/10		\$234.00	check# 1016
10/5/10		\$208.00	check # 1019
2/3/12		\$384.00	check # 1084
3/7/12		\$660.00	check #1123
5/18/12		\$500.00	check #1141
9/26/12		\$8,000.00	check #1094 signed and endorsed by John E.
5/24/13		\$142.00	transfer to 1st Cit [REDACTED]
5/28/13		\$500.00	transfer to 1st Cit [REDACTED]
6/18/13		\$500.00	transfer to 1st Cit [REDACTED]
7/1/13		\$10,000.00	transfer to 1st Cit [REDACTED]
7/1/13	\$500.00		transfer from 1st Cit [REDACTED]
7/3/13		\$500.00	transfer to 1st Cit # [REDACTED]
7/24/13	\$2,225.00		transfer from 1st Cit # [REDACTED]
7/30/13		\$1,000.00	transfer to 1st Cit [REDACTED]
9/18/13		\$3,000.00	check #1226 - Probate
9/23/13		\$1,000.00	transfer to 1st Cit [REDACTED]
11/18/13	\$298.00		transfer from 1st Cit # [REDACTED]
1/21/14		\$2,500.00	check # 1239 - estate work
3/21/14		\$640.00	check #1273 - probate up to date
3/24/14		\$100.00	check #1276 - tax prep fee
10/1/14	\$164.00		transfer from 1st Cit # [REDACTED]
5/4/15	\$289.00		transfer from 1st Cit [REDACTED] replacement of \$ spent in April
8/17/15		\$17,694.76	payoff of loan for John E. charged in error to [REDACTED]
8/19/15	\$17,694.73		bank error on loan payoff corrected
9/2/15	\$49.07		transfer from 1st Cit # [REDACTED] - correct error in May
3/15/16		\$300.00	online payment to John - 3 months Trustee's fees
7/18/16		\$300.00	transfer to 1st Cit # [REDACTED] admin fee for Trustee
7/18/16		\$400.00	transfer to 1st Cit # [REDACTED] admin fee for Trustee
8/8/16		\$100.00	transfer to 1st Cit # [REDACTED] admin fee for Trustee
9/8/16		\$100.00	check #5144- admin fee
9/30/16		\$100.00	John E. online payment
11/10/16		\$100.00	check #1000 admin fee to Trustee

ROA 000513

DATE	Deposits	Withdrawals	DESCRIPTION
			First Citizens #1409
3/28/12		\$2,695.00	transfer to 1st Cit [REDACTED]
4/24/13		\$1,000.00	transfer to 1st Cit [REDACTED]
4/25/13		\$1,000.00	transfer to 1st Cit [REDACTED]
			Edward Jones
9/30/11	\$15,000.00		check # 2172 written on 1st Cit [REDACTED] (Fifth Third CD matured in 9/2011)
9/16/13		\$1,985.12	Check # 132015606 to John Edward Vergeldt Trustee
Total	\$36,219.80	\$80,942.88	
			Note: 1st Cit [REDACTED] titled as John E. Vergeldt & Terry Shaw Vergeldt

ROA 000515

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	C/A NO.: 2016-CP-46-00820
Vicki Lynn Vergeldt,	)	
	)	
Petitioner,	)	
	)	
vs.	)	DEFENDANTS' MOTION TO DISMISS
	)	AND FOR JUDGMENT ON THE
John Edward Vergeldt, Individually	)	PLEADINGS
and as Successor Trustee of the John	)	
Vergeldt, Jr. Revocable Living Trust	)	
dated September 27, 1978, as	)	
amended,	)	
Respondent.	)	

Defendant John Edward Vergeldt, Individually and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, as amended, (collectively, "Trustee" or "Respondent"), by and through the undersigned counsel, files this motion to dismiss and for judgment on the pleadings pursuant to South Carolina Rules of Civil Procedure ("SCRCP") 12(b)(6), and 12(c) and shows this court as follows:

ARGUMENT

This case was originally filed in the York County Probate Court seeking the removal of Trustee as trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, as amended, (the "Trust").

In this case, Petitioner has brought causes of action to (1) to remove Trustee, (2) release Trust records and (3) for accounting of the Trust assets and transactions.

ROA 000515

ROA 000516

On March 29, 2019, the Trustee voluntarily resigned as Trustee in accordance with Article Twelfth of the Trust. See Exhibit A, attached hereto. As a result of the Trustee's resignation, the Petitioner is now Successor Trustee, and has achieved the aims set forth in her Complaint. There is no further dispute for this court to decide, no actual, justiciable controversy ripe for determination, and no relief for this court to grant that is not already within her power.

This motion will be based upon the pleadings of record, the South Carolina Rules of Civil Procedure and the appropriate statutory and case law. Counsel certifies that prior to filing this motion he consulted with counsel for the Petitioner and was unable to resolve this matter.

Respectfully submitted,

s/ Daniel J. Ballou

Daniel J. Ballou, SC Bar No. 5493
J. Nathaniel Pierce, SC Bar No. 102803
Morton & Gettys, LLC
Attorneys for Respondent
P.O. Box 707
Rock Hill, SC 29731
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nate.pierce@mortongettys.com

April 9, 2019
Rock Hill, South Carolina

ROA 000516

ROA 000517

RESIGNATION OF SUCCESSOR TRUSTEE

John E. Vergeldt, Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust

WHEREAS, pursuant to Article Twelfth of the John Vergeldt, Jr. Revocable Living Trust (the 'Trust'), the undersigned John E. Vergeldt, Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust ("Successor Trustee") wishes to resign as Successor Trustee effective April 30, 2019; and

WHEREAS, Article Twelfth (12.A) of the Trust provides that the Successor Trustee may resign by written notice setting forth the effective date thereof delivered personally or sent by registered mail, at least 30 days prior to said effective date, to each of the ascertained and then living beneficiaries of the Trust;

WHEREAS, Article Twelve (12.C) of the Trust provides that, upon the effective date of the resignation, the resigning Trustee shall deliver to its successor and to each beneficiary of the Trust a statement of all receipts and disbursements of the Trust together with an inventory of the assets belonging to the Trust; and

WHEREAS, Article Seventh of the Trust provides that if John E. Vergeldt shall resign as Successor Trustee, then Vicki Lynn Vergeldt shall be substituted in his place; and

NOW THEREFORE, John E. Vergeldt hereby resigns as Successor Trustee for the Trust, and delivers to Vicki Lynn Vergeldt a statement of all receipts and disbursements of the Trust together with an inventory of the assets belonging to the Trust.



John E. Vergeldt

Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust

March 29, 2019

ROA 000517

ROA 000518

John E. Vergeldt
Trustee for the John Vergeldt Jr. Trust dated 27 September 1978 as amended
12 Transom Court
Charleston, SC 29407

April 1, 2019, 2019

Vicki L. Vergeldt, via personal attorney & certified mail
 Audry Scheible, hand delivered
 Mr. Dan Ballou, attorney for the trust, via US mail

This is the required financial statement for the John Vergeldt Jr. Irrevocable Trust. All figures are as of December 31, 2018 and have been rounded up to the nearest dollar.

Bank balance Jan 01, 2018	\$1,212.00
Bank balance Dec 31, 2018	\$4,951.00
Edward Jones Balance Jan 01, 2017	\$16,903.00
Edward Jones balance Dec 31, 2017	\$9,960.00

EXPENDITURES

TRUSTEE PAYMENTS (2018)	\$400.00

As per years 2013-2016, I have followed Judge Rogers guidance on charging the trust \$100 per hour. In 2017, I charged \$100 per month and in 2018, I charged \$400.00 and, since May 2018, I have not charged the estate for all my administrative work. These amounts do not nearly cover my expenses but, with the continuing legal costs, my time, supplies, travel and lodging alone would cost the trust many thousands of dollars.

LEGAL (paid)	\$5,378.00
OUTSTANDING LEGAL BALANCE	\$8,100.00 plus current charges

This covers cost of litigation to Morton & Gettys, the agreed mediator and Ms. Kathleen Palinski (LST).

TAXES	\$1,224.00
REPAIRS	\$4,998.00
GAS & ELECTRIC	\$634.00
WATER	\$1,946.00

ROA 000518

ROA 000519

INSURANCE	\$601.00
POSTAGE	\$27.00
BANKING FEES	\$28.00
FUNERAL and HEADSTONE	\$1,358.00

The single biggest expenditure charged against the estate is legal costs necessitated by the continuing and prolonged litigation facing the trust. The trustee has decided to absorb many costs properly charged to the trust such as computer time, supplies, paper and tax advice and prep. The major repair expense is repairs due to a massive water leak and associated damage to the cottage. A person was seen around the cottage at the time of the leak, but the witness was not willing to testify so no police report was filed. There was a reimbursement from the insurance company, and this is reflected in the 1st Citizen bank statements.

The cottage has had another water leak and the water was shut off, but the damage incurred an almost \$400.00 water bill, which has been paid. The plumber found a burst pipe/fitting and I will pay the bill from royal Plumbing as soon as it is received.

Due to a previous court order I have been unable to finish the repairs to the cottage. I ESTIMATE that the cottage can be made habitable with approximately \$4,000 or so in additional work.

OUTLOOK

The financial outlook for the continuation of the cottage and its trust fund is gravely in doubt. **The current outstanding debt** is:

Legal	\$8,100.00 and growing due to continuing legal expense
Water	\$385.00; \$45.00 per quarter minimum charge
Cottage repair	\$4,000.00 estimate to finish work

TOTAL \$12,761.00

The current assets are:

Edward Jones	\$10,810.00
First Citizens Bank	\$4,951.00
TOTAL	\$15,376.00

ROA 000519

ROA 000520

I have closed the Edward Jones trust account. The check for all funds will be made out to the trust checking account and will reflect in the First Citizens April statement. Prior to April 30, 2019 I will pay ALL outstanding bills. Any funds left in the checking account will be mailed to the next successor trustee via certified check.

The spring property taxes are paid as well as insurance through December 2019. Edward Jones and First Citizens account statements for 2019 will be made ASAP after April 30, 2019 and the First Citizens account will be closed, as well as my debit canceled.

It will be the responsibility of the next successor trustee to have all bills transferred to their address (Sims Township Water & Taxes, Consumer Powers Gas & Electric) and to file Federal and state taxes for 2019 and on-going. I am sending copies of statements with addresses, account numbers and contact information. I will not be responsible for any trust activity after April 30, 2019.

Sincerely,

A handwritten signature in black ink, appearing to read "John E. Vergeldt". The signature is fluid and cursive, with the first name "John" being the most prominent.

John E. Vergeldt

Trustee for the trust ending April 30, 2019

Encl: Bank statements not included in previous correspondence or by subpoena

Edward Jones statements not included in previous correspondence or by subpoena

ROA 000520

ROA 000521

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	CIVIL ACTION NO.: 2016-CP-46-0820
Vicki Lynn Vergeldt,	)	
	)	
Petitioner,	)	
	)	NOTICE OF MOTION AND MOTION TO
vs.	)	AMEND PETITION
	)	
John Edward Vergeldt, Individually and as	)	
Successor Trustee of the John Vergeldt, Jr.	)	
Revocable Living Trust dated	)	
September 27, 1978, as amended	)	
	)	
Respondent.	)	
	)	

**TO: DANIEL J. BALLOU, ESQ., MORTON & GETTYS, LLC
ATTORNEYS FOR JOHN EDWARD VERGELDT, INDIVIDUALLY
AND AS SUCCESSOR TRUSTEE FO THE JOHN VERGELDT, JR.
REVOCABLE LIVING TRUST DATED SEPTEMBER 27, 1978, AS
AMENDED**

YOU WILL please take notice that Petitioner Vicki Lynn Vergeldt ("Petitioner"), by and through the undersigned counsel, will move before this Honorable Court ten (10) days after service hereof or as soon thereafter as counsel may be heard for an Order under Rule 15(a), SCRPC, allowing the amendment of the Petition for Removal of Trustee and Related Relief filed on March 16, 2016 ("Petition").

Petitioner bases her Motion on the grounds that this litigation was filed seeking the removal of Respondent John Edward Vergeldt, individually and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, as amended ("Respondent"). During the course of the litigation, Kathleen Palinski, Esq., was appointed as the Limited Special Trustee by Consent Order Appointing Special Trustee and Staying Case filed February 23, 2017 for the purpose of performing a forensic accounting of the various accounts of John Vergeldt, Jr.

ROA 000521

ROA 000522

and the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, as amended.

Petitioner is informed and believes that the Limited Special Trustee has substantially completed her work and/or fully completed the same. A copy of the Limited Special Trustee's report will be submitted to the Court at the hearing or filed before same. As a result of the Limited Special Trustee's work, Petitioner, as a qualified beneficiary, is informed and believes that Respondent committed acts while serving as Successor Trustee and/or is continuing to commit acts that amount to breach of trust and may be a violation of various orders of this Court. In particular, Petitioner is informed and believes that Respondent commingled trust funds, used the same for his own personal use and not for the benefit of John Vergeldt, Jr. or any other beneficiary, failed to distribute trust assets in a timely manner, failed to provide Petitioner with trust records upon request, and committed waste with trust assets. Petitioner only became aware of the extent of Respondent's upon receipt of the Limited Special Trustee's report, as amended. Petitioner's allegations related to Respondent's actions are more fully set forth on her proposed Amended Petition attached hereto as **Exhibit 1**. It is also worth noting that John Edward Vergeldt purportedly resigned as Successor Trustee on April 19, 2019, and a copy of said resignation will be filed prior to the hearing on this matter. Petitioner is informed and believes that justice requires that the Petition be amended based on the evidence uncovered during the course of this litigation, and she is informed and believes that Respondent will not be prejudiced by the amendment as he has been in possession of the evidence and/or had knowledge of the same prior to and at all times relevant herein, and Respondent's failure to disclose said evidence is part of the reason why Petitioner was forced to bring this matter.

{THIS SPACE LEFT INTENTIONALLY BLANK}

ROA 000522

ROA 000523

Petitioner additionally bases this motion on such other and further affidavits, memorandum of law, case law, statutory law, and such argument of counsel as may be appropriate.

Counsel for Petitioner certifies pursuant to Rule 11, SCRPC, that he has communicated in writing with opposing counsel and has attempted in good faith to resolve the matter contained herein and to obtain consent to the filing of proposed amended pleading; however consent was not able to be obtained.

Respectfully Submitted,

HARRELL, MARTIN & PEACE, P.A.

/s/ Taylor A. Peace, Esq. _____
TAYLOR A. PEACE, ESQ.
135 Columbia Avenue (Physical Address)
PO Box 1000 (Mailing Address)
Chapin, South Carolina 29036
Phone (803) 345-3353
tpeace@hmp-law.com

May 14, 2019
Chapin, South Carolina

ROA 000523

ROA 000524

STATE OF SOUTH CAROLINA) **IN THE COURT OF COMMON PLEAS**
)
COUNTY OF YORK) **CIVIL ACTION NO.: 2016-CP-46-0820**

Vicki Lynn Vergeldt, Individually and as)
 Successor Trustee of the John Vergeldt, Jr.)
 Revocable Living Trust dated)
 September 27, 1978,)

Petitioner,)

vs.)

John Edward Vergeldt,)

Respondent.)

**AMENDED PETITION FOR REMOVAL
 OF TRUSTEE AND RELATED RELIEF**

Petitioner Vicki Lynn Vergeldt (hereinafter “Petitioner”), individually, and as successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, as amended (“Trust”) originally brought this action seeking the removal of John Edward Vergeldt (“Respondent”) as Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, as amended, and for additional injunctive relief related to his failure to provide access to the records of the Trust in the face of significant: 1) reporting inconsistencies, 2) financial irregularities, and 3) factual contradictions; and for attorneys’ fees and costs against Respondent, individually, or, in the alternative from the corpus of the Trust. Subsequent to the initial filing of the case, significant events have transpired that have significantly altered Petitioner’s allegations and the parties’ relative positions.

Based on those events, Petitioner, complaining of Respondent, alleges and will show unto this Honorable Court as follows:

ROA 000524

ROA 000525

PARTIES

1. Petitioner is a citizen and resident of Birmingham, Michigan, a Qualified Beneficiary of the Trust described herein, and the currently serving Successor Trustee.

2. Respondent is currently a citizen and resident of the County of Charleston, State of South Carolina, a Qualified Beneficiary of the Trust described herein, was the Successor Trustee of the Trust prior to May 1, 2019, and was a citizen and resident of the County of York, State of South Carolina at all times relevant herein. Respondent was also John Vergeldt, Jr.'s agent under a Durable Power of Attorney and served as Settlor's Personal Representative.

JURISDICTION

3. This Court has subject-matter jurisdiction over this action pursuant to S.C. Code Ann. §62-1-302(a) and §62-7-201(a) (1987, as amended).

4. Pursuant to S.C. Code Ann. §62-7-108 (1987, as amended) and Paragraph **FOURTEEN G**, the Trust's principal place of administration was transferred from Michigan to York County, South Carolina which was the County of Respondent's residence at all times relevant herein and where the Trust's records were kept.

5. The Court has personal jurisdiction over Respondent, and pursuant to S.C. Code Ann. §62-7-202 (1987, as amended), he accepted the Successor Trusteeship of the Trust Agreement which had its principal place of administration in the County of York, South Carolina.

VENUE

6. Venue is proper in York County because the Trust's principal place of administration at all times relevant herein was in York County, South Carolina.

ROA 000525

ROA 000526

FACTS

7. Petitioner incorporates the previous allegations of this Amended Petition as if repeated herein verbatim.

8. John Vergeldt, Jr. (“Settlor”) was the Settlor and initial Trustee of the Trust, and he was the father of Petitioner, Respondent, and their sister Patricia Vergeldt Downey all of whom were residual beneficiaries of the Trust.

9. Settlor executed the Trust on September 27, 1978.

10. Settlor executed the Eighth Amendment and Complete Restatement to the Trust on July 29, 2009 (Attached as **Exhibit A**).

11. Settlor executed the Ninth Amendment of the Trust Agreement on February 5, 2010, amending Paragraph SIXTH B of the Eighth Amendment and Complete Restatement (Ninth Amendment of Trust Agreement attached as **Exhibit B**).

12. Settlor executed the Tenth Amendment of the Trust Agreement on March 7, 2011, amending the Eighth Amendment and Complete Restatement and Ninth Amendment. Specifically, Paragraph **SECOND C** was amended; Paragraph **SECOND D** was amended; Paragraph **SECOND Q** was added; Paragraph **SECOND R** was added; Paragraph **SIXTH B** was amended; a paragraph was added to the **SEVENTH**; Paragraph **FOURTEENTH B** was amended; and Paragraph **EIGHTEENTH** was amended (Tenth Amendment of Trust Agreement attached as **Exhibit C**).

13. On July 29, 2009 and pursuant to Paragraph **THIRD C** of the Trust, Settlor appointed Respondent to serve as Co-Trustee of the Trust during Settlor’s lifetime, vesting him with all of the powers, duties and obligations of the Trustee, and giving him binding decision-

ROA 000526

ROA 000527

making authority upon the Trust, as if made by the Settlor as Trustee (Appointment of Co-Trustee attached as **Exhibit D**).

14. Settlor died on July 9, 2013 triggering the termination of the Trust and distribution of Trust assets; however, Respondent failed and refused to do same.

15. Specifically, and upon information and belief, Respondent made significant reductions to the qualified beneficiaries' shares under the Trust pursuant to Paragraph Fifth of the Trust Agreement stating in relevant part that:

...to the extent that any child of Settlor shall receive from Settlor on or after the date of this Eighth Amendment and Complete Restatement cumulative gifts and/or advances (which have not been repaid) in excess of the cumulative gifts and/or advances (which have not been repaid) to the child of the Settlor who has received the least amount of cumulative gifts and/or advances (which have not been repaid) from Settlor on or after the date of this Eighth Amended and Complete Restatement, that excess shall reduce the devise or bequest that such child who received the excess is entitled to receive under this Trust Agreement or any amendments to this Trust Agreement...

16. Upon information and belief, Patricia Vergeldt Downey and Respondent received prior gifts and/or advances from the Trust; however, Petitioner did not. Thus, in an effort to understand unilateral reductions Respondent made to Petitioner's inheritance (and to confirm the other beneficiaries' shares were also properly reduced for all applicable gifts and/or advances), Petitioner sought documentation and information from Respondent.

17. In response, Respondent demanded that Petitioner sign a release many months prior to providing any full and final Trust accounting and waiving any future claims against himself as Trustee. Petitioner objected in writing, and Respondent then threatened to unilaterally enforce the Trust's *in terrorem* clause disinheriting Petitioner.

ROA 000527

ROA 000528

18. Petitioner repeatedly asked Respondent to review “records of assets, receipts and disbursements and other financial transactions relative to each trust” as authorized pursuant to Paragraph **FOURTEENTH A** of the Trust which states:

[t]he Successor Trustee shall have the entire care and custody of all of the assets comprising principal of the trusts hereunder and shall keep the assets safe in accordance with the requirements of like fiduciaries and shall maintain full and accurate records of assets, receipts and disbursements and other financial transactions relative to each trust, all of which shall be available for inspection at any reasonable time by any and all beneficiaries.

19. Respondent responded to Petitioner’s requests with extreme hostility, including repeated verbal abuse, multiple unreasonable and unsubstantiated reductions in the tens of thousands of dollars to Petitioner’s inheritance, which were apparently punitive in nature, repeated threats of unilaterally disposing of a family cottage (as more fully described below) held in the Trust, and continued threats of disinheritance, all while denying Petitioner access to Trust records.

20. As a result, Petitioner sought and obtained a declaratory judgment from the York County Circuit Court (the Honorable S. Jackson Kimball, III) confirming that Respondent has and/or had a duty to and must provide Petitioner with “any records that describe or affect the Trust beneficiary’s interest and relevant information about the Trust property without limitation as to time.”

21. Regardless of the clear provisions of the Trust, the applicable law, Judge Kimball’s ruling, and repeated requests by Petitioner, Respondent has steadfastly refused to cooperate by answering questions that have arisen and allow a review of the Trust’s records, and has made and continues to make false or misleading statements that he has provided all Trust records and documents in his possession and/or control.

22. At the trial before Judge Kimball, Respondent testified that he believes he has no duty of loyalty to Petitioner, who is a qualified beneficiary of the Trust and entitled to one-third

ROA 000528

ROA 000529

(1/3) of the Trust's assets. Moreover, Respondent has repeatedly demonstrated a failure to conduct himself impartially in his dealings among the three qualified beneficiaries, such that, upon information and belief, Respondent has distributed exceedingly unequal Trust shares to himself and Patricia Vergeldt Downey all the while harming Petitioner.

23. It is axiomatic that Respondent has a duty of loyalty and other fiduciary duties to Petitioner, but his actions in administering the Trust have failed to meet the same.

24. A review of the Trust's records is necessary to Petitioner's ability to adequately protect her interest in the Trust.

25. Petitioner has asked Respondent to provide statements of accounts as are required to be produced annually and upon termination of the Trust Agreement by the Tenth Amendment to Trust Agreement, Paragraph Fourteenth B:

[t]he Successor Trustee shall keep a trust account of the affairs of a trust. At least annually and upon termination of a trust, the Successor Trustee shall render a statement of account. A statement of account is a report by the Successor Trustee of the trust property, liabilities, receipts, and disbursements, including the source and amount of the Successor Trustee's compensation, a listing of the trust assets, and if feasible, their respective market values. No particular format or formality is required for a report unless a court specifies its content and presentation. The statement shall be delivered as soon as practicable after the close of the accounting period or upon termination of the trust...

26. Since Settlor's death, Respondent has provided only minimal reports, if any, which inconsistently summarize the Trust's assets, income, and expenditures, do not reconcile, and lack documentation. As Respondent acknowledged in his answer to the declaratory judgment complaint, these reports are inadequate to allow Petitioner to protect her interest in the Trust.

27. In addition, according to his own written but undocumented claims against Petitioner for his legal fees (deductions from Petitioner's inheritance which Respondent both claimed and denied were for his legal fees), Respondent has spent more than \$55,000.00 in

ROA 000529

ROA 000530

defending the previous action, which resulted in the ruling that he has a duty and must provide access to the Trust's books and records, which duty Petitioner has refused to meet before and after the final Order in the previous litigation.

28. Besides Respondent's hostility, disloyalty, and failure to conduct himself with impartiality toward Petitioner, documents obtained in the previous litigation and current litigation show substantial and unexplained irregularities in Trust assets, giving rise to further questions. Petitioner remains, however, unable to fully determine the existence, nature and extent of Respondent's breach and/or breaches of duty due to his refusal to provide adequate reports and allow inspection of the entirety of the Trust's books and records.

29. As a result of Respondent's refusal to give adequate reports and/or allow access to the Trust's books and records, Petitioner was not able to ascertain sufficient information regarding Trust assets and actions to protect her interest in same. Respondent acknowledged same in his answer to the declaratory judgment complaint, admitting that he has not provided Petitioner with enough information to protect her interests.

30. Subsequent to the filing of this matter, Kathleen Palinski, Esq. ("LST"), by Consent Order Appointing Limited Special Trustee, was appointed Limited Special Trustee to prepare an accounting for the Trust covering the time period between January 1, 2009 and ending December 31, 2016. The LST was also given the option to include an accounting of the Trust for 2008 if she determined it necessary, which she did.

31. The LST submitted the Trust accounting to the parties in a timely manner, but the same has been updated several times with the most recent update being prepared on January 29, 2018.

ROA 000530

ROA 000531

32. Upon receipt and review of the LST's accounting, Petitioner, for the first time, became aware of the extent to which Respondent, on numerous occasions and continuing through the date of his resignation as described hereinbelow, actively, knowingly, willingly, and while acting as Co-Trustee and Successor Trustee, took and spent trust assets and funds and commingled the same for his own benefit to the exclusion of Settlor, Petitioner and other qualified beneficiaries.

33. Also, Petitioner, during the course of this matter, discovered that Respondent, while acting as Co-Trustee and Successor Trustee, committed waste, failed to care for, and maintain and/or repair trust property, including Lots 3, 4, 5, 6, 7, and 8 of Block 5 of Wallace and Orr Park Subdivision, Town 19, North, Range 7 East, Sims Township, Arenac County, Michigan commonly referred to as 5469 E. 4th ST., Au Gres, Michigan ("Cottage") such that the same is now covered and/or infested with mold, mildew, and other incidents of water damage such that the Cottage has become uninhabitable.

34. On March 29, 2019, Respondent delivered to Petitioner a "Resignation of Successor Trustee"; however, he has failed and refused to deliver a statement of all receipts and disbursements of the Trust together with an inventory of the assets belonging to the Trust to the extent required by the same.

35. Petitioner is informed and believes that Respondent has taken the actions described above related to his resignation to avoid liability for his actions during the time that he served as Co-Trustee and Successor Trustee.

FIRST CAUSE OF ACTION
(Breach of Trust-by Petitioner individually)

36. Petitioner incorporates the previous allegations of this Petition as if repeated herein verbatim.

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37. At all times relevant herein, Respondent served as either the Co-Trustee and/or Successor Trustee of the Trust.

38. Pursuant to Judge Kimball's Order dated August 28, 2015 ("August 2015 Order"), Respondent became Successor Trustee on May 6, 2013.

39. Under the August 2015 Order, Respondent has a duty to provide statements of account at least annually and to permit inspection of the financial records of the Trust so that she could protect her interest in the Trust.

40. Despite Petitioner's repeated requests for financial records of the Trust, Respondent failed and refused to deliver the same or only presented them in a confusing, misleading, and incomplete manner resulting in the institution of this action

41. Petitioner is informed and believes that Respondent took such actions to conceal his actions while he was serving as Co-Trustee and Successor Trustee which is to say that he failed to abide by the terms of Trust in one or more of the following ways:

- a. By applying and using Trust funds and assets in a way and manner that was for his own personal benefit and gain to the detriment of Settlor, Petitioner, and other qualified beneficiaries as described in the Trust;
- b. By using Trust funds and property and access thereto in a way to intimidate, threaten and harass Petitioner;
- c. By distributing Trust funds and property in ways contradictory to the Trust and by distributing more to himself and other qualified beneficiaries in an unequal fashion to the detriment of Petitioner;
- d. By using Trust funds and property to pay for his own litigation costs in contravention of the Trust;
- e. By placing Trust funds and property in his own name rather than in the name of the Trust;
- f. By failing to terminate the Trust and distribute its assets in a timely manner; and
- g. By committing waste to Trust assets or letting them fall into disrepair.

42. Petitioner only became informed of Respondent's actions or the extent of the same by and through this litigation and the work of the LST.

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43. Petitioner is informed and believes that Respondent's actions described above, which Respondent attempted to conceal, constitute a breach of his duties as Co-Trustee and Successor Trustee while he was serving as the same.

44. Petitioner is informed and believes that Respondent's actions were done willfully, wantonly, recklessly, and with conscious disregard to Petitioner's rights in or to the Trust property and assets.

45. As a direct and proximate result of Respondent's actions while acting as Co-Trustee and/or Successor Trustee, which constitute a breach of trust, Petitioner has suffered actual damages in an amount to be more fully proven at the trial of this matter, said amount being her share of Trust property and assets which Respondent used for his own benefit or actively and willingly distributed and/or transferred to other parties knowing that Petitioner was entitled to the same.

46. Petitioner is informed and believes that she is entitled to judgment against Respondent, individually, for her actual damages to be more fully proven at the trial of this case arising out of Respondent's breach and/or breaches of trust that took place while he was serving as Co-Trustee and/or Successor Trustee of the Trust, plus pre-judgment interest as allowed by law, plus post judgment as allowed by law, plus punitive damages as allowed by law.

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty-by Petitioner Individually)

47. Petitioner incorporates the previous allegations of this Amended Petition as if repeated herein verbatim.

48. While he was serving as Co-Trustee and/or Successor Trustee, Respondent owed Settlor and the other qualified beneficiaries' various duties that include and/or included a fiduciary duty.

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49. Petitioner is informed and believes that Respondent's actions more fully described above were intended to conceal, obfuscate and hinder Petitioner and other qualified beneficiaries from discovering his actions described above.

50. Petitioner is informed and believes that the actions described above constitute a breach of Respondent's fiduciary duty and/or duties while he was acting as Co-Trustee and/or Successor Trustee.

51. Petitioner is informed and believes that the Respondent's actions were done willfully, wantonly, recklessly, and with conscious disregard to Petitioner's rights in and to the Trust property.

52. As a direct and proximate result of Respondent's breach of fiduciary duty and/or duties, Petitioner is informed and believes that she is entitled to judgment against Respondent, individually for his breach and/or breaches of fiduciary duties which include but are not limited to transferring and/or disposing of Petitioner's share and/or portion of the Trust's property and punitive damages to be more fully proven at the trial of this case.

53. Petitioner is informed and believes that she is entitled to judgment against Respondent for actual damages to be more fully proven at the trial of this case for his breach and/or breaches of his fiduciary duties, plus prejudgment interest as allowed by law, plus post judgment interest as allowed by law, plus punitive damages as allowed by law.

FOR A THIRD CAUSE OF ACTION
(Breach of Duty of Loyalty-by Petitioner Individually)

54. Petitioner incorporates the previous allegations of this Amended Petition as if repeated herein verbatim.

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55. In addition to the fiduciary duty described above, Respondent also owed Petitioner a duty of loyalty while serving as Successor Trustee, and, as a result, he was to act impartially with regard to the administration of the Trust and the distribution of property from the same.

56. As more fully set forth above, Respondent has acted and managed trust property inequitably and/or distributed the same to himself as well as to other qualified beneficiaries to Petitioner's detriment.

57. Petitioner is informed and believes Respondent has taken some of the actions described above to keep his breach of the duty of loyalty concealed from Petitioner.

58. Petitioner is informed and believes that Respondent's actions related to the breach of his duty of loyalty were done recklessly, willfully, wantonly, and with conscious disregard to Plaintiff's interest in the Trust or the property comprising the same.

59. As a direct and proximate result of Respondent's actions, Petitioner is informed and believes that she has suffered actual damages in an amount to be more fully proven at the trial of this matter, said damages being the amount of trust property and or assets in which Petitioner, individually, holds and/or held an interest that Respondent inequitably distributed to himself or other qualified beneficiaries, plus prejudgment interest as allowed by law, and post judgment interest as allowed by law.

60. Petitioner is informed and believes that she is entitled to judgment against Respondent in the amount of her actual damages to be more fully proven at the trial of this case resulting from Respondent's breach of loyalty, said amount being the amount of the Trust property and/or assets Respondent transferred and/or disposed himself or other qualified beneficiaries in which Petitioner has and/or had an interest, plus prejudgment interest as allowed by law, plus post judgment interest as allowed by law, plus punitive damages.

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FOR A FOURTH CAUSE OF ACTION
(Constructive Trust-by Petitioner Individually)

61. Petitioner incorporates the previous allegations of this Amended Petition as if repeated herein verbatim.

62. As set forth above, Respondent has or may have acquired property to the Trust in which Petitioner has an interest and which should have been distributed to her.

63. Respondent, on numerous occasions, threatened Petitioner with the *in terrorem* clause in the Trust to stop Petitioner from inquiring into Trust matters and to conceal his actions.

64. Petitioner is informed and believes that Respondent's actions, in light of the April 2015 Order, constitute unconscionable conduct and to cause Petitioner duress.

65. Petitioner is informed and believes that it would be inequitable and not in the interest of justice for Respondent to retain the benefit of the Trust property and/or assets in which Petitioner has and/or had an interest and which is in Respondent's possession.

66. Based on the above, Petitioner is informed and believes that she is entitled to an Order of the Court imposing a constructive trust over Respondent's property up to the amount of the value of Trust property that Respondent transferred to himself and others in which Petitioner had or maintained an interest as a qualified beneficiary.

FOR A FIFTH CAUSE OF ACTION
(Declaratory Judgment-By Petitioner as Trustee)

67. Petitioner incorporates the previous allegations of this Amended Petition as if repeated herein verbatim.

68. Upon information and belief, Respondent, while acting as Co-Trustee and/or Successor Trust distributed to himself Trust property and/or assets in an amount equal to or greater than the amount to which he is entitled under the Trust.

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69. Based upon the terms of the Trust, Petitioner, as Successor Trustee, is informed and believes that she is no longer obligated to pay or distribute to Respondent Trust property and/or assets nor is Respondent entitled to the same.

70. There are actual and genuine controversies by and between Petitioner and Respondent concerning the Trust property and assets Respondent has received and is entitled to receive going forward.

71. Petitioner is informed and believes she is entitled to a judicial declaration of this Court ordering that Respondent has received, at a minimum, all amounts to which he is entitled under the Trust and that Petitioner is not legally obligated to pay and/or distribute to Respondent the same.

FOR A SIXTH CAUSE OF ACTION
(Indemnity/Negligence-By Petitioner as Trustee)

72. Petitioner incorporates the previous allegations of this Amended Petition as if repeated herein verbatim.

73. As set forth herein above, the Trust, at all times relevant herein, owned the Cottage.

74. Under the terms of the Trust, the Respondent, as Successor Trustee was obligated and had a duty to care for, maintain, repair and/or improve the Cottage.

75. Petitioner is informed and believes that Respondent, while acting as Successor Trustee and/or Co-Trustee, failed to take action to care for, maintain and/or repair the Cottage, and as a result, it has experienced water damage and suffered and/or is suffering from its attendant affects, including but not limited to mold, mildew, and moisture intrusion, such that the Cottage is uninhabitable.

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76. While the Cottage was suffering from the water damage and its attendant effects, Respondent was distributing and/or transferring to himself and other third parties Trust property and assets that were to be used or could be used to repair, care for, and maintain the Cottage.

77. As a direct and proximate result of the Respondent's actions, Petitioner, as Successor Trustee, is informed and believes that the Trust is now required to expend Trust funds to repair and improve the Cabin.

78. If not for Respondent's failure to care for the Cottage, the Trust would not have had to expend Trust property and assets to repair the same.

79. Petitioner is informed and believes that it would be inequitable for Respondent to retain Trust Property and/or assets while the Trust pays for repairs to the Cottage resulting from Respondent's failure to maintain same.

80. Petitioner is informed and believes that Respondent should be required to indemnify and/or pay to the Trust the amounts paid and/or are now needed to repair and improve the Cottage.

81. Petitioner is informed and believes the Trust is entitled to judgment against Respondent for the amount paid and/or is now needed to repair the water damage and its attendant affects, said amount to be more fully proven at the trial of this case.

FOR A SEVENTH CASUE OF ACTION
(Unjust Enrichment-By Petitioner as Trustee)

82. Petitioner incorporates the previous allegations of this Amended Petition as if repeated herein verbatim.

83. As more fully set forth above, Respondent transferred and/or distributed to himself Trust property and assets in which he did not have an interest.

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84. Petitioner is informed and believes that Respondent, while acting as Co-Trustee and Successor Trustee, conferred on himself, individually, the benefit of Trust property and assets in which he doesn't and/or didn't have an interest, and Petitioner is informed and believes Respondent has realized and retained the benefit thereof.

85. Petitioner is informed and believes that it would be inequitable for Respondent to retain the benefit of the value of the Trust property and/or assets he received and in which he didn't have an interest without paying the Trust for the same.

86. Petitioner is informed and believes that the Trust is entitled to judgment against Respondent in the amount of the value of the Trust property and/or assets that he transferred and/or distributed to himself while serving as Co-Trustee and/or Successor Trustee in which he didn't have an interest.

FOR AN EIGHTH CAUSE OF ACTION
(Conversion-by Petitioner Individually)

87. Petitioner incorporates the previous allegations of this Amended Petition as if repeated herein verbatim.

88. As more fully set forth above, Petitioner has an interest in Trust property and assets.

89. Petitioner is informed and believes Respondent has possession of Trust assets and property that Respondent took for his own use and benefit in which Petitioner has an interest.

90. Respondent's actions were without Petitioner's permission and/or consent.

91. Petitioner is informed and believes Respondent's actions regarding the conversion of Trust property in which Petitioner has an interest was done willfully, wantonly, and with reckless disregard to Petitioner's interest in the same.

92. As a direct and proximate result of Respondent's conversion, Petitioner has suffered actual damages to be more fully proven at the trial of this case, plus consequential

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damages, plus prejudgment interest as allowed by law, plus post judgment interest as allowed by law.

93. Petitioner is informed and believes she is entitled to judgment against Respondent in the amount of her actual damages to be more fully proven at the trial of this case, plus consequential damages to be more fully proven at the trial of this case, plus prejudgment interest as allowed by law, plus post judgment interest as allowed by law, plus punitive damages.

FOR A NINTH CAUSE OF ACTION
(Litigation Costs)

94. Petitioner incorporates the previous allegations of this Amended Petition as if repeated herein verbatim.

95. Under S.C. Code Ann. §62-7-1004, the Court is empowered to award the costs of litigation which involves the administration of a trust to any party. Petitioner has been forced to pursue this action as a result of Respondent's repeated and deliberate failure to carry out his duties with regard to the Trust, as well as his extreme conduct and unjustified threats to unilaterally rewrite the distributive provisions of the Trust Agreement.

96. Petitioner is informed and believes that she is entitled to an award from Respondent, individually, from Respondent's distributive share of the Trust, and/or from Trust assets, for the costs of this action, including reasonable attorney fees.

WHEREFORE, Petitioner prays that the Court issue its Order:

- A. Awarding Petitioner her actual damages to be more fully proven at the trial of this case, said amount being the amount the Trust property and/or assets Respondent transferred and/or took in which she has and/or had an interest, plus consequential damages, plus prejudgment interest as allowed by law, plus post judgment interest as allowed by law, plus punitive damages;

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- B. Declaring a constructive trust over Respondent's property in the amount of the value of the Trust property and/or assets that Respondent transferred and/or disposed of in which Petitioner maintains and/or maintained an interest;
- C. Declaring that Respondent has received, at a minimum, the entirety of his share of Trust property and/or assets under the Trust, and Petitioner has no obligation to distribute the same; and
- D. Awarding Petitioner her litigation costs, including reasonable attorneys' fees and related expenses from Respondent, from his final distribution, and/or from the assets of the Trust; and
- E. For such other and further relief as this Court deems just and proper.

Respectfully Submitted,

HARRELL, MARTIN & PEACE, P.A.

s/ Taylor A. Peace, Esq. _____
TAYLOR A. PEACE, ESQ.
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June 20, 2019
Chapin, South Carolina

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YORK COUNTY, SC

EXHIBIT A

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YORK COUNTY, SC

EIGHTH AMENDMENT AND COMPLETE RESTATEMENT

TO TRUST AGREEMENT

between

JOHN VERGELDT, JR.

Settlor

and

JOHN VERGELOT, JR.

Trustee

**Bodman LLP
6th Floor at Ford Field
1901 St. Antoine Street
Detroit, Michigan 48226
(313) 259-7777**

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EIGHTH AMENDMENT AND COMPLETE RESTATEMENT
TO TRUST AGREEMENT
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EIGHTH AMENDMENT AND COMPLETE RESTATEMENT
TO TRUST AGREEMENT

THIS EIGHTH AMENDMENT AND COMPLETE RESTATEMENT TO TRUST AGREEMENT dated September 27, 1978 is made this 29th day of July, A.D., 2009, between John Vergeldt, Jr., of the City of Dearborn, County of Wayne, and State of Michigan, hereinafter called the "Settlor"; and John Vergeldt, Jr., hereinafter called the "Trustee". This trust may sometimes be referred to as the "John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978".

WITNESSETH:

WHEREAS, the Settlor desires to completely amend and restate the provisions of the aforesaid Trust Agreement signed by him on September 27, 1978, as amended by Second Amendment and Complete Restatement on June 27, 1990, Third Amendment dated December 23, 1998, Fourth Amendment dated February 22, 2001, Fifth Amendment dated December 10, 2003, Sixth Amendment dated April 28, 2006 and Seventh Amendment dated June 7, 2006, by deleting all of the provisions of said Trust Agreement and Amendments and by substituting the provisions hereinafter set forth; and

WHEREAS, the Trustee is agreeable to the amendments hereinafter set forth.

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NOW, THEREFORE, it is agreed that all of the provisions of the Trust Agreement dated September 27, 1978 and the Amendments thereto shall be deleted and the provisions set forth herein shall be substituted therefor:

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FIRST

FUNDING

A. The Settlor has heretofore assigned, transferred, conveyed and delivered to the Trustee various property.

B. Other property which is acceptable to the Trustee may be transferred to the Trustee by Settlor or by others. Such transfers may be accomplished at any time by any instrument, including a Will.

END

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SECONDDEFINITIONS

A. The term "child", "grandchild", "issue", "heir", "descendant", "beneficiary" or other equivalent term shall be construed to include any adopted person and his or her descendants, whether natural or adopted. Provided, however, and notwithstanding anything contained in this Agreement to the contrary, David Leigh Vergeldt shall be treated as a child of Settlor and the biological children of David Leigh Vergeldt shall be treated as grandchildren of Settlor. Provided, further, and notwithstanding anything contained in this Agreement to the contrary, Devin T. Hodgman, stepson of John Edward Vergeldt, shall be treated as a grandchild of Settlor and a child of John Edward Vergeldt for all provisions of this Agreement.

B. Any reference to a "corporate" Successor Trustee shall mean a corporate banking institution, including a national banking association, or trust company engaged in trust administration.

C. The initial Successor Trustee is John Edward Vergeldt. The Settlor may change the Successor Trustee at any time during Settlor's lifetime. The Successor Trustee is referred to in the neuter gender. The Successor Trustee shall have all of the rights, duties and powers herein created and conferred upon the Trustee and/or Successor Trustee except those powers which this Agreement specifically limits to the Settlor acting as Trustee.

D. Wherever reference is made to the Internal Revenue Code or any section thereof, such reference shall be construed to mean the Internal Revenue Code

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of 1986, as amended, or such section thereof, as the case may be, as heretofore or hereafter amended or supplemented, or as superseded by laws of similar effect.

E. The term "person" shall mean and include any individual, corporation and/or other legal or business entity.

F. The term "education" shall include all forms of education, including, but not limited to, public or private schools, primary or secondary, college, advanced college or post-college, commercial, technical, business or art education, or otherwise.

G. "EPIC" means the Estates and Protected Individuals Code of the State of Michigan.

H. Whenever this Trust Agreement provides a specific bequest or a devise to an individual, if the individual does not survive the Settlor's death, the bequest or devise shall lapse unless the bequest or devise specifically directs the bequest or devise to pass to the individual's descendants or an alternate taker.

I. If this Trust Agreement refers to "by representation" or "by right of representation", the descendants or issue of a deceased devisee shall receive their share "per stirpes".

J. In the event that any state is determined to be Settlor's heir any distribution that would have been made to the state, but for this provision, shall be added to and distributed as part of the shares being distributed to living individuals.

K. The terms "issue" and "descendants" of a person mean all the lineal descendants of that person of all generations.

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L. Use of any gender in this Agreement includes the masculine, feminine, and neuter genders as appropriate. Use of the singular number includes the plural and vice versa unless the context clearly requires otherwise.

M. Use of the verb "shall" in this Agreement indicates a mandatory direction, and use of the verb "may" indicates authorization to take action.

N. Captions, headings, and sub-headings, as used herein, are for convenience only and have no legal or dispositive effect.

O. In the event that any property or interest in property passing under this Agreement (other than as part of the residue) is encumbered by any mortgage, lien, or security interest, or is pledged to secure any obligations, such encumbrance shall not be charged to the residue, but that the devisee or legatee or beneficiary receiving such property or interest in property shall take said property or interest in property subject to all encumbrances existing at the time of Settlor's death.

P. Any generation-skipping tax resulting from a transfer occurring under this Trust Agreement shall be charged to the property constituting the transfer in the manner provided by applicable law.

END

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THIRDSETTLOR'S RIGHTS AND SUCCESSION OF TRUSTEE

A. Settlor reserves the right to use or to direct the payment of any part of or all of the net income and the principal of the trust for Settlor's own benefit during Settlor's entire lifetime. If the Successor Trustee succeeds Settlor as Trustee during Settlor's lifetime by reason of Settlor's mental or physical incapacity, the Successor Trustee shall have the power to apply so much of the net income and the principal of the trust as it shall determine to be necessary for Settlor's health, maintenance and support and the health, maintenance and support of those persons dependent upon Settlor.

B. While Settlor is Trustee, Settlor shall have all of the powers set forth in Paragraph EIGHTH A of this Agreement which Settlor may exercise completely for Settlor's own benefit, in any manner Settlor wishes, and without regard to any restrictions of law or "prudent man" rule which may pertain to investments or other actions of a fiduciary.

C. The Settlor, while acting as Trustee, shall have the exclusive power and authority: (i) to establish and maintain one or more accounts, which may be margin accounts, for the purpose of purchasing, investing in, or otherwise acquiring, selling (including short sales), possessing, transferring, exchanging, pledging, or otherwise disposing of, or turning to account of, or realizing upon, and generally dealing in and with (a) any and all forms of securities, including but not by way of limitation, shares, stocks, bonds debentures, notes, scrip, participation certificates, rights to subscribe,

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options, puts, calls, warrants, certificates of deposit, mortgages, choses in action, evidences of indebtedness, commercial paper, certificates of indebtedness and certificates of interest of any kind and nature whatsoever, secured or unsecured, whether represented by trust, participating and/or other certificates or otherwise; and (b) any and all commodities and/or contracts for the future delivery thereof, whether represented by trust, participating and/or other certificates or otherwise; (ii) to buy, sell and trade in securities of any nature, including short sales, on margin, and for such purposes may maintain and operate margin accounts with brokers, and may pledge any securities held or purchased with such brokers as security for loans and advances made to the Trustee; (iii) to pledge or mortgage trust property as collateral for any personal or business loans of Settlor, or for the benefit of any other person or entity designated by Settlor and to guarantee the repayment of such loans; (iv) to employ investment counselors and investment advisors and to grant them complete discretion to invest for and on behalf of the trust without any restrictions; (v) to delegate to any agent of Settlor's choice by power of attorney or otherwise, the conducting of banking activities for Trustee, or the hiring, cancellation or use of entry of safe deposit box or other storage facilities in the name of Trustee; and (vi) to appoint (and remove or change) during Settlor's lifetime a Co-Trustee to serve during Settlor's lifetime with all of the powers, duties and obligations of the Trustee and the decisions of the Co-Trustee made during Settlor's lifetime shall be binding upon the trust as if made by Settlor as Trustee. Said power and authority shall be peculiar to Settlor while acting as Trustee

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and shall not pass to Settlor's successors in trust, except to the extent such power and authority is set forth in other provisions of this Trust Agreement.

D. The Settlor reserves unto Settlor the right to revoke or amend this Agreement in whole or in part, at any time, upon written notification to that effect, duly executed by the Settlor and delivered to the Trustee; provided, that the duties, responsibilities, and liability of the Trustee hereunder shall not be increased without the Trustee's written consent. The right of revocation or amendment shall be personal to Settlor and may not be exercised by any other person acting for Settlor. This Trust Agreement shall become irrevocable upon Settlor's death.

E. The Successor Trustee shall succeed Settlor as Trustee in the event a guardian is appointed for Settlor by a court of competent jurisdiction or if Settlor's primary care physician renders the written opinion that Settlor, by reason of physical or mental infirmity, has become incapacitated to the extent that Settlor is unable to act in Settlor's own behalf. The Successor Trustee may at any time and for any reason determine that Settlor is no longer incapacitated and, upon such determination or upon the restoration of Settlor to full capacity by court order, Settlor shall again act as Trustee and shall have all of the powers Settlor possessed prior to the appointment of a guardian for Settlor or the determination of Settlor's incapacity, as the case may be.

F. Any Successor Trustee to Settlor shall not be liable or responsible in any way for its determinations as to Settlor's capacity or incapacity so long as it acts

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in good faith. The Successor Trustee shall always give first consideration to the needs of the Settlor.

END

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FOURTHADMINISTRATION OF SETTLOR'S ESTATE

A. Upon the death of Settlor, the Successor Trustee, if not then in possession of the trust estate, shall succeed to such property and take possession thereof and shall hold, administer and dispose of the trust estate (together with any undistributed income and any accrued income not received at Settlor's death), as hereinafter set forth.

B. The Successor Trustee shall have the power to purchase any securities or other property belonging to the estate of the Settlor at the then fair market value, and to loan the personal representative of the Settlor's estate, in such amount as the Successor Trustee may deem necessary or advisable to protect and conserve the assets of the Settlor's estate, out of the principal of the trust, other than from: any assets or the proceeds thereof which are not included in Settlor's estate for federal estate tax purposes. Such loans may be secured or unsecured. The Successor Trustee shall not be liable for any losses suffered by the trust estate as a result of its exercise of the powers created in this Subparagraph.

C. To the extent that United States Treasury Bonds held in the trust are redeemable at par in payment of federal estate tax payable by reason of Settlor's death, the Successor Trustee shall apply the redemption proceeds of such bonds in payment of the federal estate tax, anything contained in this Agreement or Settlor's Will to the contrary notwithstanding. To the extent that other property from sources other than the trust is not available to provide the necessary funds, the Successor Trustee

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may, in its discretion, pay Settlor's funeral and burial expenses, any allowances by court order for those dependent upon Settlor, administration expenses of Settlor's estate, legally enforceable claims against Settlor or Settlor's estate, federal estate tax remaining after redemption proceeds of United States Treasury Bonds are applied and all inheritance, succession and estate taxes payable by reason of Settlor's death (except generation-skipping taxes and those other taxes which Settlor's personal representative is precluded from paying by reason of Settlor's Will), together with any interest thereon or other additions thereto; provided, however, no such payments shall be made from any assets or the proceeds thereof which are not included in Settlor's estate for federal estate tax purposes. No reimbursement shall be secured from any person for any payments so made. The Successor Trustee may make these payments directly or to Settlor's personal representative. The Successor Trustee may rely upon written statements of Settlor's personal representative as to all facts relating to these payments.

D. Upon Settlor's death, the Successor Trustee shall distribute Settlor's tangible personal possessions (other than any investment assets and other than any cash on hand or on deposit by Settlor) located in Settlor's residence at Henry Ford Village, as follows:

1. Each of Settlor's children shall be given the opportunity to choose items that they would like to receive.

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2 After Settlor's children have each taken the items they desire if there are any remaining items, each of Settlor's grandchildren shall be given an opportunity to choose items they would like to receive.

3. If there are any items remaining, the Successor Trustee shall dispose of such items as the Successor Trustee deems reasonable.

In the event a dispute over an item arises between the children or grandchildren, Settlor desires that all disputes be settled by the flip of a coin.

END

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FIFTHFORGIVENESS OF LOANS AND/OR ADVANCES ANDESTABLISHMENT OF RESIDUARY TRUST

A. Settlor hereby forgives any loans and/or advances (which have not been repaid) which Settlor has made prior to the date of this Eighth Amendment and Complete Restatement to any of Settlor's children and Settlor directs that the amount of such loans and/or advances (which have not been repaid) shall not reduce any devise or bequests that such child of Settlor is entitled to receive pursuant to this Trust Agreement or any amendments to this Trust Agreement. Provided, however, to the extent that any child of Settlor shall receive from Settlor on or after the date of his Eighth Amendment and Complete Restatement cumulative gifts and/or advances (which have not been repaid) in excess of the cumulative gifts and/or advances (which have not been repaid) to the child of Settlor who has received the least amount of cumulative gifts and/or advances (which have not been repaid) from Settlor on or after the date of this Eighth Amendment and Complete Restatement, that excess shall reduce the devise or bequest that such child who received the excess is entitled to receive under this Trust Agreement or any amendments to this Trust Agreement; provided further, the reduction shall only be to the extent there has not been a full reduction under Settlor's Will.

B. After the Settlor's death and subject to the foregoing, all of the rest, residue and remainder of the trust estate, including any lapsed or disclaimed legacies or

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devises, shall be held, administered and distributed from the Residuary Trust in accordance with the provisions of Paragraph SIXTH.

END

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SIXTHADMINISTRATION OF RESIDUARY TRUSTAND TRUSTS RESULTING FROM THE RESIDUARY TRUST

A. After the death of Settlor, and if this trust at said time owns (or will own pursuant to Settlor's Will) real property described as Lots 3, 4, 5, 6, 7 and 8 of Block 5 of Wallace and Orr Park Subdivision, Town 19 North, Range 7 East, Sims Township, Arenac County, Michigan (hereinafter called the "Cottage") and any tangible personal property located in or about the Cottage, then:

1. The Successor Trustee shall allocate from the Residuary Trust to a separate trust, to be known as the "Cottage Trust", the Cottage together with the tangible personal property located in or about the Cottage at the date of Settlor's death and the sum of fifty thousand and 00/100 (\$50,000.00) dollars less any amount set aside with John Edward Vergeldt for the purpose of maintaining the Cottage. The income and principal of the Cottage Trust shall be used to pay all expenses that accrue in connection with the Cottage, including real estate taxes, fire and extended coverage and liability insurance, repairs, utilities and any other expenses related to the ownership and maintenance of the Cottage. The Cottage Trust shall continue until the death of the last surviving child of Settlor or until the Cottage is disposed of in accordance with the provisions of this Paragraph SIXTH A.

2. The Cottage shall be sold upon the occurrence of either of the two (2) following events:

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(a) There are no assets in this Trust to pay for the expenses described in 1 above and the individuals who are using the Cottage do not agree to pay said expenses; or

(b) Ten years after the creation of the Cottage Trust and a majority of Settlor's then living children elect to have the Cottage sold or if there is a deadlock between Settlor's children as to whether the Cottage should be sold. In all events John Edward Vergeldt shall have two (2) votes and the other children shall each have one (1) vote.

(c) In the event the decision is made to sell the Cottage, Settlor's children and grandchildren shall have the first option to purchase the Cottage. If none of Settlor's children or grandchildren desires to purchase the Cottage, then Linda Anne Zummer shall be given the option to purchase the Cottage. If Linda Anne Zummer does not wish to purchase the Cottage, then it shall be sold to any willing purchaser. In all events the Cottage is to be sold for fair market value.

3. The use of the Cottage shall be controlled by the Cottage Use Agreement dated August 13, 2008, as it may be amended from time to time. During Settlor's lifetime, Settlor shall have exclusive authority over all matters related to the Cottage. After Settlor's death, the Successor Trustee shall have exclusive authority to settle any disputes that may arise with respect to the Cottage, the maintenance of the Cottage and the use of the Cottage.

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Upon the sale of the Cottage, the Cottage Trust shall terminate and the assets of the Cottage Trust shall be added to the Residuary Trust and held, administered and disposed of in accordance with Paragraph SIXTH B below but shall be divided in accordance with Paragraph SIXTH B as if the date of the sale was substituted for Settlor's death.

