

U.S. District Court
Southern District of Florida (West Palm Beach)
CIVIL DOCKET FOR CASE #: 9:15-cv-81298-KAM

Bivins v. Rogers et al
Assigned to: Judge Kenneth A. Marra
Referred to: Magistrate Judge William Matthewman
Demand: \$75,000
Cause: 28:1332 Diversity-Breach of Fiduciary Duty

Date Filed: 09/17/2015
Jury Demand: Defendant
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Plaintiff

Julian Bivins
as personal Representative of the ancillary
Estate of Oliver Bivins

represented by Charles Dennis Bavol
The Bleakley Bavol Law Firm
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Tampa, FL 33613
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ATTORNEY TO BE NOTICED

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ATTORNEY TO BE NOTICED

V.

Defendant

Curtis Cahalloner Rogers, Jr .
as former guardian
TERMINATED: 02/13/2017

represented by Charles Leroy Pickett , Jr.
Ciklin Lubitz & O'Connell
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ATTORNEY TO BE NOTICED

Defendant

Stephen M Kelly
as successor guar dian

represented by Charles Ler oy Pickett , Jr.
(See above for address)
TERMINATED: 09/14/2016
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Rachel Studley
Wicker Smith O'Hara McCoy & Ford, LLC
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ATTORNEY TO BE NOTICED

Defendant

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ATTORNEY TO BE NOTICED

Jeffrey Alan Blaker
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ATTORNEY TO BE NOTICED

Lorin Louis Mrachek
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ATTORNEY TO BE NOTICED

Rachel Studley
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ATTORNEY TO BE NOTICED

Defendant

Ashley N. Crispin

represented by Brian Bradshaw Joslyn
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles Leroy Pickett , Jr.
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brandon Jay Hechtman
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ATTORNEY TO BE NOTICED

Jeffrey Alan Blaker
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ATTORNEY TO BE NOTICED

Lorin Louis Mrachek
(See above for address)
ATTORNEY TO BE NOTICED

Rachel Studley
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Ciklin Lubitz Martens & O'Connell

represented by Alan Benjamin Rose
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Brian Bradshaw Joslyn
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Lorin Louis Mrachek
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brandon Jay Hechtman
(See above for address)
ATTORNEY TO BE NOTICED

Rachel Studley
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Keith B. Stein

represented by Charles Leroy Pickett , Jr.
(See above for address)
TERMINATED: 04/15/2016

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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Cozen O'Connor
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ATTORNEY TO BE NOTICED

Jeffrey Alan Blaker
(See above for address)
ATTORNEY TO BE NOTICED

Rachel Studley
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Beys Liston Mobargha & Berland, LLP
formerly known as
Beys Stein Mobargha and Berland, LLP

represented by Charles Leroy Pickett, Jr.
(See above for address)
TERMINATED: 04/15/2016
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alexandra Jordan Schultz
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ATTORNEY TO BE NOTICED

Jeffrey Alan Blaker
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ATTORNEY TO BE NOTICED

Rachel Studley
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Law Offices of Keith B. Stein

represented by Alexandra Jordan Schultz
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Charles Leroy Pickett, Jr.
(See above for address)
TERMINATED: 04/15/2016
LEAD ATTORNEY
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Jeffrey Alan Blaker
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ATTORNEY TO BE NOTICED

Rachel Studley
 (See above for address)
 ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/17/2015	1	COMPLAINT against All Defendants. Filing fees \$ 400.00 receipt number 113C-8090084, filed by Julian Bivins. (Attachments: # 1 Exhibit Exhibit A, # 2 Civil Cover Sheet Civil Cover Sheet)(Denman, Joseph) (Entered: 09/17/2015)
09/17/2015	2	Judge Assignment to Judge Kenneth A. Marra (lrz) (Entered: 09/18/2015)
09/17/2015	3	Clerks Notice pursuant to 28 USC 636(c). Parties are hereby notified that the U.S. Magistrate Judge William Matthewman is available to handle any or all proceedings in this case. If agreed, parties should complete and file the attached form. (lrz) (Entered: 09/18/2015)
09/22/2015	4	Order Requiring Counsel to Confer and File Joint Scheduling Report. Signed by Judge Kenneth A. Marra on 9/21/2015. (ir) (Entered: 09/22/2015)
11/18/2015	5	NOTICE of Filing Proposed Summons(es) by Julian Bivins re 1 Complaint filed by Julian Bivins (Attachments: # 1 Summon(s) Ciklin Lubitz, # 2 Summon(s) Curtis Rogers, # 3 Summon(s) Brian O'Connell, # 4 Summon(s) Stephen Kelly, # 5 Summon(s) Ashley Crispin) (Denman, Joseph) (Entered: 11/18/2015)
11/18/2015	6	Summons Issued as to Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell, Curtis Cahalloner Rogers, Jr. (cqs) (Entered: 11/18/2015)
11/19/2015	7	NOTICE of Filing Proposed Summons(es) by Julian Bivins re 1 Complaint filed by Julian Bivins (Attachments: # 1 Summon(s) Stein Law, # 2 Summon(s) Beys Liston, # 3 Summon(s) Keith Stein) (Denman, Joseph) (Entered: 11/19/2015)
11/20/2015	8	Summons Issued as to Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. (cqs) (Entered: 11/20/2015)
12/21/2015	9	NOTICE of Attorney Appearance by Charles Leroy Pickett, Jr on behalf of Stephen M Kelly. Attorney Charles Leroy Pickett, Jr added to party Stephen M Kelly(pty:dft). (Pickett, Charles) (Entered: 12/21/2015)
12/23/2015	10	Unopposed MOTION for Extension of Time to Respond to Operative Complaint re 1 Complaint by Stephen M Kelly. Responses due by 1/11/2016 (Attachments: # 1 Text of Proposed Order)(Pickett, Charles) (Entered: 12/23/2015)
12/23/2015	11	(WITHDRAWN PER DE# 14)First MOTION for Extension of Time to File Response/Reply/Answer as to 1 Complaint Operative Complaint by Beys Liston Mobargha & Berland, LLP, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell, Curtis Cahalloner Rogers, Jr. Attorney Charles Leroy Pickett, Jr added to party Beys Liston Mobargha & Berland, LLP(pty:dft), Attorney Charles Leroy Pickett, Jr added to party Ciklin Lubitz Martens & O'Connell(pty:dft), Attorney Charles Leroy Pickett, Jr added to party Ashley N. Crispin(pty:dft), Attorney Charles Leroy Pickett, Jr added to party Law Offices of Keith B. Stein(pty:dft), Attorney Charles Leroy Pickett, Jr added to party Brian M. O'Connell(pty:dft), Attorney Charles Leroy Pickett, Jr added to party Curtis Cahalloner Rogers, Jr(pty:dft). (Attachments: # 1 Text of Proposed Order)(Pickett, Charles) Modified on 12/28/2015 (cqs). (Entered: 12/23/2015)
12/23/2015	12	ORDER granting 10 Motion for Extension of Time. Response to complaint due Jan. 19,

		2016 Signed by Judge Kenneth A. Marra on 12/23/2015. (mln) (Entered: 12/23/2015)
12/23/2015	13	(WITHDRAWN)NOTICE by Ciklin Lubitz Martens & O'Connell re 11 First MOTION for Extension of Time to File Response/Reply/Answer as to 1 Complaint Operative Complaint that attorney Charles Pickett does NOT represent Defendant Law offices of Keith B. Stein(Pickett, Charles)Text Modified on 12/28/2015 (cqs). (Entered: 12/23/2015)
12/23/2015	14	NOTICE OF WITHDRAWAL OF MOTION by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell, Curtis Cahalloner Rogers, Jr, Keith B. Stein re 11 First MOTION for Extension of Time to File Response/Reply/Answer as to 1 Complaint Operative Complaint filed by Law Offices of Keith B. Stein, Beys Liston Mobargha & Berland, LLP, Brian M. O'Connell, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Curtis Cahalloner Rogers, Jr. . Attorney Charles Leroy Pickett, Jr added to party Keith B. Stein(pty:dft). (Pickett, Charles) (Entered: 12/23/2015)
12/23/2015	15	Corrected MOTION for Extension of Time to File Response/Reply/Answer as to 1 Complaint by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell, Curtis Cahalloner Rogers, Jr, Keith B. Stein. (Attachments: # 1 Text of Proposed Order)(Pickett, Charles) (Entered: 12/23/2015)
12/23/2015	16	NOTICE by Ciklin Lubitz Martens & O'Connell re 13 Notice (Other), Withdrawal of DE 13 (Pickett, Charles) (Entered: 12/23/2015)
12/23/2015	17	NOTICE by Ciklin Lubitz Martens & O'Connell that attorney Charles Pickett does not represent Defendant Beys Liston Mobargha & Berland, LLP (Pickett, Charles) (Entered: 12/23/2015)
12/28/2015		Set Deadlines All Defendants. Answer Due 1/19/2016. (cqs) (Entered: 12/28/2015)
12/28/2015		Attorney Charles Leroy Pickett, Jr terminated Pr DE#17. (cqs) (Entered: 12/28/2015)
01/08/2016	18	AMENDED COMPLAINT against All Plaintiffs, filed by Julian Bivins. (Attachments: # 1 Exhibit EXHIBIT A)(Denman, Joseph) (Entered: 01/08/2016)
01/12/2016	19	ENDORSED ORDER granting 15 Motion for Extension of Time to File Response/Answer to 1 Complaint filed by Julian Bivins. Response due 1/19/16. Signed by Judge Kenneth A. Marra on 1/12/2016. (ir) (Entered: 01/12/2016)
01/19/2016	20	MOTION to Dismiss 18 Amended Complaint , MOTION to Dismiss for Lack of Jurisdiction 18 Amended Complaint (Responses due by 2/5/2016) by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Pickett, Charles) (Entered: 01/19/2016)
01/20/2016	21	NOTICE by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell re 20 MOTION to Dismiss 18 Amended Complaint MOTION to Dismiss for Lack of Jurisdiction 18 Amended Complaint of Filing Exhibits 3-6 (Attachments: # 1 Exhibit 3, part 1, # 2 Exhibit 3, part 2, # 3 Exhibit 3, part 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6) (Pickett, Charles) (Entered: 01/20/2016)
01/22/2016		Attorney Charles Leroy Pickett, Jr representing Beys Liston Mobargha & Berland, LLP (Defendant) Activated. (Pickett, Charles) (Entered: 01/22/2016)
01/22/2016	22	NOTICE of Attorney Appearance by Wendy J Stein on behalf of Curtis Cahalloner Rogers, Jr. Attorney Wendy J Stein added to party Curtis Cahalloner Rogers, Jr(pty:dft).

		(Stein, Wendy) (Entered: 01/22/2016)
01/22/2016	23	MOTION for Extension of Time to File Response/Reply/Answer to Complaint by Curtis Cahalloner Rogers, Jr. (Stein, Wendy) (Entered: 01/22/2016)
01/22/2016	24	MOTION to Dismiss 18 Amended Complaint, 1 Complaint for Insufficient Service by Beys Liston Mobargha & Berland, LLP. Responses due by 2/8/2016 (Attachments: # 1 Exhibit Declaration in Support of Motion to Dismiss, # 2 Text of Proposed Order) (Pickett, Charles) (Entered: 01/22/2016)
01/22/2016	25	Amended MOTION to Dismiss 18 Amended Complaint, 1 Complaint , First MOTION to Stay Amended Complaint(Responses due by 2/8/2016) by Beys Liston Mobargha & Berland, LLP. (Attachments: # 1 Exhibit A)(Pickett, Charles) (Entered: 01/22/2016)
01/23/2016	26	NOTICE by Beys Liston Mobargha & Berland, LLP re 25 Amended MOTION to Dismiss 18 Amended Complaint, 1 Complaint First MOTION to Stay Amended Complaint of Filing Exhibits 1-6 (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 3 part 2, # 5 Exhibit 3 part 3, # 6 Exhibit 4, # 7 Exhibit 5, # 8 Exhibit 6) (Pickett, Charles) (Entered: 01/23/2016)
01/26/2016	27	ENDORSED ORDER granting 23 Motion for Extension of Time to File Response/Answer to 18 Amended Complaint filed by Julian Bivins. Curtis Cahalloner Rogers, Jr Answer due 2/11/2016. Signed by Judge Kenneth A. Marra on 1/26/2016. (ir) (Entered: 01/26/2016)
01/28/2016	28	NOTICE of Attorney Appearance by Brian Bradshaw Joslyn on behalf of Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. Attorney Brian Bradshaw Joslyn added to party Ciklin Lubitz Martens & O'Connell(pty:dft), Attorney Brian Bradshaw Joslyn added to party Ashley N. Crispin(pty:dft), Attorney Brian Bradshaw Joslyn added to party Brian M. O'Connell(pty:dft). (Joslyn, Brian) (Entered: 01/28/2016)
01/29/2016	29	MOTION to Dismiss 1 Complaint , MOTION to Stay (Responses due by 2/16/2016) by Curtis Cahalloner Rogers, Jr. (Stein, Wendy) (Entered: 01/29/2016)
02/05/2016	30	RESPONSE/REPLY to 29 MOTION to Dismiss 1 Complaint MOTION to Stay by Julian Bivins. (Attachments: # 1 Exhibit Ex. 1 - Motion for Original Trial Judge to RETain and/or Handle Case, # 2 Exhibit Ex. 2 - Palm Beach Post Articles, # 3 Exhibit Ex. 3 - Pages from December 14, 2015 Transcript)(Denman, Joseph) (Entered: 02/05/2016)
02/08/2016	31	MOTION for Extension of Time Additional Time to Perfect Service On Beys Liston Mobargha & Berland, LLP by Julian Bivins. Responses due by 2/25/2016 (Attachments: # 1 Exhibit A- Affidavit of Service - Farah Muratovic, # 2 Exhibit B- Affidavit of Service - Ashley Smith)(Denman, Joseph) (Entered: 02/08/2016)
02/08/2016	32	RESPONSE/REPLY to 25 Amended MOTION to Dismiss 18 Amended Complaint, 1 Complaint First MOTION to Stay Amended Complaint by Julian Bivins. (Attachments: # 1 Exhibit 1- Adversary Proceeding for Declaratory Judgment, # 2 Exhibit 2- Motion for Original Trial Judge to Retain and/or Handle Case, # 3 Exhibit 3 - Motion for Additional Time to Perfect Service, # 4 Exhibit 4 - Palm Beach Post articles)(Denman, Joseph) (Entered: 02/08/2016)
02/16/2016	33	RESPONSE/REPLY to 29 MOTION to Dismiss 1 Complaint MOTION to Stay by Julian Bivins. (Denman, Joseph) (Entered: 02/16/2016)
02/16/2016	34	Unopposed MOTION for Extension of Time to File Reply Memorandum of Law to February 17, 2016 re 30 Response/Reply (Other), by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell. Responses due by 3/4/2016 (Attachments: # 1 Text of Proposed Order)(Pickett, Charles) (Entered: 02/16/2016)

02/17/2016	35	REPLY to Response to Motion re 20 MOTION to Dismiss 18 Amended Complaint MOTION to Dismiss for Lack of Jurisdiction 18 Amended Complaint filed by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell. (Pickett, Charles) (Entered: 02/17/2016)
02/18/2016	36	NOTICE by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell re 35 Reply to Response to Motion, of Filing Exhibit 1 (Attachments: # 1 Exhibit 1, pgs. 1-50, # 2 Exhibit 1, pgs. 51-100, # 3 Exhibit 1, pgs. 101-150, # 4 Exhibit 1, pgs. 151-185) (Pickett, Charles) (Entered: 02/18/2016)
02/18/2016	37	REPLY to Response to Motion re 25 Amended MOTION to Dismiss 18 Amended Complaint, 1 Complaint First MOTION to Stay Amended Complaint filed by Beys Liston Mobargha & Berland, LLP. (Attachments: # 1 Exhibit 1, pgs. 1-50, # 2 Exhibit 1, pgs. 51-100, # 3 Exhibit 1, pgs. 101-150)(Pickett, Charles) (Entered: 02/18/2016)
02/19/2016	38	ENDORSED ORDER granting nunc pro tunc 34 Motion for Extension of Time to file reply memorandum. Reply due 2/18/16. Signed by Judge Kenneth A. Marra on 2/19/2016. (ir) (Entered: 02/19/2016)
02/19/2016	39	NOTICE by Julian Bivins re 31 MOTION for Extension of Time Additional Time to Perfect Service On Beys Liston Mobargha & Berland, LLP (Attachments: # 1 Text of Proposed Order) (Denman, Joseph) (Entered: 02/19/2016)
02/22/2016	40	NOTICE by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell re 35 Reply to Response to Motion, of Correction of Error (Pickett, Charles) (Entered: 02/22/2016)
02/24/2016	41	RESPONSE in Opposition re 31 MOTION for Extension of Time Additional Time to Perfect Service On Beys Liston Mobargha & Berland, LLP filed by Beys Liston Mobargha & Berland, LLP. Replies due by 3/7/2016. (Attachments: # 1 Exhibit 1, Declaration in Support of Beys' Response)(Pickett, Charles) (Entered: 02/24/2016)
02/25/2016	42	REPLY to Response to Motion re 31 MOTION for Extension of Time Additional Time to Perfect Service On Beys Liston Mobargha & Berland, LLP filed by Julian Bivins. (Denman, Joseph) (Entered: 02/25/2016)
02/26/2016	43	MEMORANDUM in Support re 20 MOTION to Dismiss 18 Amended Complaint MOTION to Dismiss for Lack of Jurisdiction 18 Amended Complaint by Curtis Cahalloner Rogers, Jr. (Stein, Wendy) (Entered: 02/26/2016)
02/29/2016	44	ORDER granting 31 Motion for Extension of Time to perfect service; denying as moot 24 Motion to Dismiss. Signed by Judge Kenneth A. Marra on 2/26/2016. (ir) (Entered: 02/29/2016)
03/02/2016	45	Unopposed MOTION for Extension of Time to File Joint Scheduling and Discovery Conference Report re 4 Order Requiring Joint Scheduling Report by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin. Responses due by 3/21/2016 (Attachments: # 1 Text of Proposed Order)(Pickett, Charles) (Entered: 03/02/2016)
03/04/2016	46	ENDORSED ORDER granting 45 Motion for Extension of Time. Joint Scheduling Report due by 3/18/2016 Signed by Judge Kenneth A. Marra on 3/4/2016. (ir) (Entered: 03/04/2016)
03/10/2016	47	NOTICE of Attorney Appearance by Brandon Jay Hechtman on behalf of Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. Attorney Brandon Jay Hechtman added to party Ciklin Lubitz Martens & O'Connell(pty:dft), Attorney Brandon Jay Hechtman added to party Ashley N. Crispin(pty:dft), Attorney Brandon Jay

		Hechtman added to party Brian M. O'Connell(pty:dft). (Hechtman, Brandon) (Entered: 03/10/2016)
03/18/2016	48	SCHEDULING REPORT - Rule 16.1 by Curtis Cahalloner Rogers, Jr (Stein, Wendy) (Entered: 03/18/2016)
03/18/2016	49	NOTICE of Filing Proposed Summons(es) to Beys Liston Mobargha & Berland, LLP by Julian Bivins re 18 Amended Complaint filed by Julian Bivins (Attachments: # 1 Summon(s)) (Denman, Joseph) (Entered: 03/18/2016)
03/21/2016	50	Summons Issued as to Beys Liston Mobargha & Berland, LLP. (tpl) (Entered: 03/21/2016)
03/23/2016	51	SCHEDULING ORDER: Jury Trial set for 3/6/2017 09:00 AM in West Palm Beach Division before Judge Kenneth A. Marra., Calendar Call set for 3/3/2017 10:00 AM in West Palm Beach Division before Judge Kenneth A. Marra., Amended Pleadings due by 3/25/2016., Discovery due by 9/19/2016., Joinder of Parties due by 3/25/2016., Dispositive Motions due by 10/19/2016. ORDER REFERRING CASE to Magistrate Judge William Matthewman for Discovery Matters, ORDER REFERRING CASE to Mediation. Signed by Judge Kenneth A. Marra on 3/22/2016. (ir) (Entered: 03/23/2016)
03/23/2016	52	ORDER SETTING DISCOVERY PROCEDURE. Signed by Magistrate Judge William Matthewman on 3/23/2016. (srd) (Entered: 03/24/2016)
04/07/2016	53	STIPULATION for Substitution of Counsel by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein (Blaker, Jeffrey) (Entered: 04/07/2016)
04/08/2016		Attorney Jeffrey Alan Blaker terminated. Per DE#53. (cqs) (Entered: 04/08/2016)
04/08/2016	54	Initial Disclosure(s) Rule 26 by Julian Bivins (Denman, Joseph) (Entered: 04/08/2016)
04/14/2016	55	MOTION to Stay /Abate by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. Responses due by 5/2/2016 (Hechtman, Brandon) (Entered: 04/14/2016)
04/14/2016	56	MOTION to Withdraw Document 20 MOTION to Dismiss 18 Amended Complaint MOTION to Dismiss for Lack of Jurisdiction 18 Amended Complaint by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. Responses due by 5/2/2016 (Hechtman, Brandon) (Entered: 04/14/2016)
04/14/2016	57	NOTICE of Attorney Appearance by Rachel Studley on behalf of Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. Attorney Rachel Studley added to party Ciklin Lubitz Martens & O'Connell(pty:dft), Attorney Rachel Studley added to party Ashley N. Crispin(pty:dft), Attorney Rachel Studley added to party Brian M. O'Connell(pty:dft). (Studley, Rachel) (Entered: 04/14/2016)
04/15/2016		Attorney Jeffrey Alan Blaker representing Stein, Keith B. (Defendant) Activated. (cqs) (Entered: 04/15/2016)
04/15/2016		Attorney Charles Leroy Pickett, Jr terminated Per DE#53. (cqs) (Entered: 04/15/2016)
04/18/2016	58	MOTION to Stay -- Abate by Stephen M Kelly. Responses due by 5/5/2016 (Attachments: # 1 Text of Proposed Order)(Pickett, Charles) (Entered: 04/18/2016)
04/18/2016	59	MOTION to Withdraw Document 20 MOTION to Dismiss 18 Amended Complaint MOTION to Dismiss for Lack of Jurisdiction 18 Amended Complaint by Stephen M Kelly. Responses due by 5/5/2016 (Attachments: # 1 Text of Proposed Order)(Pickett, Charles) (Entered: 04/18/2016)
04/18/2016	60	NOTICE OF WITHDRAWAL OF MOTION by Curtis Cahalloner Rogers, Jr re 29

		MOTION to Dismiss 1 Complaint MOTION to Stay filed by Curtis Cahalloner Rogers, Jr. (Stein, Wendy) (Entered: 04/18/2016)
04/18/2016	61	NOTICE by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein Defendants Notice of Joinder in Motion to Withdraw Motion to Dismiss or Stay and Joinder in Motion to Abate (Blaker, Jeffrey) (Entered: 04/18/2016)
05/02/2016	62	RESPONSE to Motion re 55 MOTION to Stay /Abate, 58 MOTION to Stay -- Abate and Notice of Joinder 61 filed by Julian Bivins. Replies due by 5/12/2016. (Denman, Joseph) (Entered: 05/02/2016)
05/02/2016	63	RESPONSE in Opposition re 56 MOTION to Withdraw Document 20 MOTION to Dismiss 18 Amended Complaint MOTION to Dismiss for Lack of Jurisdiction 18 Amended Complaint , 59 MOTION to Withdraw Document 20 MOTION to Dismiss 18 Amended Complaint MOTION to Dismiss for Lack of Jurisdiction 18 Amended Complaint and Notices of Joinder 60 and 61 (Objections) filed by Julian Bivins. Replies due by 5/12/2016. (Denman, Joseph) (Entered: 05/02/2016)
05/12/2016	64	REPLY to Response to Motion re 55 MOTION to Stay /Abate filed by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. (Hechtman, Brandon) (Entered: 05/12/2016)
05/12/2016	65	REPLY to Response to Motion re 56 MOTION to Withdraw Document 20 MOTION to Dismiss 18 Amended Complaint MOTION to Dismiss for Lack of Jurisdiction 18 Amended Complaint filed by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. (Hechtman, Brandon) (Entered: 05/12/2016)
05/12/2016	66	REPLY to Response to Motion re 58 MOTION to Stay -- Abate filed by Stephen M Kelly. (Pickett, Charles) (Entered: 05/12/2016)
05/12/2016	67	REPLY to Response to Motion re 59 MOTION to Withdraw Document 20 MOTION to Dismiss 18 Amended Complaint MOTION to Dismiss for Lack of Jurisdiction 18 Amended Complaint filed by Stephen M Kelly. (Pickett, Charles) (Entered: 05/12/2016)
05/12/2016	68	MOTION to Adopt/Join 55 MOTION to Stay /Abate, 64 Reply to Response to Motion by Curtis Cahalloner Rogers, Jr. (Stein, Wendy) (Entered: 05/12/2016)
05/12/2016	69	REPLY to Response to Motion re 56 MOTION to Withdraw Document 20 MOTION to Dismiss 18 Amended Complaint MOTION to Dismiss for Lack of Jurisdiction 18 Amended Complaint filed by Curtis Cahalloner Rogers, Jr. (Stein, Wendy) (Entered: 05/12/2016)
05/16/2016	70	ORDER granting 56 Motion to Withdraw; granting 59 Motion to Withdraw; denying as moot 20 Motion to Dismiss; denying as moot 20 Motion to Dismiss for Lack of Jurisdiction; denying as moot 25 Motion to Dismiss; denying as moot 25 Motion to Stay. Signed by Judge Kenneth A. Marra on 5/13/2016. (ir) (Entered: 05/16/2016)
05/23/2016	71	NOTICE by Julian Bivins re 51 Scheduling Order, Order Referring Case to Judge, Order Referring Case to Mediation,,,,,, Designation of Mediator (Denman, Joseph) (Entered: 05/23/2016)
05/24/2016	72	Clerks Notice to Filer re 71 Notice (Other). Parties/Mediator Not Added ; ERROR - The Filer failed to add mediator. Filer is instructed to file a Notice of Entry of Mediator and add the mediator.Wrong Event Selected ; ERROR - The Filer selected the wrong event. The document was not re-docketed by the Clerk. It is necessary to refile this document. (cqs) (Entered: 05/24/2016)
05/24/2016	73	NOTICE of Mediator Selection: Judge Howard A. Tescher selected. Filed/Added by Julian Bivins, Howard A. Tescher. (Denman, Joseph) (Entered: 05/24/2016)

06/08/2016	74	STIPULATION for Order Substituting Counsel by Stephen M Kelly (Attachments: # 1 Text of Proposed Order Order Substituting Counsel)(Studley, Rachel) (Entered: 06/08/2016)
06/14/2016	75	MOTION to Stay Discovery Pending Ruling on Motion to Abate by Ciklin Lubitz Martens & O'Connell. Responses due by 7/1/2016 (Studley, Rachel) (Entered: 06/14/2016)
06/15/2016	76	NOTICE by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein Defendants Keith B. Stein, Beys Liston Mobargha & Berland, LLP, and Law Offices of Keith B. Stein, PLLC's Notice of Joinder(Blaker, Jeffrey) (Entered: 06/15/2016)
06/15/2016	77	MOTION to Stay re 68 MOTION to Adopt/Join 55 MOTION to Stay /Abate, 64 Reply to Response to Motion , 61 Notice (Other), 55 MOTION to Stay /Abate, 58 MOTION to Stay -- Abate by Stephen M Kelly. Responses due by 7/5/2016 (Attachments: # 1 Text of Proposed Order)(Pickett, Charles) (Entered: 06/15/2016)
06/17/2016	78	ORDER Setting Hearing on 58 MOTION to Stay -- Abate, 55 MOTION to Stay /Abate : Motion Hearing set for 7/22/2016 02:00 PM in West Palm Beach Division before Judge Kenneth A. Marra. Signed by Judge Kenneth A. Marra on 6/17/2016. (ir) (Entered: 06/17/2016)
06/23/2016	79	MOTION for Protective Order by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. (Attachments: # 1 Exhibit A: Request for Production to CLO Defendants, # 2 Exhibit B: Request for Production to Defendant Kelly, # 3 Exhibit C: Stein Privilege Log, # 4 Exhibit D: Kelly Privilege Log)(Hechtman, Brandon) (Entered: 06/23/2016)
06/27/2016	80	RESPONSE to Motion re 75 MOTION to Stay Discovery Pending Ruling on Motion to Abate, 77 MOTION to Stay re 68 MOTION to Adopt/Join 55 MOTION to Stay /Abate, 64 Reply to Response to Motion , 61 Notice (Other), 55 MOTION to Stay /Abate, 58 MOTION to Stay -- Abate filed by Julian Bivins. Replies due by 7/8/2016. (Denman, Joseph) (Entered: 06/27/2016)
06/29/2016	81	Corrected MOTION for Protective Order by Ciklin Lubitz Martens & O'Connell, Brian M. O'Connell, Stephen M Kelly, Ashley N. Crispin. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Studley, Rachel) Modified to add missing filers on 6/30/2016 (asl). (Entered: 06/29/2016)
06/30/2016	82	Clerks Notice to Filer re 81 Corrected MOTION for Protective Order . All Applicable Filer Name(s) Not Selected ; ERROR - All of the applicable parties filing document were not selected. The correction was made by the Clerk. It is not necessary to refile this document. (asl) (Entered: 06/30/2016)
06/30/2016	83	Corrected MOTION for Protective Order by Ciklin Lubitz Martens & O'Connell. (Attachments: # 1 Exhibit a, # 2 Exhibit b)(Studley, Rachel) (Entered: 06/30/2016)
07/08/2016	84	RESPONSE to Motion re 83 Corrected MOTION for Protective Order (Second Corrected and Amended) filed by Julian Bivins. Replies due by 7/18/2016. (Denman, Joseph) (Entered: 07/08/2016)
07/08/2016	85	MOTION for Protective Order by Stephen M Kelly. (Attachments: # 1 Exhibit A - Subpeona Duces Tecum to Accountants)(Pickett, Charles) (Entered: 07/08/2016)
07/11/2016	86	MOTION for Extension of Time to File Response/Reply/Answer Defendants Keith Stein, Law Offices of Keith B. Stein, PLLC and Beys Liston Mobargha & Berland, LLP's Agreed Motion for Extension of Time to Respond to Request to Produce by Beys Liston

		Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. (Blaker, Jeffrey) (Entered: 07/11/2016)
07/11/2016	87	NOTICE by Ciklin Lubitz Martens & O'Connell re 86 MOTION for Extension of Time to File Response/Reply/Answer Defendants Keith Stein, Law Offices of Keith B. Stein, PLLC and Beys Liston Mobargha & Berland, LLP's Agreed Motion for Extension of Time to Respond to Request to Produce (Studley, Rachel) (Entered: 07/11/2016)
07/12/2016	88	Defendant's MOTION for Extension of Time to Complete Discovery by Curtis Cahalloner Rogers, Jr. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B)(Stein, Wendy) (Entered: 07/12/2016)
07/12/2016	89	Defendant's MOTION for Protective Order by Curtis Cahalloner Rogers, Jr. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B)(Stein, Wendy) (Entered: 07/12/2016)
07/12/2016	90	RESPONSE/REPLY to 87 Notice (Other), of Joinder by Julian Bivins. (Denman, Joseph) (Entered: 07/12/2016)
07/13/2016	91	ENDORSED ORDER granting 86 Defendants Keith Stein, Law Offices of Keith B. Stein, PLLC and Beys Liston Mobargha & Berland, LLP's Agreed Motion for Extension of Time to Respond to Request to Produce. Defendants shall respond to Plaintiff's Request for Production on or before August 1, 2016. Signed by Magistrate Judge William Matthewman on 7/13/2016. (no00) (Entered: 07/13/2016)
07/13/2016	92	ENDORSED ORDER requiring Defendants Brian M. O'Connell, Ashley N. Crispin, and Ciklin Lubitz & O'Connell (the "CLO Defendants") to file their own motion for extension of time to respond to Plaintiff's Request for Production if they still seek an extension of time. The CLO Defendants filed a Notice of Joinder [DE 87] in other defendants' Agreed Motion for Extension of Time [DE 86], and Plaintiff filed an Objection to the Notice of Joinder [DE 90], claiming that Plaintiff did not agree to an extension of time as to the CLO Defendants. Therefore, if the CLO Defendants seek an extension of time to respond to discovery, they are required to file their own motion requesting such extension. Signed by Magistrate Judge William Matthewman on 7/13/2016. (no00) (Entered: 07/13/2016)
07/13/2016	93	ENDORSED ORDER granting 53 Stipulation filed by Law Offices of Keith B. Stein, Beys Liston Mobargha & Berland, LLP, Keith B. Stein. Signed by Judge Kenneth A. Marra on 7/13/2016. (ir) (Entered: 07/13/2016)
07/13/2016	94	REPLY to Response to Motion re 83 Corrected MOTION for Protective Order filed by Ciklin Lubitz Martens & O'Connell. (Attachments: # 1 Exhibit a, # 2 Exhibit b, # 3 Exhibit c, # 4 Exhibit d)(Studley, Rachel) (Entered: 07/13/2016)
07/13/2016	95	REPLY to Response to Motion re 83 Corrected MOTION for Protective Order filed by Stephen M Kelly. (Attachments: # 1 Exhibit A - Defendants' Motion to Abate, # 2 Exhibit B - Order Setting Hearing on Motion to Abate, # 3 Exhibit C - Subpoena for Documents from Smith Law Firm, # 4 Exhibit D - Subpoena for Documents from Templeton Law Firm)(Pickett, Charles) (Entered: 07/13/2016)
07/14/2016	96	RESPONSE in Opposition re 88 Defendant's MOTION for Extension of Time to Complete Discovery - Plaintiff's Objection filed by Julian Bivins. Replies due by 7/25/2016. (Denman, Joseph) (Entered: 07/14/2016)
07/15/2016	97	RESPONSE in Opposition re 85 MOTION for Protective Order Regarding Subpoenas for Documents to Accountants filed by Julian Bivins. Replies due by 7/25/2016. (Denman, Joseph) (Entered: 07/15/2016)
07/15/2016	98	Plaintiff's MOTION for Leave to File Sur-Reply Regarding Second Corrected and Amended CLO Defendants' Motion for Protective Order [DE 83] by Julian Bivins.

