APPENDIX A

(Facts Issues from the Pretrial Stipulation Compared to Trial Testimony)

1. Whether Defendants properly sought to assert that Oliver Sr. had a legal or equitable interest in 67th and Portland Place and whether they met a reasonable standard of care in pursuing that interest for Oliver Sr.
Defendants filed petitions on behalf of the Guardian. In the Florida Probate Court, Defendants filed a petition seeking a ruling that the divorce was invalid and the Ward was entitled to his share of Lorna's Estate. Q And then, so, in connection with this petition here, essentially what you were seeking was to have the Court in Florida not give credit to the Texas divorce decree so that the parties could be deemed in Florida married at the time of Lorna's death in February 2011; is that right? A It was an -- it was an intestacy claim. So the claim was Oliver Bivins, Sr. is a 50 percent beneficiary with Oliver, Jr. as the rightful spouse, asking not to give full faith and credit to that divorce that we've talked about in 2010 and saying that it was, in essence, void. Q Okay. If what you were asking the Florida court to do was deem Oliver and Lorna married on the date of her death, right? A For the purposes of inheritance, yes. Q And in this case, Lorna died without a will, correct? [...] Q Okay. So what you were seeking, then, in the petition was essentially to get the other half of 808 and one half of the Scribner mansion, other half of 330, and one half of the London apartment, correct? A That was the request. [...] Q And then as a result of the settlement, what happened was that Oliver got the entire amount of 808 and the entire amount of 330 but gave up the entire amount of the Scribner mansion and the London apartment. That's what you all negotiated for him, correct? A I disagree. Q In what regard to you disagree? Did he not waive any interest in the one-half that you were claiming to the Scribner mansion? A Exactly. In essence, you're talking about a claim to something. So it's not something that you have. You can't -- in essence, you can't give up and you can't trade something that you don't own.

Q Okay.

A So you have a lawsuit that makes allegations, but you actually would have to go and win that lawsuit all the way through to an appeal to actually win.

Q Okay.

A So it's a claim. It's not that you own it; you're sort of trading around. It's, you know, we've made this claim, and during a settlement, you know, evaluating whether or not, you know, what is the best deal we can make for the Ward, given the facts and circumstances surrounding the divorce and the litigation that's ongoing.

Q Okay. As a result of this settlement, you gave up the Ward's -- you, the attorneys, the guardian, the negotiating gave up the Ward's claim to one-half of the Scribner mansion, correct?
A The claim.

Q Okay. And you gave up one-half of the claim to the London apartment, correct?

A Yes.

Q And you obtained one-half of the 808 Lexington building, correct?

A Yes.

Q And one-half of the 330 Ocean, correct?

A Right.
(Testimony of Ashley Crispin, July 24, 2016, p. 90 lines 11-25; p. 93-94 lines 23-2; p. 94-96 lines 21-7)

Q Okay. Did you make a determination of who was Lorna's heirs, or after she died, was that a determination ever made?

A Well, the Court, the probate court, made that determination in connection with the Estate of Lorna Bivins.
And to my knowledge, her sole heir -- she died without a will; that's been covered -- was Oliver, Jr.
(Testimony of Brian O'Connell, July 26, 2017, p. 83 lines 20-25)

Q There was other litigation with Lorna's estate that was resolved through the New York settlement agreement, right?

A Yes.
The primary action that was pending was -- it's called a petition to determine beneficiaries. And the guardian, Mr. Rogers, filed this in Lorna's estate, essentially saying even though they were

supposedly divorced in Texas, there are a lot of issues with how that divorce came about. My understanding is that Lorna at the time was incompetent and in a nursing home. So there are issues about the validity of that divorce decree.
So the petition was filed in Lorna's estate to ask the Florida probate judge to essentially not honor the Texas divorce and treat them as still being married. And the effect of that would have been to essentially unwind a lot of what had happened with respect to the buildings, as well as give Mr. Bivins, the guardianship, an opportunity to collect more money from Lorna's estate, spousal rights, because they'd still be married. So that could potentially be some serious money.
And that was -- that was given up in exchange for receiving the value from the two buildings.
(Testimony of Jeffrey Skatoff, July 27, 2017 pp 96-97 lines 21-17)

Q What was Julian Bivins' position with regard to the petition to determine beneficiaries?

A Mr. Denman said in court on behalf of his client, Julian, that it was a pipe dream.

Q And what was the result of that action?

A The result of that action, in my opinion, was that that was the club necessary to club Lorna's estate into giving up one-half of 808 Lexington and one-half of 330 South Ocean. It was the threat of that action that was filed that achieved the settlement agreement where those properties were obtained.
(Testimony of Jeffrey Skatoff, July 27, 2017 p. 198 lines 16-25)

2. Whether the Defendants should have taken reasonable measures to prevent the Sovereign Bank Mortgage on 808 Lexington from going into default.

It is not the responsibility of Defendants to make payments on the Ward's assets. The Guardian is responsible for paying the Ward's bills. The Guardian had an agreement with Oliver Jr. wherein Oliver Jr. would manage 808 Lexington, collect the rents, and pay the mortgage. The Guardian was not aware the mortgage had not been paid until he was notified of the default. Additionally, Defendant Stein was hired after the mortgage was already in default so he could not have prevented it.

Q Well, did you advise or instruct the guardian to pay the Sovereign mortgage?

A No. By the time I was involved, the Sovereign was in default and had been accelerated. And under New York law, in the absence of writing in the agreement of mortgage to the contrary, there is no right to cure or reinstate a defaulted accelerated mortgage. The mortgage company would not have accepted any payments at that point.
(Testimony of Keith Stein, July 18, 2017, p. 77 lines 16-23)

Q Whose responsibility was it?

A We had an agreement with Oliver, Jr. and Deborah Kuhnel. Oliver, Jr. lived blocks from this place. He owned 50 percent of this through his mother's estate, and he used to look after this, and

I would send him e-mails asking if certain things have been done, such as paying the mortgage, and I was assured these things were being done.
(Testimony of Curtis Rogers, July 19, 2017, p. 42 lines 11-18)

Q Okay. And you had a verbal agreement with him, you're
telling us, to take care of the -- take care of your Ward's 50 percent interest in the commercial building at 808?

A Correct, because there's also a 50 percent interest in the house here, and I was to take care of that, and they were to take care of the New York. It balanced out.
(Testimony of Curtis Rogers, July 19, 2017, p. 44 lines 8-13)

Q So I'm clear, as we sit here today, other than, as you've told us, your communications with your clients, Mr. Kelly or Mr. Rogers, you're unaware that any rents were collected based upon the efforts of Ciklin Lubitz during the time that you were attorneys for the Ward prior to the time the property was sold, correct?

MS. STUDLEY: Objection, mischaracterization.

THE COURT: Overruled.

THE WITNESS: The problem with the question – and I'm not trying to be difficult -- is I'm an attorney. I represent a guardian. The guardian is the one who stands in the shoes of the ward. The guardian collects rent in this particular situation. For example, the guardian pays bills.
So I would not have the opportunity to collect rent. That would be something my guardian would do.
So my answer to you would most likely be no, because I don't really recall doing that, but it would most likely always be no, because I don't do those kinds of functions. That's what my guardians do. I render advice to my guardians.
(Testimony of Ashley Crispin, July 20, 2017, p. 86-87 lines 12-5)

A Let's see here. I know for a fact that when I had learned that the mortgage had been accelerated and that there were other problems that -- with an agreement that my client had previously made prior to my tenure as his lawyer with Oliver, Jr. about an agreement that he had to pay the expenses on 330, and that Oliver, Jr. would pay the expenses associated with 808. And I found out that agreement was not working.
I drafted a petition, and I don't remember exactly what the title of it was, but it was something along the lines of please, Court, allow my client to do whatever it takes to deal with this property in 808, including filing a partition action, which would lead to an eventual sale, so that we could deal with the mortgage and then also file an accounting action so we could seek remedy against Oliver, Jr. for whatever he didn't pay and, frankly, have the guardian make up what, you know, he didn't pay with respect to 808 and what may be owed on 330.
So that's what we did.
(Testimony of Ashley Crispin, July 20, 2017, p. 189 lines 4-21)

A And I think it was an acceptable and appropriate vehicle

to try to address the problem that was having, which was the mortgage issue. And not only that, but my guardian having a partner that wasn't living up to a deal and that he couldn't work with.
(Testimony of Ashley Crispin, July 20, 2017, p. 198 lines 18-22)

A Because Mr. Rogers, before Mr. O'Connell and I came on on his behalf, had made an agreement with Oliver, Jr., in his capacity as personal representative of the Lorna estate, that Mr. Rogers, given the fact that he was in litigation with Julian Bivins and did not have the money as of yet to take care of 330 Ocean Boulevard and 808 Lexington, he made a deal with him that Oliver, Jr. would maintain the 808 Lexington property and that he would maintain the 330 property, which he did.
At some point, that agreement came to a head where Mr. Rogers found out that Oliver, Jr. wasn't keeping up his end of the bargain. Mr. Rogers was taking care of 330, but Oliver, Jr. was not taking care of 808. And so there were issues there. It also came to light that there was a mortgage that had been accelerated. And so at this point, there was an over $380,000 obligation between the estate and the guardianship that needed to be dealt with.
Also, there was a question about what was going on with Oliver, Jr. in his maintaining the building. Who was he paying, how much was he paying, and we needed to figure out who owed who what.
(Testimony of Ashley Crispin, July 24, 2017, pp. 173-74 lines 11-7)

Q You mentioned that 808 Lexington was co-owned between Oliver, Sr.'s guardianship and Lorna's estate, correct?