B. After the death of Settlor, the Successor Trustee shall distribute the sum of six thousand (\$6,000.00) dollars, free and discharged from the trust hereof, to each grandchild of Settlor who survives Settlor and shall divide the balance of the assets of the Residuary Trust into equal shares, one share for each of Settlor's children. If any child of Settlor shall predecease Settlor (other than Settlor's daughter, Patricia A. Vergeldt Downey), said child's share shall be distributed as follows: one-half (1/2) to Settlor's child's spouse, if then living, Settlor's child was married to him or her at the date of his or her death and there was no divorce proceeding pending at the date of his or her death, and the other one-half (1/2) (or all if there is no surviving spouse who meets said conditions) shall be divided equally between Settlor's then living children. If Settlor's daughter, Patricia A. Vergeldt Downey, shall not survive Settlor, then her share shall be distributed, as follows. The Successor Trustee shall distribute from the share of Settlor's daughter, Patricia A. Vergeldt Downey, the sum of ten thousand (\$10,000.00) dollars to Settlor's daughter's spouse, James Downey, if then living, if he was married to Settlor's daughter at the date of her death, there was no divorce proceeding pending at the date of her death and the assets of the residuary estate have a fair market value at the date of Settlor's death of at least five hundred thousand (\$500,000.00) dollars and

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the balance shall be divided equally between Settlor's then living children. The part so set aside for Settlor's children and spouses of deceased children shall forthwith be assigned, transferred, conveyed and paid over to them free and discharged from the trust hereof. The part so set aside for the descendants of any of Settlor's children (other than the specific bequest of six thousand (\$6,000.00) dollars) shall, in the discretion of the Successor Trustee, either be distributed to a Uniform Transfers to Minors Act account to age twenty-one (21) or to a trust described in Paragraph SIXTH C, if the descendant has not attained age thirty (30), or otherwise shall forthwith be assigned, transferred, conveyed, and paid over to said descendants free and discharged from the trust hereof.

C. If at the time herein provided for the distribution of the principal of any trust created by or administered under this Paragraph SIXTH there shall be no beneficiary herein designated then living, the trust shall immediately terminate and the remaining trust estate shall be divided equally between Settlor's then living grandchildren and, subject to Paragraph SIXTH D, be distributed to them outright.

D. Unless the Successor Trustee elects the Uniform Transfers to Minors Act to age twenty-one (21), in the event the descendants of any of Settlor's children shall not have attained the age of thirty (30) years at the time he or she is entitled to participate in Settlor's estate, the Successor Trustee shall hold and administer the share of such person (other than the specific bequest of six thousand (\$6,000.00) dollars which shall be distributed outright to each of Settlor's grandchildren) until he or she shall have attained such age and during such period shall pay to or for

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the benefit of such person so much of the income and principal of his or her share, as it, in its sole and uncontrolled discretion, shall determine in order to provide for his or her health, support, maintenance and education. Any unexpended portion of the annual net income of such share shall be retained as principal. When such person attains the age of thirty (30) years or upon his or her death, whichever first occurs, the entire share of such person and any accumulations of income shall be transferred and delivered over to him or her or to his or her estate without reservations of any kind.

E. After the death of Settlor, the Successor Trustee may assign, transfer, convey and pay over to the then income beneficiaries, in equal shares if there is more than one income beneficiary, the entire body or corpus of his or her trust estate free and discharged from the trust hereof, in which event any remaindermen shall not be considered as having a vested interest in the trust estate so conveyed to such income beneficiaries, thereby terminating the trust, when in the uncontrolled discretion of the Successor Trustee it might become expedient or advisable to do so for the following reasons or any other reason whatsoever which the Successor Trustee may deem sufficient: (1) changes in the political, economic, or social order in the United States, (2) legislation, regulation or court decisions detrimental to any trust or trusts hereunder, or any beneficiary thereof, (3) lack of availability of suitable trust investments for an extended period, (4) insufficient principal to justify the expense of continuing the trust's existence, or (5) other events which do or may tend to greatly impair the intent and purpose of this instrument.

END

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SEVENTH

SUCCESSOR TRUSTEES

If John Edward Vergeldt shall die or resign or be unwilling or unable to act as a Successor Trustee, then the following persons shall be substituted in his place and stead in the following order: (1) Settlor's daughter, Vicki Lynn Vergeldt; and (2) Settlor's daughter, Patricia A. Vergeldt Downey.

END

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EIGHTHTRUSTEE'S POWERS

A. The Trustee shall have the following general powers and is authorized to:

(1) Enter upon and take possession of the trust estate, to collect the income and profits therefrom, and to invest and reinvest the estate in real, personal or mixed assets in accordance with its judgment, including interests in any amounts in common trust funds maintained by the Trustee, without being limited by any present or future investment law;

(2) Vote in person or by proxy with respect to any and all securities, and carry in its name or in the name of its nominee or nominees, and with or without designation of fiduciary capacity, securities or other property requiring or permitting registration;

(3) Retain all property in the form in which the same shall be received or acquired by it without liability for any loss that may be incurred thereby, and without regard to the proportion that any one asset or class of assets may bear to the whole;

(4) Allocate between income and principal all receipts and disbursements in accordance with sound trust accounting principles;

(5) Sell real or personal property, or both, either for cash or part cash and part deferred payments and at public or private sale, and option, convey, exchange, lease and release for any length of time, mortgage, pledge, partition,

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plat, sub-divide, improve, repair, surrender, abandon or otherwise deal with or dispose of all of the trust estate, or any part thereof, at such time or times and in such manner, either public or private, and upon such terms as in the discretion of the Trustee may seem expedient and proper;

(6) Borrow money on the general credit of any trust or trusts, or by pledge or mortgage of any of the trust property as security for the repayment thereof, and to renew from time to time any such indebtedness;

(7) Prosecute and defend and, in the exercise of its sole discretion, which shall be binding on all interested parties, to compromise, settle or abandon claims by or against the trust and the trust estate;

(8) Make, execute and deliver any and all such instruments in writing as shall be necessary and proper to carry out any disposition whatever of any trust property;

(9) Make any distributions of income or principal, whether before or after the beneficiary attains age eighteen (18), in the Trustee's discretion, (i) directly to the beneficiary, (ii) if the beneficiary is under a legal disability or if the Trustee determines that the beneficiary is unable to properly manage his or her affairs, to a person furnishing support, maintenance or education for the beneficiary or with whom the beneficiary is residing or to any person having legal or actual custody of the beneficiary, or to the guardian or conservator of the beneficiary, or to any trustee appointed by a court for the benefit of a beneficiary, or to any institution attended by the beneficiary, for expenditure on the

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beneficiary's behalf, or (iii) if the beneficiary is a minor, to a custodian for the beneficiary as selected by the Trustee (who may be the Trustee) for the beneficiary under a Uniform Transfers (Gifts) to Minors Act until age twenty-one (21) or similar applicable law, or (iv) in any manner whereby it may reasonably be expected that the funds will be expended for the benefit of and on behalf of the beneficiary, and the Trustee shall be under no duty to audit the use of such funds.

(10) Allocate different kinds or disproportionate shares of property or undivided interests in property among the trusts herein or the beneficiaries thereof;

(11) Enter into any transaction with the personal representative of Settlor's estate without the necessity of the consent or approval of any interested person or a court, and enter into any transaction with the trustee of any trust or the personal representative of any other estate in which any beneficiary or distributee has any interest, even though the Trustee also is the other trustee or personal representative;

(12) Continue any business (other than a profession) of Settlor so long as it shall deem it to be in the best interests of the beneficiaries and exercise all powers with respect to such business which Settlor could exercise if living;

(13) Disclaim, in whole or in part, any disclaimable interest as defined in the applicable law; and

(14) Exercise all of the powers and authority provided by applicable law.

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B. Certain elections afforded by the Internal Revenue Code may be exercised only by the person who is the "executor" within the meaning of the Internal Revenue Code. The Successor Trustee shall exercise those powers enumerated below, which under the applicable provisions of the Internal Revenue Code may be exercised only by the executor, only if the Successor Trustee is also the "executor" within the meaning of the Internal Revenue Code. Subject to the limitation expressed in the preceding sentences, the Successor Trustee shall have the power to: (1) elect to claim expenses or losses as either income or estate tax deductions; (2) elect, to the extent permitted by the Internal Revenue Code, to defer the payment of all or part of the Settlor's estate taxes; (3) exclude from or include in the Settlor's gross estate, any asset, in the first instance, for federal estate tax purposes; (4) value all assets, in the first instance, for federal estate tax purposes, using date of death or alternate values as the Successor Trustee shall elect; (5) elect to value qualified real property at its value for the use under which it qualifies and enter into any agreements required by such election; (6) elect to have gain or loss recognized on distribution of property in kind under Internal Revenue Code Section 643(e)(3); (7) elect to make, continue or revoke any election to be taxed under Subchapter S of the Internal Revenue Code with respect to any securities eligible for such an election; (8) elect to allocate the Settlor's unused generation-skipping tax exemption; and (9) elect to exercise or not to exercise any other option or election afforded by the Internal Revenue Code unless Settlor has specifically given directions with respect to such matter.

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C. Notwithstanding any provision herein to the contrary, with respect to any trust administered under this Trust Agreement no Trustee or Successor Trustee (hereafter called the "Trustee") shall have the power to use or apply trust property (i) for the support and maintenance of anyone the Trustee is obligated to support and maintain, or (ii) for the purpose of directly or indirectly discharging the personal legal obligations of that Trustee or of any beneficiary with respect to any other person, nor shall any Trustee who is also a beneficiary of any trust administered under this Trust Agreement have the power, as Trustee, to make discretionary distributions to him or herself except (if expressly permitted by this instrument) to the extent necessary for such Trustee's health, education, support and maintenance as described under Internal Revenue Code Sections 2041 and 2514 (concerning powers of appointment and ascertainable standards), and such beneficiary-Trustee shall exercise its Trustee powers solely in a fiduciary capacity and shall possess no powers that would otherwise permit that beneficiary-Trustee to enlarge or shift any of the beneficial interests (except as an incidental consequence of the discharge of such fiduciary duties); and to the extent a beneficiary-Trustee has the authority to make discretionary distributions of income and/or principal to another beneficiary from a trust administered under this Trust Agreement that the beneficiary-Trustee is also a beneficiary thereof, such distributions shall be limited by an ascertainable standard related to the distributee beneficiary's health, education, support and maintenance. No beneficiary-Trustee shall possess any power or discretion that is "conclusive," "sole," "absolute" or "uncontrolled" with respect to the exercise or non-exercise of such power or discretion; and such beneficiary-

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Trustee's power or discretion in that regard shall at all times be exercised or not exercised in a reasonable manner, be limited by a reasonably definite standard, and shall be subject to review and judicial scrutiny. Notwithstanding the foregoing, this provision shall not apply to Settlor while Settlor is serving as Trustee.

D. Notwithstanding any other provision of this Trust Agreement to the contrary, the following provisions under this Paragraph EIGHTH D shall apply upon the death of the Settlor:

1. If a trust held under this instrument would otherwise be partially exempt from generation-skipping tax ("GST") due to the intended allocation of a GST exemption to it (as used in this instrument, the "GST exemption" means the exemption from generation-skipping tax allowed under Section 2631 of the Internal Revenue Code), then, before such allocation and as of the relevant valuation date under Section 2642 of the Internal Revenue Code with respect to such allocation, the Successor Trustee may (but need not) divide that trust (the "original trust") into two separate trusts of equal or unequal value which shall be identical in all other respects to the original trust, so that the allocation of GST exemption can be made to one trust which will be entirely exempt from generation-skipping tax. The two trusts created under this Paragraph EIGHTH D 1 shall have the same name as the original trust except that the trust to which the GST exemption is allocated shall have the phrase "GST Election" added to its name.

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2. If property which is held in, or is to be added or allocated to, a trust pursuant to this instrument is subject to different treatment for any reason for purposes of the generation-skipping tax under Chapter 13 of the Internal Revenue Code than other property being added or allocated to, or also held in, that trust, then the Successor Trustee may (but need not) hold such property instead as a separate trust that is appropriately designated to distinguish it from the trust to which the property otherwise would have been allocated, but that is identical in all other respects to that trust.

3. It is the Settlor's intent that the Successor Trustee shall not be required to administer a trust hereunder that is only partially exempt from generation-skipping taxes, or to commingle property subject to different treatment for generation-skipping tax purposes whether because the transferors with respect to the property are assigned to different generations or otherwise. The provisions of this Paragraph EIGHTH D are intended to enable the Successor Trustee to avoid such situations by empowering the Successor Trustee to segregate trust property (a) that is entirely exempt from generation-skipping tax from trust property that is not exempt, or (b) that is otherwise treated differently from other trust property for purposes of the generation-skipping tax, and the provisions of this Paragraph EIGHTH D shall be applied in a manner consistent with this intention.

4 To the extent it is consistent with the Successor Trustee's fiduciary obligations, the Successor Trustee, in making discretionary distributions of net

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income and principal from the trusts referred to in this Paragraph EIGHTH D., shall take advantage of the opportunities provided by the creation of such trusts to avoid or delay generation-skipping tax when making discretionary distributions, and to maximize the amount of trust property that eventually may be distributed to the Settlor's grandchildren or more remote descendants without transfer tax of any kind at the termination of all trusts created under this Agreement.

5. For purposes of dividing trusts under this Paragraph EIGHTH D., the Successor Trustee shall select property in a manner that the assets of each trust will have an aggregate fair market value fairly representative of each trust's proportionate share of the appreciation or depreciation in the value (from the values as finally established for federal estate tax purposes) to the dates of allocation of all property then available for allocation.

6. Any person may add property to any trust hereunder, with the consent of the Successor Trustee, and such property shall thereafter be held by the Successor Trustee as a part thereof. However, no property shall be added to a trust if such addition would cause the inclusion ratio of such trust to become other than zero (0), and such property shall be held as a separate trust with terms identical to those of the trust to which the property would have been added.

7. For purposes of this Paragraph EIGHTH D., a separate share shall be treated as a separate trust.

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E. Notwithstanding anything contained in this Trust Agreement to the contrary, upon Settlor's death, the Successor Trustee may appoint (and remove and substitute) Independent Investment Advisor(s) (herein collectively referred to as the "Advisor") under this Trust Agreement and if so appointed the Successor Trustee shall exercise investment powers only on the written direction of the Advisor to the trust. Provided, however, if at any time during the continuance of any such trust there shall be no Advisor of such trust, or if the Advisor of such trust shall fail to communicate in writing to the Successor Trustee the Advisor's direction as to the exercise of any of the aforesaid powers for which exercise the direction of such Advisor shall be necessary, within twenty (20) days after the Successor Trustee shall have sent to such Advisor, by certified mail, at the Advisor's last known address(es), a written request for such direction (notwithstanding that the Successor Trustee shall be under no obligation to request any such direction), then the Successor Trustee is hereby authorized and empowered to take such action in the premises as it, in its sole discretion, shall deem to be for the best interest of the beneficiaries of such trust, and shall be relieved of any and all liability for losses incurred thereby. The Advisor shall be reimbursed for out-of-pocket expenses and reasonable investment counsel fees. The Successor Trustee is relieved of any and all liability for losses incurred as a result of obeying the Advisor's investment directions.

F. The Trustee may register this trust in accordance with Section 700.7101 of EPIC.

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G. The Successor Trustee is authorized (but not required) to make distributions from the trust estate to the Guardian(s) of any trust beneficiary, or to the person(s) acting in such capacity to any trust beneficiary (all such being collectively referred to as the "Custodian"), for the following purposes, taking into account the funds available in the trust estate:

1. Reimbursement of the Custodian for traveling to and from the place of the beneficiary's last residence and to the Custodian's place of residence for the purpose of making arrangements for and the actual transportation of the beneficiary to the Custodian's place of residence.

2. Allowance to the Custodian in such amount as the Successor Trustee deems advisable after consultation with the Custodian for the added expenses occasioned by the beneficiary's residence with the Custodian.

3. If the Custodian's residence is inadequate to handle the addition of the beneficiary, the Successor Trustee may, in its sole discretion, disburse and/or loan to the Custodian upon such terms of repayment as the Successor Trustee deems appropriate, money to assist the Custodian in remodeling or expanding the Custodian's then present residence or to purchase a more suitable residence.

4. If the Custodian's family car/van is not adequate in size to accommodate the addition of any beneficiary, the Successor Trustee may, in its sole discretion, disburse and/or loan to the Custodian money to assist the Custodian in purchasing a new and larger car/van.

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5. The Successor Trustee may advance to the Custodian the cost of any educational expense committed to on behalf of any beneficiary hereunder. These expenses shall include tuition, room and board, books, related expenses, extracurricular seminars and other expenditures which in the opinion of the Successor Trustee would further and broaden the educational opportunities available to the trust beneficiary.

H. Notwithstanding anything else contained in this Agreement to the contrary, if there is capital stock of a "small business corporation", as defined in Section 1361(b) of the Internal Revenue Code, allocable to or comprising a part of the principal of any trust created under this Trust Agreement, then, if such "small business corporation" is an "S corporation" as defined under Section 1361(a)(1) of the Internal Revenue Code, because an election had previously been made under Section 1362(a) of the Internal Revenue Code, there is only one current income beneficiary and the current income beneficiary indicates his or her willingness in writing to consent to such election, the Successor Trustee shall allocate all the capital stock of such "small business corporation" to a separate trust for the benefit of such beneficiary, or prior to making an election under said Section 1362(a) the Successor Trustee, if it has determined to make such an election and the current income beneficiary indicates his or her willingness in writing to consent to such an election, shall either allocate or sever the capital stock of such "small business corporation" from such trust and allocate the capital stock to a separate trust for the benefit of such beneficiary. The trust created hereunder shall be known as the "Qualified Subchapter S Trust FBO" said beneficiary.

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The following terms and conditions of such trust shall supplement or override, if to the contrary, any other terms and conditions contained elsewhere in this Trust Agreement to the trust for the benefit of the then current income beneficiary.

1. All income, within the meaning of Section 643(b) of the Internal Revenue Code, of the trust shall be distributed to the current income beneficiary while the small business corporation is an "S corporation";

2. During the lifetime of the current income beneficiary, the income and principal of the trust may be distributed only to the current income beneficiary or, while the current income beneficiary is under any legal disability, may be paid by the Successor Trustee to any court appointed guardian or similar appointee with respect to such legally disabled current income beneficiary;

3. The income interest of the current income beneficiary shall terminate on the earlier of the beneficiary's death or the termination of the trust;

4. Upon the termination of the trust during the life of the current income beneficiary, the trust shall distribute all of its assets to such beneficiary; and

5. The trust's terms and conditions, not to the contrary that would otherwise apply if this trust was not created, shall control the administration and disposition of any trust created hereunder.

I. Notwithstanding anything else contained in this Agreement to the contrary, if there is capital stock of a "small business corporation", as defined in Section 1361(b) of the Internal Revenue Code, allocable to or comprising a part of the principal

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of any trust created under this Trust Agreement, then, if such "small business corporation" is an "S corporation" as defined under Section 1361(a)(1) of the Internal Revenue Code, because an election had previously been made under Section 1362(a) of the Internal Revenue Code, and there are two or more current income beneficiaries or the sole current income beneficiary indicates his or her unwillingness to consent to such election, or the trust does not otherwise qualify for qualified subchapter S tax treatment, the Successor Trustee may allocate all the capital stock of such "small business corporation" to a separate trust for the benefit of such beneficiary, or prior to making an election under said Section 1362(a) the Successor Trustee, if it has determined to make such an election and there are two or more current income beneficiaries or the current income beneficiary indicates his or her unwillingness to consent to such an election, or the trust does not otherwise qualify for qualified subchapter S tax treatment, may either allocate or sever the capital stock of such "small business corporation" from such trust and allocate the capital stock to a separate trust for the benefit of such beneficiary. The trust created hereunder shall be known as the "Electing Small Business Trust FBO" said beneficiary(ies). At any time while there shall be in place a valid election to administer the trust as an Electing Small Business Trust ("ESBT"), the Successor Trustee shall not be permitted to take any action, other than an express revocation of the trust's ESBT election, which would result in the trust failing to qualify as an ESBT pursuant to Section 1361(e) of the Internal Revenue Code and the Regulations promulgated thereunder, and in furtherance thereof the following shall be observed:

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1. The trust shall not have as a current beneficiary any person other than an individual, an estate, or an organization described in paragraphs (2), (3), (4) or (5) of Section 170(c) of the Internal Revenue Code.

2. No interest in the trust shall be acquired by purchase.

3. An election under Section 1361(e)(3) of the Internal Revenue Code shall be made by the Successor Trustee and shall be in effect for the trust.

4. The trust shall not have a number of "potential current beneficiaries", as defined in Section 1361(a)(2) of the Internal Revenue Code, which would cause the corporation(s) whose stock is owned by the trust, to exceed the numerical shareholder limitation imposed upon such corporation(s) at any time by Section 1361(b) of the Internal Revenue Code.

J. Notwithstanding any provisions to the contrary contained in this Trust Agreement, the Successor Trustee shall be subject to the following restrictions, duties and obligations for any beneficiary of any trust receiving or entitled to receive government assistance or aid:

1 The Successor Trustee shall, in its sole and absolute discretion, expend principal or income for the needs of the beneficiary not otherwise provided for by government financial assistance and benefits or by the providers of the services. Such needs include, by way of description and not by way of limitation, additional food, clothing, health services not provided, radios, record players, television sets, camping, vacations, athletic contests, movies or trips; provided, however, that the Successor Trustee is under no obligation to expend

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principal or income for such needs, but if the Successor Trustee does, in its sole discretion, decide to do so, in no case shall the Successor Trustee pay or reimburse any amounts to the federal or state governments, or any subdivision thereof.

2. Any income which is not distributed shall be retained in the trust and added to the principal thereof.

3. In making the distributions provided for in Subparagraph EIGHTH J 1, the Successor Trustee shall take into consideration the amounts which the beneficiary shall be entitled to receive from any government agency, including, but not limited to, the Social Security Administration benefits, Supplemental Security Income, or Medicaid. The Successor Trustee is directed to assist the beneficiary in obtaining the full benefit of these programs. The Successor Trustee is further directed to collect, expend and account for separately all such governmental assistance benefits, but not commingle them with the trust funds.

END

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NINTHALIENATION

The principal of the trusts administered hereunder and the income resulting therefrom while in the hands of the Successor Trustee shall not be subject to any conveyance, transfer or assignment, or be pledged as security for any debt of any beneficiary thereof and shall not be subject to any claim of any creditor of any such beneficiary, through legal process or otherwise. Any attempted sale, anticipation, assignment or pledge of any of the principal or income held in any such trust by such beneficiaries or any of them shall be null and void, and shall not be recognized by the Successor Trustee. It is the Settlor's intention to place the absolute title to the property held in trust and the income therefrom in the Successor Trustee from the time the Successor Trustee succeeds Settlor as Trustee with the power and authority to pay out the same only as authorized herein. Nothing in this Paragraph shall prohibit the release of a power of appointment or withdrawal granted hereunder, or an exercise in accordance with the terms of the power.

END

TENTHRULE AGAINST PERPETUITIES

If the provisions of any trust herein for any beneficiary shall be violative of the rule against perpetuities, then such trust for such beneficiary shall be based upon the lives of all beneficiaries of all other trusts hereunder whose lives shall be competent under said rule, and such trust for such beneficiary shall continue with all of its other provisions until the expiration of the maximum period permitted by the Uniform Statutory Rule Against Perpetuities unless the provisions of any such trust as continued by this Paragraph shall direct the conveyance of any part or all of the principal of the trust to the beneficiary thereof to take place at a time before the termination of the trust as continued under this Paragraph, in which case such conveyance shall be made in accordance with such direction.

END

ELEVENTHALLOCATION OF ASSETS

The Successor Trustee may make any division or allocation in cash or in kind, and as to any property incapable of exact division, it shall not be necessary for the Successor Trustee to divide the same physically into parts to which each trust shall be entitled, but individual parts thereof may, by appropriate book entries, be allocated among the trusts. In any case where exact division of property or allocation of undivided interests therein between or among the other trusts hereunder is not practical or expedient, the Successor Trustee may select assets to be appropriated in whole or in part to any of said trusts.

END

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TWELFTHRESIGNATION OF SUCCESSOR TRUSTEE

A. The Successor Trustee of a trust may resign by written notice setting forth the effective date thereof delivered personally or sent by registered mail, at least thirty (30) days prior to said effective date, to each of the ascertained and then living beneficiaries of the trust to or for whom income may currently be paid or used, or their guardians, addressed to the last known address of such person as disclosed by the resigning Successor Trustee's records.

B Except as otherwise provided in Paragraph SEVENTH, within twenty (20) days after the delivery or mailing of such notice of resignation, a majority of such adult beneficiaries, or a majority of the guardians of minor beneficiaries, if there are no adult beneficiaries, shall select a corporate successor to the resigning Successor Trustee and shall in writing, signed by a majority of the beneficiaries or their guardians, whichever is applicable, inform the resigning Successor Trustee of the identity of the selected corporate successor to the resigning Successor Trustee. If the beneficiaries shall fail to select a corporate successor to the resigning Successor Trustee within the twenty (20) day period or if there are no adult beneficiaries and a majority of the minor beneficiaries do not have guardians, then the resigning Successor Trustee shall select a corporate successor.

C. The resigning Successor Trustee, upon the effective date of its resignation, shall deliver to its successor and to each such beneficiary of the trust a statement of all receipts and disbursements of the trust together with an inventory of the

ROA 000585

assets belonging to the trust. When the successor shall deliver its receipt for the assets of each of the trusts to the Successor Trustee so resigning, the latter shall stand and be discharged of all of its duties and obligations hereunder.

D. Each and every successor to the original Successor Trustee shall have the identical powers, rights, duties and obligations of the original Successor Trustee named in this Agreement unless otherwise provided herein.

END

THIRTEENTHLIFE INSURANCE PROVISIONS

A. The Settlor shall pay all premiums or assessments on any life insurance policies on Settlor's life made payable to this trust. The Trustee shall be under no obligation to see that said premiums or assessments are paid or to pay the same, and shall be under no obligation in respect to the policies deposited hereunder other than for their safekeeping, except to the extent expressly provided herein. Nothing herein contained shall be deemed to impose any obligation on the Settlor to maintain any or all of said policies in force. If, at any time, and so long as, the only assets held by the Trustee are insurance contracts or beneficiary designations under employee benefit plans and cash of nominal amount, the Trustee shall be under no duty or obligation to invest and/or keep invested such cash of nominal amount.

B. The Settlor reserves unto Settlor during Settlor's lifetime, all incidents of ownership, payments, dividends, surrender values and benefits of any kind which may accrue on account of any of the policies of life insurance on Settlor's life made payable to this trust, under this Agreement, and the right at any time to assign, pledge or use said policies or any of them or to change the beneficiary thereof, and to borrow money thereon; and the Settlor shall have the right and power at any time to withdraw from the possession of the Trustee any and all policies of life insurance deposited with the Trustee hereunder, upon the execution and delivery to said Trustee of a proper receipt therefor.

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C. No insurance company who shall make payment of insurance proceeds to this trust shall be required to inquire into or take notice of any of the provisions of this Agreement or to see to the application or disposition of the proceeds of said policies, and the receipt of the Successor Trustee to any such insurance company shall be effectual to release and discharge them for any payment so made and shall be binding upon every beneficiary of the trusts hereby created.

D. The Successor Trustee shall use its best efforts to collect the proceeds of any life insurance policies that are payable to this trust, or may, at its option, exercise any of the options of settlement that may at that time be available to the Successor Trustee under the terms of any of said policies. The Successor Trustee may institute any proceedings at law or in equity in order to enforce the payment thereof, it being distinctly understood, however, that the Successor Trustee shall not, except at its option, enter into or maintain any litigation to enforce the payment of said policies until it has been indemnified to its satisfaction against all expenses and liabilities to which it may, in its judgment, be subjected by any such action on its part. The Successor Trustee is authorized to compromise and adjust claims arising out of the insurance policies or any of them, upon such terms and conditions as it may deem just, and the decision of the Successor Trustee shall be binding and conclusive upon all persons and corporations interested therein. The Successor Trustee shall be responsible for the proceeds of the insurance only when, as and if collected or paid to it, and the Successor Trustee shall not be liable to anyone if for any reason the policies shall lapse or be otherwise uncollectible in whole or in part.

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E. An instrument in writing completely terminating the trust shall, without more, upon delivery to the Trustee, completely terminate all of this trust's right, title and interest to insurance proceeds otherwise payable to it. The Settlor assumes full responsibility for changing the insurance beneficiary designations to reflect Settlor's intent with respect to such policies.

F. Anything contained in this Trust Agreement to the contrary notwithstanding, the Trustees (and Successor Trustees) of each trust hereunder, other than any individual Trustee or individual Successor Trustee (except Settlor) whose life may be insured under the life insurance policy in question, shall have and, in their sole discretion, may exercise all of the incidents of ownership in each and every policy of life insurance which may at any time be owned or purchased by such trust. The term "incidents of ownership" with respect to a policy shall include, by way of illustration and not limitation, the right to collect, receive, and retain all payments, dividends, surrender values, sickness, accident, disability, retirement, or other benefits, including all death benefits, maturing on such policy during the insured's lifetime and thereafter, as well as the right to at any time transfer, assign, sell, pledge, hypothecate, borrow on, surrender, prepay, convert, divide, change the beneficiary of, and/or exercise or select any options, elections, and waivers with respect to such policy. All other provisions of this Trust Agreement to the contrary notwithstanding, any individual Trustee or individual Successor Trustee (except Settlor) whose life is insured under a trust owned policy shall under no circumstances be entitled to partake in any way in decisions relating to such policy or in the exercise of any of the foregoing powers or discretions with respect to

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such policy (and in the absence of another then acting Trustee or Successor Trustee no incidents of ownership as to such policy shall be exercised).

1. The payment of premiums on each policy owned by any trust hereunder shall be charged against the principal of that trust unless the Trustees or Successor Trustees of such trust (other than any (except Settlor) who might be financially affected thereby), in the exercise of reasonable discretion, shall determine to charge such premiums against the income of such trust on the basis of that being in the best interests of the present and future beneficiaries of such trust.

2 Furthermore and also notwithstanding all other provisions of this Trust Agreement, if any insurance on the life of a beneficiary of a trust hereunder is an asset of such trust, such insurance and all proceeds thereof, unless held by the original trust hereunder, shall be excluded from the assets which might otherwise be subject to any use, enjoyment, withdrawal, or appointment by that beneficiary (and on such beneficiary's death such proceeds shall be disposed of as though any power of appointment held by such beneficiary had not been exercised).

END

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FOURTEENTHGENERAL PROVISIONS

A. The Successor Trustee shall have the entire care and custody of all of the assets comprising principal of the trusts hereunder and shall keep the assets safe in accordance with the requirements of like fiduciaries and shall maintain full and accurate records of assets, receipts and disbursements and other financial transactions relative to each trust, all of which shall be available for inspection at any reasonable time by any and all beneficiaries.

B. The Successor Trustee shall furnish at least annually, to the beneficiary or beneficiaries to whom income is currently payable or for whose benefit it may currently be expended, a complete inventory of the assets held in the trust for such beneficiary and shall furnish at least annually, or at such other periodic intervals as may be agreed upon between the Successor Trustee and such beneficiary, or beneficiaries, a statement of all receipts and disbursements.

C. The Successor Trustee shall pay all necessary and proper disbursements, expenses and liabilities in the administration of the trusts hereunder, including reasonable compensation of the Successor Trustee or its successor.

D. In cases where the Internal Revenue Code affords the Successor Trustee any election or option, the Successor Trustee shall exercise such election or option for what it believes to be the best interest of the trust and the beneficiaries thereof. The Successor Trustee shall not make any adjustment between income and principal because of a benefit conferred or a detriment imposed upon any trust or any of

the beneficiaries thereof by reason of the applicable provisions of the Internal Revenue Code, including elections or options.

E. The trusts herein provided shall be administered and this Agreement shall be construed in accordance with the laws of the State of Michigan.

F. In any proceeding involving the construction, operation or modification of this Agreement, the then living beneficiary or beneficiaries to whom income is currently payable or for whose benefit it may currently be expended shall represent any unknown and undetermined beneficiaries, and any order, judgment or decree rendered in such proceeding shall be binding not only upon such known persons but also upon all unknown and undetermined beneficiaries.

G. The Successor Trustee shall have the power to maintain the situs of the property of any trust created under this Agreement in any jurisdiction, in the Successor Trustee's absolute discretion, and thereafter transfer the situs at any time or times to any jurisdiction selected by the Successor Trustee. Upon any such transfer of situs, the trust estate may thereafter, at the election of the Successor Trustee, be administered exclusively under the laws of (and subject, as required, to the exclusive supervision of the courts of) the jurisdiction to which it has been transferred. If the Successor Trustee of any trust created hereunder elects to change the situs of any such trust, the Successor Trustee is hereby relieved of any requirement of having to qualify in any other jurisdiction and of any requirement of having to account in any court of such other jurisdiction.

END

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FIFTEENTHDISCLAIMER

The acceptance to serve as Successor Trustee shall be construed as no more than acceptance of the terms of this Agreement as they apply to the rights, powers, duties and obligations of the Successor Trustee during its tenure as trustee and shall in no way be construed to mean acceptance, ratification or approval of any of the acts, omissions, or defaults of the individual Trustee nor any undertaking by the Successor Trustee to audit or verify the records of the individual Trustee. The Successor Trustee shall be entitled to rely upon any statements and records (which may come into the Successor Trustee's possession after a reasonable search) of the individual Trustee as to the assets of this trust and shall have no responsibility or liability hereunder to any person for the assets of this trust until reduced to the possession of the Successor Trustee.

END

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SIXTEENTHCONSOLIDATION OF TRUSTS

After the death of Settlor, if the provisions under the trust or trusts created herein shall become substantially the same as the provisions under any trust or trusts established by the Settlor or by any other person for the irrevocable benefit of the same beneficiary or beneficiaries, the Successor Trustee may, in its complete discretion, terminate such trust or trusts created hereunder and distribute all of the assets thereof to the trustee of said similar trust or trusts, or may accept from the trustee of said similar trust or trusts, all of the assets thereof, and the assets so distributed or received shall be treated as an addition to said similar trust or trusts or to this trust or trusts, as the case may be, and shall be held, treated and disposed of as a part thereof or hereof, and if distributed to a similar trust or trusts, the trust or trusts created hereunder shall thereupon terminate. The purpose of this Paragraph is to eliminate the necessity of maintaining two or more separate trusts with similar provisions for the same beneficiary. However, the Successor Trustee shall not combine any trust having an inclusion ratio, as defined in Section 2642 of the Code, of other than zero (0) with a trust having an inclusion ratio of zero (0).

END

SEVENTEENTHENVIRONMENTAL MATTERS

A. For purposes of this Paragraph, the following terms have the meanings set forth below:

1. "Assets held in the trust estate" include interests in sole proprietorships, partnerships, corporations, limited liability companies and other business entities and the assets owned by such business entities.
2. "Environmental law" means any federal, state, or local statute, rule, regulation or ordinance relating to protection of the environment or human health.
3. "Hazardous substance" means any substance defined as hazardous or toxic in or otherwise regulated by any environmental law.
4. "Environmental concerns" means, as determined by the Successor Trustee in its sole discretion, (a) any condition of, or activity conducted on or with, any property or assets held in the trust estate that violates, or may cause violation of any environmental law; (b) the presence of or any actual or threatened release of any hazardous substance from, to, at, under, or upon any property or assets held in the trust estate; and (c) any actual or threatened spill, leak, discharge, disposal, emission, dispersal, leaching, or migrating of any hazardous substance from, to, at, under, or upon any property or assets held in the trust estate.

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5. "Governmental body" means any unit of federal, state, or local government, and any agency, department, board, commission, or subdivision thereof, and any quasi-governmental agency thereof and any court or quasi-judicial entity.

B The Successor Trustee shall have the powers, in addition to those powers provided by applicable law:

1. To inspect, assess, and evaluate any property or assets held in the trust estate or proposed to be donated or transferred to the trust estate, and any records related thereto, for the purpose of determining if any environmental concerns exist with respect to such property or assets.
2. To respond to any actual or suspected environmental concerns relating to property or assets held by the Successor Trustee in the trust estate.
3. To take, on behalf of the trust estate, any action necessary to prevent, abate, or otherwise remedy any environmental concerns relating to property or assets held by the Successor Trustee in the trust estate, either before or after the initiation of an enforcement action by any governmental body.
4. To refuse to accept property or assets in trust if the Successor Trustee determines or suspects that environmental concerns are present at, affect or relate to any property or assets to be donated or transferred to the trust which the Successor Trustee believes could result

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in liability to the trust or the Successor Trustee, or otherwise impair the value of the property or assets held therein.

5. To settle or compromise at any time any and all claims or lawsuits against the trust estate or against the Successor Trustee which may be asserted by any governmental body or private party involving any alleged environmental concern relating to property or assets held in the trust estate.

6. To disclaim any power granted by any document, statute or rule of law which, in the sole discretion of the Successor Trustee, may cause the Successor Trustee to incur personal liability under any environmental law or under the common law.

7. To decline to serve as Successor Trustee if the Successor Trustee reasonably believes that there is or may be a conflict of interest between the Successor Trustee in its fiduciary capacity and in its individual capacity because of potential claims or liabilities which may be asserted against it on behalf of the trust estate because of any environmental concerns that relate to property or assets held in the trust estate.

8. To disclaim, in whole or in part, any interests in property or assets for any reason including, but not limited to, a concern that holding such property or assets in the trust estate could result in liability to the trust or the Successor Trustee as a result of any environmental concerns.

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9. To use and expend the trust income and principal to: (i) conduct environmental assessments, audits, and site monitoring to determine if any environmental concerns are present at or affect any property or assets held in the trust estate; (ii) take all appropriate remedial action to contain, remedy, cleanup, or respond to environmental concerns that relate to property or assets held in the trust estate, either on its own accord or in response to an actual or threatened claim by any governmental body or private party; (iii) institute legal proceedings concerning any environmental concerns that relate to property or assets held in the trust estate or contest or settle legal proceedings brought by any governmental body or by any private person or entity regarding environmental concerns that relate to any property or assets held in the trust estate; (iv) comply with any order of any governmental body directing an assessment, investigation, remedial action, response action, abatement or cleanup of any environmental concerns relating to property or assets held in the trust estate; (v) to take any action or do anything permitted in the above paragraph, or as otherwise permitted by law; and (vi) employ agents, consultants and legal counsel to assist or perform the above undertakings or actions. Any expenses incurred by the Successor Trustee under this paragraph may be charged against income or principal as the Successor Trustee shall determine.

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C. The Successor Trustee shall not be personally liable to any beneficiary or other person or entity for any decrease in value of property or assets held in the trust estate by reason of the Successor Trustee's compliance with any environmental law, specifically including any reporting requirement under such law. Neither the acceptance by the Successor Trustee of property nor a failure by the Successor Trustee to inspect property or assets shall be deemed to create any inference as to whether there is or may be any liability under any environmental law with respect to such property or assets.

D. No Successor Trustee shall be liable for any loss or depreciation in value sustained by the trust as a result of the Successor Trustee retaining any property or assets upon which there is later discovered to be environmental concerns requiring remedial action pursuant to any environmental law, unless the Successor Trustee contributed to the loss or depreciation in value through willful default, willful misconduct, or gross negligence.

E. Settlor's estate shall indemnify, defend, protect, and hold harmless the Successor Trustee, and each of the Successor Trustee's successors, from and against any and all claims, liabilities, penalties, fines, judgments, forfeitures, losses (including without limitation, diminution in the value of the trust property or assets, damages for the loss of or restriction on the use of rentable or usable space or of any amenity of the trust property), costs, or expenses (including attorneys' fees, consultants' fees, and experts' fees) arising from or caused in whole or in part, directly or indirectly, by any environmental concerns relating to property or assets held in the trust estate,

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regardless of the cause of such environmental concerns. Settlor's obligations under this indemnification shall include, without limitation, whether foreseeable or unforeseeable, any and all costs incurred in connection with any investigation or testing of site conditions, and any and all costs of any required or necessary repair, remedial action, response action, cleanup, detoxification, or decontamination of the trust property (including, without limitation, the soil and ground water on, under or about the trust property), and the preparation and implementation of any closure, remedial action, or other required plans in connection therewith. Settlor's obligation under this indemnification shall survive the expiration or earlier termination of the Successor Trustee's term as fiduciary under the Trust Agreement. For purposes of the release and indemnity provisions, hereof, any acts or omissions of Settlor, or by employees, agents, assignees, contractors, or subcontractors of Settlor, or by others acting for or on behalf of Settlor (whether or not they are negligent, intentional, willful, or unlawful), shall be strictly attributable to Settlor.

END

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EIGHTEENTHFORFEITURE

The beneficial provisions of this Trust Agreement and of Settlor's Last Will and Testament are intended to be in lieu of any other rights, claims or interests, whether statutory or otherwise, except bona fide pre-death debts, which any beneficiary hereunder may have against or in Settlor's estate or the assets held under this Trust Agreement. Therefore, if any beneficiary shall assert any claim, statutory election or other right or interest against or in the Settlor's estate, either pursuant to Settlor's Last Will and Testament, this Trust Agreement (as it may be amended) or otherwise, or directly or indirectly contest the Settlor's Last Will and Testament or this Trust Agreement (as it may be amended), or attack or seek to impair or invalidate any of the provisions thereof, or conspire with or voluntarily assist anyone attempting to do any of those things, then (a) all beneficial interest, powers and rights of every kind and nature which such beneficiary might otherwise have had under this Trust Agreement shall be forfeited and such forfeited interest shall augment proportionately the shares of the beneficiaries designated in Paragraph SIXTH B who shall not have participated in such acts or proceedings, (b) all of the provisions of this Trust Agreement, to the extent that they confer any benefits, powers or rights whatsoever upon such beneficiary, shall thereupon become absolutely void and revoked, and (c) such beneficiary, if then acting as a Successor Trustee hereunder, shall automatically cease to be a Successor Trustee and shall thereafter be ineligible either to select, remove or become a Successor Trustee hereunder. The foregoing shall not be construed, however, to limit the

ROA 000601

appearance of any beneficiary as a witness in any proceeding involving the Settlor's Last Will and Testament or this Trust Agreement nor limit any beneficiary's appearance in any capacity in the proceeding solely for the construction of either of said documents.

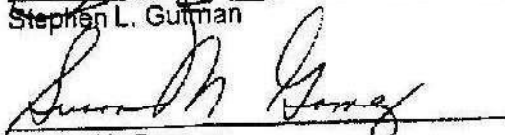
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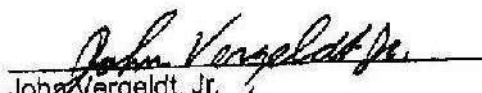
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IN WITNESS WHEREOF, the parties hereto have executed this Eighth Amendment and Complete Restatement as of the day and date first above written and by so doing the Trustee herein named accepts all of the duties and conditions imposed.

Signed in the presence of:

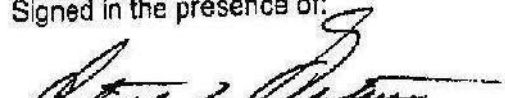

Stephen L. Guttman


Susan M. Gomez


John Vergeldt, Jr.

"Settlor"

Signed in the presence of:


Stephen L. Guttman


Susan M. Gomez


John Vergeldt, Jr.

"Trustee"

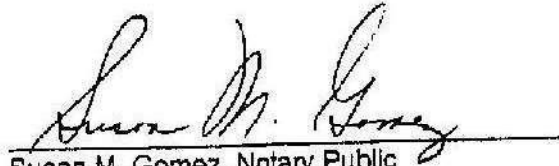
STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

On this 29th day of July, 2009, before me personally appeared John Vergeldt, Jr., to me known to be the person described in and who executed the

ROA 000603

ROA 000604

foregoing instrument and acknowledged that he executed the same as his free act and deed.



Susan M. Gomez, Notary Public
Wayne County, Michigan acting in
Wayne County, Michigan
My Commission expires: 11/11/2012

ELECTRONICALLY FILED - 2019 Jun 20 10:58 AM - YORK - COMMON PLEAS - CASE#2016CP4600820

XIX-2

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CLERK OF PROBATE
YORK COUNTY, SC

EXHIBIT B

ELECTRONICALLY FILED - 2019 Jun 20 10:58 AM - YORK - COMMON PLEAS - CASE#2016CP4600820

ROA 000605

ROA 000606

FILED RECEIVED

NINTH AMENDMENT TO TRUST AGREEMENT 2016 FEB -1 PM 2:42JUDGE OF PROBATE
YORK COUNTY, SC

THIS NINTH AMENDMENT TO TRUST AGREEMENT dated September

27, 1978, is made this 5th day of February, A.D., 2010, between John Vergeldt, Jr., of the City of Dearborn, County of Wayne, and State of Michigan, hereinafter called the "Settlor;" and John Vergeldt, Jr., hereinafter called the "Trustee." This Trust is sometimes referred to as the "John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978."

WITNESSETH

WHEREAS, on July 29, 2009 the Settlor completed amended and restated the provisions of the aforesaid Trust Agreement signed by him on September 27, 1978, by deleting all of the provisions of said Trust Agreement and Amendments and by substituting the provisions set forth in the Eighth Amendment and Complete Restatement;

WHEREAS, the Settlor desires to amend the Eighth Amendment and Complete Restatement; and

WHEREAS, the Trustee is agreeable to the amendments hereinafter set forth.

NOW, THEREFORE, it is agreed that the Eighth Amendment and Complete Restatement shall be amended as follows:

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Paragraph SIXTH B of the Eighth Amendment and Complete Restatement

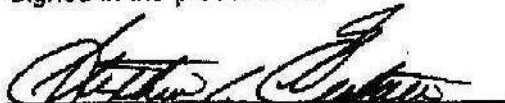
shall be deleted and the following Paragraph SIXTH B shall be substituted therefor:

B. After the death of Settlor, the Successor Trustee shall distribute the sum of six thousand (\$6,000.00) dollars, free and discharged from the trust hereof, to each grandchild of Settlor who survives Settlor and shall divide the balance of the assets of the Residuary Trust into equal shares, one (1) share for each of Settlor's children. If any child of Settlor shall predecease Settlor (other than Patricia A. Vergeldt Downey and other than David Leigh Vergeldt who died on January 30, 2010), said child's share shall be distributed as follows: one-half (1/2) to Settlor's child's spouse, if then living, Settlor's child was married to him or her at the date of his or her death, and there was no divorce proceeding pending at the date of his or her death, and the other one-half (1/2) (or all if there is no surviving spouse who meets said conditions) shall be divided equally between Settlor's then living children. If Patricia A. Vergeldt Downey shall not survive Settlor, then her share shall be divided equally between Settlor's then living children. The Successor Trustee shall distribute from the share of David Leigh Vergeldt the sum of twenty thousand (\$20,000.00) dollars to his surviving spouse, Bonnie Graham Vergeldt, if and only if she survives Settlor and if the assets of the residuary estate have a fair market value at the date of Settlor's death of at least five hundred thousand (\$500,000.00) dollars, and the balance (or all if these conditions are not satisfied) shall be divided equally between Settlor's then living children. The part so set aside for Settlor's children and spouses of deceased children shall forthwith be assigned, transferred, conveyed and paid over to them free and discharged from the trust hereof. The part so set aside for the descendants of any of Settlor's children (other than the specific bequest of six thousand (\$6,000.00) dollars) shall, in the discretion of the Successor Trustee, either be distributed to a Uniform Transfers to Minors Act account to age twenty-one (21) or to a trust described in Paragraph SIXTH C, if the descendant has not attained age thirty (30), or otherwise shall forthwith be assigned, transferred, conveyed, and paid over to said descendants free and discharged from the trust hereof.

IN WITNESS WHEREOF, the parties hereto have executed this Ninth Amendment as of the date and date first above written and by so doing the Trustee herein named accepts all of the duties and conditions imposed.

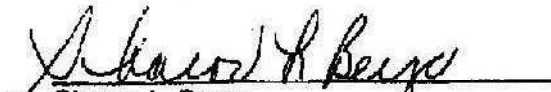
ROA 000608

Signed in the presence of:


Stephen L. Gulman


John Vergeldt, Jr.

"Settlor"

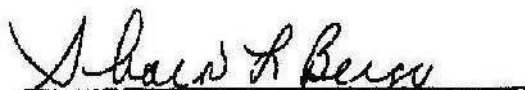

Sharon L. Bergo

Signed in the presence of:


Stephen L. Gulman

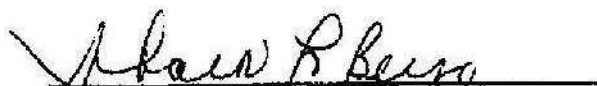

John Vergeldt, Jr.

"Trustee"


Sharon L. Bergo

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

On this 5th day of February, 2010, before me personally appeared John Vergeldt, Jr., to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.


Sharon L. Bergo, Notary Public
Oakland County, Michigan acting in
Wayne County, Michigan
My Commission expires: 09/14/2012

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2016 FEB -1 PM 2:42
JUDGE OF PROBATE
YORK COUNTY, SC

EXHIBIT C

ROA 000609

ROA 000610

FILED RECEIVED

2016 FEB -1 PM 2:42

TENTH AMENDMENT TO TRUST AGREEMENT OF PROBATE
YORK COUNTY, SD

THIS TENTH AMENDMENT TO TRUST AGREEMENT dated September 27, 1978, is made this 7th day of March, A.D., 2011, between John Vergeldt, Jr., of the City of Birmingham, County of Oakland, and State of Michigan, hereinafter called the "Settlor;" and John Vergeldt, Jr., hereinafter called the "Trustee." This Trust is sometimes referred to as the "John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978."

WITNESSETH

WHEREAS, on July 29, 2009 the Settlor completely amended and restated the provisions of the aforesaid Trust Agreement signed by him on September 27, 1978, by deleting all of the provisions of said Trust Agreement and Amendments and by substituting the provisions set forth in the Eighth Amendment and Complete Restatement;

WHEREAS, on February 5, 2010 the Settlor amended the Eighth Amendment and Complete Restatement by the Ninth Amendment;

WHEREAS, the Settlor desires to amend the Eighth Amendment and Complete Restatement and Ninth Amendment; and

WHEREAS, the Trustee is agreeable to the amendments hereinafter set forth.

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NOW, THEREFORE, it is agreed that the Eighth Amendment and Complete Restatement and Ninth Amendment shall be amended as follows:

1. Paragraph SECOND C as set forth in said Trust Agreement shall be deleted and the following Paragraph SECOND C substituted therefor:

C. The initial Successor Trustee is John Edward Vergeldt. The Settlor may change the Successor Trustee at any time during Settlor's lifetime. The Successor Trustee and each Trustee is referred to in the neuter gender. The Successor Trustee and each Trustee of each trust created pursuant to this Trust Agreement shall have all of the rights, duties and powers herein created and conferred upon the Trustee and/or Successor Trustee except those powers which this Agreement specifically limits to either the Settlor acting as Trustee or to the Successor Trustee. The Successor Trustee's duties relate to the trust while Settlor is alive, the trust after Settlor's death and during the post-death administration period and before its division for the beneficiaries' shares and each and every trust created pursuant to this Trust Agreement after Settlor's death unless this Agreement specifies a different Trustee for one or more of such trusts.

2. Paragraph SECOND D as set forth in said Trust Agreement shall be deleted and the following Paragraph SECOND D substituted therefor:

D. All tax-related terms, provisions and sections mean the same in this Agreement as they mean in the Internal Revenue Code of 1986, as amended, and the Treasury Regulations promulgated thereunder, and any successor provisions of either. Notwithstanding, if at any time a federal tax including, but not limited to, estate, gift or generation-skipping transfer tax, is not applicable and there is no term, provision or section of the federal tax law that corresponds to any term, provision or section contained in this Agreement, then such term, provision or section contained in this Agreement shall nevertheless be interpreted with reference to the term, provision or section that was in effect at the time of the execution of this Agreement or the term, provision or section that was in effect immediately before such tax law became inapplicable, as the case may be.

3. The following Paragraphs SECOND Q and SECOND R shall be added to the end of Paragraph SECOND:

ROA 000611

Q. The term "mental incapacity" shall mean the court appointment of a guardian or conservator for a person or if that person's primary care physician renders such an opinion.

R. The term "current trust beneficiary" means each beneficiary who currently either has a right to receive all or a portion of the income of a trust or is eligible to receive a mandatory or discretionary distribution of income or principal of a trust.

4. Paragraph SIXTH B as set forth in said Trust Agreement shall be deleted and the following Paragraph SIXTH B shall be substituted therefor:

B. After the death of Settlor, the Successor Trustee shall distribute the sum of six thousand (\$6,000.00) dollars, free and discharged from the trust hereof, to each grandchild of Settlor who survives Settlor and shall divide the balance of the assets of the Residuary Trust into equal shares, one (1) share for each of Settlor's children. If any child of Settlor shall predecease Settlor (other than Patricia A. Vergeldt Downey and other than David Leigh Vergeldt who died on January 30, 2010), said child's share shall be distributed as follows: one-half (1/2) to Settlor's child's spouse, if then living, Settlor's child was married to him or her at the date of his or her death, and there was no divorce proceeding pending at the date of his or her death, and the other one-half (1/2) (or all if there is no surviving spouse who meets said conditions) shall be divided equally between Settlor's then living children. If Patricia A. Vergeldt Downey shall not survive Settlor, then her share shall be divided equally between Settlor's then living children. The share of David Leigh Vergeldt shall be divided equally between Settlor's then living children. The part so set aside for Settlor's children and spouses of deceased children shall forthwith be assigned, transferred, conveyed and paid over to them free and discharged from the trust hereof. The part so set aside for the descendants of any of Settlor's children (other than the specific bequest of six thousand (\$6,000.00) dollars) shall, in the discretion of the Successor Trustee, either be distributed to a Uniform Transfers to Minors Act account to age twenty-one (21) or to a trust described in Paragraph SIXTH C, if the descendant has not attained age thirty (30), or otherwise shall forthwith be assigned, transferred, conveyed, and paid over to said descendants free and discharged from the trust hereof.

5. The following paragraph shall be added to the end of Paragraph SEVENTH:

An individual Successor Trustee's liability is limited to an act or omission committed in bad faith or with reckless indifference to the purposes of the trust or

the interests of the trust beneficiaries. The individual Successor Trustee shall be indemnified from the applicable trust estate for reasonable legal expenses in defending any claim or action filed by a trust beneficiary, except for a claim or action based upon an act or omission by the Successor Trustee to have been committed in bad faith or with reckless indifference to the purposes of the trust but only if the beneficiary prevails in such litigation.

6. Paragraph FOURTEENTH B as set forth in said Trust Agreement shall be deleted and the following Paragraph FOURTEENTH B shall be substituted therefor:

B The Successor Trustee shall keep a trust account of the affairs of a trust. At least annually and upon termination of a trust, the Successor Trustee shall render a statement of account. A statement of account is a report by the Successor Trustee of the trust property, liabilities, receipts, and disbursements, including the source and amount of the Successor Trustee's compensation, a listing of the trust assets, and, if feasible, their respective market values. No particular format or formality is required for a report unless a court specifies its content and presentation. The statement shall be delivered as soon as practicable after the close of the accounting period or upon termination of the trust. The Successor Trustee need not render account statements so long as Settlor is a Trustee. If Settlor is living but is not a Trustee, the Successor Trustee shall account only to Settlor or, if Settlor is deemed mentally incapacitated, to Settlor's spouse, and to each current trust beneficiary, but shall not provide any account statements or information about the trust to any other beneficiary. If a current trust beneficiary is another trust, account statements shall be delivered to the trustee of the other trust. Except as provided above, if any current trust beneficiary is a minor or otherwise disabled, delivery shall be made to his or her designated agent, to the conservator of his or her estate, or, if none, then to his or her parent, nearest of kin, or an adult with whom he or she is living.

8. Paragraph EIGHTEENTH as set forth in said Trust Agreement shall be deleted and the following Paragraph EIGHTEENTH substituted therefor:

EIGHTEENTH

CONTEST

A. The beneficial provisions of this Trust Agreement and of Settlor's Last Will and Testament are intended to be in lieu of any other rights, claims or interests, whether statutory or otherwise, except bona fide pre-death debts.