		(Denman, Joseph) (Entered: 07/15/2016)
07/19/2016	99	RESPONSE in Opposition re 89 Defendant's MOTION for Protective Order filed by Julian Bivins. Replies due by 7/29/2016. (Denman, Joseph) (Entered: 07/19/2016)
07/20/2016	100	REPLY to Response to Motion re 85 MOTION for Protective Order filed by Stephen M Kelly. (Pickett, Charles) (Entered: 07/20/2016)
07/22/2016	101	RESPONSE/REPLY to 96 Response in Opposition to Motion for Extension of Time to Respond to Plaintiff's Request for Production by Curtis Cahalloner Rogers, Jr. (Stein, Wendy) (Entered: 07/22/2016)
07/22/2016	102	Minute Entry for proceedings held before Judge Kenneth A. Marra: Motion Hearing held on 7/22/2016 re 55 MOTION to Stay /Abate filed by Brian M. O'Connell, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, 58 MOTION to Stay -- Abate filed by Stephen M Kelly. Appearances by: J. Ronald Denman, Brandon Hechtman, Rachel Studley, Jeffrey Blaker and Wendy Stein. Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov (ir) (Entered: 07/25/2016)
07/25/2016	103	RESPONSE in Support re 89 Defendant's MOTION for Protective Order filed by Curtis Cahalloner Rogers, Jr. (Stein, Wendy) (Entered: 07/25/2016)
08/01/2016	104	ENDORSED ORDER granting 98 Plaintiff's Motion for Leave to File a Sur-reply Regarding Second Corrected and Amended CLO Defendants' Motion for Protective Order [Docket Entry 83]. Signed by Magistrate Judge William Matthewman on 8/1/2016. (no00) (Entered: 08/01/2016)
08/01/2016	105	ORDER SETTING HEARING on 83 Defendants' Second Corrected and Amended MOTION for Protective Order, 85 Defendant Stephen Kelly's MOTION for Protective Order Regarding Subpoena for Documents to Accountants, 88 Defendant Curtis Cahalloner Rogers, Jr.'s MOTION for Extension of Time to Respnd to Plaintiff's Request for Production and 89 Defendant Curtis Cahalloner Rogers, Jr.'s MOTION for Protective Order: Motion Hearing set for 8/23/2016 at 2:00 PM in West Palm Beach Division before Magistrate Judge William Matthewman. Signed by Magistrate Judge William Matthewman on 8/1/2016. (kza) (Entered: 08/01/2016)
08/01/2016	106	NOTICE by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell re 58 MOTION to Stay -- Abate of Filing Documents from the Guardianship Proceeding as Supplemental Support for the Motion to Abate. Attorney Brandon Jay Hechtman added to party Stephen M Kelly(pty:dft). (Attachments: # 1 Appendix, # 2 Exhibit 1: Objection to Final Report, # 3 Exhibit 2: Objection to Final Accounting (Guardianship Report) of Guardian of Property filed by Curtis Rogers and Served July 8, 2015, # 4 Exhibit 3: Objection to Petition for Order Authorizing Payment of Attorneys Fees and Expenses to Beys Stein Mobargha & Berland, LLP (Filed 12/1/14), # 5 Exhibit 4: Objection to Petition for Order Authorizing Payment of Attorneys Fees and Expenses to Beys Stein Mobargha & Berland, LLP (Supplement to Petition filed 12/1/14) (Filed 2/20/15), # 6 Exhibit 5: Order Approving Initial Plan and Order Appointing Stephen Kelly, # 7 Exhibit 6: Objection to Petition for Order Authorizing Payment of Compensation and Expenses of Guardian, # 8 Exhibit 7: Objection to Petition for Order Authorizing Payment of Attorneys Fees and Expenses by Casey Ciklin et. al., # 9 Exhibit 8: Objection to Supplemental Petition for Order Authorizing Payment of Attorneys Fees and Expenses of Ciklin Lubitz Martens & OConnell (Filed February 20, 2015), # 10 Exhibit 9: Objection to Supplemental Petition for Order Authorizing Payment of Attorneys Fees and Expenses of Ciklin Lubitz & OConnell (Filed 1/15/2016)) (Hechtman, Brandon) (Entered: 08/01/2016)
08/04/2016	107	ORDER RE-SETTING HEARING on 83 Defendants' Second Corrected and Amended

		MOTION for Protective Order, 85 Defendant Stephen Kelly's MOTION for Protective Order Regarding Subpoena for Documents to Accountants, 88 Defendant Curtis Cahalloner Rogers, Jr.'s MOTION for Extension of Time to Respond to Plaintiff's Request for Production, 89 Defendant Curtis Cahalloner Rogers, Jr. 's MOTION for Protective Order: Motion Hearing reset for 8/24/2016 at 10:00 AM before Magistrate Judge William Matthewman. Signed by Magistrate Judge William Matthewman on 8/4/2016. (kza) Modified on 8/4/2016 (kza). (Entered: 08/04/2016)
08/04/2016		Reset Hearings as to 83 Defendants' Second Corrected and Amended MOTION for Protective Order, 85 Defendant Stephen Kelly's MOTION for Protective Order Regarding Subpoena for Documents to Accountants, 88 Defendant Curtis Cahalloner Rogers, Jr.'s MOTION for Extension of Time to Respond to Plaintiff's Request for Production, 89 Defendant Curtis Cahalloner Rogers, Jr. 's MOTION for Protective Order. Motion Hearing reset for 8/24/2016 10:00 AM in West Palm Beach Division before Magistrate Judge William Matthewman. (kza) (Entered: 08/04/2016)
08/08/2016	108	REPLY to Response to Motion re 98 Plaintiff's MOTION for Leave to File Sur-Reply Regarding Second Corrected and Amended CLO Defendants' Motion for Protective Order [DE 83], 83 Corrected MOTION for Protective Order SUR-REPLY filed by Julian Bivins. (Denman, Joseph) (Entered: 08/08/2016)
08/08/2016	109	NOTICE by Julian Bivins Supplemental Documents in Response to Defendant's 58 Motion to Abate (Attachments: # 1 Supplement Guardian's Adversary Petition Requesting Guardianship Judge Declare Guardian and Attorneys Did Not Breach Fiduciary Duty to Ward, # 2 Supplement Estate's Motion to Dismiss Guardian's Petition for Declaratory Judgment, # 3 Supplement Guardian's Petition for Authorization to Act in Federal Lawsuit, # 4 Supplement Estate's Objection to Guardian's Petition for Authorization to Act in Federal Lawsuit, # 5 Supplement Guardian's Notice of Pending Motions, # 6 Supplement Order Specially Setting Hearing on Estate's Motion to Dismiss Guardian's Petition for Declaratory Relief and Motion to Dismiss Guardian's Petition to Revoke Probate of Ward's Will, # 7 Supplement Guardian's Notice of Voluntary Dismissal of Adversary Petition for Declaratory Judgment) (Denman, Joseph) Modified on 8/9/2016 (cqs). (Entered: 08/08/2016)
08/08/2016	110	MOTION to Strike 106 Notice (Other),,,,,, of Filing Documents Attached Appendixby Julian Bivins. Responses due by 8/25/2016 (Denman, Joseph) (Entered: 08/08/2016)
08/08/2016	111	Clerks Notice to Filer re 109 Notice (Other),,,. Document Not Linked ; ERROR - The filed document was not linked to the related docket entry. The correction was made by the Clerk. It is not necessary to refile this document. (cqs) (Entered: 08/09/2016)
08/15/2016	112	MOTION to Compel Response to Plaintiff's First Request for Production by Julian Bivins. Responses due by 9/1/2016 (Attachments: # 1 Exhibit A - Plaintiff's Request for Production to CLO Defendants, # 2 Exhibit B - CLO Defendants' Response to Plaintiff's Request for Production, # 3 Exhibit C - Excerpt of Deposition of Melissa Lazarchick, # 4 Exhibit D - Plaintiff's Motion to Compel in Guardianship Proceeding, # 5 Exhibit E - Plaintiff's Request for Production in Guardianship Proceeding)(Denman, Joseph) (Entered: 08/15/2016)
08/15/2016	113	MOTION to Compel Response to Plaintiff's First Request for Production from Defendant Kelly by Julian Bivins. Responses due by 9/1/2016 (Attachments: # 1 Exhibit A - Request for Production to Defendant Kelly, # 2 Exhibit B - Kelly's Response to Plaintiff's Request for Production, # 3 Exhibit C - Excerpt from Deposition of Melissa Lazarchick, # 4 Exhibit D - Plaintiff's Motion to Compel in Guardianship Proceeding, # 5 Exhibit E - Plaintiff's Request for Production in Guardianship Proceeding)(Denman, Joseph) (Entered: 08/15/2016)

08/16/2016	114	RESPONSE to Motion re 110 MOTION to Strike 106 Notice (Other),,,,,, of Filing Documents Attached Appendix filed by Ciklin Lubitz Martens & O'Connell. Replies due by 8/26/2016. (Studley, Rachel) (Entered: 08/16/2016)
08/16/2016	115	ORDER ADDING MOTIONS TO AUGUST 24, 2016 HEARING AND REQUIRING EXPEDITED RESPONSES: Set Deadlines/Hearings as to 112 MOTION to Compel Response to Plaintiff's First Request for Production and 113 MOTION to Compel Response to Plaintiff's First Request for Production from Defendant Kelly.(Responses due on or before 5:00 p.m. on 8/19/2016, Replies due on or before 12:00 p.m. on 8/23/2016., Motion Hearing set for 8/24/2016 at 10:00 AM in West Palm Beach Division before Magistrate Judge William Matthewman.) Signed by Magistrate Judge William Matthewman on 8/16/2016. (kza) (Entered: 08/16/2016)
08/17/2016	116	MOTION to Compel Response to Plaintiff's First Request for Production from Defendant Stein by Julian Bivins. Responses due by 9/6/2016 (Attachments: # 1 Exhibit A - Plaintiff's Request for Production to Defendant Stein, # 2 Exhibit B - Defendant Steins' Response to Request for Production, # 3 Exhibit C - Excerpt of Deposition of Melissa Lazarchick, # 4 Exhibit D - Plaintiff's Motion to Compel in Guardianship Proceeding, # 5 Exhibit E - Plaintiff's Request for Production in Guardianship Proceeding)(Denman, Joseph) (Entered: 08/17/2016)
08/17/2016	117	MOTION to Compel Response to Plaintiff's First Request for Production from Defendant Beys Liston by Julian Bivins. Responses due by 9/6/2016 (Attachments: # 1 Exhibit A - Plaintiff's Request for Production to Defendant Beys Liston, # 2 Exhibit B - Defendant Beys Liston's Response to Plaintiff's Request for Production)(Denman, Joseph) (Entered: 08/17/2016)
08/17/2016	118	MOTION to Compel Response to Plaintiff's First Request for Production from Defendant Rogers by Julian Bivins. Responses due by 9/6/2016 (Attachments: # 1 Exhibit A - Plaintiff's Request for Production to Defendant Rogers, # 2 Exhibit B - Defendant Rogers' Response to Request for Production, # 3 Exhibit C - Excerpt of Deposition of Melissa Lazarchick)(Denman, Joseph) (Entered: 08/17/2016)
08/18/2016	119	ORDER SETTING ADDITIONAL HEARING: Set Hearing as to 116 MOTION to Compel Response to Plaintiff's First Request for Production from Defendant Stein, 117 MOTION to Compel Response to Plaintiff's First Request for Production from Defendant Beys Liston and 118 MOTION to Compel Response to Plaintiff's First Request for Production from Defendant Rogers. (Motion Hearing set for 9/16/2016 at 1:00 PM in West Palm Beach Division before Magistrate Judge William Matthewman.) Signed by Magistrate Judge William Matthewman on 8/18/2016. (kza) (Entered: 08/18/2016)
08/19/2016	120	RESPONSE in Opposition re 112 MOTION to Compel Response to Plaintiff's First Request for Production filed by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. Replies due by 8/29/2016. (Hechtman, Brandon) (Entered: 08/19/2016)
08/19/2016	121	RESPONSE in Opposition re 113 MOTION to Compel Response to Plaintiff's First Request for Production from Defendant Kelly filed by Stephen M Kelly. Replies due by 8/29/2016. (Hechtman, Brandon) (Entered: 08/19/2016)
08/23/2016	122	REPLY to Response to Motion re 113 MOTION to Compel Response to Plaintiff's First Request for Production from Defendant Kelly filed by Julian Bivins. (Denman, Joseph) (Entered: 08/23/2016)
08/23/2016	123	REPLY to Response to Motion re 112 MOTION to Compel Response to Plaintiff's First Request for Production filed by Julian Bivins. (Denman, Joseph) (Entered: 08/23/2016)
08/23/2016	124	NOTICE TO THE PARTIES: The Court gives notice to the parties that, on August 23,

		2016, it received the attached document in an unmarked envelope with no return address listed. The Court will not rely on the anonymously-sent document when ruling on any matters in this case. Signed by Magistrate Judge William Matthewman on 8/23/2016. (kza) (Entered: 08/23/2016)
08/23/2016	125	REPLY to Response to Motion re 110 MOTION to Strike 106 Notice (Other),,,,,, of Filing Documents Attached Appendix filed by Julian Bivins. (Denman, Joseph) (Entered: 08/23/2016)
08/23/2016	126	NOTICE of filing receipt of correspondence. (ir) (Entered: 08/23/2016)
08/24/2016	127	ENDORSED ORDER granting 88 Defendant, Curtis Cahalloner Rogers, Jr.'s Motion for Extension of Time to Respond to Plaintiff's Request for Production, as stated in open court during the August 24, 2016 discovery hearing. Signed by Magistrate Judge William Matthewman on 8/24/2016. (no00) (Entered: 08/24/2016)
08/24/2016	128	Paperless Minute Entry for proceedings held before Magistrate Judge William Matthewman: J. Ronald Denman for Plaintiff, Charles Pickett for Defendant Kelly, Rachel Studley and Brandon Hechtman for CLO Defendants, Wendy Stein for Defendant Rogers and Jeffrey A. Blaker for Stein Defendants, present. Motion Hearing held on 8/24/2016 re Defendants' Second Corrected and Amended MOTION for Protective Order [DE 83], Defendant Stephen Kelly's MOTION for Protective Order Regarding Subpoena for Documents to Accountants [DE 85], Defendant Curtis Cahalloner Rogers, Jr.'s MOTION for Extension of Time to Respond to Plaintiff's Request for Production [DE 88] and Defendant Curtis Cahalloner Rogers, Jr.'s MOTION for Protective Order [DE 89]; Plaintiffs MOTION to Compel CLO Defendants Response to Plaintiff's First Request for Production [DE 112] and Plaintiffs MOTION to Compel Response to Plaintiff's First Request for Production from Defendant Kelly [DE 113]. Argument held. The Court grants Motion [DE 88]. The Court takes the matter under advisement. Written order to be issued. (Digital 10:05:46.) (kza) (Entered: 08/24/2016)
08/30/2016	129	MOTION for Extension of Time to Extend Certain Pre-Trial Deadlines by Ciklin Lubitz Martens & O'Connell. Responses due by 9/16/2016 (Attachments: # 1 Text of Proposed Order)(Studley, Rachel) (Entered: 08/30/2016)
08/31/2016	130	ORDER granting in part and reserving in part 129 Motion for Extension of Pre- Trial Deadlines. Signed by Judge Kenneth A. Marra on 8/30/2016. (ir) (Entered: 08/31/2016)
09/06/2016	131	RESPONSE in Opposition re 116 MOTION to Compel Response to Plaintiff's First Request for Production from Defendant Stein Memorandum of Law in Opposition to Plaintiff's Motion to Compel as to Keith B. Stein and Law Offices of Keith B. Stein, PLLC's Response to Plaintiff's First Request for Production filed by Law Offices of Keith B. Stein, Keith B. Stein. Replies due by 9/16/2016. (Blaker, Jeffrey) (Entered: 09/06/2016)
09/07/2016	132	OMNIBUS ORDER ON DISCOVERY MOTIONS: granting 83 Defendants' Second Corrected and Amended MOTION for Protective Order; granting in part and denying in part 85 Defendant Stephen Kelly's MOTION for Protective Order Regarding Subpoena for Documents to Accountants; granting in part and denying in part 89 Defendant Curtis Cahalloner Rogers, Jr.'s Motion for Protective Order; granting in part and denying in part 112 Plaintiffs MOTION to Compel CLO Defendants Response to Plaintiff's First Request for Production; granting in part and denying in part 113 Plaintiffs MOTION to Compel Response to Plaintiff's First Request for Production from Defendant Kelly. Signed by Magistrate Judge William Matthewman on 9/7/2016. (kza) (Entered: 09/07/2016)
09/09/2016	133	NOTICE by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell re 130 Order on Motion for Extension of Time of Joint Consent to

		Move Trial Date (Hechtman, Brandon) (Entered: 09/09/2016)
09/12/2016	134	ORDER granting 129 Motion for Extension of Time. Dispositive Motions due by 12/19/2016. Calendar Call set for 7/7/2017 10:00 AM in West Palm Beach Division before Judge Kenneth A. Marra. Jury Trial set for 7/10/2017 09:00 AM in West Palm Beach Division before Judge Kenneth A. Marra. Signed by Judge Kenneth A. Marra on 9/12/2016. (ir) (Entered: 09/12/2016)
09/14/2016	135	ORDER SUBSTITUTING COUNSEL. Attorney Charles Leroy Pickett, Jr terminated as to Defendant Stephen Kelly. Signed by Judge Kenneth A. Marra on 9/13/2016. (ir) (Entered: 09/14/2016)
09/16/2016	136	STIPULATION re 119 Order,,, Set/Reset Motion/R&R Deadlines and Hearings,, Discovery Motions Set for Hearing on September 16, 2016 by Julian Bivins (Denman, Joseph) (Entered: 09/16/2016)
09/19/2016	137	OMNIBUS ORDER on Discovery Motions. Signed by Magistrate Judge William Matthewman on 9/16/2016. (lbc) (Entered: 09/19/2016)
09/19/2016	138	NOTICE by Stephen M Kelly Notice of Compliance with DE 132(Studley, Rachel) (Entered: 09/19/2016)
09/20/2016	139	NOTICE of Compliance with This Court's Omnibus Order on Discovery Motions by Curtis Cahalloner Rogers, Jr re 132 Order on Motion for Protective Order,,, Order on Motion to Compel,,,,,,,,,,,,, (Stein, Wendy) (Entered: 09/20/2016)
09/21/2016	140	Plaintiff's APPEAL of Magistrate Judge 132 Order on Motion for Protective Order,,, Order on Motion to Compel,,,,,,,,,,,,, to District Court (Attachments: # 1 Exhibit A - Part 1 - Transcript of Hearing Dated December 3, 2015, # 2 Exhibit A - Part 2 - Transcript of Hearing Dated December 3, 2015)(Denman, Joseph) (Entered: 09/21/2016)
09/24/2016	141	TRANSCRIPT of Proceedings held on 8/24/16 before Magistrate Judge William Matthewman, 1-92 pages, Court Reporter: Carl Schanzleh, 305-523-5635. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 10/20/2016. Redacted Transcript Deadline set for 10/28/2016. Release of Transcript Restriction set for 12/27/2016. (Attachments: # 1 Designation Access Form)(hh) (Entered: 09/26/2016)
09/30/2016	142	Plaintiff's APPEAL of Magistrate Judge 137 Order to District Court and Objection to Omnibus Order on Discovery Motions (Denman, Joseph) (Entered: 09/30/2016)
10/05/2016	143	MOTION to Compel Discovery Responses (Responses due by 10/24/2016), MOTION for Extension of Time Excuse Untimely Discovery Requests Under 3-Day Mailing Rule by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. (Attachments: # 1 Exhibit Service E-Mail, Aug. 18, 2016, # 2 Exhibit Objection to Interrogatories Served by Brian M. OConnell, # 3 Exhibit Objection to Interrogatories Served by Ciklin Lubitz & OConnell, # 4 Exhibit Objection to Request for Admissions Served by Ciklin Lubitz & OConnell, # 5 Exhibit Objection to Request to Produce Served by OConnell, Crispin and Ciklin Lubitz & OConnell, # 6 Exhibit Objection to Request to Produce Served by Stephen M. Kelly, # 7 Exhibit Objection to Interrogatories Served by Ashley Crispin, # 8 Exhibit) Interrogatories by Brian M. OConnell, # 9 Exhibit Interrogatories by Ciklin Lubitz & OConnell, # 10 Exhibit Request for Admissions by Ciklin Lubitz & OConnell, # 11 Exhibit Request to Produce by OConnell, Crispin and Ciklin Lubitz & OConnell, # 12 Exhibit Request to Produce by Stephen M. Kelly, # 13 Exhibit Interrogatories by Ashley Crispin)(Hechtman, Brandon) (Entered: 10/05/2016)

10/10/2016	144	RESPONSE to 140 Plaintiff's APPEAL of Magistrate Judge 132 Order on Motion for Protective Order,,, Order on Motion to Compel,,,,,,,,,,,,,, to District Court by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. (Hechtman, Brandon) (Entered: 10/10/2016)
10/11/2016	145	MOTION to Compel Discovery Stein Defendants' Motion to Compel Response to Discovery and Incorporated Memorandum in Support by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. Responses due by 10/28/2016 (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit)(Blaker, Jeffrey) (Entered: 10/11/2016)
10/11/2016	146	ORDER denying 55 Motion to Stay; denying 58 Motion to Stay; denying 68 Motion to Adopt/Join; denying as moot 75 Motion to Stay; denying as moot 77 Motion to Stay; denying as moot 110 Motion to Strike. Signed by Judge Kenneth A. Marra on 10/5/2016. (ir) (Entered: 10/11/2016)
10/13/2016	147	RESPONSE to 142 Plaintiff's APPEAL of Magistrate Judge 137 Order to District Court and Objection to Omnibus Order on Discovery Motions Stein Defendants' Response to Appeal From and Objection to Omnibus Order on Discovery Motions by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. (Blaker, Jeffrey) (Entered: 10/13/2016)
10/17/2016	148	STIPULATION re 143 MOTION to Compel Discovery Responses MOTION for Extension of Time Excuse Untimely Discovery Requests Under 3-Day Mailing Rule by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell (Attachments: # 1 Text of Proposed Order)(Hechtman, Brandon) (Entered: 10/17/2016)
10/18/2016	149	AGREED ORDER ON DEFENDANTS' MOTION TO COMPEL DISCOVERY RESPONSES [DE 143] denying 143 Motion to Compel and granting 143 Motion for Extension of Time. On or before October 31, 2016, Plaintiff shall respond to the discovery propounded by Defendants Signed by Magistrate Judge William Matthewman on 10/18/2016. (kza) (Entered: 10/18/2016)
10/20/2016	150	Plaintiff's REPLY to 144 Response/Reply (Other), In Support of Appeal from and Objection to the Magistrate Judge's September 7, 2016 Omnibus Order on Discovery Motions by Julian Bivins. (Denman, Joseph) (Entered: 10/20/2016)
10/21/2016	151	NOTICE of Change of Address by Wendy J Stein (Stein, Wendy) (Entered: 10/21/2016)
10/21/2016	152	NOTICE by Curtis Cahalloner Rogers, Jr re 142 Plaintiff's APPEAL of Magistrate Judge 137 Order to District Court and Objection to Omnibus Order on Discovery Motions Notice of Joinder (Stein, Wendy) (Entered: 10/21/2016)
10/21/2016	153	RESPONSE in Opposition re 145 MOTION to Compel Discovery Stein Defendants' Motion to Compel Response to Discovery and Incorporated Memorandum in Support and Motion for Extension of Time to Respond to Stein Defendants' Discovery and Memorandum of Law filed by Julian Bivins. Replies due by 10/31/2016. (Denman, Joseph) (Entered: 10/21/2016)
10/24/2016	154	Plaintiff's REPLY to 147 Response/Reply (Other), in Support of Appeal from and Objection to the Magistrate Judge's September 16, 2016 "Omnibus Order on Discovery Motions" by Julian Bivins. (Denman, Joseph) (Entered: 10/24/2016)
10/25/2016	155	Answer and Affirmative Defenses to Plaintiff's Amended Complaint (Dkt. No. 18) ANSWER and Affirmative Defenses to Complaint by Curtis Cahalloner Rogers, Jr. (Stein, Wendy) (Entered: 10/25/2016)
10/25/2016	156	ANSWER and Affirmative Defenses to Complaint with Jury Demand by Beys Liston

		Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. (Blaker, Jeffrey) (Entered: 10/25/2016)
10/25/2016	157	ANSWER and Affirmative Defenses to Complaint with Jury Demand by CIKLIN LUBITZ & O'CONNELL, BRIAN M. O'CONNELL, and ASHLEY N. CRISPIN by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. (Attachments: # 1 Exhibit Order App. Gdn Rogers, # 2 Exhibit Settlement Agreement and Mutual Release, # 3 Exhibit Term Sheets, # 4 Exhibit Order Appt. Succ. Ltd. Gd. Kelly, # 5 Exhibit Order approving the Hybrid/Contingences Fee Portion of Application of Attorneys for Ward for Fees and Costs, # 6 Exhibit Hrng. Trans., Sept. 19, 2016, # 7 Exhibit 808 Lexington Contract, # 8 Exhibit Offers, # 9 Exhibit Order on Global Settlement, # 10 Exhibit Mot. Dismiss Gdn' Mot. Relief from Mar. 19, 2015 Order)(Hechtman, Brandon) (Entered: 10/25/2016)
10/25/2016	158	ANSWER and Affirmative Defenses to Complaint with Jury Demand by Stephen Kelly by Ciklin Lubitz Martens & O'Connell, Stephen M Kelly, Brian M. O'Connell. (Attachments: # 1 Exhibit Order App. Gdn Rogers, # 2 Exhibit Settlement Agreement and Mutual Release, # 3 Exhibit Term Sheets, # 4 Exhibit Order Appt. Succ. Ltd. Gd. Kelly, # 5 Exhibit Order approving the Hybrid/Contingences Fee Portion of Application of Attorneys for Ward for Fees and Costs, # 6 Exhibit Hrng. Trans., Sept. 19, 2016, # 7 Exhibit 808 Lexington Contract, # 8 Exhibit Offers, # 9 Exhibit Order on Global Settlement, # 10 Exhibit Mot. Dismiss Gdn' Mot. Relief from Mar. 19, 2015 Order) (Hechtman, Brandon) (Entered: 10/25/2016)
10/27/2016	159	Plaintiff's MOTION to Expedite Settlement Conference, MOTION to Stay Trial, Discovery, and Other Deadlines Pending Completion of the Settlement Conference and a Ruling on Appeal from and Objection to Magistrate Judge's September 7, 2016 and September 16, 2016 "Omnibus Orders on Discovery Motions" and Exhaustion of all Appellate Remedies(Responses due by 11/14/2016) by Julian Bivins. (Attachments: # 1 Exhibit Exhibit A to Motion for Expedited Settlement Conference, etc.)(Denman, Joseph) (Entered: 10/27/2016)
10/28/2016	160	ORDER requiring response re 159 Plaintiff's MOTION to Expedite Settlement Conference MOTION to Stay Trial, Discovery, and Other Deadlines Pending Completion of the Settlement Conference and a Ruling on Appeal from and Objection to Magistrate Judge's September 7, 2016 and September 16, 2016 "Omnibus Orders on Discovery M. Responses due by 10/31/2016 at 2:00 p.m. Signed by Judge Kenneth A. Marra on 10/27/2016. (ir) (Entered: 10/28/2016)
10/28/2016	161	RESPONSE in Support re 145 MOTION to Compel Discovery Stein Defendants' Motion to Compel Response to Discovery and Incorporated Memorandum in Support filed by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. (Attachments: # 1 Exhibit 7)(Blaker, Jeffrey) (Entered: 10/28/2016)
10/28/2016	162	RESPONSE in Support re 145 MOTION to Compel Discovery Stein Defendants' Motion to Compel Response to Discovery and Incorporated Memorandum in Support Corrected filed by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. (Attachments: # 1 Exhibit 7)(Blaker, Jeffrey) (Entered: 10/28/2016)
10/31/2016	163	RESPONSE to Motion re 159 Plaintiff's MOTION to Expedite Settlement Conference MOTION to Stay Trial, Discovery, and Other Deadlines Pending Completion of the Settlement Conference and a Ruling on Appeal from and Objection to Magistrate Judge's September 7, 2016 and September 16, 2016 "Omnibus Orders on Discovery M filed by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly Brian M. O'Connell. Replies due by 11/10/2016. (Hechtman, Brandon) (Entered: 10/31/2016)
11/02/2016	164	ORDER denying 159 Motion for Expedited Settlement Conference; granting 159 Motion

		to Stay. Signed by Judge Kenneth A. Marra on 11/2/2016. (ir) (Entered: 11/02/2016)
11/21/2016	165	NOTICE TO THE PARTIES signed by Magistrate Judge William Matthewman on 11/21/2016. (Attachments: # 1 Letter to Judge Matthewman from J. Ronald Denman dated November 17, 2016 with attachments) (kza) (Entered: 11/21/2016)
11/21/2016	166	NOTICE of Attorney Appearance by Charles Dennis Bavol on behalf of Julian Bivins. Attorney Charles Dennis Bavol added to party Julian Bivins(pty:pla). (Bavol, Charles) (Entered: 11/21/2016)
12/02/2016	167	ORDER AFFIRMING IN PART AND REVERSING IN PART JUDGE MATTHEWMAN'S SEPTEMBER 7, 2016 AND SEPTEMBER 16, 2016 ORDERS re 132 Order on Motion for Protective Order, Order on Motion to Compel 137 Order. Signed by Judge Kenneth A. Marra on 12/2/2016. (ir) (Entered: 12/02/2016)
12/08/2016	168	ORDER AFTER IN CAMERA REVIEW: re 132 Order on Motion for Protective Order re: 85 MOTION for Protective Order - on or before December 30, 2016, Defendant Kelly shall produce to Plaintiff all of the documents listed in his privilege log except for the portion of the document labeled Bates # 241 as described. Signed by Magistrate Judge William Matthewman on 12/8/2016. (kza) (Entered: 12/08/2016)
12/09/2016	169	ORDER LIFTING STAY. Signed by Judge Kenneth A. Marra on 12/9/2016. (ir) (Entered: 12/09/2016)
12/13/2016	170	NOTICE by Beys Liston Mobargha & Berland, LLP, Keith B. Stein of Appearance. Attorney Alexandra Jordan Schultz added to party Beys Liston Mobargha & Berland, LLP(pty:dft), Attorney Alexandra Jordan Schultz added to party Keith B. Stein(pty:dft). (Schultz, Alexandra) (Entered: 12/13/2016)
12/13/2016	171	NOTICE of Compliance by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell re 168 Order, (Hechtman, Brandon) (Entered: 12/13/2016)
12/16/2016	172	ORDER granting in part and denying in part 145 Stein Defendants' Motion to Compel Response to Discovery. Plaintiff shall fully respond to the written discovery fully propounded by Defendants on or before December 23, 2016. (See Order for details). Signed by Magistrate Judge William Matthewman on 12/16/2016. (kza) (Main Document 172 replaced on 12/19/2016) (kza). (Entered: 12/16/2016)
12/16/2016		Set Deadlines Per DE#172. Miscellaneous Deadline 12/23/2016. (cqs) (Entered: 12/16/2016)
12/19/2016	173	Unopposed MOTION for Extension of Time to File Pretrial Motions by Beys Liston Mobargha & Berland, LLP, Keith B. Stein. Responses due by 1/3/2017 (Attachments: # 1 Text of Proposed Order Proposed Order on Unopposed Motion)(Schultz, Alexandra) (Entered: 12/19/2016)
12/19/2016	174	Corrected MOTION for Extension of Time to File Pretrial Motions by Beys Liston Mobargha & Berland, LLP, Keith B. Stein. Responses due by 1/3/2017 (Attachments: # 1 Text of Proposed Order Proposed Order on Corrected Motion for Extension of Time) (Schultz, Alexandra) (Entered: 12/19/2016)
12/19/2016	175	MOTION for Summary Judgment by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. Responses due by 1/3/2017 (Hechtman, Brandon) (Entered: 12/19/2016)
12/19/2016	176	Statement of: Material Facts by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell re 175 MOTION for Summary Judgment (Attachments: # 1 Exhibit Plaintiff's Response to Defendant's Requests for Admissions, #

		2 Exhibit Oliver Bivins, Sr.'s Will, # 3 Exhibit Plaintiff's Answers to Defendants' Answers to Interrogatories, # 4 Exhibit Beachton Mortgage, # 5 Exhibit NY Transfer Certificate 1, # 6 Exhibit NY Transfer Certificate 2, # 7 Exhibit Guardianship Docket, # 8 Exhibit Guardian's Final Report)(Hechtman, Brandon) (Entered: 12/19/2016)
12/20/2016	177	ORDER terminating 173 Motion for Extension of Time; granting 174 Corrected Motion for Extension of Time. Signed by Judge Kenneth A. Marra on 12/19/2016. (ir) (Entered: 12/20/2016)
12/20/2016		Set/Reset Deadlines/Hearings: Dispositive Motions due by 1/19/2017. (ir) (Entered: 12/20/2016)
12/20/2016	178	Plaintiff's MOTION for Extension of Time to Extend Certain Pretrial Deadlines After Lift of Stay by Julian Bivins. Responses due by 1/3/2017 (Attachments: # 1 Text of Proposed Order)(Denman, Joseph) (Entered: 12/20/2016)
12/21/2016	179	RESPONSE in Opposition re 178 Plaintiff's MOTION for Extension of Time to Extend Certain Pretrial Deadlines After Lift of Stay filed by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. Replies due by 12/28/2016. (Attachments: # 1 Exhibit E-Mail, Dec. 13, 2016)(Hechtman, Brandon) (Entered: 12/21/2016)
12/21/2016	180	Unopposed MOTION for Extension of Time to File Response 175 to Motion for Summary Judgment by Julian Bivins. (Attachments: # 1 Text of Proposed Order) (Denman, Joseph)Link Added Modified on 12/21/2016 (cqs). (Entered: 12/21/2016)
12/21/2016	181	Clerks Notice to Filer re 180 Unopposed MOTION for Extension of Time to File Response/Reply/Answer to Motion for Summary Judgment Document Not Linked ; ERROR - The filed document was not linked to the related docket entry. The correction was made by the Clerk. It is not necessary to refile this document. (cqs) (Entered: 12/21/2016)
12/21/2016	182	ENDORSED ORDER granting 180 Motion for Extension of Time to File Response/Reply to 175 MOTION for Summary Judgment filed by Brian M. O'Connell, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly. Responses due by 1/9/2017. Signed by Judge Kenneth A. Marra on 12/21/2016. (ir) (Entered: 12/21/2016)
12/22/2016	183	NOTICE of Compliance by Julian Bivins re 172 Order on Motion to Compel, (Denman, Joseph) (Entered: 12/22/2016)
12/23/2016	184	RESPONSE to 183 Notice of Compliance by Beys Liston Mobargha & Berland, LLP, Keith B. Stein. (Schultz, Alexandra) (Entered: 12/23/2016)
12/27/2016	185	ORDER REGARDING STEIN DEFENDANTS' RESPONSE TO PLAINTIFF'S NOTICE OF COMPLIANCE [DE 184]: if Plaintiff does not produce the two outstanding transcripts to Defendants on or before January 9, 2017, Defendants may file an additional discovery motion with the Court. Signed by Magistrate Judge William Matthewman on 12/27/2016. (kza) (Entered: 12/27/2016)
12/28/2016	186	REPLY to Response to Motion re 178 Plaintiff's MOTION for Extension of Time to Extend Certain Pretrial Deadlines After Lift of Stay filed by Julian Bivins. (Attachments: # 1 Exhibit A)(Denman, Joseph) (Entered: 12/28/2016)
01/03/2017	187	ORDER granting in part and denying in part 178 Motion for Extension of Time. See Order for Details. Dispositive Motions due by 2/28/2017. Signed by Judge Kenneth A. Marra on 1/3/2017. (cqs) (Entered: 01/03/2017)
01/04/2017	188	Unopposed MOTION for Extension of Time to Complete Discovery Responses to Stein

		Defendant by Julian Bivins. (Attachments: # 1 Text of Proposed Order)(Denman, Joseph) (Entered: 01/04/2017)
01/04/2017	189	Unopposed MOTION to Withdraw Document 176 Statement,, 175 MOTION for Summary Judgment by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. Responses due by 1/18/2017 (Attachments: # 1 Text of Proposed Order)(Hechtman, Brandon) (Entered: 01/04/2017)
01/05/2017	190	ORDER terminating 175 Motion for Summary Judgment; granting 189 Motion to Withdraw Motion for Summary Judgment. Signed by Judge Kenneth A. Marra on 1/5/2017. (ir) (Entered: 01/05/2017)
01/08/2017	191	MOTION for Sanctions Pursuant to Rule 37(b) by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. (Attachments: # 1 Exhibit Plaintiff's Response to Request to Produce, # 2 Exhibit E-Mail, Jan. 4, 2017)(Hechtman, Brandon) (Entered: 01/08/2017)
01/09/2017	192	NOTICE of Compliance by Julian Bivins re 149 Order on Motion to Compel,, Order on Motion for Extension of Time, (Denman, Joseph) (Entered: 01/09/2017)
01/10/2017	193	NOTICE by Ciklin Lubitz Martens & O'Connell OF SERVICE OF PROPOSAL FOR SETTLEMENT(Hechtman, Brandon) (Entered: 01/10/2017)
01/10/2017	194	Unopposed MOTION for Extension of Time to Complete Two Out-of-Time Fact Witness Depositions by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. Responses due by 1/24/2017 (Attachments: # 1 Text of Proposed Order Proposed Order on Unopposed Motion for Leave)(Schultz, Alexandra) (Entered: 01/10/2017)
01/11/2017	195	ENDORSED ORDER granting 194 Motion for Extension of Time to Complete Two Out-of-Time Fact Witness Depositions. Signed by Judge Kenneth A. Marra on 1/11/2017. (ir) (Entered: 01/11/2017)
01/18/2017	196	ENDORSED ORDER granting 188 Plaintiff's Unopposed Motion for Extension of Time to Respond to Stein Defendants' Discovery. Signed by Magistrate Judge William Matthewman on 1/18/2017. (no00) (Entered: 01/18/2017)
01/18/2017	197	ORDER REQUIRING REPLY FROM DEFENDANTS: Set Deadline as to 191 Defendants' MOTION for Sanctions Pursuant to Rule 37(b). (Reply due on or before 1/25/2017.) Signed by Magistrate Judge William Matthewman on 1/18/2017. (kza) (Entered: 01/18/2017)
01/20/2017	198	NOTICE of Settlement by Curtis Cahalloner Rogers, Jr (Stein, Wendy) (Entered: 01/20/2017)
01/25/2017	199	REPLY to Response to Motion re 191 MOTION for Sanctions Pursuant to Rule 37(b) filed by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. (Hechtman, Brandon) (Entered: 01/25/2017)
01/25/2017	200	ORDER denying as moot 191 Defendants' Motion for Rule 37(b) Sanctions. Signed by Magistrate Judge William Matthewman on 1/25/2017. (kza) (Entered: 01/25/2017)
01/30/2017	201	Plaintiff's MOTION for Discovery to Reopen and to Renew Motions to Compel by Julian Bivins. Responses due by 2/13/2017 (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit)(Denman, Joseph) (Entered: 01/30/2017)
02/03/2017	202	Joint MOTION for Extension of Time to extend Rule 26 Expert Disclosures and Substantive Motion Deadlines by Julian Bivins. Responses due by 2/17/2017 (Denman, Joseph) (Entered: 02/03/2017)

02/03/2017	203	TRANSCRIPT of Motion Hearing held on 07/22/16 before Judge Kenneth A. Marra, 1-119 pages, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 2/24/2017. Redacted Transcript Deadline set for 3/6/2017. Release of Transcript Restriction set for 5/4/2017. (sf) (Entered: 02/03/2017)
02/03/2017	204	ORDER granting 202 Motion for Extension of Time. Dispositive Motions due by 3/3/2017. Signed by Judge Kenneth A. Marra on 2/3/2017. (ir) (Entered: 02/03/2017)
02/08/2017	205	Plaintiff's MOTION to Compel Defendant Crispin's Responses to Deposition Questions by Julian Bivins. Attorney M. Kristen Allman added to party Julian Bivins(pty:pla). Responses due by 2/22/2017 (Attachments: # 1 Deposition Ashley Crispin - Exhibit 1, # 2 Deposition Stephen Kelly, Part I - Exhibit 2, # 3 Deposition Stephen Kelly, Part II - Exhibit 2, # 4 Exhibit Curtis Rogers' Waiver - Exhibit 3)(Allman, M.) (Entered: 02/08/2017)
02/09/2017	206	MOTION to Compel Depo Answers by Julian Bivins. Responses due by 2/23/2017 (Allman, M.) (Entered: 02/09/2017)
02/10/2017	207	Unopposed MOTION for Extension of Time to file motions to compel Brian O'Connell's Deposition Responses and Memorandum in Support re 206 MOTION to Compel Depo Answers by Julian Bivins. Responses due by 2/24/2017 (Allman, M.) (Entered: 02/10/2017)
02/10/2017	208	ENDORSED ORDER granting 207 Plaintiff's Motion to Enlarge Time to File Motions to Compel Brian O'Connell's Deposition Responses. Signed by Magistrate Judge William Matthewman on 2/10/2017. (no00) (Entered: 02/10/2017)
02/10/2017	209	Amended MOTION to Compel Deposition Responses of Brian O'Connell, Esq. by Julian Bivins. Responses due by 2/24/2017 (Attachments: # 1 Deposition Brian O'Connell, Esq. - Exhibit 1, # 2 Deposition Stephen Kelly, Part I - Exhibit 2, # 3 Deposition Stephen Kelly, Part II - Exhibit 2, # 4 Exhibit Curtis Rogers' Waiver - Exhibit 3)(Allman, M.) (Entered: 02/10/2017)
02/10/2017	210	MOTION to Compel Defendant Kelly Deposition Responses by Julian Bivins. Responses due by 2/24/2017 (Attachments: # 1 Deposition Stephen Kelly - Part 1, # 2 Deposition Stephen Kelly - Part 2, # 3 Exhibit Curtis Rogers' Waiver)(Allman, M.) (Entered: 02/10/2017)
02/13/2017	211	STIPULATION of Dismissal Joint Stipulation for Dismissal with Prejudice of All Claims as Against Defendant Curtis Challoner Rogers, Jr. Only by Curtis Cahalloner Rogers, Jr (Attachments: # 1 Text of Proposed Order)(Stein, Wendy) (Entered: 02/13/2017)
02/13/2017	212	ORDER DISMISSING CLAIMS AGAINST DEFENDANT CURTIS CHALLONER ROGERS re 211 Stipulation of Dismissal filed by Curtis Cahalloner Rogers, Jr. Signed by Judge Kenneth A. Marra on 2/13/2017. (ir) (Entered: 02/13/2017)
02/13/2017	213	RESPONSE in Opposition re 201 Plaintiff's MOTION for Discovery to Reopen and to Renew Motions to Compelfiled by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. Replies due by 2/21/2017. (Blaker, Jeffrey) (Entered: 02/13/2017)
02/13/2017	214	RESPONSE to Motion re 201 Plaintiff's MOTION for Discovery to Reopen and to Renew Motions to Compelfiled by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. Replies due by 2/21/2017. (Studley, Rachel) (Entered: 02/13/2017)

02/21/2017	215	REPLY to Response to Motion re 201 Plaintiff's MOTION for Discovery to Reopen and to Renew Motions to Compelfiled by Julian Bivins. (Attachments: # 1 Deposition Stephen Kelly - Part 1, # 2 Deposition Stephen Kelly - Part 2)(Allman, M.) (Entered: 02/21/2017)
02/22/2017	216	RESPONSE to Motion re 205 Plaintiff's MOTION to Compel Defendant Crispin's Responses to Deposition Questions filed by Ashley N. Crispin. Replies due by 3/1/2017. (Studley, Rachel) (Entered: 02/22/2017)
02/22/2017	217	RESPONSE to Motion re 209 Amended MOTION to Compel Deposition Responses of Brian O'Connell, Esq. filed by Brian M. O'Connell. Replies due by 3/1/2017. (Studley, Rachel) (Entered: 02/22/2017)
02/22/2017	218	RESPONSE to Motion re 210 MOTION to Compel Defendant Kelly Deposition Responses filed by Stephen M Kelly. Replies due by 3/1/2017. (Studley, Rachel) (Entered: 02/22/2017)
02/27/2017	219	MOTION for Leave to File Amended Reply to Defendants' Response in Opposition to Plaintiff's Motion to Re-Open Discovery and to Allow Combining of Allowable Number of Pages in Reply by Julian Bivins. (Attachments: # 1 Exhibit Amended Reply to Defendants' Response in Opposition to Plaintiff's Motion to Reopen Discovery, # 2 Exhibit Amended Reply - Exhibit 1, # 3 Exhibit Amended Reply - Exhibit 2, # 4 Exhibit Amended Reply - Exhibit 3, Part 1, # 5 Exhibit Amended Reply, Exhibit 3, Part 2, # 6 Exhibit Amended Reply, Exhibit 4, # 7 Exhibit Amended Reply, Exhibit 5)(Allman, M.) (Entered: 02/27/2017)
02/28/2017	220	ORDER requesting identity of current guardian re 201 Plaintiff's MOTION for Discovery to Reopen and to Renew Motions to Compelfiled by Julian Bivins. Signed by Judge Kenneth A. Marra on 2/28/2017. (ir) (Entered: 02/28/2017)
03/01/2017	221	REPLY to 216 Response to Motion Opposing Plaintiff's Motion to Compel Crispin Deposition Responses by Julian Bivins. (Attachments: # 1 Exhibit Verified Petition to Revoke Probate, # 2 Exhibit Verified Petition as to Authorization to Act)(Allman, M.) (Entered: 03/01/2017)
03/01/2017	222	REPLY to 217 Response to Motion to Compel O'Connell Deposition Responses by Julian Bivins. (Attachments: # 1 Exhibit Verified Probate Revocation Petition, # 2 Exhibit Verified Petition to Act)(Allman, M.) (Entered: 03/01/2017)
03/01/2017	223	REPLY to 218 Response to Motion to Compel Kelly Deposition Responses by Julian Bivins. (Attachments: # 1 Exhibit Verified Revocation Petition, # 2 Exhibit Verified Petition to Act)(Allman, M.) (Entered: 03/01/2017)
03/01/2017	224	REPLY to 218 Response to Motion to Compel Kelly Answers by Julian Bivins. (Attachments: # 1 Exhibit, # 2 Exhibit)(Allman, M.) (Entered: 03/02/2017)
03/03/2017	225	MOTION for Summary Judgment by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. Responses due by 3/17/2017 (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23)(Blaker, Jeffrey) (Entered: 03/03/2017)
03/03/2017	226	Statement of: Material Facts by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein re 225 MOTION for Summary Judgment (Blaker, Jeffrey) (Entered: 03/03/2017)
03/03/2017	227	MOTION for Summary Judgment by Ciklin Lubitz Martens & O'Connell, Ashley N.