A Yes, that's true.

Q At some point do you know whether there was a mortgage -- first of all, do you know whether there was a mortgage on that property?

A Yes, there was.

Q Do you know what happened to that mortgage?

A I do. There was, long before Mr. O'Connell and Ms. Crispin were involved, there was an agreement, a verbal agreement that was put in place between Mr. Rogers and Oliver II, who was running his mom's estate, and Oliver II would essentially handle everything with respect to 808 Lexington, including paying expenses and handling the mortgage.
Turned out he didn't do that. The mortgage then went into default, and that had to be dealt with, and that was an issue for a considerable period of time with respect to how to deal with that and how to hold somebody responsible for that.

Q Do you know how the guardianship went about dealing with the default on the 808 mortgage?

A Sure.
The guardianship filed a partition action in New York. A partition action is a way to force the sale of a piece of property that's co-owned by people when they're not, say, getting along, or one wants to sell and one doesn't. And so the partition action was filed to force a sale, which would

have resolved all issues with respect to the building. You pay off the mortgage out of the sales proceeds, and that would be the end of it. So that was one thing that was done.
The problem that the guardianship had was that it wouldn't have made sense to cure the mortgage default in any way. My understanding is that it was likely that the entire mortgage would have to have been paid. There wasn't money to do that inside of the guardianship. Even attempting to make payments wouldn't have worked, because there wasn't sufficient money in the guardianship to maintain an adequate reserve for the care of Mr. Bivins, which should be the most important consideration. And in any event, I don't believe it ever would have made sense to both pay the guardianship's share of the mortgage as well as Lorna's estate's share of the mortgage.
So there was essentially no practical or reasonable or sensible way to cure the mortgage problem.

Q Did they -- did that partition action also include an accounting?

A It did.
Oftentimes when a partition action is done, as part of that, you're going to ask the judge overseeing the partition action to figure out from the proceeds who gets what.
So in a commercial building, for example, you'd say, well, that owner took more share of the rents, you might say and I paid more the expenses. So the accounting part of the partition action, which happens at the end after the property is sold, the judge would essentially attempt to balance out the account so everybody gets what they should get based on what happened prior to the sale.
(Testimony of Jeffrey Skatoff, July 27, 2017 pp 90-93 lines 23-2)

3. Whether the Defendants should have taken measures to prevent default interest, attorney's fees and additional expenses to accrue against Oliver Sr.'s assets.

Plaintiff's theory of breach is contradictory because any measures taken by the attorneys to prevent default interest or additional expenses to accrue would have resulted in more attorneys' fees accruing. Furthermore, the attorneys filed a petition in the Guardianship Court for permission to file a partition action in order to sell the property and satisfy the mortgage, sought refinancing terms in order to pay off the mortgage, sought forbearance of a potential foreclosure action, and then ultimately sold the property and paid off the mortgage. The Ward not have the ability to pay his half of the Sovereign mortgage, however regardless of the Ward's ability to pay, Lorna's estate did not have the funds to cover the other half, as demonstrated by the testimony of Deborah Kuhnel below. Therefore, even if Oliver Sr. could contribute half, the mortgage nonetheless could not have been cured.

Q Okay. But you made no payments on the mortgage, right?

A That is correct. I did not have the money.

Q So you had no money to make any payments, or you just didn't have the money in the bank to make the payment of the entire balance?

A You said to cure the mortgage. I did not have the money
to cure the mortgage.

Q And what is your understanding of "cure the mortgage," so we're on the same page?

A Pay it off.

Q Okay. And if you could cure the mortgage just by catching up two months of deficient mortgage payments, would you have been able to do that?

MS. STUDLEY: Your Honor, it assumes facts not in evidence.

THE COURT: Overruled.

THE WITNESS: If I could have paid two months' rent
and then had 400 or some odd thousand dollars paid off with just two months rent, I probably would have done it, but that was not an option.
(Testimony of Curtis Rogers, July 19, 2017 pp. 32-33 lines 10-4)

Q. When Sovereign Bank wanted their money - -

A. Correct.

Q. - - okay, and then you just testified you called Rogers, correct, or communicated with Mr. Rogers, right?

A. Yes.

Q. You wanted him to pay half of what the bank was owed or all of it?

A. There was a sum certain in the letter of default that arrived.

Q. Okay. And that sum, did you want him to pay half of it or all of it?

A. If we could both come up with the assets, half and half, to stop the train, I would have been thrilled to death.

Q. Right. And you would have - - half and half. That's my answer.

A. Correct.

Q. But the Estate of Lorna Bivins that you were working on at Donna Levine's office - - or Donna Levine's office did not have half of it, correct?

A. Not in ready cash, correct.

Q. Right, right. it had assets, but it didn't have the cash - -

A. Correct.

Q. - - to do it right?

A. Good.
(Testimony of Deborah Kuhnel, July 19, 2017, pp. 124-25 lines 19-18).

Q. And so you understood, ma'am, that when you got this August 8, 2012, letter, they had to pay, meaning the Estate of Lorna Bivins and Oliver, Sr., had to pay the entire amount due and owing of $376,448.07 at that point, right?

A. Certainly looks like it to me.

Q. Okay. And the Estate of Lorna Bivins didn't have the cash. It may have had assets. It didn't have the cash to pay that, did it, 50 percent of that?

A. Certainly not.

Q. Okay. And certainly not, you've just testified, that the Estate of Lorna Bivins didn't have its ability to pay 50 percent of whatever would have satisfied the bank prior to that, correct?

A. At that date.

Q. Correct.

A. The Tracy letter.

Q. The July 26 of, like, less than two weeks before this, right?

A. Exactly.
(Testimony of Deborah Kuhnel, July 19, 2017, pp. 128-29 lines 9-2).

A Let's see here. I know for a fact that when I had learned that the mortgage had been accelerated and that there were other problems that -- with an agreement that my client had previously made prior to my tenure as his lawyer with Oliver, Jr. about an agreement that he had to pay the expenses on 330, and that Oliver, Jr. would pay the expenses associated with 808. And I found out that agreement was not working.
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So that's what we did.

(Testimony of Ashley Crispin, July 20, 2017, p. 189 lines 4-21)

Q Okay. Did you ever contact the bank and advise them I'm gonna file an immediate receivership, an ex parte action in New York, to gather up all the rents and pay you, please give us a little time, we'll make sure we bring this current; did you ever try to do that?

A Okay. Two problems. One, I'm not admitted in New York, so I would never call a bank and say something like that. But, two, I can't call a bank when they've accelerated a mortgage, when I don't have the money, meaning my guardian, and the estate doesn't have the money to pay it either.
Neither party had the money. So I'm calling the bank to tell them I'm gonna do what? There's nothing that I can tell them that I'm going to do to satisfy what is the obligation, which is a complete acceleration of the entire principal and interest balance on the mortgage over $350,000.
So, no, I wouldn't do that, because I wouldn't think it was prudent.
(Testimony of Ashley Crispin, July 20, 2017, pp. 194-95 lines 24-15)

THE WITNESS: Your question assumes that that's the right course of action. Your question assumes that if I called the bank, I would have miraculously been able to achieve some result for the guardian.
What I did was I wanted to do something tangible. I wanted to get the Court to approve by guardian to be able to pay off this mortgage, and so that's what I did. I filed the petition to allow that to occur and to retain competent counsel to do it, and that's what I did.
(Testimony of Ashley Crispin, July 20, 2017, p. 197 lines 3-11)

Q Do you know how the guardianship went about dealing with the default on the 808 mortgage?

A Sure.
The guardianship filed a partition action in New York. A partition action is a way to force the sale of a piece of property that's co-owned by people when they're not, say, getting along, or one wants to sell and one doesn't. And so the partition action was filed to force a sale, which would have resolved all issues with respect to the building. You pay off the mortgage out of the sales proceeds, and that would be the end of it. So that was one thing that was done.
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(Testimony of Jeffrey Skatoff, July 27, 2017 pp 91-93 lines 16-2)

Was there any indication in the records you reviewed when analyzing the Oliver Bivins guardianship that the attorneys' motivations were directly related to incurring fees?