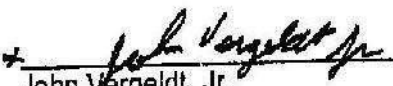
which any beneficiary hereunder may have against or in Settlor's estate or the assets held under this Trust Agreement. Except as provided in subsection (D) below, every share, interest, or power conferred by this trust is made on the condition precedent that the recipient acquiesce in all aspects of Settlor's estate planning and not engage in any activity described in clauses (i) through (x) set forth below. If any beneficiary of this trust, singly or in conjunction with any other person or persons, directly or indirectly, (i) contests in any court the validity of this trust or, in any manner, attacks or seeks to impair or invalidate any of its provisions; (ii) contests in any court the validity of the Settlor's Last Will in any manner, or attacks or seeks to impair or invalidate any of its provisions; (iii) seeks to obtain an adjudication in any proceeding in any court that this trust or any of its provisions or that Settlor's Will or any of its provisions is void; (iv) claims entitlement by way of any written or oral contract to any portion of the Settlor's estate, whether in probate or under this instrument; (v) unsuccessfully challenges the appointment of any person named as Successor Trustee of this trust, or as personal representative or successor personal representative of the Settlor's Will; (vi) objects in any manner to any action taken or proposed to be taken in good faith by the Successor Trustee or the personal representative of the Settlor's Will, or other agent, whether said personal representative is acting under court order, advice of legal counsel, or otherwise; (vii) objects to any construction or interpretation of this Trust, or any provision of it, that is adopted or is proposed in good faith by the acting Successor Trustee; (viii) unsuccessfully seeks the removal of any person acting as Successor Trustee of any Trust created under this instrument, or of the personal representative of the Settlor's Will; (ix) files any creditor's claim in Settlor's estate (without regard to its validity), whether the claim arose before or after the date of this instrument, except for claims for cash advanced or paid for expenses of last illness or funeral by said claimant; or (x) contests or seeks to invalidate any of the following: any trust which Settlor has created or may create during Settlor's lifetime, or any provision thereof, any gift which Settlor has made or will make during Settlor's lifetime, whether before or after the date of this instrument, any exercise of a power of appointment possessed by the Settlor, or any other transaction by which Settlor sold any assets (whether to a relative of Settlor's or otherwise), then that person's right to take any interest given to him or her by this trust shall be determined as it would have been determined if the person had predeceased the execution of this Trust Agreement. Further, such beneficiary, if then acting as a Successor Trustee hereunder, shall automatically cease to be a Successor Trustee and shall thereafter be ineligible either to select, remove or become a Successor Trustee hereunder. The provisions of this paragraph shall not apply to any disclaimer by any person of any benefit under this trust or under any Will. The foregoing shall not be construed, however, to limit the appearance of any beneficiary as a witness in any proceeding involving the Settlor's Last Will and Testament or this Trust Agreement nor limit any beneficiary's appearance in any capacity in the proceeding solely for the construction of either of said documents.

B. The Successor Trustee is authorized to enforce this provision and to defend, at the expense of the trust, any contest or other attack of any nature on the trust or any of its provisions.

C. In the event that any provision of this paragraph is held to be invalid, void or legal, the same shall be deemed severable from the remainder of the provisions in this paragraph, and shall, in no way, affect, impair or invalidate any other provision in this paragraph.

D. Both Settlor and the law recognize that facts or circumstances could give rise to probable cause to challenge this Agreement or some of its provisions. Therefore, the precondition of subparagraph (A) above shall not apply to a challenge or contest if there is probable cause for asserting the challenge or contest. As used in this subparagraph, probable cause shall exist if at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful.

IN WITNESS WHEREOF, the parties hereto have executed this Tenth Amendment as of the date and date first above written and by so doing the Trustee herein named accepts all of the duties and conditions imposed.

* 
John Vergeldt, Jr.

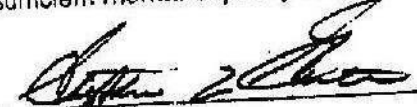
"Settlor"

* 
John Vergeldt, Jr.

"Trustee"

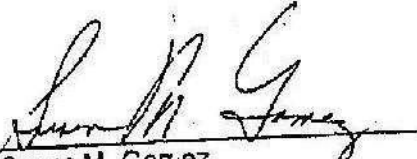
We sign below as witnesses. This Amendment was signed in our presence by the Settlor and the current Trustee. To the best of our knowledge, John Vergeldt, Jr. signed this Amendment willingly; signed it as his voluntary act for the purposes set forth in this Amendment; and at the time of execution of this Amendment

was 18 years of age or older, was under no constraint or undue influence, and had sufficient mental capacity to make this Amendment.


Stephen L. Gulman

of 6th Floor at Ford Field
1901 St. Antoine Street

Detroit, Michigan 48226


Susan M. Gomez

of 30496 Minton Street
Livonia, Michigan 48150

ROA 000617

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JUDGE OF COURSE
YORK COUNTY, SC

EXHIBIT D

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ROA 000617

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ROA 000618

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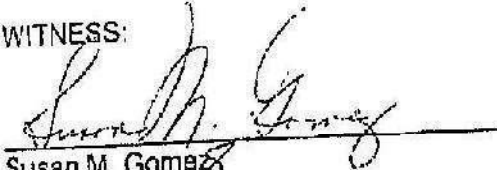
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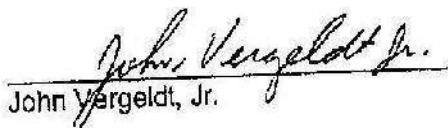
JUDICIAL BRANCH
YORK: APPOINTMENT

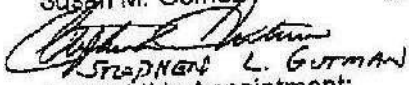
Pursuant to Paragraph THIRD C of a Trust Agreement dated September 27, 1978, as amended, between John Vergeldt, Jr., Settlor, and John Vergeldt, Jr., Trustee, the undersigned, as Settlor, hereby appoints John Edward Vergeldt to serve as Co-Trustee of the Trust created by the Trust Agreement during the undersigned's lifetime. According to Paragraph THIRD C, John Edward Vergeldt, as Co-Trustee, is vested with all of the powers, duties and obligations of the Trustee and the decisions of the Co-Trustee made during Settlor's lifetime shall be binding upon the Trust as if made by Settlor as Trustee. The undersigned reserves the right to revoke this appointment.

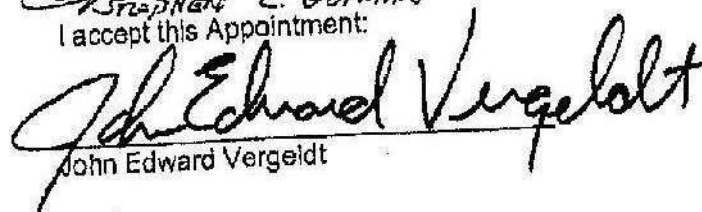
Dated: July 29, 2009

WITNESS:


 Susan M. Gomez


 John Vergeldt, Jr.


 STEPHEN L. GUTMAN
 I accept this Appointment:


 John Edward Vergeldt

Detrait_043199_1

ROA 000618

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK)

CIVIL ACTION NO.: 2016-CP-46-0820

Vicki Lynn Vergeldt, Individually and as)
 Successor Trustee of the John Vergeldt, Jr.)
 Revocable Living Trust dated)
 September 27, 1978,)

Petitioner,)
)
)

vs.)

John Edward Vergeldt,)

Respondent)
)
)

**RESPONSE TO AMENDED PETITION
 FOR REMOVAL OF TRUSTEE AND
 RELATED RELIEF AND REQUEST
 FOR DAMAGES AND
 DISINHERITANCE OF PLAINTIFF**

Respondent, John Edward Vergeldt (hereinafter "Respondent") responds to the complaint filed by Petitioner, Vicki Lynn Vergeldt (hereinafter "Petitioner"), individually, and as successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978:

Respondent denies reporting any inconsistencies and financial irregularities and confirmed with the forensic audit conducted by Ms. Palinski and presented to the court.

Respondent denies any factual contradictions and has provided proof to the court in previous court hearings.

Respondent requests attorney fees, court costs and any costs related to the past six (6) years of court actions taken against him, individually and as previous successor Trustee of The John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 based on false allegations against him by the Petitioner without prior or current proof to the court.

Respondent requests damages from Plaintiff for UNLAWFUL INTERFERENCE WITH A VALID LEGAL CONTRACT for attempting to cause disruption of marriage.

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DAVID HAMMON
C.C.P. #835
YORK COUNTY, SC

Respondent requests damages from Plaintiff and/or attorney(s) for MALICIOUS PROSECUTION for repeated unjust court actions against Plaintiff since 2013.

In response to Petitioners complaint, the following are Respondent's responses.

PARTIES

1. Agreed.
2. Agreed, EXCEPT that the Petitioner has not accepted the Trusteeship as Of this date, therefore, the actual Trustee is in question.

JURISDICTION

3. Agreed.
4. Agreed.
5. Agreed.

VENUE

6. Agreed.

FACTS

7. No comment.
8. Agreed.
9. Agreed.
10. Agreed.
11. Agreed.
12. Agreed, EXEPT that the Respondent had no knowledge of the creation of amendment 10 to the Trust prior to the death of John Vergeldt, Jr. The Plaintiff made the appointment with Mr. Bodman, the Trust attorney in Michigan.

Plaintiff transported John Vergeldt, Jr. to the appointment and oversaw

The creation of Amendment 10. Respondent and other heirs were not

Notified of this change nor involved in any way.

13. Agreed. Actual date, previously ruled by Judge Kimball, is May 6, 2013.
14. Denied.
15. Denied. All this information has been given to the court in previous hearings and ruled on in favor of Respondent.
16. Denied. I am unaware of any gifts made to any beneficiary of the trust, except for the gift of approximately \$14,000.00, made to the Petitioner while John Vergeldt, Jr. was living in her home.
17. Denied in part. A complete accounting, including all assets and all liabilities, was prepared by Respondent and approved by Don Harper, Esq. (Trust Attorney), and provided to all beneficiaries of the Trust, AS WELL AS FILED WITH JUDGE C. ROGERS IN THE PROBATE COURT, prior to Petitioner being asked to sign a release. **Petitioner accepted \$60,000.00 from the Trust of her inheritance, THEN REFUSED** to sign the release document that was prepared by Don Harper, Esq. All this information has been given to the court at previous court hearings and accepted as accurate. The petitioner is trying to use the space of time to create a smoke screen claiming that these things were not done when, indeed, they were. Petitioners actions alone triggered the forfeiture clause. **Please see EIGHTEENTH of Amendment 10.** When the Petitioner refused to sign the document, her reason, as shown in previous correspondence,

was that there was a certificate of deposit in excess of \$100,000.00, deposited with a bank in Phoenix, Arizona and that the Respondent absconded with the money. This is not true nor has she or the Forensic accountant been able to find any funds not accounted for by the Respondent. This additional complaint cost the Trust extra money during the past six (6) years.

18. Denied. The Respondent and her previous attorneys have been given, either through Subpoena or direct discovery, every document that exists, and that the Respondent is aware of. Even after receipt of these documents, Plaintiff continues to Subpoena First Citizens Bank, resulting in more costs to the Trust which has to pay for each individual document provided.
19. Denied.
20. Denied. All financial records, including bank statements, trust accounts, tax returns, account numbers, and all withdrawals, have been provided to the petitioner and the court with explanations.
21. Denied. See explanation on number 20.
22. Denied. As ruled by Judge Kimball, the Respondents primary responsibility was to the Trustee and, after his passing, to the Trust.
23. Denied.
24. Agreed. All records pertaining to the Trust have been previously been turned over to the Petitioner's attorney(s).

25. Agreed. Annual trust reports have been provided to all beneficiaries since Respondent became the trustee. These reports have also been filed with the Court and respective attorneys.
26. Denied. All reports have met conditions set forth in the Trust and have had the approval of the Trust's attorneys.
27. Denied. The Respondent is indemnified as to court actions according to the terms of the Trust.
28. Denied.
29. Denied.
30. Agreed. The agreement between attorneys and filed in the court, was that Ms. Palinski's accounting range was to go back to January 2013 but, **after complaints from the plaintiff**, Ms. Palinski took it upon herself to go back to 2008, thus resulting in higher costs to the Trust for the accounting that found no wrong doing on the part of the Trustee.
31. Agreed.
32. Agreed. A limited comingling of minor amounts of money was done by the Respondent until it was pointed out by the Trust attorney that this was not permitted and it was stopped immediately.
33. Denied.
34. Denied. All funds, including bank statements and copies of all financial records, were delivered to Petitioner with the resignation letter of Respondent, including copies of the checks sent to the restoration company, the plumbing

Company, the water company, and the remodeling company.

35. Denied.
36. Denied. The Respondent became the acting Trustee on May 6, 2013 and, by Court order, was not responsible for any actions, financial or otherwise, prior to that date.
37. Denied.
38. Agreed.
39. Agreed and has been provided.
40. Denied. Petitioner was provided with copies of all bank statements, stock and bond statements (Edward Jones), all checks and/or other withdrawals, along with explanations of all funds expended. Additionally, copies of all tax returns filed on behalf of John Vergeldt, Jr. and the Trust have been provided to Petitioner, her attorney(s) and the Court. Attorneys John Gettys, Dan Ballou and Don Harper were satisfied with the format and content of the reports.
41. Denied.
42. Denied.
43. Denied.
44. Denied.
45. Denied. Any loss of monies to the Petitioner are a direct result of her actions and nothing else.
46. Denied.
47. Agreed.

- 48. Agreed.
- 49. Denied.
- 50. Denied.
- 51. Denied.
- 52. Denied.
- 53. Denied.
- 54. Agreed.
- 55. Agreed.
- 56. Denied.
- 57. Denied.
- 58. Denied.
- 59. Denied. Please see number 45.
- 60. Denied.
- 61. Agreed.
- 62. Denied.
- 63. Denied.
- 64. Denied.
- 65. Denied.
- 66. Denied.
- 67. Agreed.
- 68. Denied.
- 69. Denied.

- 70. Denied.
- 71. Denied.
- 72. Agreed.
- 73. Agreed. The cottage, and all of its associated property, buildings, boats, and all contents held within or attached to, passed to the Trust upon the Trustee's death on July 9, 2013.
- 74. Agreed.
- 75. Denied.
- 76. Denied.
- 77. Agreed.
- 78. Denied. The disrepair at the cottage is a direct result of the Petitioner's actions and no one else.
- 79. Denied.
- 80. Denied.
- 81. Denied.
- 82. Agreed.
- 83. Denied.
- 84. Denied.
- 85. Denied.
- 86. Denied.
- 87. Agreed.
- 88. Agreed.

- 89. Denied.
- 90. Denied.
- 91. Denied.
- 92. Denied. Any loss to the Petitioner was directly due to her actions.
- 93. Denied.
- 94. Agreed.
- 95. Denied.
- 96. Denied.

WHEREFORE, Respondent prays that the Court issue its Order.

- A. Not award Petitioner any damages.
- B. Deny declaring a constructive trust over Respondent's property since he is indemnified by the Trust.
- C. Respondent is entitled to his share of any inheritance rights.
- D. Not awarding Petitioner any litigation costs, including reasonable attorneys' fees and related expenses from Respondent, from his final distribution, and/or from the assets of the Trust since Respondent is indemnified by the Trust.
- E. Award Respondent loss of income from his job at Delta Private Jets where he suffered from stress induced myocarditis brought on primarily by the continuing litigation and false allegations created by the Petitioner.
- F. Award cost of uncovered medical bills from item E above.
- G. Damages for Intentional Interference with a Valid Legal Contract whereupon the Petitioner has intentionally been putting continuing stress on Respondent's

Marriage.

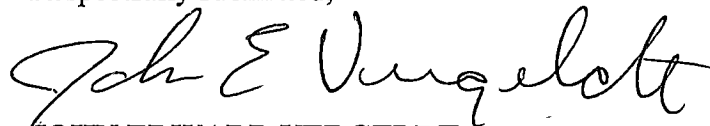
- H. Reimbursement from Petitioner to the Trust for repairs to the cottage that were stopped by Petitioner's previous legal court action, thus resulting in more damage to the cottage.
- I. Reimbursement from Petitioner to the Trust to cover the cost of all litigation costs, including reasonable attorney's fees and related expenses for all court actions initiated by Petitioner since 2012.
- J. Petitioner to be disinherited per the terms of the Trust immediately.
- K. If J is denied, then Petitioner must give keys and access to the cottage to all beneficiaries immediately.
- L. If J is accepted, the Petitioner may keep her received share of her inheritance but lose all rights to future Trust assets.
- M. Petitioner must provide to Respondent all copies of ALL legal bills and copies of all her personal and/or business accounts showing payments for all legal and court expenses from 2012 to present.
- N. Petitioner to pay damages, as the court may award to Respondent, for **ALIENATION OF AFFECTION**, in her attempt to alienate Respondent from family members, and coercion of Suzanne Vergeldt to commit perjury in Judge Kimball's court.
- N. Punitive damages to Respondent from Plaintiff and/or Attorney for continued **MALICIOUS PROCESUECTION** without cause.

- O. Petitioner to pay Respondent his court agreed \$100 (one hundred dollars) per Month Trustee fee that that her attorney would not give approval for payment for to me from April 2018 to April 2019, in the amount of \$1100.00 (eleven hundred dollars).
- P. Per Judge Kimball's order in April 2018, the Trustee MUST get permission from the other beneficiary or their attorney, prior to the expenditure of any funds from the Trust. Petitioner has refused to do so. Respondent requests records of all payment from Petitioner on behalf of the Trust since May 1, 2019 and enforcement of this ruling.
- Q. Petitioner has had access and has been seen at the cottage during the past six (6) years. Respondent requests a complete revised inventory of the cottage, outbuildings and their contents. Respondent has not been in the cottage since the fall of 2013.
- R. Declaring a constructive trust over Petitioner's Property in the amount of The Trust property, its contents and legal costs to be returned to the Trust for her court actions taken against the Trust in the approximate amount of \$150,000.00 (one hundred fifty thousand dollars).
- S. In lieu of all these requests, Respondent would like the Court to dismiss the case in its entirety with prejudice, have Plaintiff disinherited and sign a notarized statement saying that she will no longer sue Respondent, his heirs and successors for anything related to the Trust and, if she files any court actions,

she agrees, to pay for all court and attorney costs for Respondent, heirs and successors.

The reason for this request is because the Plaintiff has been asking to be appointed Trustee since before John Vergeldt, Jr. passed away. Judge Kimball stated in the first hearing in 2014 that, it appeared to him that the Plaintiff and her attorney were preparing a second lawsuit no matter how the Judge ruled. The attorney for the Plaintiff said, NO, THIS WAS GOING TO BE THE ONLY LAWSUIT. Since then, the Plaintiff and various attorneys have filed two more lawsuits. In April 2018, Judge Kimball refused to remove me as Trustee and appoint Plaintiff as the Trustee, either temporary or permanent. I thought if I gave her what she wanted and made her the Trustee, all this would go away. It appears she is on personal vendetta against me and will not stop unless the Court stops her. The only valid action, per the terms of the Trust, are to disinherit Plaintiff.

Respectfully submitted,



JOHN EDWARD VERGELDT

P.O. Box 202

Johns Island, SC 29457-0202

Phone (843) 302-6199

vergeldt@aol.com

August 17, 2019
Charleston, South Carolina

ROA 000631

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	
	)	Case No. 2016-CP-46-00820
Vicky Lynn Vergeldt, Individually,	)	
and as Successor Trustee of the John	)	
Vergeldt, Jr. Revocable Living Trust	)	
Dated September 27, 1978,	)	
	)	MOTION TO RECONSIDER
Petitioner	)	
vs.	)	
	)	
John Edward Vergeldt,	)	
Respondent	)	

Pursuant to Rule 59 (e), SCRCPP, Respondent John Edward Vergeldt seeks reconsideration by this Court of its order which was filed on February 2, 2021 and, to the extent necessary to reconsider and amend or vacate prior temporary orders which were not appealable at the time they were issued. In support of the motion, Respondent would show:

1. The trial court erred in its final order in granting relief not requested in the complaint, *i.e.*, a cause of action for breach of fiduciary duty and an award of damages when this relief was not pleaded in the complaint.
2. The trial court erred in failing to grant Defendant a jury trial on a claim for breach of fiduciary duty and prayer for damages (had such relief been sought in the pleadings). Defendant has been denied his constitutional right to a jury trial.
3. The trial court erred in *sua sponte* terminating Respondent's interest in the trust, in that the relief was not requested in the pleadings. (Order filed September 12, 2019)
4. The trial court erred in not addressing Defendant's Second Defense (Waiver, Estoppel, Laches, Unclean Hands) in that relief awarded in this action should have been precluded by the final order in Case No. 2014-CP-46-01956. Plaintiff was

ROA 000631

ROA 000632

barred from litigating in a second action issues which should have been raised in the 2014 action. Issue preclusion prevents the majority of relief granted by this Court in its final order.

5. The trial court erred in failing to apply the correct standard of proof in this matter¹, using Tenth Amendment to Seventh Paragraph (dated March 7, 2011) which expressly limits a successor trustee's liability ". . . to an act or omission committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries."
6. The trial court erred in *sua sponte* freezing the trust and requiring plaintiff's consent and court approval for expenditures (Order dated May 21, 2018) when no such relief was requested in the pleadings. By making future expenditures subject to the consent of plaintiff, Defendant was unable to make needed repairs to a trust asset due to Plaintiff's refusal to cooperate, and damages for that asset should not be assessed against Defendant since the court's order precluded him from acting.
7. The trial court erred in excluding from evidence and failing to consider the affidavit of Audry L. Scheible and attachments.
8. The trial court erred in denying Defendant's motion to disallow the report of Bosler & Company P.C. when it was not based on actual knowledge, included transactions which for which settlor was solely responsible and which Defendant could not

¹ By raising this issue on reconsideration, Respondent does not waive Issue No. 1 or any other issue raised here, and reserves the right to appeal this court's decision on other issues raised herein independently based on the final order in Case No. 2014-CP-46-01956

ROA 000632

ROA 000633

preclude, and it included legal analysis which the company was not qualified to provide².

9. Additionally, the court erred in allowing the report and testimony of Bosler since Plaintiff ailed to timely provide a copy of the report to Respondent until the day of trial (proof of late mailing provided after the hearing).
10. The trial court erred in excluding Respondent's submission in response to the Bosler report, since the report was submitted *in lieu* of cross examination and was allowed to enable informed examination after receipt of the Bosler report.
11. The trial court erred in finding Respondent responsible for acts and occurrences which occurred prior to the death of the Settlor, who was, until his death on July 9, 2013, solely responsible for administration of the trust.
12. The trial court erred in determining a breach of fiduciary duty occurred when no legal expert testimony was introduced.

Respondent further requests that, since his counsel is new to this proceeding, he be permitted to obtain transcripts of relevant proceedings before this motion is considered on the merits, to allow amendment to raise additional issues that may be revealed by the transcripts. Defendant is further informed and believes that transcripts would be of use to the Court and opposing party in connection with the instant motion.

Respectfully submitted,

s/ Desa Ballard

Desa Ballard

Harvey M. Watson III

BALLARD & WATSON

² Counsel does not presently have the transcript of proceedings and cannot know at this point whether Mr. Bosler was qualified as an expert and, if so, in what fields he was so qualified.

ROA 000633

ROA 000634

226 State Street
West Columbia, SC 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com

ATTORNEYS FOR RESPONDENT

February 12, 2021

ROA 000634

ROA 000635

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	
	)	Case No. 2016-CP-46-00820
Vicky Lynn Vergeldt, Individually,	)	
and as Successor Trustee of the John	)	
Vergeldt, Jr. Revocable Living Trust	)	
Dated September 27, 1978,	)	
	)	AMENDED
	)	MOTION TO RECONSIDER
	)	
Petitioner	)	
vs.	)	
	)	
John Edward Vergeldt,	)	
Respondent	)	

Pursuant to Rule 59 (e), SCRCPP, Respondent John Edward Vergeldt seeks reconsideration by this Court of its order which was filed on February 2, 2021 and, to the extent necessary to reconsider and amend or vacate prior temporary orders which were not appealable at the time they were issued. In support of the motion, Respondent would show:

1. The trial court erred in granting the motion to amend in June, 2019 in that the character of the relief sought changed from equitable to equitable and legal and for the first time included a claim for breach of fiduciary duty and sought damages, thereby prejudicing Vergeldt in terms of the relief sought and denying his ability to request a jury trial.
2. The trial court erred in failing to grant Defendant a jury trial on a claim for breach of fiduciary duty and prayer for damages three years into the litigation. Defendant has been denied his constitutional right to a jury trial.
3. The trial court erred in failing to grant a continuance of the trial when Plaintiff failed to provide his exhibits and evidence to Respondent prior to trial, and leaving the trial

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ROA 000636

open for written submissions, which could not reasonably satisfy Respondent's inability to cross-examine witnesses whose testimony had been completed.

4. The trial court erred in *sua sponte* terminating Respondent's interest in the trust, in that the relief was not requested in the pleadings. (Order filed September 12, 2019).
5. The trial court erred in permitting hearsay into evidence regarding the opinions of others which was related into the record by Plaintiff and reports from third parties which had not been timely provided to Respondent, *i.e.*, prior to trial.
6. The trial court erred in not addressing Defendant's Second Defense (Waiver, Estoppel, Laches, Unclean Hands) in that relief awarded in this action should have been precluded by the final order in Case No. 2014-CP-46-01956. Plaintiff was barred from litigating in a second action issues which should have been raised in the 2014 action. Issue preclusion prevents the majority of relief granted by this Court in its final order.
7. The trial court erred in failing to apply the correct standard of proof in this matter¹, using Tenth Amendment to Seventh Paragraph (dated March 7, 2011) which expressly limits a successor trustee's liability ". . . to an act or omission committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries."
8. The trial court erred in *sua sponte* freezing the trust and requiring plaintiff's consent and court approval for expenditures (Order dated May 21, 2018) when no such relief was requested in the pleadings. By making future expenditures subject to the consent

¹ By raising this issue on reconsideration, Respondent does not waive Issue No. 1 or any other issue raised here, and reserves the right to appeal this court's decision on other issues raised herein independently based on the final order in Case No. 2014-CP-46-01956

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of plaintiff, Defendant was unable to make needed repairs to a trust asset due to Plaintiff's refusal to cooperate, and damages for that asset should not be assessed against Defendant since the court's order precluded him from acting.

9. The trial court erred in excluding from evidence and failing to consider the affidavit of Audry L. Scheible and attachments.
10. The trial court erred in denying Defendant's motion to disallow the report of Bosler & Company P.C. when it was not based on actual knowledge, included transactions which for which settlor was solely responsible and which Defendant could not preclude, and it included legal analysis which the company was not qualified to provide².
11. Additionally, the court erred in allowing the report and testimony of Bosler since Plaintiff ailed to timely provide a copy of the report to Respondent until the day of trial (proof of late mailing provided after the hearing).
12. The trial court erred in excluding Respondent's submission in response to the Bosler report, since the report was submitted *in lieu* of cross examination and was allowed to enable informed examination after receipt of the Bosler report.
13. The trial court erred in finding Respondent responsible for acts and occurrences which occurred prior to the death of the Settlor, who was, until his death on July 9, 2013, solely responsible for administration of the trust.
14. The trial court erred in determining a breach of fiduciary duty occurred when no legal expert testimony was introduced regarding proximate cause and in considering the

² Counsel does not presently have the transcript of proceedings and cannot know at this point whether Mr. Bosler was qualified as an expert and, if so, in what fields he was so qualified.

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ROA 000638

standard of care of a licensed fiduciary to establish the standard of care for a lay trustee.

15. The trial court erred in overruling or failing to be bound by the final rulings of Judge Kimball in Case 2014-CP-46-1956, specifically the final order dated August 31, 2015.
16. The trial court erred in refusing to permit into evidence documents submitted by Respondent after trial, when the remedy for submission after trial was the purported remedy for Plaintiff's counsel not giving Respondent exhibits prior to trial.
17. The trial court erred in failing to consider the record and exhibits from the 2014 proceeding.
18. The trial court erred in considering the testimony of Vicki Lynn Vergeldt, because her bias and prejudice caused her testimony to lack credibility.

Respondent's counsel was graciously provided with a copy of the trial transcript by Plaintiff's counsel, who also consented to a ten-day extension of time to supplement this motion.

Respondent further requests that his counsel be permitted to obtain transcripts of other prior relevant proceedings before this motion is considered on the merits, to allow amendment to raise additional issues that may be revealed by the transcripts if necessary. Respondent is further informed and believes that transcripts would be of use to the Court and opposing party in connection with the instant motion.

Respectfully submitted,

s/ Desa Ballard

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ATTORNEYS FOR RESPONDENT

February 22, 2021

ROA 000639

ROA 000640

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	
	)	Case No. 2016-CP-46-00820
Vicky Lynn Vergeldt, Individually,	)	
and as Successor Trustee of the John	)	
Vergeldt, Jr. Revocable Living Trust	)	
Dated September 27, 1978,	)	
	)	<u>RESPONDENT'S</u>
	)	MEMORANDUM IN SUPPORT
Petitioner	)	MOTION TO RECONSIDER
vs.	)	AND SUPPLEMENTAL MOTION
	)	TO RECONSIDER
John Edward Vergeldt,	)	
Respondent	)	

Respondent submits the following brief memorandum in advance of the hearing currently scheduled for Wednesday, March 17, 2021 (remotely).

Issue One¹

The trial court erred in granting the motion to amend in June, 2019 in that the character of the relief sought changed from equitable to equitable and legal and for the first time included a claim for breach of fiduciary duty and sought damages, thereby prejudicing Respondent in terms of the relief sought and denying his ability to request a jury trial². *Res judicata* barred any claim for damages in this action.

The prior action, Case No. 2014-GC-46-0012, a/k/a 2014-CP-46-1956, sought solely equitable relief. The order ending that action, filed August 31, 2015, contained the following specific statements:

¹ This discussion addresses Issues 1, 2, 3, 6, and 13.

² The parties consented to try the matter non-jury and refer the matter to this court by order filed March 27, 2018. At that time, the pleading only contained equitable claims, and trial before this court was appropriate. It was only when the order granting the amendment to include a legal claim for damages that Respondent had a right to request a jury trial. However, the matter was already before this court.

ROA 000640

ROA 000641

I make no finding relating to the liability of any party, or the lack thereof, as no claim is stated for breach of fiduciary duty, and no relief is sought from the court to compel the Trustee to perform any duties that may be required by the Michigan Trust Code.

[Vicki] has not directly challenged John's actions as Successor Trustee.

No finding or conclusion in this order shall be deemed to be a determination of compliance, or non-compliance, with applicable law, or the terms of the Trust Agreement. Further, no finding or conclusion in this order shall be deemed to establish the amount of any entitlement of any beneficiary under the terms of the Trust Agreement.

The doctrine of *res judicata* prohibited an amendment to the 2016 order to permit a claim for damages under any theory, because any claim for damages was ripe and should have been contained and resolved in the 2014 action.

It is a fundamental principle of jurisprudence that material facts or questions which were directly in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties or their privies, *regardless of the form that the issue may take in the subsequent action*.

The rule will also apply even though the subsequent action is upon a different cause of action and involves different subject matter, claim or demand, than the earlier action. In such cases, it is likewise immaterial that the two actions have a different scope or are based on different grounds, or are tried on different theories, or are instituted for different purposes and seek different relief.

Laughon v. O'Braitis, 360 S.C. 520, 527-528, 602 S.E.2d 108 (Ct.App. 2004) (emphasis in original).

When the instant action was brought, it sought equitable relief only, and related primarily to seeking equitable relief for ongoing administration of a trust. In the original complaint in the instant action, filed on March 16, 2016, three causes of action were asserted: petition to remove trustee, release of trust records, an accounting and a prayer for litigation costs. (Complaint dated March 16, 2016).

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Three years after the instant action was filed, Petitioner filed a motion to amend to add a claim for breach of fiduciary duty. (Motion dated May 14, 2019). The doctrine of *res judicata* prohibited the addition of any substantive claim that could have been litigated in the first action.

The original action was between the same parties and related to the same subject matter as the instant action. Therefore, a second action which sought to seek damages “might have been litigated in a prior action.” *Equivest Financial v. Ravenel*, 422 S.C. 499, 507, 812 S.E.2d 438 (Ct.App. 2018).

Res judicata precludes parties from subsequently relitigating issues actually litigated and those that might have been litigated in a prior action . . . *Res judicata* is the branch of law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies.

Id. 422 S.C. at 507³ (citations omitted).

The Court of Appeals focused on three elements which must be present in order for *res judicata* to apply. First, “same identity of the parties or their privies.” *Id.* at 508. Secondly, “requires the subject matter be identical.” *Id.* Third, the prior action must have resulted in a “final, valid judgment on the merits.” *Id.* 422 S.C. at 508-509. See also *Judy v. Judy*, 383 S.C. 1, 8, 677 S.E.2d 213, 217 (Ct.App. 2009) (“When claims arising out of a particular transaction or occurrence are adjudicated, *res judicata* bars the parties to that suit from bringing subsequent actions on either the adjudicated issues or any issues that might have been raised in the first suit”); and *Riedman Corp v. Greenville Steel Structures Inc.*, 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992) (“To establish *res judicata*, three elements must be shown: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.”). “*Res judicata* also bars subsequent actions by the same parties when the claims arise out of the same transaction or

³ In *Equivest Financial*, the Court of Appeals affirmed the trial court’s judgment on the basis of *res judicata* being raised as an additional sustaining ground on appeal, even though the issue was “not raised at trial.”

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occurrence that was the subject of a prior action between those parties.” *See also South Carolina Public Interest Foundation v. Greenville County*, 401 S.C. 377, 737 S.E.2d 502, 507 (Ct.App. 2012) (“*Res judicata*’s fundamental purpose is to ensure that no one should be twice sued for the same cause of action . . . the doctrine. . . flows from the principle that *public interest* requires an end to litigation, and no one should be sued twice for the same cause of action.

As Judge Kimball made clear in his final order in the prior action, no request was made in that action for damages for a determination of whether any funds or assets were due to any party. At any time, Petitioner could have sought to amend to include a claim for damages in the first action. As Judge Kimball stated in his final order, the settlor became deceased on July 9, 2013. The prior action was filed on February 25, 2014, and for whatever reason, sought only a declaratory judgment⁴ as to how the trust was to be construed⁵.

In his final order, Judge Kimball repeatedly pointed out that no damages had been sought in the prior action and only equitable relief was sought and granted. He clearly found it odd that an entire action had been litigated, addressing a time period which extended well after the decedent’s death, yet no legal claim for damages was included.

When the instant action was filed, the trust was still in effect, and Respondent was continuing to serve as trustee, and the complaint only sought equitable relief⁶. Since the instant action then focused on an existing trust over which the court maintains continuing jurisdiction,

⁴ The second cause of action sought a declaratory judgment that the Petitioner had probable cause to bring the action, which was also partly a declaratory judgment action, and a request for litigation costs. Judge Kimball did not rule on the request for a determination of probable cause, finding it premature. He denied the request for litigation costs.

⁵ An amended complaint filed on March 4, 2014 sought the same relief, re-wrote some allegations slightly, and attached documents from the trust agreement and numerous amendments to the trust made by the settlor prior to his death.

⁶ It appears the request for equitable relief became moot as the instant litigation proceeded, and the trial court’s final order ruled only on the claim for breach of fiduciary duty.

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there was no *res judicata* concern at the time the instant action was filed. See S.C. Code Ann. § 62-7-201(a)⁷ (internal affairs of a trust) and (c) (external affairs of a trust).

Petitioner's claim for damages could have and should have included in the first action. “.. [I]t is in the public interest that there should be an end of litigation that that no one should be twice sued for the same cause of action. *Nelson v. QHG of South Carolina Inc.*, 354 S.C. 290, 580 S.E.2d 171 (Ct.App. 2003)⁸, citing *First National Bank v. United States Fidl & Guar.Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945)⁹.

It was only when Petitioner sought to amend the instant action to include a claim for damages did *res judicata* become applicable. This Court's order granting the request to amend the complaint stated “I find and conclude that under the facts and circumstances of this case, there is no prejudice in granting leave to amend. . .” (Order dated June 13, 2019). This was clear error, because the amendment added a legal claim for damages for the first time, and *res judicata* prevented the amendment from being made. *Yelsen Land Company v. State of South Carolina*, 397 S.C. 15, 723 S.E.2d 592 (2012). “For purposes of *res judicata*. . . the concept of privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation.” *Id.* 723 S.E.2d at 596.

⁷ As is made clear in Section 62-7-201(b), the probate court's statutory jurisdiction concerns the internal affairs of a trust, but the trust code does not mandate “continuing supervisory” proceedings. Section 62-7-201 delineates the jurisdiction of the probate court and circuit court as to various matters regarding trusts. See Section 62-7-102 and 2013 Act No. 100, Section 4(A)(1) through (3), printed at Article 1, Title 62. See also Section 62-1-201(49) and 62-1-302(c). Subsection (d) addresses those issues originating in probate court that can be transferred to circuit court.

⁸ The Court of Appeals' decision in *Nelson* contains an instructive discussion regarding the different standards applied to *res judicata* and collateral estoppel. See 354 S.C. at 305.

⁹ At the conclusion of Day 2 of trial, Petitioner's counsel stated “. . . Judge, there's got to be an end to this litigation. This is – as you've heard testimony now, this has been seven years ongoing. Continuing to - - continuing to be forced to litigate or the threat of litigation is . . .” to which the Court responded “I agree, . . .” (Tr. P. 383, lines 18-23).

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The first litigation presented an opportunity to adjudicate all equitable and legal claims that existed at that time. Petitioner did not elect to seek damages in the first action, and she is precluded from seeking them in the instant action.

“*Res judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties. . . *Res judicata* ends litigation, promotes judicial economy and avoid the harassment of re-litigation of the same issues.” *Nelson v. QHG of South Carolina, supra*. 354 S.C. at 304.

It was error for the trial court to grant the motion to amend to add a legal claim seeking damages to the instant action. Respondent was entitled to demand a jury trial on the legal cause of action asserted for the first time, but because the case was being litigated non-jury, Respondent was deprived of his ability to demand a jury trial. The court’s finding that Respondent would not be prejudiced is incorrect. The amendment should not have been allowed.

This court’s final order states that “[b]oth actions concern Respondent’s handling and administration of the Trust as Co-Trustee and Successor Trustee.” Order dated February 2, 2021, p. 1. The issues were the same when the second action was brought, and at the time of the filing of the instant action, the relief sought was arguably not foreclosed since the probate court had continuing jurisdiction over (internal) matters of the trust. Only when the amendment was permitted did the character and nature of the instant action and to seek damages did *res judicata* become applicable and preclusive. The order granting the amendment was error.

The bulk of trial court’s “findings of fact” are largely identical to the factual issues that were necessarily litigated before Judge Kimball, when the effect of language in the trust and its various amendments had to be construed.

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Nothing in the instant action was done that could not have been done in the first action. A limited trustee could have been appointed to review trust records and to reconstruct what records may have been found not to exist. For whatever reason, cost or otherwise, Petitioner elected not to seek damages in the first action. Nothing prevented it. As the order focuses on assets and records that go back to December 31, 2008, all issues related to damages that were adjudicated here could have been and should have been litigated in the first action, if at all.

By way of example, in the amended petition, paragraph 28 refers to documents obtained in the prior litigation as having shown . . . “substantial and unexplained irregularities in Trust assets”. (Amended Complaint dated June 20, 2019). The amended petition was carefully worded to avoid the obvious bar imposed by *res judicata*. The amended petition claims that Petitioner did become aware of the “extent to which Respondent. . . took and spent trust assets and funds and commingled the same for his own benefit” but that was an issue that was squarely before the Court and could have been undertaken the first time around. (Amended Petition ¶ 32).

The order granting Petitioner’s Motion to Amend should be vacated and all proceedings following that order should be stricken.

Sua Sponte Relief (issues 4 and 8 in amended petition¹⁰)

Undersigned counsel acknowledges she was not counsel during the trial court proceedings, and her view is necessarily limited by transcript, exhibits and the chronology and documentation drawn from the clerk’s docket¹¹. However, it appears no request was ever to the court to (1)

¹⁰ In ¶ 4 of the amended motion, Respondent’s amended motion inadvertently referenced the order dated September 12, 2019 as the operative order. The order which terminated Respondent’s interest in the trust was the order dated February 2, 2021.

¹¹ Opposing counsel has generously provided counsel with a copy of the transcript of proceedings on January 30-31, 2020.

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restrain operation of the trust; or (2) to adjudicate Respondent's interest in the trust. Both orders were *sua sponte* and not warranted or supported by the pleadings.

Even assuming it was permissible to grant the amendment to the Petition, the court may not grant relief unless it is requested in the pleadings and has been litigated.

In its order dated May 21, 2018, the trial court denied a motion for summary judgment made by Petitioner, in which she apparently sought to summarily remove Respondent as trustee¹². The motion for summary judgment which appears of record was filed on November 10, 2017 and sought only an order removing Respondent as trustee. (Motion signed November 7, 2017, filed November 9, 2017). In denying summary judgment, however, the court went beyond the requested relief and *sua sponte* issued an order to "restrain the Trustee pending a final disposition of this case to prevent further issues arising as to the use of Trust funds." Order dated May 21, 2018.

As is apparent from the proceedings which followed, Respondent was completely unable to make any expenditures to preserve trust assets following the court's *sua sponte* order, and on three occasions, filed for relief from this court because Petitioner would not consent to maintaining the trust property. The record reflects Respondent's inability to obtain Petitioner's consent to expenditures for maintenance of trust assets, which resulted in his resignation as trustee since he was unable to perform his duties. See Application for Approval of Payment filed August 29, 2019, Objection to Application for approval of Payment filed September 4, 2019, and order dated September 12, 2019¹³.

¹² This motion dated November 7, 2017 was filed more than a year *before* Petitioner moved to amend her Petition to seek damages. The error in granting the motion to amend is discussed in Part One of this memorandum.

¹³ This order appears to have been issued following a status conference, and it, too, granted *sua sponte* relief. No motions appear which support any of the relief granted in this order. The order references "documents submitted to the Court" which are not identified and are not a part of the clerk's file. On information and belief, since Petitioner became successor trustee, she has not provided any evidence of trust activity under her watch.

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Paragraph 14 of the Court's final order states "In addition, any interest Respondent may have in these trust assets has been forfeited." (Order dated February 2, 2021, unnumbered page 10¹⁴).

The amended petition, in the Fifth Cause of Action, sought a declaratory judgment that "Respondent has received, at a minimum, all amounts to which he is entitled under the Trust and that Petitioner is not legally obligated to pay and/or distribute to Respondent the same." The amended petition makes this request in ¶ 68: "[u]pon information and belief, Respondent, while acting as Co-trustee or Successor Trust (*sic*) distributed to himself Trust property and/or assets in an amount equal to or greater than the amount to which he is entitled under the Trust." The amended petition also includes a claim for "unjust enrichment" and conversion, both of which sought an award of damages. Nowhere in the amended petition is a request made to adjudicate Respondent's interest in the trust.

It is clear that a court may not grant relief unless it is requested in the pleadings. *Norwest Properties LLC v. Strebler*, 424 S.C. 617, 819 S.E.2d 154 (Ct.App. 2018)¹⁵ (liberal construction of pleadings does not support awarding damages not prayed for in the complaint); *Pittman Mortgage Co. Inc. v. Edwards*, 327 S.C. 72, 488 S.E.2d 335 (1997); *Premium Investment Corp v. Green*, 283 S.C. 464, 324 S.E.2d 72 (Ct.App. 1984). See *Barnett v. Barnett*, 282 S.C. 343, 318 S.E.2d 570, 572 (Ct.App. 1984) ("Normally a party may not receive relief not requested in the pleadings."). See also *Repko v. County of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018) (reversing the Court of Appeals for raising and ruling on an issue *sua sponte*.)

¹⁴ It is possible this resulted from a statement interjected into the record by Charles Bosler, a CPA who submitted a report at the request of the plaintiff. "So then I've heard the plaintiff say she would like to ask that the first successor trustee not be allowed any distribution because he violated the trust from the get-go." (Tr. P. 294, lines 18-22).

¹⁵ In its opinion, the Court of Appeals discussed the provisions of Rule 15(b), which allows an amendment to conform to the proof, but specifically states that "a court may not *sua sponte* invoke the second portion of Rule 15(b), citing *Green County Food Market Inc. v. Bottling Group*, 371 F.3d 1275, 1280-81 (10th Circ. 2004).

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Had Petitioner sought to amend her pleadings prior to, or immediately after judgment, it may have been within the court's authority to grant relief not previously requested in the pleadings, under the theory that the issue was impliedly tried. However, once the pleading defect has been pointed out, Respondent submits that allowing an amendment at this point would not serve the interests of justice, especially in light of the *res judicata* bar that prevented an award of damages of any kind and would be severely prejudicial since Respondent is entitled to the benefit of the defects in pleading from the 2014 case that resulted in Judge Kimball's order.

The orders dated May 21, 2018 (to the extent that it granted relief not requested) and that portion of the final order dated February 2, 2021 should be vacated.

Standard of Proof¹⁶

As is apparent from the record in this case, prior to his death the Settlor amended the trust on numerous occasions. The full trust was admitted into evidence without objection¹⁷ at trial as Plaintiff's Exhibit 3. (Tr. 1.30.2020, P. 66, lines 5-25).

The Tenth Amendment to the Trust Agreement dated March 7, 2011¹⁸ changes several provisions of the then-existing trust, and added a new provision as follows: "The following paragraph should be added to the end of Paragraph SEVENTH¹⁹:

¹⁶ This addresses Issue 7 in the Amended Motion to Reconsider.

¹⁷ Respondent objected to the admission of the trust document unless it included all ten amendments. (Tr. P. 66, lines 3-25).

¹⁸ The copy of the Tenth Amendment in possession of the undersigned bears a clerk of court's stamp dated February 1, 2016, so the Tenth Amendment may already have been a part of the record before it was introduced at trial.

¹⁹ The additional provision added also provided for the "individual successor trustee [to] be indemnified from the applicable trust estate for reasonable legal expenses in defending any claim or action filed by a trust beneficiary, except for a claim or action based upon an act or omission by the Successor Trustee to have been committed in bad faith or with reckless indifference to the purposes of the trust. . ."

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An individual Successor Trustee's liability is limited to an act or omission committed in bad faith or with reckless indifference to the purpose of the trust or the interests of the beneficiaries.

(Plaintiff's Exhibit 3, Tenth Amendment, page 3-4).

To the best of counsel's knowledge, there appears not to have been a discussion at trial as to the applicable standard of proof. This court's final order omits reference to the burden of proof applied to the factual findings in this matter²⁰.

In civil proceedings in South Carolina, the required burden of proof is "preponderance of the evidence" except as those matters which require "clear and convincing" evidence. *Gorecki v. Gorecki*, 387 S.C. 626, 693 S.E.2d 419 (Ct.App. 2010) (defining "preponderance of the evidence"); *Satcher v. Satcher*, 351 S.C. 477, 570 S.E.2d 535 (Ct.App. 2002) (defining "clear and convincing evidence").

"In South Carolina, there are two burdens of proof in civil law: the ordinary burden of 'greater weight' or 'preponderance of the evidence,' and a middle burden of 'clear and convincing.'" Sanders, Trial Handbook for South Carolina Lawyers (S.C. Bar Fifth Ed. 2020-2021) § 9:5²¹.

The trial court, not having recognized the applicable burden of proof as set forth in the Tenth Amendment to the Trust, necessarily relied on one of the two applicable common law burdens of proof. It is apparent the trial court did not recognize nor apply the significantly higher burden of proof applicable to an examination of allegations of wrongdoing by Respondent while acting as successor trustee, as set forth in the Tenth Amendment.

²⁰ The court's order states that "based on the testimony and other evidence, I make the following Findings of Fact and Conclusions of Law." (Order dated Feb. 2, 2021, unnumbered page 2).

²¹ Judge Sanders' book, in §§ 9:6 through 9:15, discussed the applicable burden of proof in various kinds of civil actions in South Carolina. There are a few statutory provisions which define the applicable burden of proof, none of which is applicable here. See § 9:4. "If there is no controlling statute or regulation, then the common law rules apply." *Id.*

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This issue is not resolved by reference to Judge Kimball's earlier order, because that order makes "findings of fact" after "consideration of any applicable burden of proof." (Order dated 8.31.2015).

The settlor may have been well aware of the degree of hostility and acrimony between his children, as he amended and restated the trust documents repeatedly, "seven times" as determined by this court. (Order dated February 2, 2021). It seems consistent with the settlor's understanding of the family dynamic that he established the highest possible burden of proof, second only to a "beyond a reasonable doubt" burden of proof, applicable only in criminal proceedings, before any of his children would be able to seek or obtain damages against the other in connection with trust activity. *Sanders, supra*, at § 9:13.

It also bears considering that the same Tenth Amendment included an indemnification provision for anyone who was sued for actions in his capacity as Successor Trustee (and significantly, not as "co-trustee"). "The individual Successor Trustee shall be indemnified from the applicable trust estate for reasonable legal expenses in defending any claim or action filed by a trust beneficiary, except for a claim or action based upon an act or omission by the Successor Trustee to have been committed in bad faith or with reckless indifference to the purposes of the trust." (Plaintiff's Exhibit 3, Tenth Amendment p. 4²²).

This court's order cannot be construed in any sense to have applied the applicable burden of proof as required by the settlor. Paragraph 11 of the court's order makes a finding that Respondent "failed to adhere to the term of the trust and his fiduciary duties. . ." Paragraph 12

²² It also bears noting that the Tenth Amendment set forth numerous situations in which any beneficiary forfeited his or her interest in the trust, one of which is "objects in any manner to any action taken or proposed to be taken in good faith by the Successor Trustee . . ." Applied to the instant action, since Plaintiff did not plead or even recognize the applicable burden of proof established by the settlor, the Plaintiff should have forfeited any interest she had in the trust.

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referenced “lack of recordkeeping and commingling of funds.” Paragraph 13 says Respondent “mishandled” certain matters and Paragraph 14 finds that he “failed to follow the terms of the trust.” Under no circumstances did the court’s findings rise to the level required by the settlor as a precondition to one of his children seeking damages from the other.

In addition to the grounds set forth above, Respondent seeks an order vacating the factual findings and conclusions of law based on the court’s failure to apply the burden of proof specified by the decedent in the trust.

Absence of Expert Testimony²³

Plaintiff presented the expert testimony of Kathleen Palinski, a lawyer who “was a bank auditor and just has extensive experience being a court-appointed trustee/conservator dealing with these kinds of matters.” (Tr. P. 16, lines 11 – p. 17, line 1). Ms. Palinski also testified that she had taken a course offered by “cannon Financial Institute, . . . the preparatory course that leads to the examination as like a certified trust officer.” (Tr. P. 18, lines 17-23). Respondent did not object to Ms. Palinski’s qualification as an expert “in fiduciary standards.” *Id.* lines 4-6. Moreover, Respondent affirmatively recognized that he believed Ms. Palinski’s testimony “will be true and factual.” *Id.* p. 16, lines 9-10.

Ms. Palinski answered “no” when asked if Respondent’s “work as trustee have (*sic*) risen to the standards you testified earlier to?” (Tr. P. 42, lines 5-10). She further testified that “for someone who is not a professional trustee, [hiring a bookkeeper] is always recommended unless, you know, [the nonprofessionals] are accountants or something of that sort.” *Id.* lines 16 - 24). She opined that Respondent “breached his duties under the trust agreement” and “under the South Carolina probate code.” (tr. P. 43, lines 13 – 20). At no point, however, was Ms. Palinski asked

²³ Issue 14 in the Amended Motion to Reconsider.

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if, in her opinion, Respondent's acts or omissions proximately resulted in any damage to Plaintiff. As a result, Ms. Palinski's opinions did not address the legal standard, *i.e.*, damages, and proximate cause. (Tr. P. 43, lines 13 – 44, line 7).

Plaintiff also presented the expert testimony of Charles E. Bosler, a certified public accountant who had also worked internally in internal accounting at a Fortune 250 company (Tr. P. 254, lines 2 - 14). Bosler was certified as an expert in "accountancy and bookkeeping." (Tr. P. 256, lines 18-22). Again, Respondent did not object to Mr. Bosler's qualification as an expert in accountancy and bookkeeping. *Id.* lines 22-23.

Mr. Bosler did not testify to the standard of care of a Successor Trustee or whether he had any opinions regarding the conduct of Respondent. His area of expertise was numbers. As to numbers, most of Mr. Bosler's report and testimony was based on what he and his office guessed a prudent man might have done under the circumstances. (Tr. p. 273, lines 13-24; Tr. p. 274, line 23-p. 275, line 11; Tr. P. 276, line 22- p. 277, line 10; Tr. p. 277, lines 17-21; Tr. p. 278, lines 6-14; Tr.p. 280, line 15-p.281, line 3; Tr. p. 286, line 1-p. 287, line 13).

Mr. Bosler testified he had sufficient information "to make a good guess of what the trust had at each year end from 2008 and pretty good records from all the transactions that happened. Not a month-to-month for every account, but enough to make a lot of sense. . ." (Tr. p. 259, lines 5 – 16).

Mr. Boster repeatedly qualified his report and explained his inability to give precise numbers.

- Some of these might have had different names, but they all ended up being trust – treated as trust assets along the way, even if they were in an account with John Jr.'s name. (P. 261 lines 10-15).
- Those assets eventually got treated as trust assets later. So I included them in the accounting. *Id.* lines 16-19).

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- . . . however, at the bottom quarter of the page, you'll see off to the left, it says insufficient explanation and support, payments to, and it says who those entities are. . . some of those payment actually were explained. They were payments to beneficiaries. . . Tr. P. 262, line 3 – 14.
- So that's 154,000 let's say, initially of unexplained expenditures. . . it wasn't believed that John Jr. had any credit cards – at least not by Vicki. (Tr. P. 263, lines 8-14).
- . . . cash transfers out that we just don't know – sometimes we know that they went to that commingled account. . . with John E. Vergeldt's – him and his wife's name. . . but I can't say that all of those cash transfers – they just listed on the bank statements as cash transfers out. (Tr. P. 263, line 25 – p. 264, line 6).
- . . . if you go down the list, there's – there was a lot of checks written that we just never got the bank statements for, so we don't know what the checks are for." (Tr. P. 264, lines 16-19).
- . . . each year there's generally an operating loss of keeping the trust open, and generally there's not a profit; it's a loss, because the expenditures are more than revenue, even – because the investment income wasn't enough to pay for all of [decendent's] expenses to live. (Tr. P. 268, lines 10-16).
- I mean, all a person could do is go on a prudent man standard after that point, because there's no way to see what money was really spent on it from our viewpoint. (Tr. P. 273, lines 21-24).
- . . . this approach was arrived after reading both the trust agreement. . . lacking an exact accounting, judges sometimes go with what a prudent man might do. (Tr. P. 277, lines 6-10).
- So we tried to be fair all the way through, and it was largely our firm's judgment." (Tr. P. 282, lines 1-2).

Without having been qualified as having any knowledge in trusts, Bosler gave opinions as to what was required by a trustee under "the trust agreement itself as well as the laws of Michigan and South Carolina". (Tr. P. 284, lines 5-8; p. 285, line 5 – p. 19). Bosler opined that, as to the cottage, Respondent should not have complied with the trust agreement and should have

. . . looked for a solution right away instead of drag on expenses and have an asset out there subject to rapid depreciation if not cared for. And I – a prudent man would have looked for a solution to, hey, why don't one of you take this; I know our father wanted it in the family but that wasn't reasonable." distributed this whole thing and wrapped it up and would have been done, and it would have eased everybody's life."

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(Tr. P. 286, line 9 – p. 287, line 13).

Respondent objected to introduction of the Bosler report. “But he has made so many assumptions that he’s plugged into his numbers, I can’t agree to it. He’s made – and he has said so. . . what that means is you guessed – he guessed. . . So this entire report is a guess. And he never talked to me.” (Tr. P. 288, lines 23-25).

Even after overruling Respondent’s objection, Mr. Bosler continued to point out the assumptions upon which his report was based. “. . . we felt was over and above a prudent man spending. Then sometimes courts allow interest, so we put that number in just to ballpark that number in case the Court would find it appropriate.” (Tr. P. 293, line 14 – 22).

Bosler’s testimony veered so far outside his area of expertise, he not only testified as to the obligations imposed by the trust document and South Carolina law. (Tr. P. 284, lines 5-8; p. 285, line 5 – p. 19). However, he was not qualified as an expert in fiduciary law, nor could he have been based on the *voir dire* conducted prior to his qualification as an expert in accounting and bookkeeping. (Tr. P. 253, line 18 – p. 256, line 21).

He even testified to the amount of attorney’s fees incurred by Plaintiff and the “tab” that he was still running; he admitted he was unsure if the amount of attorney’s fees he was asking for on behalf of the Plaintiff “involved the 2014 lawsuit as well.” . (Tr. P. 298, line 22 – p. 299, line 17). His response was “I would assume so, but I can’t say for sure. You know, I don’t know.” *Id.*

Only one place in Mr. Bosler’s testimony makes a specific statement as to what Respondent should have done. “So he just didn’t seem to keep good records.” (Tr. P. 282, lines 22-23). The balance of Mr. Bosler’s testimony was, in fact, his own calculation based on admittedly incomplete records, and assumptions based on what he repeatedly referred to as the prudent man standard.

