

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Kenneth Phillip ("Ken") Jones

Office Address: Bourland, Heflin, Alvarez, Minor & Matthews, PLC, 5400 Poplar Avenue, Ste. 100, Memphis, TN 38119

Office Phone: 901-683-3526

Facsimile: 901-763-1067

Email Address: [REDACTED]

Home Address: [REDACTED] Memphis, TN 38117 (Shelby County)
(including county)

Home Phone: [REDACTED]

Cellular Phone: [REDACTED]

INTRODUCTION

The State of Tennessee Executive Order No. 54 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am a member/ partner with Bourland, Heflin, Alvarez, Minor & Matthews, PLC. We have 12 attorneys.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1993; 016168

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

I was formerly licensed in the State of Georgia in 1993. Some years ago, I let my membership lapse because I was not practicing at all in the State of Georgia. Unfortunately, I do not know what the bar number was for the State of Georgia.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

In 1993-94, I served as a law clerk to the Hon. Bailey Brown, Senior Judge, U.S. Court of Appeals for the Sixth Circuit (now deceased). After my clerkship, from 1994 to 1997, I worked as an associate with The Kullman Law Firm in the Memphis office of the New Orleans-based firm, in the area of management-side employment law. From 1997 to the present, I have worked as an associate and then member/partner with Bourland, Heflin, Alvarez, Minor & Matthews in Memphis, practicing in the area of civil litigation.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Virtually my entire practice is in general civil litigation, excluding certain areas such as domestic law, bankruptcy, intellectual property, and workers compensation. Occasionally, I will prepare an agreement for a client such as a general release and waiver of claims or a settlement agreement.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

In 1993-1994, I served as a law clerk to the Hon. Bailey Brown, Senior Judge, U.S. Court of Appeals for the Sixth Circuit. My law clerk work involved legal research and writing, and we traveled several times to Cincinnati to hear oral arguments.

From 1994-1997, I worked as an associate for The Kullman Firm in Memphis. The firm is based in New Orleans, LA. For the first few months, I worked in the New Orleans office, and then returned to the Memphis office. I worked on defending employment discrimination litigation and responding to charges of discrimination before the U.S. Equal Opportunity Commission.

From 1997 to present, I have worked as an associate and then a member/partner with Bourland, Heflin, Alvarez, Minor & Matthews, PLC. in the area of general civil litigation, excluding certain areas such as domestic law, bankruptcy, intellectual property, and workers compensation.

Initially at Bourland Heflin, I focused some on employment law. As time has progressed, my practice has evolved to general civil litigation in trial courts such as the local Chancery, Probate, and Circuit Courts and the U.S. District Court for the Western District of Tennessee; appellate courts such as the Court of Appeals of Tennessee, Western Division; and on a few occasions, the U.S. Court of Appeals for the Sixth Circuit. As a young associate, I worked primarily on matters with older partners. As a partner, I have handled more matters myself.

I have tried some cases, but only a very small percentage of my cases have gone to trial. In late 2016 and early 2017, I tried a lawsuit in the Probate Court of Shelby County, Judge Karen Webster over approximately eight days of proceedings. I represented the administrator of an estate (my partner Scott Peatross) in a suit against a caregiver of the decedent who had wrongfully obtained large sums of money from the decedent. The claims included undue influence, breach of fiduciary duty, and conversion. We obtained a judgment from the Probate Court against the caregiver of approximately \$2.4 million dollars. The defendant has appealed to the Court of Appeals Western Section. In this trial, my partner/client was sitting at counsel table with me, so I could confer with him; otherwise, I essentially handled the trial myself.

Several years ago, I handled a will contest trial on behalf of plaintiffs in Lauderdale County Chancery Court alleging undue influence. I tried the case myself over several days. We prevailed and were able to get a family farm back for the plaintiffs.

For many years, I handled ERISA long-term disability benefits cases for a large insurance company in the U.S. District Court for the Western District of Tennessee and occasionally the U.S. Court of Appeals for the Sixth Circuit. More recently, I have represented plan participants and plaintiffs in such cases. In our circuit, these matters are decided by motions based upon the administrative record.

Over the past approximately ten years, I have represented a bank that served as trustee of a perpetual charitable trust in defending challenges to the existence of the trust and other related claims against the bank. This has included defending some eight or nine separate lawsuits in Probate Court, Chancery Court, and Circuit Court and a number of appeals to the Court of Appeals. I have worked in conjunction with another partner but have primarily handled these matters.

Most of my recent cases have been in Chancery Court.

My litigation work has included taking and defending numerous depositions and working on discovery pleadings.

I enjoy legal research and writing, such as preparing motions for summary judgment, other

motion practice, and drafting appellate briefs. I have worked as the primary draftsman on many trial court motions and appellate briefs to the TN Court of Appeals.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Not applicable.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Not applicable.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not applicable.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

Not applicable.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

None.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Davidson College, Davidson, North Carolina, A.B., Religion, 1985-1989.

University of Georgia School of Law, Athens. GA, J.D., 1990-1993. Order of the Coif, Law Review, Am Jur Award for Legal Research and Writing.

PERSONAL INFORMATION

15. State your age and date of birth.

Age 51; DOB [REDACTED] 1967

16. How long have you lived continuously in the State of Tennessee?

I have lived all my life in Tennessee, except when I attended college in North Carolina, attended law school in Georgia, worked in London for about four months in 1989 between college and law school, and worked in New Orleans for three months in 1993.

17. How long have you lived continuously in the county where you are now living?

I have lived all my life in Shelby County, except when I attended college in North Carolina, attended law school in Georgia, worked in London for about four months in 1989 between college and law school, and worked in New Orleans for three months in 1993.

18. State the county in which you are registered to vote.

Shelby County.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of

trust in a foreclosure proceeding.

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Metropolitan Inter Faith Association (“MIFA”), Secretary and Legal Counsel, 2016 to present; director, 2014 to present.

Kiwanis Club of Memphis, President, 2013-2014; member, 2011 to present.

Mid-South Eye Bank for Sight Restoration, director, 2015 to present.

Community Legal Center, director, 2012-2015.

Trinity Baptist Church, Cordova, TN, active member; deacon; former Sunday School Teacher; former chairman, Senior Pastor Search Committee; former member, pastor search committees for Music Minister, Youth Pastor, and Associate Pastor; former chairman and member, Personnel Committee; former basketball coach.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.
- If so, list such organizations and describe the basis of the membership limitation.
 - If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Memphis Bar Association, 2009 to present.

Tennessee Bar Association, 2009 to present.

Fellow, Memphis Bar Foundation, approximately 2014 to present

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Memphis Area Legal Services (MALS), Michael J. Cody Pro Bono Attorney of the Year Award, 2012.

30. List the citations of any legal articles or books you have published.

Not applicable.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

I have taught basic employment law at a couple of CLE seminars sponsored by Memphis Area Legal Services and the Memphis Bar Association, but they were probably more than five years ago.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Not applicable.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

(1) Memorandum in Support of Defendants' Motion to Transfer Case to Part I of Probate Court, or, in the Alternative, To Dismiss Complaint, in *Wright and Morrow v. Buyer and SunTrust Bank*, Probate Court of Shelby County, No. PR007275. I drafted this

memorandum which was reviewed and lightly edited by a partner.

- (2) Administrator's Trial Brief, in *In re Estate of Alys Harris Lipscomb; Peatross v. Atwater*, Probate Court of Shelby County, No. PR 1541. I drafted this trial brief which was reviewed and lightly edited by a partner.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? *(150 words or less)*

I am seeking this position because it would be an excellent way to serve the community. I enjoy legal research and writing, including motion practice and appellate briefs. I believe these strengths would be an asset to the Court of Appeals.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. *(150 words or less)*

For many years, I have been passionate about and have enjoyed participating in pro bono work primarily through Memphis Area Legal Services (MALS). Such work has included working at the "Attorney of the Day" Clinic held on Thursdays at the Shelby County Courthouse adjacent to the Courts of General Sessions and the Second Saturday legal clinics held at the Benjamin Hooks Public Library in Memphis. I have also represented clients who needed additional help after the clinics such as assisting clients who had consumer debt issues.

In 2012, I received the Michael J. Cody Pro Bono Attorney of the Year Award from MALS.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. *(150 words or less)*

I seek the open position on the Tennessee Court of Appeals, Western Section. I believe that my strengths in the areas of legal research and writing would significantly assist the Court.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? *(250 words or less)*

Since 2014, I have served as a director of the Metropolitan Inter Faith Association (MIFA) in Memphis, including since 2016 as Secretary and Legal Counsel. MIFA is an outstanding organization whose vision is "uniting the community through service" and whose mission is "supporting the independence of vulnerable seniors and families in crisis through high-impact programs." MIFA is an extremely well-run organization, and I have been privileged to serve on

its Board.

I have been a member of the Kiwanis Club of Memphis since 2011, and I served as president in 2013-2014. Through this leadership position, I moderated weekly lunch meetings and promoted the club and its service activities, including at a monthly cookout hosted at a local family shelter.

Since 1994, I have been an active member of Trinity Baptist Church in Cordova. I have served on four pastor search committees, including that for senior pastor. I am currently an active deacon and participate in the communion to the homebound ministry. I have also served as a Sunday School teacher, most recently to a class of senior adults, and coached youth sports teams. On four occasions, I have participated in mission trips: two to Guatemala and one each to Lebanon and Brazil.

If I am appointed judge, I would like to continue these community activities to the extent possible.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. *(250 words or less)*

I believe that I have demonstrated the willingness to serve others through, for example, my work with the Kiwanis Club; on the boards of directors of MIFA, the Community Legal Center, and the Mid-South Eye Bank; and numerous activities through my church community.

I believe that I have demonstrated the ability to work with persons from other backgrounds, through my pro bono volunteer work and my participation in mission trips to Guatemala, Lebanon and Brazil.

I believe that I have demonstrated the qualities of integrity and compassion throughout my 25 years of legal practice.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. *(250 words or less)*

Yes. I have zealously represented clients in situations which I felt sympathetic with the opposing party.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Lancelot L. Minor, member/partner, Bourland Heflin Alvarez Minor & Matthews, PLC, [REDACTED]
B. John J. Heflin, member/partner, Bourland Heflin Alvarez Minor & Matthews, PLC, [REDACTED]
C. John Russell, founding partner, Russell Oliver & Stephens PLC, Attorneys, [REDACTED]
D. Dr. Richard Hipps, Senior Pastor, Trinity Baptist Church, [REDACTED]
E. Mr. Cris Williams, Director Hotel Technology Engineering, Hilton Worldwide, Inc., [REDACTED]

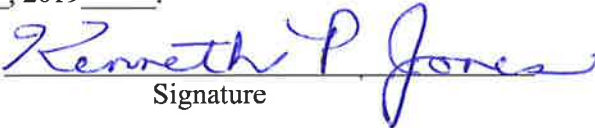
AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] __ Court of Appeals _____ of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: __ February 13, _____, 2019 ____.


Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.



**THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS**

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

**TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS**

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Kenneth Phillip Jones

Type or Print Name

Kenneth P. Jones

Signature

February 13, 2019

Date
016168

BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

I was formerly a member of the State Bar of Georgia, obtaining such license in 1993 after I graduated from the University of Georgia Law School. I resigned my membership many years ago because I have practiced law in TN and never in GA. Unfortunately, I do not recall the license number.