A No, I saw nothing that would indicate that.
(Testimony of Jeffrey Skatoff, July 27, 2017 pp 192-93 lines 23-2)

4. Whether the Defendants breached their duty to Oliver Sr. by failing to take reasonable and timely measures to return him to his Texas home.

The Guardian, not the defendants, had the authority to determine the residence of the Ward. In the beginning of the guardianship, Mr. Rogers, did not think it was in the Ward's best interest to be moved to Texas and the Court monitor found no reason to send the Ward to Texas. After the Global Settlement, Mr. Kelly, transported the Ward to Texas in an air ambulance. The delay in this transport was due to the facility not having a bed for him, and when a bed was provided the Ward was transported.

Q Julian in Florida -- you were retained -- excuse me. You
were retained, you were retained to represent the guardian in connection with an action that Julian brought to bring his father back to Texas, correct?

A That's right.

Q Okay. And that was a contentious litigation, correct?

A It was. It went all the way to the appellate court.

Q Okay. And, as a matter of fact, as part of that litigation, Julian brought a petition to discharge Mr. Rogers, correct?

A I don't know the timing, but he definitely did.

Q And that was also contentiously litigated by your firm, correct?

A Yes, it was.

Q Okay. And meanwhile, all this time your firm is billing time to the Ward for preventing Julian from succeeding on that petition and having his father transferred back to Texas, correct?

A Your client didn't have standing, which the Fourth District Court of Appeals agreed.

Q Okay. And –

A So we were successful in that litigation, and so we were awarded fees. Mr. Bivins remained in Florida for many reasons. One, because the guardian, which we heard about earlier, he had the authority to determine the Ward's residence. He determined that he should stay in Florida, so he stayed in Florida.
You then obtained a court monitor to determine whether he should stay in Florida, because you weren't – you weren't satisfied with that, and the court monitor said there was no reason to move Mr. Bivins back to Texas, so Mr. Bivins remained in Florida.
(Testimony of Ashley Crispin, July 20, 2017, pp. 256-57 lines 9-24)

Q And if you could tell the jury, you know, what happened insofar as getting Oliver Bivins back to Texas.

A Well, the son, you know, for a long time wanted the father to come back to Texas. That encompassed a global settlement that he would return. But I had stipulations he'd have a geriatric care manager in Texas, 24-hour private duty, be in the best facility in Amarillo, and that's what we did.
Had to transport him. Had to transport him by air ambulance.
That was the safest means to transport him, and we did that.

Q Was there an issue of getting a bed at one of the facilities there?

A Yeah. The facility, the Childers Place in Amarillo, didn't have a bed right away, so we had him on a waiting list.

Q Per the global settlement, was that where he was to go?

A Correct.

Q Was there some delay because of the bed hold issue?

A Right. We were waiting for a bed.
(Testimony of Stephen Kelly, p. 289-90 lines 20-11)

A The dates -- I believe that those dates are correct, Mr. Denman. But as to the reasons, that was, of course, as Mr. Kelly explained in terms of arranging for his proper placement, and the facility of choice did not have a bed available, hence there was a delay.
(Testimony of Brian O'Connell, July 25, 2017, p. 85 lines 5-9)

A Well, with regard to your question, there's some problems. When you say "we", the guardian made the determination as to what was in the best interest of Oliver, Sr. in terms of where to reside, and that was actually upheld on appeal and upheld after what's called a court monitor that

we've heard about before, which is someone appointed by the guardianship court to investigate that issue.
(Testimony of Brian O'Connell, July 25, 2017, p. 89 lines 15-21)

A The guardian was given total control to make the decision on where my father would live.
(Testimony of Julian Bivins, July 25, 2017 p. 157 lines 4-5)

Q Okay. Who was the only person who could move -- make the decision to move your dad back to Texas, as far as you understood?

A Curtis Rogers.
(Testimony of Julian Bivins, July 25, 2017 p. 158 lines 5-8)

Q Very well, thank you.
You've been re-called to the stand today talking about going to Oliver Bivins, Sr. to Florida, Texas, going back and forth. You would agree with me that Mr. Stein had nothing to do about where Oliver Bivins, Sr. would live; is
that correct?

A Absolutely correct.

Q Okay. And, as a matter of fact, in all fairness here, Ms. Crispin and Mr. O'Connell had nothing to do with where Oliver Bivins, Sr. was gonna live, correct?

A Correct.

Q Okay. The decisions you made regarding where Oliver Bivins, Sr. should live, okay, were based upon your experience as a professional guardian, correct?

A Yes.
Q Okay. Input that you had from court monitors, correct?

A Yes.

Q And your assessment of the totality of the circumstances, if I can use that phrase; is that fair?

A Yes.

Q Okay. And so these were decisions that you made,
correct?

A Yes.

Q With the approval of the Court, obviously, correct?

A Correct.

Q Okay. Nothing to do with the attorneys?

A That's correct.

(Testimony of Curtis Rogers, July 26, 2017, p. 54-55 lines 1-2)

Q And within this document, there's been a lot of talk about you getting your father back to Texas. And you were here; Mr. Kelly was here. Within paragraph 19, it was agreed to that the guardian -- this is the guardian who's going to arrange the transfer, meaning Mr. Kelly, of your father back to Texas, right?

A Yes.

Q Okay. The attorneys don't arrange that; the guardian does that, right?

A Right.
(Testimony of Julian Bivins, July 26, 2017, p. 97 lines 11-20)

Q And who determines where a ward will reside?

A That would be determined by the guardianship judge, with deference to the guardian. Normally if the guardian is arranging the affairs of their ward and it seems appropriate -- well, let me take a step back.
There's an initial plan that the guardian files with the Court, where the guardian explains to the judge exactly what they're going to do with the ward and their finances, and then there's an annual report that's filed, as well, that essentially explains where the ward is living, how they're doing.
The judge will review these documents; and as long as the guardian seems to be doing things that are appropriate and there are no issues, the judge will go along with what the guardian wants. If the judge sees an issue, he may investigate and become involved in terms of where the ward should be living and what the living arrangements should be.

(Testimony of Jeffrey Skatoff, July 27, 2017 p. 77 lines 1-17)

5. Whether the Defendants are entitled to attorneys' fees for actions taken which harmed or provided no benefit to Oliver Sr.

6. Whether the actions of the Defendants for which they sought compensation from Oliver Sr. provided any improvement to the care or treatment, or living conditions of Oliver Sr.

7. Whether the actions of the Defendants for which they sought compensation from Oliver Sr. provided any financial benefit to the estate of Oliver Sr.

These issues have already been adjudicated by the Florida Guardianship Court. The

Guardianship Court determines an attorneys' fee entitlement based on the standard that the attorneys' action benefitted the ward. As such this Court does not have subject matter jurisdiction over this claim due to collateral estoppel, res judicata, and the *Rooker-Feldman* doctrine.

"Collateral estoppel, also known as estoppel by judgment, serves as a bar to relitigation of an issue which has already been determined by a valid judgment." *Stogniew v. McQueen*, 656 So. 2d 917, 919 (Fla. 1995). The *res judicata* defense requires satisfying five conditions: "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; (4) identity of the quality [or capacity] of the persons for or against whom the claim is made; and (5) the original claim was disposed of on the merits." *Kaplan v. Kaplan*, 624 Fed.Appx. 680, 682 (11th Cir. 2015). This doctrine "applies to all matters actually raised and determined as well as to all other matters which could properly have been raised and determined in the prior action, whether they were or not." *ICC Chemical Corp. v. Freeman*, 640 So. 2d 92, 93 (Fla. 3rd DCA 1994). Lastly, the Eleventh Circuit has set forth four criteria that must be satisfied for the *Rooker-Feldman* Doctrine to apply: (1) the plaintiff in federal court is the same as the loser in state court; (2) the prior state court ruling was a final or conclusive judgment on the merits; (3) the plaintiff had a reasonable opportunity to raise its federal claims in the state court; (4) the state court either adjudicated the issue the federal court is considering or the issue was inextricably intertwined with the state court's judgment. *Kozich v. Deibert*, 15-61386-CIV, 2015 WL 12533077, at *3 (S.D. Fla. Oct. 20, 2015) (finding that the *Rooker Feldman* doctrine had been met when "Plaintiff had a reasonable opportunity to – and did – raise many of the same claims and defenses in the state court eviction action that he asserts in the above-styled action.").