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“We felt that the prudent man’s duty is to safeguard the assets and maximize distributions. That’s what it says in the Michigan and South Carolina law.” (Tr. P. 296, lines 16-19).

The closest Mr. Boser ever came to attempting to offer testimony relevant to the damages claim was “let’s assume that if the Court said . . . that the first successor trustee violated his fiduciary duty. . . (Tr. P. 300, lines 9-11). Neither Ms. Palanski n or Mr. Bosler testified that, in their opinions, Respondent owed a fiduciary duty to Plaintiff, breached that duty, nor did they opine that Plaintiff had sustained any damages as a proximate result of Respondent’s action.

A claim for breach of fiduciary duty requires the plaintiff to prove “the existence of a fiduciary duty, a breach of that duty, and damages proximately resulting from the wrongful conduct of the defendant.” *Turpin v. Lowther*, 404 S.C. 581, 745 S.E.2d 397 (Ct.App. 2013). Failure to establish proximate cause is fatal to a claim for negligence. *Harris Teeter Inc. v. Moore & Van Allen PLLC*, 390 S.C. 285, 701 S.E.2d 742 (2010).

The court’s finding of breach of fiduciary duty cannot be sustained based on the lack of expert testimony, and specifically the failure to provide any opinion as to proximate cause. The trial court should vacate the finding of breach of fiduciary duty and the damages awarded.

Remaining Issues

The remainder of the issues raised by Respondent in his amended motion to reconsider relate to evidentiary matters and are not separately briefed. However, Respondent reserves all issues raised in his amended motion to reconsider and his ability to argue those issues at rehearing and/or on appeal.

[signature next page]

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Respectfully submitted,

s/ Desa Ballard

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ATTORNEYS FOR RESPONDENT

March 15, 2021

ROA 000657

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
TEASA K. WEAVER, MASTER-IN-EQUITY
Case No. 2016-CP-46-00820

Vicki Lynn Vergeldt, individually and as
Successor Trustee of the John Vergeldt, Jr.
Revocable living Trust dated September 27, 1978, ...Respondent,

v.

John Edward Vergeldt, ...Appellant.

NOTICE OF APPEAL

Appellant John Edward Vergeldt (hereafter “Appellant”) appeals from the order of the Master in Equity filed February 2, 2021 that was received by Appellant *pro se* on or about February 6, 2021, and from the order denying reconsideration dated July 2, 2021 that was received by the undersigned counsel for Appellant on July 2, 2021. Copies of both orders are attached hereto as **Exhibits A** and **B**, respectively.

In addition, Appellant appeals from that order dated June 13, 2019, which was an interlocutory order not appealable at that time, but is now appealed pursuant to Rule 54(b) and S.C. Code Ann. § 14-3-330 (1). A copy of the order dated June 13, 2021 is attached hereto as **Exhibit C**.

Appellant reserves the right to argue on appeal any intermediate judgment order or decree necessarily affecting the judgement not before appealed from, including but not limited to the order

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filed May 12, 2020 and the order dated May 21, 2018, copies of which are attached hereto respectively as **Exhibits D** and **E**.

Finally, Appellant appeals the order filed August 31, 2020, a copy of which is attached hereto as **Exhibit F**.

s/ Desa Ballard
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ATTORNEY FOR RESPONDENT

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

Vicki Lynn Vergeldt, Individually,
and as Successor Trustee of the John
Vergeldt, Jr. Revocable Living Trust
dated September 27, 1978,

Petitioner,

vs.

John Edward Vergeldt,

Respondent.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2016-CP46-00820

FINAL ORDER

RECEIVED

Aug 02 2021

SC Court of Appeals

THIS MATTER came before the Court for a final hearing on January 30, 2020. Present at the hearing was Petitioner Vicki Lynn Vergeldt ("Petitioner"), Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, her counsel, Taylor A. Peace, Esq., and Respondent John Edward Vergeldt ("Respondent"), who appeared pro se. The following witnesses appeared and testified: Kathleen Palinski, Esq., Court appointed Limited Special Trustee ("Palinski"); Charles E. Bosler, Jr. ("Bosler"); and Audry Scheible.

FACTUAL AND PROCEDURAL BACKGROUND

This is the second legal proceeding between Petitioner and Respondent who are siblings and the last surviving heirs of John Vergeldt, Jr ("Settlor"). Another sister, Patricia Vergeldt Downey ("Patti") survived the Settlor, but she died on September 28, 2018. Both actions concern Respondent's handling and administration of the Trust as Co-Trustee and Successor Trustee.

In the first action, (C/A No.: 2014-46-1956), Petitioner sought to have certain provisions of the trust construed regarding Respondent's duty to account and produce records as well as to have the Court declare the date when the Settlor became incapacitated.

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Petitioner brought the current action in the York County Probate Court on February 1, 2016 seeking to have Respondent removed as Successor Trustee, and Respondent timely responded to the same. Initially, Respondent was represented by Daniel J. Ballou, Esq. The action was removed to the Court of Common Pleas for York County on March 16, 2016.

Due to the matters at issue, the parties consented to appoint Kathleen Palinski, Esq. ("Palinski"), as non-fiduciary Limited Special Trustee, who was empowered and authorized to obtain documents and information about the Trust related to any account(s) at any bank, investment house, or other financial institution, including, but not limited to, statements, account ownership documents/signature cards, correspondence and/or check copies.

On April 29, 2019, Respondent resigned his position as Successor Trustee of the Trust and Petitioner became the Second Successor Trustee. Having resigned as trustee, Respondent filed a motion to have the action dismissed. The motion was denied, and Petitioner was allowed to file an Amended Petition for Removal of Trustee and Related Relief on June 20, 2019.

At trial in January 2020, Respondent objected to certain exhibits offered by Petitioner, stating he had not received the exhibits. This matter was deferred, and an order issued on May 12, 2020 allowing the Respondent thirty days to provide responding affidavits. On August 31, 2020, an order was filed specifying what affidavits or exhibits filed by Respondent after the trial were received into evidence.

With this factual and procedural background set forth, based upon the testimony and other evidence, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On September 27, 1978, Mr. Vergeldt ("Settlor"), executed the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, in which he identified himself as Trustee and

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beneficiary. This trust was amended seven times prior to the current Restatement of Trust, executed on July 29, 2009. The Restatement appointed Respondent to serve as Co-trustee of the trust during the Settlor's lifetime, vesting him with all of the powers, duties and obligations of trustee, and giving him binding decision-making authority for the trust as if made by the Settlor as trustee.

2. Following the Restatement, the trust was amended two additional times; first in February 2010 to account for the death of the Settlor's son, David Leigh Vergeldt (NINTH AMENDMENT); and second in March 2011 to name Respondent as the initial successor trustee and amend other portions (TENTH AMENDMENT).

3. Relevant paragraphs of the trust include the FIFTH (residuary trust), SIXTH (cottage and beneficiary distributions), FOURTEENTH (trustee duties), and EIGHTEENTH (forfeiture). Portions of these paragraphs were amended by the TENTH AMENDMENT.

4. From approximately 2005 through his death on July 9, 2013, the Settlor experienced a decline in his mental and physical condition brought on by Parkinson's disease. The symptoms the Settlor experienced were primarily related to his physical condition, but they, over time, impaired his ability to function physically and mentally until his death on July 9, 2013.

5. In 2008, the Settlor lived independently in a retirement community where he remained until sometime in 2010 when he moved in with Petitioner. In October 2011, the Settlor was moved to Patti's home, and resided there until his transfer to Respondent's home in South Carolina in January 2012. The Settlor resided with the Respondent in South Carolina until his death in July 2013.

6. Following the Settlor's death, Petitioner requested that Respondent provide her with records and accounting as he had proposed distributing assets. It was at this point that the

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relationship between the Petitioner and the Respondent became strained and hostile. While Petitioner continued to make request for records and information, the Respondent demanded she sign a release, or be disinherited. Ultimately, Petitioner filed the first civil action between the parties.

7. The first action was presided over by the Honorable S. Jackson Kimball, III, Master-In-Equity for York County and resulted in a bench trial. As discussed previously, this action decided what reporting and accounting duties were owed to the Petitioner. No findings or conclusions were made as to whether or not Respondent breached those duties.

8. After trial, Judge Kimball ordered as follows (“2015 Final Order”):

- a) the Settlor became mentally incapacitated under the terms of the trust as of May 6, 2013;
- b) Respondent became Co-Trustee on July 29, 2009, and Successor Trustee on May 6, 2013;
- c) Respondent has a duty to provide Petitioner with “a copy of the terms of the trust that describe or affect the trust beneficiary’s interest and relevant information about the trust property” without limitation as to time.
- d) Respondent has a duty to provide statements of account, at least annually, to Petitioner, and to permit inspection of the records since the Settlor’s death.

9. Following the 2015 Final Order, this action was brought in probate court where Palinski was appointed as limited special trustee for the purpose of reviewing Respondent’s administration of the trust. Palinski received some records from Respondent, but also had to subpoena various financial institutions to piece together how the assets were disposed. She

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prepared an accounting of the trust's accounts, finances and assets covering the period between January 1, 2009 and December 31, 2016. Petitioner called her as an expert witness.

10. Petitioner also called Bosler as an expert witness who reviewed the records received by Palinksi. Bosler generated an accounting from the available data, and conducted a *pro forma* and prudent man standard assessment, starting from December 31, 2008, and ending April 30, 2019. The *pro forma* amount shows the adjustment made from the available data to the Prudent Man standard.

11. Both experts determined that the Respondent, while acting as Co-Trustee or Successor Trustee, failed to adhere to the terms of the trust and his fiduciary duties, including as follows:

- a. Comingling trust funds with his personal account;
- b. Comingling funds with accounts jointly owned with the Settlor or the trust;
- c. Failing to keep and maintain adequate records, and account for numerous cash withdrawals by check or ATM card;
- d. Failing to provide records or other information to Petitioner as beneficiary;
- e. Failing to be impartial and loyal to Petitioner as beneficiary;
- f. Failing to administer and distribute funds as directed by the trust.

12. Due to the lack of recordkeeping and comingling of funds, Palinski was unable to verify the frequent transfers to and from Respondent's personal account First Citizen's #9209; numerous checks written to cash from joint owned First Citizens account #4009; and frequent use of an ATM card from this same account. Bosler was also unable to resolve these and other transactions, including a \$17,000.00 withdrawal from a Fifth Third joint owned account in 2011. This was the same year that Respondent failed to provide an annual statement. The amount of

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unresolved withdrawals made while Respondent was Trustee reached \$64,410.00 at the time of Settlor's death. This amount increased to \$127,770.00 through his remaining time as trustee. Bosler's report also demonstrates the inaccuracies of Respondent's annual statements in comparison with the available data.

13. In addition to the unresolved transactions, Respondent also mishandled the Residuary Trust. Paragraphs FIFTH A and SIXTH direct how the Residuary Trust would be administered by the Successor Trustee. Initially, \$50,000.00 was to be separated from the Residuary Trust and placed in a "Cottage Trust", to be used solely for the Cottage's maintenance and expenses.¹ Second, \$6,000.00 was to be paid to each grandchild. Thereafter, the Successor Trustee "shall divide the balance of assets of the Residuary Trust into equal shares, one (1) share for each of Settlor's children."

14. At the time of the Settlor's passing in July 2013, the trust assets totaled \$479,703.00. Respondent paid \$48,000.00 to the grandchildren, \$60,000 to himself, \$60,000.00 to Petitioner, and \$51,000.00 to Patti.² Petitioner received no further payments, yet Respondent continued to distribute assets to himself and Patti. Notably in 2014, Respondent paid himself \$45,826.00, Patti \$35,836.00, and nothing to Petitioner.

15. Respondent also failed to follow the terms of the trust by allocating \$50,000.00 solely for the maintenance and upkeep of the Cottage. Also, while Respondent was Successor Trustee, the Cottage experienced mold, mildew or water and other damage, decreasing in value from \$62,500.00 at the time of Settlor's death to \$25,000.00.³

16. Based on the above, I find that Respondent, during his time as Co-Trustee and

¹ The "Cottage" is real estate located in Michigan described in more detail in Petitioner's exhibit 9.

² Patti's amount may have reduced to account for a vehicle gifted to her prior to the Settlor's death valued at \$10,000.00.

³ Petitioner's exhibit 9 contains a copy of the appraisal and estimate.

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Successor Trustee, not only failed to abide by the terms of the trust, but also failed in his fiduciary duties owed to the trust and the Petitioner as a beneficiary. As a result, Petitioner and the trust have suffered actual and consequential damages.

CONCLUSIONS OF LAW

Based on the forgoing Findings of Fact, the Court makes the following Conclusions of Law:

1. This Court has jurisdiction over the subject matter and parties and venue is proper pursuant to Rule 53, SCRCP and the Order of Reference filed in this matter on March 27, 2018.

2. As noted in paragraph FOURTEENTH E, the trust must be administered and construed in accordance with Michigan Law, thus this court will determine this matter according to the Michigan Trust Code, §700.7101 *et. al.*, and other applicable Michigan law.

3. First and foremost, a trustee should follow the terms of the trust. “Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes ...” M.C.L.A. §700.7801 (2010). Paragraphs FIFTH and SIXTH set clear terms for administration and disbursement of the Residuary Trust. Respondent ignored those terms as to the “Cottage Trust”, and failed to disburse funds equally between the beneficiaries.

4. Respondent, as Successor Trustee, also failed to follow the terms of the trust in FOURTEENTH A and C. Paragraph FOURTEENTH A required the Successor Trustee keep “full and accurate records of assets, receipts and disbursements, and other financial transactions relative to each trust”, and allow for inspection. Further, the burden rests upon the trustee, under either Michigan or South Carolina law, to show the correctness of his accounting. *See Long v. Earle*, 277 Mich. 505, 269 N.W. 577 (1936); *Neely v. People’s Bank of Anderson*, 133 S.C. 43, 130 S.E. 550 (1925). Respondent failed to adequately account for numerous transactions to his personal

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account, checks written to cash, and ATM purchases/withdrawals. He also failed to provide full and accurate annual statements, or make them available for Petitioner at her request. Respondent also failed to pay all “proper” disbursements as required by FOURTEENTH C by withholding funds from the Petitioner.

5. In addition to the terms of the trust, Michigan Trust Code §700.7811(1) required Respondent to maintain adequate records. In this case, Respondent failed to provide a 2011 annual statement, and the statements or other information he did provide were incorrect or insufficient.

6. Respondent breached the trust by comingling funds. “A trustee shall keep trust property separate from the trustee’s own property” M.C.L.A. §700.7811(2) (2010). It is apparent that Respondent over several years as both Co-Trustee and Successor Trustee comingled trust funds with his own personal account First Citizen account #9209, or accounts he jointly owned with the Settlor or the trust.⁴

7. Respondent failed in his statutory duties to provide information and records to the Petitioner, as a beneficiary. According to Michigan Trust Code §700.7814, a trustee shall:

Upon the reasonable request of a trust beneficiary, promptly furnish to the trust beneficiary a copy of the terms of the trust that describe or affect the trust beneficiary’s interest and relevant information about the trust property.” M.C.L.A.

§700.7814(2)(a) (2010); and

[S]end to ... qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust property and, if feasible, their respective market values ...”

⁴ A more detailed list of the joint owned accounts is found in Palinksi’s report. (Petitioner’s 2, Tab 1).

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M.C.L.A. §700.7814(3) (2010).

Respondent breached his duties to the Petitioner by failing to account and report on the assets and funds despite Petitioner's multiple requests to do so, thus concealing from Petitioner his commingling and self-dealing of trust property.

8. Respondent, as trustee, owed a duty of loyalty to the beneficiaries. A trustee is obligated to protect the trust property, administering its assets as would a prudent person in accordance with the applicable statutes, for the benefit of the trust beneficiaries. M.C.L.A. §§ 700.7810, 700.7802, 700.7803 (2010). Respondent failed in these duties for the same reasons as discussed above. He failed to keep or provide records to Petitioner, comingled funds, distributed assets to Petitioner's harm and detriment, and failed to follow the terms of the trust regarding the Cottage and protect its value.

9. Respondent as trustee was to expeditiously distribute the trust property to those entitled, upon termination or partial termination of the trust. M.C.L.A. §700.7821 (2010). Following the Settlor's passing, Respondent partially terminated the Residuary Trust by making disbursements to the child beneficiaries in 2013. He should have promptly disbursed the remaining assets.

10. As a remedy for breach of trust, the trustee may be ordered to pay the amount needed to restore the value of the trust to what it would have been had the breach not occurred. M.C.L.A. §700.7902(2)(a) (2010). It is the opinion of this court that this analysis begins by establishing what amount the Residuary Trust should have been prior to any breach. I find that amount to be \$544,113.00, which includes the total assets that existed at the time of Settlor's death according to the available data (\$479,703.00), and the total of unaccounted for expenditures during Respondent's time as Co-Trustee prior to Settlor's death (\$64,410.00).

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11. Recognizing that Respondent made some beneficiary distributions, I conclude the amount stated above should be offset by the following: (1) \$48,000 to the grandchildren, (2) \$102,496.00 to Patti, and (3) \$60,000.00 to Petitioner. Further reduction should be made to include the remaining value of the Cottage (\$25,000.00), and by the amount of funds returned to the trust in November 2019 following Respondent's resignation as trustee (\$8,906.74). Therefore, I conclude the amount to restore the trust is \$299,710.26.

12. The trust is also entitled to be reimbursed for \$5,870.00 in costs related to determining the conditions of the Trust's assets and finances. *See* M.C.L.A. §700.7901(c) and (j) (2010) (The court may order the trustee to pay money, or other appropriate relief).

13. Respondent shall also pay reasonable attorney's fees and costs. *See* M.C.L.A. §700.7904 (2010) (Costs, expenses, and reasonable attorney fees, may be awarded to any party who enhances, preserves, or protects trust property...). Petitioner and the Trust have incurred attorney's fees and other related to costs to enforce her and its rights against Respondent in the amount of \$55,512.62. The Court concludes that Petitioner's attorneys' fees are reasonable, and she is entitled to the same under Deborah Dereede v. Living Trust dated December 18, 2013 v. Karp, 427 S.C. 336, 831 S.E. 2d 435 (Ct. App. 2019) and S.C. Code Ann. §62-7-1004 (Supp. 2018). In particular,

- a. Nature, Extent and Difficulty of the Legal Services Rendered. This is an action to remove Respondent as Trustee of the Trust and to seek damages from breaches of his fiduciary duties. The case involved complex issues of probate law including the preparation and examination of pleadings, discovery and the trial preparations. A two-day hearing was held by the York County Master-In-Equity, who required an order to be prepared by Petitioner's counsel. Accordingly, the factual and legal issues presented were complex and detailed in nature, the extent of the work performed was necessary to adequately prepare and try these matters, and the matters decided were of legal and factual difficulty.

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- b. Time and Labor Necessarily Devoted to the Case. As stated above, this case involved difficult issues of both legal and factual natures. Approximately One Hundred Seventy-Four (174) hours were devoted to the case by Petitioner's counsel's firm. This does not include amount by Petitioner's previous counsel. Accordingly, the time and labor devoted to this case were necessary to properly prepare and try this case.
- c. Professional Standing of Counsel. The attorneys representing Petitioner in this case are licensed members of the Bar of the State of South Carolina. Collectively, they have many years of experience in practice in South Carolina. The practice of Petitioner's attorneys consists of foreclosure cases, collection cases, real property closing transactions, real property litigation, land title questions, other land related litigation, probate and estate administration and related litigation. Accordingly, Petitioner's attorney has high professional standing in general and in this area of practices.
- d. Contingency of Compensation. As recited above, Petitioner is being charged an hourly rate in the pursuit of this matter, and the contingency of compensation is not appropriate.
- e. Customary Fee Charged on the Locality for Similar Services. I am aware from discussions with other attorneys in the Probate/Estate Bar in the Midlands region of South Carolina, and from my general familiarity with the legal profession, that the fees charged for services similar to those in this case are similar to those charged in other like cases. Accordingly, the fees charged in this case are within the fee range charged in this locality for similar services.
- f. Beneficial Results Obtained. This attorney obtained beneficial results for the Petitioner in this action in that the Court found in favor of the Petitioner. Accordingly, it is submitted that beneficial results were obtained by this firm on the Petitioner's behalf.

14. In addition, any interest Respondent may have in these trust assets has been forfeited. According to paragraph EIGHTEENTH of the Tenth Amendment, "[i]f any beneficiary of this trust ... in any manner, ... seeks to impair or invalidate any of its provisions ... then that person's right to take an interest given to him or her by this trust shall be determined as it would have been determined if the person had predeceased the execution of this Trust Agreement." Respondent's actions as outlined in this order, impaired or invalidated the terms of the trust; therefore, he should be treated as having predeceased the Settlor.

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15. As Respondent has failed to present any evidence related to his counterclaims, they are dismissed.

16. It is also appropriate that the Trust be wound up with the assets, property, and/or funds constituting the same be distributed according to the terms of the trust.

ORDER

Accordingly, and based on the Findings of Fact and Conclusions of Law set forth above,

IT IS ORDERED, ADJUDGED AND DECREED that the Trust, as a result of the above, is hereby granted judgment against Respondent in the total amount of \$361,092.88, said amount being comprised of: \$299,710.26, to restore the trust assets; additional expenses of \$5,870.00; and Attorney's fees and costs of \$55,512.62;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Respondent is hereby and shall be treated as having predeceased the Settlor;

IT IS ADDITIONALLY ORDERED that the judgment granted herein shall accrue interest at the legal post judgment legal interest rate; and

MOREOVER, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Petitioner shall take all reasonable and necessary steps to wind up the Trust's business and distribute any remaining assets to the living beneficiaries thereof not having been deemed to predecease Mr. Vergeldt.

FINALLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Respondent's counterclaims are herein **DISMISSED**.

[Judge's Signature Page to Follow]

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016-CP-46-00820

Vicki Lynn Vergeldt

PLAINTIFF(S)

John Edward Vergeldt,

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐
Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Vicki Lynn Vergeldt	John Edward Vergeldt	\$361,092.88
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

RECEIVED
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Aug 02 2021
SC Court of Appeals

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Judge

Judge Code

Date**For Clerk of Court Office Use Only**

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Cherie J. Anderson, RMR, RPR, CRR, with EveryWord, Inc.

A transcript of these proceedings can be obtained by making a written request to EveryWord, Inc. at P.O. Box 1459, Columbia, South Carolina 29202 or calling (803) 212-0012.

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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York Common Pleas

Case Caption: Vicki Lynn Vergeldt VS John Edward Vergeldt

Case Number: 2016CP4600820

Type: Order/Judgment and Form 4

So Ordered

s/ Teasa K. Weaver 3084

Electronically signed on 2021-02-02 14:01:44 page 15 of 15



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) CIVIL ACTION NO.: 2016-CP-46-00820

Vicki Lynn Vergeldt, Individually, and as
Successor Trustee of the John Vergeldt, Jr.
Revocable Living Trust dated September
27, 1978,

Petitioner,

vs.

John Edward Vergeldt

Respondent.

ORDER DENYING
MOTION TO RECONSIDER

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Aug 02 2021

SC Court of Appeals

THIS MATTER came before the Court on March 17, 2021 at 2:00 PM for a hearing on Respondent John Edward Vergeldt's ("Respondent") Amended Motion to Reconsider ("Motion"). Due to the ongoing public health crisis precipitated by the COVID-19 pandemic, the hearing took place *via* the internet-based video conferencing platform Cisco Webex as allowed by the Administrative Order of the Honorable Donald W. Beatty, Chief Justice for the Supreme Court of South Carolina, *Re: Operation of the Trial Courts During Coronavirus Emergency (As Amended March 4, 2021)* (Appellate Case No. 2020-000447). Present at the hearing was Taylor A. Peace, Esq., attorney for Petitioner Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Trust dated September 27, 1978 ("Petitioner") and Respondent's counsel, Desa Ballard, Esq. Petitioner also appeared.

In the Motion and Respondent's Memorandum in Support Motion to Reconsider and Supplemental Motion to Reconsider, Respondent argues the Court should reconsider its rulings in the Final Order entered on February 2, 2016. He also asks the Court to reconsider, amend or vacate other prior temporary orders entered during the present litigation.

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Respondent asserts the Court erred in allowing Petitioner to amend her initial Petition for Removal of Trustee and Related Relief (“Petition”) to assert legal causes of action and entitlement to damages. Respondent argues these causes of action are barred by the doctrines of *res judicata* and issue preclusion due to the rulings in the case of *Vicki Lynn Vergeldt v. John Edward Vergeldt, Individually, and as Successor Trustee of the John Edward Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 and Patricia Vergeldt Downey* (C/A No.: 2014-CP-46-01956) (“First Lawsuit”). Respondent also argues amendment of the Petition was in error as the case was already referred to this Court and Respondent was denied his right to a jury trial as a result. Respondent further asserts the Court erred by failing to apply the proper standard of proof and/or that Petitioner presented expert testimony to meet same, erred by freezing assets of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (“Trust”), and erred by allowing and considering certain items of Petitioner’s evidence while denying Respondent the right to rebut same.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After hearing argument of counsel and reviewing documents in the Court’s file, the following Findings of Fact and Conclusions of Law are made.

A. *Res judicata* and Issue Preclusion

In the Motion, Respondent argues the Court should reconsider, amend, and/or vacate the Final Order on the grounds the Order Granting Motion to Amend (“Order Allowing Amendment”) entered on June 13, 2019 and following Amended Petition for Removal of Trustee and Related Relief filed June 20, 2019 (“Amended Petition”) were in error based on the doctrines of *res judicata* and issue preclusion. This ground for reconsideration fails.

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“*Res Judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of prior action between those parties. Under the doctrine of *res judicata*, ‘[a] litigant is barred from raising issues which were adjudicated in the form suit and any issues which might have been raised in the former suit.’” Judy v. Judy, 393 S.C. 160, 172, 712 S.E. 2d 408, 414 (2011). (citing Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E. 2d 106, 109 (1999)). “The doctrine of *res judicata* is founded on the principle that the public interest requires an end to litigation and that no one should be sued twice for the same cause of action.” Town of Sullivan’s Island v. Felger, 318 S.C. 340, 344, 457 S.E. 2d 626, 628 (Ct. App. 1995). “*Res Judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.” Plott v. Justin Enterprises, 374 S.C. 504, 511, 649 S.E. 2d 92, 95 (Ct. App. 2007). “Under *res judicata*, ‘[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit’” Id (internal citations omitted). “To establish *res judicata*, three elements must be shown: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.” Plum Creek Development Co., Inc. v. City of Conway, 334 S.C. 30, 34 512 S.E. 2d 106, 109 (1999). However, *res judicata* does not bar a second action for damages and other relief where it follows a first action that seeks a declaratory judgment. See Robison v. Asbill, 328 S.C. 450, 492 S.E. 2d 400 (Ct. App. 1997).

Narrower than *res judicata* is the doctrine of collateral estoppel or issue preclusion. See Liberty Mut. Ins. Co. v. Employers, Ins. of Wausau, 284 S.C. 234, 237, 325 S.E. 2d 566, 568 (Ct. App. 1985) (internal citations omitted). 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.

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South Carolina Dept. of Transp., 385 S.C. 550, 553, 684 S.E. 2d 779, 782 (Ct. App. 2009). “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)). To prove a defense of issue preclusion, Respondent must show that the issues in this lawsuit were: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Id. The doctrine of collateral estoppel should not be rigidly or mechanically omitted. Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it. Id (internal citations omitted).

To avail themselves of these defenses, a party must affirmatively plead them or they are waived. See Rule 8(c), SCRCPP; RIM Associates v. Blackwell, 359 S.C. 170, 183, 597 S.E.2d 152, 159 (Ct. App. 2004) (“Res judicata is an affirmative defense that must be pled at trial in order to be pursued on appeal.....An affirmative defense is waived if not pled....Generally claims or defenses not presented in the pleadings will not be considered on appeal.”).

1. ***Res Judicata* and Collateral Estoppel Not Raised in Pleadings**

As applied to this matter, neither *res judicata* nor collateral estoppel were raised by the Respondent in his Answer and Counterclaim filed March 7, 2016 (“Answer”) or his Response to Amended Petition for Removal of Trustee and Related Relief and Request for Damages and Disinheritance of Plaintiff filed August 21, 2019 (“Amended Counterclaim”), and, as a result, they are waived. See Id. Because they were raised for the first time in the Motion, it would be improper for the Court to consider them. See Patterson v. Reid, 318 S.C. 183, 456 S.E. 2d 436 (Ct. App. 1995); Miller Construction Co., LLC v. P.C. Construction of Greenwood, 418 S.C. 186, 791 S.E.

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2d 321 (Ct. App. 2016).

2. *Res Judicata* Did Not Preclude Amendment of the Petition

Even if Respondent properly raised *res judicata* and collateral estoppel as affirmative defenses, it was proper for the Court to allow amendment of the Petition to assert legal causes of action for damages.

a. Amendment of the Petition was not in error based on *res judicata*.

As to the first element of *res judicata*, identity of the parties is not present. In the First Lawsuit, Petitioner brought her action against Respondent individually and as the successor trustee to declare, among other things, her rights in the Trust and entitlement to information concerning same. In contrast, the present action was brought, ultimately, by Petitioner individually and as successor trustee against Respondent for actions taken while he served as co-trustee and successor trustee that she believed were breaches of his fiduciary duties. In other words, the identity of the parties and their duties toward each other reversed between the First Lawsuit and this case such that the parties are not identical.

The second element of *res judicata* is also not present as there is no identity of subject matter between the First Lawsuit and present litigation nor did the First Lawsuit adjudicate Respondent's liability or Petitioner's resulting damages. In the First Lawsuit, Petitioner sought only declaratory relief related to: (1) John Vergeldt's Jr.'s ("Settlor") mental competency and lack thereof, (2) the effect Settlor's competency had on who was trustee of the Trust, (3) when Respondent became co-trustee and/or successor trustee, (4) his rights and obligations toward Petitioner as one of the Trust's beneficiaries, and (5) whether Petitioner had probable cause to pursue the First Lawsuit. To be sure, the final Order in the First Lawsuit filed August 31, 2015 ("2014 Final Order") found that no declaration concerning probable cause to challenge Respondent's performance of his duties as co-trustee or successor trustee was being made, and it

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was preserved until such time that Petitioner had adequate information, which Respondent was withholding, to challenge his actions. The 2014 Final Order further found no conclusion therein should be deemed to be a determination of Respondent's compliance or non-compliance with applicable law or the Trust. No damages were claimed or adjudicated in the First Lawsuit or 2014 Final Order. In contrast, the Amended Petition expressly seeks damages related to Respondent's actions relative to the Trust as co-trustee or successor trustee such that identity of subject matter does not exist. To the extent Respondent argues Petitioner should have brought a claim for damages in the First Lawsuit, the same is not persuasive as the relief requested was only declaratory. In particular, Petitioner brought the First Lawsuit to obtain information about the Trust and Respondent's actions which he was intentionally withholding, presumably, in an attempt to conceal his actions and frustrate her efforts to discover same. To rule otherwise as to the claim for damages would not be fair or just.

The same analysis applies to the third element of *res judicata* as Respondent's liability for his actions as co-trustee and/or successor trustee and damages to Petitioner and the Trust were not adjudicated in the First Lawsuit or needed to support to final decision in the 2014 Final Order. Those issues were also expressly preserved in the 2014 Final Order which went unappealed and from which Respondent has not sought relief.

b. Issue Preclusion is also not present such that allowance of the Amended Petition was not error

The argument that issue preclusion or collateral estoppel requires reconsideration of the Final Order also fails since Respondent's liability and Petitioner's resulting damages were not actually litigated in the First Lawsuit, were not determined, and were not necessary to support the 2014 Final Order. They were expressly preserved under the 2014 Final Order. Presumably, these issues were not litigated and preserved as Respondent did not or would not recognize his own

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duties toward the Petitioner and would not provide information relating to the Trust.

c. No error allowing Amended Petition

As a result, the Court finds and concludes that *res judicata* and issue preclusion did not prohibit the Court from allowing amendment and filing of the Amended Petition, and this ground for reconsideration fails.

B. Respondent's Right to a Jury Trial

Respondent also asserts he was denied his right to a jury trial on Petitioner's legal causes of action in the Amended Petition. This ground for reconsideration also fails.

Under Rule 38(b), SCRCP, "Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time after the commencement of the action and not later than ten (10) days after service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party." Rule 38(b), SCRCP. "The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of a trial by jury." Rule 38(b), SCRCP. Also, "[i]n equity the parties are not entitled, as a matter of right, to a trial by jury. However—counterclaims—including those raised in equitable actions—may, at times, be entitled to a jury trial. As we have previously explained: (1) if both the complaint and the counterclaim are in equity, the entire matter is triable by the court. (2) If both are at law, the issues are triable by a jury. If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial. (4) If the complaint is equitable and counterclaim legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim." Wachovia Bank, Nat'l Assn. v. Blackburn, 407 S.C. 321, 328-329, 755 S.E. 2d 437, 441 (2014). Also, Rule 53(b), SCRCP provides, "In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action may be referred to a master or special referee by order of a

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circuit judge or the clerk of court....Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court.” Rule 53(b), SCRPC.

In this matter, the Petition was filed February 1, 2016 in the York County Probate Court and Respondent filed his Answer and Counterclaim in which he asserted counterclaims for: (1) abuse of process, (2) malicious prosecution, (3) violation of the South Carolina Frivolous Civil Proceedings Sanctions Act, and (4) an action for a declaratory judgment. Respondent did not demand a jury trial in his pleading despite having the right to do so. The case was referred to this Court by Order of Reference filed March 17, 2018. The Amended Petition was then filed on June 20, 2019, and Respondent filed his Response to the Amended Petition on August 21, 2019 in which he failed to re-assert his claims or assert a demand for a jury trial. No separate jury trial demand has been filed or entered since.

Because of the nature of the claims Respondent raised in his Answer and Counterclaim, he could have demanded a jury trial when it was filed or shortly thereafter, but he failed to do so. He also could have demanded a jury trial when he filed his Response to Amended Petition and divested this Court of jurisdiction of the causes of action to which he is entitled under Rule 53(b), SCRPC, but he did not do so. In other words, Respondent waived his right to a jury trial under the applicable rules of civil procedure.

As a result, the Court finds and concludes that Respondent was not denied his constitutional right to a jury trial. He waived same, and, therefore, the Court is not required to reconsider, amend, and/or vacate the Final Order on that ground.

C. Sua Sponte Relief

Respondent additionally seeks to have the Court reconsider, amend, or vacate some of its prior temporary orders and/or Final Order due to the purported *sua sponte* relief granted during

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this litigation. This ground for reconsideration fails.

1. May 21, 2018 Order

The Court initially notes Respondent's description of the May 21, 2018 Order is a mischaracterization. The May 21, 2018 Order prohibited Respondent from making expenditures from the Trust without Petitioner's consent or order of the Court. If Petitioner's consent could not be obtained, Respondent could make application to the Court. The application was required to include the amount of the expenditure, an explanation of the necessity of the expenditure, and the bill, estimate, invoice or other documentation evidencing the need for an expenditure. In other words, the Trust assets were not frozen. Regardless, the injunction imposed by the May 21, 2018 Order became moot with Respondent's resignation as successor trustee effective April 1, 2019 such the Court is not required to reconsider, amend, and/or vacate same. See Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E. 2d 474.

It is additionally worth nothing that Respondent did not seek reconsideration of the May 21, 2018 Order under Rule 59, SCRCF or seek the appeal thereof which would have been allowed under S.C. Code Ann. §14-3-330 (4). As a result, the time for Respondent to seek reconsideration or appeal of the May 21, 2018 Order has passed such that the Court cannot reconsider same if it were not already moot.

Aside from the legal argument, there have only been two (2) instances in this litigation in which Respondent could not obtain Petitioner's approval for expenditures such that Court intervention was required. The first instance concerns the Application of John E. Vergeldt for Approval of Payment which was filed on May 30, 2018 ("First Application") and concerned expenses related to a cottage owned by the Trust located in Au Gres, Michigan. The Court's file reveals no order was entered approving or denying the First Application leaving the Court to assume Petitioner ultimately consented to the proposed expenditures. The second instance was

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the Application of John E. Vergeldt for Approval of Payment filed August 29, 2019 in which Respondent sought to have the Trust pay for his former attorney's fees and costs related to this litigation which the Court denied in the Order Regarding Trust Expenditures filed September 12, 2019 ("September 2019 Order"), as amended on November 26, 2019 on the basis Respondent had not followed the procedures in the May 21, 2018 Order. Court also imposed the same injunctive relief on Petitioner which has gone unappealed. If Respondent was unable to make expenditures related to the damage to the cottage as he claims, it was not because of the *sua sponte* relief issued by the Court.

Based on the above, the relief granted in the May 21, 2018 Order is not a ground for reconsideration, vacation, or amendment of the Final Order.

2. Termination of Interest in Trust

In addition to the May 21, 2018 Order, Respondent asserts the termination of his interest in the Trust set forth was not requested in the pleadings and is a ground for reconsideration; however, this argument fails.

Under Rule 8, SCRCP, "All pleadings shall be so construed as to do substantial justice to all parties." Rule 8, SCRCP. In order to achieve substantial justice for all parties, our courts have determined that pleadings should be liberally construed. Fountain v. Fred's, Inc., 429 S.C. 533, 839 S.E. 2d 475 (Ct. App. 2020). It is the substance of the requested relief that matters "regardless of the form in which the request for relief was framed." Richland County v. Kaiser, 351 S.C. 89, 94, 5767 S.E. 2d 260, 263 (Ct. App. 2002) (internal citations omitted). "Indeed, our supreme court has 'repeatedly held that that the plaintiff may obtain any relief appropriate to the case made by the pleadings and the evidence, without regard to the *form* of the prayer for relief'. Fountain at S.C. 487 (2020) (citing Beaty v. Mass Protective Ass'n, 160 S.C. 205, 207, 158 S.E. 206, 207 (1931)). "Especially is this true in an equity case." Id. In a similar vein, "Courts have the inherent

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power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible.” Ex parte Dibble, 279 S.C. 592, 595, 310 S.E. 2d 440, 442 (Ct. Ap. 1983).

Respondent correctly points out that a party may generally not be granted relief unless it is requested in pleadings. Norwest Properties, LLC v. Strebler, 424 S.C. 617, 819 S.E. 2d 154 (Ct. App. 2018). However, the Amended Petition alleges, among other things, that Respondent placed Trust assets in his own name, that he used Trust funds and assets for his own personal gain and to intimidate and harass Petitioner, distributed Trust assets in a way that was contradictory to the Trust, used them to pay for this litigation, and let Trust assets falls into disrepair and waste. The Amended Petition also alleges that Respondent concealed and/or attempted to conceal these actions from Petitioner and that he took the same willfully, recklessly and with conscious disregard to Petitioner’s rights. Attached to the Amended Petition was the Eighth Amendment and Complete Restatement to Trust Agreement between John Vergeldt, Jr., Settlor, and John Vergeldt, Jr., Trustee, the Ninth Amendment To Trust Agreement, and the Tenth Amendment to Trust Agreement. Under these documents, the Trust provides that a beneficiary is to be treated as if they predeceased Settlor if they seek to impair or invalidate any of the Trust’s provisions. Finally, the Amended Petition prays the Court issue such other and further relief as the Court deems just and proper.

Based on the evidence presented at the hearing in this matter, the Court finds that it, while sitting in equity, has the power to liberally construe the relief requested in the Amended Petition such that it can terminate Respondent’s interest in the Trust and enforce other provisions thereof to ensure that a just result is reached. As a result, the ground for reconsideration of the Final Order fails.

D. Standard of Proof

In addition to the above, Respondent asserts the Final Order should be reconsidered

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because the Court failed to include the appropriate standard of proof or apply same. Like those before it, this ground for reconsideration fails.

Respondent argument that the Final Order's failure to address the applicable standard of proof is based on the terms of the Tenth Amendment which states a successor trustee's liability would be limited to his/their actions taken in bad faith and with reckless indifference to the Trust. Respondent attempts to interpret this language to mean that the Court should apply the clear and convincing standard of proof rather than the lower standard of preponderance of evidence.

Respondent has cited no case or statutory law requiring a higher standard of proof, so the Court finds and concludes that the applicable standard of proof in this matter is indeed the preponderance of evidence standard. The Court finds and concludes that the same was applied in this matter based on the evidence was presented such that reconsideration is not required.

Even if the clear and convincing evidence standard of proof were required to be applied, the evidence presented the First Lawsuit and this action proves Respondent's liability and Plaintiff's damages by clear and convincing evidence. The record is clear. If not for Respondent's actions over the past seven (7) or more years of using Trust's assets to enrich himself to Petitioner's detriment, intentionally withholding information and records from her so that she could not exercise her rights under the Trust, and using the Trust to intimidate, harass and threaten Petitioner, the parties would not have become embroiled in two protracted litigations and incurred extensive attorney's fees to both of their detriments.

The Court also finds and concludes that the language of the Tenth Amendment related to proof of a successor trustee's bad faith and reckless indifference is of no assistance to Respondent as that term implicates a conclusion of law to be made by the Court. It does not correlate to a particular standard of proof that Petitioner must meet. As a result, this ground for reconsideration fails.

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E. Evidentiary Issues

Many of the remaining objections Respondent raises relate to evidentiary issues; however, these objections do not require the Court to reconsider, alter, and/or vacate its Final Order as the Court does not find that it abused its discretion as to the admission of Petitioner's or Respondent's evidence. See Moore v. Moore, 360 S.C. 241, 599 S.E. 2d 467 (Ct. App. 2004).

1. Timeliness of Production of Exhibits and Disclosure of Witnesses.

One of the evidentiary objections raised by Respondent concerns the timeliness of the production and disclosure of Petitioner's exhibits and witnesses. However, this objection fails.

During the first day of the trial, Respondent objected to Petitioner's exhibits on the grounds they were not timely produced. He claimed he had not seen them prior to. Respondent asked for a continuance on the second day of trial on these grounds. Petitioner was able to provide proof that the witnesses were disclosed and exhibits mailed to Respondent prior to trial albeit shortly before. The Court denied the request considering the age of the case and that Petitioner, her witnesses, and Respondent all traveled to York for the final hearing. However, the Court took the issue of the timeliness of the production of exhibits and disclosure of witnesses under advisement to determine if the same would be admitted into evidence.

After the hearing, Respondent filed multiple motions seeking to have some of Petitioner's witnesses and evidence excluded which are noted in the public record. The Court eventually allowed Respondent to present his own affidavits, reports and/or other proposed exhibits to the Court to eliminate any prejudice Respondent may have suffered, if any, due to the late production of documents and disclosure of witnesses as indicated in an Order entered May 12, 2020 which was amended by an Order Granting Petitioner's Motion to Alter or Amend entered August 31, 2020. In particular, the Court granted Respondent leave to procure his own expert to review the Trust's accounting records and prepare a rebuttal report to that of Plaintiff's expert, Charles E.

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Bosler, and to provide affidavits as to the condition of the Cottage. The only affidavits that Respondent submitted were those of Robert T. Nirenberg and Audry Scheible. The Court allowed the former, but the latter was excluded. Respondent also submitted an affidavit executed by himself related to Mr. Bosler's report that was excluded.

Regarding the timeliness of the production of exhibits and disclosure of witnesses, Rule 26(a), SCRCP provides, "Parties may obtain discovery by one or more of the following methods:....written interrogatories...requests for production..." Rule 26(a), SCRCP. "A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response include information thereafter acquired, except that requests for discovery under Rule 31, 33, 34, and 36 shall be deemed to continue from the time of service until the time of trial of the action so that the information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers have been submitted, shall be promptly transmitted to the other party" Rule 26(e), SCRCP. "In addition, a party is under a duty seasonably to supplement his response with respect to any question directly addressed to (1) the identity and location of persons having knowledge of discoverable matters, and (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony." Rule 26(e), SCRCP. Also, "[a]t any time after the commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery....Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan for discovery and schedule for discovery...." Rule 26(f), SCRCP. Relatedly, "[t]he order may, in its courts discretion, also: (1) provide that exhibits or witnesses not listed at the hearing may not be called or admitted in evidence at the trial, unless such witness or exhibit is discovered after pre-trial hearing and promptly disclosed to opposing parties." Rule 16(b),

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SCRCP. “The entire thrust of discovery rules involves full and fair disclosure, ‘to prevent a trial from becoming a guessing game or one of surprise for either party.’” Samples v. Mitchell, 329 S.C. 105, 113, 495 S.E. 2d 213, 217 (Ct. App. 1997) (internal citations omitted). “Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial...” Id at S.C. 113.

In this matter, the Court finds and concludes that the parties exchanged interrogatories and requests for production to which they both answered and/or responded. Also, no court order was entered dictating the time by which discovery had to be completed and/or finalized. Accordingly, either party could have and had a duty to supplement their answers to interrogatories and/or documents produced in response to requests for production at any time prior to trial which Petitioner did by mailing the objection to exhibits to Respondent’s last known address between three times between January 16, 2020 and January 28, 2020. See Rule 26, Rule 33, Rule 34, and Rule 5(b) (“Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and compliant”). The Court concludes that no violation of the discovery rules occurred as a result that would warrant the exclusion of the exhibits if that were Respondent’s position.

To the extent Respondent argues he suffered prejudice by not having the proposed exhibits and witnesses disclosed to him prior to trial as he claims, such prejudice was eliminated by the Court allowing Respondent to submit rebuttal affidavits as to the condition of the cottage as well as the opportunity to obtain his own qualified expert to rebut Mr. Bosler’s report which he failed to do during the six (6) month period after the final hearing. In other words, both parties were allowed an opportunity to offer the same type of exhibits into evidence as the other regarding the cottage and Respondent had an opportunity to but failed to procure an expert witness to rebut Mr. Bosler’s report.

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Accordingly, the timeliness of the production of reports and disclosure of Mr. Bosler as a witness is not a ground for reconsideration or amendment of the Final Order.

2. Hearsay

Respondent asserts in the Motion that the Court improperly allowed Petitioner to present hearsay into evidence. However, Respondent failed to timely object to said hearsay, if it existed, and the same is waived as result and cannot be a ground for reconsideration. See Patterson v. Reid, 318 S.C. 183, 456 S.E. 2d 436 (Ct. App. 1995); Miller v. Construction Co., LLC v. P.C. Construction of Greenwood, 418 S.C. 186, 791 S.E. 2d 321 (Ct. App. 2016).

3. Affidavit of Audry L. Scheible and attachments

The Court properly excluded the Affidavit of Audry L. Scheible and attached exhibits considering Respondent attempted to introduce same into evidence after Ms. Scheible presented testimony to the Court and she concluded same. If Respondent wished her to testify as to matters in the affidavit, he should have elicited it at the time of her testimony. The exclusion of her affidavit and attachments is not grounds for reconsideration.

4. Charles E. Bosler Report

Aside from the timeliness of the production of Mr. Bosler's report, Respondent argues the same should have been excluded for other reasons to include but not limited to the fact that it was not based on actual knowledge, included transactions for which the settlor was responsible and could not preclude, and included legal analysis. Tangentially, Respondent argued that the Court erred in failing to consider his written response to Mr. Bosler's report as it was *in lieu* of cross-examination.

In this matter, Mr. Bosler was Petitioner's witness, he provided testimony that he was provided the Trust's bank statements and other account records, and these records serve as the basis of his report. Mr. Bosler's report was based on his actual knowledge of the documents

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presented to him as required under Rule 602, SCRE. He was also qualified as an expert in the field of accountancy such that the statements and testimony he made about the facts and data used to come to the conclusions in his report and testimony related thereto were proper under Rule 703, SCRE. As a result, the Court finds and concludes Mr. Bosler had personal knowledge of the facts and records presented to him which serve as the basis of his report, and it was proper to admit the same into evidence.

As to whether the report included transactions for which the Trust's settlor was solely responsible, Respondent had an opportunity to testify after Mr. Bosler's testimony and chose not to do so nor did he present witnesses to testify as to whether the Settlor was responsible for the transactions at issue despite being on notice of Petitioner's claims. Even so, testimony about Respondent's communications with Settlor about what Settlor intended with regard to specific transactions would have been barred by S.C. Code Ann. §19-11-20, as amended, (1976) ("Dead Man Statute"). The Court finds and concludes Respondent presented little evidence, if any, about transactions for which the Settlor was responsible, and this argument is not a ground for the Court to reconsider the Final Order as a result.

To the extent the Bosler report includes legal analysis, the Court finds that Mr. Bosler's report and analysis was being provided solely for a comparison between how Respondent acted with regard to the Trust's assets versus how he believed a similarly situated fiduciary would/should have acted as required by applicable accountancy standards. This testimony is allowable under Rule 703 and Rule 704, SCRE.

Further, Respondent's reply to Mr. Bosler's report was not in compliance with Court's May, 2020 Order, as amended, which allowed him time to engage an accountant or other expert to rebut Mr. Bosler's report as he represented to the Court he had. It also cannot be *in lieu* of cross-examination as it was not given in the form of questions to which Mr. Bosler had an opportunity

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to answer or respond. Rather, the response was in the form of a sworn statement which the Court properly excluded as being, at its best, testimony and/or commentary on Mr. Bosler's report given by a person who is not an accountant or similarly qualified expert, who could not be cross-examined by Petitioner's counsel, and represents an attempt by Respondent to testify after he was given his right to do the same at the final hearing.

As a result of the above, the Court finds and concludes that the Court properly admitted Charles E. Bosler's report into evidence, excluded Respondent's response, and the same is not a reason for the Court to reconsider the Final Order.

F. Absence of Expert Testimony

Respondent has additionally argued the Court erred in its Final Order because Petitioner did not present expert testimony as to whether Respondent's breach of duties was the proximate cause of Petitioner's damages.

The Motion takes issue with Petitioner's two (2) expert witnesses. The first expert was Kathleen Palinski, Esq. who was qualified as an expert in fiduciary standards and who was appointed as Limited Special Trustee by Consent Order Appointing Special Trustee and Staying Case filed on February 23, 2017. Respondent argues Ms. Palinski never testified that Respondent's breach and/or breaches of duties under the Trust proximately resulted in Petitioner's damages. However, as noted in Dereede Living Trust dated December 17, 2013 v. Karp, 427 S.C. 336, 831 S.E. 2d 435, the South Carolina Court of Appeals found that a breach of trust makes a trustee liable to beneficiaries regardless of intention. Considering Ms. Palinski testified that Respondent did not comply with the terms of the Trust or fiduciary standards or duties, Respondent is and/or was liable to Petitioner for his breaches the Trust and fiduciary duties. In other words, his failure to comply with the Trust was the proximate cause of Petitioner's damages. As to the amount of damages, Mr. Bosler testified to same. He also testified as to the impact that Respondent's breach and/or

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breaches of Trust had on the Trust's assets which resulted in Petitioner's damages that were granted in the Final Order. In particular, the damages being the amount of Trust funds and assets Respondent used to benefit and/or enrich himself to Petitioner's exclusion, the unequal distributions he made to himself and other beneficiaries to Petitioner's exclusion, and expenditures he made that were unaccounted for during the time Respondent was serving as co-trustee and/or successor trustee.

When viewed together and in light of the evidence presented, the Court finds and concludes that it had evidence in hand necessary to find and conclude Respondent was the direct and proximate cause of Petitioner's damages. As a result, this ground for reconsideration fails.

G. OTHER GROUNDS

In addition to the above grounds, the Court notes that the Motion contains several other grounds for reconsideration that are generally tied to the above. However, Respondent did not argue them at the final hearing, separately brief them, or argue them at the hearing on the Motion. The Court is left to assume that Respondent is abandoning these grounds. See Johnson v. Sonoco Products Co, 381 S.C. 172, 672 S.E. 2d 567 (2009); First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E. 2d 513 (1994). . To the extent he is not, they are rejected as grounds for reconsideration.

ORDER

Based on the above Findings of Fact and Conclusions of Law, the Court has determined that the numerous grounds for reconsideration raised in the Motion do not rise to a level such that the Court is required reconsider, amend and/or vacate the Final Order.

Accordingly, **IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED** that Respondent's Motion is **DENIED**.

{JUDGE'S SIGNATURE APPEARS ON NEXT PAGE}

ROA 000693



York Common Pleas

Case Caption: Vicki Lynn Vergeldt VS John Edward Vergeldt

Case Number: 2016CP4600820

Type: Order/Other

So Ordered

s/ Teasa K. Weaver 3084

Electronically signed on 2021-07-02 10:30:56 page 20 of 20



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ELECTRONICALLY FILED - 2019 Jun 13 11:06 AM - YORK - COMMON PLEAS - CASE#2016CP4600820

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP4600820

Vicki Lynn Vergeldt,
PLAINTIFF(S)

John Edward Vergeldt,
DEFENDANT(S)

RECEIVED

Aug 02 2021

SC Court of Appeals

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP
(Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), ☐ SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

This matter came before me on May 30, 2019 on Defendant's Motion to Dismiss and Judgment on the Pleadings and Plaintiff's Motion to Amend the Pleadings. Present at the hearing: Daniel J. Ballou, attorney for Defendant and Taylor A. Peace, attorney for Plaintiff.

Rule 15 of the S.C. Rules of Civil Procedure states that "leave shall be freely given when justice so requires and does not prejudice any other party". The party opposing the amendment has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 431 S.E.2d 587 (1993). I find and conclude that under the facts and circumstances of this case, there is no prejudice in granting leave to amend and the Defendant will have sufficient time to prepare its defense of these allegations.

Having granted Plaintiff leave to amend, Defendant's Motion to Dismiss and Judgment on the Pleadings is moot, and therefore denied. Plaintiff shall file and serve the amended pleading within 15 days of this order. The Defendant shall have 45 days from the date of service to file and serve any necessary response.

AND IT SO ORDERED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

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

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

ROA 000696

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

FILED ELECTRONICALLY FILED - 2019 JUN 13 12:05 PM - YORK - COMMON PLEAS - CASE#2016CP4600820



York Common Pleas

Case Caption: Vicki Lynn Vergeldt VS John Edward Vergeldt

Case Number: 2016CP4600820

Type: Master/Order/Form 4

So Ordered

s/ Teasa K. Weaver 3084



STATE OF SOUTH CAROLINA

COUNTY OF YORK

Vicki Lynn Vergeldt, Individually, and as
Successor Trustee of the John Vergeldt, Jr.
Revocable Living Trust dated September
27, 1978

Petitioner,

vs.

John Edward Vergeldt,

Respondent.

IN THE COURT OF COMMON PLEAS

CASE NO. 2016-CP46-00820

ORDER

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Aug 02 2021

SC Court of Appeals

This matter comes before me regarding Defendant's objection to certain affidavits and an expert's report submitted at trial by the Plaintiff on January 31, 2020. Plaintiff is represented by attorney Taylor A. Peace. Defendant John Edward Vergeldt is pro se. This matter was taken under advisement and is being ruled upon without a hearing.

At trial, Plaintiff offered the following exhibits into evidence: (1) Plaintiff's exhibit 9, affidavit of Timothy Kelley; (2) Plaintiff's exhibit 10, affidavit of Thomas Hernick; (3) Plaintiff's exhibit 11, affidavit of Brian Carson; (4) Plaintiff's exhibit 12, affidavit of Tony Lee Jordan; and (5) Plaintiff's exhibits 13 and 14, Financial Statement and Pro forma Financial Statements as prepared by testifying expert witness Charles E. Bosler. Defendant objected stating he had not received a copy of these materials prior to trial. No other objection was made. Defendant requested additional time to file responding affidavits or for the court to deny the exhibits. This matter was deferred as the court needed further information regarding discovery requests and service of the exhibits.

After review of the additional filings, it appears Plaintiff mailed the exhibits to Defendant on January 16, two weeks prior to trial. Plaintiff confirmed in his memorandum filed on February 28, 2020 that he provided the exhibits as supplemental Answers to Interrogatories and Responses to Production. There was no scheduling order issued in this case and it appears Plaintiff's counsel promptly forwarded the exhibits upon receipt. However, I find Defendant did not receive these exhibits in time to prepare for trial. The rules of discovery are meant to give the parties the means

ROA 000698

ROA 000699

to be prepared for trial. *CEL Products, LLC v. Rozelle*, 357 S.C. 125, 591 S.E.2d 643 (Ct. App. 2004) (citation omitted).

THEREFORE, IT IS ORDERED that Defendant is granted thirty (30) days from the date of this order to file responding affidavits to the exhibits stated above. No other matters will be considered.