IN THE PROBATE COURT OF SHELBY COUNTY, TENNESSEE

JUDY MORROW WRIGHT, and
DAVID MORROW, JR.,

Plaintiffs,

MATTHEW G. BUYER and
SUNTRUST BANK,

Defendants.

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No. PR007275
(Part II)

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER CASE
TO PART I OF PROBATE COURT,
OR, IN THE ALTERNATIVE, TO DISMISS COMPLAINT**

Pursuant to Local Rule VI, Tenn. R. Civ. P. 12.02(1) & (6), and other applicable provisions of law, Defendants, Matthew G. Buyer ("Buyer") and SunTrust Bank (together, "SunTrust"), respectfully file their Memorandum in Support of their Motion to Transfer this case filed by the Plaintiffs, Judy Morrow Wright ("Wright") and David Morrow Jr. ("Morrow"), to Part I of Probate Court. The case must be transferred because the subject matter of Plaintiffs' Complaint, the trusts created by Helen B. Goza, deceased ("Helen"), was litigated in the matter of *Estate of John J. Goza*, No. D-10567 ("John's Estate"), for more than six (6) years in Part I.

In the alternative, SunTrust moves to dismiss the Complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

BACKGROUND & SUMMARY OF ARGUMENT

For more than 17 years, SunTrust and its predecessor-in-interest have served as the trustee of the trusts created by Helen through the *Helen B. Goza Amended and Restated Revocable Trust Agreement*, last amended on April 9, 1999 ("Helen's Trust"; copy attached as **Exhibit A**). Those

trusts are Helen's lifetime trust, the Trust for John J. Goza, and the Perpetual Trust.¹ John J. Goza ("John"), who was Helen's only child, was an adult with Down Syndrome. Plaintiffs Wright and Morrow are two of John's intestate heirs. Buyer is a former SunTrust trust officer who formerly worked with Helen's Trusts. Helen died more than fifteen (15) years ago on May 15, 2001; and John died on September 25, 2007, more than nine (9) years ago.

Significantly, the only reason that Plaintiffs have entangled SunTrust in nine (9) years of related litigation, is that SunTrust (and its predecessor, the National Bank of Commerce) have served as Trustee of Helen's trusts. The money at issue constitutes the assets of the Perpetual Charitable Trust. *SunTrust has no financial interest whatsoever in the assets of the Trust, nor has it ever claimed any such interest.*²

John's Estate was open in Part I of this Court from October 21, 2010 through November 22, 2016.³ The Estate never had any monetary assets. Morrow served as personal representative of the Estate from October 21, 2010 through August 18, 2016.⁴ For more than six (6) years, Morrow, Wright, and/or the Estate, and Larry E. Parrish, Esq. have litigated issues related to the Trust and to

¹The Court of Appeals discussed Helen's Trusts in detail in *Morrow & Wright v. SunTrust Bank*, 2011 Tenn. App. Lexis 37 (Tenn. Ct. App. Jan. 31, 2011), *no app. for perm. to app. filed (Goza I*; copy attached as part of **Exhibit B**).

²Accordingly, Plaintiffs' premise that SunTrust's and Buyer's purpose "was to tortiously convert use and benefit of the assets of the John Goza Lifetime Trust to the use and benefit of SunTrust corporation and others (e.g. Perpetual Charitable Trust)," (Complaint, pp. 2-3), lacks any rational basis.

³A copy of the November 22, 2016 *Order Discharging Personal Representative and Closing Estate* is attached hereto as **Exhibit F**.

⁴For many years until John's death in September of 2007, Morrow served as conservator of John's person. (Complaint, ¶¶ 64, 94(d), 103(a), 117, 125, 126).

SunTrust's actions as Trustee thereof in Part I of this Court (and in multiple appeals from Part I to the Court of Appeals and Supreme Court). The Local Rules of this Court require that companion or related cases should be heard *in the same division*. Accordingly, the present case must be transferred from Part II to Part I of this Court.

Should the Court transfer this case to Part I, it need not address SunTrust's Motion to Dismiss.

In the alternative, upon SunTrust's Motion to Dismiss, the Complaint should be dismissed with prejudice pursuant to Tenn. R. Civ. P. 12 for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, as follows:

1. This Probate Court lacks subject matter jurisdiction over the Complaint because it, according to Plaintiffs, is "solely based on the fact that [Defendants] 'committed a wrongful or tortious act,'" and it accordingly falls outside of the jurisdiction of a probate court;
2. Alternatively, Plaintiffs lack standing as intestate heirs of John J. Goza because (a) the Estate of John J. Goza was closed in Part I on November 22, 2016; (b) Decedent's heirs, such as Wright and Morrow, cannot assert Decedent's claims which belong solely to the Estate's personal representative; and (c) Wright and Morrow have no interest in the assets of Helen's Trusts.
3. John J. Goza's death more than nine (9) years ago in 2007 terminated the tort claims asserted in the Complaint;
4. Plaintiffs' claims are barred by the doctrine of *res judicata*, based upon the decisions in the cases of *Goza I* through *Goza VII*, discussed below;⁵
5. Plaintiffs' claims are barred by the doctrine of claim preclusion;
6. Plaintiffs' claims are time-barred by the applicable statutes of

⁵The appellate decisions in *Goza I* through *Goza VII* are attached hereto as part of **Exhibit B**.

limitations; and

7. Plaintiffs' claims are barred by unclean hands and laches.

Pursuant to Tenn. Code Ann. § 20-12-119(c), upon dismissal of the Complaint, Defendants request an award of their reasonable attorney fees and costs.

FACTS

This is approximately the ninth (9th) lawsuit filed over the last nine (9) years (since 2008) related to the trusts created by Helen (collectively, the "Goza Litigation"; the present case will be referred to as "*Goza IX*").⁶ Attorney Larry E. Parrish has filed each lawsuit on behalf of the Estate of John J. Goza, its former Personal Representative (Morrow), and/or various of the intestate heirs of John J. Goza ("John"), namely Morrow, Wright, Ede Goza, and Shirley Shaw. *Goza IX*, the Complaint before this Court, is at least the third such petition or lawsuit brought by Plaintiffs or their privies against SunTrust in Probate Court. Morrow and Wright themselves brought the first suit, *Goza I*, in Chancery Court in *Morrow & Wright v. SunTrust*, No. CH-08-0813-2 in 2008.

Helen died more than 15 years ago on May 15, 2001. During her life, Helen created a living trust to provide for herself and her adult son John, who had Down Syndrome. If John survived Helen, which he did, the Amended and Restated Revocable Trust Agreement of Helen J. Goza dated April 9, 1999 ("Helen's Trust"; copy attached as **Exhibit A**) placed a portion of Helen's trust estate into a separate trust for John's benefit, and the balance of the trust estate into a perpetual charitable trust serving mentally disabled persons (the "Perpetual Charitable Trust"). *In re Estate of John J. Goza*, 2014 Tenn. App. Lexis 839 at *2-3 (Tenn. Ct. App. Dec. 19, 2014) ("*Goza V*"), *perm. app.*

⁶The Court of Appeals discussed the prior Goza lawsuits in *Ede Goza, et al., v. SunTrust Bank*, 2015 Tenn. App. Lexis 581 (Tenn. Ct. App. July 22, 2015), *perm. app. denied* (Tenn. 2016) ("*Goza VII*") at pages *1-*10. (See **Exhibit B**).

denied (Tenn. May 19, 2015). (See **Exhibit B**). SunTrust has long served as the trustee for the trusts. John died more than nine (9) years ago on September 25, 2007.

In every lawsuit brought by Morrow, Wright, the Estate, or their privies against SunTrust, the trial courts and the Court of Appeals have upheld the Perpetual Charitable Trust and have denied all claims. In each case in which the Estate or its privies sought review by the Supreme Court of Tennessee, it denied the applications for permission to appeal. The Court of Appeals discussed the history of the litigation in *Ede Goza v. SunTrust Bank*, 2015 Tenn. App. Lexis 581 at **2-10 (Tenn. Ct. App. July 22, 2015), *perm. app. denied* (Jan. 14, 2016) (“*Goza VII*”). As noted above, copies of the Court of Appeals and Supreme Court decisions and orders in *Goza I* through *Goza VII* are attached hereto as part of **Exhibit B** and are incorporated herein.

Wright & Morrow’s present Complaint is similar to the *First Amended Complaint* that Mr. Parrish filed on October 7, 2011 in *Estate of John J. Goza v. James M. Wells, III, Buyer, R. Michael Potter, Esq., and SunTrust*, Circuit Court, No. CT-004471-11 (“*Goza III*”), a copy of which is attached hereto as **Exhibit C**. In *Goza III*, John’s Estate similarly alleged that “[b]y the instant civil action, Estate seeks to recover economic, compensatory, and punitive damages inuring to the benefit of the Estate by virtue of the tortious acts/omissions causing, in fact and proximately, economic injury to John J. Goza during his lifetime.” (*Id.*, ¶ 2).

Three (3) years ago in *In re Estate of John Goza*, D-10567, Part I of this Court (Judge Gomes) issued an order declaring in part:

The Court is further concerned about the Estate’s failure to honor this Court’s Order of May 27, 2011 [by Judge Benham], which states in part “that if this Order is upheld on appeal there are no other or further substantive issues left to be adjudicated to conclude all proceedings in this case. This Court’s order was affirmed totally in *Goza II* [in 2012], yet the Estate, once again, filed additional pleadings with the same

issues.

....

Never has this Court seen such an egregious abuse of the system. David Morrow, Jr., in his individual capacity as well as his Personal Representative capacity has virtually been forum shopping, trying to find a court to agree with his petition. This abuse needs to stop.

Goza V, 2014 Tenn. App. Lexis 839 at * 10-11 (quoting the Probate Court). Although this Court held more than five (5) years ago that “there are no other or further substantive issues left to be adjudicated to conclude all proceedings in this case,” what this Court held to be “abuse” and “forum shopping” continues unabated with Morrow & Wright’s prosecution of the present Complaint.

Furthermore, Wright & Morrow’s present Complaint is virtually identical to their *First Amended Complaint* filed on July 1, 2016, in *Estate of Goza, Wright & Morrow v. Buyer & SunTrust*, Chancery Court, No. CH-16-0539 (“*Goza VIII*”), a copy of which is attached hereto as **Exhibit D**. The Chancery Court dismissed the *Goza VIII* Complaint by its order and final judgment entered on October 26, 2016, a copy of which is attached as **Exhibit E**.

In *In re Estate of John J. Goza*, 2014 Tenn. App. Lexis 839 at *7 n.7 (Tenn. Ct. App. Dec. 19, 2014), *perm. app. denied* (Tenn. May 19, 2015) (“*Goza V*”; see **Exhibit B**), the Court of Appeals held that its *res judicata* ruling “bars the Estate from initiating further proceedings to challenge the validity of the Perpetual Trust, **no matter who initiates the proceedings on its behalf or the theory on which it attempts to rely.**” (Emphasis added). The *Goza V* Court awarded SunTrust its attorney fees as damages for the Estate’s frivolous appeal, declaring:

[E]ven in spite of a previous opinion of this Court finding an identical challenge by the Estate to be frivolous, the Estate has once again attempted to challenge the existence of the Perpetual Trust, thereby causing needless waste of judicial resources and further depleting funds held in the Perpetual Trust for the benefit of organizations serving the mentally disabled. Under these circumstances, we find that SunTrust is entitled to reasonable fees and costs pursuant to Tennessee Code

Annotated section 27-1-122.