		Crispin, Stephen M Kelly, Brian M. O'Connell. Responses due by 3/17/2017 (Hechtman, Brandon) (Entered: 03/03/2017)
03/03/2017	228	Statement of: Material Facts by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell re 227 MOTION for Summary Judgment (Attachments: # 1 Exhibit Pl. Resp. RFA, # 2 Exhibit Texas Settlement, # 3 Exhibit Texas Settlement, # 4 Exhibit Rogers' Resignation, # 5 Exhibit N. App. CLO, # 6 Exhibit Release, # 7 Exhibit Oliver Sr.'s Will, # 8 Exhibit J. Denman dep. Sept. 9, 2015, # 9 Exhibit Agreed Final Judgment, # 10 Exhibit Petition to Revoke Probate, # 11 Exhibit Pet. Determine Beneficiaries, # 12 Exhibit Pl. Ans. Interrogatories, # 13 Exhibit Hrng. Trans. 8:11-9:12, Sept. 17, 2013, # 14 Exhibit Agreed Order on Pet. Set for Hrg., Sept. 22, 2015, # 15 Exhibit Pet. to Compel Oliver Bivins, Jr. to Comply with Settlement, # 16 Exhibit J. Denman dep, Jan. 23, 2017, # 17 Exhibit J. Bivins a/p/r/ dep. Jan 20, 2017, # 18 Exhibit R 26 Expert Rpt, Sharp CPA, # 19 Exhibit Hrng. Trans. Jul. 14, 2013, # 20 Exhibit Closing Statement, # 21 Exhibit Beachton Mortgage, # 22 Exhibit NY Trans. Cert. 1, # 23 Exhibit NY Trans. Cert. 2, # 24 Exhibit Agreed Order on Pet. for Payment, May 23, 2014, # 25 Exhibit Order Authorizing Payment of Att. for Guardian Kelly, May 23, 2014, # 26 Exhibit Pet. Authority Sell 808 Lexington, # 27 Exhibit C. Rogers dep., Jan. 12, 2017, # 28 Exhibit S. Kelly dep., Jan. 11, 2017, # 29 Exhibit Lieberman dep., Jan. 23, 2014, # 30 Exhibit Eastern Consolidated Broker Opinion of Value for 808 Lexington, # 31 Exhibit Order on Am. Pet. to Compel Rel. Funds, Dec. 22, 2015, # 32 Exhibit Docket, # 33 Exhibit Final Report of Guardian, # 34 Exhibit R. 26 Expert Rpt., Gilbert, Esq.)(Hechtman, Brandon) (Entered: 03/03/2017)
03/03/2017	229	MOTION to Seal Confidential Document per Local Rule 5.4 by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. (Attachments: # 1 Text of Proposed Order) (Hechtman, Brandon) (Entered: 03/03/2017)
03/03/2017		SYSTEM ENTRY - Docket Entry 230 [motion] restricted/sealed until further notice. (1208262) (Entered: 03/03/2017)
03/04/2017	231	MOTION to Strike from Record and Claw Back Inadvertently Filed Privileged Attorney Workproduct, to Seek Defendants' Destruction of such Documents and to Preclude Defendants' Dissemination or Use and to Substitute Corrected Exhibits by Julian Bivins. Responses due by 3/20/2017 (Attachments: # 1 Exhibit E-Mail to Defendants' Counsel, # 2 Exhibit Corrected Verified Revocation Petition)(Allman, M.) (Entered: 03/04/2017)
03/04/2017	232	Amended MOTION to Strike from the Record and Claw Back Inadvertently Filed Privileged Work Product, to Seek Defendants' Destruction of Such Documents and to Preclude Defendants' Dissemination of Use Thereof and to Substitute Corrected Exhibits and Memorandum in Support by Julian Bivins. Responses due by 3/20/2017 (Attachments: # 1 Exhibit E-Mail to Defendants' Counsel, # 2 Exhibit Amended Verification Petition)(Allman, M.) (Entered: 03/04/2017)
03/06/2017	233	RESPONSE to 220 Order by Julian Bivins. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit)(Denman, Joseph) (Entered: 03/06/2017)
03/07/2017	234	NOTICE by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell re 229 MOTION to Seal Confidential Document per Local Rule 5.4 Amended L.R. 7.1 Certificate of Conference (Hechtman, Brandon) (Entered: 03/07/2017)
03/07/2017	235	NOTICE by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell re 228 Statement,,,,,, CORRECTED EXHIBIT "3" TO THE STATEMENT OF MATERIAL FACTS RE: MOTION FOR SUMMARY JUDGMENT [DE 228-3] (Attachments: # 1 Exhibit Letters of Limited Guardianship, April 23, 2014) (Hechtman, Brandon) (Entered: 03/07/2017)

03/07/2017	236	(STRICKEN PER DE#237)Statement of: Identity of the Sole Current Guardian in Compliance with Court Order by Beys Liston Mobargha & Berland, LLP, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell, Keith B. Stein re 220 Order (Attachments: # 1 Exhibit Resignation of Curtis Rogers, # 2 Exhibit Pet. Discharge by Mr. Rogers, # 3 Exhibit Example Letters of Co-Guardianship, # 4 Exhibit 808 Lexington Deed)(Hechtman, Brandon)Text Modified on 3/7/2017 (Entered: 03/07/2017)
03/07/2017	237	NOTICE of Striking 236 Statement,, filed by Law Offices of Keith B. Stein, Beys Liston Mobargha & Berland, LLP, Brian M. O'Connell, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Keith B. Stein by Beys Liston Mobargha & Berland, LLP, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell, Keith B. Stein (Hechtman, Brandon) (Entered: 03/07/2017)
03/07/2017	238	Statement of: Identity of the Sole Current Guardian in Compliance with Court Order by Beys Liston Mobargha & Berland, LLP, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell, Keith B. Stein re 220 Order (Attachments: # 1 Exhibit Resignation of Curtis Rogers, # 2 Exhibit Pet. Discharge by Mr. Rogers, # 3 Exhibit Example Letters of Co-Guardianship, # 4 Exhibit 808 Lexington Deed)(Hechtman, Brandon) (Entered: 03/07/2017)
03/08/2017	239	ORDER Setting Hearing on 219 MOTION for Leave to File Amended Reply to Defendants' Response in Opposition to Plaintiff's Motion to Re-Open Discovery and to Allow Combining of Allowable Number of Pages in Reply Motion Hearing set for 3/24/2017 09:30 AM in West Palm Beach Division before Judge Kenneth A. Marra. Signed by Judge Kenneth A. Marra on 3/8/2017. (ir) (Entered: 03/08/2017)
03/08/2017	240	NOTICE of Compliance (Updated) with Local Rule 7.1 by Julian Bivins re 232 Amended MOTION to Strike from the Record and Claw Back Inadvertently Filed Privileged Work Product, to Seek Defendants' Destruction of Such Documents and to Preclude Defendants' Dissemination of Use Thereof and to Substitute Corrected Ex filed by Julian Bivins (Allman, M.) (Entered: 03/08/2017)
03/08/2017	241	ORDER SETTING HEARING on 205 Plaintiff's MOTION to Compel Defendant Crispin's Responses to Deposition Questions, 209 Amended MOTION to Compel Deposition Responses of Brian O'Connell, Esq. and 210 MOTION to Compel Defendant Kelly Deposition Responses: Motion Hearing set for 4/11/2017 at 2:00 PM in West Palm Beach Division before Magistrate Judge William Matthewman. Signed by Magistrate Judge William Matthewman on 3/8/2017. (kza) (Entered: 03/08/2017)
03/10/2017	242	PAPERLESS ORDER RESETTING Hearing on Motion 219 MOTION for Leave to File Amended Reply to Defendants' Response in Opposition to Plaintiff's Motion to Re-Open Discovery and to Allow Combining of Allowable Number of Pages in Reply Motion Hearing reset for 3/31/2017 02:30 PM in West Palm Beach Division before Judge Kenneth A. Marra. Signed by Judge Kenneth A. Marra on 3/10/2017. (ir) (Entered: 03/10/2017)
03/13/2017	243	RESPONSE in Opposition re 219 MOTION for Leave to File Amended Reply to Defendants' Response in Opposition to Plaintiff's Motion to Re-Open Discovery and to Allow Combining of Allowable Number of Pages in Reply filed by Beys Liston Mobargha & Berland, LLP, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell, Keith B. Stein. Replies due by 3/20/2017. (Studley, Rachel) (Entered: 03/13/2017)
03/13/2017	244	MOTION to Take Deposition from Oliver Bivins II to Complete Out of Time Fact Witness Deposition by Julian Bivins. (Attachments: # 1 Exhibit Exhibit A - Email, # 2

		Exhibit Exhibit B - Email, # 3 Exhibit Exhibit C - Email, # 4 Exhibit Exhibit D - Email, # 5 Exhibit Exhibit E - Email)(Denman, Joseph) Modified Text on 3/14/2017 (ls). (Entered: 03/13/2017)
03/15/2017	245	Unopposed MOTION for Extension of Time to File Response/Reply/Answer as to 226 Statement, 228 Statement,,,,,, 225 MOTION for Summary Judgment , 227 MOTION for Summary Judgment for Kelly, Cikilin Lubitz & O'Connell and Stein by Julian Bivins. (Denman, Joseph) (Entered: 03/15/2017)
03/16/2017	246	ENDORSED ORDER granting 245 Motion for Extension of Time to File Response/Reply to Re: 225 MOTION for Summary Judgment filed by Law Offices of Keith B. Stein, Beys Liston Mobargha & Berland, LLP, Keith B. Stein, 227 MOTION for Summary Judgment filed by Brian M. O'Connell, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly. Responses due by 3/24/2017. Signed by Judge Kenneth A. Marra on 3/16/2017. (ir) (Entered: 03/16/2017)
03/16/2017	247	MOTION for Extension of Time to File Response/Reply/Answer Unopposed Motion for Extension of Time for Defendants to File Reply Brief in Support of Motions for Final Summary Judgment by Beys Liston Mobargha & Berland, LLP, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell. Attorney Jeffrey Alan Blaker added to party Ashley N. Crispin(pty:dft), Attorney Jeffrey Alan Blaker added to party Stephen M Kelly(pty:dft), Attorney Jeffrey Alan Blaker added to party Brian M. O'Connell(pty:dft). (Attachments: # 1 Exhibit)(Blaker, Jeffrey) (Entered: 03/16/2017)
03/17/2017	248	ENDORSED ORDER granting 247 Motion for Extension of Time to File Response/Reply to Re: 225 MOTION for Summary Judgment filed by Law Offices of Keith B. Stein, Beys Liston Mobargha & Berland, LLP, Keith B. Stein, 227 MOTION for Summary Judgment filed by Brian M. O'Connell, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly. Replies due by 4/7/2017. Signed by Judge Kenneth A. Marra on 3/17/2017. (ir) (Entered: 03/17/2017)
03/17/2017	249	ORDER RE-SETTING HEARING: 209 Amended MOTION to Compel Deposition Responses of Brian O'Connell, Esq., 210 MOTION to Compel Defendant Kelly Deposition Responses , 205 Plaintiff's MOTION to Compel Defendant Crispin's Responses to Deposition Questions : Motion Hearing set for 4/18/2017 at 2:00 PM in West Palm Beach Division before Magistrate Judge William Matthewman. Signed by Magistrate Judge William Matthewman on 3/17/2017. (kza) (Entered: 03/17/2017)
03/20/2017	250	RESPONSE to Motion re 244 MOTION to Take Deposition from Oliver Bivins II to Complete Out of Time Fact Witness Deposition filed by Beys Liston Mobargha & Berland, LLP, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell, Keith B. Stein. Replies due by 3/27/2017. (Attachments: # 1 Exhibit, # 2 Exhibit)(Studley, Rachel) (Entered: 03/20/2017)
03/20/2017	251	REPLY to 243 Response in Opposition to Motion, for Leave to Amend Reply to Defendants' Responses in Opposition to Plaintiff's Motion to Reopen Discovery and To Renew Motions to Compel and to Permit Joint Amended Reply to Combine Allowable Number of Pages in Reply to Defendants' Opposition to Plaintiff's Motion to Reopen Discovery by Julian Bivins. (Allman, M.) (Entered: 03/20/2017)
03/21/2017	252	ORDER granting 229 Motion to Seal until conclusion of this proceeding. Signed by Judge Kenneth A. Marra on 3/20/2017. (ir) (Entered: 03/21/2017)
03/24/2017	253	ORDER GRANTING PLAINTIFF'S AMENDED MOTION TO STRIKE FROM THE RECORD AND CLAW BACK INADVERTENTLY FILED PRIVILEGED WORK

		PRODUCT. TO SEEK DEFENDANTS' DESTRUCTION OF SUCH DOCUMENTS AND TO PRECLUDE DEFENDANTS' DISSEMINATION OR USE THEREOF AND TO SUBSTITUTE CORRECTED EXHIBITS granting 231 Motion to Strike ; granting 232 Motion to Strike. Signed by Judge Kenneth A. Marra on 3/23/2017. (lan) (Entered: 03/24/2017)
03/24/2017	254	NOTICE by Julian Bivins of Mediation (Denman, Joseph) (Entered: 03/24/2017)
03/24/2017	255	First RESPONSE to 176 Statement,, of Material Facts by Julian Bivins. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3, # 4 Exhibit Exhibit 4, # 5 Exhibit Exhibit 5, # 6 Exhibit Exhibit 6, # 7 Exhibit Exhibit 7, # 8 Exhibit Exhibit 8, # 9 Exhibit Exhibit 9, # 10 Exhibit Exhibit 10, # 11 Exhibit Exhibit 11, # 12 Exhibit Exhibit 12, # 13 Exhibit Exhibit 13, # 14 Exhibit Exhibit 14, # 15 Exhibit Exhibit 15)(Denman, Joseph) (Entered: 03/24/2017)
03/24/2017	256	First RESPONSE to 226 Statement of Material Facts (Stein's) by Julian Bivins. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit)(Denman, Joseph) (Entered: 03/24/2017)
03/24/2017	257	RESPONSE to Motion re 225 MOTION for Summary Judgment Stein Defendants filed by Julian Bivins. Replies due by 3/31/2017. (Denman, Joseph) (Entered: 03/24/2017)
03/24/2017	258	RESPONSE to Motion re 227 MOTION for Summary Judgment Kelly, O'Connell, Crispin and CLO filed by Julian Bivins. Replies due by 3/31/2017. (Denman, Joseph) (Entered: 03/24/2017)
03/24/2017	259	NOTICE by Julian Bivins re 256 Response/Reply (Other) Amended Exhibit 8 (Attachments: # 1 Exhibit) (Denman, Joseph) (Entered: 03/24/2017)
03/24/2017	260	NOTICE by Julian Bivins re 255 Response/Reply (Other),, Amended Exhibit 9 (Attachments: # 1 Exhibit) (Denman, Joseph) (Entered: 03/24/2017)
03/27/2017	261	REPLY to Response to Motion re 244 MOTION to Take Deposition from Oliver Bivins II to Complete Out of Time Fact Witness Deposition filed by Julian Bivins. (Attachments: # 1 Exhibit, # 2 Exhibit)(Denman, Joseph) (Entered: 03/27/2017)
03/28/2017	262	ORDER denying 244 Motion to Take Deposition from Oliver Bivins. Signed by Judge Kenneth A. Marra on 3/27/2017. (ir) (Entered: 03/28/2017)
03/31/2017	263	PAPERLESS Minute Entry for proceedings held before Judge Kenneth A. Marra: Motion Hearing held on 3/31/2017 re 219 MOTION for Leave to File Amended Reply to Defendants' Response in Opposition to Plaintiff's Motion to Re-Open Discovery and to Allow Combining of Allowable Number of Pages in Replyfiled by Julian Bivins. Total time in court: 1 hour(s) : 15 minutes. Attorney Appearance(s): Alexandra Jordan Schultz, Joseph Ronald Denman, Brandon Jay Hechtman. Court Reporter: Diane Miller, 561-514-3728 / Diane_Miller@flsd.uscourts.gov. (ir) (Entered: 04/03/2017)
04/03/2017	264	Notice of Supplemental Authority re 263 Motion Hearing,, Excerpt from CONCLUSION OF GUARDIANSHIPS AND GUARDIANSHIP APPOINTMENTS, GP FL-CLE 24-1, Section 24.27 (D) by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell (Attachments: # 1 Exhibit CONCLUSION OF GUARDIANSHIPS AND GUARDIANSHIP APPOINTMENTS, GP FL-CLE 24-1) (Hechtman, Brandon) (Entered: 04/03/2017)
04/05/2017	265	TRANSCRIPT of Motion Hearing held on 3/31/2017 before Judge Kenneth A. Marra, 1-72 pages, Court Reporter: Diane Miller, 561-514-3728 / Diane_Miller@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 4/26/2017.

		Redacted Transcript Deadline set for 5/8/2017. Release of Transcript Restriction set for 7/5/2017. (dmr) (Entered: 04/05/2017)
04/06/2017	266	NOTICE by Ciklin Lubitz Martens & O'Connell Notice of Service of Proposal for Settlement (Studley, Rachel) (Entered: 04/06/2017)
04/06/2017	267	NOTICE by Stephen M Kelly Notice of Service of Proposal for Settlement (Studley, Rachel) (Entered: 04/06/2017)
04/07/2017	268	Unopposed MOTION to Continue Hearing on the Motions to Compel Responses to Depositions re 249 Order Setting Hearing on Motion,, by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. Responses due by 4/21/2017 (Attachments: # 1 Text of Proposed Order)(Hechtman, Brandon) (Entered: 04/07/2017)
04/07/2017	269	ORDER granting 268 Motion to Continue. Re: 209 Amended MOTION to Compel Deposition Responses of Brian O'Connell, Esq. filed by Julian Bivins, 210 MOTION to Compel Defendant Kelly Deposition Responses filed by Julian Bivins, 205 Plaintiff's MOTION to Compel Defendant Crispin's Responses to Deposition Questions filed by Julian Bivins. Motion Hearing set for 4/25/2017 02:00 PM in West Palm Beach Division before Judge William Matthewman. Signed by Magistrate Judge William Matthewman on 4/7/2017. (lan) Modified hearing status/text per Chambers on 4/10/2017 (sk). (Entered: 04/07/2017)
04/07/2017		Set Hearings as to 209 Amended MOTION to Compel Deposition Responses of Brian O'Connell, Esq., 210 MOTION to Compel Defendant Kelly Deposition Responses, 205 Plaintiff's MOTION to Compel Defendant Crispin's Responses to Deposition Questions . Per 269 Order. Motion Hearing set for 4/25/2017 02:00 PM in West Palm Beach Division before Judge Kenneth A. Marra. (lan) (Entered: 04/07/2017)
04/07/2017	270	Clerks Notice of Docket Correction re 269 Order on Motion to Continue,, Set/Reset Motion/R&R Deadlines and Hearings,. Corr ection Incorrect Judge for hearing. Correct Judge entered. (lan) (Entered: 04/07/2017)
04/07/2017	271	REPLY to 256 Response/Reply (Other) Section II of Plaintiff's Statement of Material Facts by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. (Blaker, Jeffrey) (Entered: 04/07/2017)
04/07/2017	272	RESPONSE in Support re 225 MOTION for Summary Judgment filed by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. (Blaker, Jeffrey) (Entered: 04/07/2017)
04/07/2017	273	RESPONSE to 255 Response/Reply (Other),, PLAINTIFF'S STATEMENT OF ADDITIONAL MATERIAL FACTS IN OPPOSITION TO SUMMARY JUDGMENT by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. (Hechtman, Brandon) (Entered: 04/07/2017)
04/07/2017	274	REPLY to Response to Motion re 227 MOTION for Summary Judgment filed by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. (Hechtman, Brandon) (Entered: 04/07/2017)
04/07/2017		Set/Reset Deadlines/Hearings per Chambers re Order 269 as to 209 Amended MOTION to Compel, 210 MOTION to Compel, 205 Plaintiff's MOTION to Compel. Motion Hearing set for 4/25/2017 02:00 PM in West Palm Beach Division before Magistrate Judge William Matthewman. (sk) (Entered: 04/10/2017)
04/10/2017	275	ORDER holding in abeyance 201 Motion for Discovery; denying 219 Motion for Leave to Amend Reply. Signed by Judge Kenneth A. Marra on 4/9/2017. (ir) (Entered: 04/10/2017)

04/10/2017	276	Clerks Notice of Docket Correction per Chambers re Order 269 as to 209 Amended MOTION to Compel, 210 MOTION to Compel, 205 Plaintiff's MOTION to Compel. Motion Hearing set for 4/25/2017 02:00 PM in West Palm Beach Division before Magistrate Judge William Matthewman. (sk) (Entered: 04/10/2017)
04/25/2017	277	PAPERLESS Minute Entry for proceedings held before Magistrate Judge William Matthewman: Motion Hearing held on 4/25/2017 re 205 Plaintiff's MOTION to Compel Defendant Crispin's Responses to Deposition Questions filed by Julian Bivins, 209 Amended MOTION to Compel Deposition Responses of Brian O'Connell, Esq. filed by Julian Bivins; 210 MOTION to Compel Defendant Kelly Deposition Responses filed by Julian Bivins. Argument held. The Court takes the matter under advisement. Written order to be issued. Total time in court: 1 hour(s) : 48 minutes. Attorney Appearance(s): Joseph Ronald Denman, Brandon Jay Hechtman, Jeffrey Alan Blaker, Alexandra Jordan Schultz. (Digital 14:05:38) (kza) (Entered: 04/25/2017)
04/26/2017	278	ENDORSED ORDER denying as moot 206 Plaintiff's Motion to Compel O'Connell's Deposition Responses in light of the fact that Plaintiff filed an amended motion [DE 209]. Signed by Magistrate Judge William Matthewman on 4/26/2017. (no00) (Entered: 04/26/2017)
04/27/2017	279	REPORT REGARDING Report of Mediation by Julian Bivins (Denman, Joseph) (Entered: 04/27/2017)
04/27/2017	280	OMNIBUS ORDER ON DISCOVERY MOTIONS: denying 205 Plaintiff's Motion to Compel Defendant Crispin's Deposition Responses; denying 209 Plaintiff's Amended Motion to Compel O'Connell's Deposition Responses; denying 210 Plaintiff's Motion to Compel Stephen Kelly's Deposition Responses. Signed by Magistrate Judge William Matthewman on 4/27/2017. (kza) (Entered: 04/27/2017)
04/28/2017	281	FINAL MEDIATION REPORT (for image see dE#279) by Herbert Stettin. Disposition: Case did not settle.(cqs) (Entered: 04/28/2017)
04/28/2017	282	Clerks Notice to Filer re 279 Report Regarding. Wrong Event Selected ; ERROR - The Filer selected the wrong event. The document was re-docketed by the Clerk, see [dE#280]. It is not necessary to refile this document. (cqs) (Entered: 04/28/2017)
05/09/2017	283	Defendant's MOTION to Disqualify Counsel One of Plaintiff's Counsel from Advocating at Trial by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. Responses due by 5/23/2017 (Attachments: # 1 Exhibit Rule 26(a) (1) Initial Disclosures, # 2 Exhibit Bivins Settlement, # 3 Exhibit K Sharp Depo Excerpt, # 4 Exhibit Gilbert Depo Excerpt)(Studley, Rachel) (Entered: 05/09/2017)
05/11/2017	284	Notice of Supplemental Authority re 227 MOTION for Summary Judgment by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell (Attachments: # 1 Supplement 4th DCA Opinion, # 2 Supplement 4th DCA Case Docket, # 3 Supplement Appellant's Initial Brief, April 28, 2016, # 4 Supplement Appellee Amended Answer Brief, September 2, 2016, # 5 Supplement Appellant's Reply Brief, September 27, 2016) (Studley, Rachel) (Entered: 05/11/2017)
05/11/2017	285	Plaintiff's OBJECTION of Magistrate Judge 280 Order on Motion to Compel,,,,, to District Court (Denman, Joseph) (Entered: 05/11/2017)
05/19/2017	286	TRANSCRIPT of Hearing Proceedings held on 4/25/17 before Magistrate Judge William Matthewman, 1-82 pages, Court Reporter: Bonnie J. Lewis, 305-523-5635. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/9/2017. Redacted

		Transcript Deadline set for 6/19/2017. Release of Transcript Restriction set for 8/17/2017. (Attachments: # 1 Designation Access Form)(hh) (Entered: 05/22/2017)
05/23/2017	287	RESPONSE to Motion re 283 Defendant's MOTION to Disqualify Counsel One of Plaintiff's Counsel from Advocating at Trial filed by Julian Bivins. Replies due by 5/30/2017. (Attachments: # 1 Exhibit Exhibit 1, # 2 Errata Exhibit 2)(Denman, Joseph) (Entered: 05/23/2017)
05/24/2017	288	MOTION to Strike Irwin Gilbert, Esq.'s Expert Report (Responses due by 6/7/2017), MOTION in Limine to Preclude Irwin Gilbert, Esq.'s Testimony by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. (Attachments: # 1 Exhibit Exhibit 1 to Gilbert deposition, # 2 Exhibit I. Gilbert, Esq. deposition, # 3 Exhibit Fla. Prof'l Guardian Registry, # 4 Exhibit R. 26 Expert Rpt. I. Gilbert, Esq.)(Hechtman, Brandon) (Entered: 05/24/2017)
05/24/2017	289	MOTION to Strike Kara Sharp, CPA's Expert Report (Responses due by 6/7/2017), MOTION in Limine to Preclude Kara Sharp's Testimony by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. (Attachments: # 1 Exhibit K. Sharp deposition, # 2 Exhibit R. 26 Expert Rpt. K. Sharp, # 3 Exhibit Settlement Detail Chart)(Hechtman, Brandon) (Entered: 05/24/2017)
05/25/2017	290	RESPONSE to 285 OBJECTION of Magistrate Judge 280 Order on Motion to Compel by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. (Studley, Rachel) Modified to add link and text on 5/25/2017 (jua). (Entered: 05/25/2017)
05/25/2017	291	RESPONSE to 285 Plaintiff's OBJECTION of Magistrate Judge 280 Order on Motion to Compel,,,,, to District Court by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. (Schultz, Alexandra) (Entered: 05/25/2017)
05/30/2017	292	REPLY to Response to Motion re 283 Defendant's MOTION to Disqualify Counsel One of Plaintiff's Counsel from Advocating at Trial filed by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. (Studley, Rachel) (Entered: 05/30/2017)
06/01/2017	293	REPLY to Response to Motion re 285 Plaintiff's OBJECTION of Magistrate Judge 280 Order on Motion to Compel,,,,, to District Court Plaintiff's Reply to Defendants' Responses [DE 290 and 291] To Appeal from and Objection to the Magistrate Judge's April 27, 2017 "Omnibus Order on Discovery Motions" filed by Julian Bivins. (Attachments: # 1 Exhibit Privilege Log Composite)(Denman, Joseph) (Entered: 06/01/2017)
06/01/2017	294	REPLY to Response to Motion re 283 Defendant's MOTION to Disqualify Counsel One of Plaintiff's Counsel from Advocating at Trial Defendants' Corrected Reply filed by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Brian M. O'Connell. (Studley, Rachel) (Entered: 06/01/2017)
06/01/2017	295	ORDER denying 283 Motion to Disqualify Counsel. Signed by Judge Kenneth A. Marra on 6/1/2017. (ir) (Entered: 06/01/2017)
06/01/2017	296	ORDER denying 225 Motion for Summary Judgment; granting in part and denying in part 227 Motion for Summary Judgment. Signed by Judge Kenneth A. Marra on 6/1/2017. (ir) (Entered: 06/01/2017)
06/01/2017	297	JUDGMENT in favor of Stephen M Kelly against Julian Bivins. Signed by Judge Kenneth A. Marra on 6/1/2017. (ir) (Entered: 06/01/2017)
06/05/2017	298	Unopposed MOTION for Extension of Time to File Response/Reply/Answer as to 288 MOTION to Strike Irwin Gilbert, Esq.'s Expert Report MOTION in Limine to Preclude

		Irwin Gilbert, Esq.'s Testimony, 289 MOTION to Strike Kara Sharp, CPA's Expert Report MOTION in Limine to Preclude Kara Sharp's Testimony by Julian Bivins. (Denman, Joseph) (Entered: 06/05/2017)
06/06/2017	299	ENDORSED ORDER granting 298 Motion for Extension of Time to File Response/Reply to 288 MOTION to Strike Irwin Gilbert, Esq.'s Expert Report MOTION in Limine to Preclude Irwin Gilbert, Esq.'s Testimony filed by Brian M. O'Connell, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, 289 MOTION to Strike Kara Sharp, CPA's Expert Report MOTION in Limine to Preclude Kara Sharp's Testimony filed by Brian M. O'Connell, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly. Responses due by 6/12/2017. Signed by Judge Kenneth A. Marra on 6/6/2017. (ir) (Entered: 06/06/2017)
06/09/2017	300	Initial Disclosure(s) of Rule 26(A)(3) Pretrial Disclosures by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein (Blaker, Jeffrey) (Entered: 06/09/2017)
06/09/2017	301	Initial Disclosure(s) of Pretrial Disclosure per Local Rule 16.1(d) and Rule 26(a)(3) by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell (Hechtman, Brandon) (Entered: 06/09/2017)
06/09/2017	302	Initial Disclosure(s) of Pretrial Disclosure per Local Rule 16.1(d) and Rule 26(a)(3), Corrected by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell (Hechtman, Brandon) (Entered: 06/09/2017)
06/09/2017	303	Initial Disclosure(s) of Plaintiff's Rule 26(a)(3) Pretrial Disclosures by Julian Bivins (Denman, Joseph) (Entered: 06/09/2017)
06/12/2017	304	RESPONSE to Motion re 288 MOTION to Strike Irwin Gilbert, Esq.'s Expert Report MOTION in Limine to Preclude Irwin Gilbert, Esq.'s Testimony filed by Julian Bivins. Replies due by 6/19/2017. (Attachments: # 1 Exhibit Rule 26 Expert Report of Jeffrey Skatoff, Esq.)(Denman, Joseph) (Entered: 06/12/2017)
06/12/2017	305	RESPONSE to Motion re 289 MOTION to Strike Kara Sharp, CPA's Expert Report MOTION in Limine to Preclude Kara Sharp's Testimony filed by Julian Bivins. Replies due by 6/19/2017. (Denman, Joseph) (Entered: 06/12/2017)
06/15/2017	306	REPLY to Response to Motion re 288 MOTION to Strike Irwin Gilbert, Esq.'s Expert Report MOTION in Limine to Preclude Irwin Gilbert, Esq.'s Testimony filed by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. (Studley, Rachel) (Entered: 06/15/2017)
06/15/2017	307	REPLY to Response to Motion re 289 MOTION to Strike Kara Sharp, CPA's Expert Report MOTION in Limine to Preclude Kara Sharp's Testimony filed by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. (Studley, Rachel) (Entered: 06/15/2017)
06/16/2017	308	MOTION to Stay or Dismiss this Action Without Prejudice, Verified by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. Responses due by 6/30/2017 (Attachments: # 1 Exhibit Order Appointing Temporary Administrator and Setting Amount of Bond, # 2 Exhibit Application for Appointment as Temporary Administrator and for Letter of Temporary Administration, # 3 Exhibit Objection to Petition for Administration, # 4 Exhibit Ancillary Letters of Administration, # 5 Exhibit Objection to Continued Appointment, # 6 Exhibit Agreed Motion for Continuance, # 7 Exhibit Order Granting Agreed Motion for Continuance, # 8 Exhibit Texas Petition in Intervention and Request for Appointment of Disinterested Third-Party Temporary Administrator, # 9 Exhibit Verified Petition for Appointment of Curator)(Hechtman, Brandon) (Entered: 06/16/2017)

06/19/2017	309	RESPONSE to Motion re 308 MOTION to Stay or Dismiss this Action Without Prejudice, Verified filed by Julian Bivins. Replies due by 6/26/2017. (Attachments: # 1 Exhibit Petition to be appointed, # 2 Exhibit Petition for Ancillary Administration, # 3 Exhibit Order Admitting Will, # 4 Exhibit Ancillary Letters of Administration, # 5 Exhibit Verified Petition, # 6 Exhibit Amended Verified Petition, # 7 Exhibit Excerpt from Kelly Transcript, # 8 Exhibit Excerpt from Rogers Transcript)(Denman, Joseph) (Entered: 06/19/2017)
06/22/2017	310	MOTION in Limine by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. (Studley, Rachel) (Entered: 06/22/2017)
06/22/2017	311	SUPPLEMENT to 303 Initial Disclosure(s) Supplemental Rule 26(a)(3) Pretrial Disclosures by Julian Bivins (Denman, Joseph) (Entered: 06/22/2017)
06/22/2017	312	First MOTION in Limine Exclude Settlement by Julian Bivins. (Denman, Joseph) (Entered: 06/22/2017)
06/22/2017	313	Second MOTION in Limine Texas Settlement by Julian Bivins. (Denman, Joseph) (Entered: 06/22/2017)
06/22/2017	314	Third MOTION in Limine JRD to Testify at Trial by Julian Bivins. (Denman, Joseph) (Entered: 06/22/2017)
06/22/2017	315	Fourth MOTION in Limine Exclude Orders to Establish Res Judicata by Julian Bivins. (Denman, Joseph) (Entered: 06/22/2017)
06/22/2017	316	Fifth MOTION in Limine to Exclude Attorney-client Privilege by Julian Bivins. (Attachments: # 1 Exhibit 2017.01.09 Transcript of Brian O'Connell, # 2 Exhibit 2017.01.09 Transcript [Ashley Crispin], # 3 Exhibit 2017.01.11 Transcript [Stephen Kelly][Vol. I and II], # 4 Exhibit 2017.01.12 Transcript [Curtis Rogers], # 5 Exhibit 2016.07.12 RRF [Crispin, O'Connell and CLO], # 6 Exhibit 2016.07.21 RRF [Curtis Rogers], # 7 Exhibit 2016.07.11 RRF [Stephen Kelly], # 8 Exhibit 2017.03.29 Transcript [Jeffrey Skatoff][Full with Exhibits])(Denman, Joseph) (Entered: 06/22/2017)
06/22/2017	317	SUPPLEMENT to 311 Supplement CORRECTED Supplement to Rule 26(a)(3) Pre Trial Disclosures by Julian Bivins (Denman, Joseph) (Entered: 06/22/2017)
06/22/2017	318	PRETRIAL STIPULATION by Julian Bivins (Denman, Joseph) (Entered: 06/22/2017)
06/23/2017	319	ORDER affirming Magistrate Judge April 27, 2017 Order DE 280 ;denying 201 Motion for Discovery; denying 285 Appeal/Objection of Magistrate Judge Order to District Court. Signed by Judge Kenneth A. Marra on 6/23/2017. (ir) (Entered: 06/23/2017)
06/23/2017	320	Initial Disclosure(s) of Plaintiff's Objection to CLO Defendants' Corrected Fed. R. 26(A) (3) Pre-Trial Disclosure [DE 302] and Objection to Stein Defendants' Rule 26(A)(3) Pretrial Disclosures [DE300] Re: 300 Initial Disclosure(s) filed by Law Offices of Keith B. Stein, Beys Liston Mobargha & Berland, LLP, Keith B. Stein, 302 Initial Disclosure(s) filed by Brian M. O'Connell, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin by Julian Bivins (Denman, Joseph) (Entered: 06/23/2017)
06/23/2017	321	Initial Disclosure(s) of Defendants' Objections to Plaintiff's Rule 26(A)(3) Pretrial Disclosures Re: 317 Supplement filed by Julian Bivins by Beys Liston Mobargha & Berland, LLP, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Law Offices of Keith B. Stein, Brian M. O'Connell, Keith B. Stein (Schultz, Alexandra) (Entered: 06/23/2017)
06/26/2017	322	Corrected MOTION in Limine by Beys Liston Mobargha & Berland, LLP, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell, Keith B. Stein. (Hechtman, Brandon) (Entered: 06/26/2017)