JUDGE'S SIGNATURE PAGE TO FOLLOW

ROA 000699



York Common Pleas

Case Caption: Vicki Lynn Vergeldt VS John Edward Vergeldt

Case Number: 2016CP4600820

Type: Master/Order/Other

So Ordered

s/ Teasa K. Weaver 3084



IN THE STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

VICKI LYNN VERGELDT,)
)
Petitioner,)
)
vs.)
)
JOHN EDWARD VERGELDT,)
Individually and as Successor Trustee of the)
John Vergeldt, Jr. Revocable Living Trust)
dated September 27, 1978, as amended.)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
CASE NO. 2016-CP-46-0820

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Aug 02 2021

SC Court of Appeals

ORDER

This matter came before the Court on May 9, 2018, upon Plaintiff's motion for partial summary judgment on her cause of action for removal of John Edward Vergeldt as Trustee. Present at the hearing were Plaintiff and her counsel, Adam T. Silvernail, Defendant and his counsel, Daniel J. Ballou.

Based on the entire record in this case, and after hearing arguments of counsel, and reviewing the parties' submissions in connection with this motion, I find that there are genuine issues of material fact which will require a full hearing, and the motion for partial summary judgment is therefore denied.

The evidence and allegations presented at the hearing do, however, give rise to a concern about preserving the remaining funds in the Trust. As a result, I find it appropriate and necessary at this time to restrain the Trustee pending a final disposition of this case to prevent further issues arising as to the use of Trust funds.

Therefore, it is ordered as follows:

1. Defendant is enjoined from making any expenditure of Trust funds without either written consent from Plaintiff's counsel, or an order of this court.

2. If consent is not given by Plaintiff's counsel, Defendant shall apply to this court for approval of any proposed expenditure. Such application shall include the amount of the proposed expenditure, an explanation of the necessity of the expenditure, and the bill, estimate, invoice or other documentation, evidencing the need for an expenditure. The application and supporting

ROA 000701

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documentation shall be served on Plaintiff's counsel, who shall have five business days to file any opposition.

3. Defendant may continue to deposit Trust funds into the Trust's accounts without prior consent by Plaintiff, or approval by this court.

4. These conditions shall continue until modified or removed by subsequent order of this court.

AND IT IS SO ORDERED.

JUDGE'S E-SIGNATURE TO FOLLOW

ROA 000702



York Common Pleas

Case Caption: Vicki Lynn Vergeldt VS John Edward Vergeldt

Case Number: 2016CP4600820

Type: Order/Other

So Ordered

s/ S. Jackson Kimball 3063



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) CIVIL ACTION NO.: 2016-CP-46-0820

Vicki Lynn Vergeldt, Individually, and as
Successor Trustee of the John Vergeldt, Jr.
Revocable Living Trust dated September
27, 1978,

Petitioner,

vs.

John Edward Vergeldt

Respondent.

ORDER GRANTING PETITIONER'S
MOTION TO ALTER OR AMEND

RECEIVED

Aug 02 2021

SC Court of Appeals

THIS MATTER came before the Court on June 17, 2020 for a hearing on the Motion to Alter or Amend ("Motion") filed on May 19, 2020 by Petitioner Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 ("Petitioner"). Petitioner sought the Court's clarification of various issues, motions, and other matters ruled upon by the Court in its Order filed May 12, 2020 ("May, 2020 Order") and/or the alteration thereof. Present at the hearing was Petitioner's counsel, Taylor A. Peace, Esq., and Respondent John Edward Vergeldt ("Respondent"), appearing *pro se*. Petitioner and Respondent are sometimes collectively referred to herein as "Parties".

BACKGROUND

On May 7, 2020, the Court held a status conference with Petitioner's counsel and Respondent to determine which of the Parties' pre-trial and post-trial motions could proceed without a hearing in light of the ongoing public health crisis caused by the COVID-19 pandemic. The specific motions discussed were Respondent's Motion for Contempt filed October 18, 2019, the Contempt of Court filed by Respondent on December 10, 2019, Respondent's verbal motion

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ROA 000705

for continuance/objection to evidence Petitioner presented the trial of this case on January 31, 2020, Petitioner's Motion for Sanctions filed on February 19, 2020, the Objection and Motion to Quash Subpoena filed by Teresa A. Shaw Vergeldt on March 13, 2020, and Respondent's Motion for Sanctions filed on April 15, 2020.

As a result of the telephone status conference, the Court ruled in the May, 2020 Order that Petitioner mailed the proposed exhibits to which Respondent objected in a timely manner as part of her supplemental Answers to Interrogatories and Requests for Production; however, Respondent did not receive them in time to prepare for trial. Accordingly, the May, 2020 Order gave Respondent an additional thirty (30) days from the entry thereof to file rebuttal affidavits and an expert's report. The May, 2020 Order stated that no other matters would be considered.

The documents in the Court's file indicates that that Respondent filed the following documents after entry of the May, 2020 Order: 1) a Motion to Exclude Bosler Report and Direct Testimony, 2) an Affidavit of John E. Vergeldt in Response to Motion of T. Peace dated May 19, 2020, and an Affidavit of Audry L. Scheible with exhibits. The Affidavit of Audry L. Scheible contains photographs that Respondent attempted to introduce at trial that were excluded at trial. The Court also notes that Respondent filed two (2) Affidavits of Robert T. Nirenberg after the trial of this matter but before the entry of the May, 2020 Order.

As to the Motion itself, Petitioner seeks clarification of the Court's rulings on the pre-trial and post-trial motions, whether Respondent was required to disclose his witnesses to Petitioner prior to submission of his affidavits and/or reports, and whether Petitioner would have an opportunity to respond thereto.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

With that background established and based upon the pre-trial and post-trial motions and other submissions by Petitioner and Respondent, the May, 2020 Order, and argument presented

ROA 000705

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at the hearing, Petitioner is entitled have the May, 2020 Order granted to alter or amend and clarify the Court's rulings on the pre-trial and post-trial motions and to rule on the various other filings and developments in the case since the issuance of the May, 2020 Order, and, as a result the Motion is **GRANTED**.

Accordingly, I find, conclude and order that the May, 2020 Order is restated and affirmed unless altered, amended, changed and/or added to by the following:

1. Respondent's Motion for Contempt filed October 18, 2019 should be and is hereby **DENIED**;
2. Respondent's Contempt of Court filed December 10, 2019 should be and is hereby **DENIED**;
3. Petitioner's Motion for Sanctions filed February 19, 2020 should be and is hereby **DENIED**;
4. The Objection and Motion to Quash Subpoena filed by Respondent and Teresa A. Shaw Vergeldt filed March 13, 2020 should be and is hereby **DENIED**;
5. Respondent's Motion or Sanctions filed on April 15, 2020 should be and is hereby **DENIED**; and
6. Neither party shall be entitled or allowed to submit other additional evidence not otherwise already submitted.

Concerning the submission of the Motion to Exclude Bosler Report and Bosler Direct Testimony, Affidavit of Audry L. Scheible, Affidavit of John E. Vergeldt in Response to Motion of T. Peace dated May 19, 2020, and Affidavits of Robert T. Nirenberg that were submitted after the trial of this matter, I find, conclude, and order as follows:

1. Respondent's Motion to Exclude Bosler Report and Bosler Direct Testimony is **DENIED**;

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2. The Affidavit of Audry L. Scheible and exhibits attached thereto are **EXCLUDED**, and
3. The Affidavits of Robert T. Nirenberg will be **ALLOWED** by the Court and considered as evidence in this matter.
4. Respondent's objections as to the Affidavit of Timothy Kelley, Affidavit of Thomas Hernick, Affidavit of Brian Carson, Affidavit of Tony Lee Jordan and, and Financial Statement and Pro Forma Financial Statements prepared by Charles E. Bosler are **DENIED**.

IT IS SO ORDERED.

{JUDGE'S SIGNATURE PAGE TO FOLLOW}

ROA 000707



York Common Pleas

Case Caption: Vicki Lynn Vergeldt VS John Edward Vergeldt

Case Number: 2016CP4600820

Type: Master/Order/Other

So Ordered

s/ Teasa K. Weaver 3084

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Case No.
2016-CP-46-00820

• • •

DATE TAKEN: Thursday, January 30, 2020

TIME BEGAN: 10:01 a.m.

TIME ENDED: 6:21 p.m.

LOCATION: York County Historic Courthouse
2 Congress Street
York, South Carolina

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APPEARANCES:

ROA 000710

HARRELL MARTIN & PEACE, P.A.
BY: TAYLOR A. PEACE, ESQUIRE
135 Columbia Avenue
Chapin, South Carolina 29036
(803) 345-3353
tpeace@hmp-law.com
Representing the Plaintiff

ALSO PRESENT:

John Edward Vergeldt, Pro Se

Vicki Lynn Vergeldt

ROA 000710

1	I N D E X	ROA 000711
2	WITNESS:	
3	KATHLEEN PALINSKI	
4	EXAMINATION	PAGE
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10	Further Recross-Examination by John E. Vergeldt	75
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12	WITNESS:	
13	VICKI LYNN VERGELDT	
14	EXAMINATION	PAGE
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17	Redirect Examination by Mr. Peace	221
18	Recross-Examination by John Edward Vergeldt	231
19	Further Redirect Examination by Mr. Peace	339
20	Further Recross-Examination by John E. Vergeldt	348
21	WITNESS:	
22	AUDRY SCHEIBLE	
23	EXAMINATION	PAGE
24	Direct Examination by John Edward Vergeldt	239
25		ROA 000711

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I N D E X (CONT.)

ROA 000712

WITNESS:

CHARLES E. BOSLER

EXAMINATION

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253

Direct Examination by Mr. Peace

257

Cross-Examination by John Edward Vergeldt

301

Redirect Examination by Mr. Peace

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ROA 000712

1	COURT'S EXHIBITS		ROA 000713
2	EXHIBITS	DESCRIPTION	ACCEPTED
3	Exhibit 1	Plaintiff's Ex. 8 Photos That Were Redacted	334
4			
5			
6	PLAINTIFF'S EXHIBITS		
7	EXHIBITS	DESCRIPTION	ACCEPTED
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9	Exhibit 2	Palinski Report	29
10	Exhibit 3	Trust Agreement	66
11	Exhibit 4	Power of Attorney	95
12	Exhibit 5	Judge Kimball's Order	101
13	Exhibit 6	Petition for Removal of Trustee	104
14	Exhibit 7	Amended Petition for Removal	107
15	Exhibit 8	Photographs of Cottage	110
16	Exhibit 9	Affidavit & Appraisal of Tim Kelley	123
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19	Exhibit 11	Affidavit & Estimate of Carson	130
20	Exhibit 12	Affidavit & Estimate of Jordan	132
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25	Exhibit 17	Peace Fee Documentation	346
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1	DEFENDANT'S EXHIBITS		ROA 000714
2	EXHIBITS	DESCRIPTION	ACCEPTED
3	Exhibit 1	Debit & Charges Listing	160
4	Exhibit 2	2/29/12 Letter from John, Jr.	160
5	Exhibit 3	5/17/12 Letter from JEV	160
6	Exhibit 4	3/25/14 Letter w/ Financials	170
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9	Exhibit 7	7/10/19 Email from V. Vergeldt to Audry Scheible	197
10			
11	Exhibit 8	Photographs	351
12	(All exhibits with the exception of		
13	Defendant's Exhibit 8 were retained by Judge		
14	Weaver. Defendant's Exhibit 8 was retained by John		
15	Edward Vergeldt.)		
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25	ROA 000714		

1 THE COURT: This is Case Number ROA 000715
2 2016-CP-46-00820, Vicki Lynn Vergeldt v. John
3 Edward Vergeldt.

4 Present for Plaintiff or Petitioner is
5 Mr. Taylor Peace.

6 Mr. Vergeldt, you are representing yourself
7 today?

8 JOHN EDWARD VERGELDT: Unfortunately, ma'am,
9 due to financial reasons, yes.

10 THE COURT: And Mr. Peace, you may proceed.

11 MR. PEACE: Thank you, Your Honor. Would the
12 Court prefer that I call a witness or just give a
13 brief statement on what this case is about?

14 THE COURT: A brief statement about what this
15 case is about would be very helpful.

16 MR. PEACE: Thank you, Your Honor. May it
17 please the Court, Taylor Peace for the petitioner.
18 This is the end of a long -- what we hope to be the
19 end of a long and winding road for my client and
20 her brother. This case is essentially a breach of
21 trust case that has its roots back in their
22 father's execution of a trust agreement back -- the
23 most recent complete restatement being executed
24 back in 2009.

25 Mr. Vergeldt -- for ease of reference ROA 000715

1 Honor, my client and Mr. Vergeldt's father **ROA#000716**
2 is John Vergeldt, Jr. The respondent's name is
3 John Edward Vergeldt. So there may be times,
4 throughout the hearing, when I refer to the father
5 as John, Jr. and John Edward being the respondent,
6 this John Edward.

7 Basically since about the execution -- roots
8 of the case relate back to the execution of this
9 trust. Then in about 2011 on to 2013, Mr. and Mrs.
10 Vergeldt ended up having some disputes about
11 where -- money that was in the trust and how their
12 father's finances were being handled.

13 It all ended up coming to a head when, after
14 Mr. Vergeldt died in July of 2013 -- right before
15 his death Mr. Vergeldt, who had a power of attorney
16 and was the co-trustee under the trust agreement,
17 filed a guardianship and conservatorship
18 proceeding. That went away when Mr. Vergeldt
19 passed away, and then Ms. Vergeldt filed a
20 declaratory judgment action to determine her rights
21 under the trust agreement.

22 That lawsuit was necessary because
23 Mr. Vergeldt had refused to give Ms. Vergeldt
24 information about how trust finances were being
25 handled as well as how her father's finances **ROA#000716**

1 being handled. ROA 000717

2 That case was ended in 2015 by an order of
3 Judge Kimball. So we -- my client and the
4 respondent have been in this courtroom many times
5 over the past seven years.

6 Then, even despite Judge Kimball's order,
7 Mr. Vergeldt continued to refuse to provide
8 information -- complete information to my client.
9 Adam Silvernail brought this case, started it in
10 January of 2016, in an attempt to have Mr. Vergeldt
11 removed as the -- now the successor trustee of the
12 trust. Mr. Silvernail became very ill, and then we
13 ended up amending -- we ended up amending our
14 petition in, I believe, April or May of this year
15 seeking damages; and by that -- due to the fact
16 that at that time we had received all of the
17 information we needed to amend, we knew the extent
18 or the -- we knew what actions Mr. Vergeldt had
19 taken regarding their father and finances of the
20 trust, saw some very significant indiscretions and
21 discrepancies based on what we saw and amended to
22 bring this action for damages.

23 At about that time, Mr. Vergeldt resigned as
24 the successor trustee. Under the trust agreement,
25 Ms. Vergeldt is now the second successor trustee. ROA 000717

1 and we're here seeking damages at this point. **ROA 000718**
2 Judge. I think it's -- what Your Honor will hear
3 will make it pretty clear to the Court that
4 Mr. Vergeldt, over the period of about seven years,
5 abused trust funds, spent them inappropriately, did
6 not act impartial towards my client, and used the
7 trust funds as a vehicle to try and make her stop
8 asking questions, to strong-arm her into just
9 letting him do whatever he wanted.

10 And that's why we're here today, Judge, to
11 end a case that -- or end a family dispute that has
12 been going on for about seven years and finally
13 kind of break the ties that bind these two
14 individuals.

15 THE COURT: Thank you, Mr. Peace.

16 Mr. Vergeldt, would you like to respond?

17 JOHN EDWARD VERGELDT: Yes, ma'am. I
18 apologize for being nervous. I am, by nature, an
19 engineer and an airline pilot, so this is all quite
20 new to me. He is seeking damages, and so are we.
21 The plaintiff has done everything she can possibly
22 do to destroy my life, to destroy my family, to
23 destroy my marriage.

24 She has written numerous letters accusing my
25 wife of being a gold digger. She has brought **ROA 000718**

1 people into the courtroom that accused me **ROA 000719**
2 as a commercial pilot with AIDS, which is
3 disqualifying. Somehow after that, that letter
4 wound up at the FAA. I spent months trying to
5 clear that up. Another letter that was written for
6 her at her behest said that I fly alcohol- and
7 chemically impaired. Somehow that wound up with
8 US Air, which I had to spend more months with HR
9 clearing up. Another letter where some -- she had
10 a friend write claimed that I had various STDs,
11 which somehow, again, wound up with the FAA and
12 US Air. As you can tell, I'm not very happy about
13 some of that stuff.

14 Judge Kimball ruled that my father became
15 incapacitated and that he was, in fact, in charge
16 of all of his finances until May 6th of 2019 --
17 I'm sorry -- 2013. So anything prior to that, it's
18 already been ruled, my father was in charge of. So
19 a lot of the things that Mr. Silvernail brought up
20 are things from 2008 or 2009.

21 As far as not giving her information, she got
22 every piece of information there was. She got
23 copies of every check; she got the monthly bank
24 statements; she got the income tax returns; and
25 still, she kept saying, I want more. **ROA 000719**

1 Well, I sat down with Mr. Gettis and **ROA 000720**
2 Mr. Blue, my attorneys at the time, as well as
3 Mr. Don Harper, the attorney for the trust. She
4 got everything. There are no documents that could
5 be produced that she didn't get.

6 I provided her with all of the account
7 information back when Dad was still alive and told
8 her where all of the account information was.
9 Perchance something should happen to me, I did not
10 want her, as the first successor trustee, to have
11 to go hunting around and find out where everything
12 was.

13 The crux of the matter is, he says I
14 bludgeoned her. Of the people who got money, the
15 grandkids and the three beneficiaries of the trust,
16 Mr. Harper prepared a release, and he said that
17 everyone had to sign it before the final
18 distribution was made. She got all but \$15,904 of
19 the distributions. She refused to sign the
20 document. I told her, Mr. Harper told her, we all
21 told her, you've got to sign this thing so that I
22 can close the whole thing out. She refused to sign
23 it.

24 So no, she -- under advice of counsel,
25 Mr. Gettis, Mr. Blue, and Mr. Harper, she **ROA 000720**

1 get paid the last bit of money. ROA 000721

2 And I don't know what else I can say. I deny
3 hiding information from her, but I will say to
4 you -- and I've got witness testimony today to show
5 what a -- I won't say violent, but what a -- how to
6 parse this word -- she's a very reactive
7 individual, and I either do exactly what she says
8 or she responds mean and nasty. And I have spent
9 the last 15 years of my life trying to defend
10 myself from her.

11 I resigned as the trustee mainly because the
12 cottage is so far away that I was having a very,
13 very difficult time getting work done on it because
14 she wouldn't give me permission to get the work
15 done. The cottage is in the condition that it's in
16 now -- based on Judge Kimball's last ruling, I had
17 to submit any bills that were due -- electric, gas,
18 and restoration work on the cottage -- to her
19 attorney, and I never met the man. It was between
20 Mr. Silvernail and Mr. Peace. I would submit the
21 bills to him and never heard a word. Only one time
22 in all of those months was I granted permission to
23 pay the gas and electric bill.

24 So quite honestly, I did disobey Judge
25 Kimball's rules because I had to pay the gas ROA 000721

1 electric bills or they were going to shut **ROA 000722**

2 As far as the restoration work on the
3 cottage, she refused to allow me to pay the bills.
4 So Sam's Construction said, unless we're going to
5 get paid, we're going to stop work. I agreed: You
6 should stop work because I can't pay you because I
7 can't get permission based on Judge Kimball's
8 ruling to do so.

9 That is my position. I've done everything
10 required by law. I've done everything required by
11 common decency. I've given her every document,
12 every account number, and still she maintains
13 there's money missing. I will freely admit, as a
14 pilot, after Dad passed away, I made some mistakes.
15 Some monies were commingled, but no money ever
16 disappeared. I never took a dime from my father's
17 estate.

18 I met Ms. Palinski. She showed me errors
19 that I had made. I stopped making them. Again,
20 I'm a pilot. I was just trying to do the best for
21 my dad and the best for everybody, but you cannot
22 cooperate with a person who does not cooperate with
23 you. Thank you.

24 THE COURT: Thank you.

25 Mr. Peace, call your first witness. **ROA 000722**

1 MR. PEACE: Thank you, Your Honor. **ROA 000723**
2 to call Kathleen Palinski to the stand.

3 (Kathleen Palinski was sworn in by the
4 Court.)

5 THE COURT: You may be seated.

6 KATHLEEN PALINSKI
7 having been first duly sworn, was examined and
8 testified as follows:

9 - - -

10 DIRECT EXAMINATION

11 - - -

12 BY MR. PEACE:

13 Q. Good morning, Ms. Palinski. How are you?

14 A. Good.

15 Q. Before we get started, if you could just
16 state your name for the record.

17 A. It's Kathleen, with a K, Palinski,
18 P-A-L-I-N-S-K-I.

19 Q. And where do you live, Ms. Palinski?

20 A. I'm currently residing in Port Royal. I
21 had moved there in October. I had previously
22 lived in Columbia, South Carolina.

23 Q. And what do you do for a living?

24 A. I am licensed as an attorney in
25 South Carolina.

ROA 000723

1 Q. Okay. Can you tell the Court a little about
2 about your education.

3 A. Okay. After graduating from high school,
4 I attended Michigan State University. I
5 graduated from there in 1970 with a bachelor's
6 degree in the college of business.

7 JOHN EDWARD VERGELDT: If it please the
8 Court, I'll stipulate that I've also met with
9 Ms. Palinski, and I believe her testimony will be
10 true and factual.

11 THE COURT: It might be that Mr. Peace is
12 trying to qualify her as --

13 MR. PEACE: Yes, Your Honor.

14 THE COURT: Do you have any objection to her
15 being qualified as a witness as --

16 JOHN EDWARD VERGELDT: No, ma'am, I don't.

17 THE COURT REPORTER: I'm sorry. I'm sorry.
18 Can you please let the judge finish her statement.

19 THE COURT: As an expert in?

20 MR. PEACE: In fiduciary standards.

21 Ms. Palinski has extensive experience being a
22 court-appointed fiduciary. She's -- as I'm sure
23 she'll testify, prior to becoming a lawyer was a
24 bank auditor and has just extensive experience
25 being a court-appointed trustee/conservator.

1 with these kinds of matters. ROA 000725

2 THE COURT: Okay. Any objection to her being
3 qualified as an expert?

4 JOHN EDWARD VERGELDT: No, ma'am.

5 THE COURT: No objection, and she is so
6 qualified.

7 MR. PEACE: Thank you, ma'am.

8 BY MR. PEACE:

9 Q. Even though we just qualified you as a
10 witness, Ms. Palinski, can you tell me about --
11 or tell the Court about -- your experience as a
12 trustee, court-appointed conservator, any kind of
13 fiduciary capacities in which you serve.

14 A. Yes. Just briefly, I've been licensed to
15 practice for over 22 years now. It will be 23
16 years in May. And back in '02/'03, because I did
17 have the background in banking -- I think that's
18 how it came about -- and my MBA was in finance, I
19 started to work more and more in the probate
20 court as a conservator or as a personal
21 representative or a special administrator.

22 And so looking back, I think my first
23 appointment as a fiduciary was like in '03; and
24 since that time, I have served, as you said, as a
25 personal representative, conservator, or ROA 000725

1 54 times. Just a variety of work. EveryWord Inc. ROA 000726
2 from managing timberland; selling, renting,
3 commercial/residential real estate; quiet title
4 actions. Just all of the cleanup work that comes
5 with taking over the finances of an individual or
6 an estate.

7 Q. Thank you.

8 A. Anything else?

9 Q. No, that covers it.

10 A. Okay.

11 Q. What kind of duties do you have as a
12 fiduciary, either court-appointed or otherwise?

13 A. Well, I think there's two standards that
14 I've always worked from. One is, of course, our
15 probate code, specifically our trust code,
16 Section 62, 62-7, that area.

17 And also -- and I went back and took a few
18 years ago -- I took a course offered by Cannon
19 Financial Institute, and it's the preparatory
20 course that leads to the examination as like a
21 certified trust officer. I couldn't obtain the
22 certification because I wasn't working in a bank
23 or a trust company, but that -- those
24 institutions are governed by Regulation 9, which
25 comes from the comptroller of the currency. EveryWord Inc. ROA 000726

1 they set the standards as to what the trust company or bank -- what their responsibilities
2 are. And of course, many of those are found in
3 our -- exactly in our probate court.

4
5 So you know, it always -- it always starts
6 out with, if someone is going to serve --

7 THE WITNESS: Excuse me. Could I ask for
8 water?

9 THE COURT: Yes.

10 THE WITNESS: I will. I'm just hoarse this
11 morning. Thank you.

12 A. It always starts with your responsibility
13 to administer -- it's someone else's money. It's
14 not your money, and you have to come to that in
15 good faith; you have to be impartial. And I
16 think that's particularly difficult and fraught
17 with potential problems if you are also a
18 beneficiary of the trust or of the estate. Of
19 course, I've never had to deal with that, because
20 I was always a third party, a neutral. I didn't
21 have a dog -- it wasn't going to be my money.

22 But you're responsible for prudent
23 administration, and my standard has always been
24 I'm actually more careful with this money than I
25 am with my own personally, because it's

1 money; it belongs to the beneficiaries, **ROA 000728**
2 some point it will be distributed to them. So
3 you have a duty -- you certainly have to preserve
4 and protect the assets. You first have to
5 identify all of them.

6 THE WITNESS: I'm going to pause for a second
7 here. That's helpful. Thank you.

8 A. The control and the protection of the
9 assets, whenever there's real estate or that --
10 you know, to keep properties insured, to pay all
11 the taxes, not to lose those properties with
12 respect to financial assets.

13 It's getting all of those accounts
14 properly titled because then you do not own those
15 accounts; you are a signatory on them; and you
16 always want the account to be set up with the
17 institution where it -- you're signing as the
18 fiduciary, as the personal representative or the
19 trustee or the conservator. Again, it's not your
20 money or my money.

21 And let's see. Also, if you ever have a
22 situation where you know you're going to have
23 employees -- and in the course of my work, I have
24 taken over corporations, wound up dissolving the
25 corporation, and those types of things. **ROA 000728**

1 first thing I would do when there was go **ROA 000729**
2 people employed was to obtain the services of a
3 payroll company. It's not that expensive, takes
4 care of all the -- payroll is very difficult in
5 terms of -- it's very technical; there's a lot of
6 requirements, a lot of time requirements, and the
7 thing that is always -- I don't know if it's in
8 the back of my mind or the front of my mind, but
9 when you get into payroll and withholding and
10 that, the -- it's one area of the IRS code
11 regulations where the individual who was
12 responsible for the payroll can be held
13 personally liable if it is not done correctly.
14 So it's a very high -- it's a high-risk area, is
15 what I'm saying, and I would always obtain the
16 services of a payroll company.

17 You also have a duty for the filing of the
18 tax returns. And when I first got any case, the
19 first thing I would do -- would look back to see
20 if there were any tax returns that had not been
21 filed. And sometimes you just don't have access
22 to the records, so the safe harbor is to go to
23 the IRS, and you can get a transcript of all of
24 the income that has been paid under the Social
25 Security number of the individual who ha **ROA 000729**

1 whose money it was, be it the personal **ROA 000730**
2 representative, or in the case of a trust,
3 whoever was the trustee.

4 One of the very fundamental duties is
5 reporting to the beneficiary, and I know -- I
6 know this is a broken record, but it's not your
7 money; it's their money. They may not have
8 access to it or control over it at this time, but
9 you have a very -- a great responsibility to
10 provide that information to the beneficiaries:
11 Where is the money? What are you spending it on?

12 One of the -- and I've seen the reports
13 from trust companies -- from banks and trust
14 companies of all their trust reporting. One of
15 the first things that you do is you create check
16 registers, and you pay from invoices; you always
17 keep copies of the invoices, copies of the check.
18 Basically you're always prepared if you have to
19 go to the Court or answer to the IRS.

20 And I had an estate where there were two
21 years where the IRS did do desk audits. In other
22 words, I had to submit all of the checks, all of
23 the invoices, to the IRS.

24 So the reporting duty is just -- it's just
25 the crux of all of the situation. **ROA 000730**

1 And you know, as a fiduciary, if ~~ROA 000731~~
2 working in an area or you've got responsibility
3 in an area where you don't have the credentials
4 or the experience, you find a professional to
5 help you. One example is I wound up with a
6 trust, and I had it for 11 years, and it had
7 several hundred acres of timberland. Well, I'm
8 not a forester. And so you find a certified
9 forester to help you, and you work with them, and
10 of course, you make the decisions.

11 And the same way with the investments.
12 Though my MBA was in finance, I had not done
13 extensive investing. And so you find a good
14 financial -- now they call them financial
15 advisers, but a broker, and you work with that
16 individual. You make the decisions, but you make
17 sure that you've got a professional that can help
18 you, that can assist you and guide you.

19 It's -- you know, I -- well, I'll pause
20 there and say I'll let you ask some questions,
21 but --

22 Q. Thank you, Ms. Palinski.

23 A. I didn't -- I guess I made it sound
24 more -- well, it is difficult. It is -- it's a
25 very -- and it's a lot of judgment in the ~~ROA 000731~~

1 and what you do, so -- ROA 000732

2 Q. How did you get involved in this case?

3 A. Adam Silvernail, an attorney in Columbia,

4 contacted me --

5 Q. Okay.

6 A. -- and I guess he had been involved. He

7 represented Ms. Vergeldt in the beginning. And

8 he asked me if I would be willing to go back --

9 and what I thought would first be an audit of the

10 records of a trust, going back over a number of

11 years, the Vergeldt trust. And I said, yeah,

12 that's the kind of work that I do.

13 I wouldn't be -- I wouldn't be taking over

14 as trustee, but I would be going back -- I was

15 appointed as a special limited trustee so that I

16 could obtain the records necessary to -- again,

17 what I thought would be an audit of the trust,

18 the accounting.

19 And so there was a Court -- I was

20 appointed by the Court, and I was given a

21 six-month window to create this accounting or

22 audit this accounting. The records that I did

23 receive, I realized that I was going to have to

24 really go back and create check registers. There

25 were 11 different accounts involved. ThROA 000732

1 was -- Mr. Vergeldt -- of course, I never **ROA 000733**
2 man because I was appointed in 2017, and he
3 passed away in 2013, but he was -- I could relate
4 to him, as I did to my -- thinking about my
5 parents, that generation.

6 They saw the banks fail in the Depression,
7 and then they knew that FDIC insurance only
8 covered \$100,000 worth of bank deposits,
9 balances. And so they were -- if they had
10 substantial assets, they would have it in several
11 different institutions to make sure that it was
12 insured by the FDIC.

13 And so there were a lot of accounts, and this
14 Credit Union ONE in Michigan, that had been his
15 main checking account for years. So at that point,
16 and with the six-month deadline, I issued subpoenas
17 to all of the institutions. And the order gave me
18 authority to obtain the records for John, Jr., the
19 father, and the trust, his revocable trust.

20 And so those records were coming in, and
21 that's when I realized that I actually needed to
22 create the check registers for all of these
23 accounts.

24 And the court order allowed me to go back
25 as far as 2008 if I felt that was necessary **ROA 000733**

1 Originally it was like 2009 through **ROA 000734**
2 December 31st of 2016, and I think the
3 litigation was going on then. And as I started
4 to work with it, I did go back to 2018, to
5 January of -- I'm sorry -- of 2008 -- okay -- and
6 build all of that forward.

7 You want me to pause? Yeah.

8 Q. Yes, ma'am.

9 A. Okay.

10 Q. You sent out -- you testified you sent out
11 subpoenas. Did you ask Mr. John Edward, the
12 respondent, for any information?

13 A. Well, in working with his attorney, Dan
14 Blue, Dan told me -- Attorney Blue said that he
15 had several boxes of records that Mr. Vergeldt
16 had provided to him, and he invited me up to his
17 law office to go through those boxes to extract
18 whatever I could, gave me the use of a copy
19 machine.

20 And I went through those boxes, pulled
21 what I could, you know, from that, but it was
22 not -- it was not anywhere complete. There was
23 no check register. There were some statements,
24 but not the whole -- all of the bank statements.

25 So I really -- at that point, I m**ROA 000734**

1 decision that I had no choice but to get **ROA 000735**
2 the statements and then whatever check copies --
3 there were some check copies, I think, that I got
4 from Mr. Blue's office, but all of the check
5 copies that were available.

6 And then created all the check registers
7 and a report, you know, of the -- of what my
8 findings were.

9 MR. PEACE: And Judge, I will represent -- I
10 have one copy of that order, but it is of record,
11 that I can put into evidence if the Court would
12 like.

13 THE WITNESS: You want the order?

14 MR. PEACE: Yes, ma'am.

15 THE WITNESS: Okay. I was reading back.

16 MR. PEACE: And she's testified to it.

17 I'll --

18 BY MR. PEACE:

19 Q. Do you recognize this document?

20 A. Yes. Uh-huh.

21 Q. Can you tell me what it is?

22 A. Yes. It was the order by which I was
23 appointed and set the parameters, the scope of my
24 work for work as special trustee.

25 Q. Thank you.

ROA 000735

1 THE COURT: If you can show it to **ROA 000736**
2 Mr. Vergeldt.

3 JOHN EDWARD VERGELDT: Yes, ma'am, that's
4 fine.

5 THE COURT: Any objection?

6 JOHN EDWARD VERGELDT: No, ma'am.

7 MR. PEACE: Your Honor, I'd introduce it as
8 Exhibit 1.

9 JOHN EDWARD VERGELDT: I would like to point
10 out that the order, I believe, stipulated that
11 the -- her authority started on January 1, 2013 and
12 would extend up to as far as she felt she needed to
13 go. So anything prior to January 1 is something
14 that she and Mr. Silvernail decided to do.

15 THE COURT: And Mr. Vergeldt, you'll be able
16 to ask her questions --

17 JOHN EDWARD VERGELDT: Very good. I'm sorry.

18 THE COURT: Plaintiff's 1 entered without
19 objection.

20 MR. PEACE: Thank you, Your Honor.

21 (Plaintiff's Exhibit 1 was marked for
22 identification.)

23 BY MR. PEACE:

24 Q. I believe you testified that you did
25 complete a report. Is that correct? **ROA 000736**

1 A. I did. ROA 000737

2 Q. Do you recognize this document? Can you

3 identify that document?

4 A. Yes. That is all of the check registers.

5 I put together a notebook and then my summary

6 report on the top of that.

7 Q. And this is -- you put this together

8 pursuant to the court order?

9 A. Yes, I did, and it -- the order says

10 between January 1, 2009 and December 31, 2016, so

11 that's what I worked from, and that I did have

12 the authority to go back to as early as

13 January 1, 2008.

14 MR. PEACE: Okay. Your Honor, I'd like to

15 have this marked as Exhibit 2 or introduced into

16 evidence as Exhibit 2.

17 JOHN EDWARD VERGELDT: I stand corrected,

18 ma'am. No objection. That's not what we decided

19 in the courtroom, but if the attorneys agreed on

20 something different, I don't know. So yes, I have

21 no objection.

22 THE COURT: Plaintiff's 2 entered without

23 objection.

24 MR. PEACE: Thank you, Your Honor.

25 (Plaintiff's Exhibit 2 was marked for ROA 000737

1 identification.)

ROA 000738

2 BY MR. PEACE:

3 Q. Ms. Palinski, remind me why you felt you
4 needed to go back and produce the check
5 registers.

6 A. Because there were no check registers -- I
7 originally -- we talk a lot in auditing about
8 tracing things back, looking at transactions and
9 tracing them back to the original records,
10 verifying them. And of course, a check register
11 is derivative from the bank statements and the
12 checks. So you work from the check register, and
13 then you would go back to a statement, an
14 institution statement, and verify that that
15 transaction is -- was properly reported.

16 But none of that was available -- that
17 check register, so I wound up working from the
18 statements. I've got mine.

19 Q. Oh, I'm sorry.

20 MR. PEACE: Here, Judge.

21 A. I really saw no other way to give a
22 comprehensive objective report except by doing
23 the work that I did.

24 Q. Before we -- before we introduced that
25 into evidence, you were talking about the

ROA 000738

1 saw Mr. John, Jr. had about 11 accounts, **RON 000739**
2 was because of a suspicion of banks?

3 A. I think that was just very typical of that
4 generation as to how they -- they handled them.

5 Q. What else did you find in the statements?
6 What kind of items stood out to you?

7 A. Well, I guess one of the first things was
8 that so many checks were being written to cash,
9 and as a fiduciary standard, you just don't write
10 checks to cash. And I actually prepared a
11 summary of all of the -- it was Exhibit B
12 attached to my report of all of the checks that
13 were written to cash.

14 The other thing -- and this -- there was
15 one account -- because when I subpoenaed, as I
16 think I said, it was Mr. Vergeldt, Jr.'s Social
17 Security number and the tax ID for the trust.
18 Those were the records that I was entitled to
19 receive. But there was this one other account
20 that was -- where there were a lot of transfers
21 to that account back and forth out of and into
22 Mr. Vergeldt, Jr.'s account, and that was the
23 First Citizens account that ended in 9209.

24 So when I went to Mr. Blue's office, that
25 was one of the questions I had for him, **RON 000739**

1 could find nothing -- I guess I original **ROA 000740**
2 thought that I would find some of those
3 statements, that 9209, in the boxes. I think
4 there were -- gosh -- three or four boxes of
5 records that he had. But there weren't.

6 And he contacted John Edward Vergeldt on
7 the phone that day, and they sent -- apparently
8 sent over a bank statement. That account was
9 titled in the name of John Edward Vergeldt and
10 his spouse. It was -- and that's why I had not
11 received anything about it from my subpoenas,
12 because that would have not been under John,
13 Jr.'s Social or the trust. That was Mr. John
14 Edward Vergeldt's personal account.

15 So I'm looking at that, and I prepared a
16 schedule of all of the deposits into that account
17 and transfers out of that account as it related
18 to his father's accounts. And as I looked at
19 that, that, to me, was commingling of funds.

20 Q. Okay.

21 A. And as a fiduciary, a standard is, you do
22 not mix your funds with that of the fiduciary
23 accounts. That is -- it's not your money.

24 Q. Did you notice any -- did you ask Mr. --
25 did you happen to have any discussions with **ROA 000740**

1 Edward Vergeldt about why that was happened. ROA 000741

2 A. Mr. Vergeldt and his attorney came to my
3 office in Columbia after I had published my
4 report.

5 Q. Okay.

6 A. And at that point, the explanation was,
7 you know, he understood that was his father's
8 money, but there were times when these transfers
9 were necessary to meet the needs of his father.

10 Q. Do you know where his father was living at
11 the time? Did he give you any indication?

12 A. At the time? What was that time?

13 Q. At the time these transfers were
14 occurring.

15 A. He, at some point, had come to live -- I
16 think it was in 2012 that his father had come to
17 live with him here in South Carolina.

18 JOHN EDWARD VERGELDT: January 1, ma'am.

19 THE COURT: Mr. Vergeldt.

20 JOHN EDWARD VERGELDT: I'm sorry, ma'am.

21 I'll shut up.

22 THE COURT: Just let me explain.

23 JOHN EDWARD VERGELDT: Yeah.

24 THE COURT: You can cross-examine her once

25 he's --

ROA 000741

1 JOHN EDWARD VERGELDT: She was looking ROA 000742
2 THE COURT REPORTER: I'm sorry.
3 JOHN EDWARD VERGELDT: -- at me like she was
4 asking me a question.
5 THE COURT: Mr. Vergeldt.
6 JOHN EDWARD VERGELDT: I promise you, I'll
7 stop.
8 THE COURT: I know you're nervous, but just
9 let me finish. Please only object -- if you have
10 an objection to a question, you can object.
11 JOHN EDWARD VERGELDT: Yes, ma'am.
12 THE COURT: Otherwise you are going to be
13 entitled to cross-examination and ask her any
14 questions. Even if there's something that she gets
15 wrong, that you think she gets wrong, you'll be
16 able to cross-examine to try to correct anything
17 that you think she says in error.
18 JOHN EDWARD VERGELDT: Yes, ma'am.
19 THE COURT: You may proceed.
20 BY MR. PEACE:
21 Q. So the explanation you received was that
22 John, Jr. had come to live with John Edward?
23 A. Yes. Uh-huh.
24 Q. What was the explanation on -- did you
25 receive any kind of explanation about wh ROA 000742

1 about the transfers to cash or the checks **ROM 000743**
2 payable to cash?

3 A. That a lot of the checks payable to cash
4 had been to pay caregivers. Apparently John,
5 Jr., with his physical condition and all, had
6 caregivers, and so all of those people were being
7 paid by cash.

8 Q. Were you given an explanation why they
9 were paid in cash?

10 A. That the trust then would be saving money
11 because it would not have to pay the employer's
12 Social Security and Medicare contribution. You
13 know, as employees, money is withheld from our
14 payroll for Social Security and Medicare
15 purposes, and then the employer has to match
16 that, and all of that money is -- you know, is
17 paid -- you know, paid to the IRS.

18 And so it was going to be less expensive
19 to just pay the people in cash, and there were
20 letters written by John Edward saying that gifts
21 were being made on an annual basis to these
22 people who were actually the caregivers.

23 Q. I'm looking through your report,
24 specifically tab number 11. It looks like that
25 there are a good number of Visa debits **ROM 000743**

purchases. **ROA 000744**

A. There was an ATM card for these accounts, and a fiduciary standard is -- because, of course, an ATM card, you can use it to make deposits, but you can also use it to withdraw cash. And you can use it at merchants, at vendors and that.

And as a fiduciary -- and this is also true of the banks -- you never have an ATM card for those accounts. You do everything by cash or a transfer within the bank with support in the form of invoices, what that money was paid for.

So there were -- there were numerous transactions -- and I think in my report, my conclusion was that I really could not -- there was no way to know whether those ATM transactions to vendors were for the benefit of John, Jr. during his lifetime. There were restaurants; there were nail salons.

There were just -- and there -- of course I was able -- when I did the check registers, I was able to, from the statements, to pick up -- to record in my check registers who those vendors were where the ATM card was used.

So -- but again, that's not something **ROA 000744**

1 typically that a fiduciary would do. **ROA 000745**

2 Q. Okay. Are there still items outstanding
3 that you're not sure where they go?

4 A. Yes.

5 Q. Can you tell us what those are?

6 A. Yeah. There was a certificate of deposit
7 at Fifth Third Bank, and I think \$50,000 was put
8 into that account, and that account -- that is
9 another thing. It had -- it was a 37-month CD.
10 If I could have just a moment, I'm going to go
11 look at that check register to make sure.

12 That -- the Fifth Third Bank, it was a CD.
13 It was a 37-month CD. It was \$50,000. And it
14 opened -- it was opened in August of 2008. And
15 that account, although it came directly from
16 John, Jr.'s main account at the Credit Union ONE,
17 when the CD was opened, it was titled in the name
18 of John Vergeldt, Jr. or John Edward Vergeldt,
19 the son.

20 And again, that was Mr. Vergeldt's money,
21 and as a fiduciary, you would never be a joint
22 owner on the account. You would be a signatory,
23 you know, and you would be holding it as trustee.
24 So that -- that is evidence that John Edward was
25 involved, you know, back as early as 2000 **ROA 000745**

1 So -- and that money then -- some ~~CD~~ ~~12,000~~ ~~46~~
2 of that account, I could not locate when that --
3 when that CD matured. I could not find where --
4 and I think it had gotten up to like 50 -- yeah,
5 the interest was capitalized on a CD. It was
6 just added each time that it rolled over. So at
7 that point, it was up to \$58,000.

8 And 15,000 of that money went -- I was
9 able to trace it into a deposit, Duke Energy
10 Premier Notes. It was like an interest-bearing
11 note from Duke Energy. 15 of it went by the time
12 that it was maturing -- of the CD at Fifth Third
13 was maturing -- 15,000 went into Duke Energy.

14 But there was no record of deposits coming
15 into any other trust accounts for that \$42,000
16 for that difference. So I left that as an
17 unresolved item in my report.

18 Q. On account number 4009 --

19 A. Okay.

20 Q. -- after Mr. Vergeldt passed away -- he
21 passed away in July?

22 A. July of '13?

23 Q. July of '13. I believe so.

24 A. Uh-huh.

25 Q. Did you see the same sort of exper ~~CD~~ ~~12,000~~ ~~46~~

1 the -- out of the 4009 account that you **ROA 000747**
2 beforehand?

3 A. There were -- there were still a few
4 checks written to cash. There was -- you know,
5 there was July -- July of '13. What was the date
6 of --

7 Q. July 7th, 2013.

8 A. July 7. There were a lot of transactions
9 after that. Some of them, from the descriptions
10 on the check and who the payee was, looked like
11 it was related to funeral and different things,
12 airline tickets.

13 But there was a purchase at Best Buy, the
14 Walmart Supercenter, and so on and so forth, and
15 they're all on page 27 -- start with page 27 of
16 36 of that check register, and it goes on -- I
17 was looking to see. That account was opened
18 through -- all through my period of review of
19 December of 2016.

20 Distributions were, obviously, made to
21 some of the beneficiaries under the trust,
22 because it -- at Mr. Vergeldt's death; then the
23 trust was going to end. It was going to be
24 distributed out to the children and
25 grandchildren.

ROA 000747

1 There were also checks written -- ~~RON 000748~~
2 is that cottage that Mr. Vergeldt had mentioned
3 this morning -- for electricity bills, property
4 taxes, that sort of thing, which you would expect
5 in a trust, you know, to pay for the ongoing
6 expenses.

7 Q. Let's look at -- on page 28 of your -- of
8 the 4009 --

9 A. Sure.

10 Q. Do you see where there is a -- down
11 towards -- two-thirds of the way down --
12 three-quarters, down towards the bottom of the
13 page, there are about five or six 6- or
14 5,000-dollar transfers?

15 A. Transfers or checks written?

16 Q. I'm sorry. Checks written.

17 A. Yes. Uh-huh.

18 Q. And then right about that same area, there
19 was a check issued for \$30,000 to Edward Jones
20 and Patti. And then a couple entries down, two
21 30,000-dollar checks, one to Vicki and one to
22 John?

23 A. Yes. Uh-huh.

24 Q. Do you -- go ahead.

25 A. I was going to say, the one \$30,000 ~~RON 000748~~

1 was transferred to an Edward Jones account **ROA 000749**
2 the benefit -- Patti was one of the children of
3 John, Jr., so she would have been one of the
4 beneficiaries of the trust.

5 Q. And if you'll flip over to page 30 --

6 A. Uh-huh.

7 Q. -- about a third of the way down, there's
8 two entries for 2/9/2014, a payment of 35,836,
9 FBO Patti to Edward Jones; and then 2/29/14, a
10 payment to -- there's no description, but then
11 the payee is John?

12 A. Right. The payee was John Edward --
13 uh-huh -- for the 42,000.

14 Q. Do you see a contemporaneous -- or did you
15 find a contemporaneous check to Vicki around that
16 same time?

17 A. No. No. Because that would have been in
18 the check register. No.

19 Q. Other than those outstanding items, were
20 you able to put together what I'll call the
21 financial story of what happened with John
22 Vergeldt, Jr.'s finances, the trust finances?

23 A. I guess I need to ask you to -- I'm not
24 sure what you're asking, Mr. Peace.

25 Q. Other than the resolved outstanding **ROA 000749**

1 you discussed earlier, was that everything you were able to find on John Vergeldt, Jr. or the trust?

2
3
4 A. Yes. Uh-huh.

5 Q. Based on what your work -- based on the work that you did here and what you originally found, would the trustees -- would John Edward's work as trustee have risen to the standards you testified earlier to?

6
7
8
9
10 A. No.

11 Q. Okay.

12 A. No.

13 Q. Would he have benefited from hiring a bookkeeper or an accountant to keep this information for him?

14
15
16 A. I'm smiling about that because, of course, I do my own accounting, you know, because that's -- you know, that's what I do. To date, the trust has had to pay me \$14,000 for the work that I did, and if there had been a bookkeeper in place, a bookkeeping service -- for someone who is not a professional trustee, that is always recommended unless, you know, they're accountants or something of that sort. And it would have been a lot less expensive, in my opinion.

1 a bookkeeping system or a bookkeeper service. **ROM 000751**
2 a payroll service, and then the records would
3 have been there for review instead of coming
4 back, all these years later -- and there's gaps
5 in what I could get, because banks only retain
6 their records for seven years. Anything before
7 that, you just can't -- you just can't retrieve.

8 So the work that I did under that court
9 order was a lot more expensive than anything that
10 would have -- it would have cost the trust to
11 have captured all of this contemporaneously over
12 the period of time.

13 Q. Okay. By failing to meet the standards
14 that you previously testified to, do you believe
15 that Mr. Vergeldt breached his duties under the
16 trust agreement?

17 A. Under the trust agreement and also under
18 the South Carolina probate code, in my opinion,
19 this did not meet the standard for fiduciary
20 administration.

21 Q. And those would be the duties of
22 impartiality?

23 A. Impartiality, the reporting -- you know,
24 especially the reporting, the commingling of the
25 funds, the opening of accounts with Mr. **ROM 000751**

1 Edward on the account as an owner, all of the other things together. ROA 000752

3 As a trustee or a personal representative
4 who would have to go to the Court potentially and
5 have your work reviewed, this is not the way that
6 the probate court would accept or find acceptable
7 as they reviewed it.

8 MR. PEACE: Okay. I have no further
9 questions for Ms. Palinski.

10 THE COURT: Thank you, Mr. Peace.
11 Mr. Vergeldt.

12 JOHN EDWARD VERGELDT: Sure. Thank you.

13 - - -

14 CROSS-EXAMINATION

15 - - -

16 BY JOHN EDWARD VERGELDT:

17 Q. Okay. At the last hearing, you were not
18 selected by Mr. Silvernail. I will say that.
19 It's in the court record. You were selected by
20 Mr. Blue. You, in fact, were suggested by
21 Mr. Blue, and Mr. Silvernail rejected you, as
22 your costs would have been too high, which is why
23 Judge Kimball did not remove me as the trustee.

24 MR. PEACE: I'm going to object, Your Honor.

25 Is Mr. Vergeldt going to ask a question or not? ROA 000752

1 THE COURT: Yeah. Mr. Vergeldt. ROA 000753
2 JOHN EDWARD VERGELDT: Sorry.
3 THE COURT: You'll have an opportunity for
4 argument.
5 JOHN EDWARD VERGELDT: All right. Thank you.
6 THE COURT: Just ask her a question.
7 BY JOHN EDWARD VERGELDT:
8 Q. So you saw the reports that were prepared
9 for the beneficiaries before and after John
10 Vergeldt, Jr. passed away that listed the assets
11 and the --
12 A. Uh-huh.
13 Q. -- liabilities?
14 You saw the yearly accounts?
15 A. I did. I was provided copies of those.
16 Q. Yes. I provided those for you.
17 The total sum at our father's passing, do
18 you remember what that was, the total sum of
19 assets minus liabilities?
20 A. If I could refer, I prepared a table.
21 Q. Would you accept --
22 THE COURT REPORTER: I'm sorry. I don't
23 believe the witness was finished.
24 JOHN EDWARD VERGELDT: I'm sorry.
25 A. In my notebook, under tab 2, I have ROA 000753

1 from -- as I had the statements in that, **ROA 000754**
2 prepared a table of the balance -- as of
3 year-end, a recap of all of the accounts, and as
4 of December 31st of 2013, there was \$187,214 in
5 trust accounts. Really just two accounts, the
6 First Citizens, that 4009, the one that was used
7 for most transactions; and the Edward Jones
8 account that had been opened in August of 2011 --

9 Q. Okay.

10 A. -- and it remained open at that date in
11 2013.

12 Q. You've gone back to checks that were
13 written in 2008, '9, '10, '11, and '12. Do you
14 know who wrote those checks?

15 A. Early on, Mr. Vergeldt, Jr. was writing
16 the checks.

17 Q. Yes.

18 A. And then there were checks in '9, '10, '11
19 where you were signing the accounts. You were
20 signing the checks.

21 Q. Actually, those, in '9, '10, and '11, were
22 signed mostly --

23 JOHN EDWARD VERGELDT: And I do have to --

24 I --

25 THE COURT: Mr. Vergeldt, you just need **ROA 000754**

1 ask a question. You'll get -- **ROA 000755**

2 Q. Do you know that David Vergeldt was

3 writing the majority of his checks from

4 2005 through 2008 or 2009?

5 A. Well, sir, I wouldn't -- no, I did not

6 know that because I started with January 1 of

7 2008.

8 Q. I understand. And do you know that

9 Patricia Vergeldt wrote the majority of his

10 checks from the time Mr. Vergeldt -- John

11 Vergeldt, Jr. took the duty away from David

12 Vergeldt and gave it to Patricia Vergeldt because

13 of funds being missing in his account? Are you

14 aware of that?

15 A. I -- someone in this whole process has

16 said that David had been removed by your father.

17 David --

18 Q. Yes.

19 A. -- was another son, and I understand he's

20 now deceased.

21 Q. Yes.

22 A. But again, those were not records that --

23 Q. I understand.

24 A. -- was within the scope of my --

25 THE COURT REPORTER: I'm sorry. **ROA 000755**

1 Q. She -- ROA 000756

2 THE COURT: Mr. Vergeldt, you need to allow

3 her to fully answer her question and then ask

4 another question.

5 Ms. Palinski, was there anything further?

6 THE WITNESS: No. Just that that was not --

7 those were not records that I looked at, and it

8 wasn't within the scope of the order appointing me.

9 Q. So the -- okay.

10 MR. PEACE: I'm going to object to the

11 reference.

12 THE COURT: I'm going to allow it.

13 MR. PEACE: That's fine, Judge.

14 Q. When Patricia Vergeldt took over writing

15 the checks, the majority of the checks, for John

16 Vergeldt, Jr., you have -- basically there is no

17 record of those, either, because of the check

18 registers, correct? There's not a good record of

19 the checks that were written, and you had to go

20 back and reconstruct those. Did I understand

21 that?

22 A. I'm sorry, sir. I don't understand.

23 Q. What I'm trying to get to is --

24 A. Uh-huh.

25 Q. -- you have mentioned that there ROA 000756

1 check registers, and I understand that. **ROA 000757**
2 you're alluding to the fact, when you said I have
3 failed as a fiduciary, that I somehow had
4 responsibility for those check records up until
5 roughly 2012, which, in fact, I did not, because
6 I was not the primary --

7 THE COURT: Mr. Vergeldt.

8 JOHN EDWARD VERGELDT: I'm testifying. I'm
9 sorry.

10 Q. But you alluded to me being the primary
11 keeper of records and check registers through
12 those years; is that correct?

13 A. Exactly which years are you referencing?

14 Q. This was a --

15 A. I'm sorry. And I shouldn't be asking --

16 Q. It's going to sound like I'm speechifying
17 again, but this was a family institution where
18 the entire family, quite honestly, was gathered
19 around my father helping take care of all.

20 THE COURT: Mr. Vergeldt.

21 JOHN EDWARD VERGELDT: So I can't --

22 THE COURT: Stop. Mr. Vergeldt.

23 JOHN EDWARD VERGELDT: I'm moving on.

24 THE COURT: No. Here, it's a thing, and it
25 may be because you're nervous. **ROA 000757**

1 JOHN EDWARD VERGELDT: I'm very nervous. BOA 000758

2 THE COURT: Just take a breath and take your
3 time. There is no rush with these questions.
4 Because you had a question for her; her response to
5 you was what year you were referring to. If you
6 could give her that information, maybe she can
7 answer your question.

8 Or what years were you referring to?

9 BY JOHN EDWARD VERGELDT:

10 Q. Do you know what year it was when I took
11 over the responsibility for paying the bills?

12 A. I want to look. I'm going to take just a
13 moment, because I want to look at that 4009.
14 At -- you know, your father was a resident of
15 Michigan, and there were a number of First
16 Citizens accounts that were opened -- I think
17 those are all Mr. Vergeldt's accounts.

18 And this is under tab 1 in my notebook.
19 There was a First Citizens account opened as
20 early as October of '08. And there's no First
21 Citizens Bank in Michigan, so those were
22 accounts -- and actually, that one that was
23 opened in October of '08 that was jointly titled
24 by your father and you.

25 And also then there was another BOA 000758

1 six -- in June of '09 of First Citizens **ROA 000759**
2 opened in your father's name and the name of the
3 trust.

4 And there was another one opened -- and
5 that's the 4009 -- in July of 2010, and that was
6 titled for both John, Jr., the trust, and John
7 Edward.

8 And then an Edward Jones account down
9 here -- and I'm sorry; I can't recall if it was
10 Rock Hill or York, but it was an Edward Jones
11 account in this area. That opened in August of
12 '11.

13 And also, another First Citizens account
14 was opened that same month, and that also had
15 three owners: your father, yourself, and the
16 trust. And that account -- that account was used
17 only -- that Edward Jones account that had been
18 opened that same month, the dividends and
19 interest coming into that account were swept
20 daily into this First Citizens account.