Id. at *11.

Neither Wright, Morrow, John's other intestate heirs, nor John's Estate are beneficiaries of the Perpetual Charitable Trust. Instead, Helen chose as its beneficiaries those organizations "which the Trustee shall select that provide services to the mentally handicapped (including, without limitation, those persons diagnosed with Down[] Syndrome) and are exempt from Federal income tax under Section 501(c)(3) of the Code." (**Exhibit A**; Helen's Trust, Article IV).

On November 22, 2016, this Court closed the Estate of John J. Goza, No. D-10567 (Part I). A copy of the order is attached hereto as **Exhibit F**.

As demonstrated below, this matter should be transferred to Part I. Alternatively, should the Court reach SunTrust's Motion to Dismiss, this Court lacks jurisdiction over the subject matter of Plaintiffs' *Goza IX* Complaint, which should be dismissed pursuant to Tenn. R. Civ. P. 12.01. Moreover, the Complaint should be dismissed for failure to state a claim upon which relief can be granted under Rule 12.02(6).

ANALYSIS

THE SUIT MUST BE TRANSFERRED TO PART I OF THIS COURT, WHICH CONDUCTED THE PROCEEDINGS IN THE *ESTATE OF JOHN J. GOZA* FOR SIX (6) YEARS.

ALTERNATIVELY, THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO TENN. R. CIV. P. 12 DUE TO THE COURT'S LACK OF JURISDICTION OVER THE SUBJECT MATTER OR FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

1. Transfer to Part I of this Court.

As a preliminary matter, this case should be transferred to Part I of this Court. The *Estate*

of *John J. Goza*, No. D-10567 (“John’s Estate”), was open in Part I of this Court from October 21, 2010 through November 22, 2016. Morrow served as Personal Representative of the Estate from October 21, 2010 through August 18, 2016, at which time the Court appointed Marjorie S. Baker, Esq., as Successor Personal Representative. Morrow, Wright, and/or the Estate, and Larry E. Parrish, Esq. have litigated issues related to Helen’s Trusts and to SunTrust’s actions as Trustee thereof, for more than six (6) years in Part I of this Court (and in multiple appeals from Part I to the Court of Appeals and Supreme Court).

Probate Court Local Rule VI(1) requires as follows:

When filing a matter that is a companion case or that relates to a pending matter, the attorney should call this fact to the attention of the Clerk. Under such circumstances, the Clerk will assign the new case to the Division of Court in which the companion or related case is pending.

Similarly, Local Rule VI(2) provides:

After a case has been assigned to a particular Division, the Judge of that Division shall have complete control over the matter. In the interest of justice and for good cause, the Judges, by mutual consent, may transfer a case from one division of the Court to the other.

Similarly, Tenn. R. Civ. P. 42.01 declares that “[w]hen actions involving a common question of law or fact are pending before a court, the court may order all the actions consolidated or heard jointly, and may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

Wright & Morrow’s own Complaint focuses on John’s Estate. At Paragraph 4, Plaintiffs allege that “Estate exists as the *res* in an *in rem* legal proceeding, by virtue of an order entered October 21, 2010, by the Probate Court. . . opening Estate for probate and administration, as an intestate estate.” Next, Plaintiffs assert that “The letters of administration enable Estate to garner

Estate's assets for distribution, in accordance with Tennessee's laws of dissent [sic] and distribution." (Complaint, ¶ 5b). Plaintiffs' "**Complaint is for no purpose other than to garner Estate's assets. . . .**" (*Id.*, ¶ 5c; emphasis added). Moreover, in their Prayer for Relief, Wright & Morrow do not seek any damages. Instead, they ask the Court to order Defendants to "**pay Estate**" damages. (Complaint, p. 89; emphasis added).

Accordingly, pursuant to Local Rule VI and/or Tenn. R. Civ. P. 42.01, since this case was not initially assigned to Part I as a companion case or as a case related to Case No. D-10567, as it should have been, it must now be transferred to Part I.

(Should this Court grant SunTrust's Motion to Transfer, it need not consider the remainder of SunTrust's arguments related to its Motion to Dismiss the Complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.)

2. Motion to Dismiss Under Rule 12.02(1) & (6).

In the alternative, should the Court not transfer the case to Part I, the Complaint should be dismissed pursuant to Tenn. R. Civ. P. 12. Rule 12.02(1) provides for a motion to dismiss for lack of jurisdiction over the subject matter. "Because courts cannot act where jurisdiction is lacking, a trial court has an inescapable duty to determine whether the dispute is within its subject matter jurisdiction." *Goza III*, 2013 Tenn. App. Lexis 581 at * 7, n. 5 (**Exhibit B**) (*citing Edwards v. Hawks*, 222 S.W.2d 28, 31 (Tenn. 1949)). The lack of subject matter jurisdiction is so fundamental that whenever it is raised and demonstrated, it requires dismissal of a case. *E.g., Dishmon v. Shelby State Community College*, 15 S.W.3d 477, 480 (Tenn. Ct. App. 1999), *perm. app. denied* (2000).

Under Rule 12.02(6), for a complaint to survive a motion to dismiss for failure to state a claim upon which relief can be granted, its well-pled facts and reasonable inferences "must raise the

pleader's right to relief beyond the speculative level." *Webb v. Schofield*, 468 S.W.3d 482, 489 (Tenn. 2015) (quotations and citation omitted). In reviewing the complaint, courts are not required to accept as true legal arguments or conclusions couched as "facts." *Id.*

3. No Subject Matter Jurisdiction.

"Subject matter jurisdiction implicates a court's power to adjudicate a particular case or controversy." *Goza I*, 2011 Tenn. App. Lexis 37 at *15 (quotation and citation omitted). "Without subject matter jurisdiction, a court cannot enter a valid, enforceable order." *Id.* (citing *Brown v. Brown*, 281 S.W.2d 492, 497 (Tenn. 1955)). The only way for a court to obtain subject matter jurisdiction is from either the state constitution or a statute. *E.g., In re Conservatorship of Beasley*, 2015 Tenn. App. Lexis 393 at *8 (Tenn. Ct. App. May 28, 2015). Whether a court has subject matter jurisdiction is a question of law. *Id.* at *9. Here, this Court lacks subject matter jurisdiction over the Complaint, and accordingly, the Complaint should be dismissed pursuant to Tenn. R. Civ. P. 12.02(1).

Wright & Morrow say that their causes of action in the present *Goza IX* Complaint are "solely based on the fact that [Defendants] 'committed a wrongful or tortious act.'" (Complaint, p. 3; emphasis added). "Among other injuries, the complaint seeks recovery of compensatory damages for [Defendants] intentionally causing John J. Goza to suffer personal injury." (*Id.*). "Plaintiffs seek to recover compensatory and punitive damages, for causes of action Estate's decedent, John J. Goza, before his death, could have filed, and which presently inure to the benefit of the Estate." (Complaint, ¶ 2).

The sole basis for subject matter jurisdiction asserted by Plaintiffs (Complaint, ¶ 1) is Tenn. Code Ann. § 16-11-108 (chancery courts/ jurisdiction and powers/ persons adjudicated incompetent),

which states:

The chancery court has jurisdiction, concurrent with the county court, over persons adjudicated incompetent and their estates.

To the contrary, this Court does not possess subject matter jurisdiction pursuant to Tenn. Code Ann. § 16-11-108. First, Title 16, Chapter 11, Part 1 of the Tennessee Code addresses the jurisdiction and powers of *chancery court*, not this Court.

Second, to the extent that this Probate Court is equivalent to a county court, John J. Goza was a person adjudicated incompetent. John, however, died more than nine (9) years ago in 2007, so his incompetency is not a basis for this court's jurisdiction over Wright & Morrow's tort claims.

Third, this Court, of course, does have jurisdiction over *estates* of persons adjudicated incompetent. *See, Union Planters Nat'l Bank & Trust Co. v. Bornds*, 77 S.W.2d 645 (Tenn. 1935) (holding Probate Court of Shelby County had concurrent jurisdiction with the chancery court over the persons and estates of persons of unsound mind). But Part I of this Court closed John's Estate on November 22, 2016. (**Exhibit F**). Were John's Estate still open, which it is not, the present Complaint would have to be brought in **Part I** of this Court, where Messrs. Morrow and Parrish opened John's Estate in 2010. Plaintiffs cannot through this lawsuit open a "second estate" for John in Part II. In sum, the Complaint should be dismissed for lack of subject matter jurisdiction.

(If the Court agrees that it lacks subject matter jurisdiction, the Court need not address the alternative bases for dismissal of the Complaint for failure to state a claim upon which relief can be granted discussed below).

4. Wright & Morrow Lack Standing.

Where the plaintiff lacks authority, the defendant can move to dismiss the complaint for

failure to state a claim upon which relief can be granted. *Knierim v. Leatherwood*, 542 S.W.2d 806 (Tenn. 1976); Tenn. R. Civ. P. 9.01. Pursuant to the doctrine of *standing*, where the plaintiff is not properly situated to prosecute the action, the court will refuse to address it. *Knierim*, 542 S.W.2d at 808.

Tennessee courts decide only *actual legal controversies*, which exist “when the disputed issue is real and existing, and not theoretical or abstract, and when the dispute is between parties with real and adverse interests.” *West v. Schofield*, 468 S.W.3d 482, 490 (Tenn. 2015) (internal quotations and citations omitted). According to the Supreme Court:

The doctrine of standing is used to determine whether a particular plaintiff is entitled to judicial relief. It is the principle that courts use to determine whether a party has a sufficiently personal stake in a matter at issue to warrant a judicial resolution of the dispute. Persons whose rights or interests have not been affected have no standing and are, therefore, not entitled to judicial relief.

The sort of distinct and palpable injury that will create standing must be an injury to a recognized legal right or interest.

Metro. Gov't of Nashville & Davidson County v. Bd. of Zoning Appeals, 477 S.W.3d 750, 755 (Tenn. 2015) (citations and quotations omitted). The court carefully examines the complaint's allegations to see whether the particular plaintiff is entitled to an adjudication of the particular claims raised. *Id.* The doctrine of *standing* “precludes courts from adjudicating an action at the instance of one whose rights have not been invaded or infringed”; the plaintiff must show an injury-in-fact. *Efferson v. Stephens*, 2015 Tenn. App. Lexis 64 at *8 (Tenn. Ct. App. Feb. 9, 2015) (quotation and citation omitted).

Likewise, Tennessee's doctrine of *justiciability* limits judicial decisions to legal controversies involving real and existing disputes that are not theoretical or abstract, and that are between parties

with real and adverse interests. *West v. Schofield*, 468 S.W.3d 482 (Tenn. 2015); *Goza I*, 2011 Tenn. App. Lexis at 37 at *18.

To establish *standing*, a party must demonstrate:

1. A distinct and palpable injury, as opposed to a conjectural or hypothetical one;
2. A causal connection between the claimed injury and the challenged conduct; and
3. That the alleged injury is capable of being redressed by a favorable decision of the courts.

Lynch v. City of Jellico, 205 S.W.3d 384, 395 (Tenn. 2006).