06/26/2017	323	<p>CLERK'S Notice of Policy re Electronic Submission of Exhibits.</p> <p>Unless otherwise ordered by the presiding Judge, Administrative Order 2016-70 directs that within three (3) days of the conclusion of a proceeding, parties must file in the CMECF system electronic versions of most documentary exhibits admitted into evidence (excluding sealed exhibits in criminal cases), including photographs of non-documentary physical exhibits. At the time of filing the electronic exhibits, the attorney for the filing party shall complete and file a Certificate of Compliance Re Admitted Evidence. Electronically filed exhibits are subject to CM/ECF Administrative Procedures, Section 6, Redaction of Personal Information, Privacy Policy, and Inappropriate Materials. Failure to file the electronic exhibits and Notice of Compliance within three (3) days may result in the imposition of sanctions. The Certificate of Compliance Re Admitted Evidence, a Quick Reference Guide to Electronically Filing Trial Exhibits, and the full text of Administrative Order 2016-70 can be found at the Courts website, http://www.flsd.uscourts.gov as to Beys Liston Mobargha & Berland, LLP, Julian Bivins, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Stephen M Kelly, Law Offices of Keith B. Stein, Brian M. O'Connell, Keith B. Stein. (ir) (Entered: 06/26/2017)</p>
06/26/2017	324	<p>REPLY to Response to Motion re 308 MOTION to Stay or Dismiss this Action Without Prejudice, Verified filed by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. (Studley, Rachel) (Entered: 06/26/2017)</p>
06/27/2017	325	<p>PAPERLESS Order Cancelling 7/7/17 Calendar Call Hearing. Jury selection will begin on or about 7/17/17 or after completion of Court's first case on trial calendar. Dates are subject to change if first case settles. Signed by Judge Kenneth A. Marra on 6/27/2017. (ir) (Entered: 06/27/2017)</p>
06/27/2017	326	<p>RESPONSE to Motion re 322 Corrected MOTION in Limine filed by Julian Bivins. Replies due by 7/5/2017. (Attachments: # 1 Exhibit Edward Robbins Expert Report) (Denman, Joseph) (Entered: 06/27/2017)</p>
06/27/2017	327	<p>RESPONSE to Motion re 316 Fifth MOTION in Limine to Exclude Attorney-client Privilege, 314 Third MOTION in Limine JRD to Testify at Trial, 315 Fourth MOTION in Limine Exclude Orders to Establish Res Judicata, 312 First MOTION in Limine Exclude Settlement, 313 Second MOTION in Limine Texas Settlement filed by Beys Liston Mobargha & Berland, LLP, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Law Offices of Keith B. Stein, Brian M. O'Connell, Keith B. Stein. Replies due by 7/5/2017. (Attachments: # 1 Exhibit Ver'd Pet Take Action NY Property - 9-13-12)(Studley, Rachel) (Entered: 06/27/2017)</p>
06/28/2017	328	<p>ORDER denying 308 Motion to Stay. Signed by Judge Kenneth A. Marra on 6/27/2017. (ir) (Entered: 06/28/2017)</p>
06/29/2017	329	<p>NOTICE by Julian Bivins Deposition Designations (Attachments: # 1 Designation) (Denman, Joseph) (Entered: 06/29/2017)</p>
06/30/2017	330	<p>Joint MOTION for Extension of Time to File Proposed Jury Instructions and Verdict Form by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. Responses due by 7/14/2017 (Attachments: # 1 Text of Proposed Order)(Schultz, Alexandra) (Entered: 06/30/2017)</p>
07/03/2017	331	<p>Proposed Jury Instructions by Julian Bivins. (Attachments: # 1 Plaintiff's Verdict Form, # 2 Defendants' Verdict Form)(Denman, Joseph) (Entered: 07/03/2017)</p>
07/05/2017	332	<p>PAPERLESS ORDER granting nunc pro tunc 330 Joint Motion for Extension of Time. Proposed Jury Instructions and Verdict Form shall be filed on or before July 3, 2017. Signed by Judge Kenneth A. Marra on 7/5/2017. (lh1) (Entered: 07/05/2017)</p>

07/05/2017	333	REPLY to Response to Motion re 314 Third MOTION in Limine JRD to Testify at Trial filed by Julian Bivins. (Denman, Joseph) (Entered: 07/05/2017)
07/05/2017	334	REPLY to Response to Motion re 312 First MOTION in Limine Exclude Settlement filed by Julian Bivins. (Denman, Joseph) (Entered: 07/05/2017)
07/05/2017	335	REPLY to Response to Motion re 315 Fourth MOTION in Limine Exclude Orders to Establish Res Judicata filed by Julian Bivins. (Denman, Joseph) (Entered: 07/05/2017)
07/05/2017	336	REPLY to Response to Motion re 313 Second MOTION in Limine Texas Settlement filed by Julian Bivins. (Denman, Joseph) (Entered: 07/05/2017)
07/05/2017	337	REPLY to Response to Motion re 316 Fifth MOTION in Limine to Exclude Attorney-client Privilege filed by Julian Bivins. (Denman, Joseph) (Entered: 07/05/2017)
07/06/2017	338	NOTICE by Beys Liston Mobargha & Berland, LLP, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Law Offices of Keith B. Stein, Brian M. O'Connell, Keith B. Stein of Filing of Defendants' Objections and Counter-Designations to Plaintiff's Deposition Designations (Attachments: # 1 Objections and Counter-Designations) (Schultz, Alexandra) (Entered: 07/06/2017)
07/07/2017	339	Proposed Voir Dire Questions by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. (Studley, Rachel) (Entered: 07/07/2017)
07/07/2017	340	Proposed Voir Dire Questions by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. (Schultz, Alexandra) (Entered: 07/07/2017)
07/10/2017	341	MOTION to Bring Electronic Equipment into the courtroom by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. Responses due by 7/24/2017 (Attachments: # 1 Text of Proposed Order)(Studley, Rachel) (Entered: 07/10/2017)
07/11/2017	342	ORDER granting 341 Motion to Bring Electronic Equipment into the courtroom. Signed by Judge Kenneth A. Marra on 7/10/2017. (ir) (Entered: 07/11/2017)
07/12/2017	343	MOTION Motion to Allow Access to Courthouse with Electronic Devises by Julian Bivins. (Attachments: # 1 Text of Proposed Order)(Denman, Joseph) (Entered: 07/12/2017)
07/12/2017	344	MOTION Plaintiff's Motion for Judicial Notice of Palm Beach County, Florida, Ancillary Letters of Administration in re: Estate of Oliver Bivins and 67th Street Deeds with Memo by Julian Bivins. (Attachments: # 1 Exhibit Certified Copy of Letters of Administratin, # 2 Exhibit Certified Copies of Deeds, # 3 Text of Proposed Order)(Denman, Joseph) (Entered: 07/12/2017)
07/12/2017	345	MOTION to Bring Electronic Equipment into the courtroom by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. Responses due by 7/26/2017 (Attachments: # 1 Text of Proposed Order)(Schultz, Alexandra) (Entered: 07/12/2017)
07/13/2017	346	SUPPLEMENT Corrected Suppl Rule 26(a)(3) PreTrial Disclosures by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell (Studley, Rachel) (Entered: 07/13/2017)
07/13/2017	347	Amended MOTION to Bring Electronic Equipment into the courtroom by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. Responses due by 7/27/2017 (Attachments: # 1 Text of Proposed Order)(Studley, Rachel) (Entered: 07/13/2017)
07/13/2017	348	ORDER granting 343 Motion to Allow Access to Courthouse with Electronic Devises. Signed by Judge Kenneth A. Marra on 7/12/2017. (ir) (Entered: 07/13/2017)

07/13/2017	349	ORDER granting 345 Motion to Bring Electronic Equipment into the courtroom. Signed by Judge Kenneth A. Marra on 7/12/2017. (ir) (Entered: 07/13/2017)
07/13/2017	350	Proposed Voir Dire Questions by Julian Bivins. (Denman, Joseph) (Entered: 07/13/2017)
07/14/2017	351	NOTICE by Beys Liston Mobargha & Berland, LLP, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Law Offices of Keith B. Stein, Brian M. O'Connell, Keith B. Stein re 329 Notice (Other) of Filing Defendant's Objections and Counter-Designations to Plaintiff's Deposition Designations for Rhonda Gluck. Attorney Rachel Studley added to party Beys Liston Mobargha & Berland, LLP(pty:dft), Attorney Rachel Studley added to party Law Offices of Keith B. Stein(pty:dft), Attorney Rachel Studley added to party Keith B. Stein(pty:dft). (Attachments: # 1 Objections and Counter-Designations) (Studley, Rachel) (Entered: 07/14/2017)
07/14/2017	352	RESPONSE to Motion re 344 MOTION Plaintiff's Motion for Judicial Notice of Palm Beach County, Florida, Ancillary Letters of Administration in re: Estate of Oliver Bivins and 67th Street Deeds with Memo filed by Beys Liston Mobargha & Berland, LLP, Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Law Offices of Keith B. Stein, Brian M. O'Connell, Keith B. Stein. Replies due by 7/21/2017. (Studley, Rachel) (Entered: 07/14/2017)
07/14/2017	353	NOTICE to parties: Jury selection will begin on Monday, July 17, 2017 at 9:00 a.m. in Courtroom #1 on the FOURTH FLOOR. (ir) (Entered: 07/14/2017)
07/14/2017	354	ORDER granting 347 Amended Motion to Bring Electronic Equipment into the courtroom. Signed by Judge Kenneth A. Marra on 7/14/2017. (ir) (Entered: 07/14/2017)
07/14/2017	355	ORDER denying without prejudice 344 Motion for judicial notice. Signed by Judge Kenneth A. Marra on 7/14/2017. (ir) (Entered: 07/14/2017)
07/14/2017	356	ORDER denying as moot 310 Motion in Limine; granting in part, denying in part and reserving in part 322 Motion in Limine. Signed by Judge Kenneth A. Marra on 7/14/2017. (ir) (Entered: 07/14/2017)
07/14/2017	357	ORDER entered 288 Motion to Strike ; entered 288 Motion in Limine; entered 289 Motion to Strike ; entered 289 Motion in Limine. Signed by Judge Kenneth A. Marra on 7/14/2017. (ir) (Entered: 07/14/2017)
07/14/2017	358	ORDER granting without prejudice 312 Motion in Limine; denying without prejudice 313 Motion in Limine; granting without prejudice 314 Motion in Limine; denying without prejudice 315 Motion in Limine; denying without prejudice 316 Motion in Limine. Signed by Judge Kenneth A. Marra on 7/14/2017. (ir) (Entered: 07/14/2017)
07/14/2017	359	NOTICE by Julian Bivins of Intent to Introduce Rule 1006 Summaries at Trial (Attachments: # 1 Exhibit A to Notice of Intent, etc., # 2 Exhibit B to Notice of Intent, etc., # 3 Exhibit C to Notice of Intent, etc., # 4 Exhibit D to Notice of Intent, etc., # 5 Exhibit E to Notice of Intent, etc., # 6 Exhibit F to Notice of Intent, etc., # 7 Exhibit G to Notice of Intent, etc) (Denman, Joseph) (Entered: 07/14/2017)
07/14/2017	360	NOTICE by Julian Bivins re 338 Notice (Other), Plaintiffs' Notice of Filing Objections and Counter-Designations to Defendants' Deposition Designations and Counter - Designations (Attachments: # 1 Exhibit Plaintiffs' Objections and Counter-Designations to Defendants' Deposition Designations and Counter-Designations) (Denman, Joseph) (Entered: 07/14/2017)
07/14/2017	361	Plaintiff's Objection to CLO Defendants' Corrected Supplemental Fed. R. 26(A)(3) Pre-Trial Disclosure [DE 346] to 346 Supplement by Julian Bivins. (Denman, Joseph) (Entered: 07/14/2017)

07/15/2017	362	NOTICE by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell re 338 Notice (Other), Highlighted Deposition Transcripts (Attachments: # 1 Deposition Bernstein, # 2 Deposition Bivins 2013, # 3 Deposition Bivins 2015, # 4 Deposition Bivins Sr., # 5 Deposition Crispin I, # 6 Deposition Crispin II, # 7 Deposition Crispin, # 8 Deposition Ginsburg, # 9 Deposition Gluck, # 10 Deposition hawkins, # 11 Deposition heinrich, # 12 Deposition Kuhnel, # 13 Deposition Kuhnel 2012, # 14 Deposition Kuhnel 2013, # 15 Deposition Kuhnel 2015, # 16 Deposition Lieberman 2017, # 17 Deposition Lieberman, # 18 Deposition O'Connell 2017, # 19 Deposition Stein, # 20 Deposition O'Connell 2013) (Studley, Rachel) (Entered: 07/15/2017)
07/17/2017	363	Amended MOTION to Bring Electronic Equipment into the courtroom by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. Responses due by 7/31/2017 (Attachments: # 1 Text of Proposed Order)(Studley, Rachel) (Entered: 07/17/2017)
07/17/2017	364	Amended MOTION to Bring Electronic Equipment into the courtroom by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. Responses due by 7/31/2017 (Attachments: # 1 Text of Proposed Order)(Schultz, Alexandra) (Entered: 07/17/2017)
07/17/2017	367	PAPERLESS Minute Entry for proceedings held before Judge Kenneth A. Marra: Jury Trial begun on 7/17/2017. Total time in court: 7 hour(s) : 45 minutes. Attorney Appearance(s): Rachel Studley, Jeffrey Alan Blaker, Joseph Ronald Denman, Charles Dennis Baval, Brandon Jay Hechtman. Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. (ir) (Entered: 07/18/2017)
07/18/2017	365	ORDER granting 363 Motion to Bring Electronic Equipment into the courtroom. Signed by Judge Kenneth A. Marra on 7/17/2017. (ir) (Entered: 07/18/2017)
07/18/2017	366	ORDER granting 364 Amended Motion to Bring Electronic Equipment into the courtroom. Signed by Judge Kenneth A. Marra on 7/18/2017. (ir) (Entered: 07/18/2017)
07/18/2017	370	PAPERLESS Minute Entry for proceedings held before Judge Kenneth A. Marra: Jury Trial held on 7/18/2017. Day 2. Opening statements and evidence presented. Total time in court: 7 hour(s). Attorney Appearance(s): Rachel Studley, Jeffrey Alan Blaker, Alexandra Jordan Schultz, Joseph Ronald Denman, Charles Dennis Baval, Brandon Jay Hechtman. Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. (ir) (Entered: 07/19/2017)
07/19/2017	368	PLAINTIFF'S NOTICE OF FILING HIGHLIGHTED DEPOSITION TRANSCRIPTS PURSUANT TO PLAINTIFF AND DEFENDANTS' DEPOSITION DESIGNATIONS, OBJECTIONS, AND COUNTER-DESIGNATIONS by Julian Bivins (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Exhibit, # 16 Exhibit, # 17 Exhibit, # 18 Exhibit, # 19 Exhibit, # 20 Exhibit, # 21 Exhibit, # 22 Exhibit, # 23 Exhibit, # 24 Exhibit, # 25 Exhibit, # 26 Exhibit, # 27 Exhibit, # 28 Exhibit, # 29 Exhibit, # 30 Exhibit, # 31 Exhibit, # 32 Exhibit, # 33 Exhibit, # 34 Exhibit) (rms1) (Entered: 07/19/2017)
07/19/2017	369	Clerks Notice of Noncompliance of 368 Notice (Other),,, re: Failure to Electronically File Document(s). Pursuant to Administrative Order 2006-24 and the CM/ECF Administrative Procedures, electronic filing is mandatory for attorneys admitted to practice in this Court unless otherwise noted in the Administrative Procedures. It is not necessary to re-file this document but future filings must comply with the CM/ECF Administrative Procedures. (rms1) (Entered: 07/19/2017)
07/19/2017	371	PAPERLESS Minute Entry for proceedings held before Judge Kenneth A. Marra: Jury

		Trial held on 7/19/2017. Day 3. Total time in court: 7 hour(s). Attorney Appearance(s): Rachel Studley, Jeffrey Alan Blaker, Alexandra Jordan Schultz, Joseph Ronald Denman, Charles Dennis Bavol, Brandon Jay Hechtman. Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. (ir) (Entered: 07/19/2017)
07/20/2017	372	PAPERLESS Minute Entry for proceedings held before Judge Kenneth A. Marra: Jury Trial held on 7/20/2017. Day 4. Total time in court: 7 hour(s). Trial continued to 7/24/17. Attorney Appearance(s): Rachel Studley, Jeffrey Alan Blaker, Alexandra Jordan Schultz, Joseph Ronald Denman, Charles Dennis Bavol, Brandon Jay Hechtman. Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. (ir) (Entered: 07/24/2017)
07/24/2017	373	PAPERLESS Minute Entry for proceedings held before Judge Kenneth A. Marra: Jury Trial held on 7/24/2017. Day 5. Total time in court: 8 hour(s). Attorney Appearance(s): Rachel Studley, Jeffrey Alan Blaker, Alexandra Jordan Schultz, Joseph Ronald Denman, Charles Dennis Bavol, Brandon Jay Hechtman. Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. (ir) (Entered: 07/25/2017)
07/25/2017	375	PAPERLESS Minute Entry for proceedings held before Judge Kenneth A. Marra: Jury Trial held on 7/25/2017. Day 6. Duabert hearing on witness Irwin Gilbert held after jury sent home. Court reserves ruling. Total time in court: 9 hour(s). Attorney Appearance(s): Rachel Studley, Jeffrey Alan Blaker, Alexandra Jordan Schultz, Joseph Ronald Denman, Charles Dennis Bavol, Brandon Jay Hechtman, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. (ir) (Entered: 07/26/2017)
07/26/2017	374	ENDORSED ORDER granting 288 Motion to Strike ; granting 288 Motion in Limine to Preclude Irwin Gilbert, Esq.'s Testimony. Defendants' motion to preclude Irwin Gilbert's testimony as an expert witness is granted. The Court finds that Mr. Gilbert does not have the qualifications by way of knowledge, education, training or experience to be able to provide testimony as an expert witness relative to the appropriate standard of care to which an attorney representing a professional guardian of an incapacitated ward would be required to adhere. The Court also finds the motion was filed timely. Signed by Judge Kenneth A. Marra on 7/26/2017. (ir) (Entered: 07/26/2017)
07/26/2017	377	PAPERLESS Minute Entry for proceedings held before Judge Kenneth A. Marra: Jury Trial held on 7/26/2017. Day 7. Total time in court: 7 hour(s). Attorney Appearance(s): Rachel Studley, Jeffrey Alan Blaker, Alexandra Jordan Schultz, Joseph Ronald Denman, Charles Dennis Bavol, Brandon Jay Hechtman. Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. (ir) (Entered: 07/27/2017)
07/27/2017	376	Plaintiff's MOTION for Reconsideration re 374 Order on Motion to Strike, Order on Motion in Limine,,, by Julian Bivins. (Denman, Joseph) (Entered: 07/27/2017)
07/27/2017	378	PAPERLESS Minute Entry for proceedings held before Judge Kenneth A. Marra: Jury Trial held on 7/27/2017. Day 8. Both sides rest. Court reserves ruling on Rule 50 motions. Jury charge conference held. Closing statements to begin on 7/28/17. Total time in court: 8 hour(s) : 15 minutes. Attorney Appearance(s): Rachel Studley, Jeffrey Alan Blaker, Alexandra Jordan Schultz, Joseph Ronald Denman, Charles Dennis Bavol, Brandon Jay Hechtman, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. (ir) (Entered: 07/28/2017)
07/28/2017	379	PAPERLESS Minute Entry for proceedings held before Judge Kenneth A. Marra: Jury Trial completed on 7/28/2017. Closing arguments, jury deliberations and verdict returned. Total time in court: 5 hour(s). Attorney Appearance(s): Rachel Studley, Jeffrey Alan Blaker, Alexandra Jordan Schultz, Joseph Ronald Denman, Charles Dennis Bavol, Brandon Jay Hechtman. Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. (ir) (Entered: 07/28/2017)

07/28/2017	380	Court's Jury Instructions. (ir) (Entered: 07/28/2017)
07/28/2017	381	JURY VERDICT. (ir) (Additional attachment(s) added on 7/31/2017: # 1 Restricted Unredacted Jury Note/Verdict - Jury Verdict) (ir). (Entered: 07/28/2017)
07/28/2017	382	PLAINTIFF'S Exhibit List. (ir) (Entered: 07/28/2017)
07/28/2017	383	DEFENDANT'S Exhibit List. (ir) (Entered: 07/28/2017)
07/28/2017	384	Jury Notes. (ir) (Additional attachment(s) added on 7/31/2017: # 1 Restricted Unredacted Jury Note/Verdict - Jury Notes) (ir). (Entered: 07/28/2017)
07/29/2017	385	TRANSCRIPT of Jury Trial held on 07/17/2017 before Judge Kenneth A. Marra, Volume Number 1 of 9, 1-111 pages, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/21/2017. Redacted Transcript Deadline set for 8/29/2017. Release of Transcript Restriction set for 10/27/2017. (sf) (Entered: 07/29/2017)
07/29/2017	386	TRANSCRIPT of Jury Trial held on 07/18/2017 before Judge Kenneth A. Marra, Volume Number 2 of 9, 1-242 pages, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/21/2017. Redacted Transcript Deadline set for 8/29/2017. Release of Transcript Restriction set for 10/27/2017. (sf) (Entered: 07/29/2017)
07/29/2017	387	TRANSCRIPT of Jury Trial held on 07/19/2017 before Judge Kenneth A. Marra, Volume Number 3 of 9, 1-308 pages, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/21/2017. Redacted Transcript Deadline set for 8/29/2017. Release of Transcript Restriction set for 10/27/2017. (sf) (Entered: 07/29/2017)
07/29/2017	388	TRANSCRIPT of Jury Trial held on 07/20/2017 before Judge Kenneth A. Marra, Volume Number 4 of 9, 1-302 pages, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/21/2017. Redacted Transcript Deadline set for 8/29/2017. Release of Transcript Restriction set for 10/27/2017. (sf) (Entered: 07/29/2017)
07/29/2017	389	TRANSCRIPT of Jury Trial held on 07/24/2017 before Judge Kenneth A. Marra, Volume Number 5 of 9, 1-340 pages, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/21/2017. Redacted Transcript Deadline set for 8/29/2017. Release of Transcript Restriction set for 10/27/2017. (sf) (Entered: 07/29/2017)
07/29/2017	390	TRANSCRIPT of Jury Trial held on 07/25/2017 before Judge Kenneth A. Marra, Volume Number 6 of 9, 1-355 pages, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.

		Redaction Request due 8/21/2017. Redacted Transcript Deadline set for 8/29/2017. Release of Transcript Restriction set for 10/27/2017. (sf) (Entered: 07/29/2017)
07/29/2017	391	TRANSCRIPT of Jury Trial held on 07/26/2017 before Judge Kenneth A. Marra, Volume Number 7 of 9, 1-294 pages, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/21/2017. Redacted Transcript Deadline set for 8/29/2017. Release of Transcript Restriction set for 10/27/2017. (sf) (Entered: 07/29/2017)
07/29/2017	392	TRANSCRIPT of Jury Trial held on 07/27/2017 before Judge Kenneth A. Marra, Volume Number 8 of 9, 1-339 pages, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/21/2017. Redacted Transcript Deadline set for 8/29/2017. Release of Transcript Restriction set for 10/27/2017. (sf) (Entered: 07/29/2017)
07/29/2017	393	TRANSCRIPT of Jury Trial held on 07/28/2017 before Judge Kenneth A. Marra, Volume Number 9 of 9, 1-167 pages, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/21/2017. Redacted Transcript Deadline set for 8/29/2017. Release of Transcript Restriction set for 10/27/2017. (sf) (Entered: 07/29/2017)
07/31/2017	394	MOTION for Attorney Fees and Costs by Stephen M Kelly. Responses due by 8/14/2017 (Attachments: # 1 Exhibit Affidavit - Studley, # 2 Exhibit Affidavit - Pickett, # 3 Exhibit PFS - Kelly, # 4 Exhibit Copy of Time Card, # 5 Exhibit Copy of Cost Card)(Studley, Rachel) (Entered: 07/31/2017)
07/31/2017	395	TRIAL EXHIBITS 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 45, 48, 50, 52, 54, 55, 58, 60, 61, 62, 66, 67, 68, 70, 71, 74, 75, 78, 79, 80 by Julian Bivins. (Attachments: # 1 Exhibit 31, # 2 Exhibit 32, # 3 Exhibit 33, # 4 Exhibit 34, # 5 Exhibit 35, # 6 Exhibit 36, # 7 Exhibit 37, # 8 Exhibit 38, # 9 Exhibit 39, # 10 Exhibit 41, # 11 Exhibit 42, # 12 Exhibit 45, # 13 Exhibit 48, # 14 Exhibit 50, # 15 Exhibit 52, # 16 Exhibit 54, # 17 Exhibit 55, # 18 Exhibit 58, # 19 Exhibit 60, # 20 Exhibit 61, # 21 Exhibit 62, # 22 Exhibit 66, # 23 Exhibit 67, # 24 Exhibit 68, # 25 Exhibit 70, # 26 Exhibit 71, # 27 Exhibit 74, # 28 Exhibit 75, # 29 Exhibit 78, # 30 Exhibit 79, # 31 Exhibit 80)(Denman, Joseph) (Entered: 07/31/2017)
07/31/2017	396	TRIAL EXHIBITS 81, 83, 86, 87, 88, 97, 98, 99, 100, 102, 103, 104, 105, 106, 108, 110, 112, 113, 115, 116, 119, 120, 121, 127, 129, 131, 134, 135, 136, 137, 138, 145, 146, 147, 148, 153, 163, 164, 165, 167, 169, 170 by Julian Bivins. (Attachments: # 1 Exhibit 81, # 2 Exhibit 83, # 3 Exhibit 86, # 4 Exhibit 87, # 5 Exhibit 88, # 6 Exhibit 97, # 7 Exhibit 98, # 8 Exhibit 99, # 9 Exhibit 100, # 10 Exhibit 102, # 11 Exhibit 103, # 12 Exhibit 104, # 13 Exhibit 105, # 14 Exhibit 106, # 15 Exhibit 108, # 16 Exhibit 110, # 17 Exhibit 112, # 18 Exhibit 113, # 19 Exhibit 115, # 20 Exhibit 116, # 21 Exhibit 119, # 22 Exhibit 120, # 23 Exhibit 121, # 24 Exhibit 127, # 25 Exhibit 129, # 26 Exhibit 131, # 27 Exhibit 134, # 28 Exhibit 135, # 29 Exhibit 136, # 30 Exhibit 137, # 31 Exhibit 138, # 32 Exhibit 145, # 33 Exhibit 146, # 34 Exhibit 147, # 35 Exhibit 148, # 36 Exhibit 153, # 37 Exhibit 163, # 38 Exhibit 164, # 39 Exhibit 165, # 40 Exhibit 167, # 41 Exhibit 169, # 42 Exhibit 170) (Denman, Joseph) (Entered: 07/31/2017)
07/31/2017	397	TRIAL EXHIBITS 173, 174, 175, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 192, 193, 194, 195, 197, 198, 199, 200, 201 by Julian Bivins. (Attachments: # 1

		Exhibit 173, # 2 Exhibit 174, # 3 Exhibit 175, # 4 Exhibit 178, # 5 Exhibit 179, # 6 Exhibit 180, # 7 Exhibit 181, # 8 Exhibit 182, # 9 Exhibit 183, # 10 Exhibit 184, # 11 Exhibit 185, # 12 Exhibit 186, # 13 Exhibit 187, # 14 Exhibit 188, # 15 Exhibit 189, # 16 Exhibit 192, # 17 Exhibit 193, # 18 Exhibit 194, # 19 Exhibit 195, # 20 Exhibit 197, # 21 Exhibit 198, # 22 Exhibit 199, # 23 Exhibit 200, # 24 Exhibit 201)(Denman, Joseph) (Entered: 07/31/2017)
07/31/2017	398	Plaintiff's CERTIFICATE of Compliance Re Admitted Evidence by Joseph Ronald Denman on behalf of Julian Bivins (Denman, Joseph) (Entered: 07/31/2017)
08/01/2017	399	NOTICE by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell, Keith B. Stein of Filing Defendant's Exhibits Admitted into Evidence(Attachments: # 1 Exhibit CLO 8, # 2 Exhibit CLO 26, # 3 Exhibit CLO 28, # 4 Exhibit CLO 30, # 5 Exhibit CLO 35, # 6 Exhibit CLO 45, # 7 Exhibit CLO 57, # 8 Exhibit CLO 64, # 9 Exhibit CLO 66, # 10 Exhibit CLO 69, # 11 Exhibit CLO 70, # 12 Exhibit CLO 75, # 13 Exhibit CLO 95, # 14 Exhibit Stein 54, # 15 Exhibit Stein 55) (Studley, Rachel) (Entered: 08/01/2017)
08/01/2017	400	NOTICE by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein of Filing Trial Exhibits (Attachments: # 1 Exhibit Stein 54, # 2 Exhibit Stein 55) (Schultz, Alexandra) (Entered: 08/01/2017)
08/01/2017	401	CERTIFICATE of Compliance Re Admitted Evidence for exhibit(s): Stein 54 and Stein 55 by Alexandra Jordan Schultz on behalf of Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein (Schultz, Alexandra) (Entered: 08/01/2017)
08/01/2017	402	CERTIFICATE of Compliance Re Admitted Evidence by Rachel Studley on behalf of Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell (Studley, Rachel) (Entered: 08/01/2017)
08/02/2017	403	CLERK'S NOTICE Instructing counsel to arrange for pick up of the Original Plaintiff's and Defendant's Trial Exhibits within five days (August 9,2018) at the U.S. District Court/ Southern District of Florida West Palm Beach Divisional Office of the Clerk room 202. (dj) Modified on 8/4/2017 (dj). (Entered: 08/02/2017)
08/03/2017	404	RELEASE OF EXHIBITS ORIGINAL DEFENDANT'S (KEITH B. STEIN) TRIAL EXHIBITS released to Diane Blasi (lan) (Entered: 08/03/2017)
08/04/2017	405	RELEASE OF EXHIBITS ORIGINAL PLAINTIFF TRIAL EXHIBITS released to Charles Goldberg (lan) (Entered: 08/07/2017)
08/04/2017	406	RELEASE OF EXHIBITS ORIGINAL DEFENDANT'S TRIAL EXHIBITS released to Diane Blasi (lan) (Entered: 08/07/2017)
08/14/2017	407	JUDGMENT in favor of Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein against Julian Bivins. Signed by Judge Kenneth A. Marra on 8/11/2017. (ir) (Entered: 08/14/2017)
08/14/2017	408	RESPONSE to Motion re 394 MOTION for Attorney Fees and Costs filed by Julian Bivins. Replies due by 8/21/2017. (Attachments: # 1 Exhibit Verified Petition for Authorization to Act with Respect to any and all Claims, Defenses, or the Like in Pending Federal Court, # 2 Exhibit Notice of Cancellation of Hearing, # 3 Exhibit Order on Julian Bivins' Objection to Stephen Kelly as Successor Guardian, # 4 Exhibit Objections to Time and Billing)(Denman, Joseph) (Entered: 08/14/2017)
08/14/2017	409	NOTICE by Julian Bivins re 408 Response to Motion, (Attachments: # 1 Exhibit Corrected Exhibit B to DE 408-2, # 2 Exhibit Exhibit E to DE 408) (Denman, Joseph) (Entered: 08/14/2017)

08/21/2017	410	MOTION for Bill of Costs by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. Responses due by 9/5/2017 (Blaker, Jeffrey) (Entered: 08/21/2017)
08/21/2017	411	MEMORANDUM in Support re 410 MOTION for Bill of Costs by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. (Attachments: # 1 Exhibit Bill of Costs)(Blaker, Jeffrey) (Entered: 08/21/2017)
08/21/2017	412	REPLY to Response to Motion re 394 MOTION for Attorney Fees and Costs filed by Stephen M Kelly. (Hechtman, Brandon) (Entered: 08/21/2017)
08/24/2017	413	NOTICE of Attorney Appearance by Lorin Louis Mrachek on behalf of Ciklin Lubitz Martens & O'Connell. Attorney Lorin Louis Mrachek added to party Ciklin Lubitz Martens & O'Connell(pty:dft). (Mrachek, Lorin) (Entered: 08/24/2017)
08/24/2017	414	NOTICE of Attorney Appearance by Alan Benjamin Rose on behalf of Ciklin Lubitz Martens & O'Connell. Attorney Alan Benjamin Rose added to party Ciklin Lubitz Martens & O'Connell(pty:dft). (Rose, Alan) (Entered: 08/24/2017)
08/25/2017	415	Renewed MOTION for Judgment as a Matter of Law and for New Trial, and Alternative Motion for Remittitur by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. Attorney Lorin Louis Mrachek added to party Ashley N. Crispin(pty:dft), Attorney Lorin Louis Mrachek added to party Brian M. O'Connell(pty:dft). (Attachments: # 1 Appendix)(Mrachek, Lorin) (Entered: 08/25/2017)
08/25/2017	416	MOTION for Judgment (Final) on Affirmative Defenses of Collateral Estoppel/Res Judicata and Release by Ciklin Lubitz Martens & O'Connell, Ashley N. Crispin, Brian M. O'Connell. (Attachments: # 1 Exhibit NY Settlement Agreement, # 2 Exhibit Order on Hybrid Contingencies Fee, # 3 Exhibit Agreed Order on Petitions for Payment of Attys' Fees and Costs, # 4 Exhibit Order Approving Global Settlement Agreement) (Mrachek, Lorin) (Entered: 08/25/2017)
09/08/2017	417	Plaintiff's MOTION for Extension of Time to File Response/Reply/Answer as to 415 Renewed MOTION for Judgment as a Matter of Law and for New Trial, and Alternative Motion for Remittitur, 416 MOTION for Judgment (Final) on Affirmative Defenses of Collateral Estoppel/Res Judicata and Release by Julian Bivins. (Denman, Joseph) (Entered: 09/08/2017)
09/08/2017	418	NOTICE of Settlement by Julian Bivins (Denman, Joseph) (Entered: 09/08/2017)
09/08/2017	419	Plaintiff's MOTION for New Trial as to Stein Defendants by Julian Bivins. (Denman, Joseph) (Entered: 09/08/2017)
09/14/2017	420	ENDORSED ORDER denying as moot based on parties notice of settlement 417 Motion for Extension of Time to File Response/Reply/Answer. Signed by Judge Kenneth A. Marra on 9/14/2017. (ir) (Entered: 09/14/2017)
09/22/2017	421	RESPONSE in Opposition re 419 Plaintiff's MOTION for New Trial as to Stein Defendants Stein Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for New Trial filed by Beys Liston Mobargha & Berland, LLP, Law Offices of Keith B. Stein, Keith B. Stein. Replies due by 9/29/2017. (Blaker, Jeffrey) (Entered: 09/22/2017)
09/25/2017	422	NOTICE OF WITHDRAWAL OF MOTION by Stephen M Kelly re 394 MOTION for Attorney Fees and Costs filed by Stephen M Kelly (Studley, Rachel) (Entered: 09/25/2017)

Transaction Receipt

09/27/2017 21:13:57

PACER Login:	iv0168:3536162:0	Client Code:	
Description:	Docket Report	Search Criteria:	9:15-cv-81298-KAM
Billable Pages:	30	Cost:	3.00

9:15-cv-81298-KAM Bivins v. Rogers et al

Kenneth A. Marra, presiding

William Matthewman, referral

Date filed: 09/17/2015

Date of last filing: 09/25/2017

Case Summary

Office: West Palm Beach
Jury Demand: Defendant

Nature of Suit: 190

Jurisdiction: Diversity
County: Palm Beach (Office: West Palm Beach)

Origin: 1

Lead Case:

Related Case:

Filed: 09/17/2015

Demand: \$75000

Cause: 28:1332 Diversity-Breach of Fiduciary Duty

Disposition: Judgment - Jury Verdict

Terminated:

Reopened:

None

None

Other Court Case:

None

Defendant Custody Status:
Flags: REF_DISCOV,WM

Plaintiff: Julian Bivins	represented M. Kristen Allman by	Phone: 813-221-3759 Fax: 813-221-3198 Email: kallman@bleakleybavol.com
Plaintiff: Julian Bivins	represented Charles Dennis Bavol by	Phone: 813-221-3759 Fax: 813-221-3198 Email: cbavol@bleakleybavol.com
Plaintiff: Julian Bivins	represented Joseph Ronald Denman by	Phone: 813-221-3759 Fax: 813-221-3198 Email: rdenman@bleakleybavol.com
Defendant: Stephen M Kelly	represented Jeffrey Alan Blaker by	Phone: 561-697-8088 Fax: 697-8664 Email: jblaker@conroysimberg.com
Defendant: Stephen M Kelly	represented Brandon Jay Hechtman by	Phone: (305) 448-3939 Fax: (305) 441-1745 Email: bhechtman@wickersmith.com
Defendant: Stephen M Kelly	represented Rachel Studley by	Phone: 561-689-3800 Fax: 689-9206 Email: rstudley@wickersmith.com
Defendant: Brian M. O'Connell	represented Jeffrey Alan Blaker by	Phone: 561-697-8088 Fax: 697-8664 Email: jblaker@conroysimberg.com
Defendant: Brian M. O'Connell	represented Brandon Jay Hechtman by	Phone: (305) 448-3939 Fax: (305) 441-1745 Email: bhechtman@wickersmith.com
Defendant: Brian M. O'Connell	represented Brian Bradshaw Joslyn by	Phone: 561-832-5900 Fax: 561-833-4209 Email: bjoslyn@ciklinlubitz.com
Defendant: Brian M.	represented Lorin Louis Mrachek	Phone: 561-655-2250

O'Connell	by	Fax: 655-5537
Defendant: Brian M. O'Connell	represented Charles Leroy Pickett, Jr.	Email: lmrachek@mrachek-law.com
	by	Phone: 561-832-5900
		Fax: 833-4209
Defendant: Brian M. O'Connell	represented Rachel Studley	Email: Cpickett@ciklinlubitz.com
	by	Phone: 561-689-3800
		Fax: 689-9206
Defendant: Ashley N. Crispin	represented Jeffrey Alan Blaker	Email: rstudley@wickersmith.com
	by	Phone: 561-697-8088
		Fax: 697-8664
Defendant: Ashley N. Crispin	represented Brandon Jay Hechtman	Email: jblaker@conroysimberg.com
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Defendant: Ashley N. Crispin	represented Brian Bradshaw Joslyn	Email: bhechtman@wickersmith.com
	by	Phone: 561-832-5900
		Fax: 561-833-4209
Defendant: Ashley N. Crispin	represented Lorin Louis Mrachek	Email: bjoslyn@ciklinlubitz.com
	by	Phone: 561-655-2250
		Fax: 655-5537
Defendant: Ashley N. Crispin	represented Charles Leroy Pickett, Jr.	Email: lmrachek@mrachek-law.com
	by	Phone: 561-832-5900
		Fax: 833-4209
Defendant: Ashley N. Crispin	represented Rachel Studley	Email: Cpickett@ciklinlubitz.com
	by	Phone: 561-689-3800
		Fax: 689-9206
Defendant: Ciklin Lubitz Martens & O'Connell	represented Brandon Jay Hechtman	Email: rstudley@wickersmith.com
	by	Phone: (305) 448-3939
		Fax: (305) 441-1745
Defendant: Ciklin Lubitz Martens & O'Connell	represented Brian Bradshaw Joslyn	Email: bhechtman@wickersmith.com
	by	Phone: 561-832-5900
		Fax: 561-833-4209
Defendant: Ciklin Lubitz Martens & O'Connell	represented Lorin Louis Mrachek	Email: bjoslyn@ciklinlubitz.com
	by	Phone: 561-655-2250
		Fax: 655-5537
Defendant: Ciklin Lubitz Martens & O'Connell	represented Charles Leroy Pickett, Jr.	Email: lmrachek@mrachek-law.com
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		Fax: 833-4209
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		Fax: 655-5537
Defendant: Ciklin Lubitz Martens & O'Connell	represented Rachel Studley	Email: arose@mrachek-law.com
	by	Phone: 561-689-3800
		Fax: 689-9206
Defendant: Keith B. Stein	represented Jeffrey Alan Blaker	Email: rstudley@wickersmith.com
	by	Phone: 561-697-8088
		Fax: 697-8664
Defendant: Keith B. Stein	represented Alexandra Jordan Schultz	Email: jblaker@conroysimberg.com
	by	Phone: (561) 515-5205
Defendant: Keith B. Stein	represented Rachel Studley	Email: aschultz@conroysimberg.com
	by	Phone: 561-689-3800
		Fax: 689-9206
Defendant: Beys Liston	represented Jeffrey Alan Blaker	Email: rstudley@wickersmith.com
		Phone: 561-697-8088

Mobargha & Berland, LLP	by	Fax: 697-8664
Defendant: Beys Liston	represented Alexandra Jordan Schultz	Email: jblaker@conroysimberg.com
Mobargha & Berland, LLP	by	Phone: (561) 515-5205
Defendant: Beys Liston	represented Rachel Studley	Email: aschultz@conroysimberg.com
Mobargha & Berland, LLP	by	Phone: 561-689-3800
		Fax: 689-9206
		Email: rstudley@wickersmith.com
Defendant: Law Offices of Keith B. Stein	represented Jeffrey Alan Blaker	Phone: 561-697-8088
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		Email: jblaker@conroysimberg.com
Defendant: Law Offices of Keith B. Stein	represented Alexandra Jordan	Phone: (561) 515-5205
	by Schultz(Designation Retained)	Email: aschultz@conroysimberg.com
Defendant: Law Offices of Keith B. Stein	represented Rachel Studley	Phone: 561-689-3800
	by	Fax: 689-9206
		Email: rstudley@wickersmith.com
Mediator: Howard A. Tescher		
Mediator: Herbert Stettin		

PACER Service Center			
Transaction Receipt			
09/27/2017 21:12:46			
PACER Login:	iv0168:3536162:0	Client Code:	
Description:	Case Summary	Search Criteria:	9:15-cv-81298-KAM
Billable Pages:	1	Cost:	0.10

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO.: 15-81298-CV-MARRA-MATTHEWMAN**

JULIAN BIVINS, as Personal Representative
of the ancillary Estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR.,
as former guardian, STEPHEN M. KELLY,
as successor guardian, BRIAN M. O'CONNELL,
ASHLEY N. CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN,
BEYS LISTON MOBARGHA & BERLAND, LLP
f/k/a BEYS STEIN MOBARGHA & BERLAND, LLP,
and LAW OFFICES OF KEITH B. STEIN, PLLC,
n/k/a STEIN LAW, PLLC,
Defendants.