A The Ward's assets, after a court order and court approval, after I've proved up that I've benefited the ward, yes, then the assets of the ward are utilized to pay my fees.
(Testimony of Ashley Crispin, July 20, 2017, p. 89 lines 3-5)

A You're talking about the fee statute. Very important that we talk about that, because 744.108 is the fee statute. It's how lawyers get paid.
So you're trying to ask me about a duty to the ward when talking about how lawyers get paid. So I can't blend the two.
But I agree with you, that's how you get paid. If you want to get paid, the proof to the Court is did you benefit the ward through your services to the guardian.
(Testimony of Ashley Crispin, July 20, 2017, p. 126 lines 3-11)

A I don't -- I'm not saying that at all.
What I'm trying to say is the standard in which you get paid is did you provide a benefit to the ward. That's how you get paid. Okay? That's the criteria for that.
When you're talking about what is your, in essence, what is your duties, what is your fiduciary duty to a ward, that's not laid out in 744.108.
(Testimony of Ashley Crispin, July 20, 2017, p. 126 lines 16-22)

A I billed Mr. Rogers or Mr. Kelly for my services and then sought them to be paid from the Ward, and they were paid pursuant to the Court's review of it and a court order. I testified under oath to the Court so that the Court could determine whether it was in the best interests of the

Ward.
And after I testified and Mr. O'Connell testified and the experts testified and you objected, the Court found that it was, it was to be paid from the assets of the Ward.
(Testimony of Ashley Crispin, July 20, 2017, pp. 156-57 lines 22-4)

Q Okay. And for all the litigation that you would perform on~-- to pursue your fees, you would also be able to bill that time to the Ward for collecting those fees, right?

A Right, under the same statute you just showed me, 744.108, yes.

Q Right. So you can go out and hire experts, and the Ward
pays for them, right?

A That's correct, if the Court approves it.

Q And –

A Sometimes they don't, but if they do.

Q Okay. And you can go out and take depositions and bill the Ward for the depositions in connection with that, right?

A Bill the guardian, ask the Court, get court approval, then payment from the Ward.
(Testimony of Ashley Crispin, July 20, 2017, p. 222-23 lines 15-3)

A That the Court approved after hearing evidence about whether or not it was in the best interest of the Ward, and awarded them to the law firm for representing our clients under 744.108, and after hearing your objections and your client saying that they were unreasonable, awarded anyway.
(Testimony of Ashley Crispin, July 20, 2017, p. 238 lines 25-7)

Q Okay. So when you have an evidentiary hearing on fees,
tell the jury, please, what that entails.

A It entails primarily, even if there's an objecting party, it doesn't really matter, the Court looks at the fees, every single entry that is made by every single timekeeper and determines whether, one, the timekeeper is charging a rate that's appropriate, and, two, whether the hours that they spend are appropriate, and has the ability to cut the hours down to even zero if they so feel that it's inappropriate.
But not only that, they have to look to determine whether the services that were provided, by looking at the actual time entries, were for the benefit of the Ward.
And so they make those determinations by looking at the actual time entries, and questions are asked, if there are any, about, well, what were you doing, why were you doing it, you know, those kinds of things.
(Testimony of Ashley Crispin, July 24, 2017, pp. 221-22 lines 20-10)

Q Okay. And the Court made a determination that the attorneys had done a good job for Oliver, Sr.; did the Court not?

A They found that we were working in the best interests of the Ward and that we did a very good job.
(Testimony of Ashley Crispin, July 24, 2017, p. 225 lines 3-7)

Q Okay. But there was no benefit achieved to the Ward from September 17th, 2013, until it finally closed and the deed was transferred on December 16th, 2014, correct?

A No, because the Court heard our fee petition, actually it's an exhibit here, and determined that it was a benefit to the Ward to have achieved that settlement.
(Testimony of Brian O'Connell, July 25, 2017, p. 23 lines 13-18)

Q You billed time, significant time to litigating efforts to keep Oliver, Sr. in Florida, correct?

A There was time that was billed to -- about half on the guardianship -- guardian client, excuse me, under these various headings, and that was certainly one heading. And then ultimately those fees were presented to the guardianship court for approval, and many times you objected to those fees, but the judge considered, the guardianship judge considered those arguments and decided what fees should be paid.
(Testimony of Brian O'Connell, July 25, 2017, p. 91 lines 5-13)

Q What's the predicate for approval of fees?

A Essentially the judge will determine, first of all, is your rate appropriate, what you're charging per hour; is the amount of time that you spent appropriate for the tasks that were being done; but then, most importantly, did you provide a benefit to the ward. The Court will not the approve typically attorney fees if the Court doesn't see any benefit to the ward. So if the Court approves the fees, the Court would implicitly then be finding that there was a benefit to the ward.

Q Do you know whether that happened in this case?

A I believe it did. I believe there were several fee orders that were issued by the Court.
(Testimony of Jeffrey Skatoff, July 27, 2017 pp 104 lines 3-15)

8. Whether the Defendants breached their duty to Oliver Sr. by failing to seek an immediate discharge of Rogers as Guardian.

No evidence was presented on this issue.

9. Whether the Defendants breached their duty to Oliver Sr. by entering into an agreement

to obtain a contingency fee rather than an hourly fee for seeking to establish Oliver Sr.'s equitable or legal right to pre-divorce property.

The Guardian chose to enter into a reduced contingency fee agreement with Defendants because the Ward did not have the cash available to pay their reduced hourly rates. The Court approved the contingency agreement, percentage, and awarded Defendants the appropriate amount of fees.

Q And did you also believe they had a fiduciary duty to you?

A I had to work out contingency agreements, because there was no money to pay them. So I don't know what you mean by a fiduciary agreement.
(Testimony of Curtis Rogers, July 19, 2017, p. 18 lines 12-17)

Q And you understand -- as a matter of fact, when you brought the action in the probate court to get an equitable interest in the properties, you provided a contingency fee relationship with your attorneys, correct?

A Correct, approved by the courts.

Q Okay. But that's what you sought to do, correct?

A Actually, we had no money. We didn't have enough money to pursue that.
(Testimony of Curtis Rogers, July 19, 2017, pp. 144-45 lines 20-2)

Q So in the year -- the years 2012 and 2013, were you dealing with issues in Texas?

A Yes.

Q And were you dealing with issues in New York?

A Yes.

Q And did you have the money to pay for all of those issues?

A No.
(Testimony of Curtis Rogers, July 19, 2017, p. 232 lines 11-18)

A Exactly, based on a positive recovery.
And, again, this contingency fee agreement, albeit between Mr. Rogers and my firm, it was Court approved.
(Testimony of Ashley Crispin, July 20, 2017, p. 132 lines 19-21)

10. Whether the Defendants failed to meet their professional standard of care in performing due diligence in connection with the New York Settlement.

There is no evidence that Defendants failed to meet their standard of care in performing due diligence and valuing the properties in the New York Settlement. Defendants obtained formal written broker's opinions from Eastern Consolidated, one of the largest brokerage firms in New York, on the values of the New York Properties in order to value the settlement. Additionally, the broker's opinion on 808 Lexington was higher than the appraisal obtained by Plaintiff, and the property sold for more as well.

Q Well, you weren't sure of the property involving -- let's start with 808 Lexington. You weren't sure of the value of 808 Lexington, were you?

A Well, we -- we had a broker's opinion of value from Eastern Consolidated, one of the largest commercial real estate brokerage firms in New York, that had been provided to us months before this hearing, wherein they determined that the value of the property was between four-and-a-half million and six and a half million. And we also had an appraisal which you obtained, which -- from a licensed appraiser, which valued the property at approximately 4.3 million. So we did know -- we had that information available to us at that time.
(Testimony of Keith Stein, July 18, 2017, p. 135 lines 13-24)

Q Okay. And what was the value of the appraisal that Julian Bivins got through his lawyer for 808?

A It was 4,317,000. Am I close?

Q Okay. So can -- now, I used another term of art there really quick, "fair market value". What does that mean, can you tell the members of the jury?

A Well, fair market value is the value at which a willing buyer and a willing seller would agree to transact a purchase and sale.

Q A willing buyer, right?

A A willing buyer.

Q Did Mr. Lieberman bring willing buyers to the table after the approval of the New York settlement agreement?

A Yes.

Q And what were those willing buyers willing to pay for 808?

A A range of between five and a half million dollars up to $6.1 million.

Q So the appraisal that Julian got was wrong? Is that right?

A I guess one could say it was wrong. It was shy by at least $1.2 million.

Q Appraisals aren't bulletproof; they can be wrong?

A Correct. That's precisely why I had testified earlier that, in my business, we frequently don't rely on appraisals, other than in a very technical sense, when they're required by a regulated bank or even a nonregulated lender who wants to put that document in their file but isn't really relying on the value that's being provided by the appraiser.

Q And Mr. Lieberman, he works for Eastern Consolidated; is that right?

A He did at that time.

Q Okay. He worked at Eastern Consolidated at the time. Do you have an understanding of what Eastern Consolidated is?

A Eastern Consolidated is one of the largest commercial real estate brokerage firms in New York.
(Testimony of Keith Stein, July 18, 2017, pp. 189-90 lines 5-11)

Q Okay. Now, the decision to sell, is that a decision under the Florida guardianship law that's made by attorneys, or is it made by the professional guardian?

A Well, it's really made by the guardianship judge about who has the authority to sell, if you have the authority to sell the property, whether it should be sold. All you're really doing is recommending to the guardianship judge what you think should take place and why.