Plaintiffs acknowledge that when Helen died in 2001, pursuant to both Helen's Trust and to her pourover Last Will and Testament, her assets went into the Trust for the benefit of her son John. (Complaint, p. 1). Plaintiffs further recognize that when John died intestate with no assets on September 25, 2007, the assets of the trust for John went into the Perpetual Charitable Trust. (*Id.*). In addition, Plaintiffs assert that the terms of Helen's Trust (**Exhibit A**) are what control the disposition of this action. (*Id.*, ¶¶ 23(m), (n), (cc)).

None of John's intestate heirs – such as Morrow and Wright – are beneficiaries of the trusts created by Helen, including the Perpetual Charitable Trust. The beneficiaries of the Perpetual Charitable Trust are nonprofit organizations that “provide services to the mentally handicapped (including, without limitation, those persons diagnosed with Downs Syndrome.” (**Exhibit A**, Art. IV). Accordingly, in their Complaint, Plaintiffs have not shown that they have suffered any *distinct and palpable injury*. See *Lynch*, 205 S.W.3d at 395. Accordingly, Plaintiffs lack standing, and the Complaint should be dismissed.

Moreover, if any person or entity were to have standing, it would be the administrator of John's Estate. According to Plaintiffs themselves:

- “Plaintiffs seek to recover compensatory and punitive damages, for causes of action Estate’s decedent, John J. Goza, before his death, could have filed, and **which presently inure to the benefit of the Estate.**” (Complaint, ¶ 2; emphasis added).
- “**Estate** exists as the *res* in an *in rem* legal proceeding, by virtue of an order entered October 21, 2010, by the Probate Court. . . opening Estate for probate and administration, as an intestate estate.” (*Id.*, ¶ 4; emphasis added).
- “The letters of administration **enable Estate to garner Estate’s assets for distribution**, in accordance with Tennessee’s laws of dissent and distribution.” (*Id.*, ¶ 5b; emphasis added).
- “The Complaint **is for no purpose other than to garner Estate’s assets. . .**” (*Id.*, ¶ 5(c); emphasis added).
- “The claims for relief made herein are choses-in-action (personal property) owned by John J. Goza before John J. Goza’s September 27, 2007 death.” (*Id.*, ¶ 6(g)).
- “The instant lawsuit is **to garner for Estate the choses-in-action. . .**” (*Id.*, ¶ 6(h); emphasis added).

Wright & Morrow do not pray for any damages in the Complaint, alleging only that **John’s Estate** should be awarded damages.

Morrow and Wright purport to assert claims *individually* as heirs at law of John. (Complaint, caption & ¶¶ 6(k) to (n)). **The exclusive right to assert claims on behalf of a decedent, however, belongs to the administrator of the estate.** *Mason v. Spurlock*, 65 Tenn. (4 Baxt.) 554 (1874) (ordinarily the personal representative is the only person who has the right to maintain a suit to recover debts due to the decedent); *Ware v. Hendrickson (In re Estate of Hendrickson)*, 2009 Tenn. App. Lexis 302 at * 19 (Tenn. Ct. App. Feb. 25, 2009). Since Wright and Morrow *lack standing*,

their purported claims must be dismissed with prejudice under Rule 12.02(6) for failure to state a claim upon which relief can be granted.

5. John's 2007 Death Terminated Plaintiffs' Alleged Tort Claims.

As noted above, Plaintiffs assert that the gravamen of their Complaint is in tort. However, John's death in 2007 terminated any causes of action he might have had for such personal torts. His heirs cannot assert them now.

According to the Supreme Court, the general rule in Tennessee is that claims for torts allegedly committed against a decedent, *die with the decedent*. *Carne v. Maryland Cas. Co.*, 346 S.W. 259, 261-62 (Tenn. 1961); *accord*, *Dillingham v. Tri-State Ins. Co.*, 381 S.W.2d 914, 917-18 (Tenn. 1964).⁷ In *Carne*, the Supreme Court specifically held that claims for *fraud* do not survive the death of the allegedly defrauded person. 346 S.W. at 262. Therefore, Plaintiffs' Counts 3, 5, 6, 7, 8, 9, 12 for fraud expired upon John's 2007 death.

Since the gravamen of Plaintiffs' Complaint is in tort, and the claims for torts allegedly committed against John expired when John died, the Complaint should be dismissed for failure to state a claim upon which relief can be granted.

6. The Claims are Also Barred by Res Judicata.

Even if the Court possessed subject matter jurisdiction, which it does not; and even if Morrow & Wright had standing, which they do not; and even if John's death did not terminate the tort claims, which it did; then the *Goza IX* Complaint still fails to state a claim upon which relief can be granted on numerous other grounds, including *res judicata*.

⁷An exception not applicable here is the tort for wrongful death, which is provided for by statute. *Timmins v. Lindsey*, 310 S.W.3d 834, 84-41 (Tenn. Ct. App. 2009), *perm. app. denied* (2010).

Res judicata bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or *could have been* litigated in the former suit. *Jackson v. Smith*, 387 S.W.3d 486 (Tenn. 2012); *Massengill v. Scott*, 738 S.W.2d 629, 631 (Tenn. 1987); *Goza II*, 397 S.W.2d at 570. Its basis is that “the same parties, in the same capacities, should not be required to litigate anew a matter which might have been determined and settled in a former litigation” and that “litigation should be determined with reasonable expedition, and not protected through inattention and lack of diligence on the part of litigants or their counsel.” *Jordan v. Johns*, 79 S.W.2d 798, 802 (Tenn. 1935). *Res judicata* is a “rule of rest” that promotes finality, prevents inconsistent or contradictory judgments, conserves resources, and prevents vexatious lawsuits. *Jackson v. Smith*, 387 S.W.3d at 491; *Goza VII*, 2015 Tenn. App. Lexis 581 at *13-14.

Plaintiffs have attempted to split their claims into multiple different lawsuits, but Tennessee courts prohibit claim splitting. *Jackson v. State*, 2011 Tenn. App. Lexis 491 at *20 (Tenn. Ct. App. July 21, 2011) (holding “one of the policies behind the doctrine of *res judicata* is ‘to prevent the splitting of a single cause of action and the use of several grounds for recovery under the same action as a basis for second suits’”), *aff’d*, 387 S.W.3d 486 (Tenn. 2012). “[T]he principle of claim preclusion prevents parties from splitting their cause of action; it requires parties to raise in a single lawsuit all the grounds for recovery arising from a single transaction.” *Id.*, 2011 Tenn. App. Lexis 491 at *24.

Res judicata bars not only issues that were actually decided, but also *all issues which could have been raised* in a former suit. *E.g.*, *Goza VII*, 2015 Tenn. App. Lexis 581 at *13-16 (Tenn. Ct. App. 2015), *perm. app. denied* (Tenn. Jan. 14, 2016); *Goza V*, 2014 Tenn. App. Lexis 839 at *16-20 (Tenn. Ct. App. Dec. 19, 2014), *perm. app. denied* (Tenn. May 19, 2015); *Goza III*, 2013 Tenn. App.

Lexis 581 at *13 (Tenn. Ct. App. Sept. 4, 2013); *Goza II*, 397 S.W.3d 564, 570 (Tenn. Ct. App. 2012), *perm. app. denied* (2013) (copies attached as **Exhibit B**). When a final judgment extinguishes the plaintiff's claim, "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions out of which the transaction arose." *Goza V*, 2014 Tenn. App. Lexis 839 at *20; *see, Creech v. Addington*, 281 S.W.3d 363, 379-82 (Tenn. 2009) (holding Tennessee applies the transactional approach in determining the scope of *res judicata* with regard to claims that could have been brought in a previous suit).

All of the purported claims in the present *Goza IX* Complaint relate to Helen's Trust (**Exhibit A**), including the Perpetual Charitable Trust and the Trust for John, and SunTrust's alleged actions as trustee for Helen's Trusts. This was the subject matter of *Goza I* through *Goza V* and of *Goza VII* & *VIII*. (See **Exhibit B**). For example, the Complaint incorrectly refers to Helen's Trust to benefit John and Helen's Perpetual Charitable Trust as "Resulting Trust No. 1" and "Resulting Trust No. 2." (*E.g.*, Complaint, ¶¶ 23(g) & 23(n)). Later in their Complaint, Plaintiffs aver:

The instrument signed by Mrs. Goza, on or about August 16, 1991, amended and restated March 9, 1999 and April 9, 1999 . . . set out in writing the terms, conditions, and the limitations and duties of the Trustee (SunTrust Corporation) of the Revocable Living Trust, of the John Goza Lifetime Trust and of the Perpetual Living Trust. (Complaint, ¶ 23(cc)).

Plaintiffs complain that SunTrust, in its capacity as Trustee, earned fees from the Trusts. (Complaint, ¶ 23(v)).

In *Goza III*, the Estate previously sued both SunTrust and Buyer (a copy of the Complaint is attached hereto as **Exhibit C**). As the Court of Appeals held in *Goza IV*:

. . . Mr. Morrow states that the Estate's only assets are two separate "choses in

action,” or rights to recover debt. The first chose in action is the Estate’s claimed right to recover the trust funds remaining in SunTrust’s possession. That chose in action was litigated in *Goza II*. **The second chose in action is the Estate’s claimed right to a personal judgment against SunTrust and SunTrust’s employees. That chose in action was litigated in *Goza III*. Both courts that considered the Estate’s choses in action found that they are essentially attempts to relitigate the validity of the Perpetual Trust, which was established in *Goza I*; both courts found that the Estate’s claims are barred by *res judicata*.**

Goza IV, 2014 Tenn. App. Lexis 836 at *16-17 (Tenn. Ct. App. Dec. 19, 2014) (emphasis added; **Exhibit B**).

The claims in the present *Goza IX* Complaint could have been raised in *Goza I*, *Goza II*, *Goza III*, *Goza IV*, *Goza V*, and/or *Goza VII*. See *Goza VII*, 2015 Tenn. App. Lexis 581 at *13-16 (**Exhibit B**). Accordingly, the Complaint should be dismissed with prejudice for failure to state a claim upon which relief can be granted based upon the doctrine of *res judicata*.

7. **The Claims are also Barred by the Doctrine of Claim Preclusion.**

Similarly to *res judicata*, the claim preclusion doctrine “bars a second suit between the same parties on the same cause of action with respect to all issues which were or could have been raised in the former suit.” *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 178 (Tenn. Ct. App. 2000); *Goza VII*, 2015 Tenn. App. Lexis at *14. Claim preclusion applies where the underlying judgment was rendered by a court of competent jurisdiction, the same parties or their privies were involved in both suits, the same claim was asserted in both suits, and the underlying judgment was final and on the merits. *Jackson v. Smith*, 387 S.W.3d 486, 491 (Tenn. 2012). Based upon the prior *Goza* rulings (**Exhibit B**), those elements are all present here, and the *Goza IX* Complaint should be dismissed for failing to state a claim upon which relief can be granted based upon claim preclusion.

8. **The Claims are Also Barred by the Applicable Statutes of Limitations.**

In addition, all of Plaintiffs' purported claims are barred by the applicable statutes of limitation.

"It is well-settled in this state that the gravamen of an action, rather than its designation as an action in tort or in contract, determines the applicable statute of limitations." *Pera v. Kroger Co.*, 674 S.W.2d 715, 719 (Tenn. 1984).