AMENDED COMPLAINT

COMES NOW the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, by and through his undersigned counsel, and sues CURTIS CAHALLONER ROGERS, JR., the former guardian of Oliver Bivins (the "Ward"), STEPHEN M. KELLY, as successor guardian of the Ward, BRIAN M. O'CONNELL, ASHLEY N. CRISPIN, CIKLIN LUBITZ & O'CONNELL, KEITH B. STEIN, BEYS LISTON MOBARGHA & BERLAND, LLP f/k/a BEYS STEIN MOBARGHA & BERLAND, LLP, and LAW OFFICES OF KEITH B. STEIN, PLLC, n/k/a STEIN LAW, PLLC, and says:

JURISDICTION AND VENUE

1. The Ward, Oliver Wilson Bivins, died on March 2, 2015. The Ward was a citizen of, and domiciled in, Amarillo, Potter County, Texas on the date of his death.

2. Julian Bivins (hereinafter, "Julian") is the Personal Representative of the ancillary Estate of the deceased Ward in Palm Beach County, Florida (the "Deceased Ward").

3. Curtis Rogers (hereinafter, "Rogers") is the former guardian of the Deceased Ward. Rogers is a citizen of, and domiciled in, Palm Beach County, Florida.

4. Stephen M. Kelly (hereinafter, "Kelly") is the successor guardian of the Deceased Ward. Kelly is a citizen of, and domiciled in Boynton Beach, Palm Beach County, Florida.

5. Brian M. O'Connell (hereinafter, "O'Connell") is a citizen of, and domiciled in Palm Beach County, Florida.

6. Ashley N. Crispin (hereinafter, "Crispin") is a citizen of, and domiciled in Palm Beach County, Florida.

7. Ciklin Lubitz & O'Connell (hereinafter, "Ciklin") is general partnership organized under the laws of the State of Florida with its principal place of business in Palm Beach County, Florida. The partners of Ciklin are the following: Dean Vegosen, P.L., Phil D. O'Connell, JR., P.A., Brian B. Joslyn, P.A., Jason S. Heselkorn, P.A., John D. Boykin, P.A., Jerald S. Beer, P.A., Bruce G. Alexander, P.A., Alan J. Ciklin, P.A., and Robert L. Crane, P.A.

8. Dean Vogeson (hereinafter, "Vogeson"), is the sole member of Dean Vogeson P.L. and is a citizen of and domiciled in Palm Beach County, Florida. Dean Vogeson P.L. is a Florida professional liability association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida.

9. Phil D. O'Connell, (hereinafter, "Phil O'Connell"), is the sole shareholder of Phil D. O'Connell Jr., P.A. and is a citizen of and domiciled in Palm Beach County, Florida. D Phil D. O'Connell Jr., P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida.

10. Brian B. Joslyn, (hereinafter, "Joslyn"), is the sole shareholder of Brian B. Joslyn, P.A. and is a citizen of and domiciled in Palm Beach County, Florida. Brian B. Joslyn, P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida.

11. Jason S. Haselkorn, (hereinafter, "Haselkorn"), is the sole shareholder of Jason S. Haselkorn, P.A. and is a citizen of and domiciled in Palm Beach County, Florida. Jason S. Haselkorn, P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida. .

12. John D. Boykin, (hereinafter, "Boykin"), is the sole shareholder of John D. Boykin, P.A. and is a citizen of and domiciled in Palm Beach County, Florida. John D. Boykin, P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida. .

13. Jerald S. Beer, (hereinafter, "Beer"), is the sole shareholder of Jerald S. Beer, P.A. and is a citizen of and domiciled in Palm Beach County, Florida. Jerald S. Beer, P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida.

14. Bruce G. Alexander, (hereinafter, "Alexander"), is the sole shareholder of Bruce G. Alexander, P.A. and is a citizen of and domiciled in Palm Beach County, Florida. Bruce G.

Alexander, P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida. .

15. Alan. J. Ciklin, (hereinafter, "Alan Ciklin"), is the sole shareholder of Alan. J. Ciklin, P.A. and is a citizen of and domiciled in Palm Beach County, Florida. Alan. J. Ciklin, P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida.

16. Robert L. Crane, (hereinafter, "Crane"), is the sole shareholder of Robert L. Crane, P.A. and is a citizen of and domiciled in Palm Beach County, Florida. Robert L. Crane, P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida.

17. Keith B. Stein (hereinafter, "Stein") is a citizen of and domiciled in New York, but does business in Palm Beach County, Florida.

18. Beys Liston Mobargha & Berland, LLP f/k/a Beys Stein Mobargha & Berland, LLP (hereinafter, "Beys") is a limited liability partnership doing business in Palm Beach County, Florida with its principal place of business in New York. The partners of Beys are the following: Jason H. Berland, Michael P. Beys, Joshua D. Liston, and Nader Mobargha. Keith B. Stein was a partner of the former iteration of Beys: Beys Stein Mobargha & Berland, LLP.

19. Jason H. Berland (hereinafter, "Berland") is a citizen of and domiciled in New York.

20. Michael P. Beys (hereinafter, "Michael Beys") is a citizen of and domiciled in New York.

21. Joshua D. Liston (hereinafter, "Liston") is a citizen of and domiciled in New York.

22. Nader Mobargha (hereinafter, "Mobargha") is a citizen of and domiciled in New York.

23. The Law Offices of Keith B. Stein, PLLC n/k/a Stein Law, PLLC (hereinafter, "Stein Law Firm") is a professional limited liability company doing business in Palm Beach County, Florida with its principal place of business in New York. Keith B. Stein is the sole member of the Stein Law Firm.

24. Stein, Beys, and Stein Law Firm committed tortious acts in Palm Beach County, Florida which resulted in the causes of actions under this complaint causing injury to the Estate of the Deceased Ward in Palm Beach County, Florida. Stein, Beys, and the Stein Law Firm expected or should reasonably have expected to have consequences in Palm Beach County, Florida because they each derived substantial revenue from the legal services they provided Rogers and Kelly from New York to Florida.

25. Plaintiff is a deemed a citizen of the State of Texas, the same state as the decedent under 28 U.S.C. § 1332 (c)(2).

26. Defendants are all citizens of states other than Texas for purposes of 28 U.S.C. §1332.

27. This is an action for money damages that exceed \$75,000.00, exclusive of interest, attorney's fees and costs.

28. Accordingly, this is a civil action which falls within the Court's original jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship).

GENERAL ALLEGATIONS

29. Oliver Bivins' (hereinafter, "Oliver Sr.") first marriage was to Dorothy Bivins, and they had a child, Julian Bivins.

30. In 1961, Oliver Sr. married Lorna Bivins (hereinafter, "Lorna"), a woman 25 years younger from New York.

31. In approximately 1990, when Oliver Sr. was approximately 70 years old, he and Lorna adopted a child together, Oliver Bivins, Jr. (hereinafter "Oliver Jr.").

32. At all material times during the marriage, Oliver Sr. lived in Amarillo, Texas and Lorna and Oliver Jr. lived in New York, New York at 67th Street, although for intermittent periods of time, Lorna and Oliver Jr. resided in Palm Beach, Florida at Lorna and Oliver Sr.'s condominium.

33. On March 5, 1992, Oliver Sr. created a joint trust with Lorna to which he transferred family owned oil and mineral rights in Amarillo, Texas (hereinafter the "Joint Trust").

34. In addition to the oil and mineral rights in Amarillo, Texas, the couple owned four properties. Lorna owned a property located at 82 Portland Place in London, England (hereinafter "London Property") and a property at 67th Street in New York, New York (hereinafter "67th Street"), and Lorna and Oliver Sr. owned together, as tenants by the entirety, properties at 808 Lexington Avenue, New York, New York (hereinafter "808 Lexington") and 330 South Ocean Blvd., Palm Beach, Florida (hereinafter "Ocean Blvd"). (The properties identified in this paragraph will be collectively referred to herein as "The Properties".)

35. On April 12, 2010, Oliver Sr. filed for divorce from Lorna in Amarillo, Texas seeking to dissolve the marriage and terminate the Joint Trust.

36. On July 28, 2010, the Court entered a Final Decree of Divorce and an Order Terminating the Joint Trust.

37. In the divorce, Oliver Sr. received everything, including the oil and mineral rights in Amarillo, Texas.

38. The Texas Court presiding over the divorce made no provision in its order, however, with respect to the Properties and no Guardian or other Defendant made any effort to re-open the Texas divorce proceeding to address the property rights of the parties pertaining to the Properties.

39. Lorna continued to hold the London and 67th Street properties in her name alone, although Oliver Sr. funded these properties to the extent not covered by tenants renting the properties. As for the the properties at 808 Lexington Avenue and 330 Ocean Boulevard, which were held as tenants by the entirety prior to the divorce, became held by Lorna and Oliver Sr. as tenants in common.

40. Following the divorce, Oliver Sr. transferred to Julian interests owned by Oliver Sr. in several parcels of real property, including the oil and mineral rights in Amarillo, Texas and a condominium in Amarillo, Texas.

41. On or about January 5, 2011, petitions to determine incapacity for both Oliver Sr. and Lorna were filed in Florida and an emergency temporary guardian, Stephen Kelly, was appointed over their person and property.

42. Lorna passed away in February 2011, shortly after the temporary guardianship was established.

43. Oliver Jr. was appointed the personal representative of the estate of Lorna Bivins.

44. On or about May 10, 2011, the Court appointed Rogers as the limited guardian of the person and property of Oliver Sr.

Texas Settlement

45. Rogers' first order of business was to seek an ex parte emergency order preventing Oliver Sr., who was in Florida temporarily from his long time home in Texas, from leaving Florida. He then began an investigation into the transfers of real property from Oliver Sr. to Julian and sought approval from the Florida guardianship court to bring an action against Julian and Julian simultaneously filed an action in Texas to validate the transfers.

46. The Florida guardianship court entered an order permitting Rogers to retain counsel on a contingency basis to prosecute and defend the actions involving the transfers.

47. Rogers, with a Texas supervising guardian, thereafter obtained an appointment as the Texas guardian over Oliver Sr.'s property in Texas.

48. The Texas litigation sought to undo all of the transfers that Oliver Sr. had made to Julian in Texas. The attorneys hired in Texas, pursuant to the contingency fee agreement, were entitled to 25% of the entire estate that was transferred back to Oliver Sr., even if Julian agreed to do it the very next day.

49. On or about February 27, 2013, Julian and Rogers entered into a settlement agreement as to the Texas proceedings (hereinafter "Texas Settlement").

50. The Properties were not the subject of the Texas lawsuit and the Texas Settlement made no provision for them.

51. As part of the Texas Settlement, Julian was required to transfer back to Oliver Sr. all of the Texas real property previously transferred to Julian, except that Julian was permitted to

keep the Ranch and all interim distributions and other proceeds Julian had already received from the real property.

52. The Texas properties were transferred to a trust for the benefit of Julian and Oliver Sr. (hereinafter the "Texas Trust") with Julian having a 37% interest in the Texas Trust and Oliver Sr. having a 63% interest in the Texas Trust.

53. As a major consideration for Julian entering into the Texas Settlement, Rogers was to resign as guardian of Oliver Sr. in Texas and Florida within thirty (30) days of court approval of the Texas settlement, and Steve Kelly was to serve as successor guardian.

54. Rogers was required to, but did not, submit a final accounting and documents necessary to obtain an order of discharge from the Texas and Florida guardianships within 30 days of the approval of the Texas settlement by the Texas and Florida guardianship courts.

55. As part of the Texas Settlement, Rogers was released from liabilities for his errors and omissions and other breaches of his fiduciary obligation, by Julian in his capacity as an interested party and sole beneficiary of Oliver Sr.'s only known will, only through the date of the Texas Settlement. This release was not made on behalf of the Ward, and could not be, whereas Oliver Sr. was alive, and Julian was not and had no authority to release Rogers on behalf of Oliver Sr.

56. The Florida guardianship court approved the settlement on April 1, 2013.

New York Settlement

57. In November 2012, Rogers entered into a contingency fee/hybrid agreement with Ciklin to initiate an action in Florida requesting that the Court presiding over the Lorna estate (the "Lorna Court") give no full faith and credit to the Texas Divorce Decree, so that the Lorna Court

would deem the Properties to pass to Oliver Sr. as though he were still married to Lorna at the time of her death. (“Florida Beneficiary Petition”).

58. In or about October 2012, Rogers also engaged Keith Stein of Beys to partition the 808 Lexington property (“New York litigation”).

59. Prior to initiating the partition action of 808 Lexington, Stein, who was not a litigator, had only prepared, at best, one prior partition action in the course of his more than two decades of practice.

60. At the time of the partition action, and for several years prior, 808 Lexington was encumbered by a mortgage in the original principal sum of \$850,000.00 (“808 Mortgage”).

61. By the time of the partition action, the balance of the mortgage was approximately \$387,000.00, while the value of 808 Lexington was in excess of \$4,000,000.

62. Prior to, and following the date of the Texas Settlement, Rogers failed to take any action to pay, monitor, negotiate, or prevent default, acceleration, or negative consequences to the Ward in connection with the 808 Mortgage.

63. On or about October 5, 2012, unbeknownst to Julian, and presumably because Rogers had not taken any action to manage the 808 Lexington asset or liabilities and the 808 Mortgage was in default, the son of the paralegal of Oliver Jr.’s attorney (who was also a close friend of Oliver Jr.) formed a corporation known as Beachton Tuxedo, LLC (“Beachton”) and surreptitiously acquired the 808 Mortgage via an Assignment of Mortgage (“Assignment”) for the outstanding balance owed on the mortgage.

64. As of the date of the Assignment, the notes secured by the Mortgage were in default, had been accelerated, and gave Beachton the immediate right to foreclose on 808 Lexington. The default interest rate on the Beachton mortgage was 17%.

65. As further consideration for Beachton to acquire the 808 Mortgage and not foreclose on it, Oliver Jr., individually, and as personal representative of the Estate of Lorna, assigned to Beachton a 40% of his and/or the Estate of Lorna's equity interest in 808 Lexington, which, at a bare minimum, gave Beachton an immediate return on its \$387,000 mortgage of far in excess of one million dollars, yet Beachton did not provide a satisfaction of mortgage in exchange for the interest and also continued to charge interest at the maximum rate allowable under the 808 Mortgage.

66. Accordingly, the assignment by Oliver Jr. resulted in a satisfaction of the 808 Mortgage, or alternatively a usurious rate of interest being charged by Beachton on the 808 Mortgage.

67. In July 2013, Rogers, as guardian for Oliver Sr., Oliver Jr., individually and as personal representative of the Estate of Lorna, and Beachton entered into a settlement agreement to settle the Florida Beneficiary Petition and the New York Litigation (hereinafter referred to as the "New York Settlement." A true and correct copy of the New York Settlement Agreement is attached hereto as Exhibit "A" and incorporated herein by reference.

68. Pursuant to the New York Settlement, Oliver Jr. agreed to immediately transfer to Oliver Sr. the 50% interest of the Estate of Lorna in 808 Lexington and Ocean Boulevard, such that as a result of such transfers, Oliver Sr. would own 100% fee simple interest in 808 Lexington and Ocean Boulevard.

69. The Estate of Lorna was required to satisfy all real estate taxes and related charges through May 8, 2013, and one-half of the real estate taxes and related charges from May 9, 2013, through the date immediately prior to the closing date.

70. Additionally, in connection with the New York Settlement, Oliver Jr. and Beachton agreed that the 40% interest in the 808 Lexington that Oliver Jr. had assigned to Beachton when it took over the 808 Mortgage, would be transferred to a 20% interest in the 67th Street property, which continued to amount to an interest by Beachton of well over a million dollars at minimum. (The percentage change in the transfer was due to the fact that the value of the 67th Street property was significantly higher than the value of 808 Lexington.)

71. Notwithstanding Beachton's acceptance of the 20% interest in 67th Street, Beachton continued to charge the maximum interest rate allowable under the 808 Mortgage, plus late fees, which combined with the 20% interest in 67th Street, constituted a satisfaction of the 808 Mortgage, or alternatively, a usurious rate of interest.

72. The closing date under the New York Settlement was to occur within ten (10) business days of the date upon which all approvals have been received from the Florida court, and each such other court. No other such court approval was required to approve the New York Settlement besides the Florida Court, which did so on September 17, 2013. Accordingly, the closing date was October 1, 2013 ("Closing Date").

73. Under the terms of the New York Settlement, Rogers, acting as guardian for Oliver Sr., agreed to waive and/or relinquish in favor of the Estate of Lorna any and all right, title, and interest in and to 67th Street and the London Property.

74. The New York Settlement required Rogers, as guardian of Oliver Sr., to pay the Beachton mortgage debt in full on or before August 31, 2013, and in exchange, Beachton agreed to continue to forebear from taking action based on the purported failure to make payments under the 808 Mortgage that Beachton purchased, including foreclosure.

75. On or about November, 2014, 67th Street sold for \$22.5 million. Accordingly, Beachton's 20% interest in the 67th Street property was worth \$4.5 million.

76. Any claim by Beachton that an outstanding balance was due on the Beachton mortgage was usurious as Beachton became entitled to receive, via its 20% equity interest in 67th Street, more than five (5) times the outstanding balance owed on the 808 Mortgage.

77. Neither Rogers nor his counsel took any action to have a Court declare the 808 Mortgage acquired by Beachton as having been satisfied or otherwise usurious.

78. Moreover, despite representations to the Florida guardianship Court that they would do so, Rogers neither made any genuine efforts to procure substitute financing for the Beachton mortgage at a lower interest rate than the default rate Beachton mortgage was charging, nor undertook any action to remove the Beachton lien from the 808 property due to it being usurious or satisfied, or undertook any action to bring the note current to avoid the default interest being charged.

79. The terms of the New York Settlement, to which Julian, as an interested person and sole beneficiary to Oliver Sr.'s only known will, persistently objected, provided that all interest on the mortgage debt accruing after June 30, 2013, but on or before the date the Beachton mortgage debt is paid in full, was to be payable 50% by the Estate of Lorna and 50% by Rogers, as guardian of Oliver Sr.

80. Moreover, the New York Settlement agreement provides that if "any party fails to comply with any of the party's obligations set forth in Section 2 or 3 of this Agreement, the party to whom the obligation is owed shall have the right to enforce the terms set forth therein and the legal fees and costs incurred by the aggrieved party in enforcing such terms shall be paid by the Party found to be in breach of such terms."

808 Lexington Management

81. Despite the terms of the Texas Settlement and the consideration provided thereunder, Rogers remained in office as guardian for Oliver Sr. until April 23, 2014, when Kelly was appointed by the Court as successor guardian of Oliver Sr.

82. From April 1, 2013 (the date of the Florida Court's approval of the Texas Settlement) until Rogers was discharged by the Court in April 2014, as Florida guardian for Oliver Sr. (the "Interim Guardianship"), Rogers had a duty to properly manage 808 Lexington as a rental property.

83. From April 23, 2014 (the date Kelly was appointed by the Court as successor guardian of Oliver Sr.) until the closing of the sale of 808 Lexington by Kelly, as guardian of Oliver Sr., Kelly had a duty to properly manage 808 Lexington as a rental property.

84. The 808 Lexington Property consisted of four floors. The first floor was rented out by a restaurant, Fig and Olive, which generated approximately \$23,500 per month in rent. The lease for Fig and Olive was set to expire in November 2014.

85. The second floor of 808 Lexington was leased out to Pinafore Nursery and generated approximately \$3,500 per month in rent, which was considerably below market. The lease for Pinafore Nursery expired on December 31, 2010, and there was no new written lease entered into by Pinafore Nursery. Following the expiration of the lease with Pinafore Nursery, it continued to pay a monthly rent of \$3,500, notwithstanding that it was a holdover tenant without a lease.

86. The fourth floor apartment had been rented out to Kimberly Beamis for \$2,300 per month, but she vacated the premises prior to January 1, 2013 due to the failure of Rogers to maintain the unit. Thereafter, fourth floor apartment became occupied by a person related to one

of the owners of Beachton for \$1,500 per month, which amount was paid directly to Oliver Jr. and nothing to the Rogers or Kelly on behalf of the Ward. The \$1500, to the extent it was paid, was well below market value, no lease was in place, and Rogers or Kelly failed to investigate, participate, or take any action for the benefit of the Ward pertaining to this unit.

87. The third floor tenant was evicted in either 2012 or 2013. Neither Rogers nor Kelly undertook any efforts to re-rent this unit, which had a monthly rental value of several thousand dollars.

88. Prior to the New York Settlement, Rogers should have been collecting 50% of the rental income from 808 Lexington, and should have made efforts to obtain full market rent on the second, third, and fourth floor units.

89. Following the Court's approval of the New York Settlement, Rogers should have been collecting all of the rental income from 808 Lexington. Yet, during the period of Interim Guardianship, Rogers only passively collected 50% of the rental income from Fig and Olive. Rogers and Kelly ignored the remaining rent that Oliver Jr. was collecting on the other 50% of the rental income from Fig and Olive and ignored any effort to obtain any rental income from the other units or tenants.

90. Following his appointment as successor guardian, Kelly should have been collecting all of the rental income from 808 Lexington. Yet, until the sale of 808 Lexington, he only passively collected 50% of the rental income from Fig and Olive. Kelly ignored the remaining rent that Oliver Jr. was collecting on the other 50% of the rental income from Fig and Olive and ignored any effort to obtain any rental income from the other units or tenants.

91. Until recent efforts undertaken mainly by Julian at his own expense, Oliver Jr. had not paid any money to the State of New York or to Rogers or Kelly for any past due property taxes

pursuant to the New York Settlement, or for the amount of property taxes on 808 Lexington from May 9, 2013, to the date immediately prior to the Closing Date.

92. Until recent efforts undertaken mainly by Julian at his own expense, Oliver Jr. had not paid any of the interest that accrued on the 808 Mortgage from June 30, 2013, until it was paid in full.

93. During the period of Interim Guardianship, Rogers also failed to take actions for the benefit of the Ward, including, but not limited to, the following acts with respect to 808 Lexington:

- a. Enter into discussions with Fig and Olive regarding renewing its lease or increasing the monthly rental payments;
- b. Enter into discussions with Pinafore Nursery to sign a new lease and increase its rent from the monthly rent it was paying for the previous four years;
- c. Take any action to market the third or fourth floor apartments;
- d. Take any action with respect to repairing, renovating, or maintaining 808 Lexington, including, but not limited to, its common areas, to obtain the highest and best rental values for the property;
- e. Collect the appropriate rental income due Oliver Sr. from the lease of 808 Lexington;
- f. Pursue an action against Oliver Jr. to force Oliver Jr. to use the rental income from 808 Lexington to pay down the Beachton mortgage and to enforce the New York Settlement;
- g. Bring an action against Beachton for usury or satisfaction based upon the interest it received in 808 Lexington and thereafter 67th Street; and

- h. Obtain commercial financing to pay off the 808 Mortgage assigned to Beachton to avoid the default interest rate it was accruing against 808 Lexington.

94. After his appointment as successor guardian of Oliver Sr. on April 23, 2014, Kelly also failed to take actions for the benefit of the Ward, including, but not limited to, the following acts with respect to 808 Lexington:

- a. Enter into discussions with Fig and Olive regarding renewing its lease or increasing the monthly rental payments;
- b. Enter into discussions with Pinafore Nursery to sign a new lease and increase its rent from the monthly rent it was paying for the previous four years;
- c. Take any action to market the third or fourth floor apartments;
- d. Take any action with respect to repairing, renovating, or maintaining 808 Lexington, including, but not limited to, its common areas, to obtain the highest and best rental values for the property;
- e. Collect the appropriate rental income due Oliver Sr. from the lease of 808 Lexington;
- f. Properly pursue an action against Oliver Jr. to force Oliver Jr. to use the rental income from 808 Lexington to pay down the Beachton mortgage and to enforce the New York Settlement;
- g. Bring an action against Beachton for usury or satisfaction based upon the interest it received in 808 Lexington and thereafter 67th Street; and
- h. Obtain commercial financing to pay off the 808 Mortgage assigned to Beachton to avoid the default interest rate it was accruing against 808 Lexington.

Due Diligence as to New York Settlement

95. Prior to entering into the New York Settlement, Rogers failed to do any type of due diligence as to the true fair market value of 808 Lexington and 67th Street, including, but not limited to, obtaining appraisals of the properties. Yet, Rogers and his counsel represented to the Florida Court that the New York Settlement was in the best interests of Oliver Sr. and that the properties were approximately equal in value.

96. On or about the Closing Date, the fair market value of 808 Lexington was approximately \$5 million and the true fair market value of 67th Street was more than \$22.5 million.

97. The fair market value of the London property has never been addressed other than in a cursory fashion by Rogers or the attorneys he hired to protect the Ward's interest, despite the property being located in the most exclusive and high priced rental district in London and documents within the Guardians possession indicating that it had a value far in excess of the Ocean Boulevard property.

98. As a result, contrary to what was represented by Rogers and his counsel to the guardianship court to obtain approval for the settlement, the estate of Oliver Sr. received assets from the New York Settlement with a value substantially less than those received by the Estate of Lorna.

COUNT I

**Breach of Fiduciary Duty Against Defendants Rogers,
O'Connell, Crispin, Ciklin, Stein, Beys, and Stein Law Firm**

99. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 98, *supra*, as if fully set forth herein.

100. During the period of the Interim Guardianship, Rogers had a fiduciary duty to Oliver Sr. to act in his best interest until Rogers was discharged as guardian, including, among other things, a duty of loyalty.

101. O'Connell, Crispin, Ciklin, Stein, Beys, and the Stein Law Firm ("Counsel for Rogers") represented Rogers, in his capacity as guardian for Oliver Sr., in connection with the New York Settlement and thereafter.

102. Counsel for Rogers, while he was acting as guardian for Oliver Sr., owed similar duties to Oliver Sr. and were fully aware that the work they were doing for Rogers, as guardian of Oliver Sr., was for the benefit of Oliver Sr.

103. Rogers, as guardian of Oliver Sr., and Counsel for Rogers were negligent and reckless in the exercise of their fiduciary duties to Oliver Sr., resulting in damages to him.

104. By failing to take actions for the benefit of the Ward, including, but not limited to, failing to, (a) properly manage 808 Lexington, (b) perform proper due diligence of the value of 808 Lexington, 67th Street, Ocean Boulevard, or the London Property to properly evaluate the fairness of the New York Settlement, (c) take prompt or appropriate action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr., (d) failing to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage, (e) arrange for commercially reasonable substitute financing for the Beachton mortgage, and (f) failing to pursue action against Beachton to have its mortgage deemed satisfied or released, Rogers damaged the Estate of Oliver Sr. in contravention of his fiduciary duties to Oliver Sr.

105. At all material times, Counsel for Rogers, as guardian of Oliver Sr., owed fiduciary duties to Oliver Sr. and were involved and participated in Rogers' actions or inactions, resulting in the above described damage.

106. Plaintiff was required to retain the Bleakley Bavol Law Firm to mitigate the damages to the Estate of Oliver Sr. and is required to pay it a reasonable fee for its services.

WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendants Rogers, O'Connell, Crispin, Ciklin, Stein, Beys, and the Stein Law Firm and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

COUNT II
Breach of Fiduciary Duty Against Defendants Kelly,
O'Connell, Crispin, Ciklin, Stein, Beys, and Stein Law Firm

107. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 98, supra, as if fully set forth herein.

108. Following his appointment as successor guardian of Oliver Sr. on April 23, 2014, Kelly had a fiduciary duty to Oliver Sr. to act in his best interest until Kelly was discharged as guardian, including, among other things, a duty of loyalty.

109. O'Connell, Crispin, Ciklin, Stein, Beys, and the Stein Law Firm represented Kelly ("Counsel for Kelly"), in his capacity as successor guardian for Oliver Sr.

110. Counsel for Kelly, while he was acting as guardian for Oliver Sr., owed similar duties to Oliver Sr. and were fully aware that the work they were doing for Kelly, as successor guardian of Oliver Sr., was for the benefit of Oliver Sr.

111. Kelly, as guardian of Oliver Sr., and Counsel for Kelly were negligent and reckless in the exercise of their fiduciary duties to Oliver Sr., resulting in damages to him.

112. By failing to take actions for the benefit of the Ward, including, but not limited to, failing to (a) properly manage 808 Lexington, (b) take prompt or appropriate action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr., (c) failing to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage, (d) arrange for commercially reasonable substitute financing for the Beachton mortgage, (e) entering into an unreasonable exclusive sales agreement with Lipa Lieberman, and (f) failing to pursue action against Beachton to have its mortgage deemed satisfied or released, Kelly damaged the Estate of Oliver Sr. in contravention of Defendants' fiduciary duties.

113. At all material times, Counsel for Kelly, as successor guardian of Oliver Sr., owed fiduciary duties to Oliver Sr. and were involved and participated in Kelly's actions or inactions, resulting in the above described damage.

114. Plaintiff was required to retain the Bleakley Bovol Law Firm to mitigate the damages to the Estate of Oliver Sr. and is required to pay it a reasonable fee for its services.

115. WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendants Kelly, O'Connell, Crispin, Ciklin, Stein, Beys, and the Stein Law Firm and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

COUNT III
Negligence Against Defendant Rogers

116. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 98, *supra*, as if fully set forth herein.

117. Defendant Rogers had a duty to the Ward to administer the guardianship observing

a standard in dealing with guardianship property that would be observed by a prudent person dealing with the property of another, in the best interest of the ward, using such special skills and/or expertise to the extent that any such representation was made as to the special skills or expertise of the guardian.

118. Defendant Rogers, as guardian of the Ward, negligently administered the guardianship by failing to discharge his duties as guardian and by wasting and mismanaging the Ward's property.

119. Defendant Rogers was negligent in the following ways:

- (a) By failing to properly manage 808 Lexington;
- (b) By failing to perform proper due diligence of the value of 808 Lexington and 67th Street to properly evaluate the fairness of the New York Settlement;
- (c) By failing to take action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr.;
- (d) By failing to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage;
- (e) By failing to arrange for commercially reasonable substitute financing for the Beachton mortgage;
- (f) By failing to pursue action against Beachton to have its mortgage deemed satisfied or released;
- (g) By permitting Beachton to collect usurious interest on the 808 Lexington mortgage;
- (h) By permitting the guardianship attorney's to collect unnecessary and excessive fees;
- (i) By failing to monitor or challenge excessive hourly attorney's fees charged by the guardianship attorneys;

- (j) By failing to prepare or implement a guardianship plan;
- (k) By failing to prepare accurate annual reports regarding the guardianship assets;
- (l) By failing to maintain guardianship financial records to accurately track and recover guardianship assets;
- (m) By pursuing needless and wasteful litigation against the Ward's heir;
- (n) By failing to take action against the Ward's former wife, Lorna Bivins, to recover contribution for unpaid taxes; and
- (o) By charging the Ward excessive guardian fees;

120. As a direct and proximate result of the negligence of Defendant Rogers as set forth above, the Ward has suffered damages.

WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendant Rogers and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

COUNT IV
Negligence Against Defendant Kelly

1121. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 98, *supra*, as if fully set forth herein.

122. Defendant Kelly had a duty to the Ward to manage the guardianship observing a standard in dealing with guardianship property that would be observed by a prudent person dealing with the property of another, in the best interest of the ward, using such special skills and/or expertise to the extent that any such representation was made as to the special skills or expertise of the guardian.

123. Defendant Kelly, as guardian of the Ward, negligently administered the guardianship by failing to discharge his duties as guardian and by wasting and mismanaging the Ward's property.

124. Defendant Kelly was negligent in the following ways:

- (a) By failing to properly manage 808 Lexington;
- (b) By failing to take action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr.;
- (c) By failing to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage;
- (d) By failing to arrange for commercially reasonable substitute financing for the Beachton mortgage;
- (e) By failing to pursue action against Beachton to have its mortgage deemed satisfied or released;
- (f) By permitting Beachton to collect usurious interest on the 808 Lexington mortgage;
- (g) By failing to monitor or challenge excessive hourly attorney's fees charged by the guardianship attorneys;
- (h) By failing to prepare or implement a guardianship plan;
- (i) By failing to prepare accurate annual reports regarding the guardianship assets; and
- (j) By failing to maintain guardianship financial records to accurately track and recover guardianship assets.
- (k) By charging the Ward excessive guardian fees;

125. As a direct and proximate result of the negligence of Defendant Kelly as set forth above, the Ward has suffered damages.

WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendant O'Connell and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

COUNT V
Professional Negligence Against Defendant O'Connell

126. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 98, supra, as if fully set forth herein.

127. O'Connell represented both Rogers and Kelly in their capacity guardians for Oliver Sr.

128. During the guardianship, O'Connell undertook to provide legal services to the guardianship, with the full knowledge that Oliver Sr. was an intended beneficiary of his legal services. At all times O'Connell held himself out as competent in the areas of law for which he was retained to provide representation.

129. O'Connell was required to exercise the same legal skill as a reasonably competent attorney and to use reasonable care in determining and implementing a strategy to be followed to achieve the guardianship's goals, or alternatively goals that were in the best interest of Oliver Sr.

130. In the course of handling legal matters for the guardianship, O'Connell negligently failed to act with the degree of competence generally possessed by attorneys in the State of Florida who handle similar matters. Oliver Sr., through his guardians was forced to pay O'Connell a substantial amount of money for his representation.

131. O'Connell was negligent and/or committed malpractice in the following ways:

- (a) By failing to perform proper due diligence of the value of 808 Lexington and 67th Street, or Ocean Boulevard or the London Property to properly evaluate the fairness of the New York Settlement;
- (b) By failing to advise the guardianship regarding the clear discrepancy in the values of the properties involving in the New York Settlement;
- (c) By advising the client to enter into the New York settlement against the best interest of the guardianship and encouraging settlement to obtain fees rather than benefit Oliver Sr.;
- (d) By failing to advise the guardianship to take action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr.;
- (e) By failing to advise the guardianship to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage;
- (f) By failing to advise the guardianship to arrange for commercial reasonable substitute financing for the Beachton mortgage;
- (g) By failing to pursue action against Beachton to have its mortgage deemed satisfied or released;
- (h) By failing to advise the guardianship regarding the usurious interest charged by Beachton;
- (i) By charging and taking from the guardianship excessive attorney's fees; and by failing to prevent Lipa Lieberman from obtaining an exclusive sales agreement or excessive fees because Lieberman had helped O'Connell bolster his fee claim under the hybrid contingency fee claim;
- (j) By failing to properly prosecute claim against Oliver Jr. under Global Settlement and trying to settle for low amount solely to obtain fees as opposed to acting in best interest of

Oliver Sr. and/ or his estate, and engaging in acts constituting a conflict of interest by seeking to avoid recoupment against Oliver Jr. unless she could obtain a release from Julian as to the Guardian; and

(k) By failing to account to the Court or Julian that he and his firm had failed to comply with the Global Settlement Order by improperly holding back several hundred thousand dollars from the proceeds of the sale of 808 Lexington in the firm's trust account.

132. As a direct and proximate result of O'Connell's negligence and/or malpractice, the Ward sustained damages.

133. Ciklin Lubitz & O'Connell is vicariously liable for the negligence of its attorneys including O'Connell.

WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendant O'Connell and Ciklin Lubitz & O'Connell and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

COUNT VI
Professional Negligence Against Defendant Crispin

134. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 98, supra, as if fully set forth herein.

135. Crispin represented both Rogers and Kelly in their capacity guardians for Oliver Sr.

136. During the guardianship, Crispin undertook to provide legal services to the guardianship, with the full knowledge that Oliver Sr. was an intended beneficiary of his legal

services. At all times Crispin held herself out as competent in the areas of law for which she was retained to provide representation.

137. Crispin was required to exercise the same legal skill as a reasonably competent attorney and to use reasonable care in determining and implementing a strategy to be followed to achieve the guardianship's goals, or alternatively goals that were in the best interest of Oliver Sr.

138. In the course of handling legal matters for the guardianship, Crispin negligently failed to act with the degree of competence generally possessed by attorneys in the State of Florida who handle similar matters. Oliver Sr., through his guardians was forced to pay Crispin a substantial amount of money for her representation.

139. Crispin was negligent and/or committed malpractice in the following ways:

- (a) By failing to perform proper due diligence of the value of 808 Lexington and 67th, or Ocean Boulevard or the London Property Street to properly evaluate the fairness of the New York Settlement;
- (b) By failing to advise the guardianship regarding the clear discrepancy in the values of the properties involving in the New York Settlement;
- (c) By advising the client to enter into the New York settlement against the best interest of the guardianship and encouraging settlement to obtain fees rather than benefit Oliver Sr.;
- (d) By failing to advise the guardianship to take action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr.;
- (e) By failing to advise the guardianship to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage;
- (f) By failing to advise the guardianship to seek substitute financing for the Beachton mortgage;

(g) By failing to pursue action against Beachton to have its mortgage deemed satisfied or released;

(h) By failing to advise the guardianship regarding the usurious interest charged by Beachton;

(i) By charging and taking from the guardianship excessive attorney's fees and by failing to prevent Lipa Lieberman from obtaining an exclusive sales agreement or excessive fees because Lieberman had helped Crispin's firm bolster their fee claim under the hybrid contingency fee claim;

(j) By failing to properly prosecute claim against Oliver Jr. under Global Settlement and trying to settle for low amount solely to obtain fees as opposed to acting in best interest of Oliver Sr. and/ or his estate, and engaging in acts constituting a conflict of interest by seeking to avoid recoupment against Oliver Jr. unless she could obtain a release from Julian as to the Guardian; and

(k) By failing to account to the Court or Julian that she and her firm had failed to comply with the Global Settlement Order by improperly holding back several hundred thousand dollars from the proceeds of the sale of 808 Lexington in the firm's trust account.