Q Okay. And if the guardianship judge, based upon your experience in the state of Florida, based upon your review of the file and all the documentation that you reviewed, if the guardianship judge felt that he needed a formal appraisal as opposed to a broker's opinion of value, he would have asked for it, correct?

MR. DENMAN: Objection, Your Honor; calls for speculation.

THE COURT: Overruled.

THE WITNESS: Yes. And, in fact, in the transcript he said he didn't need one. That's what the judge said.
(Testimony of Jeffrey Skatoff, July 27, 2017 p. 113 lines 7-25)

Q Did you have an opportunity to evaluate that settlement agreement?

A I did. And what I did was I looked at the – the movement of the property, saw that the claims were being released, and, most importantly, I read the transcript of the hearing wherein the judge, during an extensive hearing, asked everybody involved in the case what they wanted and why, and everybody had an opportunity to explain what their position was on the New York

settlement agreement.
And you can see from the transcript -- I don't know if the jury's had access to it, but you can see in the transcript the analysis that the judge goes through, essentially saying getting certainty is almost always going to be better than litigation was sort of how the judge made his determination.

Q What do you mean getting certainty is always better than having litigation?

A What the guardianship had were claims against Lorna's estate that would require either pending lawsuits to be continuously maintained and funded and dealt with. So that would be the uncertainty of litigation. Versus the certainty that the New York settlement agreement gave to the guardianship, which was you'll get 50 percent of 808 Lexington and 50 percent of 330 South Ocean that you didn't previously own.
And the settlement agreement is what did that. And the judge was, from looking at the transcripts and his reasoning, seemed to be persuaded that getting certainty in terms of approximately $3 million worth of value from these properties was better than the alternative of continuing to litigate.

Q Is there some particular concern with certainty when you're dealing with a 93-year-old ward with dementia?

A Well, sure.
Anytime you're involved in litigation, you've gotta consider what does it cost to maintain the lawsuit and how long is it going to take to resolve. So this was an opportunity to resolve the matter right now with certainty with somebody who may not live that much longer, as opposed to leave him in an uncertain position without the benefit of the additional money coming into the guardianship estate.

(Testimony of Jeffrey Skatoff, July 27, 2017 pp 93-95 lines 20-10)

11. Whether the Defendants breached their duty to Oliver Sr. by representing to the Court that he had insufficient funds for living expenses to pay for hourly attorneys' fees.

No evidence was presented that the Ward had sufficient funds to pay for hourly fees. To the contrary, the evidence in the record shows the Ward had insufficient funds to pay for hourly fees.

Q And did you also believe they had a fiduciary duty to
you?

A I had to work out contingency agreements, because there was no money to pay them. So I don't know what you mean by a fiduciary agreement.
(Testimony of Curtis Rogers, July 19, 2017, p. 18 lines 12-17)

Q And you understand -- as a matter of fact, when you brought the action in the probate court to get an equitable interest in the properties, you provided a contingency fee relationship with your

attorneys, correct?

A Correct, approved by the courts.

Q Okay. But that's what you sought to do, correct?

A Actually, we had no money. We didn't have enough money to pursue that.
(Testimony of Curtis Rogers, July 19, 2017, pp. 144-45 lines 20-2)

Q So in the year -- the years 2012 and 2013, were you dealing with issues in Texas?

A Yes.

Q And were you dealing with issues in New York?

A Yes.

Q And did you have the money to pay for all of those issues?

A No.
(Testimony of Curtis Rogers, July 19, 2017, p. 232 lines 11-18)

A Exactly, based on a positive recovery.
And, again, this contingency fee agreement, albeit between Mr. Rogers and my firm, it was Court approved.
(Testimony of Ashley Crispin, July 20, 2017, p. 132 lines 19-21)

12. Whether the Defendants breached their standard of care to Oliver Sr. by failing to take appropriate measures in New York to collect rents to maintain the mortgage and other expenses on property in which Oliver Sr. had a legal or equitable interest.

It is not the responsibility of Defendants to make payments on the Ward's assets or collect rents on the assets. The Guardian is responsible for paying the Ward's bills and collecting rents. The Guardian had an agreement with Oliver Jr. wherein Oliver Jr. would manage 808 Lexington, collect the rents, and pay the mortgage. The Guardian was not aware the mortgage had not been paid until he was notified of the default. Mr. Rogers testified that he relied on Oliver Jr. to collect rents and handle the management of 808 and that he did not make decisions regarding the rent and leases for 808 Lexington units based on advice of counsel.

Q Whose responsibility was it?

A We had an agreement with Oliver, Jr. and Deborah Kuhnel. Oliver, Jr. lived blocks from this place. He owned 50 percent of this through his mother's estate, and he used to look after this, and I would send him e-mails asking if certain things have been done, such as paying the

mortgage, and I was assured these things were being done.
(Testimony of Curtis Rogers, July 19, 2017, p. 42 lines 11-18)

Q Okay. And you had a verbal agreement with him, you're telling us, to take care of the – take care of your Ward's 50 percent interest in the commercial building at 808?

A Correct, because there's also a 50 percent interest in the house here, and I was to take care of that, and they were to take care of the New York. It balanced out.
(Testimony of Curtis Rogers, July 19, 2017, p. 44 lines 8-13)

Q. Okay. With regard to not following up on the lease or obtaining rents on the property, you were doing this with the advice of counsel, correct?

MS. STUDLEY: Your Honor, objection.

THE COURT: Overruled.

THE WITNESS: No.

BY MR. DENMAN:
Q. You were doing this on your own?
A. Not following up?

Q. Not obtaining any rents on the third and fourth floor apartment or renewing the lease on the second floor apartment.

A. No, I was not doing that on the basis of what counsel told me.

[...]

Q. Why did you not follow up and collect rents?

A. Because I had an agreement that this was - - that was Oliver Jr.'s responsibility, and I took responsibility for the property in Florida.
(Testimony of Curtis Rogers, July 19, 2017, p. 47-48 lines 11-12).

A I did collect rent from Oliver Bivins, Jr., through his attorney, Donna Levine, for the period of time of August through November of 2014, because the check was made out to the guardianship and was tendered to my law firm.
(Testimony of Ashley Crispin, July 20, 2017, p. 85 lines 11-14)

Q So I'm clear, as we sit here today, other than, as you've told us, your communications with your clients, Mr. Kelly or Mr. Rogers, you're unaware that any rents were collected based upon the efforts of Ciklin Lubitz during the time that you were attorneys for the Ward prior to the time the property was sold, correct?

MS. STUDLEY: Objection, mischaracterization.

THE COURT: Overruled.

A The problem with the question – and I'm not trying to be difficult -- is I'm an attorney. I represent a guardian. The guardian is the one who stands in the shoes of the ward. The guardian collects rent in this particular situation. For example, the guardian pays bills.
So I would not have the opportunity to collect rent. That would be something my guardian would do.
So my answer to you would most likely be no, because I don't really recall doing that, but it would most likely always be no, because I don't do those kin's of functions. That's what my guardians do. I render advice to my guardians.
(Testimony of Ashley Crispin, July 20, 2017, pp. 86-87 lines 12-5)

A Well, I mean, I guess it's the way you look at it. I mean, you know, the claim was made by myself and you, on behalf of your client, that we were entitled to have the rents all the way back to August of 2013. That was the claim that we made against them, and luckily both of us were successful and all the rent was collected.
So we absolutely made the claim, despite whether or not the actual deed had been transferred, that we deserved that rent. We got it back.
(Testimony of Ashley Crispin, July 20, 2017, pp.106-7 lines 21-4)

Q Okay. You represented to the Court in September 2013, that in connection -- if the Court could approve the transaction, that the guardian would have 100 percent ownership of 808 Lexington and would start receiving in excess of 12 to $15,000 per month from the rental income that Oliver II was retaining, correct?

A That was the expectation, yes. I don't know exactly what I said, but certainly that was the expectation. So, yes, I'm sure I did.
(Testimony of Ashley Crispin, July 20, 2017, p. 109 lines 7-15)

THE WITNESS: If you say represented to the judge, I've got Oliver, Jr. and his agents that I have to deal with, and my client can't help if they do something that he doesn't want that want meeting with his expectation. The only thing he can try to do is try to resolve that matter, and if he
can't resolve that matter, frankly, he has to get involved in litigation. And that's -- it's not representation, it's -- yes, it was the expectation. And unfortunately it wasn't met, but it wasn't because of my guardian.
(Testimony of Ashley Crispin, July 20, 2017, p. 250-51 lines 22-5)

A I've spent significant time at the end of 2014 and 2015 dealing that issue that resolved itself in a court-ordered payment by Oliver, Jr. to make up for those rents that he took.
(Testimony of Ashley Crispin, July 20, 2017, p. 253 lines 9-12)

13. Whether Defendants breached their duty to Oliver Sr. by failing to hire attorneys in New York with appropriate experience.