John died more than nine (9) years ago on September 26, 2007. (Complaint, ¶ 6(a)). The statutes of limitations on Plaintiffs' claims started to run, at the latest, on that date. As recited above, Plaintiffs contend their claims are "solely based on the fact that [Defendants] 'committed a wrongful or tortious act,'" and seek to recover damages for the Estate for personal and economic injury to John J. Goza. (Complaint, p. 3 & ¶ 2). The gravamen of the Complaint is accordingly in tort for alleged personal and monetary injury to John. Thus, the three-year limitations period set forth in Tenn. Code Ann. § 28-3-105 (torts; property) or the one-year period in § 28-3-104 (torts; person) govern. **Wright & Morrow filed the present Complaint far too late on October 21, 2016, more than nine (9) years after John's death.** Plaintiffs' claims are all time-barred and must be dismissed.

A. **John's Incompetency.**

Regarding statutes of limitations, Tenn. Code Ann. § 28-1-106 ("Accrual of right") declares in relevant part:

If the person entitled to commence an action is, at the time the cause of action accrued, . . . adjudicated incompetent, such person, or such person's representatives and privies, as the case may be, may commence the action, after legal rights are restored, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from restoration of legal rights.

The tolling ends when the disability is removed. The disability of “unsound mind” (now the statute refers to persons “adjudicated incompetent”) is removed, at the latest, at the time of the individual’s death. *Abels v. Genie Indus., Inc.*, 202 S.W.3d 99, 105 (Tenn. 2006). Thus, Plaintiffs’ purported claims accrued at the latest on September 26, 2007, and the time limitation for this current lawsuit ran out over six (6) years ago on September 26, 2010.

B. Conspiracy (Count 1).

As their Count 1, Wright & Morrow allege the tort of conspiracy. A conspiracy is not independently actionable; instead, it is dependent upon an underlying predicate tort. *Hill v. Gannon*, 2016 Tenn. App. Lexis 264 (Tenn. Ct. App. Apr. 18, 2016). The statute of limitations for conspiracy is three years. Tenn. Code Ann. § 28-3-105; e.g., *Budget Rent-A-Car v. Car Services, Inc.*, 469 S.W.2d 360 (Tenn. 1971) (noting Chancery Court lacks jurisdiction over claim for unliquidated damages resulting from tort).

The limitations period for Plaintiffs’ conspiracy claim expired at the latest three years after John’s death, or on September 26, 2010. Plaintiffs filed the present suit more than six (6) years later in October of 2016. The conspiracy claim is accordingly time-barred and should be dismissed.

C. Breach of Contract (Count 2).

Plaintiffs acknowledge that the gravamen of their Complaint is in tort, so all of Plaintiffs’ claims are barred by the three-year statute of limitations in Tenn. Code Ann. § 28-3-105.

Even if the statute of limitations for each individual claim were analyzed, the result is the same: all claims are time-barred. The statute of limitations for a breach of contract claim is six years. Tenn. Code Ann. § 28-3-109. A breach of contract claim accrues when the breach occurs. *Dean Witter Reynolds v. McCoy*, 853 F.Supp. 1023 (E.D. Tenn. 1994). The limitations period for the

breach of contract claim expired, at the latest, six years after John's death, or on September 26, 2013, which date was more than three (3) years before Wright & Morrow filed suit. The breach of contract claim should therefore be dismissed.

D. Fraud (Counts 3, 5, 6, 7, 8, 9, 12).⁸

The limitations period for a fraud claim is three years. Tenn. Code Ann. § 28-3-105; *e.g.*, *Worldwide Healthcare Sys. v. SSI Surgical Serv.*, 2011 U.S. Dist Lexis 61208 (E.D. Tenn. 2011); *Keller v. Colgems-EMI Music*, 924 S.W. 2d 357, 361 (Tenn. Ct. App. 1996). The statute of limitations for Plaintiffs' fraud claims expired at the latest three years after John's death, or on September 26, 2010. Wright & Morrow filed the present suit on October 21, 2016. The fraud claims should accordingly be dismissed.

E. Conversion (Counts 4, 12, 13).

The limitations period for the tort of conversion is also three years. Tenn. Code Ann. § 28-3-105(2). The cause of action accrues at the date of the conversion. *Million v. Medairs*, 65 Tenn. 132 (1873). The limitations period for the conversion claims expired at the latest three years after John's death, or on September 26, 2010. Since Plaintiffs filed suit on October 21, 2016, their untimely conversion claims must be dismissed.

F. "Breach of Trust" (Counts 5, 6, 7, 8, 9, 14).⁹

The limitations period for a claim for breach of trust is either one year or three years. Tenn.

⁸As discussed above in Analysis Section 5, the fraud claims expired upon John's death. *Carne v. Maryland Cas. Co.*, 346 S.W. 259, 261-62 (Tenn. 1961).

⁹Wright & Morrow's assertion of breach of trust claims is incompatible with their assertion that their Complaint "seeks no relief from any trust and is against no trust. . . .[or] against any currently serving trustee of any currently existing trust." (Page 2).

Code Ann. § 35-15-1005 provides in relevant part:

- (a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one (1) year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust. . . .

* * * * *

- (c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within three (3) years after the first to occur of:
 - (1) The removal, resignation, or death of the trustee;
 - (2) The termination of the beneficiary's interest in the trust; or
 - (3) The termination of the trust.

John's interest in the trust for his benefit created by Helen, terminated when John died on September 27, 2007. Accordingly, if the Plaintiffs have any claims for breach of trust, such claims expired on September 27, 2010, and were long ago time-barred.

G. Breach of Confidence / Confidential Relationship (Counts 10, 11).

Likewise, to the extent that the Plaintiffs have any claims for "breach of confidence" or "breach of confidential relationship," under Tenn. Code Ann. § 35-15-1005 or other applicable law, such claims expired, at the latest, on September 27, 2010.

H. Personal Injury / Negligence (Count 15).

Wright & Morrow seek recovery of compensatory damages for Defendants supposedly causing John J. Goza to suffer personal injury. (Complaint, p. 3). The limitations period for a claim for a negligent injury to the person is one year. Tenn. Code Ann. § 28-3-104; *Vaughn v. Morton*, 371 S.W.3d 116, 118 (Tenn. 2012). Therefore, the limitations period for Plaintiff's negligence claim

expired at the latest one year after John's death, or on September 26, 2008. Since Plaintiffs filed suit more than eight years thereafter, the negligence claim should accordingly be dismissed.

In sum, all of the Plaintiffs' claims are time-barred by the applicable statutes of limitations, and the Complaint should be dismissed for failure to state a claim.

9. The Claims are Also Barred by Laches and Unclean Hands.

The basis for the doctrine of *laches* is that "equity will not intervene on behalf of one who has delayed unreasonably in pursuing his rights." *Long v. Board of Professional Responsibility*, 435 S.W.3d 174, 181-82 (Tenn. 2014) (quotation and citation omitted). Laches depends on the facts of each case and requires "an unreasonable delay that prejudices" the defendant. *Id.* Laches may be applied in equity even if the statute of limitations has not yet expired. *Dennis Joslin Co. v. Johnson*, 138 S.W.3d 197, 200-01 (Tenn. Ct. App. 2003). Application of laches is within the trial court's discretion. *Bivens v. White*, 2915 Tenn. App. Lexis 738 at *21 (Tenn. Ct. App. Sept. 16, 2015).

The Court of Appeals has explained:

Equity never interferes on behalf of a party whose negligence, or delay, has caused, occasioned, or contributed to, the injury of which he complains. No one can take advantage of his own wrong; and when one of two persons must suffer a loss, that one shall suffer it whose act, or neglect, occasioned it. Clean hands, a pure heart, and swift feet are required of him who seeks the aid of a Court of Conscience. If, in any case, i[t] appears that the injury complained of might not have happened had the plaintiff, or his agents, or attorneys, been diligent, the Court will stay its hand and decline to intervene.

Brown v. Ogle, 46 S.W.3d 721 (Tenn. Ct. App. 2000) (quoting Inman, GIBSON'S SUITS IN CHANCERY), *perm. app. denied* (2001). The *Brown* Court upheld dismissal of that case based upon laches, holding that the plaintiff was not diligent in prosecuting the matter. *Id.* at 728.

Here, Wright & Morrow delayed unreasonably by waiting to bring this action until nine (9)

years after John's death. The Trusts, the charitable beneficiaries of the Perpetual Charitable Trust, Buyer, and SunTrust have all been extremely prejudiced by having to defend eight-plus years of near-continuous *Goza* Litigation brought by Plaintiffs and their privies. Plaintiffs could have, and should have raised the claims alleged in the present *Goza IX* Complaint in their previous suits.

As a result of Plaintiffs' *Goza* Litigation, the assets of the Perpetual Charitable Trust have been greatly wasted; and distributions of Trust Assets to the nonprofit institutions caring for the mentally disabled, as Helen Goza clearly intended, have been long delayed. Similarly, Wright & Morrow come to this Court with unclean hands because they and their privies have already brought and litigated at least eight (8) previous lawsuits against SunTrust related to Helen's Trusts and SunTrust's trust administration. Accordingly, the Complaint should also be dismissed based upon the doctrines of laches and unclean hands.

10. SunTrust and Buyer Should be Awarded Their Reasonable Attorney Fees and Costs.

Tenn. Code Ann. § 20-12-119(c) provides in part that:

. . . where a trial court grants a motion to dismiss pursuant to Rule 12. . . for failure to state a claim upon which relief may be granted, the court **shall** award the party or parties against whom the dismissed claims were pending. . .the costs and reasonable and necessary attorney's fees incurred on the proceedings as a consequence of the dismissed claims by that party or parties.

(Emphasis added). Upon dismissal of the Complaint, Defendants request an award of their reasonable attorney fees and costs pursuant to Section 20-12-119(c).

CONCLUSION

Wherefore, for all of the foregoing reasons, Defendants, SunTrust Bank and Matthew G. Buyer, pray that the Court grant their Motion and transfer this cause to Part I of Probate Court.

In the alternative, Defendants ask the Court to dismiss the Plaintiffs' Complaint with prejudice for lack of subject matter jurisdiction and/or failure to state a claim upon which relief can be granted. Defendants also ask the Court to award them their reasonable attorney fees and costs incurred in defending this matter pursuant to Tenn. Code Ann. § 20-12-119(c), and request such other, further relief that the Court deems appropriate.