140. As a direct and proximate result of Crispin's negligence and/or malpractice, the Ward sustained damages.

141. Ciklin Lubitz & O'Connell is vicariously liable for the negligence of its attorneys including Crispin.

WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendant

Crispin and Ciklin Lubitz & O'Connell and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

COUNT VII
Professional Negligence Against Defendant Stein

142. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 98, supra, as if fully set forth herein.

143. Stein represented both Rogers and Kelly in their capacity guardians for Oliver Sr. with the full knowledge and understanding that Oliver Sr. was the intended beneficiary of his legal services.

144. During the guardianship, Stein undertook to provide legal services to the guardianship. At all times Stein held himself out as competent in the areas of law for which he was retained to provide representation.

145. Stein was required to exercise the same legal skill as a reasonably competent attorney and to use reasonable care in determining and implementing a strategy to be followed to achieve the guardianship's goals.

146. In the course of handling legal matters for the guardianship, Stein negligently failed to act with the degree of competence generally possessed by attorneys in the State of Florida who handle similar matters. The guardianship paid Stein a substantial amount of money for the sole purpose of representing the guardianship.

147. Stein was negligent and/or committed malpractice in the following ways:

(a) By failing to perform proper due diligence of the value of 808 Lexington and 67th Street, Ocean Boulevard or the London Property to properly evaluate the fairness of the New York Settlement;

- (b) By failing to advise the guardianship regarding the clear discrepancy in the values of the properties involving in the New York Settlement;
- (c) By advising the client to enter into the New York settlement against the best interest of the guardianship;
- (d) By failing to advise the guardianship to take action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr.;
- (e) By failing to advise the guardianship to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage;
- (f) By failing to arrange for commercially reasonable substitute financing for the Beachton mortgage, as opposed to preventing such an alternative unless it also included financing to cover attorney's fees for himself, his firm, and the guardians and their other counsel;
- (g) By failing to pursue action against Beachton to have its mortgage deemed satisfied or released;
- (h) By failing to advise the guardianship regarding the usurious interest charged by Beachton;
- (i) By charging and taking from the guardianship excessive attorney's fees;
- (j) By taking large sums of money under the guise of retainers without accounting or documentation therefore; and
- (k) By failing to account to the Court or to Julian regarding the failure to comply with the terms of the Global Settlement Agreement as the closing agent.

148. As a direct and proximate result of Stein's negligence and/or malpractice, the Ward sustained damages.

149. Beys Liston Mobargha & Berland, LLP f/k/a Beys Stein Mobargha & Berland, LLP and The Law Offices of Keith B. Stein, PLLC n/k/a Stein Law, PLLC are vicariously liable for the negligence of their attorneys including Stein.

WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendants Stein, Beys, and the Stein Law Firm and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

Jury Demand

Plaintiff demands a trial by jury on all issues so triable.

Dated: January 8, 2016.

Respectfully Submitted,

/s/ J. Ronald Denman

J. Ronald Denman
Florida Bar Number 0863475
The Bleakley Baval Law Firm
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Tampa, FL 33613
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Attorneys for JULIAN BIVINS

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

IN RE: GUARDIANSHIP OF:

GUARDIANSHIP DIVISION

OLIVER BIVINS,

FILE NO: 502011GA000006XXXXSB

Incapacitated.

ORDER ON MOTION FOR COURT APPROVAL OF SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS CAUSE coming before the Court on the Motion for Court Approval of Settlement Agreement and Mutual Release, the Court having heard argument of counsel, and being otherwise fully advised, it is thereupon

ORDERED AND ADJUDGED as follows:


1. The Motion for Court Approval of Settlement Agreement and Mutual Release is

Granted

2.

~~_____~~
~~_____~~
~~_____~~
~~_____~~
~~_____~~

DONE AND ORDERED in Delray Beach, Palm Beach County, Florida on the 17 day of SEPT, 2013.


MARTIN H. COLIN
Circuit Judge

Copies returned:

- Brian M. O'Connell, Esq., 515 N. Flagler Dr., 20th Floor, West Palm Beach, FL 33401
- Ronald Denman, Esq., 1000 Brickell Ave., Suite 600, Miami, FL 33131
- Ronda D. Gluck, Esq., 980 N. Federal Highway, #402, Boca Raton, FL 33432
- Donna P. Levine, Esq., 324 Datura St., #145, West Palm Beach, FL 33401
- Keith Stein, Esq., 405 Lexington Ave., 7th Floor, New York, NY 10174
- Mark N. Axinn, Esq., 845 Third Ave., New York, NY 10022
- Edward Kuhnel, 49 West Lake Stable Rd., Tuxedo Park, NY 10987
- Peter G. Goodman, Esq., 250 Park Avenue, Suite 1900, New York, NY 10177



SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE (this "Agreement") is made this ___ day of July, 2013, by and among Curtis C. Rogers (the "Guardian"), as Guardian of the person and property of Oliver Bivins, Sr. ("Oliver Sr."), Oliver Bivins, in his individual capacity ("Oliver Jr."), Oliver Jr., as the Personal Representative of the Estate of Lorna Bivins (the "Estate"), and Beachton Tuxedo LLC ("BTLIC") (collectively, the "Parties").

WHEREAS, various disputes and litigations exist and are pending in the States of Florida and New York, by and among the Parties, including each of the cases described in Exhibit A annexed hereto (collectively, the "Cases"), which disputes and cases pertain to, *inter alia*, matters related to the guardianship of Oliver Sr. and certain of its properties, and matters related to the property of the Estate and the probate thereof, including without limitation, certain real estate owned by and/or asserted to be owned by Oliver, Sr. and the Estate in the States of Florida and New York, and in London, England;

WHEREAS, the Parties, without acknowledging the existence of any liability or wrongdoing, believe it is in their mutual interests to enter into this Agreement to resolve, settle and compromise the claims and counterclaims filed in the Cases and the certain other matters of dispute (the "Settlement"), in order to avoid the further expense and inconvenience of litigation pursuant to the terms set forth herein;

NOW THEREFORE, in consideration of the promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Incorporation of Recitals. Each of the foregoing recitals is incorporated herein as if fully set forth below.
2. Court Approvals and Closing. The Guardian, Oliver Jr., and the Estate (collectively, the "Petitioners") hereby agree that, no later than ten (10) business days following the execution by all Parties of this Agreement, they will collectively and acting in good faith petition the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Guardianship Division and Probate Division (the "Florida Court"), and within ten (10) business days of any Parties' written notice of any other court whose approval may be needed, the Petitioners will collectively and acting in good faith petition each other court whose approval of this Settlement may be required, for approval of this Settlement and the terms and conditions contained in this Agreement. Each of the actions and transactions set forth in this Agreement, with the exception of the payment of the Mortgage Debt as required by Section 3(F), shall be closed within ten (10) business days of the date upon which all such approvals have been received from the Florida Court and each such other court (the "Closing Date").
3. Property Transfers/Obligations Related to Transfers/Releases.
 - (A) 808 Lexington Avenue. The Estate, acting by and through Oliver Jr., as personal representative, or acting through his successor or agent or its other appropriate representative,

shall transfer to the Guardian, for the benefit of Oliver Sr., any and all of its right, title and interest in and to that certain parcel of real estate known as 808 Lexington Avenue, New York, New York, also known as Block 1397, Lot 16 on the Tax Map of New York County ("**808 Lexington**"), such that the Guardian shall, as a result of such transfer (the "**808 Conveyance**"), own 100% fee simple title to 808 Lexington. The 808 Conveyance shall be accomplished by a bargain and sale without covenants deed in substantially the form annexed hereto as **Exhibit B**. The Estate and Oliver Jr. hereby agree that neither the Estate nor Oliver Jr. will further encumber, or cause to be encumbered, 808 Lexington prior to the Closing Date with any lien or encumbrance unless such lien or encumbrance is permitted by the Guardian in writing, it being understood that (i) the lien of any unpaid real estate taxes and related charges and (ii) the mortgage described in subparagraph 3(F) below are hereby deemed to be permitted by the Guardian. The Estate shall immediately remedy any failure on its part to comply with the foregoing obligation. With respect to the 808 Conveyance, except as provided below: (i) the Guardian shall pay all New York State and New York City real estate transfer taxes associated with such transfer, (ii) there shall be no adjustment of real estate or related taxes, and (iii) the Guardian shall pay all recording and/or title insurance charges relating thereto. The Estate shall be responsible for satisfying the real estate taxes and related charges through May 8, 2013. The Estate and the Guardian shall each be responsible for half of the real estate taxes and related charges from May 9, 2013 through 11:59PM of the date immediately prior to the Closing Date. As of the Closing Date the Guardian shall be responsible for the real estate taxes and related charges. Any property tax payments for 808 Lexington that are past-due on the Closing Date shall be immediately paid in full (including any interest and/or penalties) to the New York City Department of Finance by the Guardian and the Estate, as apportioned. The Estate shall within ten (10) days of the Closing Date, (x) provide to the Guardian any and all documents relating to 808 Lexington, including but not limited to documents relating to the day to day management of 808 Lexington and documents related to any tenancy or leasehold interest, and (y) transfer to the Guardian any security deposit or other monies held with regard to, or on behalf of, any 808 Lexington tenant and any utility deposits.

(B) 330 Ocean Boulevard. The Estate, acting by and through Oliver Jr., as personal representative, or acting through his successor or agent or its other appropriate representative, shall transfer to the Guardian, for the benefit of Oliver Sr. (the "**330 OB Conveyance**"), any and all right, title and interest in and to that certain real estate known as Unit 5A, 330 Ocean Boulevard, Palm Beach, Florida ("**330 OB**"). Such transfer shall be evidenced by deed in such form as may be reasonably required by the Guardian in order to convey to the Guardian 100% of the Estate's interest in 330 OB. As a result of the 330 OB Conveyance, the Guardian shall own 100% fee simple title to 330 OB. The Estate and Oliver Jr. hereby agree that neither the Estate nor Oliver Jr. will further encumber, or cause to be encumbered, 330 OB prior to the Closing Date with any lien or encumbrance unless such lien or encumbrance is permitted by the Guardian in writing, it being understood that (i) the lien of any unpaid real estate taxes and related charges and (ii) any mortgage affecting 330 OB as of the date hereof are hereby deemed to be permitted by the Guardian. The Estate shall immediately remedy any failure on its part to comply with the foregoing obligation. With respect to the 330 OB Conveyance, except as provided below: (i) the Guardian shall pay all real estate transfer taxes associated with such transfer, (ii) there shall be no adjustment of real estate or related taxes, and (iii) the Guardian shall pay all recording and/or

title insurance charges relating thereto. The Guardian shall be responsible for satisfying the real estate taxes and related charges on 330 OB from and after the date hereof.

(C) 39 East 67th Street. The Guardian, acting on behalf of Oliver Sr., shall waive and/or relinquish, and hereby waives and relinquishes, in favor of the Estate, any and all right, title and interest in and to that certain real estate known as 39 E. 67th Street, New York, New York, also known as Block 1382, Lot 28 on the Tax Map of New York County ("**39E67**"). If deemed necessary by the Estate, and upon prior written request from the Estate to the Guardian, the Guardian shall evidence such transfer of Oliver Sr.'s interest, if any, in 39E67 to the Estate by delivery of a deed in such form as may be reasonably required by the Estate and/or by delivery of such other documents as requested by the Estate in order to convey marketable fee simple title to 39E67 to the Estate. The Guardian shall execute and deliver such deed to the Estate within five (5) business days following the giving of such written request. The Guardian and Oliver Sr. hereby agree that neither Guardian nor Oliver Sr. will further encumber, or cause to be encumbered, 39E67 prior to the Closing Date with any lien or encumbrance unless such lien or encumbrance is permitted by the Estate in writing, it being understood that (i) the lien of any unpaid real estate taxes and related charges and (ii) the mortgage affecting 39E67 as of the date hereof are hereby deemed to be permitted by the Estate. The Guardian shall immediately remedy any failure on its part to comply with the foregoing obligation. The Estate shall pay all transfer taxes, title charges and recording fees associated with such transfer. The Estate shall be liable for all expenses, maintenance costs and any other liabilities associated with 39E67.

(D) 82 Portland Place. The Guardian, acting on behalf of Oliver Sr., shall transfer and/or relinquish, and hereby waives and relinquishes, to the Estate, any and all right, title and interest in and to the leasehold interest in that certain residential apartment known as Flat V, 82 Portland Place, London, England ("**82 Portland**"). If deemed necessary by the Estate, and upon prior written request from the Estate to the Guardian, the Guardian shall evidence such transfer of Oliver Sr.'s interest, if any, in 82 Portland to the Estate by delivery of such instruments in such forms as may be reasonably required by the Estate. The Guardian shall execute and deliver such instruments to the Estate within five (5) business days following the giving of such written request. The Guardian and Oliver Sr. hereby agree that neither the Guardian nor Oliver Sr. will encumber 82 Portland prior to the Closing Date with any lien or encumbrance unless such lien or encumbrance is permitted by the Estate in writing, it being understood that (i) the lien of any unpaid real estate taxes and related charges, (ii) the existing ground lease, and (iii) any mortgage affecting 82 Portland as of the date hereof are hereby deemed to be permitted by the Estate. The Guardian shall immediately remedy any failure on its part to comply with the foregoing obligation. The Estate shall pay all taxes associated with such transfer. The Estate shall be liable for all expenses, maintenance costs and any other liabilities associated with 82 Portland.

(E) Cash Payment. The Guardian, acting on behalf of Oliver Sr., will pay to the Estate the amount of \$150,000 in cash, which payment shall be made to the IOLTA account of Levine & Susaneck, P.A. Such payment will be made by the Guardian within thirty (30) days of the Closing Date or upon the sale of 808 Lexington, whichever is first in time.

(F) Mortgage on 808 Lexington. As of the Closing Date, the Guardian on behalf of Oliver Sr., shall become the sole obligor of those certain mortgage notes (the “**808 Notes**”) and all amounts due and owing thereunder (including but not limited to all principal, accrued interest, fees and expenses, including legal fees and disbursements (the “**Mortgage Debt**”) that are secured by, among other things, a consolidation, extension, and modification agreement dated November 19, 2001, and those certain mortgages in the aggregate principal sum of \$850,000 that create a lien on 808 Lexington (the “**808 Mortgages**”). The 808 Notes and 808 Mortgages are held by BTLLC pursuant to those certain assignment documents dated October 5, 2012 made by Sovereign Bank, N.A. f/k/a Sovereign Bank, successor-by-merger to Independence Community Bank, as Assignor, to Beachton Tuxedo LLC, as Assignee, including that certain Assignment of Mortgage (the “**Assignment**”) recorded in the Office of the City Register of New York County on October 31, 2012 as CRFN 2012000429258 (the 808 Notes, the 808 Mortgages, and the Assignment are collectively referred to herein as, the “**Mortgage Loan**”). The Guardian shall pay the Mortgage Debt in full, on or before August 31, 2013 (the “**Forbearance Expiration Date**”), it being understood, agreed, and acknowledged by the Parties that BTLLC or its predecessor(s) previously accelerated the entire principal amount of the Mortgage Loan; provided, however, that to the extent the amount of such total payment owing on the Mortgage Debt exceeds \$465,000 as of June 30, 2013, such excess amount shall be subtracted from the \$150,000 due and payable under (E) above (but shall not be deducted from the Mortgage Debt payable by the Guardian to BTLLC). All interest on the Mortgage Debt accruing after June 30, 2013, and on or before the date the Mortgage Debt is paid in full, shall be payable 50% by the Estate and 50% by the Guardian. Except in the event of a default hereunder by the Guardian, the Estate, or Oliver Jr., BTLLC hereby agrees to continue to forebear from taking action based on the failure to make payments as required under the Mortgage Loan, including foreclosure (the “**Forbearance**”), until the Forbearance Expiration Date. Notwithstanding anything contained in this Agreement to the contrary (other than the Forbearance), the terms of the 808 Note and the 808 Mortgage shall remain in full-force and effect, and BTLLC shall have all the rights and remedies contained in the documents evidencing the Mortgage Loan, until such time as the Mortgage Debt is paid in full. The Parties agree to execute a stand-alone mortgage assumption agreement (and accompanying affidavits) for recording with the New York County Clerk, in a form reasonably acceptable to the parties, to memorialize the Guardian’s assumption of mortgagor’s obligations under the Mortgage Loan.

(G) Attorneys Fees and Costs. The Parties acknowledge and agree that there are attorneys fees and costs due Ciklin Lubitz Martens & O’Connell (“**Ciklin Lubitz**”) and Bill T. Smith, P.A. pursuant to the fee agreement approved by the Florida Court on November 30, 2012 and the positive result or recovery attained by this Agreement. The Parties further acknowledge and agree that such attorneys’ fees and costs shall be satisfied from 808 Lexington and 330 OB in accordance with the Compromised Settlement Agreement approved by the Texas Court on March 13, 2013 and the Florida Court on April 1, 2013.

(H) Guardianship of Lorna Bivins. Ciklin Lubitz is holding \$41,973.03 in its Trust account. The Parties agree that the funds shall be utilized to partially satisfy compensation obligations incurred in the Guardianship of Lorna Bivins, Case No. 502011GA000007XXXXSB. From such funds the following payments shall be made: Steve Kelly, Legal Management Services, Inc. in the amount of \$6,500; Ciklin Lubitz Marten’s & O’Connell in the amount

\$11,000.00; Hark Yon et al in the amount of \$22,473.03; Lavalley, Brown & Ronan in the amount of \$2,000. The Parties acknowledge the above payments are being made as "partial" payments.

(I) Stipulation and Dismissal. On the Closing Date, the Parties will collectively (i) execute all stipulations of dismissal and other pleadings necessary and appropriate to voluntarily dismiss, with prejudice, all of the Cases (described on Exhibit A attached hereto) and any other claims by or among any of the Parties against one another, including without limitation all appeals, and as otherwise related to the foregoing described properties and ownership matters, excepting only the excluded claims as described on Exhibit A; (ii) file with the appropriate courts all such stipulations of dismissal and other documents and pleadings required to effectuate such dismissals, and (iii) take all steps reasonably necessary to effectuate all of the foregoing as soon as reasonably practicable.

(J) Releases.

(i) Subject to the performance in full by each of (a) Oliver Jr., acting individually and as personal representative on behalf of the Estate, and (b) BTLIC, of their respective promises and covenants herein, the failure of which shall void this paragraph (J)(i), the Guardian, acting on behalf of Oliver Sr. and each and all of Oliver, Sr.'s past, present and future heirs, successors, predecessors, assigns, advisors, attorneys, representatives and agents (collectively including the Guardian, the "Oliver Sr. Persons"), hereby release, acquit, and forever discharge Oliver Jr., individually, and each and all of his respective past and present heirs, successors, predecessors, assigns, advisors, attorneys, representatives and agents (collectively including Oliver Jr., the "Oliver Jr. Persons"), the Estate and each and all of its respective past, present and future heirs, successors, predecessors, assigns, advisors, attorneys, representatives and agents (collectively including the Estate, the "Estate Persons"), and BTLIC and each and all of its respective past, present and future heirs, successors, predecessors, assigns, advisors, attorneys, representatives and agents (collectively including BTLIC, the "BTLIC Persons"), from any and all claims, counterclaims, demands, causes of actions, liabilities, contracts, agreements, promises, obligations or defenses of any kind whatsoever, whether known or unknown, related to or arising out of the matters described herein and in the Cases, which any of the Oliver Sr. Persons have or may have against any or all of the Oliver Jr. Persons, the Estate Persons, the BTLIC Persons, occurring from the beginning of the world to the date of this Agreement, and the Oliver Sr. Persons further agree that this Agreement may be pleaded and shall serve as a full defense to any action, suit or other proceeding covered by the terms of this Agreement which is or may be initiated, prosecuted or maintained, it being agreed and understood, however, that notwithstanding the foregoing, the obligations of this Agreement remain in full force and effect as an agreement of the Parties and as an Order of the Florida Court upon the Florida Court's approval hereof.

(ii) Subject to the performance in full by each of (a) the Guardian, acting on behalf of Oliver Sr., (b) the Estate, and (c) BTLIC, of their respective promises and covenants herein, the failure of which shall void this paragraph (J)(ii), the Oliver Jr. Persons hereby release, acquit, and forever discharge the Oliver Sr. Persons, the Estate Persons, and the BTLIC Persons, from any and all claims, counterclaims, demands, causes of actions, liabilities, contracts, agreements, promises, obligations or defenses of any kind whatsoever, whether known or unknown, related to or arising out of the matters described herein and in the Cases, which any of

the Oliver Jr. Persons have or may have against any or all of the Oliver Sr. Persons, the Estate Persons, or the BTLLC Persons, occurring from the beginning of the world to the date of this Agreement, and the Oliver Jr. Persons further agree that this Agreement may be pleaded and shall serve as a full defense to any action, suit or other proceeding covered by the terms of this Agreement which is or may be initiated, prosecuted or maintained, it being agreed and understood, however, that notwithstanding the foregoing, the obligations of this Agreement remain in full force and effect as an agreement of the Parties and as an Order of the Florida Court upon the Florida Court's approval hereof.

(iii) Subject to the performance in full by each of (a) the Guardian, acting on behalf of Oliver Sr., (b) Oliver Jr., acting individually, and (c) BTLLC, of their respective promises and covenants herein, the failure of which shall void this paragraph (J)(iii), the Estate Persons hereby release, acquit, and forever discharge the Oliver Sr. Persons, the Oliver Jr. Persons, and the BTLLC Persons, from any and all claims, counterclaims, demands, causes of actions, liabilities, contracts, agreements, promises, obligations or defenses of any kind whatsoever, whether known or unknown, related to or arising out of the matters described herein and in the Cases, which any of the Estate Persons have or may have against any or all of the Oliver Sr. Persons, the Oliver Jr. Persons, or the BTLLC Persons, occurring from the beginning of the world to the date of this Agreement, and the Estate Persons further agree that this Agreement may be pleaded and shall serve as a full defense to any action, suit or other proceeding covered by the terms of this Agreement which is or may be initiated, prosecuted or maintained, it being agreed and understood, however, that notwithstanding the foregoing, the obligations of this Agreement remain in full force and effect as an agreement of the Parties and as an Order of the Florida Court upon the Florida Court's approval hereof.

(iv) Subject to the performance in full by each of (a) the Guardian, acting on behalf of Oliver Sr., (b) Oliver Jr., acting individually, and (c) Oliver Jr., acting on behalf of the Estate, of their respective promises and covenants herein, the failure of which shall void this paragraph (J)(iv), the BTLLC Persons, hereby release, acquit, and forever discharge the Oliver Sr. Persons from any and all claims, counterclaims, demands, causes of actions, liabilities, contracts, agreements, promises, obligations or defenses of any kind whatsoever, whether known or unknown, related to or arising out of the matters described herein and in the Cases, which any of the BTLLC Persons have or may have against the Oliver Sr. Persons occurring from the beginning of the world to the date of this Agreement, and the BTLLC Persons further agree that this Agreement may be pleaded and shall serve as a full defense to any action, suit or other proceeding covered by the terms of this Agreement which is or may be initiated, prosecuted or maintained, it being agreed and understood, however, that notwithstanding the foregoing, the obligations of this Agreement remain in full force and effect as an agreement of the Parties.

(v) Nothing in any of the foregoing releases shall be construed to release any of the Parties from their obligations as set forth in this Agreement or shall release any claims specifically excluded on Exhibit A.

4. Enforcement of Obligations. The Parties understand and agree that notwithstanding any contrary terms in this Agreement, in the event any party fails to comply with any of the party's obligations as set forth in Sections 2 and 3 of this Agreement, the party to whom the obligation is owed shall have the right to enforce the terms set forth therein, and the legal fees and costs

incurred by the aggrieved party in enforcing such terms shall be paid by the Party found to be in breach of such terms.

5. No Admission of Liability. The Parties understand and agree that this Agreement is only a compromise in settlement of disputed claims and matters and shall not be construed as an admission of liability or wrongdoing by any party.

6. Waiver of Interim and Final Report. Oliver Jr. hereby waives any and all objections to any interim or final report prepared or to be prepared and submitted by the Guardian to the Florida Court, including without limitation any accounting, plan, discharge, compensation and expenses of the Guardian, attorneys fees and costs. The Guardian hereby waives any and all objections to any interim or final report prepared or to be prepared and submitted by Oliver Jr. as the Personal Representative of the Estate to the Florida Court, including without limitation any accounting, plan, discharge, compensation and expenses of the Personal Representative, attorneys fees and costs.

7. Continued Guardianship. The Parties hereby agree that none shall object, in any manner, to Curtis C. Rogers' continued service as the Guardian at least until the consummation in full of this Settlement or the appointment of the Successor Guardian as contemplated in the Compromised Settlement Agreement, whichever occurs first.

8. Authority. Each Party executing this Agreement hereby represents and warrants that it has full power and authority to enter into this Agreement. Each individual executing this Agreement on behalf of an entity Party hereby represents and warrants that he or she has the full power and authority to so execute this Agreement.

9. No Assignment. Each Party represents and warrants that it is the lawful owner of all claims being released by such Party and has not assigned any released claim or portions thereof to any other person or entity. In the event that a Party shall have assigned, sold, transferred, or otherwise disposed of any claim or other matter herein released, such Party shall hold harmless and indemnify the other Parties to this Agreement from and against any loss, cost, claim or expense, including but not limited to all costs related to the defense of any action, including attorneys' fees, based upon, arising from, or incurred as a result of any such claim or matter.

10. Confidentiality. The terms of this Agreement shall remain confidential, and none of the Parties shall disclose such terms to any third party (other than a Party's affiliates, officers, directors, employees, shareholders, partners, members, managers, attorneys, accountants, auditors, or governmental agencies), except as may be required by law or fiduciary duty. In the event any of the Parties shall receive a subpoena, discovery request or other legal process seeking the production or disclosure of this Agreement or the terms of the Agreement, such party promptly shall notify the other Parties to enable them to seek a protective order. However, no Party shall be precluded by this provision from complying with any such subpoena, discovery request or other legal process seeking production or disclosure of this Agreement unless ordered by a court of competent jurisdiction not to comply. Any failure to keep the terms and conditions of this Agreement confidential shall be a default, entitling the non-defaulting Party to the default remedies set forth in this Agreement or otherwise permitted by law.

11. Understanding and Counsel. The Parties further represent and warrant that:
 - (A) They have read and understand the terms of this Agreement.
 - (B) They have been represented by counsel with respect to this Agreement and all matters covered by and relating to it.
 - (C) They have entered into this Agreement for reasons of their own and not based upon any representation of any other person other than those set forth herein.
12. Legal Fees and Costs. Except as provided herein, each of the Parties shall pay its own respective costs and attorneys' fees.
13. Entire Agreement. This Agreement constitutes the entire agreement with respect to the subject matter addressed herein and supersedes any prior written and/or verbal agreement between the Parties, including the Memorandum of Understanding among the Parties, dated May 8, 2013; but excluding the 808 Notes and the 808 Mortgages, and any other agreement by, between, or among BTLIC, the Estate, and/or Oliver Jr. dated on or after May 7, 2013.
14. Amendments. This Agreement may not be orally modified. This Agreement may only be modified in a writing signed by all of the Parties.
15. Illegality or Unenforceability of Provisions. In the event any one or more of the provisions contained in this Agreement shall for any reason be held by a court of competent jurisdiction in whole or in part to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement. A reviewing court also shall have the authority to amend or "blue pencil" this Agreement so as to make it fully valid and enforceable.
16. Successors, Assigns and Third Party Beneficiaries. This Agreement shall be binding on, inure to the benefit of, and be enforceable by, each of the Parties, and each of their respective personal representatives, heirs, successors and assigns.
17. Headings. All headings and captions in this Agreement are for convenience only and shall not be interpreted to enlarge or restrict the provisions of the Agreement.
18. Waiver and Modification. The failure of a Party to insist, in any one or more instances, upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall not be construed as a waiver, or a relinquishment for the future, of such covenant or option, but the same shall continue and remain in full force and effect.
19. Further Necessary Actions. To the extent that any document or action is reasonably required to be executed or taken by any Party to effectuate the purposes of this Settlement Agreement, the Party will execute and deliver such document or documents to the requesting Party or take such action or actions at the request of the requesting Party.
20. Florida Law. The Parties understand and agree that this Agreement shall be construed and interpreted in accordance with the laws of the State of Florida, without giving effect to

principles of conflicts of law that would require the application of the law of any other jurisdiction; and provided, however, that except as to the location of the realty where specific enforcement is sought, the law of such jurisdiction shall govern. Notwithstanding the foregoing, the laws of the State of New York shall govern and control all controversies arising out of this Agreement which may relate to New York State, including but not limited to 808 Lexington, 39E67, the 808 Notes, the 808 Mortgages, the Mortgage Loan, and the Mortgage Debt (collectively, the "New York Matters").

21. Construction of Settlement Agreement. The Parties acknowledge that this Agreement is the product of negotiations by Parties represented by counsel of their choice and that the language of this Agreement shall not be presumptively construed either in favor or against any of the Parties but shall be given a reasonable interpretation.

22. Notices. Any notices that the Parties may wish to serve upon each other pursuant to this Agreement shall be served by hand, facsimile, email, or overnight courier service as follows:

TO THE GUARDIAN:

Curtis C. Rogers
710 First Avenue South
Lake Worth, FL 33460
Email: rogersdna@gmail.com

With a copy to:

Brian M. O'Connell, Esq.
Ashley N. Crispin, Esq.
Ciklin Lubitz Martens & O'Connell
515 N. Flagler Dr., 20th Floor
West Palm Beach, FL 33401
Facsimile: 561-833-4209
Email: boconnell@ciklinlubitz.com
acrispin@ciklinlubitz.com

And to:

Keith B. Stein, Esq.
Roy C. Justice, Esq.
Beys Stein Morbargha & Berland LLP
405 Lexington Avenue, 7th Floor
New York, NY 10174
Facsimile: 646-755-3599
Email: kstein@beysstein.com
rjustice@beysstein.com

TO OLIVER BIVINS, JR.:

Oliver Bivins, Jr.
39 E. 67th St.
New York, NY 10065
Email: o.bivins.ii@gmail.com

With a copy to:

Donna P. Levine, Esq.
Levine & Susaneck, P.A.
324 Datura Street, Suite 145
West Palm Beach, FL 33401
Facsimile: 561-820-8099
Email: dlevinelaw@aol.com

And to:

Mark N. Axinn, Esq.
Brill & Meisel
845 Third Avenue
New York, NY 10022
Email: markaxinn@hotmail.com

TO BEACHTON TUXEDO LLC:

Edward Kuhnel
49 West Lake Stable Road
Tuxedo Park, NY 10987
Facsimile: N/A
Email: edward.kuhnel@gmail.com

With a copy to:

Peter G. Goodman, Esq.
Benjamin Gorelick, Esq.
Smith, Gambrell & Russell, LLP
250 Park Avenue, Suite 1900
New York, NY 10177
Facsimile: 212-907-9865
Email: pgoodman@srglaw.com;
bgorelick@srglaw.com

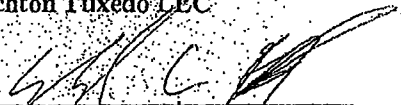
23. Counterparts and Electronic Signature. This Agreement may be executed in one or more counterparts, each of which is deemed to be an original hereof, and all of which shall be considered one and the same document as if all Parties had executed a single original document. This Agreement may be executed in Portable Document Format and each signature thereto shall be and constitute an original signature, again as if all Parties had executed a single original document.

24. Continuing Jurisdiction. The Florida Court shall retain continuing jurisdiction over the Petitioners and enforcement of this Agreement (with respect to the Petitioners only) until all property transfers and monetary payments required by this Agreement have been made. During such period and except with respect to the New York Matters, any disputes or controversies arising with respect to the interpretation, enforcement or implementation of this Agreement shall be resolved by motion to the Florida Court. Notwithstanding anything to the contrary, all disputes and/or controversies arising out of the New York Matters at any time shall be resolved in the New York courts, and the Parties hereby submit to the jurisdiction of such courts for such purpose.

25. Survival. All of the representations, warranties and covenants set forth in this Agreement shall survive the performance by the Parties of their obligations hereunder.

- Remainder of Page Intentionally Left Blank – Signatures Appear on Next Page -

IN WITNESS WHEREOF, the Parties have executed and delivered this Agreement as of the date first set forth above.

<p>Curtis C. Rogers <i>As Guardian for Oliver Bivins, Sr.</i></p> <p>Beachton Tuxedo LLC</p> <p>By: </p> <p>Name: <u>Edward Kuback</u> Title: <u>Managing Member</u></p>	<p>Oliver Bivins, Jr. <i>Individually, and as Personal Representative of the Estate of Lorna Bivins</i></p>
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Counterparts and Electronic Signature. This Agreement may be executed in one or more counterparts, each of which is deemed to be an original hereof, and all of which shall be considered one and the same document as if all Parties had executed a single original document. This Agreement may be executed in Portable Document Format, and each signature thereto shall be and constitute an original signature, again as if all Parties had executed a single original document.

Continuing Jurisdiction. The Florida Court shall retain continuing jurisdiction over the Petitioners and enforcement of this Agreement (with respect to the Petitioners only) until all property transfers and monetary payments required by this Agreement have been made. During such period and except with respect to the New York Matters, any disputes or controversies arising with respect to the interpretation, enforcement or implementation of this Agreement shall be resolved by motion to the Florida Court. Notwithstanding anything to the contrary, all disputes and/or controversies arising out of the New York Matters at any time shall be resolved in the New York courts, and the Parties hereby submit to the jurisdiction of such courts for such purpose.

Survival. All of the representations, warranties and covenants set forth in this Agreement shall survive the performance by the Parties of their obligations hereunder.

- Remainder of Page Intentionally Left Blank - Signatures Appear on Next Page -

IN WITNESS WHEREOF, the Parties have executed and delivered this Agreement as of the date first set forth above.

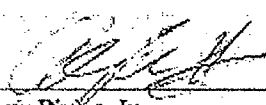
<p>Curtis C. Rogers As Guardian for Oliver Bivins, Sr.</p> <p>Beachton Tuxedo LLC</p> <p>By: _____ Name: _____ Title: _____</p>	 <p>Oliver Bivins, Jr. Individually, and as Personal Representative of the Estate of Lorna Bivins</p>
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EXHIBIT A

CASES TO BE DISMISSED AND/OR OBJECTIONS TO BE WAIVED

Dismissed - Petition to Determine Beneficiaries, In Re: Estate of Lorna Bivins, Circuit

EXHIBIT A

CASES TO BE DISMISSED AND/OR OBJECTIONS TO BE WAIVED

1. Dismissed - Petition to Determine Beneficiaries, In Re: Estate of Lorna Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Probate Division, File No. 502011CP001130XXXXMB.
2. Dismissed - Curtis Rogers, as Guardian of Oliver Bivins, Sr. v. Oliver Bivins, as Personal Representative of the Estate of Lorna Bivins Complaint, 502013CA006086XXXXMB/AJ **excepting** COUNT 3- DECLARATORY ACTION - TAXES and any claim by the Guardian for contribution, or otherwise, relating to potential or current income tax liabilities for the period of time predating January 1, 2011 of Oliver Sr, the Guardian and/or the Estate.
3. Waiver - The Estate and/or Oliver Jr.'s objections to Guardian Compensation and Expenses and the Guardian's Attorney's Fees and Costs, including but not limited to Ciklin Lubitz, Bill T. Smith, P.A., and Beys Stein Mobargha & Berland LLP, and any report of the Guardian, including but not limited to any Plans, Accountings, Petition for Discharge, In Re: Guardianship of Oliver Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 502011GA000006XXXXSB.
4. Dismissed - Petition to Order Personal Representative of the Estate of Lorna Bivins to Disgorge Chase Account Funds In Re: Guardianship of Oliver Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 502011GA000006XXXXSB.
5. Dismissed - Petition to Order Oliver Bivins, II to Disgorge Chase Account Funds In Re: Guardianship of Oliver Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 502011GA000006XXXXSB.
6. Dismissed - Petition to Order Personal Representative of the Estate of Lorna Bivins to Disgorge Chase Account Funds In Re: Guardianship of Lorna Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 502011GA000007XXXXSB.
7. Dismissed - Petition to Order Oliver Bivins, II to Disgorge Chase Account Funds In Re: Guardianship of Lorna Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 02011GA000007XXXXSB.
8. Dismissed - Curtis C. Rogers, as Guardian of Oliver Bivins, Sr. v. Oliver Bivins, as Personal Representative of the Estate of Lorna Bivins, Oliver Bivins, individually, and Beachton Tuxedo LLC, Supreme Court of the State of New York, County of New York, Index No. 650242/2013.

9. Dismissed- Partition Action- Oliver Bivins, as Personal Representative of the Estate of Lorna vs. Curtis Rogers, as Guardian of Oliver Bivins, File No: 502013CP000632XXXXSB.
10. Dismissed- Appeal by Oliver Bivins, individually and Personal Representative of the Lorna Bivins vs. the Guardianship of Oliver Bivins, Case No: 4D13-1363.
11. Waiver- The Estate and/or Oliver Jr.'s objections to Stephen Kelly, Emergency Temporary Guardian of Lorna Bivins and Oliver Bivins, Petition for Discharge, Final Accounting and any other report, plan, pleading or paper filed by Mr. Kelly.
12. Dismissed - Casey Ciklin v. The Estate of Lorna Bivins, collection of Lorna Bivins Guardianship Attorneys' fees and costs, Circuit Civil Court, Palm Beach County, Florida, File No. 2011CC011689XXXXMB.
13. Dismissed- Steven Kelly v. Estate of Lorna Bivins, collection of ETG compensation and expenses in Lorna Bivins Guardianship, Palm Beach County Circuit Court, Case No. 2011CC011688XXXXMB.

EXHIBIT B

FORM OF DEED

808 Lexington Avenue

NY - 1005 Bargain and Sale Deed, with Covenant against Grantors Acts-Individual or Corporation (Single Sheet)

CONSULT YOUR LAWYER BEFORE SIGNING THIS INSTRUMENT - THIS INSTRUMENT SHOULD BE USED BY LAWYERS ONLY.

THIS INDENTURE, made as of the ____ day of _____, 2013

BETWEEN

Oliver Bivins as Executor of the Estate of Lorna Bivins a/k/a Lorna M. Bivins, c/o Mark N. Axinn, Esq., Brill & Meisel, 845 Third Avenue, New York, NY 10022, and Curtis C. Rogers, as Guardian of the person and property of Oliver Bivins a/k/a Oliver Bivins, III, c/o Beys Stein Mobargha & Berland, LLP, The Chrysler Building, 405 Lexington Avenue, 7th fl., New York, NY 10174,

parties of the first part, and

Curtis C. Rogers, as Guardian of the person and property of Oliver Bivins, c/o Beys Stein Mobargha & Berland, LLP, The Chrysler Building, 405 Lexington Avenue, 7th fl., New York, NY 10174,

party of the second part,

WITNESSETH, that the party of the first part, in consideration of Ten and no/100 (\$10.00) Dollars paid by the party of the second part, does hereby grant and release unto the party of the second part, the heirs or successors and assigns of the party of the second part forever,

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the City, County and State of New York described as follows: 808 Lexington Avenue, New York, NY, Block 1397, Lot 16 on the Tax Map of New York County, and more fully described on Schedule A annexed hereto and made part hereof.