21 So in looking at those, there was -- oh.
22 And then the Yadkin Valley, which is now First
23 National Bank -- that's also down in this area;
24 that's not a Michigan institution -- that opened
25 in November of 2010. **ROA 000759**

1 And then the Duke Energy notes, ~~that~~ **ROA 000760**
2 investment account, that's the one that was
3 opened for you in the name of you and your father
4 as joint tenants with survivorship, and that
5 opened in November of 2011.

6 So in looking back at that, Mr. Vergeldt,
7 these records indicate that you were involved
8 back as early as October of '08.

9 Q. Okay. Now, how many of the First Citizens
10 accounts were not demand accounts but were money
11 market accounts?

12 A. I didn't really distinguish that because I
13 wasn't -- I just -- I didn't distinguish.

14 Q. How -- I'm sorry.

15 A. So they may have been interest-bearing. I
16 guess, from looking at the statement, you could
17 see if there was any interest paid into it by the
18 institution.

19 Q. When those accounts were opened, were they
20 opened -- could you tell -- with trust monies or
21 John Vergeldt, Jr.'s personal money?

22 A. Let's see. They were -- well, you see, at
23 that point, your father was still living, and it
24 was a revocable trust. And you know, so those
25 accounts would have been under his Social ~~Security~~ **ROA 000760**

1 Security number.

ROA 000761

2 And so what I'm trying to say is, at that
3 point, while that settler is still living with a
4 revocable trust, it's his money, whether it's
5 titled in the name of the trust or him
6 individually. And yes, those accounts, as I
7 recall, were all opened with money from your
8 father or his revocable trust --

9 Q. Thank you.

10 A. -- which, again, at that point, it's
11 one -- one person -- one taxpayer.

12 Q. So since he was in charge of his finances
13 at the time, him opening an account -- which you
14 agreed he opened the accounts, they were in his
15 name or his trust's name?

16 A. Well, some of them were -- also included
17 you.

18 Q. I'm getting there. Yes.

19 A. Okay.

20 Q. The trust, being John Vergeldt, Jr., would
21 have the perfect right to put anyone on the trust
22 or on that account that he chose to?

23 A. No.

24 Q. Why not?

25 A. Because it was your father's money.

ROA 000761

1 would have to be in the name of your father. ROA 000762
2 individually or the trust. In my understanding
3 and interpretation of fiduciary standards, a
4 trustee -- well, I'll just stop there.

5 Q. Okay. So -- but a co-trustee could be on
6 it?

7 A. Yes.

8 Q. So if --

9 A. Well, not as an owner, but as a signatory.

10 Q. Very well. So if John Vergeldt, Jr.
11 opened the trust account and put someone else on
12 the account and the bank allowed them to do so,
13 does it stand to reason that the bank was
14 satisfied that the person could be on the
15 account?

16 A. That would be for someone from the bank to
17 testify as to why they did it that way.

18 Q. Moving on, as you noticed the accounts,
19 the number of accounts, the physical number of
20 accounts, did you notice that they diminished in
21 around 2011 and 2012?

22 A. Again, I'm referring to tab 2 in the
23 notebook, that table of the recap of the
24 accounts. In 2011, there was eight accounts that
25 were open, that remained open; the -- and ROA 000762

1 2012, it was five accounts; and then 2011, ROA 000763
2 his death, by the end of the year, there were
3 just the two accounts.

4 Q. Would it make sense to you that someone
5 was trying to convince the trustee to clean up
6 the accounting?

7 A. To simplify the accounting, yes.

8 Q. To simplify the accounting.

9 A. Uh-huh. Yes. And that is a good
10 fiduciary practice once you're able to bring
11 everything into the trust.

12 Q. Okay. The debit account where you noticed
13 all of the transactions?

14 A. The debit account, sir? What --

15 Q. There was a debit card.

16 A. Oh, the debit card. Okay. That was on
17 the 4 --

18 Q. Yes.

19 A. The First Citizens.

20 Q. And you made a comment as to how many
21 charges there were on the debit account, and you
22 questioned that. When you met with me and
23 Mr. Blue, did you ask me about that account? Do
24 you remember?

25 A. Yes, sir, I do. The explanation, ROA 000763

1 remember, for the use of the debit account **ROA 000764**
2 that there would be service charges of \$12 a
3 month from First Citizens Bank just for having
4 that account, and if there were a number of debit
5 card transactions that month -- sufficient
6 number -- then there would be no 12-dollar
7 service card -- service charge.

8 Q. Thank you.

9 A. So it was to avoid the service charge.

10 Q. Did you notice that the funds that were
11 taken out were almost universally replaced? You
12 said there were withdrawals and additions?

13 A. Well, my reference to that was transfers
14 to and from your individual account.

15 Q. Correct.

16 A. Not the ATM account. Not the ATM card.

17 Q. So what I'm asking is if I or the
18 plaintiff took funds out of the account and then
19 replaced them because they were trying to do the
20 12 required -- which is 12 -- trying to do the 12
21 required debit charges and then replace that
22 money, you would say that that's commingling
23 money, correct?

24 A. Yes. And also, I did see some of those
25 deposits into that account after debit card **ROA 000764**

1 Q. Who had access to the debit account **ROA 000765**
2 you know?

3 A. When you say debit account, I just want to
4 be --

5 THE COURT REPORTER: I'm sorry.

6 A. Debit card.

7 Q. There was a debit card, which was an
8 ATM --

9 THE COURT: Mr. -- let her finish before you
10 talk over her.

11 A. That's okay. I'm sorry. I was just
12 confused by the terminology. Debit card.

13 Q. An ATM card --

14 A. Right.

15 Q. -- or a debit card.

16 A. Uh-huh.

17 Q. Do you know who had access to the debit
18 card?

19 A. No.

20 MR. PEACE: Judge, I'll stipulate that when
21 Mr. Vergeldt mentions the debit account, he's
22 speaking of account number 4009.

23 Q. I handed you just now a piece of paper
24 that has significant expenditures from the debit
25 account. **ROA 000765**

1 BY JOHN EDWARD VERGELDT:

ROA 000767

2 Q. In your opinion, were all of the
3 withdrawals from that account done in
4 South Carolina or were some of them done outside
5 of the state?

6 A. I would have no way of knowing that
7 because, of course, they just appear on the --

8 Q. I understand.

9 A. -- the bank statement. Uh-huh.

10 Q. Okay. Of the withdrawals in the year 2010
11 and '11, are the numbers that I've presented you
12 anywhere close, or can you even answer that
13 question?

14 A. I cannot because, again, they're just
15 dollar amounts for a month.

16 Q. Thank you.

17 A. It's not transactions. Uh-huh.

18 Q. Thank you. If a co-trustee was exercising
19 authority that was ordered to him, was -- if a
20 co-trustee was doing something that the trustee
21 ordered him to do, would he be conducting himself
22 in a fiduciary manner -- a positive fiduciary
23 manner?

24 A. I'm definitely confused by the question
25 because --

ROA 000767

1 Q. Let me rephrase. ROA 000768

2 A. -- I don't know who the co-trustee would

3 have been.

4 Q. If a co-trustee followed the specific

5 instructions as far as the use of a debit card

6 from the trustee, would the co-trustee still be

7 in breach of his fiduciary duties?

8 A. And I -- I'm sure I look confused. I am,

9 because the trustee was your father. He was the

10 settler and the trustee, and I'm interpreting

11 this to infer that you or someone else was

12 serving as his co-trustee.

13 JOHN EDWARD VERGELDT: Your Honor, may I

14 answer it? I think she's asked me a question.

15 THE COURT: You can just answer the question.

16 A. I just -- if there's -- if there are

17 co-trustees, one trustee can delegate to another

18 trustee.

19 Q. If a trustee --

20 THE COURT: Let her finish.

21 JOHN EDWARD VERGELDT: I'm sorry. I thought

22 she had.

23 A. Well, and I just -- you just don't use

24 debit cards in -- as a fiduciary. As a standard,

25 you don't. ROA 000768

1 Q. If the trustee of a trust account **ROA 000769**
2 is his money --

3 A. Right.

4 Q. -- correct?

5 If he were to say, get two debit cards and
6 give them to two different people and explicitly
7 gave those two people the authority to use his
8 card for purchases, would anyone be in a breach
9 of a fiduciary trust? Would anybody be in breach
10 of trust?

11 A. I really -- I'm just -- I'm stuck on this,
12 because I'm saying you just -- if your father --
13 if your father had an account, like the Credit
14 Union ONE account -- that was never -- that was
15 his individual account during his lifetime; it
16 was never a trust account; it was never titled
17 that way.

18 So if he had had a debit card on Credit
19 ONE -- Credit Union -- again, I think it was
20 Credit Union ONE was the name of it, he could
21 certainly use a debit card that was not a trust;
22 but then when you get to a trust account, a
23 fiduciary standard would not to be used [sic] --
24 now, if someone else besides the settler -- if
25 his successor trustee was handling that **ROA 000769**

1 if I were representing -- if I were the **ROA 000770**
2 for that trustee, I would say, do not use a debit
3 card.

4 Q. Okay. So if the trustee, however, did say
5 to use it, anyone who's in breach of a fiduciary
6 responsibility would be the trustee?

7 A. The trustee would be. If the -- the
8 trustee -- if the trustee was giving someone a
9 debit card, that would not be a proper --

10 Q. But if the trustee did -- you're saying it
11 shouldn't have been done?

12 A. It shouldn't have been done.

13 Q. If the trustee retained the right to
14 terminate the co-trustee or change the terms of
15 his trust, at any point should any of the
16 beneficiaries or the people in the trust anger
17 him or displease him, you would assume that
18 they would do what he said?

19 Let me rephrase that.

20 A. Yes, please. It's so speculative.

21 Q. If the trustee had the right to change the
22 trust --

23 A. Change the trust. Right.

24 Q. -- because it was not an irrevocable
25 trust; it was a revocable trust -- **ROA 000770**

1 A. Uh-huh. **ROA 000771**

2 Q. -- the trustee could have removed the

3 co-trustee at any time; he could have appointed a

4 different co-trustee had he chosen to; he could

5 have added beneficiaries -- which he did in

6 amendment number -- removed beneficiaries.

7 He could do all of that because he was

8 still alive and cogent, correct?

9 A. He was the settler and the trustee.

10 Uh-huh.

11 Q. Yes. So one would assume, then, if he

12 made the decision to give out debit cards to

13 certain people that he -- they had his permission

14 to use it, although it wouldn't, in your opinion,

15 be good bookkeeping practices?

16 A. There is -- I'm not sure how to be

17 responsive. I'm not trying to be argumentative

18 or difficult --

19 Q. No.

20 A. -- but I'm just not familiar with that

21 type of use of a trust account. I just have to

22 leave it at that.

23 Q. Thank you. But if it was done, you

24 would -- if someone had brought that to you,

25 you'd say, please don't do that? **ROA 000771**

1 A. Don't do that. Absolutely don't ~~BOA 000772~~
2 Uh-huh.

3 Q. But if the trustee went to the trustee's
4 attorney and said, is this okay; and the attorney
5 said, I don't see anything wrong with it, would
6 you expect the trustee to change?

7 Because the attorney was probably not a
8 bookkeeper.

9 But from a bookkeeping standpoint, you
10 would not like that?

11 A. If an attorney were advising a trustee, I
12 would expect that the attorney was familiar with
13 fiduciary standards in terms of the advice that
14 he was giving that trustee.

15 Q. Okay. So the co-trustee retained
16 responsibility, first and foremost, to the
17 trustee?

18 A. Who is -- well, I don't know who the -- in
19 this -- I'm trying to apply it to the facts of
20 this case, and I don't know who was serving as
21 co-trustee.

22 Q. Okay.

23 A. If --

24 Q. Just to clear one thing up, and then I'm
25 done. You do not know how many ATM or ~~BOA 000772~~

1 cards there were, nor who had them, nor ~~ROA 000773~~
2 access to them?

3 A. No, I did not.

4 Q. So you have no way of looking at those
5 transactions to determine exactly who made them?

6 A. No.

7 JOHN EDWARD VERGELDT: No more questions.

8 THE COURT: Anything further?

9 JOHN EDWARD VERGELDT: May I get this?

10 MR. PEACE: Your Honor, just very, very brief
11 redirect.

12 - - -

13 REDIRECT EXAMINATION

14 - - -

15 BY MR. PEACE:

16 Q. Ms. Palinski, as part of your work, were
17 you given a copy of the trust agreement?

18 A. Yes. Uh-huh.

19 Q. Did you review the trust agreement as part
20 of your work?

21 A. Yes. Uh-huh. I'm sure I did. Yeah.

22 Q. Can you identify that document for me?

23 A. That would be the John Vergeldt, Jr.
24 trust.

25 Q. Okay. And that's the trust agree~~ROA 000773~~

1 we're here to discuss today? **ROA 000774**

2 A. Yes. Uh-huh.

3 MR. PEACE: Thank you. Your Honor, I'd like
4 to --

5 JOHN EDWARD VERGELDT: Objection. You have
6 provided me with amendment 8. Are you going to
7 discuss amendments 9 and 10 or are they included in
8 here as well?

9 MR. PEACE: They are included.

10 JOHN EDWARD VERGELDT: Okay. Thank you.

11 THE COURT: Any objection?

12 JOHN EDWARD VERGELDT: No, ma'am.

13 THE COURT: Plaintiff's 3 entered without
14 objection.

15 MR. PEACE: Thank you, Judge.

16 (Plaintiff's Exhibit 3 was marked for
17 identification.)

18 MR. PEACE: I will let everybody know that
19 because the trust is 90-something pages long, I
20 went ahead and printed front and back. If that
21 causes the court reporter an issue, I can untab my
22 copy.

23 THE COURT REPORTER: No, sir. It's no
24 problem.

25 **ROA 000774**

1 BY MR. PEACE: ROA 000775

2 Q. Ms. Palinski, Mr. Vergeldt asked you on

3 cross-examination a good number of what I'll call

4 hypotheticals concerning a trustee and a

5 co-trustee and whether the -- what would happen

6 if the trustee directed somebody to take actions

7 with regard to a debit card.

8 A. Uh-huh.

9 Q. If you will flip to the very end of the

10 document, the trust agreement.

11 A. Uh-huh. Are you talking about where it

12 says Appointment --

13 Q. Yes, ma'am.

14 A. -- on the last page? Okay.

15 Q. Yes, ma'am. Can you identify for the

16 Court what this document does?

17 A. This is -- it's an amendment. And

18 Mr. Vergeldt, Jr., the settler, and the

19 trustee -- he is, in this amendment, appointing

20 John Edward Vergeldt to serve as co-trustee.

21 Q. What powers was John Edward Vergeldt

22 vested with?

23 A. All of the powers, duties, and obligations

24 of the trustee.

25 Q. Okay. So -- and he is specifically ROA 000775

1 identified as a co-trustee? ROA 000776

2 A. Yes.

3 Q. Not a subordinate trustee?

4 A. Not a suc- --

5 Q. Not an ancillary trustee. He is a

6 co-trustee?

7 A. Yes.

8 Q. Okay. So if John Vergeldt, Jr. or if John

9 Edward Vergeldt was given a debit card regarding

10 account number 4009, and was -- and used it,

11 would that be a violation of his fiduciary duty?

12 A. Of the co-trustee's duty?

13 Q. Yes, ma'am.

14 A. No, not -- no. And perhaps, you know --

15 restate that, yeah.

16 Q. Let me rephrase the question. If John

17 Edward Vergeldt was given a debit card regarding

18 account number 4009 and used that debit card,

19 would that comply with the fiduciary standards we

20 discussed earlier?

21 A. I'm going to come back and say -- and

22 obviously, I was confused by the line of

23 questioning of John Edward Vergeldt. But the

24 co-trustee still had a responsibility to act as

25 fiduciary, and you know, a trust documentROA 000776

1 controls, generally speaking, the role - R01A000777
2 work that the trustee can do, the transactions
3 they can enter into.

4 There are default provisions in our
5 probate code to fill in the gaps. There's also a
6 probate code provision where there are certain
7 things that the trust document cannot control.
8 Exculp- --

9 Q. It can't waive?

10 A. It can't waive what the duties are under
11 our trust code.

12 So as I listen to this line of questioning
13 and that if the -- as I read this, I don't -- I
14 don't see this as waiving a fiduciary
15 responsibility of the co-trustee, even if the
16 settler said, do this.

17 Q. And in this particular case, I believe you
18 testified earlier that John Vergeldt, Jr. was the
19 settler, the initial trustee of --

20 A. Yes. Yes. Correct.

21 Q. All right. If a -- if a trustee directs a
22 co-trustee to violate a fiduciary duty, does the
23 co-trustee have an obligation to refuse?

24 A. Yes.

25 Q. Regardless of whether or not he - R01A000777

1 initial trustee may become angry, amend ~~BOA 000778~~
2 trust documents, take whatever action?

3 A. Yes.

4 MR. PEACE: Thank you. No further questions
5 for Ms. Palinski, Your Honor.

6 THE COURT: Anything further?

7 JOHN EDWARD VERGELDT: Just shortly.

8 - - -

9 RECROSS-EXAMINATION

10 - - -

11 BY JOHN EDWARD VERGELDT:

12 Q. So again, I'm going to propose a
13 hypothetical to you. It's a family situation,
14 and the trustee gives one of the family members
15 who is a beneficiary of the trust a debit card
16 and says, go ahead and use it for ancillary
17 expenses.

18 You would expect a person who really isn't
19 a fiduciary, who really isn't anything other than
20 another son who is trying to help out his dad --
21 you would expect him to know that the answer
22 should have been no?

23 A. Yes, because this is -- you know, this is
24 a situation -- you know, as you say, it's a
25 nonprofessional fiduciary; it's a family ~~BOA 000778~~

1 that's going to be serving as a fiduciary, ROA 000779
2 that does not waive that fiduciary's
3 responsibility. If you're going to accept that
4 position, then you're held to the law.

5 Q. So if that co-trustee went to the trust's
6 attorney and explained it and the attorney
7 specifically said, yeah, I don't see the problem
8 with that, then actually, the co-trustee sought
9 out the information, attempted to find out if
10 that was okay, and was told by competent legal
11 authority, the trust's attorney designated by the
12 trustee, you would expect him to do what?

13 A. Seek a second opinion.

14 Q. How would you expect a layman to know
15 that?

16 A. If you're going to be a trustee, you have
17 a duty to be -- to inform yourself of the
18 responsibilities for the fiduciary.

19 Q. Thank you. You would expect then that the
20 trustee would know that they have to file income
21 taxes for the trust?

22 A. Yes.

23 Q. Okay. And if the trustee of the trust
24 after the person passed did not file income tax
25 returns, you would find them to be in breach, ROA 000779

1 A. Right. That was -- was it outstanding ROA 000781
2 of the date of death? Yes. It was never --
3 during that period of time, it was never
4 accounted for.

5 Q. And to this date --

6 A. Uh-huh. Right.

7 Q. -- you could not account for it?

8 A. Could not account for it.

9 Q. Any other outstanding items since 2013,
10 the date of the settler's death?

11 A. Well, that 9209, the First Citizens
12 account, all of those transactions. And that was
13 the account that was owned by John Edward. That
14 was his individual account. That difference --
15 money went in; money went out. You know, some
16 money was moved back to the trust. Some money
17 was taken and then moved back.

18 Those items are still in accounting --
19 unaccounted for. I had done a schedule of
20 those -- there's a difference -- let me find
21 that. Give me one minute.

22 Exhibit B, and this is in tab 4 of my
23 notebook. There was -- there were deposits into
24 trust accounts from the accounts of John Edward.
25 The deposits total \$47,219. I'll spare ROA 000781

1 cents, but -- and the withdrawals from a **BCA 000782**
2 of John, Jr. or the trust were \$80,942. So there
3 was a difference of 33,723 from money that was
4 withdrawn. More was withdrawn than was deposited
5 back from this individual account of John Edward
6 Vergeldt.

7 And then was there anything else?

8 JOHN EDWARD VERGELDT: Your Honor, was that
9 withdrawal of \$33,000 a check or cash?

10 THE COURT: Mr. Vergeldt --

11 THE WITNESS: May I answer? I can explain
12 that, Your Honor. Just for clarification, that was
13 unresolved. That 37,723 is the difference between
14 what went in and what came out from John Edward.

15 BY THE COURT:

16 Q. And is that all of the out- --

17 A. Well, I guess -- let me go on beyond that.

18 1400 of that money from the 33,000 was reported
19 as trustee's fees, and at that point, you know,
20 that would have been John Edward as trustee.

21 1400 of the 33-7 was labeled as trustee fees. So
22 that would reduce it to -- \$32,323 was
23 unaccounted for or withdrawals exceeded -- what I
24 should say, withdrawals exceeded deposits. Okay.

25 Q. And by unaccounted, just no explanation **BCA 000782**

1 that you could find -- **ROA 000783**
2 A. Right. Uh-huh.
3 Q. -- for those expenditures?
4 A. No. It was just always transfers. And
5 that's where I picked them up from the trust
6 accounts. There were these transfers or checks
7 written -- well, transfers primarily to the 9209
8 account.
9 THE COURT: Any follow-up questions to that,
10 Mr. Peace?
11 MR. PEACE: No, Your Honor.
12 THE COURT: Any follow-up questions,
13 Mr. Vergeldt?
14 - - -
15 FURTHER RECROSS-EXAMINATION
16 - - -
17 BY JOHN EDWARD VERGELDT:
18 Q. So you're saying the unaccounted-for money
19 is how much?
20 A. Well, it was 42,969 from the Fifth Third
21 Bank certificate of deposit when that was
22 redeemed.
23 Q. Okay.
24 A. There was no ability to trace where 42,000
25 of that went. **ROA 000783**

1 Q. When we met, did you ask me, or h **ROA 000784**
2 not noticed that yet?
3 A. I don't recall.
4 Q. Okay. The other figure that you came up
5 with was 32,323. Did I write that down
6 correctly?
7 A. Yes, sir. Uh-huh.
8 Q. And what is that?
9 A. That is the difference between
10 withdrawals --
11 Q. Okay. So that's an open item?
12 A. Uh-huh.
13 Q. You don't know where that money went to?
14 A. Yes. In other words, once it went into
15 the account of John Edward Vergeldt, I did not
16 have any authority under my order to get records
17 of that account to see what -- how that money was
18 originally disbursed, spent, whatever.
19 Q. Was it a transfer or was it a check?
20 A. They were predominantly just transfers
21 into your -- into your individual account.
22 Q. Is it possible -- I'm asking that rather
23 than write a check -- which I agree now a check
24 should have been written -- that was a
25 disbursement for inheritance? **ROA 000784**

1 A. I have no way of knowing how the **ROA 000785**
2 withdrawals were applied.

3 Q. So you can't say yes or no. I'm asking
4 you, is it possible, in your mind, that that
5 transfer from this account to this account could
6 have been simply for ease of circumstances in
7 movement of inheritance?

8 A. It was a commingling -- under the
9 standards, it was a commingling of funds. It
10 moved funds from the trust to your individual
11 account.

12 Q. This is before -- to clarify, this is
13 before the settler passed away?

14 A. Yes.

15 Q. So this was the money that came out of the
16 Yadkin Valley. Yes? You don't know where that
17 money went.

18 A. I did not see any transfers from the
19 Yadkin Valley bank into your account.

20 Q. So that account was just closed until the
21 money went somewhere?

22 A. The Yadkin Valley account money went --
23 all of the Yadkin money -- and that's tab 14 of
24 my notebook -- that all went to the main First
25 Citizens account, the 4009, which was a **ROA 000785**

1 account. None of the Yadkin Valley money ROA 000786
2 directly into your individual account.

3 Q. When the trustee opened his Edward Jones
4 account right about that time, can you tell me
5 how much money was used to open the Edward Jones
6 account?

7 A. That's tab 12 of the notebook, and that
8 came from the 4009.

9 Q. Okay. All of it?

10 A. The 50,000-dollar opening deposit.

11 JOHN EDWARD VERGELDT: Thank you. No further
12 questions, Your Honor.

13 THE COURT: Ms. Palinski, you're excused.

14 THE WITNESS: Thank you.

15 (Exhibit 3 was marked for identification.)

16 MR. PEACE: Judge, do you mind if we take a
17 five-minute recess?

18 THE COURT: Yeah. We can make it a
19 ten-minute.

20 (A recess was taken.)

21 THE COURT: We can push through till
22 1 o'clock to break for lunch, unless that's going
23 to be --

24 MR. PEACE: However the Court wants to
25 proceed, I'm ready to go. I can do whatever ROA 000786

1 Your Honor, I call Vicki Vergeldt to the stand. **ROA 000787**
2

3 THE COURT: Ms. Vergeldt.

4 (Vicki Lynn Vergeldt was sworn in by the
5 Court.)

6 THE COURT: You may proceed.

7 VICKI LYNN VERGELDT

8 having been first duly sworn, was examined and
9 testified as follows:

10 - - -

11 DIRECT EXAMINATION

12 - - -

13 BY MR. PEACE:

14 Q. All right. If you could state your name
15 for the record, please, Mrs. Vergeldt.

16 A. Vicki Lynn Vergeldt.

17 Q. Spell Vergeldt for me, please.

18 A. I've spent my life spelling this name. V,
19 as in Victor, E-R-G, as in George, E-L-D, like
20 Doug, T like Tom.

21 Q. Thank you. Where do you live,
22 Ms. Vergeldt?

23 A. I live in Michigan.

24 Q. Where exactly in Michigan?

25 A. I live in Birmingham, Michigan. **ROA 000787**

1 Q. For the point of reference on a map, ROA 000788
2 where is Dearborn, Michigan -- or I'm sorry --
3 A. Birmingham.
4 Q. -- Birmingham, Michigan?
5 A. It's in Oakland County. It's a northern
6 suburb of Detroit.
7 Q. Okay. Have you always lived in Michigan?
8 A. I have.
9 Q. Where have you lived in Michigan?
10 A. I was raised in Detroit.
11 Q. Okay.
12 A. I went to the University of Michigan in
13 Ann Arbor, so I lived my college years there. I
14 went to graduate school in East Lansing, so --
15 that was at Michigan State University.
16 Q. Okay. What do you have your degree in
17 from Michigan?
18 A. My Michigan degree is in speech.
19 Q. I was going to call it Big Blue, but I
20 didn't want to do that.
21 And when did you graduate from Michigan?
22 A. Oh, golly. 1972, I think.
23 Q. What about Michigan State?
24 A. Hang on. That's when I graduated high
25 school. 1976. ROA 000788

1 Q. Okay. ROA 000789

2 A. Yes.

3 Q. All right. And when did you graduate from

4 Michigan State?

5 A. Well, actually, now that think of it, I

6 did a two-year period of time as an adjunct

7 instructor in Mexico. So I did that, and then I

8 came back, and I went to graduate school, and

9 that would have been in '81. I think I graduated

10 in '83.

11 Q. Okay. And what was your degree -- what

12 was your degree in from Michigan State?

13 A. Applied linguistics.

14 Q. And what do you do for a living?

15 A. I spent 30 years in corporate

16 communications. I worked for some very large

17 companies. I worked for Chrysler initially, then

18 Toyota. Then I was recruited by some very large

19 supplier companies.

20 Q. Anybody we would know on the supplier

21 side?

22 A. I don't think so. It was plastic

23 engineered products. I was a vice president of

24 communications there.

25 Q. Okay. ROA 000789

1 A. And the second one was a lead designer **ROA 000790**
2 engineering consulting firm, and I was vice
3 president of sales and marketing there.

4 Q. You said you did that for 30 years. Are
5 you not working now?

6 A. I am not.

7 Q. When did you retire or stop working?

8 A. Well, I freelanced for a while. When my
9 father became ill, I did not feel I could -- I
10 wasn't interested in working the kinds of hours
11 that I had to work at that stage in his
12 situation.

13 Q. Tell me about your family. Let's start
14 with your -- let's start with your -- not your
15 current nuclear family, but your brothers and
16 sisters and --

17 A. There were four of us.

18 Q. Okay.

19 A. I had two older brothers. My oldest
20 brother is Dave.

21 Q. Okay.

22 A. He died in 2010.

23 Q. Okay.

24 A. Then came John.

25 Q. Okay.

ROA 000790

1 A. Then came me. There's three years ROA 000791
2 us.
3 Q. Okay.
4 A. And then came a younger sister, and she
5 died in 2018.
6 Q. Would that be Patti?
7 A. That's Patti.
8 Q. Okay.
9 A. So there were three -- by the time my
10 father passed away, there were three residuary
11 beneficiaries, and those three people were me,
12 John, and our sister Patti.
13 Q. Does your -- do your brothers and
14 sisters -- are you married?
15 A. I am married.
16 Q. How long have you been married?
17 A. 34 years.
18 Q. 34 years. To whom are you married?
19 A. I'm married to Tim Yost.
20 Q. You've been married to him the entirety of
21 the 34 years?
22 A. I have.
23 Q. Good. Do you have any children?
24 A. We do.
25 Q. How many children do you have? ROA 000791

1 A. One. ROA 000792

2 Q. Son or daughter?

3 A. A son. He's 24 years old. His name is

4 Benjamin. He's a student at Wayne State

5 University. He's a musician.

6 Q. Okay. Do your brothers and sisters have

7 any children? Do you have any nieces and

8 nephews?

9 A. I do.

10 Q. Can you tell me who they are and to who

11 they belong?

12 A. Well, one of them is in the courtroom.

13 Audry Scheible is my niece. She was my sister's

14 second daughter.

15 And my brother John has -- let me think --

16 a stepson, an adopted son, and a natural son.

17 Three kids.

18 Q. You said your dad's situation. Can you

19 tell me what you're talking about.

20 A. Okay. John lived in South Carolina. My

21 oldest brother Dave died in 2010, but prior to

22 that, he suffered a lot of illness. He was

23 diabetic, suffered a lot of illness. Our sister

24 also suffered a lot of illness.

25 So I was in the position to be able to ROA 000792

1 aware of what was going on with my dad. **ROA 000793**

2 Q. Okay.

3 A. For one thing, we just got along well. So

4 my dad and I went on a sailing adventure together

5 at his invitation in 2006. For that reason, we

6 were in a berth. I don't know if you've been on

7 a sailboat, but it's very small.

8 Q. Okay.

9 A. And that -- something happened at that --

10 on that vacation that made it pivotal, and that

11 was, he said, sometimes I feel like I have to

12 tell my feet what to do.

13 Q. Okay.

14 A. And also, he fell backward going from one

15 deck to another. Both of those were red flags.

16 Q. Okay.

17 A. When we got back from that, I had him

18 evaluated by a neurologist, and he was diagnosed

19 with Parkinson's.

20 Q. Remind me when that would have been.

21 A. 2006. It would have been probably around

22 September of 2006.

23 Q. Okay.

24 A. So he was diagnosed with Parkinson's

25 disease, and he was started with treatment. **ROA 000793**

1 2006. ROA 000794

2 Q. Okay. Did he have -- okay. 2006.

3 What -- did he live independently in 2006?

4 A. He did. Our mom, his wife, passed away in

5 2000. So by 2006, Dad had been living alone in

6 the family house, which is a big old four-bedroom

7 colonial home, and I spent a lot of time with

8 him. We spent all of our vacations with him,

9 holidays, any birthday, all that stuff. I was

10 interested in including him.

11 Q. Did he continue to live by himself?

12 A. I should say that, in 2005, he began to

13 really feel like he needed a little help, and he

14 hired a friend of our family. They made an

15 exchange.

16 Q. Okay.

17 A. She was invited to live rent-free in his

18 home, and in exchange, she would help with

19 marketing and food preparation and a little

20 cleaning.

21 Q. Okay. All right. Did that arrangement

22 end?

23 A. It ended because she graduated college.

24 Q. Did he continue to live in the home?

25 A. He did, but I was aware that he was ROA 000794

1 suffering. He seemed to cry a lot. I took him to
2 to a psychiatrist. I had him evaluated. My
3 purpose for that was to see if he had any
4 suicidal tendencies. He really missed my mom a
5 lot.

6 So then he got diagnosed with Parkinson's
7 disease in 2006. He still continued to live
8 alone. He babysat our dogs. When we came back
9 from a vacation, he said, I'd like a dog. I had
10 tried to talk him into getting a dog. I thought
11 it would be a good companion for him. So we
12 arranged a little tiny poodle to be his
13 companion.

14 Q. When did he move to South Carolina?

15 A. Not until January 14th of 2013.

16 Q. Did he continue to live in the same place
17 between 2006 and 2013?

18 A. No. Should I go on?

19 Q. If you can tell me where he lived and the
20 time periods.

21 A. Yeah. Sure. He made the decision in the
22 end of 2007 that he would like to move to a
23 retirement community.

24 Q. Okay.

25 A. My dad was a really responsible guy.

1 did not want to be a burden on his kids. ROA 000796
2 that decision, and my brother and I helped him as
3 far as choosing which apartment he would have.
4 Dad made the decision -- this was in 2007. Dad
5 made the decision that he would like to move to
6 Henry Ford Village.

7 John flew up there to look at the
8 apartments that we considered, and both of us
9 were involved in being supportive of his
10 decision.

11 Q. Okay.

12 A. So he moved there effective in January of
13 2008. I coordinated the move. I hired the
14 mover. I packed his stuff. He was not able to
15 do that kind of thing at that stage in his life.

16 And I made sure that his apartment was set
17 up in a very pretty way and comfortable. That
18 was in January 2009.

19 Q. Did he move again?

20 A. He did. He managed to live independently
21 until July 3rd of 2010.

22 Q. Okay.

23 A. At that point, his condition had gradually
24 worsened. In 2009, it became clear to me that he
25 could not take his medicine anymore on h ROA 000796

1 So I obtained -- I tried a variety of things before it became clear how difficult the
2 situation was. I tried a variety of different
3 things, and finally, we got a lockable device.
4 And it had a timer in it. I would fill it. He
5 was unable to sequence the dose and timing of the
6 pills.
7

8 That was in 2009. So in 2010, I was very
9 involved with him. I was seeing him probably
10 four times a week. I arranged for Audry
11 Scheible, my niece who's here, to assist him. I
12 believe it was after Memorial Day weekend -- I
13 could be wrong about that; I don't remember
14 exactly. But it was clear -- I spent that
15 Memorial Day weekend with him in his apartment,
16 and it was clear to me that he needed more help
17 than he got. It was his preference and our
18 wishes that he continue to be able to live
19 independently if possible.

20 But then in July, suddenly he could not
21 walk. And I knew enough about Parkinson's
22 disease. I found him a movement disorder
23 specialist. I'm the person that took him to the
24 doctor. He had cancer a few times. I made sure
25 that all that stuff got taken care of. **ROA 000797**

1 He began to get lost while driving. ROA 000798
2 the one who drove him.

3 So I was aware that it wasn't a function
4 of Parkinson's disease that he would suddenly be
5 unable to walk. Parkinson's disease is very slow
6 in terms of its physical impact.

7 I had him evaluated immediately. It was
8 determined that he was severely dehydrated. And
9 so at that point, the whole family, on a
10 telephone call, decided it would be in Dad's best
11 interest to move into my home because we were
12 close and we were nearby him and we were in a
13 position to do that. So that's what we did.

14 Q. Did he continue to live in your home
15 before he moved to South Carolina?

16 A. No, he did not.

17 Q. Okay.

18 A. On October 19th of 2011, my niece, who
19 at that point was one of the caregivers, under
20 the direction of her mom, removed him without my
21 permission. I was at work, and they removed him
22 to my sister Patti's home.

23 Q. Okay. Did he live there until he moved to
24 South Carolina?

25 A. He did.

ROA 000798

1 Q. Okay. All right. When did he first move to South Carolina? ROIA 000799

2 A. January 14th of 2012.

3 Q. '12 or '13?

4 A. 2012.

5 Q. 2012. Okay. All right. During this time
6 period, how was the relationship between you and
7 your brothers and sisters -- I'm sorry -- between
8 your brother and your sister?
9

10 A. Well, I think it was -- I would
11 characterize it as pretty cooperative at that
12 point. We were all interested in trying to be
13 supportive of our dad.

14 Q. Obviously, things appear to have changed.
15 What do you know about -- what is your
16 understanding about what changed?

17 A. To me, what changed was that I asked a
18 question in January of 2013.

19 Q. Okay.

20 A. I was away on vacation. John sent an
21 email dated January 1st of 2013. It appeared
22 to me that there was a 100,000-dollar error in
23 the numbers of the email. It's important that I
24 was away because John actually emailed me again,
25 saying -- in the original email, he said ROIA 000799

1 have any questions, please let me know. **ROA 000800**

2 And then I was away, and I couldn't focus
3 on it, and he asked again, do you have any
4 questions? And I said, look, I'm away right now,
5 but when I get back, let me look at it; and if I
6 have any questions, I'll let you know; thank you.

7 And so I asked him the question, and to
8 me, that was the beginning of all kinds of
9 problems, including that that month he would not
10 allow me to see our dad in South Carolina.

11 Q. After he moved to South Carolina, how many
12 times did you see your dad?

13 A. Well, I wanted to see Dad once a month,
14 but John wouldn't permit that. I actually kept a
15 register of how many times I saw him, and I saw
16 him on average every seven or eight weeks.

17 Q. Even though you saw him in that time
18 period, did you talk to him?

19 A. I did. My dad asked me to keep in touch
20 with him on a daily basis, so I had set an alarm
21 in my phone so that it would remind me to give
22 him a call. And usually these calls were short,
23 you know, several minutes long. I think it was
24 just a, you know, reassurance.

25 Q. Sure. Did you discuss -- when you **ROA 000800**

1 with your father and afterwards, did you **ROA 000801**
2 his finances with him?

3 A. I did not.

4 Q. How come?

5 A. Because John was handling them.

6 Q. What about when he moved to
7 South Carolina?

8 A. I did not. He wasn't capable of that at
9 that time.

10 Q. Did he ever raise any issues with you or
11 ask any questions of you about what was going on
12 with his finances?

13 A. Never.

14 Q. Are you aware if he discussed his finances
15 with any of your other -- with your sister?

16 A. I never observed that.

17 Q. Okay. What about any of your nieces or
18 nephews?

19 A. I never observed that. He was ill.

20 Q. And he finally passed -- or I'm sorry; not
21 finally. He passed away on July 7th, 2013?

22 A. July 9th.

23 Q. July 9th. Thank you.

24 A. Uh-huh. 2013.

25 Q. At the time, you said John was married **ROA 000801**

1 his finances. Under what authority was ~~ROA~~ **ROA 000802**
2 handling your father's finances?

3 A. To tell you the truth, I didn't know. I
4 assumed that it was because he was Dad's son.

5 Q. Were you aware of your dad's trust at the
6 time?

7 A. I don't believe I was. I didn't have a
8 copy of it. I didn't know -- I didn't know about
9 his account. I didn't know anything about that.

10 Q. When did you become aware of the trust?

11 A. I believe the first time that I was aware
12 of something -- a legal -- a legal document
13 pertaining to that was in May of 2009, because
14 John wrote and obtained a durable power of
15 attorney. He got my dad to sign it. That was in
16 May of 2009.

17 Q. Can you identify this document for me?

18 JOHN EDWARD VERGELDT: Your Honor, I object
19 to the term he got my father to sign it. It
20 perfectly -- perfectly understandable that he asked
21 it to be prepared and signed it of his own
22 volition, and no one coerced, twisted his arm, or
23 got him to do anything.

24 THE COURT: You'll be able to ask questions
25 or testify yourself, Mr. Vergeldt. **ROA 000802**

1 Q. Can you identify that document for **ROA 000803**
2 A. It's a durable power of attorney.
3 Q. Okay. Who is it by and between?
4 A. It's by John Vergeldt, Sr., which is
5 actually an error --
6 Q. Okay.
7 A. -- because my father was John Vergeldt,
8 Jr., and John Edward Vergeldt.
9 MR. PEACE: I'm going to place this into
10 evidence -- move to place this into evidence as
11 Exhibit 4.
12 THE COURT: Any objection?
13 JOHN EDWARD VERGELDT: No, ma'am.
14 THE COURT: Plaintiff's 4 entered without
15 objection.
16 (Plaintiff's Exhibit 4 was marked for
17 identification.)
18 Q. You became aware of the power of attorney,
19 you said, 2009?
20 A. Correct.
21 Q. What about the trust that's at issue?
22 A. I beg your pardon?
23 Q. When did you become aware of the trust
24 that's at issue?
25 A. I'm really not sure when. **ROA 000803**

1 Q. Can you identify that document for ROA 000804
2 A. I can.
3 MR. PEACE: Can I grab Plaintiff's 3?
4 THE COURT REPORTER: Yes.
5 A. Well, this is the eighth amendment and
6 complete restatement to the trust agreement
7 between John Vergeldt, Jr. as settler and John
8 Vergeldt, Jr. as trustee.
9 Q. When did you first receive a copy of this
10 document?
11 A. I received this after my father's death.
12 Q. Who did you receive it from?
13 A. John Edward Vergeldt.
14 Q. Before you received this, did you -- or
15 after the error, did you begin asking questions
16 about your father's finances?
17 A. I did initially when he moved from his
18 home into the apartment. I just asked in a very
19 general sense, is this doable? And I was told
20 yes.
21 And I knew that one of the things that my
22 dad was interested in was that he could have
23 received caregiving if he became in need of it.
24 And I asked, is that doable? And I was told yes.
25 I was told that he was well set. ROA 000804

1 I also remember in a conversation **ROA 000805**
2 dad, at first he said he did not want to take any
3 of the stuff from his house. And I was surprised
4 and I said, well, okay, Dad. You're in a
5 position; you can get new stuff if you want. I
6 said, why don't you think about that?

7 So the next time I saw him, two days
8 later, he said, I'd like to take everything. And
9 I said, well, that's not going to work because
10 it's never going to fit. So I gave him a pad of
11 Post-It notes, and I said, you go around and
12 stick a Post-It note on everything you want in
13 your new place.

14 Q. Okay.

15 A. But because of the -- I didn't know
16 exactly how to respond to him. I was aware then
17 that he was evidently well set. He told me not
18 to worry.

19 Q. You received this trust agreement after
20 your father's death. Did you ask your father
21 what was in -- what was in the document?

22 A. I read it.

23 Q. Did you ask what property was in the
24 trust?

25 A. Well, at that point our relations **ROA 000805**

1 exceedingly strained, and it was difficult to ask questions and get an answer, even
2 to ask questions and get an answer, even
3 regarding probate. I had questions about it. I
4 had never been through this kind of thing before.

5 And his response to me -- I have this in
6 writing -- was, you have an attorney advising
7 you -- which, as a matter of fact, I didn't -- I
8 suggest you get that answer from him.

9 Q. Okay. Where was your father's estate
10 probated?

11 A. I think in Wayne County, but I'm not sure.

12 Q. You're not sure. Okay.

13 A. Well, no, I take it back. It had to have
14 been probated here, because he died here.

15 Q. Yes, ma'am.

16 A. Yeah.

17 Q. Okay. After you received this document
18 and you made inquiries about what was in the
19 trust property, did you receive any kind of an
20 answer?

21 A. I beg your pardon?

22 Q. What answer did you receive from your
23 brother about trust records and trust documents?

24 A. Oh, I see. I was aware, because -- okay.

25 After Dad died, John informed us -- Patricia

1 me -- via email of an OM financial account ROA 000807

2 I don't think we knew about the Edward Jones
3 account -- the OM financial account and one
4 account at First Citizens, the 4009 account. And
5 forgive me; I can't remember if I knew at that
6 point about the Edward Jones account. I don't
7 think so. Anyway, that was the first information
8 I received about any of my dad's accounts.

9 Q. Did you continue to request information?

10 A. I did, because my brother proposed some
11 distributions without the benefit of an
12 accounting.

13 Q. Okay.

14 A. And prior to that, he had begun to be
15 quite hostile. So you know, from January of
16 2013, when he wouldn't let me see Dad that month,
17 and then as that year progressed, up until Dad
18 died, he was very hostile toward me.

19 Q. How did you begin receiving information
20 about the trust?

21 A. Eventually, John demanded that I sign a --
22 a -- what would you call it -- a comprehensive
23 release of claim and that I sign this on the
24 basis of what he was proposing as the
25 distributions and that, if I did not agree ROA 000807

1 that, he would disinherit me. ROA 000808

2 Q. Okay.

3 A. I felt that that was really arm twisting,
4 and I had decided to seek some advice.

5 So I believe there were one -- there were
6 actually two such emails. Both of them were
7 threatening.

8 Q. Okay.

9 A. None of the numbers were supported with
10 third-party references.

11 Eventually I did seek advice, and that
12 representative then sought records from John on
13 my behalf, and he denied it. And that happened,
14 I think, maybe two more times, and eventually the
15 declaratory judgment was filed on my behalf to
16 try to get the records.

17 Q. When you say declaratory judgment, you
18 mean a lawsuit was filed?

19 A. Correct.

20 Q. Where was that lawsuit filed?

21 A. Here in York, because Dad passed away in
22 York County.

23 Q. Okay. When did that lawsuit end?

24 A. We had a bench trial in July of 2015. We
25 received the order from Judge Kimball per ROA 000808

1 to that trial in August of 2015. ROA 000809

2 Q. Okay. Identify that document for me.

3 A. Yes. Let me see the back page. Right.

4 This was -- this is a copy of Judge Kimball's

5 order from -- it is dated August 28th of 2015.

6 So he issued this order about 30 days after the

7 bench trial.

8 MR. PEACE: All right. Your Honor, I would

9 move to place a copy of Judge Kimball's order in

10 case number 2014-CP-46-1956 into evidence.

11 THE COURT: Any objection, Mr. Vergeldt?

12 JOHN EDWARD VERGELDT: No, ma'am.

13 THE COURT: Entered without objection.

14 Plaintiff's 5.

15 (Plaintiff's Exhibit 5 was marked for

16 identification.)

17 Q. Ms. Vergeldt, what was the result of that?

18 What did Judge Kimball rule?

19 A. May I look in here?

20 Q. Yes, ma'am.

21 A. Okay. I'm trying to find the exact

22 verbiage, but basically, he said he had a duty to

23 provide -- here it is. John has a duty to

24 provide to all beneficiaries, quote, a copy of

25 the terms of the trust that describe or ROA 000809

1 the trust beneficiaries' interest and re **ROA 000810**
2 information about the trust property, and that
3 duty encompasses all available information
4 relevant to the trust property without time
5 limitation.

6 He further has a duty to provide
7 statements of account at least annually to
8 current trust beneficiaries and to permit
9 inspection of the financial records of the trust
10 from the date of Mr. Vergeldt's death.

11 Q. Okay. So your brother had to provide you
12 with -- upon request -- statements of trust
13 accounts and trust property?

14 A. Correct.

15 Q. And an accounting from the date of his
16 death?

17 A. Correct.

18 Q. Did he do that?

19 A. He did not.

20 Q. Did you make requests that he do that?

21 A. Many times.

22 Q. Did you do that through counsel -- did you
23 do that yourself?

24 A. No.

25 Q. Okay.

ROA 000810

1 A. The relationship was very damaged **ROA 000811**
2 strained. Let's just say strained.

3 Q. That's fair. And then you brought this
4 action. What happened after that?

5 A. My counsel approached John's counsel in
6 writing twice asking for an opportunity to review
7 the box of records. We were aware, as I believe
8 Ms. Palinski said, there was a box of records at
9 John's counsel's place of work. We asked
10 permission for my counsel to review those
11 records. That did not happen.

12 Q. Did that not happen because -- why did
13 that not happen?

14 A. They -- we received written response
15 saying that -- okay. We received written
16 response from John's counsel on John's behalf
17 indicating that John did not agree, based on his
18 reading of Judge Kimball's order, that I was
19 entitled to see those records.

20 Q. And then what did you do after that?

21 A. We filed the removal petition.

22 Q. Go ahead and identify that document for
23 me.

24 A. Well, this is a copy of the removal
25 petition that we filed in York County on **ROA 000811**

1 January 21st of 2016. ROA 000812

2 MR. PEACE: Okay. Your Honor, I'd like to
3 place a copy of the original petition filed in this
4 matter as Plaintiff's 6.

5 THE COURT: Any objection, Mr. Vergeldt?

6 JOHN EDWARD VERGELDT: No, ma'am.

7 THE COURT: Plaintiff's 6 entered without
8 objection.

9 (Plaintiff's Exhibit 6 was marked for
10 identification.)

11 Q. And what relief were you seeking -- were
12 you seeking at the time that you filed this
13 petition?

14 A. We wanted his removal so that it was known
15 that I would have been the next successor
16 trustee.

17 Q. And we'll go over the trust in a second.

18 A. Okay.

19 Q. Even after you filed this action, did your
20 brother provide you with the information you were
21 seeking?

22 A. No.

23 Q. Did he claim that you had provided him all
24 of the information that you were seeking?

25 A. Did he claim that he had provided ROA 000812

1 Q. Yes, ma'am. Or provided it to him. ROA 000813

2 A. He did.

3 Q. What happened after that?

4 A. Well, there were long gaps between the

5 various filings and the discovery period. The

6 discovery answers, when we would get them, were

7 generally very confusing, very disorganized, very

8 incomplete, and so it made it very difficult.

9 And also, he filed a countersuit against

10 me.

11 Q. The difficulty, is that why Ms. Palinski

12 ended up being appointed?

13 A. Yes.

14 Q. Okay. And she put together the report

15 that she talked about today?

16 A. Yes, she did.

17 Q. Had you seen that report before?

18 A. I have seen it before.

19 Q. Okay. What does her report indicate to

20 you --

21 A. Well --

22 Q. -- generally?

23 A. I was most impressed by her covering

24 letter because, in the covering letter, she

25 revealed that there was a commingled account. ROA 000813

1 was impressed by that because, in John's **ROA 000814**
2 discovery answers, he had previously testified
3 that that -- to the question to whom his account,
4 First Citizens [redacted] 9209, titled --

5 MR. PEACE: Your Honor, move to strike
6 that --

7 THE WITNESS: Am I not allowed to say that?

8 MR. PEACE: -- that full account number so
9 it's just the last four.

10 THE WITNESS: Okay. I'm sorry. I didn't
11 know.

12 THE COURT: So instructed.

13 A. And John had answered in writing that it
14 was titled solely to John Vergeldt , Jr.

15 So when we received Ms. Palinski's report
16 and it indicated that she had discovered that
17 that account was, in fact, titled solely to John
18 Edward Vergeldt and his wife, that was of
19 interest to me.

20 Q. Okay.

21 A. Should I continue? You asked a question.
22 What else did I notice about it?

23 Q. Your answer is perfectly fine.

24 A. Okay.

25 Q. And then you amended your petition **ROA 000814**

1 correct? ROA 000815

2 A. I did.

3 Q. Okay. What were the circumstances

4 surrounding the amendment of the petition?

5 A. Well, it was clear on the basis of

6 Ms. Palinski's report that a breach had occurred.

7 Q. Okay.

8 A. Besides the commingled account, she was

9 unable to trace the funding sources on more than

10 half of the accounts she surveyed. There were

11 monies that were missing that she identified were

12 missing, and -- right. So we -- I felt that

13 there were grounds.

14 Q. Can you identify this document for me.

15 A. Yes. This is the amended petition for

16 John's removal as trustee and related relief.

17 MR. PEACE: Okay. Your Honor, I'd like to

18 place this -- a copy of the amended petition in as

19 Plaintiff's 7.

20 THE COURT: Any objection, Mr. Vergeldt?

21 JOHN EDWARD VERGELDT: No, ma'am.

22 THE COURT: Plaintiff's 7 in without

23 objection.

24 (Plaintiff's Exhibit 7 was marked for

25 identification.) ROA 000815

1 Q. What are you seeking in that amended **ROA 000816**
2 petition?

3 A. I would like damages.

4 Q. I notice in the caption that you are now
5 identified as a successor trustee. Can you tell
6 me about that.

7 A. Excuse me for a second. My father's legal
8 paperwork had identified me as the next in line
9 after John. John was the first, I was the
10 second, and our sister Patti was the third.

11 Q. Okay.

12 A. In March -- I believe it was March 29th
13 of 2019, I received a certified letter -- or it
14 might have been registered; I don't remember
15 which -- but you know, a protected piece of
16 correspondence from John indicating that he was
17 resigning as the successor -- the first successor
18 trustee.

19 Q. Okay. All right. So that would have made
20 you the successor, the current trustee?

21 A. That's correct. And that became effective
22 April 29th of 2019.

23 Q. Did you begin to -- in addition to
24 Ms. Palinski's work, what other -- of the other
25 accounts that Ms. Palinski has identified, **ROA 000816**

1 else is in the trust? ROA 000817

2 A. I beg your pardon?

3 Q. Other than the accounts Ms. Palinski has

4 identified, what --

5 A. Oh.

6 Q. -- what property is in the trust?

7 A. There is a parcel of land -- I believe you

8 call it real property --

9 Q. Uh-huh.

10 A. -- on which there was a family cottage.

11 The cottage is still standing, but -- okay.

12 Q. Tell me about the interior of the cottage.

13 A. Okay. So the interior of the cottage is

14 extremely damaged. I was unable to see it

15 because I did not have keys to the place. I

16 finally was able to obtain keys through the

17 efforts of two attorneys in November of 2018.

18 When I went to visit the cottage, I found that

19 extreme damage had occurred.

20 Q. Okay.

21 A. The floor tiles had lifted; they were

22 cracked and broken. The mouldings on the walls,

23 toe and ceiling mouldings, were all down. There

24 was a pervasive odor of mold. There was visible

25 mildew and mold growing on all visible surfaces. ROA 000817

1 and in between the walls. ROA 000818

2 Q. Okay.

3 A. It was also filthy, and it appeared that

4 work that had been commenced and I was aware had

5 been paid for was left incomplete.

6 Q. Can you identify this document for me.

7 A. Yes. This is a photo document and a

8 collection of inventory of damages to the

9 contents of the cottage, because not only were

10 there damages to the physical structure,

11 essentially almost everything in the building has

12 been destroyed.

13 MR. PEACE: I'd like to place this -- what

14 I'll call a packet concerning the cottage as

15 Plaintiff's 8.

16 THE COURT: Any objection, Mr. Vergeldt?

17 JOHN EDWARD VERGELDT: No, ma'am.

18 THE COURT: Plaintiff's 8 entered without

19 objection.

20 JOHN EDWARD VERGELDT: May I rephrase that?

21 I also have pictures that I believe are

22 representative of the cottage, and they show a much

23 different picture. So yes, I guess I will object

24 to these, because I believe the pictures that I

25 have with the witness that I have shows a ROA 000818

1 very different picture of the condition of the cottage. ROA 000819
2

3 THE WITNESS: I would like to say something.
4 May I?

5 THE COURT: So what --

6 JOHN EDWARD VERGELDT: So I do object to
7 these pictures. I do not feel that they are
8 representative.

9 THE COURT: Would you like to respond?

10 MR. PEACE: Whether they are representative
11 or not, Your Honor, is not a legal basis for them
12 coming into evidence. Ms. Vergeldt has testified
13 that these are pictures that she took of the
14 interior of the cottage. Granted, her testimony is
15 that they're two years old, but they're
16 representative of what they were -- of what the
17 cottage, I guess, was two years ago.

18 As somebody who is now the successor trustee
19 of the cottage, despite, you know, what has
20 happened or may have happened or what Mr. Vergeldt
21 may testify to or what Mr. Vergeldt's witness may
22 testify to, she has the ability to state that, when
23 she saw the cottage in 2018, this was its current
24 condition.

25 THE WITNESS: I see the point. Yeah ROA 000819

1 MR. PEACE: As a successor trustee, **ROA 000820**
2 plenty of knowledge to testify as to the condition
3 of the cottage.

4 THE COURT: I agree with Mr. Peace.
5 Overruled, Mr. Vergeldt. So Plaintiff's 8 entered
6 over objection.

7 (Plaintiff's Exhibit 8 was marked for
8 identification.)

9 Q. Okay. So right now what we know is in the
10 cottage or what you have been able to determine
11 is the trust property are the accounts that
12 Ms. Palinski identified plus the cottage; is that
13 correct?

14 A. Correct.

15 Q. Not been able to find anything else?

16 A. I have not.

17 MR. PEACE: Do you have Plaintiff's 3, the
18 trust document?

19 THE COURT REPORTER: Yes, I believe the
20 witness has it.

21 Q. So that is the trust document, correct?

22 A. It is.

23 Q. I'd go ahead and grab it because we're
24 going to go through it.

25 A. Oh. Okay.

ROA 000820

1 Q. All right. Let's take a look at **ROA 000821**
2 page 2-1 -- well, let me ask you this to start
3 off with. The document is entitled Eighth
4 Amendment and Complete Restatement to Trust
5 Agreement.