Respectfully submitted,



Kenneth P. Jones (BPR# 16168)

M. Matthew Thornton (BPR# 18930)

BOURLAND, HEFLIN, ALVAREZ,

MINOR & MATTHEWS, PLC

5400 Poplar Avenue, Suite 100

Memphis, TN 38119

Phone: (901) 683-3526

Facsimile: (901) 763-1037

kjones@bhammlaw.com

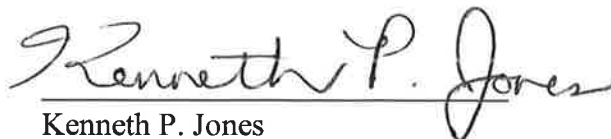
Counsel for Defendants, Matthew G. Buyer and SunTrust Bank

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served by U.S. Mail, postage prepaid, this 17th day of January, 2017, upon:

Larry Parrish, Esq.
Parrish Lawyers, P.C.
1661 International Drive, Suite 400
Memphis, TN 38120

Janet Kleinfelter, Esq.
Deputy Attorney General
435 Fifth Ave N.
Nashville, TN 37243



Kenneth P. Jones

IN THE PROBATE COURT OF SHELBY COUNTY, TENNESSEE

JUDY MORROW WRIGHT, and)	
DAVID MORROW, JR.,)	
)	
Plaintiffs,)	
)	
MATTHEW G. BUYER and)	No. <u>PR007275</u>
SUNTRUST BANK,)	(Part I)
)	
Defendants.)	
)	

**EXHIBITS TO
MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER CASE
TO PART I OF PROBATE COURT,
OR, IN THE ALTERNATIVE, TO DISMISS COMPLAINT**

- A. Helen B. Goza Amended and Restated Revocable Trust Agreement, dated April 9, 1999;
- B. Appellate Decisions in *Goza I* through *Goza VII*;
- C. *First Amended Complaint*, filed on October 7, 2011, in *Estate of John J. Goza v. James M. Wells, III, Buyer, R. Michael Potter, Esq., and SunTrust*, Circuit Court, No. CT-004471-11 (*Goza III*);
- D. Wright & Morrow's *First Amended Complaint*, filed on July 1, 2016, in *Estate of Goza, Wright & Morrow v. Buyer & SunTrust*, Chancery Court, No. CH-16-0539 (*Goza VIII*);
- E. *Order Granting Amended Motion to Dismiss First Amended Complaint, and Final Judgment*, entered on October 26, 2016, in *Goza VIII*; and
- F. *Order Discharging Personal Representative and Closing Estate*, entered November 22, 2016, in *Estate of John J. Goza*, No. D-10567 (Part I).

IN THE PROBATE COURT OF SHELBY COUNTY, TENNESSEE

In re: ESTATE OF ALYS HARRIS LIPSCOMB, Deceased *PR 1541*

SCOTT B. PEATROSS, as Administrator of the Estate of Alys Harris Lipscomb, Deceased, Plaintiff,

v.

CARNITA F. ATWATER, Defendant.

ADMINISTRATOR'S TRIAL BRIEF

Plaintiff, Scott B. Peatross, as Administrator of the Estate of Alys Harris Lipscomb, respectfully submits his Trial Brief for the trial in this cause upon the Complaint against the Defendant, Carnita Atwater.

I. BACKGROUND AND FACTS

This is a textbook case of egregious financial exploitation of an elderly person, Dr. Alys Lipscomb, by her caretaker, Defendant Atwater. Defendant Atwater held and extensively used Dr. Lipscomb's October 7, 2011 Durable Power of Attorney (copy attached hereto as **Exhibit 2**); exercised undue influence over, and breached her fiduciary duty to Dr. Lipscomb; and fraudulently caused more than two million dollars of Dr. Lipscomb's funds to be unlawfully transferred to and converted to herself.

The Court has admitted to probate Dr. Lipscomb's Last Will and Testament dated May 13, 2011 (the "Will"; copy attached hereto as **Exhibit 1**). (Order, October 17, 2014). Through her Will, Dr. Lipscomb essentially devises one-half of her assets to six nonprofit organizations, and the other one-half to 30 named individuals. The Will gives Defendant Atwater 15% of one-half, or 7.5% of Dr. Lipscomb's assets.

In its August 17, 2015 *First Amended Complaint* (copy attached as **Exhibit 11**), the Administrator asserts the following causes of action against Defendant Atwater:

1. Breach of fiduciary duty;
2. Undue influence;
3. Constructive trust and an accounting;
4. Injunctive relief;
5. Conversion;
6. Fraud;
7. Punitive Damages; and
8. Exploitation of an elderly and/or disabled person under the Tennessee Adult Protection Act, Tenn. Code Ann. §§ 71-6-101, *et seq.*, including § 71-6-120.

The Administrator seeks a judgment in favor of the Estate against Defendant Atwater for compensatory damages, prejudgment interest, punitive damages, attorney fees, and costs.

Born in 1915, Dr. Lipscomb worked as a pioneering and distinguished female physician in Memphis in nuclear medicine, among other areas. Dr. Lipscomb lived through the Great Depression, which significantly shaped her character traits such as frugality and modest dress. Dr. Lipscomb died on May 21, 2014 at age 98. Although she had many friends, Dr. Lipscomb never married, never had any children, and had no relatives with whom she was particularly close.

Dr. Lipscomb, who by the late 2000's had not been driving for many years, wanted to remain living in her home at 9305 Mulkins (the "Home"), rather than in a nursing facility. As her health deteriorated and she experienced falls, by 2010 or 2011, Dr. Lipscomb required around-the-clock care in order to remain living at Home. Defendant Atwater served

first as a part-time and then a full-time caretaker for Dr. Lipscomb, and then moved into the Home and lived with Dr. Lipscomb. Dr. Lipscomb became very dependent upon Defendant Atwater in every aspect of Dr. Lipscomb's life, including as to meals, transportation, finances, and daily personal care.

From early 2010 through Dr. Lipscomb's death in May of 2014, approximately three million dollars (\$3,000,000.00) of Dr. Lipscomb's funds were transferred to Defendant Atwater. The transfers were made by checks written on two of Dr. Lipscomb's SunTrust Bank accounts, most of which checks Defendant Atwater both wrote out and signed utilizing the POA. As a result, Defendant Atwater depleted Dr. Lipscomb's Estate assets from approximately \$6 million to about \$3 million.

Defendant Atwater was generously compensated by Dr. Lipscomb for her caretaker services, for which she received \$3,000 per week and then \$15,000 per month (\$180,000 annually). The Administrator is *not* seeking a recovery of these monies paid to Defendant from approximately 2010 to Dr. Lipscomb's death for caretaker services in the total sum of approximately \$610,000.

In 2008, Dr. Lipscomb executed a Revocable Living Trust prepared by attorney Katina Gaines. On May 13, 2011, however, Dr. Lipscomb signed her Will. Significantly, Defendant Atwater helped to type up the Will.

Later in 2011, Defendant Atwater also typed up and prepared Dr. Lipscomb's Durable General Power of Attorney (the "POA") designating Defendant Atwater as attorney-in-fact. No attorney was involved with preparing the POA. On October 7, 2011, Defendant Atwater arranged for a notary public to come to the Home, and Dr. Lipscomb signed the POA in the presence of Defendant Atwater and the notary.

Defendant Atwater frequently used the POA, drafting it herself and signing most of the checks on Dr. Lipscomb's SunTrust accounts that are at issue in this case. The largest of the checks to Defendant Atwater, all drafted *after* the POA became effective, were for the sums of **\$320,000, \$300,000, \$400,000, and \$300,000**. (Exhibits 3, 4, 5 and 6). The total sum of just those four transfers of Dr. Lipscomb's funds to Defendant Atwater is **\$1,320,000.00**.

The SunTrust Bank records for Dr. Lipscomb's bank accounts establish as follows:

- On Dr. Lipscomb's Account No. 8671, from approximately February of 2010 through July 12, 2012, the total funds transferred to Defendant Atwater were approximately **\$682,455.26** (a summary of the -8671 checks is attached hereto as **Exhibit 9**); and
- On Dr. Lipscomb's Account No. 3289, during the approximately two-year period from May 28, 2012 through May 21, 2014, the funds transferred to Defendant Atwater totaled approximately **\$2,305,045.70** (a summary of the -3289 checks is attached hereto as **Exhibit 10**).

Thus, the total amount of Dr. Lipscomb's funds transferred from the two SunTrust Banks accounts to Defendant Atwater from February of 2010 to May of 2014 was about **\$2,987,500.90**. Subtracting \$610,000 for caregiver pay, Defendant Atwater converted funds from Dr. Lipscomb totaling approximately \$2,377,500.

Dr. Lipscomb died in the early morning of May 21, 2014. (**Exhibit 7**, Death Certificate). Later that same morning, Defendant Atwater went to SunTrust Bank to cash and to deposit into Ms. Atwater's personal bank account a \$300,000.00 check on Dr. Lipscomb's account – a check which Defendant Atwater had drafted to herself and signed. A copy of the May 21, 2014 receipt for Defendant Atwater's transaction is attached as **Exhibit 8**.

II. BURDEN OF PROOF

As a matter of law, the October 7, 2011 POA created a fiduciary relationship between Defendant Atwater and Dr. Lipscomb. *Matlock v. Simpson*, 902 S.W.2d 384 (Tenn. 1995). All transfers of Dr. Lipscomb's assets to the attorney-in-fact, Defendant Atwater, are presumed to be invalid as the result of Defendant Atwater's undue influence. *Id.*; *Graves v. White*, 63 Tenn. 38 (1874). The presumption of undue influence extends to *all dealings* between persons in confidential and fiduciary relations, and embraces gifts and other transactions by which the dominant party obtains a benefit from the other party. *Parish v. Kemp*, 179 S.W.3d 524 (Tenn. Ct. App. 2005).

Defendant Atwater bears the burden of proof to attempt to rebut the presumption of undue influence, which voids the transfers, by **clear and convincing evidence** of the fairness of the transactions. *Matlock v. Simpson*.

Likewise, should Defendant Atwater attempt to claim that any of the financial transfers were *gifts* from Dr. Lipscomb, then Ms. Atwater also bears the burden of proving both intent and delivery by **clear and convincing evidence**. *Atchley v. Rimmer*, 255 S.W.2d 366, 369 (Tenn. 1923); *Kesterson v. Kesterson*, 2006 Tenn. App. Lexis 2 at *9-11 n. 3 (Tenn. Ct. App. Jan. 4, 2006); *Ingram v. Phillips*, 684 S.W.2d 954, 957 (Tenn. Ct. App. 1984), *perm. app. denied* (1985). The testimony of an alleged beneficiary of an *inter vivos* gift is insufficient to establish that gift. *Kesterson*, 2006 Tenn. App. Lexis 2 at *9-11 n. 3. "This long-standing rule seeks to prevent the sort of fraud which easily could be perpetuated when the testimony of an interested beneficiary is offered as the only proof of gift after the death of the donor." *Union Planters Bank, N.A. v. Shepard*, 2003 Tenn. App. Lexis 498 at *12 (Tenn. Ct. App. July 14, 2003); *accord*, *Atchley v. Rimmer*, 255 S.W.2d at 369

(determining that the alleged donee of the gift from the deceased was incompetent to testify as to alleged conversations with deceased pursuant to the Dead Man's Statute).

The Supreme Court of Tennessee has described the **clear and convincing evidence burden of proof** as follows:

Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. In other words, the evidence must be such that the truth of the facts asserted is highly probable. In general, the bar for attaining relief is set very high and the burden borne by the [party bearing the burden of proof] is heavy.

Furlough v. Spherion Atlantic Workforce, LLC, 397 S.W.3d 114, 128 (Tenn. 2013) (quotations, punctuation, and citations omitted).

III. ADMINISTRATOR'S CAUSES OF ACTION AGAINST DEFENDANT

The Supreme Court of Tennessee has repeatedly emphasized that courts should act "vigilant[ly] to prevent imposition upon those who are weak, frail, and vulnerable to the influence and importunities of others who exercise a dominant position over them." *Richmond v. Christian*, 555 S.W.2d 105, 109 (Tenn. 1977). More than 140 years ago, the Supreme Court held that where, as here, the relationship of the donor and the donee is confidential, and the donor is in a state of mental and physical weakness and in her "second childhood" at the time an alleged gift is made, the burden is on the donee to show **by the clearest evidence** that no advantage was taken of the confidential relations or of the donor's weakness. *Graves v. White*, 63 Tenn. 38, 40-42 (1874). The court views such a transfer of assets "**with the strictest scrutiny.**" *Id.* at 41 (emphasis added).