BEING the same premises previously conveyed by deed dated December 27, 1988 from Wilson Furnished Leasing, Inc., as grantor, to Lorna Bivens a/k/a Lorna M. Bivens and Oliver Bivens, III, collectively as grantee, and recorded on January 9, 1989 in Reel 1518, Page 623.

TOGETHER with all right, title and interest, if any, of the party of the first part in and to any streets and roads abutting the above described premises to the center lines thereof;

TOGETHER with the appurtenances and all the estate rights of the party of the first part in and to said premises; **TO HAVE AND TO HOLD** the premises herein granted unto the party of the second part, the heirs or successors and assigns of the party of the second part forever.

AND the party of the first part covenants that the party of the first part has not done or suffered anything whereby the said premises have been encumbered in any way whatever, except as aforesaid.

AND the party of the first part, in compliance with Section 13 of the Lien Law, covenants that the party of the first part will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose. The word "party" shall be construed as if it read "parties" whenever the sense of this indenture so requires.

IN WITNESS WHEREOF, the party of the first part has duly executed this deed the day and year first above written.

Oliver Bivins as Executor of the Estate of Lorna
Bivins

Curtis C. Rogers, as Guardian of the person and
property of Oliver Bivins

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On the ___ day of _____, 2013 before me, the undersigned, personally appeared Curtis C. Rogers, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On the ___ day of _____, 2013 before me, the undersigned, personally appeared Oliver Bivens, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

RECORD AND RETURN TO:

Beys Stein Mobargha & Berland, LLP
The Chrysler Building
405 Lexington Avenue-7th fl.
New York, NY 10174
Attn: Keith B. Stein, Esq.

PROPERTY ADDRESS & TAX MAP DESIGNATION

808 Lexington Avenue, New York, NY
Block: 1397
Lot: 16
County: New York

SCHEDULE A

BEGINNING at a point on the westerly side of Lexington Avenue distant forty feet five inches northerly from the corner formed by the intersection of the westerly side of Lexington Avenue and the northerly side of 62nd Street; running thence WESTERLY parallel with 62nd Street and part of the distance through a party wall eighty feet; thence NORTHERLY parallel with Lexington Avenue twenty feet; thence EASTERLY parallel with 62nd Street, and part of the distance through a party wall eighty feet to the westerly side of Lexington Avenue and thence SOUTHERLY along the westerly side of Lexington Avenue twenty feet to the point or place of BEGINNING.

Said premises being known as and by the street number 808 Lexington Avenue.

The said premises are being sold and are being conveyed subject to Party-wall Agreement, recorded in Liber 3672 of Conveyances, at page 367.

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.) NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.

I. (a) PLAINTIFFS JULIAN BIVINS, as Personal Representative of Ancillary Estate of Oliver Wilson Bivins **DEFENDANTS** CURTIS CAHALLONER ROGERS, JR., as former guardian, STEPHEN M. KELLY,

(b) County of Residence of First Listed Plaintiff Potter County, Texas (EXCEPT IN U.S. PLAINTIFF CASES) County of Residence of First Listed Defendant Palm Beach County (IN U.S. PLAINTIFF CASES ONLY)

(c) Attorneys (Firm Name, Address, and Telephone Number) The Bleakley Bavol Law Firm 15170 N. Florida Avenue Tampa, Florida 33613

(d) Check County Where Action Arose: MIAMI-DADE MONROE BROWARD PALM BEACH MARTIN ST. LUCIE INDIAN RIVER OKEECHOBEE HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff 3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Citizen of This State	<input type="checkbox"/> 1	<input checked="" type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input checked="" type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl, Ret, Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence Other: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Re-filed (See VI below) 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment 8 Remanded from Appellate Court

VI. RELATED/RE-FILED CASE(S) (See instructions): a) Re-filed Case YES NO b) Related Cases YES NO

JUDGE DOCKET NUMBER

VII. CAUSE OF ACTION Breach of fiduciary duty by Guardian and Counsel to Ward
 Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity):
 LENGTH OF TRIAL via 7-10 days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ 75,001.00 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE
 DATE 9/17/15 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT IFP JUDGE MAG JUDGE

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

Case No.: _____
District Judge: _____
Magistrate Judge: _____

JULIAN BIVINS, as Personal Representative
of the ancillary Estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR.,
as former guardian, STEPHEN M. KELLY,
as successor guardian, BRIAN M. O'CONNELL,
ASHLEY N. CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN,
BEYS LISTON MOBARGHA & BERLAND, LLP
f/k/a BEYS STEIN MOBARGHA & BERLAND, LLP,
and LAW OFFICES OF KEITH B. STEIN, PLLC,
n/k/a STEIN LAW, PLLC,
Defendants.

_____ /

COMPLAINT

COMES NOW the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, by and through his undersigned counsel, and sues CURTIS CAHALLONER ROGERS, JR., the former guardian of Oliver Bivins (the "Ward"), STEPHEN M. KELLY, as successor guardian of the Ward, BRIAN M. O'CONNELL, ASHLEY N. CRISPIN, CIKLIN LUBITZ & O'CONNELL, KEITH B. STEIN, BEYS LISTON MOBARGHA & BERLAND, LLP f/k/a BEYS STEIN MOBARGHA & BERLAND, LLP, and LAW OFFICES OF KEITH B. STEIN, PLLC, n/k/a STEIN LAW, PLLC, and says:

JURISDICTION AND VENUE

1. The Ward, Oliver Wilson Bivins, died on March 2, 2015. The Ward was a citizen of, and domiciled in, Amarillo, Potter County, Texas on the date of his death.

2. Julian Bivins (hereinafter, "Julian") is the Personal Representative of the ancillary Estate of the deceased Ward in Palm Beach County, Florida (the "Deceased Ward").

3. Curtis Rogers (hereinafter, "Rogers") is the former guardian of the Deceased Ward. Rogers resides in Palm Beach County, Florida.

4. Stephen M. Kelly (hereinafter, "Kelly") is the successor guardian of the Deceased Ward. Kelly resides in Boynton Beach, Palm Beach County, Florida.

5. Brian M. O'Connell (hereinafter, "O'Connell") resides and does business in Palm Beach County, Florida.

6. Ashley N. Crispin (hereinafter, "Crispin") resides and does business in Palm Beach County, Florida.

7. Ciklin Lubitz & O'Connell (hereinafter, "Ciklin") is a law firm with its principal place of business in Palm Beach County, Florida.

8. Keith B. Stein (hereinafter, "Stein") resides in New York, but does business in Palm Beach County, Florida.

9. Beys Liston Mobargha & Berland, LLP f/k/a Beys Stein Mobargha & Berland, LLP (hereinafter, "Beys") is a limited liability partnership doing business in Palm Beach County, Florida with its principal place of business in New York.

10. The Law Offices of Keith B. Stein, PLLC n/k/a Stein Law, PLLC (hereinafter, "Stein Law Firm") is a limited liability partnership doing business in Palm Beach County, Florida with its principal place of business in New York.

11. Stein, Beys, and Stein Law Firm committed tortious acts in Palm Beach County, Florida which resulted in the causes of actions under this complaint causing injury to the Estate of the Deceased Ward in Palm Beach County, Florida. Stein, Beys, and the Stein Law Firm expected or should reasonably have expected to have consequences in Palm Beach County, Florida because they each derived substantial revenue from the legal services they provided Rogers and Kelly from New York to Florida.

12. Plaintiff is a deemed a citizen of the State of Texas, the same state as the decedent under 28 U.S.C. § 1332 (c)(2).

13. Defendants are all citizens of states other than Texas for purposes of 28 U.S.C. §1332.

14. This is an action for money damages that exceed \$75,000.00, exclusive of interest, attorney's fees and costs.

15. Accordingly, this is a civil action which falls within the Court's original jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship).

GENERAL ALLEGATIONS

16. Oliver Bivins' (hereinafter, "Oliver Sr.") first marriage was to Dorothy Bivins and they had a child, Julian Bivins.

17. In 1961, Oliver Sr. married Lorna Bivins (hereinafter, "Lorna"), a woman 25 years younger from New York.

18. In approximately 1990, when Oliver Sr. was approximately 70 years old, he and Lorna adopted a child together, Oliver Bivins, Jr. (hereinafter "Oliver Jr.").

19. At all material times during the marriage, Oliver Sr. lived in Amarillo, Texas and Lorna and Oliver Jr. lived in New York, New York at 67th Street, although for intermittent periods

of time, Lorna and Oliver Jr. resided in Palm Beach, Florida at Lorna and Oliver Sr.'s condominium.

20. On March 5, 1992, Oliver Sr. created a joint trust with Lorna to which he transferred family owned oil and mineral rights in Amarillo, Texas (hereinafter the "Joint Trust").

21. In addition to the oil and mineral rights in Amarillo, Texas, the couple owned the following four properties as follows. Lorna owned a property at 82 Portland Place in London, England (hereinafter "London Property") and a property at 67th Street in New York, New York (hereinafter "67th Street") and Lorna and Oliver Sr. owned together, as tenants by the entirety, properties at 808 Lexington Avenue, New York, New York (hereinafter "808 Lexington") and 330 South Ocean Blvd., Palm Beach, Florida (hereinafter "Ocean Blvd"). (The properties identified in this paragraph will be collectively referred to herein as "The Properties".)

22. On April 12, 2010, Oliver Sr. filed for divorce from Lorna in Amarillo, Texas seeking to dissolve the marriage and terminate the Joint Trust.

23. On July 28, 2010, the Court entered a Final Decree of Divorce and an Order Terminating the Joint Trust.

24. In the divorce, Oliver Sr. received everything, including the oil and mineral rights in Amarillo, Texas.

25. The Texas Court made no provision in its order, however, with respect to The Properties and no Guardian or other Defendant made any effort to re-open the Texas divorce proceeding to address the property rights of the parties pertaining to the Properties.

26. Lorna continued to hold the London and 67th Street properties in her name alone, although Oliver Sr. funded these properties to the extent not covered by tenants renting the properties, and the properties at 808 Lexington Avenue and 330 Ocean Boulevard, which were

held as tenants by the entirety prior to the divorce, became held by Lorna and Oliver Sr. as tenants in common.

27. Following the divorce, Oliver Sr. transferred to Julian interests owned by Oliver Sr. in several parcels of real property, including the oil and mineral rights in Amarillo, Texas and a condominium in Amarillo, Texas.

28. On or about January 5, 2011, petitions to determine incapacity for both Oliver Sr. and Lorna were filed and an emergency temporary guardian, Stephen Kelly, was appointed over their person and property.

29. Lorna passed away in February 2011, shortly after the temporary guardianship was established.

30. Oliver Jr. was appointed the personal representative of the estate of Lorna Bivins.

31. On or about May 10, 2011, the Court appointed Rogers as the limited guardian of the person and property of Oliver Sr.

Texas Settlement

32. Rogers investigated the transfers of real property from Oliver Sr. to Julian and sought approval from the Florida guardianship court to bring an action against Julian and Julian simultaneously filed an action in Texas to validate the transfers.

33. The Florida guardianship court entered an order permitting Rogers to retain counsel on a contingency basis to prosecute and defend the actions involving the transfers.

34. Rogers, with a Texas supervising guardian, was appointed in Texas as guardian of Oliver Sr.'s property in Texas.

35. On or about February 27, 2013, Julian and Rogers entered into a settlement agreement as to the Texas proceedings (hereinafter "Texas Settlement").

36. The Properties were not the subject of the Texas lawsuit and the Texas Settlement made no provision for them.

37. As part of the Texas Settlement, Julian was required to transfer back to Oliver Sr. all of the Texas real property previously transferred to Julian, except that Julian was permitted to keep the Ranch and all interim distributions and other proceeds Julian had already received from the real property.

38. The Texas properties were transferred to a trust for the benefit of Julian and Oliver Sr. (hereinafter the "Texas Trust") with Julian having a 37% interest in the Texas Trust and Oliver Sr. having a 63% interest in the Texas Trust.

39. As a major consideration for Julian entering into the Texas Settlement, Rogers was to resign as guardian of Oliver Sr. in Texas and Florida within thirty (30) days of court approval of the Texas settlement, and Steve Kelly was to serve as successor guardian.

40. Rogers was required to submit a final accounting and documents necessary to obtain an order of discharge from the Texas and Florida guardianships within 30 days of the approval of the Texas settlement by the Texas and Florida guardianship courts.

41. As part of the Texas Settlement, Rogers was released from liabilities for his errors and omissions and other breaches of his fiduciary obligation, only through the date of the Texas Settlement.

42. The Florida guardianship court approved the settlement on April 1, 2013.

New York Settlement

43. In November 2012, Rogers entered into a contingency fee/hybrid agreement with Ciklin to initiate an action in Florida requesting that the Court presiding over the Lorna estate (the "Lorna Court") give no full faith and credit to the Texas Divorce Decree, so that the Lorna Court

would deem the Properties to pass to Oliver Sr. as though he were still married to Lorna at the time of her death. (“Florida Beneficiary Petition”).

44. In or about October 2012, Rogers also engaged Keith Stein of Beys to partition the 808 Lexington property (“New York litigation”).

45. Prior to initiating the partition action of 808 Lexington, Stein had only prepared, at best, one prior partition action in the course of his more than two decades of practice.

46. At the time of the partition action, and for several years prior, 808 Lexington was encumbered by a mortgage in the original principal sum of \$850,000.00 (“808 Mortgage”).

47. By the time of the partition action, the balance of the mortgage was approximately \$387,000.00.

48. Prior to, and following the date of the Texas Settlement, Rogers failed to take any action to pay, monitor, negotiate, or prevent default, acceleration, or negative consequences to the Ward in connection with the 808 Mortgage.

49. On or about October 5, 2012, unbeknownst to Julian, and presumably because Rogers had not taken any action to manage the 808 Lexington asset or liabilities and the 808 Mortgage was in default, the son of the paralegal of Oliver Jr.’s attorney (who was also a close friend of Oliver Jr.) surreptitiously formed a corporation known as Beachton Tuxedo, LLC (“Beachton”) and acquired the 808 Mortgage via an Assignment of Mortgage (“Assignment”) for the outstanding balance owed on the mortgage.

50. As of the date of the Assignment, the notes secured by the Mortgage were in default, had been accelerated by Beachton and gave Beachton the right to foreclose on 808 Lexington. The default interest rate on the Beachton mortgage was 17%.

51. As further consideration for Beachton to acquire the 808 Mortgage and not foreclose on it, Oliver Jr., individually, and as personal representative of the Estate of Lorna, assigned to Beachton, 40% of the equity interest in 808 Lexington, which, at a bare minimum, provided Beachton with an interest of far more than a million dollars, (on a \$387,000 mortgage) yet Beachton continued to charge interest at the maximum rate allowable under the 808 Mortgage.

52. Accordingly, the assignment by Oliver Jr. resulted in a potentially usurious interest being charged by Beachton on the 808 Mortgage, or alternatively, a satisfaction of the 808 Mortgage.

53. In July 2013, Roger, as guardian for Oliver Sr., Oliver Jr., individually and as personal representative of the Estate of Lorna, and Beachton entered into a settlement agreement to settle the Florida Beneficiary Petition and the New York Litigation (hereinafter referred to as the "New York Settlement." A true and correct copy of the New York Settlement Agreement is attached hereto as Exhibit "A" and incorporated herein by reference.

54. Pursuant to the New York Settlement, Oliver Jr. agreed to transfer to Oliver Sr. the 50% interest of the Estate of Lorna in 808 Lexington and Ocean Boulevard, such that as a result of such transfers, Oliver Sr. would own 100% fee simple interest in 808 Lexington and Ocean Boulevard.

55. The Estate of Lorna was required to satisfy all real estate taxes and related charges through May 8, 2013, and one-half of the real estate taxes and related charges from May 9, 2013, through the date immediately prior to the closing date.

56. Additionally, in connection with the New York Settlement, Oliver Jr. and Beachton agreed that the 40% interest in the 808 Lexington that Oliver Jr. had assigned to Beachton when it took over the 808 Mortgage, would be transferred to a 20% interest in the 67th Street property,

which amounted to an interest by Beachton of well over a million dollars. (The percentage change in the transfer was due to the fact that the value of the 67th Street property was significantly higher than the value of 808 Lexington.

57. Notwithstanding Beachton's acceptance of the 20% interest in 67th Street, Beachton continued to charge the maximum interest rate allowable under the 808 Mortgage, plus late fees, which combined with the 20% interest in 67th Street, constituted a usurious rate of interest, or alternatively, a satisfaction of the 808 Mortgage.

58. The closing date under the New York Settlement was to occur within ten (10) business days of the date upon which all approvals have been received from the Florida court, and each such other court. No other such court approval was required to approve the New York Settlement besides the Florida Court, which did so on September 17, 2013. Accordingly, the closing date was October 1, 2013 ("Closing Date").

59. Under the terms of the New York Settlement, Rogers, acting as guardian for Oliver Sr., agreed to waive and/or relinquish in favor of the Estate of Lorna any and all right, title, and interest in and to 67th Street and the London Property.

60. The New York Settlement required Rogers, as guardian of Oliver Sr., to pay the Beachton mortgage debt in full on or before August 31, 2013, and in exchange, Beachton agreed to continue to forebear from taking action based on the purported failure to make payments under the 808 Mortgage that Beachton purchased, including foreclosure.

61. On or about November 2014, 67th Street sold for \$22.5 million. Accordingly, Beachton's 20% interest in the 67th Street property was worth \$4.5 million.

62. Any claim by Beachton that an outstanding balance was due on the Beachton mortgage was usurious as Beachton became entitled to receive, via its 20% equity interest in 67th Street, more than five (5) times the outstanding balance owed on the 808 Mortgage.

63. Neither Rogers nor his counsel took any action to have a Court declare the 808 Mortgage acquired by Beachton as having been satisfied or otherwise usurious.

64. Moreover, despite representations to the Florida guardianship Court that they would do so, Rogers neither made any genuine efforts to procure substitute financing for the Beachton mortgage at a lower interest rate than the default rate Beachton mortgage was charging, nor undertook any action to remove the Beachton lien from the 808 property due to it being usurious or satisfied.

65. The terms of the New York Settlement, to which Julian persistently objected, provided that all interest on the mortgage debt accruing after June 30, 2013, but on or before the date the Beachton mortgage debt is paid in full, was to be payable 50% by the Estate of Lorna and 50% by Rogers, as guardian of Oliver Sr.

66. Moreover, the New York Settlement agreement provides that if “any party fails to comply with any of the party’s obligations set forth in Section 2 or 3 of this Agreement, the party to whom the obligation is owed shall have the right to enforce the terms set forth therein and the legal fees and costs incurred by the aggrieved party in enforcing such terms shall be paid by the Party found to be in breach of such terms.”

808 Lexington Management

67. Rogers remained in office as guardian for Oliver Sr. until April 23, 2014, when Kelly was appointed by the Court as successor guardian of Oliver Sr.

68. From April 1, 2013 (the date of the Florida Court's approval of the Texas Settlement) until Rogers was discharged by the Court in April 2014, as Florida guardian for Oliver Sr. (the "Interim Guardianship"), Rogers had a duty to manage 808 Lexington as a rental property.

69. From April 23, 2014 (the date Kelly was appointed by the Court as successor guardian of Oliver Sr.) until the closing of the sale of 808 Lexington by Kelly, as guardian of Oliver Sr., Kelly had a duty to manage 808 Lexington as a rental property.

70. The 808 Lexington Property consisted of four floors. The first floor was rented out by a restaurant, Fig and Olive, which generated approximately \$23,500 per month in rent. The lease for Fig and Olive was set to expire in November 2014.

71. The second floor of 808 Lexington was leased out to Pinafore Nursery and generated approximately \$3,500 per month in rent. The lease for Pinafore Nursery expired on December 31, 2010, and there was no new written lease entered into by Pinafore Nursery. Following the expiration of the lease with Pinafore Nursery, it continued to pay a monthly rent of \$3,500, notwithstanding that it was a holdover tenant without a lease.

72. The fourth floor apartment had been rented out to Kimberly Beamis for \$2,300 per month, but she vacated the premises prior to January 1, 2013 due to the failure of Rogers to maintain the unit. Thereafter, fourth floor apartment became occupied by a person related to one of the owners of Beachton for \$1,500 per month, which amount was paid to Oliver Jr. and nothing to the Rogers or Kelly on behalf of the Ward. The \$1500, to the extent it was paid, was well below market value, no lease was in place, and Rogers or Kelly failed to investigate, participate, or take any action for the benefit of the Ward pertaining to this unit.

73. The third floor tenant was evicted in either 2012 or 2013. Neither Rogers nor Kelly undertook any efforts to re-rent this unit, which had a monthly rental value of several thousand dollars.

74. Prior to the New York Settlement, Rogers should have been collecting 50% of the rental income from 808 Lexington, and should have made efforts to obtain full market rent on the second, third, and fourth floor units.

75. Following the Court's approval of the New York Settlement, Rogers should have been collecting all of the rental income from 808 Lexington. Yet, during the period of Interim Guardianship, Rogers only passively collected 50% of the rental income from Fig and Olive. Rogers and Kelly ignored the remaining rent that Oliver Jr. was collecting on the other 50% of the rental income from Fig and Olive and ignored any effort to obtain any rental income from the other units or tenants.

76. Following his appointment as successor guardian, Kelly should have been collecting all of the rental income from 808 Lexington. Yet, until the sale of 808 Lexington, he only passively collected 50% of the rental income from Fig and Olive. Kelly ignored the remaining rent that Oliver Jr. was collecting on the other 50% of the rental income from Fig and Olive and ignored any effort to obtain any rental income from the other units or tenants.

77. Oliver Jr. has also not paid any money to the State of New York or to Rogers or Kelly for any past due property taxes pursuant to the New York Settlement, or for the amount of property taxes on 808 Lexington from May 9, 2013, to the date immediately prior to the Closing Date.

78. Oliver Jr. has not paid any of the interest that accrued on the 808 Mortgage from June 30, 2013, until it was paid in full.

79. During the period of Interim Guardianship, Rogers also failed to take actions for the benefit of the Ward, including, but not limited to, the following acts with respect to 808 Lexington:

- a. Enter into discussions with Fig and Olive regarding renewing its lease or increasing the monthly rental payments;
- b. Enter into discussions with Pinafore Nursery to sign a new lease and increase its rent from the monthly rent it was paying for the previous four years;
- c. Take any action to market the third or fourth floor apartments;
- d. Take any action with respect to repairing, renovating, or maintaining 808 Lexington, including, but not limited to, its common areas, to obtain the highest and best rental values for the property;
- e. Collect the appropriate rental income due Oliver Sr. from the lease of 808 Lexington;
- f. Bring an action against Oliver Jr. to force Oliver Jr. to use the rental income from 808 Lexington to pay down the Beachton mortgage and to enforce the New York Settlement;
- g. Bring an action against Beachton for usury or satisfaction based upon the interest it received in 808 Lexington and thereafter 67th Street; and
- h. Obtain commercial financing to pay off the 808 Mortgage assigned to Beachton to avoid the default interest rate it was accruing against 808 Lexington.

80. After his appointment as successor guardian of Oliver Sr. on April 23, 2014, Kelly also failed to take actions for the benefit of the Ward, including, but not limited to, the following acts with respect to 808 Lexington:

- a. Enter into discussions with Fig and Olive regarding renewing its lease or increasing the monthly rental payments;
- b. Enter into discussions with Pinafore Nursery to sign a new lease and increase its rent from the monthly rent it was paying for the previous four years;
- c. Take any action to market the third or fourth floor apartments;
- d. Take any action with respect to repairing, renovating, or maintaining 808 Lexington, including, but not limited to, its common areas, to obtain the highest and best rental values for the property;
- e. Collect the appropriate rental income due Oliver Sr. from the lease of 808 Lexington;
- f. Bring an action against Oliver Jr. to force Oliver Jr. to use the rental income from 808 Lexington to pay down the Beachton mortgage and to enforce the New York Settlement;
- g. Bring an action against Beachton for usury or satisfaction based upon the interest it received in 808 Lexington and thereafter 67th Street; and
- h. Obtain commercial financing to pay off the 808 Mortgage assigned to Beachton to avoid the default interest rate it was accruing against 808 Lexington.

Due Diligence as to New York Settlement

81. Prior to entering into the New York Settlement, Rogers failed to do any type of due diligence as to the true fair market value of 808 Lexington and 67th Street, including, but not limited to, obtaining appraisals of the properties. Yet, Rogers and his counsel represented to the Florida Court that the New York Settlement was in the best interests of Oliver Sr. and that the properties were approximately equal in value.

82. On or about the Closing Date, the fair market value of 808 Lexington was approximately \$5 million and the true fair market value of 67th Street was more than \$22.5 million.

83. The fair market value of the London property has never been addressed other than in a cursory fashion by Rogers or the attorneys he hired to protect the Ward's interest, despite the property being located in the most exclusive and high priced rental district in London.

84. As a result, the estate of Oliver Sr. received assets from the New York Settlement with a value substantially less than those received by the Estate of Lorna.

COUNT I

Breach of Fiduciary Duty Against Defendants Rogers, O'Connell, Crispin, Ciklin, Stein, Beys, and Stein Law Firm)

85. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 84, *supra*, as if fully set forth herein.

86. During the period of the Interim Guardianship, Rogers had a fiduciary duty to Oliver Sr. to act in his best interest until Rogers was discharged as guardian, including, among other things, a duty of loyalty.

87. O'Connell, Crispin, Ciklin, Stein, Beys, and the Stein Law Firm ("Counsel for Rogers") represented Rogers, in his capacity as guardian for Oliver Sr., in connection with the New York Settlement and thereafter.

88. Counsel for Rogers, while he was acting as guardian for Oliver Sr., owed similar duties to Oliver Sr. and were fully aware that the work they were doing for Rogers, as guardian of Oliver Sr., was for the benefit of Oliver Sr.

89. Rogers, as guardian of Oliver Sr., and Counsel for Rogers were negligent and reckless in the exercise of their fiduciary duties to Oliver Sr., resulting in damages to him.

90. By failing to take actions for the benefit of the Ward, including, but not limited to, failing to, (a) properly manage 808 Lexington, (b) perform proper due diligence of the value of 808 Lexington and 67th Street to properly evaluate the fairness of the New York Settlement, (c) take action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr., (d) failing to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage, (e) seek substitute financing for the Beachton mortgage, and (f) failing to pursue action against Beachton to have its mortgage deemed satisfied or released, Rogers damaged the Estate of Oliver Sr. in contravention of Defendants' fiduciary duties.

91. At all material times, Counsel for Rogers, as guardian of Oliver Sr., owed duties to Oliver Sr. and were involved and participated in Rogers' actions or inactions, resulting in the above described damage.

92. Plaintiff was required to retain the Bleakley Bovol Law Firm to mitigate the damages to the Estate of Oliver Sr. and is required to pay it a reasonable fee for its services.

WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendants Rogers, O'Connell, Crispin, Ciklin, Stein, Beys, and the Stein Law Firm and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

COUNT II

Breach of Fiduciary Duty Against Defendants Kelly, O'Connell, Crispin, Ciklin, Stein, Beys, and Stein Law Firm

93. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 84, supra, as if fully set forth herein.

94. Following his appointment as successor guardian of Oliver Sr. on April 23, 2014, Kelly had a fiduciary duty to Oliver Sr. to act in his best interest until Kelly was discharged as guardian, including, among other things, a duty of loyalty.

95. O'Connell, Crispin, Ciklin, Stein, Beys, and the Stein Law Firm represented Kelly ("Counsel for Kelly"), in his capacity as successor guardian for Oliver Sr.

96. Counsel for Kelly, while he was acting as guardian for Oliver Sr., owed similar duties to Oliver Sr. and were fully aware that the work they were doing for Kelly, as successor guardian of Oliver Sr., was for the benefit of Oliver Sr.

97. Kelly, as guardian of Oliver Sr., and Counsel for Kelly were negligent and reckless in the exercise of their fiduciary duties to Oliver Sr., resulting in damages to him.

98. By failing to take actions for the benefit of the Ward, including, but not limited to, failing to (a) properly manage 808 Lexington, (b) take action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr., (c) failing to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage, (d) seek substitute financing for the Beachton mortgage, and (e) failing to pursue action against Beachton to have its mortgage deemed satisfied or released, Kelly damaged the Estate of Oliver Sr. in contravention of Defendants' fiduciary duties.

99. At all material times, Counsel for Kelly, as successor guardian of Oliver Sr., owed duties to Oliver Sr. and were involved and participated in Kelly's actions or inactions, resulting in the above described damage.

100. Plaintiff was required to retain the Bleakley Bovol Law Firm to mitigate the damages to the Estate of Oliver Sr. and is required to pay it a reasonable fee for its services.

WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendants Kelly, O'Connell, Crispin, Ciklin, Stein, Beys, and the Stein Law Firm and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

Jury Demand

Plaintiff demands a trial by jury on all issues so triable.

Dated: September 17, 2015.

Respectfully Submitted,

THE BLEAKLEY BAVOL LAW FIRM

/s/ J. Ronald Denman

J. Ronald Denman

Florida Bar Number 0863475

15170 North Florida Avenue

Tampa, FL 33613

(813) 221-3759 [Telephone]

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Attorneys for JULIAN BIVINS

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

IN RE: GUARDIANSHIP OF: GUARDIANSHIP DIVISION

OLIVER BIVINS, FILE NO: 502011GA000006XXXXSB

Incapacitated.

ORDER ON MOTION FOR COURT APPROVAL OF SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS CAUSE coming before the Court on the Motion for Court Approval of Settlement Agreement and Mutual Release, the Court having heard argument of counsel, and being otherwise fully advised, it is thereupon

ORDERED AND ADJUDGED as follows:

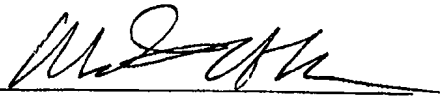
1. The Motion for Court Approval of Settlement Agreement and Mutual Release is

Granted.

2.

~~_____~~
~~_____~~
~~_____~~
~~_____~~
~~_____~~

DONE AND ORDERED in Delray Beach, Palm Beach County, Florida on the 17 day of SEPT, 2013.


MARTIN H. COLIN
Circuit Judge

Copies returned:

- Brian M. O'Connell, Esq., 515 N. Flagler Dr., 20th Floor, West Palm Beach, FL 33401
- Ronald Denman, Esq., 1000 Brickell Ave., Suite 600, Miami, FL 33131
- Ronda D. Gluck, Esq., 980 N. Federal Highway, #402, Boca Raton, FL 33432
- Donna P. Levine, Esq., 324 Datura St., #145, West Palm Beach, FL 33401
- Keith Stein, Esq., 405 Lexington Ave., 7th Floor, New York, NY 10174
- Mark N. Axinn, Esq., 845 Third Ave., New York, NY 10022
- Edward Kuhnel, 49 West Lake Stable Rd., Tuxedo Park, NY 10987
- Peter G. Goodman, Esq., 250 Park Avenue, Suite 1900, New York, NY 10177



SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE (this "Agreement") is made this ___ day of July, 2013, by and among Curtis C. Rogers (the "Guardian"), as Guardian of the person and property of Oliver Bivins, Sr. ("Oliver Sr."), Oliver Bivins, in his individual capacity ("Oliver Jr."), Oliver Jr., as the Personal Representative of the Estate of Lorna Bivins (the "Estate"), and Beachton Tuxedo LLC ("BTLLC") (collectively, the "Parties").

WHEREAS, various disputes and litigations exist and are pending in the States of Florida and New York, by and among the Parties, including each of the cases described in Exhibit A annexed hereto (collectively, the "Cases"), which disputes and cases pertain to, *inter alia*, matters related to the guardianship of Oliver Sr. and certain of its properties, and matters related to the property of the Estate and the probate thereof, including without limitation, certain real estate owned by and/or asserted to be owned by Oliver, Sr. and the Estate in the States of Florida and New York, and in London, England;

WHEREAS, the Parties, without acknowledging the existence of any liability or wrongdoing, believe it is in their mutual interests to enter into this Agreement to resolve, settle and compromise the claims and counterclaims filed in the Cases and the certain other matters of dispute (the "Settlement"), in order to avoid the further expense and inconvenience of litigation pursuant to the terms set forth herein;

NOW THEREFORE, in consideration of the promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Incorporation of Recitals. Each of the foregoing recitals is incorporated herein as if fully set forth below.
2. Court Approvals and Closing. The Guardian, Oliver Jr., and the Estate (collectively, the "Petitioners") hereby agree that, no later than ten (10) business days following the execution by all Parties of this Agreement, they will collectively and acting in good faith petition the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Guardianship Division and Probate Division (the "Florida Court"), and within ten (10) business days of any Parties' written notice of any other court whose approval may be needed, the Petitioners will collectively and acting in good faith petition each other court whose approval of this Settlement may be required, for approval of this Settlement and the terms and conditions contained in this Agreement. Each of the actions and transactions set forth in this Agreement, with the exception of the payment of the Mortgage Debt as required by Section 3(F), shall be closed within ten (10) business days of the date upon which all such approvals have been received from the Florida Court and each such other court (the "Closing Date").
3. Property Transfers/Obligations Related to Transfers/Releases.
 - (A) 808 Lexington Avenue. The Estate, acting by and through Oliver Jr., as personal representative, or acting through his successor or agent or its other appropriate representative,

shall transfer to the Guardian, for the benefit of Oliver Sr., any and all of its right, title and interest in and to that certain parcel of real estate known as 808 Lexington Avenue, New York, New York, also known as Block 1397, Lot 16 on the Tax Map of New York County (“**808 Lexington**”), such that the Guardian shall, as a result of such transfer (the “**808 Conveyance**”), own 100% fee simple title to 808 Lexington. The 808 Conveyance shall be accomplished by a bargain and sale without covenants deed in substantially the form annexed hereto as **Exhibit B**. The Estate and Oliver Jr. hereby agree that neither the Estate nor Oliver Jr. will further encumber, or cause to be encumbered, 808 Lexington prior to the Closing Date with any lien or encumbrance unless such lien or encumbrance is permitted by the Guardian in writing, it being understood that (i) the lien of any unpaid real estate taxes and related charges and (ii) the mortgage described in subparagraph 3(F) below are hereby deemed to be permitted by the Guardian. The Estate shall immediately remedy any failure on its part to comply with the foregoing obligation. With respect to the 808 Conveyance, except as provided below: (i) the Guardian shall pay all New York State and New York City real estate transfer taxes associated with such transfer, (ii) there shall be no adjustment of real estate or related taxes, and (iii) the Guardian shall pay all recording and/or title insurance charges relating thereto. The Estate shall be responsible for satisfying the real estate taxes and related charges through May 8, 2013. The Estate and the Guardian shall each be responsible for half of the real estate taxes and related charges from May 9, 2013 through 11:59PM of the date immediately prior to the Closing Date. As of the Closing Date the Guardian shall be responsible for the real estate taxes and related charges. Any property tax payments for 808 Lexington that are past-due on the Closing Date shall be immediately paid in full (including any interest and/or penalties) to the New York City Department of Finance by the Guardian and the Estate, as apportioned. The Estate shall within ten (10) days of the Closing Date, (x) provide to the Guardian any and all documents relating to 808 Lexington, including but not limited to documents relating to the day to day management of 808 Lexington and documents related to any tenancy or leasehold interest, and (y) transfer to the Guardian any security deposit or other monies held with regard to, or on behalf of, any 808 Lexington tenant and any utility deposits.

(B) 330 Ocean Boulevard. The Estate, acting by and through Oliver Jr., as personal representative, or acting through his successor or agent or its other appropriate representative, shall transfer to the Guardian, for the benefit of Oliver Sr. (the “**330 OB Conveyance**”), any and all right, title and interest in and to that certain real estate known as Unit 5A, 330 Ocean Boulevard, Palm Beach, Florida (“**330 OB**”). Such transfer shall be evidenced by deed in such form as may be reasonably required by the Guardian in order to convey to the Guardian 100% of the Estate’s interest in 330 OB. As a result of the 330 OB Conveyance, the Guardian shall own 100% fee simple title to 330 OB. The Estate and Oliver Jr. hereby agree that neither the Estate nor Oliver Jr. will further encumber, or cause to be encumbered, 330 OB prior to the Closing Date with any lien or encumbrance unless such lien or encumbrance is permitted by the Guardian in writing, it being understood that (i) the lien of any unpaid real estate taxes and related charges and (ii) any mortgage affecting 330 OB as of the date hereof are hereby deemed to be permitted by the Guardian. The Estate shall immediately remedy any failure on its part to comply with the foregoing obligation. With respect to the 330 OB Conveyance, except as provided below: (i) the Guardian shall pay all real estate transfer taxes associated with such transfer, (ii) there shall be no adjustment of real estate or related taxes, and (iii) the Guardian shall pay all recording and/or

title insurance charges relating thereto. The Guardian shall be responsible for satisfying the real estate taxes and related charges on 330 OB from and after the date hereof.

(C) 39 East 67th Street. The Guardian, acting on behalf of Oliver Sr., shall waive and/or relinquish, and hereby waives and relinquishes, in favor of the Estate, any and all right, title and interest in and to that certain real estate known as 39 E. 67th Street, New York, New York, also known as Block 1382, Lot 28 on the Tax Map of New York County ("39E67"). If deemed necessary by the Estate, and upon prior written request from the Estate to the Guardian, the Guardian shall evidence such transfer of Oliver Sr.'s interest, if any, in 39E67 to the Estate by delivery of a deed in such form as may be reasonably required by the Estate and/or by delivery of such other documents as requested by the Estate in order to convey marketable fee simple title to 39E67 to the Estate. The Guardian shall execute and deliver such deed to the Estate within five (5) business days following the giving of such written request. The Guardian and Oliver Sr. hereby agree that neither Guardian nor Oliver Sr. will further encumber, or cause to be encumbered, 39E67 prior to the Closing Date with any lien or encumbrance unless such lien or encumbrance is permitted by the Estate in writing, it being understood that (i) the lien of any unpaid real estate taxes and related charges and (ii) the mortgage affecting 39E67 as of the date hereof are hereby deemed to be permitted by the Estate. The Guardian shall immediately remedy any failure on its part to comply with the foregoing obligation. The Estate shall pay all transfer taxes, title charges and recording fees associated with such transfer. The Estate shall be liable for all expenses, maintenance costs and any other liabilities associated with 39E67.

(D) 82 Portland Place. The Guardian, acting on behalf of Oliver Sr., shall transfer and/or relinquish, and hereby waives and relinquishes, to the Estate, any and all right, title and interest in and to the leasehold interest in that certain residential apartment known as Flat V, 82 Portland Place, London, England ("82 Portland"). If deemed necessary by the Estate, and upon prior written request from the Estate to the Guardian, the Guardian shall evidence such transfer of Oliver Sr.'s interest, if any, in 82 Portland to the Estate by delivery of such instruments in such forms as may be reasonably required by the Estate. The Guardian shall execute and deliver such instruments to the Estate within five (5) business days following the giving of such written request. The Guardian and Oliver Sr. hereby agree that neither the Guardian nor Oliver Sr. will encumber 82 Portland prior to the Closing Date with any lien or encumbrance unless such lien or encumbrance is permitted by the Estate in writing, it being understood that (i) the lien of any unpaid real estate taxes and related charges, (ii) the existing ground lease, and (iii) any mortgage affecting 82 Portland as of the date hereof are hereby deemed to be permitted by the Estate. The Guardian shall immediately remedy any failure on its part to comply with the foregoing obligation. The Estate shall pay all taxes associated with such transfer. The Estate shall be liable for all expenses, maintenance costs and any other liabilities associated with 82 Portland.