The Guardian was in charge of choosing and hiring attorneys' in New York. The Defendants did not retain nor were they responsible for retaining any New York attorneys in this matter. As demonstrated in Curtis Rogers' testimony, Keith Stein is an experienced attorney:

Q And you understand from Mr. Stein's background, as it was represented to you, is that he has extensive background in capitalization and refinancing, correct?

A Yes.

Q And you understand that his main expertise in law would be real estate and financing, correct? Or let me -- that's what – specialized in. That's his area of practice would be real estate and corporate, right?

A I believe so.
(Testimony of Curtis Rogers, July 19, 2017, p. 163 lines 11-19)

14. Whether the Defendants breached their duty to Oliver Sr. to obtain commercially reasonable and available financing to refinance the Beachton mortgage.

The Defendants were not under any obligation to refinance the 808 Lexington property. The Guardian received the refinancing offers and chose to sell the property rather than refinance it.

But if we owned the building outright and weren't contending with the fact that 50 percent of the building were owned by the Estate of Lorna Bivins, but if we owned it, if the guardianship owned the building outright, and we were able to refinance it with enough additional cash flow after paying off the mortgage, we would have been able to renovate the building and rent it out presumably at market.
(Testimony of Keith Stein, July 18, 2017, p. 142 lines 10-16)

Q But instead of getting loans to take it out at 465, 470, 500, you went out and sought loans upwards up to a million 5, correct?

A Those were the numbers I was asked to get by the guardian to get quotes on.
(Testimony of Keith Stein, July 18, 2017, p. 167 lines 4-8)

Q Now, as far as some of the items that would require court approval, did you ever seek court approval to actually allow for the refinancing of the 808 property?

A No.
(Testimony of Keith Stein, July 18, 2017, p. 188 lines 1-4)

Q There was quite a bit of discussion about a
requirement to refinance the property. There's not actually a term in the New York settlement

agreement that says that you have to refinance 808 Lexington, is there?

A No, there is not.

Q So, in fact, when the Court approved the New York settlement agreement, it didn't actually approve a requirement to refinance the property; isn't that right?

A That's correct.

Q Okay. So, again -- and there's not actually any court order saying that you have to refinance the property on any particular terms?

A No.
(Testimony of Keith Stein, July 18, 2017, p. 198 lines 12-24)

Q Whose decision was it to refinance or not to refinance?

A It would be the guardian, with court approval.

Q Right.
Why didn't the guardian if you know, refinance the Beachton mortgage?

A Julian objected to each and every one of the term sheets proposed.
(Testimony of Ashley Crispin, July 24, 2017, p. 208 lines 4-10)

Q And what did you want to do insofar as the property, if anything?

A The property in New York at the 808? I wanted to sell it. I wanted to sell it right away.
(Testimony of Stephen Kelly, July 24, 2017 pp. 286-87 lines 24-2)

15. Whether the Defendants breached their duty of loyalty to Oliver Sr. by seeking excessive refinancing to cover attorneys' fees as opposed to an amount equivalent to the outstanding balance of the Beachton Mortgage.

There is no evidence that the Defendants were under any obligation to refinance the 808 Lexington property. Additionally, Defendants sought refinancing information to determine if it was a good action to take on behalf of the ward. Ultimately the guardian decided to sell the property rather than refinance it.

A Well, my understanding was that that 150 was to go into the management trust, but would ultimately be paid by the trust to Donna Levine. I mean, there was a huge discussion in the context of the settlement agreement that counsel to the Estate of Lorna Bivins was owed $150,000.

Q So then that was what was provided under the settlement agreement is that the Ward would

pay an additional $150,000 –

A That was one of the things in the settlement agreement.

Q So that's 465 and 150,'but you were seeking upwards of a million 5; is that correct?

A And as I explained earlier, we were also seeking enough money to be able to renovate the building, bring it to market and create proper liquidity out of it, as well as contingent funds for the support of the Ward.
(Testimony of Keith Stein, July 18, 2017, p. 169 9-24)

16. Whether the Defendants should have undertaken efforts to seek equitable distribution of property owned by Oliver Sr. and Lorna identified in the Final Decree of Divorce.

No evidence regarding the equitable distribution of the properties was presented.

17. Whether the Defendants failed to timely and appropriately seek to enforce the New York Settlement Agreement.

The Defendants sought to enforce the New York Settlement.

A Again, the communications that I have with my client I'm not permitted to discuss. So as it relates to items that I've done, I filed a petition to compel compliance of Oliver
Bivins, Jr. with respect to the New York settlement agreement. I authored that, and I signed, and I filed it with the Court.
(Testimony of Ashley Crispin, July 20, 2017, p. 86 lines 7-11)

Q Okay. But the guardianship never got a hundred percent ownership of 808 Lexington until the sale over 15 months later, correct?

A No. But the reason for that is because the approval of the New York settlement -- excuse me -- was in September of 2013. Pursuant to its terms -- and I don't have it in front of me, but I am very familiar with it, and it provided for court approval. Not only Florida court approval but any other court approval that was going to be necessary, which required a New York ancillary guardianship. And what that really means is that Curtis Rogers, who is the guardian, had to go up to New York, and he had to establish an ancillary guardianship up there, which he attempted to do.
The agreement said until that time that he got that ancillary guardianship established, he couldn't actually accept the deed and hold property, because he's a Florida
guardian, not a New York resident. So we did that.
We then had another -- but this is important, because we then had another difficulty, which was that we had a successor guardian come in, Steve Kelly. He came in the April-May 2014 timeframe. So you then have another successor guardian who has to go through the same process. At that time, luckily the process in New York had changed, and it was just a registration

process, and we were able to do that quickly.
Then Mr. Kelly wanted to sell the property, and so the transfer occurred through there.
(Testimony of Ashley Crispin, July 20, 2017, pp. 95-96 lines 13-18)

Q But actually the deeds were not transferred, and 100 percent ownership of those properties were not effected until the time of the closing in December of 2014, correct?

A That's correct.

Q Okay. And that's when the deeds were ultimately transferred as part of that transaction, correct?

A That's right, due to the problems that, again, Ms. Crispin testified to before in terms of needing the New York guardianship, the ancillary guardianship in New York to be established, to take the title, to approve the settlement, and then there were the disputes that were ongoing with the counsel for Oliver, Jr.

Q Okay.

A About the deed transfer.
(Testimony of Brian O'Connell, July 25, 2017 p. 21 lines 1-19)
Q Explain to the jury why things such as that take a bit of time, particularly given the circumstances that were present here.

A Once again, normally when Lorna's estate agrees to turn over its half, it doesn't happen, I think ultimately what was determined was that they needed to put in place a New York guardianship to receive the one-half of 808. And my understanding is that that took a considerable amount of time. They had hired one lawyer to do the work, and that lawyer didn't do it properly. I think they went to another lawyer to do this procedure, which, again, everything takes time.
And I think ultimately what happened was that New York passed a new law allowing the transfer to take place without the guardianship, so ultimately they were able to facilitate the deal. Just there were delays like crazy, but it did happen.
(Testimony of Jeffrey Skatoff, July 27, 2017 p. 112 lines 16-6)

18. Whether the Defendants breached their duty to Oliver Sr. by failing to maximize the value of Oliver Sr.'s assets by improving or renting 808 Lexington or 330 Ocean Boulevard at market value.

Defendants did not have the authority to make decisions regarding renovation and renting of the properties on the Ward's behalf. The Guardian chose not to renovate 808 Lexington because it required time and money that the Ward did not have.

Long-term ownership of that property for this guardianship was a problematic concept. The property was in severely delapidated state, would have required extensive amounts of cash in order to renovate the property to bring it to rentable standards in all -- in all of its rentable space.

It would have been absentee ownership, because the guardian was in Florida, not in New York. I certainly was not -- I'm not a property manager and was not retained to be a property manager.
So the answer is I was a proponent of having ownership either reside solely in the guardianship's hands so that a liquidity event could be consummated with respect to that property to -- to create monies available for the benefit of the Ward.
(Testimony of Keith Stein, July 18, 2017, p. 132 lines 2-15)

Q Which is exactly why you said that it would be utterly foolish not to perform some simple deferred maintenance and lease the two empty apartments, correct?

A Well, the simple deferred maintenance would have required probably tens of thousands of dollars to put those two apartments into liveable condition.
Mr. Denman, if you had seen those apartments, you couldn't imagine the condition they were in. They had no plumbing, they had no appliances, they had no flooring, they had cracked windows, there's a staircase in the building that one could barely get up. I don't even know that it would have passed code under its condition.
So I -- I'm not -- as I said, I'm not a property manager. I don't know exactly what it would have cost to fully renovate the building in order to rent those two apartments out. But if we owned the building outright and weren't contending with the fact that 50 percent of the building were owned by the Estate of Lorna Bivins, but if we owned it, if the guardianship owned the building outright, and we were able to refinance it with enough additional cash flow after paying off the mortgage, we would have been able to renovate the building and rent it out presumably at market.
(Testimony of Keith Stein, July 18, 2017, pp. 141-42 lines 20-16)

Q Okay. And the deferred maintenance that you're referring to, as we sit here today, do you know how much the deferred maintenance would have been to put in to rent those units for 5100 per month?