1. Count 1: Defendant Atwater Breached Her Fiduciary Duty to Dr. Lipscomb.

Serving as Dr. Lipscomb's attorney-in-fact under the POA, Defendant Atwater had

a fiduciary duty to take all actions on Dr. Lipscomb's behalf in the utmost good faith, with loyalty, and with honesty. *Ralston v. Hobbs*, 306 S.W.3d 213, 221 (Tenn. Ct. App. 2009), *perm. app. denied, published pursuant to Tenn. R. Sup. Ct. 4(D)* (2010). Acting in a person's best interests includes preserving her assets, and the attorney-in-fact not pursuing her own self-interest. *Id.* at 227-28. Defendant Atwater breached her fiduciary duty by transferring and converting enormous sums of money constituting a substantial portion of Dr. Lipscomb's assets for Defendant Atwater's own personal benefit.

The Court of Appeals has explained:

Our courts have long held that the execution of a power of attorney establishes a confidential or fiduciary relationship between the attorney in fact and the grantor of the power. *Matlock v. Simpson*, 902 S.W.2d 384 (Tenn. 1995); *Mitchell v. Smith*, 779 S.W.2d 384 (Tenn. Ct. App. 1989); *Askew v. Askew*, 619 S.W.2d 384 (Tenn. Ct. App. 1981); *Black v. Pettigrew*, 38 Tenn. App. 1, 270 S.W.2d 196 (1953). . . .

Numerous opinions of our appellate courts have stated that the dominant party in a fiduciary relationship is obligated to deal with the property of the other party in the utmost good faith. *Estate of Doyle v. Hunt*, 60 S.W.3d 838 (Tenn. Ct. App. 2001); *Alexander v. Inman*, 974 S.W.2d 689 (Tenn. 1998); *McFarlin v. McFarlin*, 785 S.W.2d 367 (Tenn. Ct. App. 1989). Other cases have spoken of the duties of loyalty and honesty as also being a part of a fiduciary's obligation. *Roberts v. Iddins*, 797 S.W.2d 615 (Tenn. Ct. App. 1990); *Knox-Tenn Rental Co. v. Jenkins Ins., Inc.*, 755 S.W.2d 33 (Tenn. 1988).

Finally, the existence of a confidential relationship, combined with a gift or benefit to the dominant party, creates a presumption of undue influence, and of the invalidity of the transaction. *Fell v. Rambo*, 36 S.W.3d 837 (Tenn. Ct. App. 2000).

Martin v. Moore, 109 S.W.3d 305, 309-10 (Tenn. Ct. App. 2003), *perm. app. denied*.

On a breach of fiduciary duty claim, the court in *Ralston v. Hobbs* held that the conduct of the defendant nephew, as the plaintiff uncle's attorney-in-fact, in transferring the bulk of his uncle's savings to the nephew's personal accounts; refusing to return the funds;

and admitting that he could not prove the transfers were made on the uncle's behalf or that any of the funds except for funeral expenses were expended for his uncle's benefit, created a rebuttable presumption that the nephew had converted the uncle's assets. Further, the *Ralston* Court held that a showing that before making the gift, the donor received *independent advice* regarding the consequences and advisability of an alleged gift to the dominant party in a fiduciary relationship, is *required in order* to rebut the presumption of the invalidity of the gift to the dominant party by clear and convincing evidence, in cases where it would be difficult under the circumstances to show the fairness of the transaction without proof of the independent advice, particularly where the gift seems unnatural. *Ralston*, 306 S.W.3d at 228; *Richmond v. Christian*, 555 S.W.2d 105 (Tenn. 1977).

In *Richmond*, the Supreme Court held that where the donor was old and frail, the transfer at issue gave all of her property to one son, and the transfer represented a change from her prior plans to divide the property equally among the donor's three children, proof that the donor received independent advice prior to making gift was required in order to rebut the presumption of invalidity of the transfer arising from the confidential or fiduciary relationship between the donor and her son. 555 S.W. 2d at 108; *accord*, *Turner v. Leathers*, 232 S.W.2d 269 (Tenn. 1950). The *Richmond* Court found significant that the donor needed help with virtually every personal need; her defendant son lived with her in her house; and "she appears to have entrusted to him her life and all of her belongings." 555 S.W. 2d at 108. Likewise here, Dr. Lipscomb needed help with almost every personal need; Defendant Atwater lived with Dr. Lipscomb in her Home; and Dr. Lipscomb entrusted herself and her property to Defendant Atwater.

See also, *Martin v. Moore*, 109 S.W.3d 305, 313 (Tenn. Ct. App. 2003) (holding

wife's withdrawals of \$66,000 from husband's separately-owned checking account, as husband's attorney-in-fact under POA, constituted a breach of fiduciary duty), *perm. app. denied*.

As Dr. Lipscomb's attorney-in-fact, Defendant Atwater, as noted above, was under a fiduciary duty to act in the utmost good faith, loyally, and honestly, and *only for the benefit of Dr. Lipscomb*. The transfers of funds exceeding \$2.3 million to Defendant Atwater are presumed invalid and void. Dr. Lipscomb did *not* receive any independent advice of counsel prior to the financial transfers to Defendant Atwater which accordingly must be voided for breach of fiduciary duty and conversion.

2. **Count 2: Defendant Atwater Exerted Undue Influence Over Dr. Lipscomb. Accordingly, the Transfers of Dr. Lipscomb's Assets to Defendant Atwater Must be Voided.**

As noted above, all transfers of Dr. Lipscomb's assets to Defendant Atwater occurring from October 7, 2011, the date of the POA, through Dr. Lipscomb's death are **presumed void** because of Defendant Atwater's undue influence. *E.g., Johnson v. Craycraft*, 914 S.W.2d 506 (Tenn. Ct. App. 1995), *perm. app. denied*. "Suspicious circumstances" indicative of undue influence may include:

- (1) the existence of a confidential relationship between the transferor and the beneficiary;
- (2) the transferor's physical or mental deterioration;
- (3) the beneficiary's active involvement in procuring the instrument or the transfer;
- (4) secrecy concerning the existence of the instrument or the transfer;
- (5) the transferor's advanced age;
- (6) the lack of independent advice in preparing the instrument or the transfer;

- (7) the transferor's illiteracy or blindness;
- (8) the unjust or unnatural nature of the terms of the instrument or the transfer;
- (9) the transferor being in an emotionally distraught state;
- (10) discrepancies between the instrument or transfer and the transferor's expressed intentions; and
- (11) fraud or duress directed toward the transferor.

E.g., In re Elam's Estate, 738 S.W.2d 169, 173 (Tenn. 1987); *Kelly v. Allen*, 558 S.W.2d 845, 848 (Tenn. 1977); *Mitchell v. Smith*, 779 S.W.2d 384 (Tenn. Ct. App. 1989); *Taliaferro v. Green*, 622 S.W.2d at 835-36.

McMillin v. McMillin, No. E2014-00497-COA-R3-CV, 2015 WL 1510766 (Tenn. Ct. App. Mar. 31, 2015) is illustrative regarding undue influence. Decedent's will expressed her desire that her four adult children share equally in her estate. In the months prior to the 82-year-old decedent's death, bank accounts titled solely in her name were changed to joint accounts with the son with the right of survivorship. The other siblings claimed that the defendant son had exerted undue influence over decedent in the transactions. The jury rendered a verdict in favor of plaintiffs, and the Court of Appeals affirmed.

After determining that the defendant son had a confidential relationship with his mother, the *McMillan* Court found that the son undoubtedly obtained a benefit when the decedent established him as a joint owner with right of survivorship on accounts that she had previously maintained in her sole name. Accordingly, the defendant son was required to demonstrate the fairness of the transactions by clear and convincing evidence, but he could not do so. The *McMillan* Court noted that "Decedent's will evidenced a clear and unambiguous intent by her that her children share equally in her estate." *Id.*, 2015 WL

1510766 at *6.

Here, Dr. Lipscomb's Will evidences a "clear and unambiguous intent" that **some 36 different entities and individuals share in her estate**. Dr. Lipscomb's Will, which bequeaths only 7.5% (about one-thirteenth) of her assets to Defendant Atwater, is patently inconsistent with the transfers of approximately fifty percent (50%) of her assets (\$3 million out of \$6 million) to her caretaker. Defendant Atwater cannot demonstrate by clear and convincing evidence that the transfers were fair, and the Administrator is entitled to a judgment against Defendant Atwater based upon undue influence.

3. **Count 3: The Administrator is Entitled to a Constructive Trust Upon Defendant Atwater's Assets and an Accounting by Defendant Atwater.**

An accounting is a disclosure predicated on the legal inability of a plaintiff to determine how much money is due him from another. *Bradshaw v. Thompson*, 454 F.2d 75, 79 (6th Cir. 1972) (applying TN law), *cert. denied*, 409 U.S. 878 (1972). It is well-settled that where the accounts are complicated or comprised of numerous items extending over a long period of time, that constitutes sufficient grounds for the assumption of jurisdiction by a court of equity. *Greene County Union Bank v. Miller*, 75 S.W.2d 49 (Tenn. Ct. App. 1934). Based upon Defendant Atwater's breach of fiduciary duty, conversion, undue influence, fraud, and exploitation of Dr. Lipscomb, the court should impose a restrictive trust upon Defendant Atwater's assets and order her to provide a full accounting of assets.

4. **Count 4: Injunctive Relief.**

The Court's July 3, 2014 TRO declares in relevant part:

. . .it is appropriate pending the hearing on the Verified Complaint to temporarily restrain Defendant Carnita F. Atwater or her agent(s) from transferring, spending, or disposing of any asset described in the Verified

Complaint and formerly owned by the Decedent, Alys Harris Lipscomb, or any asset purchased, in whole or in part, with funds that belonged to Decedent. . . . Defendant is hereby ORDERED not to transfer, spend, or dispose of any asset described in the Verified Complaint and formerly owned by the Decedent, Alys Harris Lipscomb, or any asset purchased, in whole or in part, with funds that belonged to Decedent.

On August 12, 2014, the Court entered its Order Extending TRO, which remains in effect.

5. Count 5: Defendant Atwater Converted Dr. Lipscomb's Assets.

Conversion is the appropriation of tangible property to a party's own use in exclusion of or defiance of the owner's rights. *Barger v. Webb*, 391 S.W.2d 664, 665 (Tenn. 1965); *Wells v. Chattanooga Bakery*, 448 S.W.3d 381, 392 (Tenn. Ct. App. 2014) (publ. pursuant to Tenn. Ct. App. R. 11). The elements of conversion are (1) the appropriation of another's property to one's own use and benefit and (2) the intentional exercise of dominion over it, (3) in defiance of the true owner's rights. *Mammoth Care Prod. Credit Ass'n v. Oldham*, 569 S.W.2d 833, 836 (Tenn. Ct. App. 1977). Defendant Atwater converted millions of dollars of Dr. Lipscomb's funds for Defendant Atwater's own uses.

In *Estate of Dooley v. Hickman*, 2006 Tenn. App. Lexis 562 (Tenn. Ct. App. Aug. 29, 2006), defendant, decedent's attorney-in-fact, wrote a \$21,000 check to herself on decedent's bank account. The estate sought reimbursement. The defendant attorney-in-fact sought to introduce testimony that decedent had instructed her to write the check and to take the money as payment for her personal services. The *Dooley* Court, however, ruled that the Dead Man's Statute clearly applied and affirmed the exclusion of the attorney-in-fact's testimony and the lower court's ruling that the defendant had *converted* the \$21,000 check and must reimburse the estate.