6 Do you know of any other document that
7 would have completely replaced this trust
8 agreement?

9 A. I do know of it because of what happened.
10 It did exist. This was a complete restatement.

11 Q. After the eighth restatement, was there
12 any other subsequent complete restatement?

13 A. Not a complete restatement.

14 Q. All right. But there were -- are you
15 saying that there were -- I'm sorry. Were there
16 subsequent amendments?

17 A. There were. There were two.

18 Q. Thank you. Now, who under this trust
19 agreement is the initial trustee?

20 A. My father. It states that on the front
21 page.

22 Q. Okay. All right. Is he identified in the
23 definition section?

24 A. Probably. Let's see. I beg your pardon.

25 Did you ask who is the trustee or the su**ROA 000821**

ROA 000822

1 trustee?

2 Q. Both.

3 A. Well, it states in paragraph C, the
4 initial successor trustee is John Edward
5 Vergeldt.

6 Q. Okay.

7 A. The settler may change the successor
8 trustee at any time during settler's lifetime.

9 Q. Okay. And then does the trust property or
10 does the trust agreement -- does the trust
11 agreement provide for distribution of trust
12 property? What was the trust supposed to do?

13 I'm sorry. That was about 50 questions in
14 one. Let me rephrase. What was the trust
15 intended for, to your knowledge?

16 A. To my knowledge, there were two functions
17 with the trust.

18 Q. Okay.

19 A. One was to delineate what Dad wanted to
20 have happen with the residuary trust, meaning the
21 monies that were in his name at the time of his
22 death. And he instructed that there should be a
23 50,000-dollar sub-trust, which was a pour-over
24 trust, taken from the residuary assets, and
25 applied strictly for the upkeep of this

ROA 000822

1 the Vergeldt cottage, I'll call it, just **RCDA 000823**
2 clear.

3 Q. Okay.

4 A. And then there were \$48,000 designated for
5 a 6,000-dollar gift to each of eight
6 grandchildren. It was specified beyond that that
7 the remainder should be divided into three equal
8 shares, one for each of his living children, as
9 the residuary beneficiaries, and that would have
10 been John, me, and Patti.

11 Q. What about other gifts that he may have
12 made during his lifetime?

13 A. Yes. There is a provision in the trust
14 called Cumulative Gifts and Advances, and this
15 was a provision that stated that any gifts or
16 advances or loans that had been made by my father
17 prior to July 29th of 2009 were forgiven. If
18 the person who was the beneficiary of those gifts
19 didn't pay it back, they were off the hook.

20 Q. Can you point out to the Court where that
21 provision is located?

22 A. Golly. Maybe. Let me think. Is it 6?

23 Q. I'm sorry, Ms. Vergeldt. I can't answer
24 your questions.

25 A. Shoot, you can't tell me. Okay. **RCDA 000823**

1 a second. **ROA 000824**

2 It's the sixth. I was right. It's in the

3 sixth. And --

4 Q. Is it in the sixth or the fifth,

5 Ms. Vergeldt?

6 A. Hang on a sec. Yes. I'm sorry. It is

7 the fifth.

8 Q. That's all right.

9 A. The fifth is entitled Forgiveness of Loans

10 and/or Advances and Establishment of Residuary

11 Trust.

12 Q. Okay. All right. Does the trust

13 provide -- I'll come back.

14 Who are identified -- you said that you --

15 I'm sorry -- your brother was identified as the

16 first successor trustee; you are identified as

17 the second; your sister is identified as the

18 third?

19 A. Correct.

20 Q. Where can that be found in this trust

21 agreement?

22 A. Just a second, please.

23 Q. Sure.

24 A. I believe it's in the third. I'll

25 double-check that. **ROA 000824**

1 Q. Okay. ROA 000825

2 A. I beg your pardon. It's in the seventh,

3 Successor Trustees.

4 Q. Okay. Does the trust provision contain

5 any document saying or any provision saying what

6 the duties of the successor trustee are?

7 A. Well, the duties are actually throughout

8 this document. Do you want me to refer to the

9 seventh?

10 Q. No, ma'am. I'll ask it a different way.

11 Does provision 14 -- term 14 set forth what the

12 successor trustee's duties are -- some of them?

13 A. I believe a number of the sections of this

14 trust document specify what the duties are.

15 Q. Does it -- does the trust state what

16 happens if somebody were to challenge the trust?

17 A. Yes. Yes. If -- there is a forfeiture

18 clause in the trust. It originated in the eighth

19 amendment, and it was elaborated further in the

20 tenth amendment.

21 Q. Let's flip to the tenth amendment.

22 A. It's called -- it's on page 4 at the back.

23 Q. Okay. That's page 4 of the tenth

24 amendment.

25 A. Correct. It's under the 18th. ROA 000825

1 subheading is Contest. ROA 000826

2 Q. To your understanding, what does that
3 provision provide?

4 A. Basically states that if anybody tries to
5 prevent my father's wishes from being carried out
6 in any way, then that person shall be treated as
7 if they predeceased the existence of the trust.

8 Q. Does it have any exceptions to it?

9 A. Well, there is a paragraph at the end
10 stating that -- it says, both settler and the law
11 recognize that facts or circumstances could give
12 rise to probable cause to challenge this
13 agreement or some of its provision. Therefore,
14 the precondition of subparagraph A above shall
15 not apply to a contest or challenge if there's
16 probable cause for asserting the challenge or
17 contest.

18 As used in this subparagraph, probable
19 cause shall exist if at the time of instituting a
20 proceeding there was evidence that would lead a
21 reasonable person, properly informed and advised,
22 to conclude that there was a substantial
23 likelihood that the challenge would be
24 successful.

25 Q. Okay. And we talked about this with ROA 000826

1 Ms. Palinski on the last page that -- on **ROA 000827**
2 Plaintiff's 3 is the appointment document. Was
3 that executed at the same time as the Eighth
4 Amendment and Complete Restatement of the Trust
5 Agreement?

6 A. Are you asking for the tenth amendment?

7 Q. No, ma'am. The appointment document
8 that's on the back of the last page of the
9 document.

10 A. Oh, that. Yes. Correct. This was
11 executed on July 29th, 2009. This is the
12 appointment of John as the co-trustee.

13 Q. So from 2009 until 2019, your brother was
14 either the co-trustee or the successor trustee?

15 A. That's correct.

16 Q. Let's jump back to the cottage real
17 quick -- no, let's not do that.

18 Once you became the successor trustee, we
19 know what Ms. Palinski did to try to account for
20 the assets, to marshal them and try to get a
21 handle on what was going on. What steps did you
22 take?

23 A. Well, concerning the cottage, I had no
24 experience with a mold overgrowth of this
25 magnitude, so -- and I also initially was **ROA 000827**

1 successor trustee. When I saw the extent of the damage, ROA 000828
2 damage in November of 2018, I had not yet become
3 a successor trustee, but I did hire a mold
4 remediation person because I didn't understand
5 what I was seeing. And I did hire somebody. I
6 paid that person out of pocket to tell me, you
7 know, what's happening here.

8 Then when I became the successor trustee,
9 I hired -- or I didn't hire anybody, actually.
10 Initially I just asked for contractors who would
11 come and give me an estimate of what damages they
12 saw and what it would cost to remediate those
13 damages.

14 I also hired a -- this person I did pay
15 out of pocket -- a mold inspector who ran
16 air-quality tests to confirm my concern that
17 being in the cottage without a mask, a face mask,
18 would -- could -- could be a health hazard for
19 people.

20 Q. Have you had any conversations with any
21 real estate brokers, any -- about --

22 A. Yes. I was concerned about, you know,
23 what would happen to this property. When John
24 left as the first successor trustee, there was --
25 I was written a personal check to me for ROA 000828

1 from trust assets, but everything else, **ROA 000829**
2 and I was concerned because the cottage appeared
3 to be in a very compromised state.

4 Q. Okay.

5 A. So -- could you repeat your question?

6 Q. Have you talked to anybody about the value
7 of the cottage?

8 A. Yes. So I was -- at that point entered my
9 mind, I don't even know if I can sell this. So I
10 asked a real estate broker. He's very
11 experienced. He works only in that area. And he
12 came and gave me his opinion. And actually, the
13 damages that I learned about as a result of
14 having the contractors and the real estate broker
15 were worse than I had understood. There were
16 structural damages, for example, as a result of
17 neglect that had occurred on the property after
18 my father's death.

19 Q. What damage -- what were you --

20 A. If I were to sell the property, what would
21 happen. I was concerned I might not be able to
22 sell the property, and he confirmed that. He
23 said he did not believe the property is
24 marketable in its current condition because of
25 the mold issue. **ROA 000829**

1 He also stated that, in his professional opinion, the property had devalued from its
2 appraised value of 60 -- 62,500 was the appraised
3 value in July of 2013. And he stated that, in
4 his opinion, it had devalued by 40 percent, to
5 possibly 25,000, but he said he did not think, in
6 his honest opinion, it would be marketable
7 because, in the state of Michigan, you have to
8 divulge if there is a problem of mold.

9 Q. Can you recognize that -- can you identify
10 that document for me.

11 A. Yes. Well, this is an affidavit from Tim
12 Kelley. Tim Kelley is the real estate
13 professional who visited the property with me and
14 gave me the opinion that he did not feel it could
15 be sold.

16 Q. The appraisal that you mentioned, is that
17 attached to that affidavit?

18 A. It is. The appraisal goes back to July of
19 2013, and John had this arranged, you know, as
20 part of his initial duties after Dad died.

21 MR. PEACE: Okay. Your Honor, move to place
22 the affidavit in as Plaintiff's 9.

23 THE COURT: Any objection, Mr. Vergeldt?

24 JOHN EDWARD VERGELDT: I've never seen it.
25

1 but I guess no. I have no knowledge of itROA 000831
2 THE COURT: So no objection?
3 JOHN EDWARD VERGELDT: No, ma'am.
4 MR. PEACE: I will say, Judge, we did produce
5 it to Mr. Vergeldt a couple weeks ago.
6 JOHN EDWARD VERGELDT: You did? I'm sorry.
7 I didn't hear you. You said you did?
8 MR. PEACE: I did.
9 JOHN EDWARD VERGELDT: And how did you do
10 that?
11 MR. PEACE: By mail as part of the
12 supplemental responses to interrogatories.
13 JOHN EDWARD VERGELDT: I never got it.
14 THE COURT: So Plaintiff's 9 in without
15 objection.
16 (Plaintiff's Exhibit 9 was marked for
17 identification.)
18 BY MR. PEACE:
19 Q. I'm sorry, Ms. Vergeldt. Can you tell me
20 again what the value of the cottage he said
21 was -- Mr. Kelley?
22 A. Currently?
23 Q. Yes, ma'am.
24 A. If it could be marketed, which he said he
25 did not believe it could be, \$25,000, whROA 000831

1 went on to state was what he would have ~~ROA 000832~~
2 the land itself would have been possible to sell.

3 Q. Okay.

4 A. But in other words, it had lost the value
5 of the house.

6 Q. Okay. Has anybody told you what caused
7 the mold or what you perceive to be mold in the
8 house?

9 A. I am aware that there was a flood that
10 occurred there. I am aware of that as a result
11 of Judge Kimball's second order, which we haven't
12 talked about.

13 Q. Why don't you tell me about Judge
14 Kimball's second order.

15 A. So Judge Kimball ordered in May of 2018
16 that there should be no further expenditures from
17 trust assets without prior approval, and so,
18 through the attorneys, John was to submit any
19 invoices. I was aware, on the basis of seeing
20 the invoices, that there had been a flood.

21 Q. Do you know what the -- what the cause of
22 the flood was?

23 A. I do.

24 Q. Why don't you tell me about that.

25 A. I became aware -- when I became t~~ROA 000832~~

1 successor trustee, I researched the Consumer Reports
2 Powers statements. ROA 000833

3 Q. Consumers provides electricity?

4 A. They provide electricity -- electricity
5 and gas --

6 Q. Okay.

7 A. -- up at that property.

8 Q. Okay.

9 A. And what I found was that during the
10 coldest weather in Michigan, specifically during
11 the months of October, November, December, and
12 January, the usage rate for natural gas was flat,
13 indicating that the heat was not on.

14 Q. What about -- so what would that tell you?

15 A. That would tell me that, unless the owner
16 took the precaution of having the water turned
17 off and the pipes blown out, there would be a
18 risk of the pipes bursting due to freezing of the
19 water in the pipes, and that could result in a
20 flood.

21 Q. Do you know if that happened?

22 A. It is my understanding that is exactly
23 what happened.

24 Q. You said you had a mold inspector come out
25 there, correct? ROA 000833

1 A. I did. **ROA 000834**

2 Q. Can you identify that document for me?

3 MR. PEACE: I'll tell you, Mr. Vergeldt,

4 all -- these affidavits were all sent to your

5 P.O. Box on Johns Island.

6 JOHN EDWARD VERGELDT: And sir, they were

7 never received.

8 MR. PEACE: Okay.

9 Q. Can you identify that document for me?

10 A. I can. Well, this is an affidavit from

11 Tom Hernick. He is a mold inspector. That's

12 what he does for a living. He's a geologist by

13 training. And he's in the business of conducting

14 and performing air-quality tests and

15 identifying -- when there is a problem of mold

16 overgrowth, identifying the extent of it and

17 whether or not it poses a health risk.

18 MR. PEACE: All right. Your Honor, I'd like

19 to place the affidavit of Tom Hernick into evidence

20 as Plaintiff's 10.

21 THE COURT: Any objection?

22 JOHN EDWARD VERGELDT: Again, the same

23 objection, Your Honor, which -- I've never seen it.

24 He says he sent it to me, but he did not. So no

25 objection. **ROA 000834**

1 THE COURT: So no objection? ROA 000835

2 JOHN EDWARD VERGELDT: I guess that's the
3 term: No objection. He never -- this is the first
4 I've seen both of these. I think he's blindsiding
5 me, showing me stuff now that he says he sent to
6 me, but he did not.

7 MR. PEACE: Judge, I'll be more than happy,
8 during a lunch break, to print the transmittal
9 letter and supplemental responses showing the date
10 I sent it to the address that Mr. Vergeldt has
11 given the Court.

12 THE COURT: Okay. I'll receive it subject to
13 Mr. Peace providing us with that information.

14 JOHN EDWARD VERGELDT: Yes, ma'am.

15 THE COURT: So Plaintiff's 10 entered over
16 objection.

17 (Plaintiff's Exhibit 10 was marked for
18 identification.)

19 Q. Okay. What did Mr. Hernick end up
20 finding?

21 A. He found that there was a very high level
22 of a couple different mold organisms and high
23 enough that they could pose a serious health
24 risk.

25 He also found that the problem waROA 000835

1 prevalent. It was growing on basically ~~ROA 000836~~
2 surface that he looked at.

3 And he also found that the crawl space
4 above one of the bedrooms had blacked [sic] the
5 airflow in the soffits.

6 Q. Did he indicate whether or not this was a
7 recent -- that the -- what did he say caused the
8 mold or what he perceived to be mold?

9 A. I beg your pardon?

10 Q. Did he give any indication in his report
11 that he -- did he give any indication in his
12 report of what he believed caused the mold?

13 A. Water intrusion.

14 Q. Did he say anything about it was a recent
15 water intrusion or that the substance was growing
16 over a period of time?

17 A. He felt that it had been growing over a
18 period of time.

19 Q. Okay.

20 A. I'd like to say something also, if I
21 may --

22 Q. Sure.

23 A. -- about the broker's opinion of value.

24 Q. Yes, ma'am.

25 A. The broker's opinion of value also ~~ROA 000836~~

1 that he did not believe the damages in the ROA 000837
2 cottage could have occurred under anything less
3 than years of abuse or neglect.

4 Q. Did you have access to the cottage?

5 A. I did not.

6 Q. How come?

7 A. After my dad died in July of 2013 --

8 Q. Were you denied access to the cottage?

9 THE COURT REPORTER: I'm sorry. I have to
10 have an audible response.

11 THE WITNESS: One second.

12 THE COURT REPORTER: Thank you.

13 A. Just give me a minute. I'll get it
14 together. Just a sec.

15 Okay. My brother ordered that everybody
16 remove their personal items from the property,
17 and I did that. I went with my husband and our
18 son in July, shortly after he made that request,
19 and I removed my items.

20 But subsequent to that, John accused me of
21 theft of my personal items, and he attempted to
22 do a reduction to his proposed distribution of
23 what he felt should be my inheritance based on, I
24 guess, his estimates of what those items' value
25 were.

ROA 000837

1 Q. Thank you, Ms. Vergeldt. I'm going to show you what -- can you identify that document
2 show you what -- can you identify that document
3 for me?

4 A. Yes. This is one of the contractors -- I
5 tried to be fair. I had a couple different
6 contractors look at it. It was summer, so it was
7 their busy time.

8 Q. Sure.

9 A. So I was able to get two contractors to
10 look at it. Brian Carson was one of the
11 contractors who looked at the property.

12 MR. PEACE: Okay. Your Honor, I'd like to
13 move to place the affidavit of Brian Carson in as
14 Plaintiff's 11.

15 THE COURT: Any objection?

16 JOHN EDWARD VERGELDT: No, ma'am, with the
17 same caveat.

18 THE COURT: As the previous objection about
19 not receiving it?

20 JOHN EDWARD VERGELDT: Yes, ma'am.

21 THE COURT: Entered over objection.

22 (Plaintiff's Exhibit 11 was marked for
23 identification.)

24 Q. Okay. What sort of estimate did
25 Mr. Carson give you?

ROA 000838

1 A. I believe the exact estimate was ~~ROA 000839~~
2 I could double-check that. I --

3 Q. Yeah. If you'll double-check that for me.

4 A. I've got the wrong Brian. I'm sorry. I'm
5 so sorry. This is Brian Carson, not Brian
6 Goodson. I'm sorry. Sorry. Brian Carson is the
7 mold remediation specialist, not the mold
8 inspector. The mold remediation specialist.

9 Because the contractors -- one in
10 particular refused to even give me a quote unless
11 I agreed that I would have it professionally
12 remediated due to risk.

13 Q. Okay.

14 A. So this pertains to specifically getting
15 the mold out of the building, and the estimate
16 was for \$14,744, and he did write -- because I
17 got that estimate in December of 2014 -- excuse
18 me -- December of 2018 -- he did write that it
19 could be more. Now we're more than a year later.

20 Q. Okay. One more Michigan summer.

21 A. It has had one more Michigan summer, which
22 is significant, because our winters are cold and
23 our summers get hot.

24 Q. We know all about it.

25 A. You guys get more hot. **ROA 000839**

1 Q. All right. You said you had some **ROA 000840**
2 contractors talk about the repairs?

3 A. I did.

4 Q. Can you identify this document for me?

5 A. Yes. This is an affidavit from one of
6 those contractors. He's a very experienced
7 residential homebuilder from Michigan. He works
8 in the area.

9 Q. What's his name?

10 A. Tony Jordan.

11 MR. PEACE: Your Honor, I'd move to place the
12 affidavit of Tony Jordan into evidence as
13 Plaintiff's 12.

14 THE COURT: Any objection?

15 JOHN EDWARD VERGELDT: Same stipulation,
16 ma'am.

17 THE COURT: And that's just that it wasn't
18 previously provided?

19 JOHN EDWARD VERGELDT: Yes, ma'am. Thank
20 you.

21 THE COURT: Entered over objection.

22 (Plaintiff's Exhibit 12 was marked for
23 identification.)

24 Q. Okay. What did Mr. Jordan indicate needed
25 to be done to the cottage? **ROA 000840**

1 A. Basically the place needs to be g **ROA 000841**
2 rebuilt.

3 Q. Can you give me a little bit more
4 specifics and what the cost he estimated was?

5 A. The cost -- the estimated cost was
6 \$95,965, excluding the mold remediation.

7 Q. So we're looking at about \$100,000 to
8 repair --

9 A. Correct.

10 Q. -- the property?

11 A. Correct.

12 Q. Okay. What else have you done regarding
13 the trust property, the accounts, to get your
14 arms around it?

15 A. The accounts themselves?

16 Q. Yes, ma'am.

17 A. I had to open an account at a bank in
18 Michigan because, when John resigned, he did
19 close the prior trust account, which was a First
20 Citizens account, in South Carolina. There was a
21 slight delay, because John wrote the check to me,
22 Vicki Vergeldt, personally. My banker said he
23 was unable to open the trust account with those
24 funds.

25 I had to first deposit them into **ROA 000841**

1 personal account, and then I could write ROA 000842
2 from my personal account and put that as the
3 second successor trustee into the new trust
4 account.

5 Q. Okay. Did you hire anybody to do an
6 accounting?

7 A. I did. I hired a very experienced
8 accountant. His name is Charles Bosler. He's in
9 the courtroom today.

10 Q. How did you find Mr. Bosler?

11 A. I worked with Charlie in the past.

12 Q. Can you identify this document for me?

13 A. Yes. This is the document that Mr. Bosler
14 produced. It's a complete accounting showing the
15 actual and pro forma financial statements of all
16 of the assets that he was able to trace from --
17 he actually timed this from December of
18 2008 through John's resignation in April 2019.

19 MR. PEACE: Okay. Your Honor, I'd like to
20 place the Bosler accounting into evidence as
21 Plaintiff's 13.

22 THE COURT: Any objection?

23 JOHN EDWARD VERGELDT: Same objection, ma'am,
24 but yes.

25 THE COURT: Entered over objection. ROA 000842

1 (Plaintiff's Exhibit 13 was marked ~~ROA~~ 000843
2 identification.)

3 Q. You mentioned a pro forma. Can you tell
4 me what that is to you?

5 A. A pro forma is an accounting standard
6 whereby certain assumptions are made of what
7 would be expected expenditures by a prudent
8 fiduciary.

9 Q. An individual that Ms. Palinski testified
10 to earlier today?

11 A. Pardon me?

12 Q. As somebody like Ms. Palinski testified to
13 earlier today?

14 A. Correct. Yes.

15 Q. I'll, as a sneak peek, be calling
16 Mr. Bosler as a witness to testify as to exactly
17 what he did; but in your words, can you tell me
18 what he did and what he ended up finding, to your
19 knowledge?

20 A. In my words, he went through all of the
21 records that we had obtained to date. I provided
22 him with the same records that John has had, and
23 I was as comprehensive in what I gave him. I
24 gave him everything I had.

25 So he went through the records, ~~ROA~~ 000843

1 traced where the monies were and where they were. **ROA 000844**
2 He traced them on the basis of their actual --
3 the actual expenditures, and then he applied this
4 prudent man standard of what a prudent man would
5 have done.

6 So there are actually two sets of
7 accounting documents in this report.

8 Q. Do you know what he ended up finding?

9 A. Yes. He found that it did not appear, in
10 his opinion, that the assets were properly
11 managed.

12 Q. Based on his comparison of the prudent man
13 versus the pro forma?

14 A. Yes. And he also is informed as far as
15 Michigan trust law, and he did a comparison on
16 his own between Michigan trust law and
17 South Carolina trust law, and those findings are
18 reflected in this report.

19 Q. Can you look on page 18 of Mr. Bosler's
20 report.

21 A. Yes.

22 Q. All right. What does he show that the
23 damage is -- the amounts that your brother
24 improperly removed from the trust as being?

25 A. There are several calculations. **ROA 000844**

1 Q. Okay. ROA 000845

2 A. One pertains to best estimate of

3 inappropriate advances and unnecessary lost fair

4 market value attributable to John --

5 Q. Okay.

6 A. -- from January 1st of 2009 through

7 April 30th of 2019, which was over and above

8 his beneficiary share of the trust assets. That

9 was \$127,770.

10 Q. And then he includes some accrued interest

11 on those advances. To your knowledge, why would

12 he have done that?

13 A. Well, because there should have been

14 appreciation on these assets, and I should have

15 benefited from having these assets, but I was

16 unable to.

17 Q. And he's indicated down below that there's

18 a -- he's got an entry here, JED share of

19 beneficiary distributions forfeited upon

20 violating trust provisions. Are you seeking to

21 have your brother forfeit his shares?

22 A. I am. I would like the Court to rule on

23 the provision in the trust indicating that if

24 somebody tries to go against what my father's

25 wishes were as delineated in both his will ROA 000845

1 the trust that that person forfeits their ROA 000846
2 to inherit.

3 Q. And is that based upon -- is the time
4 period just what has happened since when? I
5 mean, is this -- strike that. I'll ask a better
6 question.

7 Okay. What is this -- what is on page 19?
8 Accrued interest on -- I'm sorry. Let's start
9 the one right down. Assets from Merrill Lynch
10 account transferred to joint account of JEV and
11 wife. What is the Merrill Lynch account?

12 A. I believe that refers to an account that
13 I'm aware of that we were -- we had difficulty
14 figuring out what happened to those monies. They
15 didn't come back into the trust. They certainly
16 didn't come to me as a beneficiary.

17 Q. Okay. And Mr. Bosler's report doesn't
18 discuss the cottage, does it? I mean, does it
19 discuss the --

20 A. No. He -- his job, as I outlined it to
21 him, was to take the bank records and financial
22 institution records and all records that I could
23 provide to him and try to figure out if I was
24 just in seeking damages.

25 Q. All right. If you will look at the ROA 000846

1 pages of the -- what I call the cottage **ROA 000847**

2 A. Yeah.

3 Q. Can you tell me what those -- what that
4 spreadsheet shows.

5 A. Well, the first part is the pictures of
6 what I found, and also, there are nine pages that
7 begin with -- it says cottage inventory. I
8 annotated it in Adobe because these notes --
9 which are a little hard to read, because John
10 did -- John wrote it out by hand. It's a little
11 hard to read, but this is his handwriting; my
12 annotations.

13 And so I had expressed a concern that the
14 inventory that John gave us in 2013 is not
15 consistent with the objects that are in the
16 cottage now and also what the current condition
17 of the objects is.

18 So then based on that, I made an estimate
19 list of what it would cost to replace these
20 items, and they are after that inventory. That's
21 a nine-page inventory. I have a two-page
22 estimates list of what I believe, modestly
23 speaking, it would cost to replace the items that
24 have been destroyed in the process of this damage
25 to the cottage. **ROA 000847**

1 Q. Can you tell the Court what exact ~~ROA 000848~~
2 the -- what you estimate the replacement value of
3 those items as being?

4 A. Of the items alone or of the items and the
5 building?

6 Q. Just the items alone.

7 A. The items alone, \$23,433, excluding
8 several TBDs that I couldn't get estimates on
9 concerning, for example, new flooring, which is
10 actually probably rolled into the contractor's --

11 Q. Okay. All right. In the alternative --
12 are you also asking for attorney's fees and costs
13 in this matter?

14 A. I am.

15 MR. PEACE: Your Honor, depending on what the
16 Court rules, I'll be more than happy to submit an
17 attorney's fees affidavit showing Ms. Vergeldt has
18 had three lawyers. I have evidence originating
19 from those law firms indicating how much she's been
20 charged and paid. Depending on what the Court
21 rules, I'll submit an attorney fee affidavit at the
22 end of the day.

23 THE COURT: Okay.

24 Q. Ms. Vergeldt, you indicated that based on
25 Mr. Bosler's report, you're seeking that ~~ROA 000848~~

1 brother refund the trust -- well, let me ROA 000849
2 question. Are you seeking that money personally
3 or as trustee?

4 A. It's my goal to terminate this trust.
5 It's my belief this trust should have been
6 terminated in 2013. I see no reason for the
7 trust to continue. It's my goal to terminate the
8 trust. Therefore, I would hopefully receive
9 those funds to me personally.

10 Q. Okay. And that's because you're asking
11 that your brother be -- not receive any further
12 funds from the trust?

13 A. Well, I don't understand. Yes, I don't
14 believe my brother is entitled to anything
15 further that may be awarded as a result of this
16 action.

17 MR. PEACE: I don't believe I have any
18 further questions for Ms. Vergeldt at this time,
19 Your Honor.

20 THE COURT: I think at this time we'll take a
21 lunch break and be back at 2:15.

22 Ms. Vergeldt, you're still on the stand;
23 you're still under oath.

24 THE WITNESS: Okay.

25 THE COURT: I just want you to know ROA 000849

1 don't talk to anyone while you're still giving testimony about the case. ROA 000850

2
3 THE WITNESS: I understand. So during lunch,
4 don't talk about the case?

5 THE COURT: That's right. Any objection to
6 that, Mr. Peace?

7 MR. PEACE: No, ma'am.

8 THE COURT: And Mr. Vergeldt, you had one
9 matter.

10 JOHN EDWARD VERGELDT: Ms. Scheible has -- as
11 my witness has a long drive in front of her today.
12 So at the Court's discretion, if she can be heard
13 so she can get on the road, that would be nice for
14 her.

15 THE COURT: Mr. Peace, any objection to
16 taking a witness out of --

17 MR. PEACE: Well, I'm assuming Mr. Vergeldt
18 intends on crossing Ms. Vergeldt?

19 JOHN EDWARD VERGELDT: You bet.

20 MR. PEACE: So I have no objection provided
21 that -- I have no objection. We can --

22 THE COURT: She'll be the next witness after
23 your cross of Ms. Vergeldt.

24 JOHN EDWARD VERGELDT: Thank you very much,
25 ma'am.

ROA 000850

1 MR. PEACE: That's what I was worried about. ROA 000851
2 That would be just fine.

3 THE COURT: Okay.

4 (A recess was taken.)

5 THE COURT: We're back on the record.

6 In dealing with the issue brought by
7 Mr. Vergeldt that he was not provided, I believe it
8 was -- started with Plaintiff's 9, 10, 11, and 12
9 and 13. And Mr. Peace, if you have some
10 information for me to consider regarding
11 Mr. Vergeldt's objection?

12 MR. PEACE: Yes, Your Honor. I went back and
13 contacted my office, and they said, well, Taylor,
14 you've got copies of production in your file that
15 you have with you. So I looked, and it looks like
16 I do have a cover letter dated January 23rd, 2020
17 to John Edward Vergeldt at P.O. Box 202, Johns
18 Island, South Carolina, producing and providing
19 Petitioner's Supplemental Answers to Respondent's
20 First Set of Interrogatories and Requests for
21 Production.

22 Included in those documents is a -- are the
23 affidavits that I had at the time, those being the
24 affidavits of Tim Kelley; a Katherine Lipp, whose
25 affidavit I did not introduce; an affidavit ROA 000851

1 Goodson, who I also did not introduce; an ~~ROA 000852~~
2 of Brian Carson, and -- those.

3 I also have a document entitled -- a cover
4 letter January 28th to John Edward Vergeldt,
5 P.O. Box 202 at Johns Island, with the affidavit of
6 Tom Hernick as well as the affidavit of Tony
7 Jordan.

8 One thing that I don't see is a copy of the
9 Bosler report that we sent to Mr. Vergeldt.
10 However, I'll represent to the Court that we sent
11 him a copy of the red bound report, so my paralegal
12 may not have made a copy of that when it went out
13 the door.

14 THE COURT: When was that sent?

15 MR. PEACE: That would have been sent with
16 the January 23rd production.

17 THE COURT: And Mr. Peace, there was no
18 scheduling order involved with this case?

19 MR. PEACE: No, Your Honor.

20 THE COURT: And remind me, what are the rules
21 regarding -- were there any discovery requests?

22 MR. PEACE: There were some discovery
23 requests.

24 THE COURT: And what -- was there any sort of
25 time limitation on when these documents, ~~ROA 000852~~

1 affidavits, or anything that you had prepared **ROA 000853**
2 trial, were to be sent off for Mr. Vergeldt?

3 MR. PEACE: No. I'm not aware of any order
4 setting those. We provided them -- provided all of
5 them to him two days before the trial. I mean, he
6 was in -- it had been mailed two days prior to
7 trial.

8 THE COURT: So 48 hours, is that by case
9 rule, or is that just standard practice to provide
10 documents 48 hours before?

11 MR. PEACE: I mean, I like to have them all
12 done prior to the 48 hours, but I'm not aware of
13 any rule that specifically states by which all the
14 documents have to be delivered. I mean, the
15 interrogatories and requests for production are
16 continuing through the date -- through the time of
17 trial.

18 Yeah. I'm not aware of any rule that
19 specifically states that I can't continue to --
20 that I can't continue to pull documents together
21 for use at trial and produce them within a specific
22 time period.

23 THE COURT: And I guess I could look at the
24 date. What's the date of the affidavit?

25 MR. PEACE: Which one, Judge? Most **ROA 000853**

1 affidavits were executed sometime within the ROA 000854
2 couple weeks.

3 THE COURT: Any rules or orders regarding how
4 soon you're supposed to -- once that execution is
5 done, how soon you need to get that to
6 Mr. Vergeldt?

7 MR. PEACE: Not that I'm aware of, Judge.
8 Part of the issue is -- part of the issue in this
9 case is simply that there's a bunch of people in
10 Michigan who are -- who are -- whose information
11 would be needed. But even -- the information
12 that's contained in the affidavits was given to
13 Ms. Vergeldt, and we decided we wanted to use it at
14 trial relatively recently.

15 I guess what I'm trying to say is, I wasn't
16 intentionally holding anything back for any
17 surprise or anything like that.

18 THE COURT: I'm inquiring because I know
19 Judge Kimball was involved in some of this at the
20 beginning, and I just want to make sure that there
21 wasn't any current orders or anything else that I'm
22 missing as far as when this should have been
23 provided to provide Mr. Vergeldt sort of notice of
24 what to expect at trial, or --

25 MR. PEACE: No, Judge. The only thing ROA 000854

1 know about an order from Judge Kimball is **ROA 000855**
2 for summary judgment back in 2018 along with --
3 along with the order talking about when Kathleen is
4 supposed -- excuse me -- Ms. Palinski was supposed
5 to finish her --

6 THE COURT: Thank you, Mr. Peace.

7 Mr. Vergeldt.

8 JOHN EDWARD VERGELDT: I had my wife go to
9 the post office box at lunchtime, and we checked
10 our mail, and we do not have any. So he says he
11 mailed it; I would not dispute his word, but the
12 first time I saw that stack of papers was when he
13 handed it to me today. Believe me, ma'am, Your
14 Honor, if I had seen a piece of paper that somebody
15 is asking for a half a million dollars, I would
16 have noticed it.

17 So I do not have any of those. I could not
18 have reviewed them. I sat here like a frog on a
19 log. Okay. Here it is. I have no idea what's in
20 them. 75, 80 pages of stuff that I've had no prior
21 notice of. And I'm asking that you exclude it.
22 Thank you.

23 THE COURT: What I'm going to do,
24 Mr. Vergeldt, is I'm going to accept them for now
25 into evidence, and I'll review this issue **ROA 000855**

1 and regarding your objection to it. I want to state that
2 that I think that -- I'll state for the record that
3 Mr. Peace did show me letters where he sent the
4 materials, confirming those dates that he
5 previously stated on the record. I don't know if
6 you had a chance to review that, Mr. Vergeldt.

7 JOHN EDWARD VERGELDT: He showed me letters;
8 yes, ma'am. But just like in my request -- my
9 motion for contempt, I have not received any of
10 their requests to pay the expenditures of the
11 cottage. I received one dated October 18th of
12 2019. I haven't received anything else.

13 So -- it isn't the post office, I don't
14 believe. He's got my email. It's not going to
15 Spam, and it's not coming to my email, and it's not
16 going to the post office box. So I'll go query the
17 post office when I get home, but that's -- again, I
18 have -- might as well have just dropped it on my
19 foot. Thank you.

20 THE COURT: Well, it appears, from what has
21 been reported at this time, that Mr. Peace has
22 complied with the rules of the court providing
23 discovery for trial, so -- but I will, just for the
24 parties, note that I'm accepting it under further
25 review of this issue.

ROA 000856

1 And that would be as to Plaintiff's **ROA 000857**
2 believe that's 8 through 13.

3 JOHN EDWARD VERGELDT: Yes, ma'am.

4 MR. PEACE: Thank you.

5 THE COURT: All right, Mr. Vergeldt. You may
6 proceed with cross-examination.

7 - - -

8 CROSS-EXAMINATION

9 - - -

10 BY JOHN EDWARD VERGELDT:

11 Q. I will apologize if I tear up again. This
12 is very emotional for all of us, so I'll try to
13 get started here.

14 There was a family meeting in the fall of
15 2011 at the cottage; is that correct?

16 A. I did not attend that meeting.

17 Q. We did a yearly family meeting.

18 A. Not that I recall.

19 Q. That's fine. You did not attend that
20 meeting.

21 You made a statement that Audry took Dad
22 from your house; is that correct? You made a
23 statement on examination?

24 A. I did.

25 Q. Okay. If you had been at that meeting, **ROA 000857**

1 which you were invited to -- you were full ROA 000858
2 of -- you would have heard Dad say he no longer
3 wished to live at your house. Are you aware of
4 that?

5 A. No, I'm not.

6 Q. You're not aware of the letter that he
7 signed saying he wished to live in
8 South Carolina?

9 A. I am aware of such a letter.

10 Q. You're aware of that letter?

11 A. I am.

12 Q. Does that not kind of imply that if he
13 wished to reside for the rest of his life in
14 South Carolina, he did not wish to live at your
15 house?

16 A. It does not.

17 Q. Okay. In the three months -- two and a
18 half months -- between Dad leaving your house,
19 was he solely at Patti's house or was the time
20 split?

21 A. He was supposed to have been able to visit
22 me, and Patti did not allow that.

23 Q. Patti did not allow that. How did Patti
24 stop that?

25 A. She called me repeatedly and stated ROA 000858

1 she would not arrange his belongings and **ROA 000859**
2 so that he could come to my house.

3 Q. Okay.

4 A. On one occasion, it was arranged that I
5 would take him up North. I asked for assistance
6 having him be driven from her house to my house,
7 because my house is farther north, and we were
8 going further north, and she refused.

9 Q. Now --

10 A. I bought him a cell phone, because he
11 could not use a phone unassisted, and she put it
12 through the washing machine.

13 Q. Okay. And that's how Patti stopped him
14 from visiting you?

15 A. Those are some examples of how she
16 prevented him from visiting me, yes.

17 Q. I realize that memory is faulty. Do you
18 remember calling me on numerous occasions while I
19 was at work and in various parts of the country
20 between 1 and 3 o'clock in the morning and waking
21 me up to scream at me?

22 A. No, John. That is false. That is false.
23 I heatedly refute that statement.

24 Q. So you never did?

25 A. I never did. For one thing, I do **ROA 000859**

1 up that late. **ROA 000860**

2 Q. Do you recall calling me at 2:05 on a
3 Friday afternoon when Kylie Kimmell, the
4 healthcare provider who was to bring him to you,
5 was supposed to be there at 2 o'clock, and you
6 called me at 2:05?

7 And again, I'm not -- I was on a trip, and
8 you called me at 2:05 and screamed at me? Do you
9 recall that?

10 A. I do not remember ever screaming at you.

11 Q. Okay. Okay. So was there, in that
12 two-and-a-half-month period where -- I'm going to
13 introduce evidence that said he was going back
14 and forth, because the agreement that was
15 written -- and everyone was given a copy of it --
16 was that he would spend the initial one month at
17 Patti's house and then alternate two weeks at
18 each individual house, yours and hers.

19 A. I recall that.

20 Q. Do you remember that?

21 A. Yes. You wrote it. But it was not
22 complied with.

23 Q. I am aware of that. Do you -- you don't
24 remember any heated conversations with me about
25 why that wasn't happening? **ROA 000860**

1 A. I do not. **ROA 000861**

2 Q. Thank you. We'll come back to that.

3 While Dad lived at your house -- and I'm

4 going to, again, just -- this is -- I'm not being

5 judgmental. Have you ever seen that piece of

6 paper before?

7 A. I have never seen that before.

8 Q. Okay. Do those numbers look reasonably

9 accurate in the monies that were put on Dad's

10 charge card and/or debit card?

11 A. I do not know.

12 MR. PEACE: Objection. She's already

13 testified that she has never seen that document

14 before.

15 JOHN EDWARD VERGELDT: I'm asking her to look

16 at it.

17 A. I've never seen it, John. I don't know.

18 Q. Would you look at it, please?

19 A. I did look at it.

20 MR. PEACE: Objection, Your Honor.

21 THE COURT: I'm sustaining the objection.

22 She doesn't know anything --

23 JOHN EDWARD VERGELDT: Okay. Can I have it

24 back?

25 THE COURT: Yes. **ROA 000861**

BY JOHN EDWARD VERGELDT:

ROA 000862

Q. Did the trustee give you a debit card and/or credit card?

A. No. I did not have Dad's debit card or credit card.

Q. Okay. So you were aware of the letter that Dad wrote where he said to the entire family he was going to come for a visit back to Michigan in the March/April time frame and then he would be leaving?

A. I'm aware of that letter. It's dated February 29th of two-thousand and -- 2012. What I'm also aware of is that he could not possibly have written that letter and that, a year later, there is an email from you stating that actually the writer of the letter was a so-called psychologist that you hired. That's who wrote the letter, not Dad.

But in any case, you did not comply with the terms of the letter.

Q. Did Dad sign that letter?

A. It doesn't matter, John.

Q. Did Dad sign the letter?

A. Yes, he signed it, but he signed it with the expectation -- let me finish, please

ROA 000862

1 signed it with the expectation that you, **ROA 000863**
2 person who was his co-trustee and durable power
3 of attorney, would have complied with the terms
4 of the letter.

5 Q. Okay.

6 A. You did not.

7 Q. Can you -- so you have a good
8 recollection. I'll pull it out if you'd like,
9 but you seem to have a good recollection. Can
10 you state what sections were not complied with?

11 A. Yes. Yes, I can.

12 Q. Would you, please.

13 A. Specifically he stated that he would like
14 his children, meaning Patti and me, and his
15 grandchildren, to be able to visit him as often
16 as possible and that he was in a position to
17 financially be assisting in the costs involved so
18 that we could see him on a regular basis.

19 Q. Okay. So did you visit him on a regular
20 basis?

21 A. Not nearly as much as either he or I would
22 have preferred.

23 Q. Did you visit him on a regular basis? Yes
24 or no, please.

25 A. No.

ROA 000863

1 MR. PEACE: Objection. Asked and answered. ROA 000864
2 JOHN EDWARD VERGELDT: She didn't --
3 THE COURT: She did answer.
4 A. No.
5 Q. You stated previously you visited him
6 about every six weeks.
7 A. No, John. What I stated was every seven
8 to eight weeks and that my preference was to be
9 able to visit him once a month.
10 Q. Thank you. But he didn't say then he was
11 going to return to South Carolina and stay there?
12 A. I don't remember, John.
13 Q. Okay. Was there a healthcare power of
14 attorney ever given you?
15 A. I don't believe so. I believe the
16 healthcare power of attorney went to Patti, with
17 me as a backup, because Patti was a registered
18 nurse.
19 Q. Did you regularly include Patti in your
20 discussions with medicines and doctor visits?
21 A. Yes, I did.
22 Q. When Dad was in South Carolina, who was
23 the designated healthcare representative?
24 A. I suppose you were. I don't remember.
25 Q. Thank you. Yes. ROA 000864

1 Did you call doctors in South Carolina and attempt
2 attempt to get his medications changed,
3 specifically Dr. Brancato, Patel, and Nunnery?

4 A. I did not.

5 Q. Did Dr. Patel not write you a letter
6 saying, from now on, I will only discuss your
7 father's medical stuff with --

8 A. No.

9 Q. -- your father?

10 A. He never sent me such a letter.

11 THE COURT REPORTER: I'm sorry.

12 THE WITNESS: Sorry. I have to go slower.

13 THE COURT: Let one another finish before you
14 talk.

15 JOHN EDWARD VERGELDT: I'm sorry.

16 MR. PEACE: Judge, I would -- I know this
17 line of questions has gone on for a little while,
18 but I would object to it. We're not here to
19 re-litigate the 2013/2014 case, which concerned
20 their father's healthcare. We're here to discuss
21 Mr. Vergeldt's actions concerning the trust and his
22 property. Unless it has bearing on it, I would
23 argue that it's not relevant under Rule 403 and
24 should, therefore, be excluded.

25 JOHN EDWARD VERGELDT: It does have **ROA 000865**

1 relevance, ma'am. If you give me just a moment, I'll get there. ROA 000866

2

3 THE COURT: Okay.

4 BY JOHN EDWARD VERGELDT:

5 Q. You stated earlier that I became
6 belligerent, correct?

7 A. That's correct.

8 Q. Do you feel that you ever became
9 belligerent towards me?

10 A. I do not.

11 Q. Do you remember ransacking my bedroom and
12 going through my wife's possessions and mine?

13 A. That's false. I remember on one of the
14 weekends that I was at your house, I had
15 forgotten to bring my charger. I walked through
16 your bedroom because at that point you were
17 leaving the bedroom unlocked because the bathroom
18 adjoining the bedroom was where I needed to
19 shower Dad.

20 And I recall seeing a charger in plain
21 view. I certainly did not go digging through
22 your possessions or your wife's and nor would I.
23 It isn't my nature.

24 Q. Was there a discussion about you going
25 through our bedroom and our private stuff? ROA 000866

1 A. No. There was an accusation in a **ROA 000867**
2 letter that you wrote to me in February of 2012.

3 Q. Did you ever accuse me of failing to
4 provide Dad's medical condition to you?

5 A. I did.

6 Q. Were you given a copy of that letter?

7 A. I was.

8 Q. So you had complete access granted by --
9 you're shaking your head. You had complete
10 access to Dad's medical records? Yes or no?

11 A. The problem with this letter, like the
12 other letters, is that it was not complied with.
13 And when I did contact Dr. Brancato, he responded
14 to me in writing that you had not authorized him
15 to give me any information. This letter was a
16 farce.

17 Q. You took a family vacation --

18 MR. PEACE: Your Honor, I'm sorry.

19 JOHN EDWARD VERGELDT: This is all going to
20 come together, sir, if you'll give me a minute.

21 THE COURT: Mr. Vergeldt.

22 JOHN EDWARD VERGELDT: Your Honor, I should
23 talk to you.

24 THE COURT: Right. And let him state his
25 objection.

ROA 000867

1 MR. PEACE: Well, my relevancy objection **ROA 000868**
2 stands. But my question is, are these letters
3 being introduced into evidence?

4 THE COURT: Not so far.

5 MR. PEACE: Thank you.

6 JOHN EDWARD VERGELDT: I would like to
7 introduce them into evidence.

8 THE COURT: Well, you need to get it marked.

9 JOHN EDWARD VERGELDT: Okay. Bear with me,
10 please. How do I do that?

11 THE COURT:

12 (Defendant's Exhibit 1, Exhibit 2, and
13 Exhibit 3 were marked for identification.)

14 THE COURT: The objection is to the May
15 17th, 2012 letter; is that --

16 MR. PEACE: Well, it depends on what's been
17 marked.

18 THE COURT: Defendant's 1 is the itemization
19 of amounts.

20 MR. PEACE: I would object to that on the
21 grounds that she's been asked to testify to it;
22 however, she's never seen it. That would more --
23 that would -- putting that into evidence may be
24 more appropriately suited for another witness.

25 THE COURT: I agree. It's sustained **ROA 000868**

1 JOHN EDWARD VERGELDT: It was entered into evidence in front of Judge Kimball, if that makes a difference.

4 THE COURT: It does not at this hearing.

5 JOHN EDWARD VERGELDT: Okay.

6 THE COURT: But again, Mr. Vergeldt, that does not mean that it is not suitable for another witness, like Mr. Peace said.

9 MR. PEACE: Defendant's -- I'm sorry, Judge.

10 THE COURT: Defendant's 2 is the February 29th, 2012 letter.

12 MR. PEACE: Okay. I would object to this letter on the grounds of Rule 403. Nobody is -- that's not relevant to what we're -- you know, Mr. Vergeldt -- John, Jr.'s wishes are not relevant to -- wishes as to where he's going to live are not in evidence -- are not at issue in this matter, and I believe it would be hearsay. It was written by John Vergeldt, Jr., who's not here to testify about his wishes. It would be barred by the Dead Man Statute.

22 THE COURT: Your response, Mr. Vergeldt?

23 JOHN EDWARD VERGELDT: Well, again, it was entered into evidence in front of Judge Kimball, and he accepted it. And he is dead. However, it was entered into evidence in front of Judge Kimball, if that makes a difference.

1 signed it and notarized it and sent it to ~~ROA~~ 000870
2 member of the family. These are, in fact, his
3 wishes for where he wanted to live.

4 MR. PEACE: I was wrong in my hearsay
5 objection, Judge. That would be allowed under
6 Rule 804-4 -- 804(a)4, because Mr. Vergeldt is not
7 here to be present and testify at the hearing
8 because of death.

9 However, I would renew my Rule 403 objection.
10 It's not relevant as to what Mr. -- what the
11 respondent did with the funds in his father's
12 trust.

13 THE COURT: And --

14 JOHN EDWARD VERGELDT: It has directly to do
15 with funds, ma'am.

16 THE COURT: This document?

17 JOHN EDWARD VERGELDT: Yes. It has directly
18 to do with funds, with monies.

19 THE COURT: I'm going to accept Defendant's
20 2 over objection, but I'm going to note your
21 objection, Mr. Peace. So I may change my mind
22 about Defendant's 2. So I'm going to accept it for
23 now.

24 JOHN EDWARD VERGELDT: Yes, ma'am.

25 MR. PEACE: And the same objection, ~~ROA~~ 000870

1 Honor, for Exhibit 3. It -- you know, his ~~RA 000871~~
2 to his health records has not been raised in this
3 case, and therefore, I don't believe it's relevant
4 under Rule 403.

5 THE COURT: Is that a claim that he was under
6 obligation through the trust to provide any health
7 records, I guess?

8 MR. PEACE: It may be, but we've not raised
9 that issue. I mean, he is -- I believe the issue
10 of Mr. Vergeldt, Jr.'s health and competency was
11 raised at the previous hearing. But no, I don't
12 believe we've raised the issue of access to his
13 medical records in this case.

14 THE COURT: I'm going to accept this exhibit,
15 Defendant's Exhibit 3, a letter on May 17th,
16 2012, noting Plaintiff's objection. So ultimately,
17 Mr. Vergeldt, I may exclude this.

18 JOHN EDWARD VERGELDT: I understand. Thank
19 you.

20 BY JOHN EDWARD VERGELDT:

21 Q. You mentioned in your testimony that while
22 you were in South Africa, a financial statement
23 was prepared and delivered to your house and you
24 had the chance to see it. And there was a
25 statement on it, if you have any question ~~RA 000871~~

1 me? ROA 000872

2 A. That's correct, but it wasn't delivered to

3 my house; it was delivered via email. That's the

4 only way I could have seen it. I was in South

5 Africa.

6 Q. Okay. Thank you. One was also delivered

7 to your house via regular mail, which I'm sure

8 you got later on.

9 A. I don't believe that's the case.

10 Q. After you reviewed that, did you request

11 that Dad start paying for your transportation to

12 and from South Carolina to visit?

13 A. I did not.

14 Q. You did not?

15 A. I did not, John.

16 Q. There was not an offer made by Dad to give

17 you \$10,000 up front for you to use in any way

18 that you saw fit?

19 A. The person who made that offer to me was

20 not my father; it was you. And I declined that

21 because I did not feel it was in your right to be

22 offering me \$10,000 prior to our father's death.

23 Q. It wasn't signed by him?

24 A. I don't know. The offer, as far as I

25 recall, was a verbal offer that was made ROA 000872

1 husband on the phone. **ROA 000873**

2 Q. Okay. So did you ever accuse my wife of

3 being a gold digger?

4 A. I don't know.

5 Q. I'm sorry?

6 A. I don't know.

7 Q. Thank you. When -- okay. Would it be

8 fair to say that by this point in the family's

9 relationship there was a very large amount of

10 animosity that had been generated -- and I'm not

11 trying to casting aspersions -- between you and

12 my wife?

13 A. I don't know what your wife has to do with

14 this matter. I'm not prepared to comment on

15 that.

16 Q. You have in many of your letters and

17 writings brought up the issue of me being

18 belligerent. Yes or no?

19 A. No.

20 Q. So you haven't said I became belligerent

21 or argumentative?

22 A. I believe Counsel commented, based on

23 writings that I provided to Counsel, that you

24 were hostile and intimidating and threatening

25 toward me. **ROA 000873**

1 Q. So if a person says to you, this **ROA 000874**
2 a person X, we'll call the sheriff today, entered
3 my bedroom and went through my personal stuff, do
4 you see how that could raise a level of animosity
5 and perhaps hostility?

6 MR. PEACE: Objection. What's the relevance?

7 JOHN EDWARD VERGELDT: Well, the relevance is
8 she has made comment --

9 THE COURT: Mr. Vergeldt, I'm going to
10 sustain his objection. Don't ask speculative
11 questions.

12 JOHN EDWARD VERGELDT: Okay.

13 THE COURT: In other words, no hypotheticals.

14 Q. Shortly before Dad passed away, he was in
15 the hospital, in Rock Hill at Piedmont Hospital;
16 is that correct?

17 A. I don't recall what hospital he was in.

18 Q. But he was in a hospital, if you remember?

19 A. I think it was Mecklenburg Medical Center,
20 if I remember correctly.

21 Q. Okay. But he was in a hospital?

22 A. He was.

23 Q. Okay. And in order to effect you [sic]
24 visitation, were you allowed to stay at our
25 house --

ROA 000874

1 A. I was not. ROA 000875

2 Q. -- without reservation?

3 A. I was not. I stayed in the hospital,

4 John. I stayed in his hospital room.

5 Q. Were you allowed access to our house to

6 effect your visitation?

7 A. I don't recall. I don't know -- exactly

8 when are you referring to? Shortly before his

9 death?

10 Q. About a week before his death.

11 A. Yes, you allowed me to stay in his house.

12 Yes, you did.

13 Q. Okay.

14 A. No. I beg your pardon. You allowed me to

15 enter the house so that I could see Dad.

16 That's -- you did.

17 Q. Dad wasn't in the house. Dad was in --

18 A. No, he was not. He was in your -- he was

19 in your house in a hospital bed. All of us were

20 there.

21 Q. That was the next -- I'm sorry.

22 Are you aware that that was the next visit

23 you had, about two weeks after that?

24 A. I'm sorry, John. I don't recall which

25 visit you're referring to. ROA 000875

1 Q. You came -- there were -- do you **ROA 000876**
2 having two visits, one of which when Dad was in
3 the hospital, you went to the hospital intern --
4 not intern, but internist and changed his
5 medication?

6 A. I never went to his internist and changed
7 his medication. I had --

8 Q. Did you go to any doctor and change his
9 medication?

10 A. No. I had no authority to do that.

11 THE WITNESS: What does this have to do with
12 this lawsuit?

13 THE COURT: Ms. --

14 THE WITNESS: I'm not allowed to ask --

15 THE COURT: Don't ask any questions.

16 Q. All right. You have previously stated
17 that I denied you proper paperwork. I didn't
18 bring it all, just because of the volume, but
19 this is the annual financial statement, which I'd
20 like to enter into evidence.

21 This is an example. This was in March of
22 2014. Did you receive one of those?

23 A. Yes.

24 Q. Did you receive one for 2013?

25 A. No.

ROA 000876

1 Q. Well, you previously stated that ~~ROA 000877~~
2 because you looked at it and you got it via
3 email.

4 A. The material that I got in -- I believe it
5 was dated January 1st, 2013, was prior to you
6 becoming successor trustee. It was --

7 Q. Yes.

8 A. It was not described as an annual trust
9 report; it was, I believed -- your intention was
10 to try to allay concerns that may have existed
11 about Dad's -- basically his end-of-life care.

12 This statement, however, was your first
13 annual trust report as successor trustee. I
14 believe the date -- could you please refresh my
15 memory what the date is?

16 Q. Of this one? Yes. This one was March of
17 2014.

18 A. Yes. March of 2014. It was March 25th;
19 is that correct?

20 Q. Correct.

21 A. Correct. Our father had died July 9th
22 of 2013.

23 Q. Correct.

24 A. You had made initial distributions at the
25 end of 2013, in September and October. ~~ROA 000877~~

1 not receive this report until after thosBOA 000878
2 distributions had been made. The numbers in this
3 report are inaccurate based on what has come to
4 light.

5 MR. PEACE: Does Mr. Vergeldt intend to
6 introduce this into evidence?

7 JOHN EDWARD VERGELDT: I do, sir.

8 THE COURT: We need to mark that as
9 Defendant's 4.

10 THE WITNESS: I would like to continue. May
11 I?

12 THE COURT: Let me make sure --

13 THE WITNESS: Okay.

14 THE COURT: Let's deal with this
15 Defendant's 4. Mr. Vergeldt, is this --

16 JOHN EDWARD VERGELDT: Yes.

17 THE COURT: -- a copy of --

18 JOHN EDWARD VERGELDT: Yes. Thank you.

19 THE COURT: Any objection, Mr. Peace?

20 MR. PEACE: No objection, Your Honor.

21 THE COURT: Defendant's 4 entered without
22 objection.

23 (Defendant's Exhibit 4 was marked for
24 identification.)