A I see what it says over here, 50 to a hundred thousand dollars.

[...]

Q Okay. So let me direct you to page 94, line 15. At that date, were you asked this question under oath, and did you give this answer?

"Question: So you believe in its current condition, you could actually get for the third and fourth floor apartments in their current conditions, with 50 to $100,000 in deferred maintenance, you could get up to $5100 rent per month on those?"
And would you read your answer on line 22.

A Yes, my answer is, yes, these are conservative numbers. Fifty to a hundred thousand, if you multiply –

Q Sir, my question –

A -- 50 times two, it is a hundred thousand.
(Testimony of Lipa Lieberman, July 20, 2017, pp. 11-14 lines 17-5)

19. Whether the Defendants breached their duty of loyalty to Oliver Sr. by permitting the Guardian to enter into an excessive and unnecessary exclusive listing agreement.

The Guardian chose to enter into the listing agreement with Lipa Lieberman at Eastern Consolidated, the commission was a standard rate that did not require Court approval. However, the Court did actually approve the listing agreement and the commission.

Q Did you actually seek court approval to hire Mr. -- Eastern Consolidated and Lipa Lieberman?

A As part of the order to sell the property, it was approved.

Q And you actually saw an order approving the commission that Mr. Lipa Lieberman was paid; isn't that right?

A Yes.
(Testimony of Keith Stein, July 18, 2017, p. 187 lines 5-11)

Q Okay. And, Mr. Lieberman, you understand that the Court approved your commission retention and payment in this matter, correct?

A Yes.

Q Okay. And you also understand that the Court could have undone or modified your agreement, correct?

A At any time.
(Testimony of Lipa Lieberman, July 20, 2017, p. 59 lines 8-14)

Q Okay. And, let's see, you had tried in June. As a matter of fact, that's why the exclusive listing agreement has the June date on it. It wasn't actually signed in June, but it had the June date on it, because you'd been trying to get an exclusive signed, but it wasn't being signed, right?

A Well, it's not that it wasn't being signed. I was always told that it would have to be, you know, approved by the Court, so . . .
(Testimony of Lipa Lieberman, July 20, 2017, p. 61 lines 12-19)

Q Is this the petition that you said that everyone was advised and knew that Eastern Consolidated had entered into an exclusive listing agreement with the guardian for 6 percent?

A I said -- exactly what it says here is exactly what I said, Kelly is hiring Eastern Consolidated.

Q Kelly is hiring Eastern Consolidated, a commercial real estate firm, located in New York City,

to market the real property and accept contracts, subject to court approval, for the sale of the property at the highest and best fair market value to the highest bidder, right?

A Yes.

Q Okay. Where –
MR. DENMAN: And, please, if you could make that a bit smaller so we can see the whole document?
BY MR. DENMAN:
Q The document nowhere in here says that this is going to be an exclusive listing agreement for Eastern Consolidated, does it?

A It doesn't say that, but, I mean, it's very clear that Eastern Consolidated is being contemplated by Kelly to be hired.

Q It doesn't say that he's going to be getting a 6 percent commission, does it?

A Well, it doesn't say that, but it doesn't need to. The guardian is permitted under the guardianship law to hire real estate agents to list properties at standard rates, as long as it's a standard rate. And 6 percent would certainly be a standard rate, and so there was no need to really put that in there. It would need to be in there if it was more than a standard rate.
(Testimony of Ashley Crispin, July 20, 2017, p.140-41 lines 17-21)

Q Okay. You would agree with me, well, the first paragraph up at the top talks about Mr. Lieberman's commission that he would get for the sale, right?

A Exactly. It was court approved. His 300,000, or his 6 percent, is court approved.
(Testimony of Ashley Crispin, July 24, 2017, p. 51 lines 16-20)

Q When you were asked about the hearing that ultimately approved the brokerage agreement for Eastern Consolidated, there was a lot made about an agreement being signed two days before the hearing, and then you mentioned that the court can confirm an agreement.
Can you explain what that means to the jury.

A Yes. As I indicated earlier, there's a list of about 20 factors that require court approval before the guardian can undertake these; signing contracts, selling real estate, things of that nature: And the Guardianship Code says that the guardian is supposed to get permission ahead of time or can ask the Court to confirm the action after the fact. Both are permissible under the Guardianship Code.

Q And does the Court necessarily have to confirm the action?

A If the Court doesn't confirm the action in some way, then there could be an issue.

Q And it may not -- then the contract wouldn't go forward, right?

A That's right.
Oh, I see what you're saying. Right, then the contract would be void.
(Testimony of Jeffrey Skatoff, July 27, 2017 pp. 196-97 lines 10-6)

20. Whether the Defendants breached their duty to Oliver Sr. by misrepresenting to the Court that the Oliver Bivins Management Trust (the "Trust") was refusing to pay the Ward's medical and living expenses in order to obtain approval of the New York Settlement and to sell 808 Lexington.

No evidence was presented regarding a misrepresentation that the Oliver Bivins Management Trust was not paying the Ward's medical and living expenses.

21. Whether the Defendants breached their duty to Oliver Sr. by misrepresenting to the Court that 808 Lexington and 67th were of equal value.

Plaintiff offers no proof that Mr. Stein or any of the CLO Defendants misrepresented that 808 Lexington and 67th Street were of equal value. First, the testimony provided by Keith Stein was not given to persuade the Court to enter an Order approving the New York Settlement; it was given after the settlement had already been approved. Second, Mr. Stein did not make any misrepresentation, his testimony is as follows:

Q What was the value. Didn't you agree that on that date you believed it was worth roughly equivalent value to 808. That's what I asked.

A So my belief on that day was that 808 Lexington Avenue is worth between four and a half and five and a half million dollars if a hundred percent owned by the guardianship, and that based on the broker's opinion of value that had been provided by Eastern Consolidated on 39 East 67th Street of between 7 and 9 million, that if we put the mid-point of 8 million, and we assumed we, at best, could achieve a 50 percent ownership of that property, that would equate to 4 million. Therefore, I was comparing, in my answer to the judge there, 4 million on 67th Street, to four and a half to five and a half million on 808 Lexington.

Q And do you remember when you were sworn under oath and you said in your transcript of your testimony, September 17th, 2013, referring to page 16, line 14, and you said: And the townhouse, the East 67th Street property, is probably roughly equivalent to value of the 808 Lexington property.
So you think it was a good exchange or a good trade, correct? That's what you testified to under oath, then, correct?

A Yes. But it was -- first of all, within context it was understood that value to us would mean 50 percent of the value of 67th Street, not a hundred percent, because we were never -- we would, at best, never been able to achieve more than 50 percent of the value of 67th Street. Remember that

unless the divorce was unwound, Oliver, Sr. had absolutely no rights to any value to 67th Street. He didn't own it. He hadn't owned it since 1950 -- 1961. He had had zero interest in East 67th Street since 1961.
So --

Q Okay. Your testimony, you would agree with me, looking at the transcript, under oath was, page 16, line 15: And the townhouse, the East 67th Street property, is probably roughly equivalent to value of 808 Lexington property?
That's what you testified under oath then.

MR. BLAKER: Your Honor, this is the third time in about three minutes.

THE COURT: Yes, you can explain why you said that.

THE WITNESS: Okay. And the answer I just gave was the explanation, but I'll give it again.
In the context of that hearing, what was being considered -- and, by the way, this hearing was not the hearing to approve the settlement. This was a fee hearing.

BY MR. DENMAN:
Q So that changes it; your testimony is different under oath?

A No, I'm just pointing that out. I'm not saying it's different. I'm just pointing it out. I was under oath, and I was testifying to the best of my ability, knowledge and truthfulness. But in the context of that hearing, what was being compared in terms of relative values was how much is 808 Lexington worth, and the answer is four and a half to five and a half million dollars, a hundred percent of which would be owned by the guardianship. So let's pick the midpoint and say that's $5 million of value that would be owned by the guardianship.
And East 67th Street was considered to be worth 7 and 9 million by an experienced commercial real estate broker in Manhattan who delivered an opinion of value, and his opinion was 7 to 9 million for that building. So if you pick the midpoint of 8, and we, at best, if we were able to unravel the divorce could have laid claim to 50 percent of that 8 million, that's a $4 million number.
So I'm comparing in this testimony 4 million on the one hand to four and a half to 5 million on the other hand.

Q Okay.