The Administrator should be awarded a judgment against Defendant Atwater for her

conversion of Dr. Lipscomb's assets.

6. **Count 6: Defendant Atwater Perpetrated a Fraud Upon Dr. Lipscomb.**

A person acts fraudulently when she (1) intentionally misrepresents an existing, material fact or produces a false impression, in order to mislead another or to obtain an undue advantage, and (2) another is injured because of reasonable reliance upon that misrepresentation. *E.g., Hodges v. S.C. Toof and Co.*, 833 S.W.2d 896, 901 (Tenn. 1992). Defendant Atwater defrauded Dr. Lipscomb by misrepresenting to Dr. Lipscomb that she was looking out for Dr. Lipscomb's assets and her best interests. Dr. Lipscomb relied upon Defendant Atwater's representations and allowed Defendant Atwater to control her assets and her life. Dr. Lipscomb was greatly injured by Defendant Atwater taking more than two million dollars from her.

7. **Count 7: Punitive Damages Should be Assessed Against Defendant Atwater.**

Punitive damages may be awarded against the defendant where she has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly. *Hodges v. S.C. Toof and Co.*, 833 S.W.2d 896, 901 (Tenn. 1992). Defendant Atwater's intentional, egregious and unlawful behavior in breach of her fiduciary duty to Dr. Lipscomb entitled the Estate to an award of punitive damages.

8. **Count 8: Defendant Atwater Exploited Dr. Lipscomb Under the Adult Protection Act.**

The Adult Protection Act (the "Act") provides in part at Tenn. Code Ann. § 71-6-120 that:

(b) In addition to other remedies provided by law, an elderly person or disabled adult in that person's own right, or by conservator or next friend, shall have a right of recovery in a civil action for compensatory damages for

abuse or neglect, sexual abuse or exploitation as defined in this part or for theft of such person's or adult's money or property whether by fraud, deceit, coercion or otherwise. . . .

Dr. Lipscomb, who was in her late 90's, was both an “elderly person”¹ and a “disabled adult,” defined by § 71-6-120(a)(2) as a person over 18 who “has some impairment of body or mind that makes the person unfit to work at any substantially remunerative employment” or “lacks the capacity to consent.”

The Act further defines “exploitation” as “the improper use by a caretaker of funds that have been paid by a governmental agency to an adult or to the caretaker for the use or care of the adult.” § 71-6-102(8). Among Dr. Lipscomb’s assets were her monthly Social Security benefits. Defendant Atwater financially exploited Dr. Lipscomb by taking millions of dollars of her funds.

9. The Administrator is Entitled to an Award of Its Attorney Fees Against Defendant Atwater.

Attorney fees may be awarded against a fiduciary who breaches her fiduciary duty. *Martin*, 109 S.W.3d at 313 (Tenn. Ct. App. 2003); *Brandt v. Bib Ent.*, 986 S.W.2d 586 (Tenn. Ct. App. 1998); *Marshall v. First National Bank of Lewisburg*, 622 S.W.2d 558 (Tenn. Ct. App. 1981). “[T]he imposition of such fees on fiduciaries who deliberately use their position of trust to enrich themselves creates a disincentive to such behavior.” *Martin*, 109 S.W.3d at 313. The Estate is entitled to an award of its reasonable attorney fees against Defendant Atwater.

In addition, the Estate is entitled to recover attorney fees against Ms. Atwater

¹An “elderly person” is defined as “a person who is sixty (60) years of age or older who has some mental or physical dysfunctioning, including any resulting from age.” Tenn. Code Ann. § 71-6-120(a)(3).

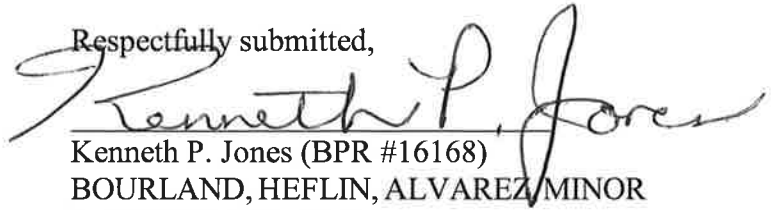
pursuant to the Adult Protection Act, which provides that where the defendant is liable for financial exploitation of or theft from the elderly or disabled person, “if it is proven by clear and convincing evidence that. . .exploitation or theft resulted from intentional, fraudulent, or malicious conduct by the defendant, a claimant shall be entitled to recover reasonable attorney fees.” Tenn. Code Ann. § 71-6-120(d).

CONCLUSION

For good cause shown, at the trial of this cause, the Administrator asks the Court to enter judgment in favor of the Administrator of the Estate against Defendant Atwater as follows:

- compensatory damages for breach of fiduciary duty, undue influence, conversion, fraud, and/or financial exploitation under the Adult Protection Act, in the sum of \$2,377,500;
- ordering that Defendant provide a full accounting for all funds wrongfully obtained by Dr. Lipscomb;
- prejudgment interest in an amount to be determined by the Court;
- punitive damages in an amount to be determined by the Court;
- attorney fees in an amount to be determined by the Court; and
- imposing a constructive trust upon Defendant’s assets until the judgment against her is satisfied.

Respectfully submitted,



Kenneth P. Jones (BPR #16168)
BOURLAND, HEFLIN, ALVAREZ/MINOR
& MATTHEWS, PLC
Attorneys for the Plaintiff, Administrator of
the Estate of Alys Harris Lipscomb
5400 Poplar Avenue, Suite 100
Memphis, Tennessee 38119
Telephone: (901) 683-3526

CERTIFICATE OF SERVICE

The undersigned attorney certifies on this 31st day of October, 2016, that a copy of this document has been or will be mailed to the following person(s), except where noted as deceased, etc.:

Robert Spence, Esq.
The Spence Law Firm
80 Monroe Avenue
Garden Suite One
Memphis, Tennessee 38103

Michael Harrell
Harrell & Associates
1884 Southern Avenue
Memphis, TN 38114
Attorneys for Carnita Atwater

Olen M. "Mac" Bailey, Jr.
The Bailey Law Firm
5100 Wheelis Dr., Ste. 215
Memphis, TN 38117
Attorney for Tom Huddleston

Joseph A. Livesay, Sr., Esq.
239 Adams Avenue
Memphis, TN 38103
Attorney for Caby & Betty Byrne

Blan R. Nicholson
301 Washington Ave. #203
Memphis, TN 38103
Attorney for Frances Manley

Tricia York Tweel, Esq.
Harris Shelton Hanover
999 S. Shady Grove Road
Suite 300
Memphis, TN 38120
Attorney for Tommy & Phyllis Pollard

Richard Lipscomb Dabney
3217 Norwood
Birmingham, AL 35234

James Edgar Pledger
Philip J. Pledger
9706 Coral Drive SW
Lakewood, WA 98498

Donna J. Pledger
Philip J. Pledger
Jennifer O'Conner
23006 Carmella Rd. NW
Poulsbo, WA 98370

William G. Pledger (Deceased)

Anne Dwyer
8678 Pepper Bush Ln.
Germantown, TN 38139

Marilyn M. Parker
177 Wildwood Drive
Pineville, LA 71360

Pamela Magee
3477 Highland Cove
Memphis, TN 38111

Nadia Strid, (Deceased)

Mary E. Thompson (Deceased)

Helen Zeman
c/o Margaret Zeman Mahler
(Daughter/POA)
7312 Shayla Court
Fairview, TN 37062

Mark & Susan Hoggard
11155 Macedonia Rd.
Arlington, TN 38002

Kathy Vaughan
1870 Hunters Creek Drive
Germantown, TN 38138

Charlotte Ashford
(Whereabouts unknown)

Della "Dee" Davenport
2948 Poplar Grove Rd.
Germantown, TN 38139

Susan Stralka
3033 Poplar Grove Ln.
Germantown, TN 38139

Peggy White
2957 Poplar Grove Ln.
Germantown, TN 38139

Carey Eginald
[contact info unknown]

Freddie & Sarah Bartholomew
65 Country Forrest Dr.
Oakland, TN 38060

Church Health Center
ATTN: Ann Langston
1210 Peabody Avenue
Memphis, TN 38104

Methodist Healthcare Foundation
ATTN: Paula Jacobson
P.O. Box 42048
Memphis, TN 38174

Gratitude Methodist Church
ATTN: Robert Ferguson
7678 Deadfall Road
Arlington, TN 38002

Rev. Timothy Carpenter,
District Superintendent
Ashbury District - UMC
3476 Summer Avenue, Suite 201
Memphis, TN 38122

Girl Scouts of the South
ATTN: Kathleen R. Webb, Chair
717 S. White Station Rd., Ste. 2
Memphis, TN 38117

Tunica Presbyterian Church
PO Box 1095
Tunica, MS 38676


Kenneth P. Jones

IN THE PROBATE COURT OF SHELBY COUNTY, TENNESSEE

In re: ESTATE OF ALYS HARRIS LIPSCOMB, Deceased *PR 1541*

*SCOTT B. PEATROSS, as Administrator of the Estate of Alys Harris
Lipscomb, Deceased, Plaintiff,*

v.

CARNITA F. ATWATER, Defendant.

**LIST OF EXHIBITS TO
ADMINISTRATOR'S TRIAL BRIEF**

1. May 13, 2011 Dr. Lipscomb's Last Will and Testament, and Order Admitting Will to Probate (October 17, 2014)
2. October 7, 2011 Dr. Lipscomb's Durable General Power of Attorney making Carnita Atwater her attorney-in-fact
3. October 22, 2011 Check No. 1799 on Dr. Lipscomb Trust SunTrust Bank Account 8671 payable to Dr. Carnita Atwater in the sum of \$320,000.00 for "Happy Baby Birthday with LOVE"
4. September 3, 2013 Check No. 1208 on Alys H. Lipscomb SunTrust Bank Account 3289 payable to Dr. Carnita Atwater in the sum of \$300,000.00 for "Birthday + Love Gift"
5. February 14, 2014 Check No. 1250 on Alys H. Lipscomb SunTrust Bank Account 3289 payable to Dr. Carnita Atwater in the sum of \$400,000.00 for "Valentine, Birthday + Bonus (Annual)"
6. May 18, 2014 Check No. 1266 on Alys H. Lipscomb SunTrust Bank Account 3289 payable to Dr. Carnita Atwater in the sum of \$300,000.00 for "Love Gift + Living Arrangement"
7. May 21, 2014 Date of Death of Alys H. Lipscomb, M.D. (Death Certificate)

8. May 21, 2014 Receipt for Carnita Atwater's deposit of Check No. 1266 on Alys H. Lipscomb SunTrust Bank Account 3289 payable to Dr. Carnita Atwater in the sum of \$300,000.00 for "Love Gift + Living Arrangement" into Ms. Atwater's bank account
9. Undated Summary of Checks written to Carnita Atwater on Alys H. Lipscomb Revocable Living Trust SunTrust Bank Account No. 8671
10. Undated Summary of Checks written to Carnita Atwater on Alys H. Lipscomb SunTrust Bank Account No. 3289
11. August 17, 2015 Administrator's First Amended Complaint

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