25 Q. You do not remember getting a 201BOA 000878

1 financial statement? **ROA 000879**

2 A. I just corrected you. I did not receive a

3 2013 annual financial statement.

4 Q. Okay.

5 A. I received an email from you, who -- you

6 were functioning at that point as co-trustee.

7 You were not successor trustee at that point.

8 Dad was still alive.

9 Q. As a courtesy, did you receive one in

10 2009?

11 A. I received a half page what I would term

12 was more like a budget. It was extremely

13 incomplete; it had no third-party substantiation;

14 and when you were asked to produce it as part of

15 discovery, you said you no longer could find it.

16 Moreover, it was not dated. The only way that I

17 could figure out the time frame that it applied

18 to was because it had referenced Henry Ford

19 Village, and I knew he lived in Henry Ford

20 Village at that time.

21 Q. Did you get one in 2010?

22 A. I believe so. I believe I got one in --

23 THE COURT REPORTER: I'm sorry.

24 Q. Did you get one in 2011?

25 A. I don't believe so. **ROA 000879**

1 Q. Did you get one in 2012? ROA 000880

2 A. I don't believe so.

3 Q. Okay. Those were as a courtesy. The

4 first one was actually due -- if I understand the

5 terms of the trust correctly, was in 2014. And

6 exactly what the trust says --

7 JOHN EDWARD VERGELDT: Please correct me if

8 I'm wrong, sir.

9 Q. -- is that the annual financial statement,

10 under no required format, under no specific

11 format, will be provided listing the assets and

12 the liabilities of the trust. Is that correct?

13 A. Are you asking me to verify what the

14 content of the trust is?

15 Q. I'm asking to the best of your memory. Is

16 that what it says?

17 A. I don't believe that you gave a full

18 report of what was supposed to be included in

19 that in your comment just now.

20 Q. Did I inform you at the time when you

21 called me about it that it had been approved by

22 the trust attorney, Mr. Don Harper?

23 A. I don't recall.

24 Q. Do you recall receiving this one -- and I

25 apologize for kind of jumping around a bit. ROA 000880

1 because I just didn't have time to prepare **ROA 000881**
2 everything.

3 THE COURT: Mr. Vergeldt, would you please
4 show that to Counsel before you approach the
5 witness?

6 JOHN EDWARD VERGELDT: I'm sorry. Yeah.
7 Sure. This is just the annual finance -- I just --
8 what I'm trying to show here is continuity.
9 There's no way that I would -- I don't believe
10 would have sent out one year and not the next year.
11 And here's the tax return that went with it, sir --

12 MR. PEACE: Okay.

13 JOHN EDWARD VERGELDT: -- which she has
14 subpoenaed.

15 BY JOHN EDWARD VERGELDT:

16 Q. You did subpoena the tax returns, correct?

17 THE COURT: Wait a minute, Mr. Vergeldt.

18 JOHN EDWARD VERGELDT: Yes. You've got to
19 let her answer.

20 THE COURT: Deal with one exhibit at a time.
21 Give Mr. Peace an opportunity to review what
22 your --

23 MR. PEACE: The Edward Jones and bank
24 statements are a part of this financial report?

25 JOHN EDWARD VERGELDT: Yes, sir. **ROA 000881**

1 asked for more amplifying information, and ROA 000882
2 course. It's just pulling it off the -- I should
3 be addressing -- it was just --

4 MR. PEACE: I have no objection.

5 THE COURT REPORTER: I'm sorry.

6 JOHN EDWARD VERGELDT: -- she asked for more,
7 so I gave her more. You asked for the monthly
8 statements.

9 THE COURT: Mr. Vergeldt, he has no
10 objection. Would you like to enter that as one
11 exhibit?

12 JOHN EDWARD VERGELDT: There's the tax
13 returns for that year.

14 THE COURT: And no objections, Mr. Peace, to
15 the tax returns?

16 MR. PEACE: No objection, Your Honor.

17 (Defendant's Exhibit 5 and Exhibit 6 were
18 marked for identification.)

19 THE COURT: We're going to mark as Exhibit 5
20 the tax returns.

21 MR. PEACE: Your Honor, I still have no
22 objections. I would just ask that any EIN numbers
23 or account numbers be redacted in the event these
24 are published on a public record.

25 THE COURT: Okay. They're entered with ROA 000882

1 objection. ROA 000883

2 JOHN EDWARD VERGELDT: Thank you.

3 MR. PEACE: Mr. Vergeldt --

4 THE COURT: I'm sorry. That's Defendant's

5 5 and 6.

6 MR. PEACE: Mr. Vergeldt, do you want her to

7 have these? Do you want these?

8 JOHN EDWARD VERGELDT: No. Actually, they

9 were entered -- they were shown for continuity

10 purposes.

11 BY JOHN EDWARD VERGELDT:

12 Q. Do you remember getting roughly the same

13 document for 2018?

14 A. I would like to comment concerning your

15 reports.

16 THE COURT: Just answer his questions,

17 Ms. Vergeldt. And could you show her which

18 document you're referring to?

19 Q. Did you receive copies of the annual

20 financial statement for 2018 as well as the tax

21 returns?

22 A. Yes.

23 Q. Okay. Did you object at any time, as

24 you've said in your petition, that my financial

25 reports were very, very difficult for you? ROA 000883

1 understand and wade through? Did you ever **BOA 000884**
2 me that you could not understand my financial
3 reports?

4 A. I have been notifying you since 2013 that
5 your reports were inadequate and unfactual and
6 unsupported by third-party substantiating
7 records.

8 Q. Very good. When you said that they were
9 incomplete, you never told me, did you, how they
10 were incomplete?

11 A. John, it was not my duty to direct you on
12 how to do an accounting.

13 Q. And if I provided you with every document
14 that I had in my possession as well as every
15 number that -- I'm sorry -- every number that I
16 had in my possession and every document that I
17 had in my possession, including tax returns, bank
18 statements, statements from Edward Jones, you
19 received -- do you believe you received all of
20 the documents that I had in my possession?

21 A. I do not.

22 Q. Which documents --

23 A. Excuse me. I can't say what you had in
24 your possession. I can say what should have been
25 in your possession and what you ought to **BOA 000884**

1 turned over. I did not receive what should have been
2 been in your possession as the fiduciary, and it
3 was not turned over. That's the whole reason
4 that we're litigating.

5 Q. What should -- I'm sorry. I stepped on
6 you. What should have been in my possession?

7 A. All of the records upon which your
8 signature appeared from 2008 through your
9 resignation in 2019.

10 Q. Very good.

11 A. All of them. All of the check copies, all
12 of the statements.

13 Q. You did not receive all of the bank
14 statements?

15 A. I did not, including when you resigned. I
16 got bank statements, but I --

17 Q. What are these?

18 A. -- I did not get Edward Jones statements.

19 Q. Excuse me. What are these?

20 A. John --

21 Q. These are Edward Jones statements, are
22 they not?

23 A. I had to contact Edward Jones because
24 there were missing statements, so I really don't
25 know what you're showing me. Just fanning

1 papers in front of my face doesn't help ~~ROA 000886~~

2 Q. Your specific complaint, if memory serves
3 me, on the Edward Jones as well as the bank
4 statements, was that I did not include page 5,
5 which were blank pieces of paper, although on the
6 bottom, they did say, 5 of 5. Is that correct?

7 A. I don't know. I can't tell you what your
8 memory is.

9 Q. You did receive bank statements?

10 A. I did not receive all of the bank
11 statements.

12 Q. Did you not receive bank statements that
13 said January, February, March, April, May, June,
14 July, August --

15 A. I do not know.

16 Q. You don't remember?

17 A. This has been going on a really long time.
18 I do not know.

19 Q. Let's move on. Okay. Did you live in
20 Mexico?

21 MR. PEACE: I'm going to object to the
22 relevance.

23 THE COURT: What's the relevance?

24 JOHN EDWARD VERGELDT: The relevance, Your
25 Honor, is she will disobey any law. She was ~~ROA 000886~~

1 Mexico. I know it for a fact. She worked **ROA 000887**
2 Mexico illegally. I'm not -- there's no criminal
3 thing here. Bribes were paid in order for her to
4 stay in Mexico.

5 MR. PEACE: Judge.

6 JOHN EDWARD VERGELDT: And it goes to her
7 character as to her ability to tell the truth.

8 THE COURT: I'm going to sustain his
9 objection. Let's move on. Very good. Okay.

10 BY JOHN EDWARD VERGELDT:

11 Q. In 2006, when Dad began showing symptoms
12 of Parkinson's disease, you said that you started
13 taking him to doctors?

14 A. No. What I said is I specifically took
15 him to a neurologist to have him evaluated to see
16 what was wrong that he felt like he had to tell
17 his feet to move and fell backwards.

18 Q. Did you tell the people that were the
19 primary and secondary healthcare providers that
20 you were going to do that?

21 A. There were no -- there was no one at that
22 time in 2006. I was just his daughter in 2006.

23 Q. Yes. But there wasn't a healthcare power
24 of attorney given to anyone in 2006?

25 A. I don't know, John. I don't recall **ROA 000887**

1 Q. Okay. ROA 000888

2 A. He wasn't sick until he was diagnosed as

3 sick.

4 Q. Okay. All right. Never mind. You say

5 you don't remember anyone having a healthcare

6 power of attorney?

7 A. I said I did remember somebody having a

8 healthcare power of attorney, but I don't recall

9 when that was put into effect. To the best of my

10 knowledge, it occurred more like around 2009, and

11 it occurred maybe, but not necessarily, in

12 conjunction with the durable power of attorney

13 that you wrote and got Dad to sign.

14 Q. Let's get back to I wrote and got Dad to

15 sign. How did I get Dad to sign it? Did I hold

16 him down? What did I do to make him sign

17 something giving me power?

18 A. John, it all stems from trust. Trust. He

19 trusted you. I trusted you. You betrayed the

20 trust.

21 THE COURT: Ms. Vergeldt, just answer the

22 question.

23 Q. The person that was living with him in

24 2005 -- correct me if I'm wrong -- testified in

25 court that she needed to be in his house ROA 000888

1 he was so weak and so full of dementia that he could not
2 could not sign his name; that's why he did not --
3 she did not believe that he signed any of these
4 documents. Do you remember that?

5 A. No. She did not testify to that.

6 Q. What --

7 A. What she stated was that he was lonely and
8 he was having problems with his frank depression
9 and that by the time he was residing with me,
10 which was the 2010/2011 time frame, sometimes he
11 needed help with his spoon. He could not eat
12 unassisted sometimes.

13 And it was in answer -- it was in the
14 context of him signing documents, which her
15 testimony was to the point he couldn't hardly
16 hold a spoon; he wasn't signing documents.

17 Q. Would you say it was a family decision for
18 him to move to Henry Ford Village?

19 A. I don't believe so, but that occurred in
20 2007. I believe it was his decision to move to
21 Henry Ford Village.

22 Q. Yes. Did he talk to everybody in the
23 family? You testified earlier that I came up
24 from South Carolina and you and I went and
25 visited the place and --

ROA 000889

1 A. I can't say that he spoke with even BOA 000890
2 the family. I was aware that you were involved,
3 and I was involved. To my knowledge, no one else
4 in the family was involved.

5 Q. When he signed the papers to move into
6 Henry Ford Village, are you aware of what my
7 advice to him was?

8 A. I have no idea what your advice was. How
9 could I?

10 Q. Okay. Because you were -- that's a
11 statement. I won't make it.

12 Were you in the room with me when I
13 advised him not to move into Henry Ford
14 Village --

15 A. I was not.

16 Q. -- because I did not like the terms of the
17 contract?

18 A. I was not.

19 Q. Did you later, in an interrogatory, if
20 that's the right -- in a letter from the
21 attorneys saying where is this document, ask me
22 for the HUD statement for Henry Ford Village?

23 A. What we were looking for, as I recall, was
24 the proceeds of the sale of his house on Berwyn,
25 and we were unable to find it. And we were BOA 000890

1 looking for the proceeds from the sale of ROA 000891
2 condominium at Henry Ford Village, which we were
3 unable to find.

4 Q. Were you aware that he did not own the
5 condo at Henry Ford Village?

6 A. I understand, from having a -- you know,
7 looking into this further, that he paid 100 -- I
8 don't know -- maybe \$158,000 -- I'm not even sure
9 exactly of the number, but I believe he paid
10 \$158,000 for the privilege of being a resident at
11 Henry Ford Village.

12 I am aware that he received two payments
13 back from Henry Ford Village. Whether or not he
14 was technically an owner, I don't know. But he
15 was a resident, he paid to reside there, and he
16 received money back when he vacated his
17 apartment.

18 Q. You are correct. Would it surprise you to
19 note that the number was closer to \$175,000?

20 A. I would be surprised, and it would be
21 interesting, because we found no record of that.

22 Q. Would you also be surprised to know that
23 the amount of money that you got back when you
24 vacated, if you vacated in under five years, five
25 complete years, was prorated on the number ROA 000891

1 months that you got -- that you stayed there. ROA 000892

2 A. No, I'm not aware, but I don't understand

3 what has that got to do with me.

4 Q. Did you accuse me of keeping the monies,

5 of not paying his bills?

6 A. No.

7 Q. You did not accuse me of saying money was

8 not returned to the family from Henry Ford

9 Village because I hadn't paid the bills?

10 A. Oh. I don't know what you're referring

11 to. All I can tell you is that we were unable to

12 trace where those payments went at that point in

13 time.

14 Q. Okay. When Dad was living alone or moved

15 to Henry Ford Village, you stated that you went

16 and saw him often.

17 A. I did.

18 Q. Did anyone else go and see him often?

19 A. Yes.

20 Q. Who?

21 A. I bet Patti went probably -- I don't

22 know -- once every couple weeks. I bet Audry

23 went as often as she could. There came a point

24 in time, as I said earlier in my testimony, that

25 I asked specifically Audry if she could ROA 000892

1 to be more helpful to him. I was working BOA 000893
2 full-time at the time, and I had a child, and I
3 was spending probably -- I don't know -- four
4 days a week trying to help him.

5 Q. When Dad was living with you, were you
6 working?

7 A. I was.

8 Q. You stated earlier that you weren't.

9 A. I did not.

10 Q. All right. I believe you did, but --

11 A. No. I stated that I changed the nature of
12 my work to a freelance basis so that I could have
13 the flexibility I needed for a four-year-old and
14 an 80-something-year-old person.

15 Q. And your son was four at the time?

16 A. I take that back. 14-year-old.

17 Q. Thank you. Would it be fair to say that
18 it was a family decision for Dad to move in with
19 you?

20 A. I believe that's fair.

21 Q. And you did not give anyone a credit card
22 or a debit card to use to purchase things for
23 Dad?

24 A. I am aware that Audry Scheible basically
25 held on to the debit card because she was BOA 000893

1 primary caregiver during the day while IRDA 000894
2 work. It was my understanding that that card was
3 to be used for expenses pertaining to Dad.
4 However, I would also like to point out that I
5 paid out of pocket more than \$10,000 for Dad's
6 clothing and vet bills and other kinds of things
7 that you were made aware of years before Dad
8 died.

9 I sent you full documentation, itemized
10 receipts, and you refused to pay that back.

11 JOHN EDWARD VERGELDT: Move to strike, ma'am.
12 She didn't begin to answer my question.

13 THE COURT: Denied.

14 JOHN EDWARD VERGELDT: Thank you.

15 BY JOHN EDWARD VERGELDT:

16 Q. Amendment 10 to the trust document -- are
17 you aware -- actually, the trust document did not
18 come from me; it came from Mr. Gutman. Are you
19 aware of that?

20 A. I am aware that in -- let me get my dates.
21 I believe it was December 4th, 2010, you sent a
22 multipage email to me and Patti instructing us on
23 where all of Dad's legal, medical, and financial
24 information were being stored in your home in
25 Tega Cay. I think it's very important that IRDA 000894

1 occurred in 2010 and that the purpose of ROA 000895
2 in case something happened to you, because I had
3 said, I'm really worried if something happens to
4 you, you've got everything down there in
5 South Carolina, and I'm worried about what's
6 going to happen.

7 That email was very detailed and
8 instructed on the use of obtaining a durable
9 power of attorney and a co-trustee appointment
10 and how to use it. It also explicitly stated
11 where those documents were located. They were
12 not located with Dad; they were located with you
13 in South Carolina while Dad was living in
14 Michigan, ill.

15 Q. That's true. I'm sorry. Did they ever
16 change their location?

17 A. I have no idea. As far as I knew --

18 Q. And your visits -- I'm sorry. I
19 interrupted you.

20 A. As far as I knew, I requested an
21 opportunity to look at them, and you denied it.

22 Q. When you were in our house, on your
23 numerous -- numerous meaning five, six -- I will
24 freely admit I don't know exactly how many. But
25 on one of your visits, did you look at t ROA 000895

information?

ROA 000896

A. In 2009, I was there on a visit to your home. At that point, things were pretty cordial, and at that point, you allowed me to see it. And at that point, I actually saw among the papers a certificate of deposit statement for \$100,000. That has never been found.

Subsequently I was -- well, at the time that I was reviewing them, I was called away. I was interrupted. And subsequently I asked if I could look at those books, and you refused. And I know that in your deposition, in August 30th, 2016, I believe is the correct date, you testified that you had destroyed those records.

Q. So let's talk about this \$100,000. I can't state this, but did you ever find any evidence of \$100,000?

A. Yes, I have found evidence of \$100,000. As a matter of fact, I have found evidence of \$118,300 that went into known trust accounts from unknown accounts. Since I find it very unreasonable to conclude that you were funding any of my father's trust accounts with your personal money, it raises in my mind the possibility that \$118,300 came from accounts

ROA 000896

1 at least at one time may have pertained **ROA 000897**
2 father and that we were unable to discover.

3 Q. Very good. Amendment 10 to the trust
4 document, did you take Dad to Mr. Gutman's office
5 to prepare and sign amendment 10?

6 A. No, I did not. Audry Scheible drove him.
7 I was at work.

8 Q. We'll get back to that later.

9 Okay. So to kind of sum things up now,
10 you were given a document you say is useless that
11 was sent to the doctors giving -- while Dad was
12 living with me, giving you permission to have all
13 pertinent medical information?

14 A. I say that when I tried to take advantage
15 of that document, I received a written response
16 from Dr. Brancato apologizing that you had
17 refused to give him permission to allow me to
18 talk to him.

19 Q. Do you have that document?

20 A. No, because I did not expect the line of
21 inquiry at this hearing to involve my father's
22 care.

23 Q. So your statement is that Audry Scheible
24 took Dad to sign the document, the amendment 10?

25 A. Yes, I believe that is correct. **ROA 000897**

1 Q. Do you believe the trustee should ~~ROA 000898~~
2 held -- the co-trustee should be held liable for
3 information in an amendment that he was not aware
4 existed?

5 A. I'm not certain what information in that
6 amendment you're referring to.

7 Q. Amendment 10.

8 A. I don't know which information. It's a
9 fairly long amendment. What are you referring
10 to?

11 Q. The amendment 10. The entire thing.

12 MR. PEACE: I think it's been asked and
13 answered, Judge.

14 JOHN EDWARD VERGELDT: Okay.

15 Q. You say you didn't have a key to the
16 cottage after Dad passed away.

17 A. No. What I said is, I made a visit to the
18 cottage in July of 2013 at your request to remove
19 my personal items. I did that, and then
20 hostilities -- hostilities had already begun, but
21 they started to get worse. One of the things
22 that happened is that you accused me in writing
23 of theft. You assigned values to the items that
24 I removed and attempted to employ the cumulative
25 gifts and advances provision of the trust ~~ROA 000898~~

1 reduce my proposed distribution as an **ROA 000899**
2 inheritance.

3 Q. Let's get back to that. I'm sorry.

4 A. I'm not finished.

5 THE COURT: You can continue, Ms. Vergeldt.

6 A. I've lost my train of thought. Could you
7 repeat your question, please?

8 Q. We started off, ma'am -- golly --

9 JOHN EDWARD VERGELDT: Can somebody -- could
10 you give me a clue what my last question was?

11 THE COURT REPORTER: I'll read back the
12 question; yes, sir.

13 JOHN EDWARD VERGELDT: Thank you.

14 (Page 189, line 15 is read back by the court
15 reporter.)

16 JOHN EDWARD VERGELDT: Thank you.

17 THE COURT REPORTER: You're welcome.

18 Q. So you didn't have a key to the cottage
19 after Dad passed away. Is that your testimony?

20 A. No, it is not.

21 Q. Or you did?

22 A. As I was explaining, I had a key
23 initially, I went to the cottage with my husband
24 and our son, I removed our items, and then there
25 was this ugly attack on me. And I was m**ROA 000899**

1 and I was upset, and I felt the best thing **ROA 000900**
2 was to stay away from the cottage. However, we
3 were litigating by 2014, and I felt it was in my
4 best interest to know what the condition of the
5 cottage was.

6 In October of 2015, I sent Ben, my son, to
7 check on the cottage. While he was there, Patti
8 arrived. She demanded to know under what
9 authority he was there. She threatened to call
10 the police on him simply for being there. She
11 barred his exit when he tried to leave.

12 So that formulated, in my mind, that the
13 hostilities were still very, very high, and I
14 stayed away from the cottage. However, through
15 counsel, I did request a visiting procedure, a
16 scheduling procedure, with the intention that I'd
17 be able, with my family, to visit the cottage
18 unmolested. That is something that you never
19 responded to.

20 And in your following years' annual trust
21 report -- I did not know before then -- you
22 attached some statements of services provided by
23 Patti and her companion, which you paid her and
24 her companion to do, ostensibly for the
25 maintenance of the cottage. **ROA 000900**

1 The only thing, on visual inspection ROA 0000901
2 did was change the locks. Those locks were
3 changed at the cottage in October of 2015.
4 Thereafter, I repeatedly requested, through
5 counsel, a set of keys. That was denied. I did
6 not receive a set of keys so that I could see the
7 inside of the cottage until November of 2018.

8 However, the prior summer, which was
9 August of 2017, I was really concerned about the
10 cottage, and I visited it with a camera. I was
11 not alone. I have never been alone at the
12 cottage. I took photographs, and I reported that
13 it was in a state of severe neglect. I was quite
14 concerned in particular because all of the cement
15 work and brickwork had turned black and because
16 the gutters were full of debris. There was --
17 there were saplings growing in the gutters.
18 Pieces of the gutters were missing. The
19 downspouts in several places were missing. There
20 was inches thick mold growing on the roof of the
21 cottage and of the barn in particular. I'm less
22 concerned about the shed. But everything --
23 everything was overgrown.

24 The parking lots were -- the parking
25 lights were all broken and lying in pieces ROA 0000901

1 ground. Part of the landscaping decor had been removed or was just gone. Somebody had tried to
2 removed or was just gone. Somebody had tried to
3 do some tuck pointing on the brick, and they used
4 the wrong color.

5 So at that point, I did inform you,
6 through counsel, that I had serious concerns
7 about the level of negligence at the cottage.
8 Again, that was in August of 2017.

9 Q. Do you have a copy of that? Because I
10 don't believe I ever received it. And I'm not
11 questioning you. Do you have a copy, because --

12 A. Well, as a matter of fact, I do have a
13 copy.

14 Q. May I have that? Because I never got it.

15 Now, shall we move along? Would it
16 surprise you to know that the people who were
17 hired to do maintenance on the cottage were
18 certified handymen?

19 A. That would not surprise me.

20 Q. Okay. So if Jeff, who happened to have
21 been cohabitating with our other sister, was, in
22 fact, a licensed and certified handyman, hiring
23 Jeff to do maintenance work on a cottage would
24 not be out -- would not be untoward as long as
25 they were not paid a usurious or out-of-

1 rate for the amount of work that was being done. ROA 000903

2 A. I don't question that you hired Jeff
3 Gordon. I question that you never confirmed that
4 the work that you hired Jeff for and to do was,
5 in fact, done.

6 Q. In fact, would it surprise you to know
7 that I knew that it wasn't done because Jeff
8 died?

9 A. Well, you paid him for it, according to
10 your annual report.

11 Q. No. I paid him for the --

12 Would it surprise you to know that the
13 work that he was paid for was work that had
14 actually been completed?

15 A. Yes, that would surprise me; because on
16 visual inspection, it was not.

17 Q. Okay. So moving right along --

18 THE COURT REPORTER: May we take a break,
19 please?

20 THE COURT: Yes. We're going to take a
21 five-minute break.

22 (A recess was taken.)

23 THE COURT: We're back on the record. You
24 may proceed, Mr. Vergeldt.

25 ROA 000903

1 BY JOHN EDWARD VERGELDT:

ROA 000904

2 Q. So you made the statement that there was
3 mold on the roof, and you said -- I can't find
4 the other one. I'll show you that one, and then
5 I'll -- is this your email to Audry?

6 A. Yes, it is.

7 Q. You specifically asked her not to talk to
8 anyone about it?

9 A. I said -- let me see exactly what I wrote.
10 I said, because of the lawsuit, please do not
11 copy anyone on this letter or talk about it.
12 Those who need to know its contents already do or
13 will get the info through the proper channels.

14 Q. Thank you. So you assume that I got the
15 pictures as well as the report of the moss on the
16 roof as well as the stuff in the gutters? You
17 assume that?

18 A. What I know is that that report from
19 August of 2017 was attached to an affidavit that
20 was filed with the Court. You were part of those
21 proceedings, so it was my belief, yes, that you
22 would have received it.

23 Q. Okay.

24 A. And incidentally, this is not related to
25 that.

ROA 000904

1 THE COURT: Ms. Vergeldt, don't comm **ROA 000905**
2 THE WITNESS: Okay.
3 JOHN EDWARD VERGELDT: I'd like to enter this
4 as an exhibit, please.
5 THE COURT: This will be Defendant's
6 Number 7. Any objection, Mr. Peace?
7 MR. PEACE: No objection, Your Honor.
8 THE COURT: Defendant's 7 entered without
9 objection.
10 (Defendant's Exhibit 7 was marked for
11 identification.)
12 Q. So you said in there that you don't want
13 anyone to talk to me about the material condition
14 of the cottage because you believe they've been
15 notified in another way?
16 A. I don't believe that's what I said in that
17 letter, no.
18 Q. All right. It says, don't talk to anyone
19 or tell anyone about this. I'm sure Uncle John
20 has been notified.
21 Did you say that?
22 A. No, I did not.
23 JOHN EDWARD VERGELDT: Sir, could I borrow
24 this, please?
25 MR. PEACE: Certainly. **ROA 000905**

1 Q. Before that, I checked the outside **ROA 000906**
2 place on August 2017 and took pictures and made a
3 report, which I am sure Uncle John received.

4 Did you say that?

5 A. I guess I did.

6 Q. All right. So if Uncle John had received
7 it -- John had received it -- you would have
8 anticipated that somebody would have done
9 something?

10 A. I don't know.

11 Q. Okay. Let's go right to the mold. The
12 mold -- did your mother place bars of Irish
13 Springs soap in every closet, in every dresser
14 drawer, and in every bed in an attempt to hold
15 the mold down?

16 A. No. There was no problem with mold. At
17 that time, she did that because she had an
18 old-fashioned idea that it made things smell
19 good.

20 Q. That would be your opinion: Yes or no?
21 That is your opinion?

22 A. John, it appears your opinion and my
23 opinion differ.

24 Q. Okay. That's fair. Obviously, it does,
25 or we wouldn't be here. **ROA 000906**

1 So you do not know then whether or not there was a plan to fix those items?
2

3 A. Which items?

4 Q. The items that you've listed. You do not
5 know if there was a plan to fix those items?

6 A. I'm sorry; I don't know what you're
7 referring to.

8 Q. The items that you say needed addressing,
9 you do not know if there was a plan to have those
10 fixed --

11 A. I would need to --

12 Q. -- or addressed?

13 A. -- review that note. I don't know what
14 you're talking about.

15 Q. Those are the -- the gutters, the growth
16 on the roof.

17 A. Well, I think you need to understand that
18 this is a retrospective report to Audry because
19 Audry and I had not spoken in many years. The
20 last time I saw Audry was on a sidewalk when we
21 were here in town before Judge Kimball in July of
22 2015.

23 Q. My question was, do you know if there was
24 a plan to address those issues?

25 A. Well, my point to her was that there

1 issued in 2017, and now, come forward to **ROA 000908**
2 is a disaster. It's not just -- it's a disaster.
3 It's uninhabitable.

4 Q. We'll get to that. So if I say to you
5 that one of the list of things that Jeff had been
6 contracted to complete included all of those
7 items --

8 A. I have no idea what you contracted Jeff to
9 complete.

10 Q. Thank you. The different-color --

11 A. Mortar.

12 Q. Mortar. Do you know who put the
13 different-color mortar on?

14 A. I have no idea.

15 Q. Would it surprise you that Dad did it?

16 A. Yes, it would.

17 Q. It would?

18 A. Yes, it would.

19 Q. Because that's the color of mortar that
20 they had at the Busy Bee Hardware store the day
21 he went up there to buy it?

22 A. When would that have been, John -- well,
23 I'm not allowed to ask questions.

24 THE COURT: Let's stop.

25 Q. Would it surprise you --

ROA 000908

1 MR. PEACE: Hold on. ROA 000909

2 THE COURT: Stop. Okay. Routinely, you end

3 up asking each other questions. Ms. Vergeldt, you

4 can't ask questions.

5 THE WITNESS: I understand, Judge. I'm

6 sorry.

7 THE COURT: Mr. Vergeldt, you do not make

8 statements; you ask questions.

9 JOHN EDWARD VERGELDT: Yes, ma'am.

10 THE COURT: And I'm going to stop each of you

11 if it gets out of hand again. Okay?

12 THE WITNESS: That's fair.

13 THE COURT: Answer questions; ask questions.

14 Okay. You may proceed, Mr. Vergeldt.

15 BY JOHN EDWARD VERGELDT:

16 Q. Would it surprise you that Dad hired a

17 contractor whose first name is Nelson who has

18 worked in bricks and mortar his entire life and

19 he inspected the chimney and found those cracks

20 in the chimney had no structural bearing?

21 A. I don't know.

22 Q. Thank you. So there's a flood. Numerous

23 people have gone into the cottage -- we agree on

24 that?

25 A. I don't know. ROA 000909

1 Q. Okay. Well, I can't state that. **ROA 000910**
2 numerous people had been in the cottage. When
3 the cottage was entered, we don't know.

4 Would it surprise you to know that Jack
5 Scheible had been, as a courtesy, and Ken Sanford
6 had been, as a courtesy, going by the cottage to
7 make sure that the heat and everything looked
8 fine and your -- I had been told that everything
9 was fine until I got a water bill for about
10 \$1,900? Would that surprise you?

11 A. I don't know.

12 Q. So again, if the water bill comes in and
13 obviously there's a leak, so the water company is
14 called and the water is turned off, would it
15 surprise you that I immediately called Clean
16 Sweep, who is a water restoration company, to get
17 over there and inspect it?

18 A. I am certain you did not, because --

19 Q. I have the bills.

20 THE COURT: Mr. -- ask your next question.

21 Q. Would it surprise you that after the
22 inspection by Clean Sweep was done that Royal
23 Plumbing in Sterling, Michigan was hired to come
24 inspect the place, find where the breaks in the
25 lines were, and repair them? **ROA 000910**

1 A. I don't know. ROA 000911

2 Q. Would it surprise you then that Clean

3 Sweep was rehired to come back and do a complete

4 mold inspection and dry the place out complete

5 with dryers and heat?

6 A. I don't know.

7 Q. Would it surprise you then that after that

8 was done, the water was turned back on, and there

9 was an inspection done -- there was damage to the

10 cottage; I agree with you. Would it surprise you

11 that Sam's Construction was hired to immediately

12 come in and begin repairs?

13 A. I had no knowledge of these circumstances.

14 I don't know anything that you're referring to.

15 Q. Would it surprise you that,

16 coincidentally, we were back in this room in

17 front of Judge Kimball where an order was given

18 that I could not expend money on the cottage

19 without permission? Were you aware of that?

20 A. That's a misinterpretation of Judge

21 Kimball's order. I'm real familiar with that

22 order.

23 Q. What do you interpret it to say?

24 A. That you were given the opportunity to

25 give me, as the only other beneficiary, ROA 000911

1 any invoices, expenses, any planned expenses. **ROIA 000912**
2 from remaining trust assets, in an effort to keep
3 me informed because, at that hearing, it was
4 determined that there was not enough money to
5 pay -- to pay a professional successor trustee.
6 And so, therefore, Judge placed an injunction
7 against you.

8 I am also informed that I approved every
9 single bill as soon as I got it, usually within
10 24 hours.

11 When you made a reference earlier to Adam
12 Silvernail, I am aware that you filed a motion
13 for payment. I don't recall exactly the timing.
14 It probably was after that hearing. But Adam was
15 suffering a life-threatening illness, and I was
16 in the process of changing to a different
17 attorney. However, I know that I did my part to
18 approve -- I didn't deny any of your requests at
19 all, and I approved them usually within 24 hours.
20 They were -- it was handled through counsel.

21 Q. So we will assume that perhaps
22 Mr. Silvernail was not doing real well?

23 A. I said --

24 Q. I think that's a fair statement.

25 Now, would it surprise you to know **ROIA 000912**

1 that I received exactly one -- one, mind you, ROA 000913
2 permission to pay bills?

3 A. What I recall is that that may have been
4 true during the period of approximately May to
5 June of 2018 -- 2018 -- yeah, I got the year
6 right -- 2018, and I retained Tommy Lydon in July
7 of 2018 and immediately addressed your motion for
8 payment and immediately unstuck the process.

9 Q. So then if I were to say that I never
10 received permission to pay but one bill, which is
11 why the work on the cottage stopped, because I
12 couldn't get permission from you to continue the
13 work --

14 A. I would say --

15 Q. May I finish?

16 A. Sure. Sorry.

17 Q. -- that you are at least culpable in the
18 damage to the cottage because the cottage would
19 have been, by Sam's Construction, totally fixed?

20 A. Okay, John. That's not what happened.

21 Q. Yes, it is -- I'm sorry.

22 A. No, it isn't. I have -- I have the
23 subpoena responses from our insurance company.

24 Okay.

25 THE COURT: Mr. Vergeldt, rephrase your ROA 000913

1 question, and Mr. Vergeldt, I think it would be helpful
2 if you --

3 JOHN EDWARD VERGELDT: Stopped pacing?

4 THE COURT: Well, it may help -- if you
5 wanted to be seated while you ask questions, you
6 certainly can if you need to read documents. But I
7 think your questioning are so lengthy, it --

8 JOHN EDWARD VERGELDT: I understand.

9 THE COURT: -- I think it gets unclear to
10 Ms. Vergeldt.

11 JOHN EDWARD VERGELDT: Sometimes I don't know
12 how to frame the question without making a
13 statement.

14 BY JOHN EDWARD VERGELDT:

15 Q. So to the best of your knowledge,
16 Mr. Lydon or Mr. Silvernail forwarded you
17 permission for all work to continue on the
18 cottage?

19 A. I am certain that Mr. Lydon forwarded
20 everything to Mr. Blue. I am certain.

21 Q. All right. So then it is your belief that
22 one of the two attorneys may have failed to
23 forward -- would it surprise you to know that I
24 addressed a letter to Judge Kimball saying, in
25 fact, I was going to be in violation of **ROA 000914**

1 because I could not get permission to pay **ROA 000915**
2 bills?

3 A. I don't recall, John. I am not privy to
4 that information.

5 Q. I understand. All right. So the people
6 who were working on the cottage -- you physically
7 saw work being done on the cottage. Yes?

8 A. No. I saw work that had been started and
9 stopped.

10 Q. But you don't know why it was stopped?

11 A. I am aware that in your last annual report
12 you alleged that the work was stopped because I
13 blocked it.

14 Q. Thank you. So mold -- mold is like
15 fingerprints. There's no way to tell how old
16 mold is. Is that correct? Is that what your
17 man's report said?

18 A. I don't know.

19 Q. You quoted it.

20 A. I don't recall saying that it's like
21 fingerprints.

22 Q. Okay. It's not like finger -- let me
23 rephrase. Is mold such a thing that you cannot
24 tell from looking at mold how old it is?

25 MR. PEACE: Objection. Ms. Vergeldt **ROA 000915**

1 qualified to speak to the -- **ROA 000916**

2 JOHN EDWARD VERGELDT: Okay.

3 MR. PEACE: -- to speak to the properties of

4 mold, to speak to the age of mold, how it grows,

5 you know, how -- she's not capable of carbon dating

6 mold, if you can carbon date such a thing.

7 JOHN EDWARD VERGELDT: Your Honor, she read

8 it into the record by reading out of that report.

9 THE COURT: Why don't you grab the report and

10 point out which portion of it you would like to ask

11 her a question about. If she read from the

12 report -- it may be over here, Mr. Vergeldt. That

13 was -- are you referring to the mold remediation?

14 That would be Plaintiff's 11. I think it's up

15 here, Mr. Vergeldt.

16 THE COURT REPORTER: The exhibits are in

17 order in front of the witness.

18 BY JOHN EDWARD VERGELDT:

19 Q. Based on my experience, the mold and/or

20 mildew damage that I observed is the result of

21 prolonged exposure to water and/or moisture

22 intrusion, which is consistent with the leaky

23 roof and leaky plumbing.

24 So is that a fair statement? Because the

25 guy wrote it. **ROA 000916**

1 Q. Okay. We've talked about the soffits **ROA 000918**
2 being in bad condition. Do you know when the
3 soffits were installed in Michigan -- which gets
4 snow and ice and large changes in inclement
5 weather? Do you know when they were installed?

6 A. No.

7 Q. Would it surprise you to find out it was
8 in 1968?

9 That's 50 years.

10 Would it surprise you to know that they
11 are 1/16-inch plywood and the lifespan of
12 1/16-inch plywood in an exposed environment is
13 about eight years?

14 A. I beg your pardon. What's the question?
15 Would I be surprised about soffit technology?

16 Q. The proposed --

17 A. I don't know about --

18 THE COURT: Ma'am --

19 MR. PEACE: I'd ask that --

20 THE COURT: Please ask your question again.
21 Rephrase it.

22 Q. The lifespan -- the likelihood of the --

23 THE COURT: Mr. Vergeldt, you're starting
24 with a statement. You need to ask her --

25 **ROA 000918**

1 Q. Do you know what the lifespan of ~~ROA 000919~~
2 plywood that is properly painted is in an
3 inclement environment?

4 A. No.

5 Q. Would it surprise you it's between five
6 and seven years?

7 A. Well, that's the length of time that
8 you've been the trustee.

9 Q. Do you know the last time they were
10 painted?

11 A. I have no idea, but you were
12 responsible --

13 Q. Would it surprise you to know that I'm the
14 last person who painted them?

15 A. That would surprise me, yes.

16 Q. Okay. Would it surprise you to know that
17 the only reason the work was stopped on
18 completing the repairs, the remediation as well
19 as the mold removal, that all have been
20 identified -- that was done because I could not
21 get permission?

22 A. I don't believe it.

23 Q. So it would surprise you or it wouldn't?
24 It would surprise you because you don't believe
25 what I'm saying?

ROA 000919

1 A. Well, what I can speak to is that ROA 000920
2 regular ongoing exchange via email showing me
3 your proposed expenditures and giving me the
4 opportunity to approve or deny, and I made a
5 point of quickly approving everything that I was
6 given. I have no reason to doubt that my
7 attorney would have failed in his obligation to
8 forward those to Dan Blue. I have no reason to
9 doubt that.

10 Q. Do you believe Audry is a beneficiary of
11 the trust?

12 A. I'm sorry. I don't understand your
13 question.

14 Q. You and I are beneficiaries of the trust.
15 Upon Patti's passing, did Audry become a
16 beneficiary of the trust?

17 A. I'm not clear on that point. I'm not a
18 trust attorney.

19 Q. Okay.

20 A. It appears to me that Audry received her
21 full inheritance at the time that our dad died.

22 Q. Have you ever been a trustee of a trust?

23 A. Well, I currently am.

24 Q. Before that, have you ever been a trustee
25 of a trust? ROA 000920

1 A. I have not. ROA 000921

2 Q. You have not. You were not a trustee of

3 our mother's trust when she passed away?

4 A. I was a backup successor trustee in the

5 event that our father predeceased our mother. I

6 have a copy of that trust at home.

7 Q. Okay.

8 A. I did not bring it because I don't think

9 it's relevant to this matter.

10 Q. Are you aware that an EIN -- while you

11 were the backup or potential successor trustee,

12 an EIN number for that trust was never asked for?

13 A. John, I don't know what you're driving at.

14 I have no idea what you're talking about.

15 THE COURT: Ms. Vergeldt, just instead of --

16 if you don't know, then I don't know --

17 A. I don't know.

18 Q. Okay. Would it surprise you to know that

19 since there was no EIN number filed, there were

20 no tax returns filed?

21 A. I would be amazed to know that.

22 Q. Do you know what happened to that trust?

23 A. I do not.

24 Q. Would it surprise you to know that you

25 personally turned it over to me and signed it. ROA 000921

1 over to me and I spent three years arguing with the
2 the IRS about the failure to file tax returns?

3 A. I don't believe that's true.

4 Q. So you have been a trustee, a successor
5 trustee?

6 A. No, I was not a successor trustee; I was
7 named the successor trustee in the event that our
8 father predeceased our mom.

9 Q. Thank you. Did you have any fiduciary
10 training as a trustee?

11 A. I did not.

12 Q. Did you seek any fiduciary training as a
13 trustee?

14 A. I was never functioning as a trustee, so
15 no, I did not seek any fiduciary training as a
16 trustee.

17 Q. Did you have any knowledge that perhaps
18 you should have sought training as a fiduciary
19 trustee?

20 THE WITNESS: Excuse me. I need a break.

21 Excuse me, please.

22 THE COURT: You need a break?

23 THE WITNESS: I do.

24 THE COURT: We'll take a five-minute break.

25 (A recess was taken.) **ROA 000922**

1 THE COURT: You may proceed. ROA 000923
2 BY JOHN EDWARD VERGELDT:
3 Q. You made the statement earlier:
4 Everything else he took, regarding me. I believe
5 you were referring to removing things from the
6 cottage.
7 A. I'm sorry. I don't know what context
8 you're referring to.
9 Q. All right. We were talking about when I
10 ordered you to take your stuff out of the
11 cottage. Now, correct me if I'm wrong: The
12 discussion at the time was, since this was before
13 Dad passed away -- I've got to set the stage.
14 But there was an email that went out -- I'm sure
15 you remember -- that said, if there's something
16 in the cottage that you want, that holds special
17 stuff to you, if you identify it, it will be
18 marked, and no one else can have it.
19 Is that correct?
20 A. Well, the timing is incorrect, John. You
21 sent that after Dad's death.
22 Q. Very well. So everybody prepared -- or
23 most of the kids and people in the family
24 prepared a list of things they wanted, correct?
25 A. I'm sorry. Referring to what? ROA 000923

1 objects in -- ROA 000924

2 Q. The objects --

3 A. -- in the cottage?

4 THE COURT REPORTER: I'm sorry.

5 Q. The art -- the things that were just

6 really special. If you wanted that, it would not

7 be included in an inventory. Is that correct?

8 A. I'm sorry. What are you referring to?

9 The cottage?

10 Q. The cottage. The things that you say are

11 missing and you're demanding to know what I took.

12 A. That's an incorrect statement.

13 Q. Which one? That I -- the things that you

14 say I demanded that you take. I demanded you get

15 your stuff out of the cottage.

16 A. You did demand that. You demanded that in

17 writing. That's correct. And I removed my

18 things. Correct.

19 Q. Were those not the things that you claimed

20 were yours?

21 A. They were mine.

22 Q. Because they were -- I'm sorry. I stepped

23 on you. Were there items on your list that also

24 appeared on someone else's list?

25 A. I have no idea. ROA 000924

1 Q. If there were items on your list **RON 000925**
2 appeared on my list and/or Patti's list, would it
3 be fair for the trustee to say, bring those one
4 or two items back because there are multiple
5 claims?

6 A. I don't know if it would be fair or not.
7 I don't know. I'm not sure what you're referring
8 to.

9 Q. All right. You said there was other
10 structural damage to the cottage. Could you
11 expound, please.

12 A. I need a time frame, please.

13 Q. Now.

14 A. The roof is leaking. The area around the
15 chimney is leaking. The ceiling inside -- at
16 least the main room of the cottage is sagging to
17 a precarious degree, suggesting it could
18 collapse. There is another roof sag in what was
19 Dad's bedroom.

20 All of the patios are severely damaged
21 with what appears to be black mold. It's a mold
22 of some sort that's black. I did not have that
23 tested, as it was outside.

24 The dish -- the washing machine does not
25 work. I know this on the basis of a mechanic **RON 000925**

1 inspection that I had done there. **ROA 000926**

2 Q. Okay. Referring to structural damage.

3 A. Oh, structural damage.

4 Q. Mold on the sidewalk is not structural
5 damage. I made a statement. Is it?

6 MR. PEACE: Objection.

7 Q. I'm sorry. Let me retract. Let me
8 rephrase.

9 Do you believe mold on the sidewalk that
10 can be easily treated with a pressure sprayer and
11 some bleach is structural damage?

12 A. Let me answer your prior question, please.
13 You asked if I'm aware of other structural
14 damage. I am aware of at least two places where,
15 due to the failure to clean the gutters on an
16 annual basis, water was able to dam up, creep
17 under the roof; and in two places -- in one
18 place, it rotted completely through the house,
19 from the exterior to the interior.

20 And also, once it had basically saturated
21 the frame of the house under the roof and had no
22 place else to go, then it would cascade down on
23 to the foundation and in another place, on the
24 opposite side of the house, that also resulted in
25 extensive rot from the outside all the way **ROA 000926**

1 through the walls to the inside of the house. BOA 000927

2 Q. These are the soffits that we've
3 previously referred to.

4 A. No, sir. These refer to the gutters that
5 weren't maintained.

6 Q. I understand. The gutters are attached to
7 the soffits. The gutters are made out of
8 plastic. They cannot rot. Further, there was
9 never any downspouts.

10 THE COURT: Mr. Vergeldt.

11 JOHN EDWARD VERGELDT: Yes. The gutters --

12 MR. PEACE: Objection.

13 THE COURT: You need to ask a question.

14 JOHN EDWARD VERGELDT: You're correct.

15 Q. Would it surprise you to know that the
16 gutters had been cleaned spring and fall every
17 year for the last five years?

18 A. I would be shocked because none of the
19 photographs illustrate that, including the
20 appraisal that was done in 2013.

21 Q. We'll get back to that. Not with you.
22 With the next person.

23 THE COURT: Don't comment.

24 THE WITNESS: Bite my lips.

25 Q. Do you believe you have the right? BOA 000927

1 terminate the trust? **ROA 000928**

2 A. I do. I am currently the trustee.

3 Q. Did you read the terms in the trust for

4 terminating the trust?

5 A. I did. There is no money left in the

6 trust. That's one of the factors in the decision

7 to terminate.

8 Q. What does the trust document stipulate has

9 to be done if the trust runs out of money?

10 A. One of the things is that it can be

11 terminated.

12 Q. Yes. Does it also not say that it should

13 be offered for sale to any beneficiary or any

14 member of the family first followed by Linda

15 Zoomer and the Zoomer family, second followed by

16 putting it on the open market?

17 A. It states that. However, it is my

18 position that you have violated your rights as a

19 beneficiary, and I would argue that so has Audry

20 Scheible.

21 JOHN EDWARD VERGELDT: Your Honor, I am

22 finished.

23 THE COURT: Anything further, Mr. Peace?

24 MR. PEACE: A very, very brief redirect, Your

25 Honor. **ROA 000928**

ROA 000929

REDIRECT EXAMINATION

BY MR. PEACE:

Q. Ms. Vergeldt, do you recall when Judge Kimball issued the order restraining the then trustee from making expenditures without your approval?

A. I do.

Q. Can you tell me when that was?

A. May of 2018.

Q. And how long was -- how long before that was the respondent the successor trustee or co-trustee?

A. He became the co-trustee on July 29th of 2009; he became the successor trustee, according to Judge Kimball's order in August of 2015, on May 6th of 2013; and he did not resign as the first successor trustee until March 29th of 2019, effective April 29th of 2019.

Q. Okay. So the issues that were raised -- that were dealt with in the cottage that Mr. Vergeldt asked you extensively about, the persons that you had inspect the cottage, they didn't -- what was their conclusion?

ROA 000929

1 A. It was long-standing neglect. **ROA 000930**
2 Q. Long-standing neglect. So the respondent
3 had been the successor trustee or the co-trustee
4 from 2009 to 2019, approximately ten years,
5 correct?
6 A. Correct.
7 Q. And he had been the successor trustee from
8 2009 until 2019, correct -- I'm sorry. Let me
9 rephrase.
10 A. Hang on.
11 Q. 2013 until 2019?
12 A. Excuse me?
13 Q. He had been the first successor trustee
14 from 2013?
15 A. Correct.
16 Q. May 2013?
17 A. Yes. Correct.
18 Q. Through April 2019?
19 A. Correct.
20 Q. And during that entire span of -- during
21 that entire time period, there was only one year
22 in which he had been restrained from making any
23 expenditures without your approval, correct?
24 A. I don't believe that he was ever
25 restrained from making expenditures at **ROA 000930**

1 There may have been a one- or two-month **ROA 000931**
2 Adam Silvernail was in the case of -- withdrawing
3 due to illness. There was a delay.

4 Q. Okay. But your testimony -- the order
5 says that he had to seek your approval or consent
6 before he made any expenditure, correct?

7 A. Yes.

8 Q. Okay. And your testimony is that you
9 never denied him permission or consent -- we'll
10 call it consent -- never denied you -- you never
11 denied him consent to make any expenditure,
12 correct?

13 A. That's correct.

14 Q. All right. So from 2009 when he became
15 the co-trustee to 2013 when he became the
16 successor trustee, no work was ever performed on
17 the cottage -- or to your knowledge, no work was
18 performed on the cottage to resolve these issues?

19 A. To my knowledge, the only work that was
20 performed on the cottage that was completed
21 involved having the locks changed in October of
22 2015.

23 Q. Which your testimony is that it was done
24 after your son came to the cottage in 2015?

25 A. It was that same weekend. **ROA 000931**

1 Q. Prior to becoming the second successor trustee, what was your position in the trust? ROA 000932

2
3 A. I was a residuary beneficiary of the
4 trust.

5 Q. Okay. Who had the care, custody, and
6 control of the property up until you became the
7 successor trustee?

8 A. My brother.

9 Q. Did you have any obligations to make the
10 repairs or give him consent, except for that
11 one-year period, to make those repairs?

12 A. I did not.

13 Q. Okay. In fact, the trust states that
14 that -- the trust gives that responsibility to
15 the successor trustee, correct?

16 A. However, I did take responsibility. In
17 August of 2017, I did put it in writing, with
18 photographs, documenting my concern about the
19 exterior of the cottage because I couldn't gain
20 entry to the interior.

21 Q. But there was no -- nobody asked you to do
22 that?

23 A. No. I was concerned because I loved the
24 place.

25 Q. Okay. All right. In fact, the t ROA 000932

1 gives your brother the -- or your brother ROA 000933
2 co-trustee or successor trustee the obligation to
3 care for the property, correct?

4 A. That's correct.

5 Q. Can you pull out the trust provision or
6 the trust document that's been entered into
7 evidence?

8 A. Me?

9 Q. Yes, ma'am.

10 A. Okay. One second.

11 THE COURT REPORTER: Exhibit Plaintiff's 3.

12 Q. Ms. Vergeldt, I'll hand you the trust
13 document.

14 A. Okay. Thank you. Sorry.

15 Q. That's all right. If you will turn to
16 provision 14, term 14.

17 A. Can you give me a page number, please?

18 Q. X -- Roman numerals 14-1.

19 A. Yes, sir. Yes.

20 Q. All right. Would you agree with me that
21 subsection -- or that section A of that 14th
22 term states that the successor trustee shall have
23 the entire care and custody of all of the assets
24 consisting of principal -- or consisting of the
25 principal of the trust hereunder and shall ROA 000933

1 the assets safe in accordance with requirements **ROA 000934**
2 of [unintelligible]. Fiduciaries shall maintain
3 full and accurate records over assets, receipts,
4 and disbursements and other financial
5 transactions relative to the trust, all of which
6 shall be available for inspection at any
7 reasonable time by any and all beneficiaries.

8 A. Yes, it states that.

9 Q. Okay. If the trustee that -- or the trust
10 puts that obligation to have that care and
11 custody on the successor trustee, correct?

12 A. It does.

13 Q. Not on the beneficiary?

14 A. Correct.

15 Q. And it also states then that the successor
16 trustee shall furnish at least annually to the
17 beneficiary or beneficiaries to whom income is
18 currently payable or for whose benefit it may
19 currently be expended a complete inventory of the
20 assets held in the trust for such beneficiary and
21 shall furnish at least annually or at such other
22 periodic intervals, as may be agreed upon between
23 the successor trustee and such beneficiary, a
24 statement of all receipts and disbursements.

25 A. Correct. It does state that. **ROA 000934**

1 Q. Okay. And then it says, the successor trustee shall pay all necessary and proper
2 trustee shall pay all necessary and proper
3 disbursements, expenses, and liabilities in
4 administration of the trust hereunder, including
5 reasonable compensation of the successor trustee
6 and its successor.

7 A. Yes, sir, it says that.

8 Q. In this entire document or in this
9 entire -- those provisions I just read, where
10 does it state -- other than in Judge Kimball's
11 order, does it say that John Vergeldt or a
12 co-trustee or successor trustee has to request
13 your permission to make repairs to a cottage?

14 A. It does not.

15 Q. Okay. Where does it say that the
16 beneficiary was responsible for making repairs to
17 the cottage?

18 A. It does not.

19 Q. Okay. So that liability to have the
20 entire care and custody of the assets lies solely
21 to the successor trustee, correct?

22 A. It is. That's correct.

23 Q. I'm going to hand you what was previously
24 marked as Defendant's 6 and Defendant's 4. Based
25 on what has been discovered during the case

1 this lawsuit, do you believe that those ~~ROA 000936~~
2 your position that those annual financial
3 statements do not consist of a complete inventory
4 of the assets held in trust?

5 A. It is my position that they do not.

6 Q. Okay. Did you ever make a request for a
7 complete inventory of the assets held in trust?

8 A. I did many times.

9 Q. Okay. And were those requests refused?

10 A. They were.

11 Q. Did you ever ask for an accurate -- for a
12 record of receipts -- I'm sorry -- assets,
13 receipts, and disbursements and other financial
14 transactions relative to the trust?

15 A. I did.

16 Q. And were you denied those records?

17 A. I was.

18 Q. Did you ask for them at 2 o'clock in the
19 morning?

20 A. No. I'm sleeping then.

21 Q. Did you ask for them to be delivered to
22 you in a manner that would have been unduly
23 costly to the trust?

24 A. Not at all.

25 Q. All right. Let's take a look at ~~ROA 000936~~

1 the 2014 financial statement. Okay? **ROA 000937**

2 A. Okay. Yes.

3 Q. Does this show -- does this show any --

4 does this show a list of the expenses of the

5 trust?

6 A. Yes, it does.

7 Q. Do you believe it shows all of the

8 expenses of the trust?

9 A. I do not.

10 Q. Is this similar to the trust reports that

11 you would receive from your brother?

12 A. It is.

13 Q. Did your brother ever share with you any

14 plans to make repairs to the cottage? Did your

15 brother share with you any plans during the ten

16 years that he was a co-trustee or a successor

17 trustee any plans to make repairs to the cottage?

18 A. I don't recall that he ever did. I don't

19 believe he did.

20 Q. Okay. Did you share the pictures with

21 your brother that you took in 2017?

22 A. My brother and I were not in direct

23 communication with each other because litigation

24 was ongoing at that time. However, I shared them

25 with my counsel, and they were attached **ROA 000937**

1 entered to the record, I guess is how you ROA 900938
2 with an affidavit of mine voicing my concern
3 about what was going on with that property.

4 Q. And that was in this action?

5 A. Correct.

6 Q. Okay.

7 A. It was during the first part of the
8 action, yes.

9 Q. First part of this action?

10 A. Correct.

11 Q. Do you recall when that would have -- let
12 me rephrase the question. 2017 was a year before
13 Judge Kimball issued the order restraining your
14 brother, correct?

15 A. Correct.

16 Q. Okay. And in that year between the time
17 you took the pictures and the time that Judge
18 Kimball issued his order restraining your
19 brother, to your knowledge, no work was done on
20 the cottage?

21 A. Let me think for a second.

22 Q. Okay.

23 A. That's correct. That is correct. There
24 were some -- he did report -- I have to look at
25 all three or four of the financial state ROA 900938