A And to me, in my mind, in Manhattan real estate, given everything else that would have been resolved by virtue of completing this settlement agreement, was a good compromise and result.
(Testimony of Keith Stein, July 18, 2017, p. 144-47 lines 14-13)

Q Okay. The morning, what was the morning session that you were in court for? What was that?

A The morning session was for the approval of the actual transaction.

Q So anything you said in the afternoon was not the predicate for the Court to approve the New

York settlement agreement; is that right?

A No, the New York settlement agreement had been approved I think by, you know, 10:00 a.m. or 10:15, whatever the timing was, and then we broke, and then we started another hearing on other matters, which is what I was testifying to in the transcript that you're referring to.
(Testimony of Keith Stein, July 18, 2017, pp. 195-96 lines 22-8)

22. Whether Defendants breached their duty to Oliver Sr. by pursuing litigation after the death of Oliver Sr.

The Guardians chose to contest the validity of the Ward's will.

Q And so the petitions on January 15th, 2016, February 5th, 2016, and August 23rd, 2016, were filed almost a year after the Ward passed away, correct?

A But like I said, I mean, the disputes between the guardian -- the guardians, Mr. Rogers, Mr. Kelly, and your client, Mr. Bivins, and the various law firms involved, they continue on to this day. That's what I'm trying to say.
Unfortunately, a discharge hasn't been able to be obtained because of those objections, and the fees will continue on until such time as there's a discharge. And hopefully, maybe we can resolve some things someday, and we've tried before, and I hope that we can.
(Testimony of Ashley Crispin, July 24, 2017, pp. 99-100 lines 23-3)

Q And, as a matter of fact, as part of your fees, you're actually seeking fees, your own fees, in connection with petitioning the probate court to revoke the will, right?

A I filed that -- remember, when you say "you", I represent somebody. It's like there's an empty seat here that we don't keep talking about. I have my guardian, that's my client. And my client is seeking to remove Julian Bivins as personal representative, and he's also seeking to invalidate the will, because he believes it's invalid.

Q Okay. And the petition to invalidate the will is not bought -- brought on behalf of anyone in the Bivins family, right?

A No, it's brought on behalf of the men that worked on his behalf for many years.
(Testimony of Ashley Crispin, July 24, 2017, p. lines -)

23. Whether the Defendants misrepresented to the Court the benefit to Oliver Sr. from the New York Settlement and the sale of 808 in order to obtain payment of their attorneys' fees.

Plaintiff admitted that the New York Settlement was a net benefit to the Ward and Plaintiff has not presented any evidence of any misrepresentation to the Guardianship Court regarding the benefit of the New York Settlement to Oliver Sr.

Q And in the New York settlement, as part of the New York settlement, you would agree that you represented to the Court that this was great for the Ward, because he would start receiving next month all of the rental income that Oliver, Jr. was receiving, correct?

A That was the expectation, absolutely. And Ms. Levine actually chimed in on that, and she represented Oliver, Jr. as personal representative, and she also stated that that would be what would happen. So it certainly was the expectation, yes.
(Testimony of Ashley Crispin, July 20, 2017, p. 106 lines 6-15)

Q Okay. And the Court heard argument, and all the attorneys got a chance to talk, and the Court considered the situation; is that correct?

A Considered Julian's objection.

Q But Julian said, or Mr. Denman said on Julian's behalf, did he not, that this settlement was a net positive to Oliver, Sr.; is that correct?

A On many occasions.

Q Correct.
He said it more than one time. He said it multiple times, that this settlement was a net positive to Oliver, Sr., correct?

A That's right, because it was.
(Testimony of Ashley Crispin p. 203-04 lines 19-6)

Q Explain to the jury, please, the extent of that litigation that was pending that the New York settlement intended to resolve.

A Sure.
There were a number of competing actions between the guardianship and Lorna's estate. Attached to the New York settlement agreement is a whole separate page of all the different cases that are pending that were going to be resolved by the settlement agreement. Might be 12 of them, maybe 15. It covers the entire page.
The most important one was the release and withdrawal of the petition to determine beneficiaries; whereby, if that claim had been pursued, then the guardianship would have had some rights to Lorna's estate. And so that was one of the main things that was given up in the New York settlement agreement.
(Testimony of Jeffrey Skatoff, July 27, 2017 pp 109-9 lines 23-13)

Q Okay. And as we were discussing, Mr. Skatoff, that's your opinion based upon your experience, based upon your review of the documentation and based upon all the facts and circumstances of which you are aware, is that that New York settlement was a good idea and prudent?

A Yes.
(Testimony of Jeffrey Skatoff, July 27, 2017 pp. 111 lines 7-12)

Q Did you have an opportunity to evaluate that settlement agreement?

A I did. And what I did was I looked at the – the movement of the property, saw that the claims were being released, and, most importantly, I read the transcript of the hearing wherein the judge, during an extensive hearing, asked everybody involved in the case what they wanted and why, and everybody had an opportunity to explain what their position was on the New York settlement agreement.
And you can see from the transcript -- I don't know if the jury's had access to it, but you can see in the transcript the analysis that the judge goes through, essentially saying getting certainty is almost always going to be better than litigation was sort of how the judge made his determination.

Q What do you mean getting certainty is always better than having litigation?

A What the guardianship had were claims against Lorna's estate that would require either pending lawsuits to be continuously maintained and funded and dealt with. So that would be the uncertainty of litigation. Versus the certainty that the New York settlement agreement gave to the guardianship, which was you'll get 50 percent of 808 Lexington and 50 percent of 330 South Ocean that you didn't previously own.
And the settlement agreement is what did that. And the judge was, from looking at the transcripts and his reasoning, seemed to be persuaded that getting certainty in terms of approximately $3 million worth of value from these properties was better than the alternative of continuing to litigate.

Q Is there some particular concern with certainty when you're dealing with a 93-year-old ward with dementia?

A Well, sure.
Anytime you're involved in litigation, you've gotta consider what does it cost to maintain the lawsuit and how long is it going to take to resolve. So this was an opportunity to resolve the matter right now with certainty with somebody who may not live that much longer, as opposed to leave him in an uncertain position without the benefit of the additional money coming into the guardianship estate.

(Testimony of Jeffrey Skatoff, July 27, 2017 pp 93-95 lines 20-10)

Was there any indication in the records you reviewed when analyzing the Oliver Bivins guardianship that the attorneys' motivations were directly related to incurring fees?

A No, I saw nothing that would indicate that.
(Testimony of Jeffrey Skatoff, July 27, 2017 pp 192-93 lines 23-2)

24. Whether the Defendants breached their duty of loyalty to Oliver Sr. by improperly retaining proceeds of the sale of 808 Lexington.

This issue has already been adjudicated by the Florida Guardianship Court and the Fourth District Court of Appeal in Florida in *Bivins v. Guardianship of Bivins*, 42 Fla. L. Weekly D1053 (Fla. 4th DCA May 10, 2017). As such this Court does not have subject matter jurisdiction over this claim due to collateral estoppel, res judicata, and the *Rooker-Feldman* doctrine.

"Collateral estoppel, also known as estoppel by judgment, serves as a bar to relitigation of an issue which has already been determined by a valid judgment." *Stogniew v. McQueen*, 656 So. 2d 917, 919 (Fla. 1995). The *res judicata* as a defense requires satisfying five conditions: "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; (4) identity of the quality [or capacity] of the persons for or against whom the claim is made; and (5) the original claim was disposed of on the merits." *Kaplan v. Kaplan*, 624 Fed.Appx. 680, 682 (11th Cir. 2015). This doctrine "applies to all matters actually raised and determined as well as to all other matters which could properly have been raised and determined in the prior action, whether they were or not." *ICC Chemical Corp. v. Freeman*, 640 So. 2d 92, 93 (Fla. 3rd DCA 1994). Accordingly, the Eleventh Circuit has set forth four criteria that must be satisfied for the *Rooker-Feldman* Doctrine to apply: (1) the plaintiff in federal court is the same as the loser in state court; (2) the prior state court ruling was a final or conclusive judgment on the merits; (3) the plaintiff had a reasonable opportunity to raise its federal claims in the state court; (4) the state court either adjudicated the issue the federal court is considering or the issue was inextricably intertwined with the state court's judgment. *Kozich v. Deibert*, 15-61386-CIV, 2015 WL 12533077, at *3 (S.D. Fla. Oct. 20, 2015) (finding that the *Rooker Feldman* doctrine had been met when "Plaintiff had a reasonable opportunity to – and did – raise many of the same claims and defenses in the state court eviction action that he asserts in the above-styled action.").

A Again, what happened was that the judge listened to both sides as to what this holdback should be, how much it should be, and found that we were correct that under the law, a certain amount could be held back, and, yes, that another amount was to be transferred to the trust. And the judge, so there's completeness, the judge did rule that Mr. Stein could retain his $72,000, but then the appellate court said that should be transferred.
So just so there's a whole story told.
(Testimony of Brian O'Connell, July 25, 2017, p. 84 lines 2-9)