(E) Cash Payment. The Guardian, acting on behalf of Oliver Sr., will pay to the Estate the amount of \$150,000 in cash, which payment shall be made to the IOLTA account of Levine & Susaneck, P.A. Such payment will be made by the Guardian within thirty (30) days of the Closing Date or upon the sale of 808 Lexington, whichever is first in time.

(F) Mortgage on 808 Lexington. As of the Closing Date, the Guardian on behalf of Oliver Sr., shall become the sole obligor of those certain mortgage notes (the "**808 Notes**") and all amounts due and owing thereunder (including but not limited to all principal, accrued interest, fees and expenses, including legal fees and disbursements (the "**Mortgage Debt**") that are secured by, among other things, a consolidation, extension, and modification agreement dated November 19, 2001, and those certain mortgages in the aggregate principal sum of \$850,000 that create a lien on 808 Lexington (the "**808 Mortgages**"). The 808 Notes and 808 Mortgages are held by BTLLC pursuant to those certain assignment documents dated October 5, 2012 made by Sovereign Bank, N.A. f/k/a Sovereign Bank, successor-by-merger to Independence Community Bank, as Assignor, to Beachton Tuxedo LLC, as Assignee, including that certain Assignment of Mortgage (the "**Assignment**") recorded in the Office of the City Register of New York County on October 31, 2012 as CRFN 2012000429258 (the 808 Notes, the 808 Mortgages, and the Assignment are collectively referred to herein as, the "**Mortgage Loan**"). The Guardian shall pay the Mortgage Debt in full, on or before August 31, 2013 (the "**Forbearance Expiration Date**"), it being understood, agreed, and acknowledged by the Parties that BTLLC or its predecessor(s) previously accelerated the entire principal amount of the Mortgage Loan, provided, however, that to the extent the amount of such total payment owing on the Mortgage Debt exceeds \$465,000 as of June 30, 2013, such excess amount shall be subtracted from the \$150,000 due and payable under (E) above (but shall not be deducted from the Mortgage Debt payable by the Guardian to BTLLC). All interest on the Mortgage Debt accruing after June 30, 2013, and on or before the date the Mortgage Debt is paid in full, shall be payable 50% by the Estate and 50% by the Guardian. Except in the event of a default hereunder by the Guardian, the Estate, or Oliver Jr., BTLLC hereby agrees to continue to forebear from taking action based on the failure to make payments as required under the Mortgage Loan, including foreclosure (the "**Forbearance**"), until the Forbearance Expiration Date. Notwithstanding anything contained in this Agreement to the contrary (other than the Forbearance), the terms of the 808 Note and the 808 Mortgage shall remain in full-force and effect, and BTLLC shall have all the rights and remedies contained in the documents evidencing the Mortgage Loan, until such time as the Mortgage Debt is paid in full. The Parties agree to execute a stand-alone mortgage assumption agreement (and accompanying affidavits) for recording with the New York County Clerk, in a form reasonably acceptable to the parties, to memorialize the Guardian's assumption of mortgagor's obligations under the Mortgage Loan.

(G) Attorneys Fees and Costs. The Parties acknowledge and agree that there are attorneys fees and costs due Ciklin Lubitz Martens & O'Connell ("**Ciklin Lubitz**") and Bill T. Smith, P.A. pursuant to the fee agreement approved by the Florida Court on November 30, 2012 and the positive result or recovery attained by this Agreement. The Parties further acknowledge and agree that such attorneys' fees and costs shall be satisfied from 808 Lexington and 330 OB in accordance with the Compromised Settlement Agreement approved by the Texas Court on March 13, 2013 and the Florida Court on April 1, 2013.

(H) Guardianship of Lorna Bivins. Ciklin Lubitz is holding \$41,973.03 in its Trust account. The Parties agree that the funds shall be utilized to partially satisfy compensation obligations incurred in the Guardianship of Lorna Bivins, Case No. 502011GA000007XXXXSB. From such funds the following payments shall be made: Steve Kelly, Legal Management Services, Inc. in the amount of \$6,500; Ciklin Lubitz Marten's & O'Connell in the amount

\$11,000.00; Hark Yon et al in the amount of \$22,473.03; Lavalle, Brown & Ronan in the amount of \$2,000. The Parties acknowledge the above payments are being made as "partial" payments.

(I) Stipulation and Dismissal. On the Closing Date, the Parties will collectively (i) execute all stipulations of dismissal and other pleadings necessary and appropriate to voluntarily dismiss, with prejudice, all of the Cases (described on Exhibit A attached hereto) and any other claims by or among any of the Parties against one another, including without limitation all appeals, and as otherwise related to the foregoing described properties and ownership matters, excepting only the excluded claims as described on Exhibit A; (ii) file with the appropriate courts all such stipulations of dismissal and other documents and pleadings required to effectuate such dismissals, and (iii) take all steps reasonably necessary to effectuate all of the foregoing as soon as reasonably practicable.

(J) Releases.

(i) Subject to the performance in full by each of (a) Oliver Jr., acting individually and as personal representative on behalf of the Estate, and (b) BTLLC, of their respective promises and covenants herein, the failure of which shall void this paragraph (J)(i), the Guardian, acting on behalf of Oliver Sr. and each and all of Oliver, Sr.'s past, present and future heirs, successors, predecessors, assigns, advisors, attorneys, representatives and agents (collectively including the Guardian, the "**Oliver Sr. Persons**"), hereby release, acquit, and forever discharge Oliver Jr., individually, and each and all of his respective past and present heirs, successors, predecessors, assigns, advisors, attorneys, representatives and agents (collectively including Oliver Jr., the "**Oliver Jr. Persons**"), the Estate and each and all of its respective past, present and future heirs, successors, predecessors, assigns, advisors, attorneys, representatives and agents (collectively including the Estate, the "**Estate Persons**"), and BTLLC and each and all of its respective past, present and future heirs, successors, predecessors, assigns, advisors, attorneys, representatives and agents (collectively including BTLLC, the "**BTLLC Persons**"), from any and all claims, counterclaims, demands, causes of actions, liabilities, contracts, agreements, promises, obligations or defenses of any kind whatsoever, whether known or unknown, related to or arising out of the matters described herein and in the Cases, which any of the Oliver Sr. Persons have or may have against any or all of the Oliver Jr. Persons, the Estate Persons, the BTLLC Persons, occurring from the beginning of the world to the date of this Agreement, and the Oliver Sr. Persons further agree that this Agreement may be pleaded and shall serve as a full defense to any action, suit or other proceeding covered by the terms of this Agreement which is or may be initiated, prosecuted or maintained, it being agreed and understood, however, that notwithstanding the foregoing, the obligations of this Agreement remain in full force and effect as an agreement of the Parties and as an Order of the Florida Court upon the Florida Court's approval hereof.

(ii) Subject to the performance in full by each of (a) the Guardian, acting on behalf of Oliver Sr., (b) the Estate, and (c) BTLLC, of their respective promises and covenants herein, the failure of which shall void this paragraph (J)(ii), the Oliver Jr. Persons hereby release, acquit, and forever discharge the Oliver Sr. Persons, the Estate Persons, and the BTLLC Persons, from any and all claims, counterclaims, demands, causes of actions, liabilities, contracts, agreements, promises, obligations or defenses of any kind whatsoever, whether known or unknown, related to or arising out of the matters described herein and in the Cases, which any of

the Oliver Jr. Persons have or may have against any or all of the Oliver Sr. Persons, the Estate Persons, or the BTLIC Persons, occurring from the beginning of the world to the date of this Agreement, and the Oliver Jr. Persons further agree that this Agreement may be pleaded and shall serve as a full defense to any action, suit or other proceeding covered by the terms of this Agreement which is or may be initiated, prosecuted or maintained, it being agreed and understood, however, that notwithstanding the foregoing, the obligations of this Agreement remain in full force and effect as an agreement of the Parties and as an Order of the Florida Court upon the Florida Court's approval hereof.

(iii) Subject to the performance in full by each of (a) the Guardian, acting on behalf of Oliver Sr., (b) Oliver Jr., acting individually, and (c) BTLIC, of their respective promises and covenants herein, the failure of which shall void this paragraph (J)(iii), the Estate Persons hereby release, acquit, and forever discharge the Oliver Sr. Persons, the Oliver Jr. Persons, and the BTLIC Persons, from any and all claims, counterclaims, demands, causes of actions, liabilities, contracts, agreements, promises, obligations or defenses of any kind whatsoever, whether known or unknown, related to or arising out of the matters described herein and in the Cases, which any of the Estate Persons have or may have against any or all of the Oliver Sr. Persons, the Oliver Jr. Persons, or the BTLIC Persons, occurring from the beginning of the world to the date of this Agreement, and the Estate Persons further agree that this Agreement may be pleaded and shall serve as a full defense to any action, suit or other proceeding covered by the terms of this Agreement which is or may be initiated, prosecuted or maintained, it being agreed and understood, however, that notwithstanding the foregoing, the obligations of this Agreement remain in full force and effect as an agreement of the Parties and as an Order of the Florida Court upon the Florida Court's approval hereof.

(iv) Subject to the performance in full by each of (a) the Guardian, acting on behalf of Oliver Sr., (b) Oliver Jr., acting individually, and (c) Oliver Jr., acting on behalf of the Estate, of their respective promises and covenants herein, the failure of which shall void this paragraph (J)(iv), the BTLIC Persons, hereby release, acquit, and forever discharge the Oliver Sr. Persons from any and all claims, counterclaims, demands, causes of actions, liabilities, contracts, agreements, promises, obligations or defenses of any kind whatsoever, whether known or unknown, related to or arising out of the matters described herein and in the Cases, which any of the BTLIC Persons have or may have against the Oliver Sr. Persons occurring from the beginning of the world to the date of this Agreement, and the BTLIC Persons further agree that this Agreement may be pleaded and shall serve as a full defense to any action, suit or other proceeding covered by the terms of this Agreement which is or may be initiated, prosecuted or maintained, it being agreed and understood, however, that notwithstanding the foregoing, the obligations of this Agreement remain in full force and effect as an agreement of the Parties.

(v) Nothing in any of the foregoing releases shall be construed to release any of the Parties from their obligations as set forth in this Agreement or shall release any claims specifically excluded on Exhibit A.

4. Enforcement of Obligations. The Parties understand and agree that notwithstanding any contrary terms in this Agreement, in the event any party fails to comply with any of the party's obligations as set forth in Sections 2 and 3 of this Agreement, the party to whom the obligation is owed shall have the right to enforce the terms set forth therein, and the legal fees and costs

incurred by the aggrieved party in enforcing such terms shall be paid by the Party found to be in breach of such terms.

5. No Admission of Liability. The Parties understand and agree that this Agreement is only a compromise in settlement of disputed claims and matters and shall not be construed as an admission of liability or wrongdoing by any party.

6. Waiver of Interim and Final Report. Oliver Jr. hereby waives any and all objections to any interim or final report prepared or to be prepared and submitted by the Guardian to the Florida Court, including without limitation any accounting, plan, discharge, compensation and expenses of the Guardian, attorneys fees and costs. The Guardian hereby waives any and all objections to any interim or final report prepared or to be prepared and submitted by Oliver Jr. as the Personal Representative of the Estate to the Florida Court, including without limitation any accounting, plan, discharge, compensation and expenses of the Personal Representative, attorneys fees and costs.

7. Continued Guardianship. The Parties hereby agree that none shall object, in any manner, to Curtis C. Rogers' continued service as the Guardian at least until the consummation in full of this Settlement or the appointment of the Successor Guardian as contemplated in the Compromised Settlement Agreement, whichever occurs first.

8. Authority. Each Party executing this Agreement hereby represents and warrants that it has full power and authority to enter into this Agreement. Each individual executing this Agreement on behalf of an entity Party hereby represents and warrants that he or she has the full power and authority to so execute this Agreement.

9. No Assignment. Each Party represents and warrants that it is the lawful owner of all claims being released by such Party and has not assigned any released claim or portions thereof to any other person or entity. In the event that a Party shall have assigned, sold, transferred, or otherwise disposed of any claim or other matter herein released, such Party shall hold harmless and indemnify the other Parties to this Agreement from and against any loss, cost, claim or expense, including but not limited to all costs related to the defense of any action, including attorneys' fees, based upon, arising from, or incurred as a result of any such claim or matter.

10. Confidentiality. The terms of this Agreement shall remain confidential, and none of the Parties shall disclose such terms to any third party (other than a Party's affiliates, officers, directors, employees, shareholders, partners, members, managers, attorneys, accountants, auditors, or governmental agencies), except as may be required by law or fiduciary duty. In the event any of the Parties shall receive a subpoena, discovery request or other legal process seeking the production or disclosure of this Agreement or the terms of the Agreement, such party promptly shall notify the other Parties to enable them to seek a protective order. However, no Party shall be precluded by this provision from complying with any such subpoena, discovery request or other legal process seeking production or disclosure of this Agreement unless ordered by a court of competent jurisdiction not to comply. Any failure to keep the terms and conditions of this Agreement confidential shall be a default, entitling the non-defaulting Party to the default remedies set forth in this Agreement or otherwise permitted by law.

11. Understanding and Counsel. The Parties further represent and warrant that:
 - (A) They have read and understand the terms of this Agreement.
 - (B) They have been represented by counsel with respect to this Agreement and all matters covered by and relating to it.
 - (C) They have entered into this Agreement for reasons of their own and not based upon any representation of any other person other than those set forth herein.
12. Legal Fees and Costs. Except as provided herein, each of the Parties shall pay its own respective costs and attorneys' fees.
13. Entire Agreement. This Agreement constitutes the entire agreement with respect to the subject matter addressed herein and supersedes any prior written and/or verbal agreement between the Parties, including the Memorandum of Understanding among the Parties, dated May 8, 2013; but excluding the 808 Notes and the 808 Mortgages, and any other agreement by, between, or among BTLIC, the Estate, and/or Oliver Jr. dated on or after May 7, 2013.
14. Amendments. This Agreement may not be orally modified. This Agreement may only be modified in a writing signed by all of the Parties.
15. Illegality or Unenforceability of Provisions. In the event any one or more of the provisions contained in this Agreement shall for any reason be held by a court of competent jurisdiction in whole or in part to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement. A reviewing court also shall have the authority to amend or "blue pencil" this Agreement so as to make it fully valid and enforceable.
16. Successors, Assigns and Third Party Beneficiaries. This Agreement shall be binding on, inure to the benefit of, and be enforceable by, each of the Parties, and each of their respective personal representatives, heirs, successors and assigns.
17. Headings. All headings and captions in this Agreement are for convenience only and shall not be interpreted to enlarge or restrict the provisions of the Agreement.
18. Waiver and Modification. The failure of a Party to insist, in any one or more instances, upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall not be construed as a waiver, or a relinquishment for the future, of such covenant or option, but the same shall continue and remain in full force and effect.
19. Further Necessary Actions. To the extent that any document or action is reasonably required to be executed or taken by any Party to effectuate the purposes of this Settlement Agreement, the Party will execute and deliver such document or documents to the requesting Party or take such action or actions at the request of the requesting Party.
20. Florida Law. The Parties understand and agree that this Agreement shall be construed and interpreted in accordance with the laws of the State of Florida, without giving effect to

principles of conflicts of law that would require the application of the law of any other jurisdiction; and provided, however, that except as to the location of the realty where specific enforcement is sought, the law of such jurisdiction shall govern. Notwithstanding the foregoing, the laws of the State of New York shall govern and control all controversies arising out of this Agreement which may relate to New York State, including but not limited to 808 Lexington, 39E67, the 808 Notes, the 808 Mortgages, the Mortgage Loan, and the Mortgage Debt (collectively, the "New York Matters").

21. Construction of Settlement Agreement. The Parties acknowledge that this Agreement is the product of negotiations by Parties represented by counsel of their choice and that the language of this Agreement shall not be presumptively construed either in favor or against any of the Parties but shall be given a reasonable interpretation.

22. Notices. Any notices that the Parties may wish to serve upon each other pursuant to this Agreement shall be served by hand, facsimile, email, or overnight courier service as follows:

TO THE GUARDIAN:

Curtis C. Rogers
710 First Avenue South
Lake Worth, FL 33460
Email: rogersdna@gmail.com

With a copy to:

Brian M. O'Connell, Esq.
Ashley N. Crispin, Esq.
Ciklin Lubitz Martens & O'Connell
515 N. Flagler Dr., 20th Floor
West Palm Beach, FL 33401
Facsimile: 561-833-4209
Email: boconnell@ciklinlubitz.com
acrispin@ciklinlubitz.com

And to:

Keith B. Stein, Esq.
Roy C. Justice, Esq.
Beys Stein Morbargha & Berland LLP
405 Lexington Avenue, 7th Floor
New York, NY 10174
Facsimile: 646-755-3599
Email: kstein@beysstein.com
rjustice@beysstein.com

TO OLIVER BIVINS, JR.:

Oliver Bivins, Jr.
39 E. 67th St.
New York, NY 10065
Email: o.bivins.ii@gmail.com

With a copy to:

Donna P. Levine, Esq.
Levine & Susaneck, P.A.
324 Datura Street, Suite 145
West Palm Beach, FL 33401
Facsimile: 561-820-8099
Email: dlevinelaw@aol.com

And to:

Mark N. Axinn, Esq.
Brill & Meisel
845 Third Avenue
New York, NY 10022
Email: markaxinn@hotmail.com

TO BEACHTON TUXEDO LLC:

Edward Kuhnel
49 West Lake Stable Road
Tuxedo Park, NY 10987
Facsimile: N/A
Email: edward.kuhnel@gmail.com

With a copy to:

Peter G. Goodman, Esq.
Benjamin Gorelick, Esq.
Smith, Gambrell & Russell, LLP
250 Park Avenue, Suite 1900
New York, NY 10177
Facsimile: 212-907-9865
Email: pgoodman@srglaw.com;
bgorelick@srglaw.com

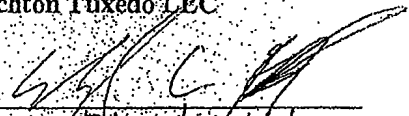
23. Counterparts and Electronic Signature. This Agreement may be executed in one or more counterparts, each of which is deemed to be an original hereof, and all of which shall be considered one and the same document as if all Parties had executed a single original document. This Agreement may be executed in Portable Document Format and each signature thereto shall be and constitute an original signature, again as if all Parties had executed a single original document.

24. Continuing Jurisdiction. The Florida Court shall retain continuing jurisdiction over the Petitioners and enforcement of this Agreement (with respect to the Petitioners only) until all property transfers and monetary payments required by this Agreement have been made. During such period and except with respect to the New York Matters, any disputes or controversies arising with respect to the interpretation, enforcement or implementation of this Agreement shall be resolved by motion to the Florida Court. Notwithstanding anything to the contrary, all disputes and/or controversies arising out of the New York Matters at any time shall be resolved in the New York courts, and the Parties hereby submit to the jurisdiction of such courts for such purpose.

25. Survival. All of the representations, warranties and covenants set forth in this Agreement shall survive the performance by the Parties of their obligations hereunder.

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IN WITNESS WHEREOF, the Parties have executed and delivered this Agreement as of the date first set forth above.

<p>Curtis C. Rogers <i>As Guardian for Oliver Bivins, Sr.</i></p> <p>Beachton Tuxedo LEC</p> <p>By: </p> <p>Name: <u>Edward Kuback</u> Title: <u>Managing Member</u></p>	<p>Oliver Bivins, Jr. <i>Individually, and as Personal Representative of the Estate of Lorna Bivins</i></p>
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Counterparts and Electronic Signature. This Agreement may be executed in one or more counterparts, each of which is deemed to be an original hereof, and all of which shall be considered one and the same document as if all Parties had executed a single original document. This Agreement may be executed in Portable Document Format and each signature thereto shall be and constitute an original signature, again as if all Parties had executed a single original document.

Continuing Jurisdiction. The Florida Court shall retain continuing jurisdiction over the Petitioners and enforcement of this Agreement (with respect to the Petitioners only) until all property transfers and monetary payments required by this Agreement have been made. During such period and except with respect to the New York Matters, any disputes or controversies arising with respect to the interpretation, enforcement or implementation of this Agreement shall be resolved by motion to the Florida Court. Notwithstanding anything to the contrary, all disputes and/or controversies arising out of the New York Matters at any time shall be resolved in the New York courts, and the Parties hereby submit to the jurisdiction of such courts for such purpose.

Survival. All of the representations, warranties and covenants set forth in this Agreement shall survive the performance by the Parties of their obligations hereunder.

- Remainder of Page Intentionally Left Blank -- Signatures Appear on Next Page -

IN WITNESS WHEREOF, the Parties have executed and delivered this Agreement as of the date first set forth above.

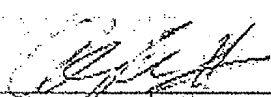
Curtis C. Rogers As Guardian for Oliver Bivins, Sr.	
Beachton Tuxedo LLC	Oliver Bivins, Jr. Individually, and as Personal Representative of the Estate of Lorna Bivins
By: _____ Name: _____ Title: _____	

EXHIBIT A

CASES TO BE DISMISSED AND/OR OBJECTIONS TO BE WAIVED

- Dismissed - Petition to Determine Beneficiaries, In Re: Estate of Lorna Bivins, Circuit

EXHIBIT A

CASES TO BE DISMISSED AND/OR OBJECTIONS TO BE WAIVED

1. Dismissed - Petition to Determine Beneficiaries, In Re: Estate of Lorna Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Probate Division, File No. 502011CP001130XXXXMB.
2. Dismissed - Curtis Rogers, as Guardian of Oliver Bivins, Sr. v. Oliver Bivins, as Personal Representative of the Estate of Lorna Bivins Complaint, 502013CA006086XXXXMB/AJ **excepting** COUNT 3- DECLARATORY ACTION - TAXES and any claim by the Guardian for contribution, or otherwise, relating to potential or current income tax liabilities for the period of time predating January 1, 2011 of Oliver Sr, the Guardian and/or the Estate.
3. Waiver - The Estate and/or Oliver Jr.'s objections to Guardian Compensation and Expenses and the Guardian's Attorney's Fees and Costs, including but not limited to Ciklin Lubitz, Bill T. Smith, P.A., and Beys Stein Mobargha & Berland LLP, and any report of the Guardian, including but not limited to any Plans, Accountings, Petition for Discharge, In Re: Guardianship of Oliver Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 502011GA000006XXXXSB.
4. Dismissed - Petition to Order Personal Representative of the Estate of Lorna Bivins to Disgorge Chase Account Funds In Re: Guardianship of Oliver Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 502011GA000006XXXXSB.
5. Dismissed - Petition to Order Oliver Bivins, II to Disgorge Chase Account Funds In Re: Guardianship of Oliver Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 502011GA000006XXXXSB.
6. Dismissed - Petition to Order Personal Representative of the Estate of Lorna Bivins to Disgorge Chase Account Funds In Re: Guardianship of Lorna Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 502011GA000007XXXXSB.
7. Dismissed - Petition to Order Oliver Bivins, II to Disgorge Chase Account Funds In Re: Guardianship of Lorna Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 02011GA000007XXXXSB.
8. Dismissed - Curtis C. Rogers, as Guardian of Oliver Bivins, Sr. v. Oliver Bivins, as Personal Representative of the Estate of Lorna Bivins, Oliver Bivins, individually, and Beachton Tuxedo LLC, Supreme Court of the State of New York, County of New York, Index No. 650242/2013.

9. Dismissed- Partition Action- Oliver Bivins, as Personal Representative of the Estate of Lorna vs. Curtis Rogers, as Guardian of Oliver Bivins, File No: 502013CP000632XXXXSB.
10. Dismissed- Appeal by Oliver Bivins, individually and Personal Representative of the Lorna Bivins vs. the Guardianship of Oliver Bivins, Case No: 4D13-1363.
11. Waiver- The Estate and/or Oliver Jr.'s objections to Stephen Kelly, Emergency Temporary Guardian of Lorna Bivins and Oliver Bivins, Petition for Discharge, Final Accounting and any other report, plan, pleading or paper filed by Mr. Kelly.
12. Dismissed - Casey Ciklin v. The Estate of Lorna Bivins, collection of Lorna Bivins Guardianship Attorneys' fees and costs, Circuit Civil Court, Palm Beach County, Florida, File No. 2011CC011689XXXXMB.
13. Dismissed- Steven Kelly v. Estate of Lorna Bivins, collection of ETG compensation and expenses in Lorna Bivins Guardianship, Palm Beach County Circuit Court, Case No. 2011CC011688XXXXMB.

EXHIBIT B

FORM OF DEED

808 Lexington Avenue

NY - 1005 Bargain and Sale Deed, with Covenant against Grantors Acts-Individual or Corporation (Single Sheet)

CONSULT YOUR LAWYER BEFORE SIGNING THIS INSTRUMENT - THIS INSTRUMENT SHOULD BE USED BY LAWYERS ONLY.

THIS INDENTURE, made as of the ____ day of _____, 2013

BETWEEN

Oliver Bivins as Executor of the Estate of Lorna Bivins a/k/a Lorna M. Bivins, c/o Mark N. Axinn, Esq., Brill & Meisel, 845 Third Avenue, New York, NY 10022, and Curtis C. Rogers, as Guardian of the person and property of Oliver Bivins a/k/a Oliver Bivins, III, c/o Beys Stein Mobargha & Berland, LLP, The Chrysler Building, 405 Lexington Avenue, 7th fl., New York, NY 10174,

parties of the first part, and

Curtis C. Rogers, as Guardian of the person and property of Oliver Bivins, c/o Beys Stein Mobargha & Berland, LLP, The Chrysler Building, 405 Lexington Avenue, 7th fl., New York, NY 10174,

party of the second part,

WITNESSETH, that the party of the first part, in consideration of Ten and no/100 (\$10.00) Dollars paid by the party of the second part, does hereby grant and release unto the party of the second part, the heirs or successors and assigns of the party of the second part forever,

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the City, County and State of New York described as follows: 808 Lexington Avenue, New York, NY, Block 1397, Lot 16 on the Tax Map of New York County, and more fully described on Schedule A annexed hereto and made part hereof.

BEING the same premises previously conveyed by deed dated December 27, 1988 from Wilson Furnished Leasing, Inc., as grantor, to Lorna Bivens a/k/a Lorna M. Bivens and Oliver Bivens, III, collectively as grantee, and recorded on January 9, 1989 in Reel 1518, Page 623.

TOGETHER with all right, title and interest, if any, of the party of the first part in and to any streets and roads abutting the above described premises to the center lines thereof;

TOGETHER with the appurtenances and all the estate rights of the party of the first part in and to said premises; **TO HAVE AND TO HOLD** the premises herein granted unto the party of the second part, the heirs or successors and assigns of the party of the second part forever.

AND the party of the first part covenants that the party of the first part has not done or suffered anything whereby the said premises have been encumbered in any way whatever, except as aforesaid.

AND the party of the first part, in compliance with Section 13 of the Lien Law, covenants that the party of the first part will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose. The word "party" shall be construed as if it read "parties" whenever the sense of this indenture so requires.

IN WITNESS WHEREOF, the party of the first part has duly executed this deed the day and year first above written.

Oliver Bivins as Executor of the Estate of Lorna
Bivins

Curtis C. Rogers, as Guardian of the person and
property of Oliver Bivins

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On the ___ day of _____, 2013 before me, the undersigned, personally appeared Curtis C. Rogers, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On the ___ day of _____, 2013 before me, the undersigned, personally appeared Oliver Bivens, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

RECORD AND RETURN TO:

Beys Stein Mobargha & Berland, LLP
The Chrysler Building
405 Lexington Avenue-7th fl.
New York, NY 10174
Attn: Keith B. Stein, Esq.

PROPERTY ADDRESS & TAX MAP DESIGNATION

808 Lexington Avenue, New York, NY
Block: 1397
Lot: 16
County: New York

SCHEDULE A

BEGINNING at a point on the westerly side of Lexington Avenue distant forty feet five inches northerly from the corner formed by the intersection of the westerly side of Lexington Avenue and the northerly side of 62nd Street; running thence WESTERLY parallel with 62nd Street and part of the distance through a party wall eighty feet; thence NORTHERLY parallel with Lexington Avenue twenty feet; thence EASTERLY parallel with 62nd Street, and part of the distance through a party wall eighty feet to the westerly side of Lexington Avenue and thence SOUTHERLY along the westerly side of Lexington Avenue twenty feet to the point or place of BEGINNING.

Said premises being known as and by the street number 808 Lexington Avenue.

The said premises are being sold and are being conveyed subject to Party-wall Agreement, recorded in Liber 3672 of Conveyances, at page 367.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO.: 15-81298-CV-MARRA-MATTHEWMAN**

JULIAN BIVINS, as Personal Representative
of the ancillary Estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR.,
as former guardian, STEPHEN M. KELLY,
as successor guardian, BRIAN M. O'CONNELL,
ASHLEY N. CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN,
BEYS LISTON MOBARGHA & BERLAND, LLP
f/k/a BEYS STEIN MOBARGHA & BERLAND, LLP,
and LAW OFFICES OF KEITH B. STEIN, PLLC,
n/k/a STEIN LAW, PLLC,
Defendants.

AMENDED COMPLAINT

COMES NOW the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, by and through his undersigned counsel, and sues CURTIS CAHALLONER ROGERS, JR., the former guardian of Oliver Bivins (the "Ward"), STEPHEN M. KELLY, as successor guardian of the Ward, BRIAN M. O'CONNELL, ASHLEY N. CRISPIN, CIKLIN LUBITZ & O'CONNELL, KEITH B. STEIN, BEYS LISTON MOBARGHA & BERLAND, LLP f/k/a BEYS STEIN MOBARGHA & BERLAND, LLP, and LAW OFFICES OF KEITH B. STEIN, PLLC, n/k/a STEIN LAW, PLLC, and says:

JURISDICTION AND VENUE

1. The Ward, Oliver Wilson Bivins, died on March 2, 2015. The Ward was a citizen of, and domiciled in, Amarillo, Potter County, Texas on the date of his death.

2. Julian Bivins (hereinafter, "Julian") is the Personal Representative of the ancillary Estate of the deceased Ward in Palm Beach County, Florida (the "Deceased Ward").

3. Curtis Rogers (hereinafter, "Rogers") is the former guardian of the Deceased Ward. Rogers is a citizen of, and domiciled in, Palm Beach County, Florida.

4. Stephen M. Kelly (hereinafter, "Kelly") is the successor guardian of the Deceased Ward. Kelly is a citizen of, and domiciled in Boynton Beach, Palm Beach County, Florida.

5. Brian M. O'Connell (hereinafter, "O'Connell") is a citizen of, and domiciled in Palm Beach County, Florida.

6. Ashley N. Crispin (hereinafter, "Crispin") is a citizen of, and domiciled in Palm Beach County, Florida.

7. Ciklin Lubitz & O'Connell (hereinafter, "Ciklin") is general partnership organized under the laws of the State of Florida with its principal place of business in Palm Beach County, Florida. The partners of Ciklin are the following: Dean Vegosen, P.L., Phil D. O'Connell, JR., P.A., Brian B. Joslyn, P.A., Jason S. Heselkorn, P.A., John D. Boykin, P.A., Jerald S. Beer, P.A., Bruce G. Alexander, P.A., Alan J. Ciklin, P.A., and Robert L. Crane, P.A.

8. Dean Vogeson (hereinafter, "Vogeson"), is the sole member of Dean Vogeson P.L. and is a citizen of and domiciled in Palm Beach County, Florida. Dean Vogeson P.L. is a Florida professional liability association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida.

9. Phil D. O'Connell, (hereinafter, "Phil O'Connell"), is the sole shareholder of Phil D. O'Connell Jr., P.A. and is a citizen of and domiciled in Palm Beach County, Florida. D Phil D. O'Connell Jr., P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida.

10. Brian B. Joslyn, (hereinafter, "Joslyn"), is the sole shareholder of Brian B. Joslyn, P.A. and is a citizen of and domiciled in Palm Beach County, Florida. Brian B. Joslyn, P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida.

11. Jason S. Haselkorn, (hereinafter, "Haselkorn"), is the sole shareholder of Jason S. Haselkorn, P.A. and is a citizen of and domiciled in Palm Beach County, Florida. Jason S. Haselkorn, P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida. .

12. John D. Boykin, (hereinafter, "Boykin"), is the sole shareholder of John D. Boykin, P.A. and is a citizen of and domiciled in Palm Beach County, Florida. John D. Boykin, P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida. .

13. Jerald S. Beer, (hereinafter, "Beer"), is the sole shareholder of Jerald S. Beer, P.A. and is a citizen of and domiciled in Palm Beach County, Florida. Jerald S. Beer, P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida.

14. Bruce G. Alexander, (hereinafter, "Alexander"), is the sole shareholder of Bruce G. Alexander, P.A. and is a citizen of and domiciled in Palm Beach County, Florida. Bruce G.

Alexander, P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida. .

15. Alan. J. Ciklin, (hereinafter, "Alan Ciklin"), is the sole shareholder of Alan. J. Ciklin, P.A. and is a citizen of and domiciled in Palm Beach County, Florida. Alan. J. Ciklin, P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida.

16. Robert L. Crane, (hereinafter, "Crane"), is the sole shareholder of Robert L. Crane, P.A. and is a citizen of and domiciled in Palm Beach County, Florida. Robert L. Crane, P.A. is a professional association organized under the laws of the State of Florida with its principal place of business is in Palm Beach County, Florida.

17. Keith B. Stein (hereinafter, "Stein") is a citizen of and domiciled in New York, but does business in Palm Beach County, Florida.

18. Beys Liston Mobargha & Berland, LLP f/k/a Beys Stein Mobargha & Berland, LLP (hereinafter, "Beys") is a limited liability partnership doing business in Palm Beach County, Florida with its principal place of business in New York. The partners of Beys are the following: Jason H. Berland, Michael P. Beys, Joshua D. Liston, and Nader Mobargha. Keith B. Stein was a partner of the former iteration of Beys: Beys Stein Mobargha & Berland, LLP.

19. Jason H. Berland (hereinafter, "Berland") is a citizen of and domiciled in New York.

20. Michael P. Beys (hereinafter, "Michael Beys") is a citizen of and domiciled in New York.

21. Joshua D. Liston (hereinafter, "Liston") is a citizen of and domiciled in New York.

22. Nader Mobargha (hereinafter, "Mobargha") is a citizen of and domiciled in New York.

23. The Law Offices of Keith B. Stein, PLLC n/k/a Stein Law, PLLC (hereinafter, "Stein Law Firm") is a professional limited liability company doing business in Palm Beach County, Florida with its principal place of business in New York. Keith B. Stein is the sole member of the Stein Law Firm.

24. Stein, Beys, and Stein Law Firm committed tortious acts in Palm Beach County, Florida which resulted in the causes of actions under this complaint causing injury to the Estate of the Deceased Ward in Palm Beach County, Florida. Stein, Beys, and the Stein Law Firm expected or should reasonably have expected to have consequences in Palm Beach County, Florida because they each derived substantial revenue from the legal services they provided Rogers and Kelly from New York to Florida.

25. Plaintiff is a deemed a citizen of the State of Texas, the same state as the decedent under 28 U.S.C. § 1332 (c)(2).

26. Defendants are all citizens of states other than Texas for purposes of 28 U.S.C. §1332.

27. This is an action for money damages that exceed \$75,000.00, exclusive of interest, attorney's fees and costs.

28. Accordingly, this is a civil action which falls within the Court's original jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship).

GENERAL ALLEGATIONS

29. Oliver Bivins' (hereinafter, "Oliver Sr.") first marriage was to Dorothy Bivins, and they had a child, Julian Bivins.

30. In 1961, Oliver Sr. married Lorna Bivins (hereinafter, "Lorna"), a woman 25 years younger from New York.

31. In approximately 1990, when Oliver Sr. was approximately 70 years old, he and Lorna adopted a child together, Oliver Bivins, Jr. (hereinafter "Oliver Jr.").

32. At all material times during the marriage, Oliver Sr. lived in Amarillo, Texas and Lorna and Oliver Jr. lived in New York, New York at 67th Street, although for intermittent periods of time, Lorna and Oliver Jr. resided in Palm Beach, Florida at Lorna and Oliver Sr.'s condominium.

33. On March 5, 1992, Oliver Sr. created a joint trust with Lorna to which he transferred family owned oil and mineral rights in Amarillo, Texas (hereinafter the "Joint Trust").

34. In addition to the oil and mineral rights in Amarillo, Texas, the couple owned four properties. Lorna owned a property located at 82 Portland Place in London, England (hereinafter "London Property") and a property at 67th Street in New York, New York (hereinafter "67th Street"), and Lorna and Oliver Sr. owned together, as tenants by the entirety, properties at 808 Lexington Avenue, New York, New York (hereinafter "808 Lexington") and 330 South Ocean Blvd., Palm Beach, Florida (hereinafter "Ocean Blvd"). (The properties identified in this paragraph will be collectively referred to herein as "The Properties".)

35. On April 12, 2010, Oliver Sr. filed for divorce from Lorna in Amarillo, Texas seeking to dissolve the marriage and terminate the Joint Trust.

36. On July 28, 2010, the Court entered a Final Decree of Divorce and an Order Terminating the Joint Trust.

37. In the divorce, Oliver Sr. received everything, including the oil and mineral rights in Amarillo, Texas.

38. The Texas Court presiding over the divorce made no provision in its order, however, with respect to the Properties and no Guardian or other Defendant made any effort to re-open the Texas divorce proceeding to address the property rights of the parties pertaining to the Properties.

39. Lorna continued to hold the London and 67th Street properties in her name alone, although Oliver Sr. funded these properties to the extent not covered by tenants renting the properties. As for the the properties at 808 Lexington Avenue and 330 Ocean Boulevard, which were held as tenants by the entirety prior to the divorce, became held by Lorna and Oliver Sr. as tenants in common.

40. Following the divorce, Oliver Sr. transferred to Julian interests owned by Oliver Sr. in several parcels of real property, including the oil and mineral rights in Amarillo, Texas and a condominium in Amarillo, Texas.

41. On or about January 5, 2011, petitions to determine incapacity for both Oliver Sr. and Lorna were filed in Florida and an emergency temporary guardian, Stephen Kelly, was appointed over their person and property.

42. Lorna passed away in February 2011, shortly after the temporary guardianship was established.

43. Oliver Jr. was appointed the personal representative of the estate of Lorna Bivins.

44. On or about May 10, 2011, the Court appointed Rogers as the limited guardian of the person and property of Oliver Sr.

Texas Settlement

45. Rogers' first order of business was to seek an ex parte emergency order preventing Oliver Sr., who was in Florida temporarily from his long time home in Texas, from leaving Florida. He then began an investigation into the transfers of real property from Oliver Sr. to Julian and sought approval from the Florida guardianship court to bring an action against Julian and Julian simultaneously filed an action in Texas to validate the transfers.

46. The Florida guardianship court entered an order permitting Rogers to retain counsel on a contingency basis to prosecute and defend the actions involving the transfers.

47. Rogers, with a Texas supervising guardian, thereafter obtained an appointment as the Texas guardian over Oliver Sr.'s property in Texas.

48. The Texas litigation sought to undo all of the transfers that Oliver Sr. had made to Julian in Texas. The attorneys hired in Texas, pursuant to the contingency fee agreement, were entitled to 25% of the entire estate that was transferred back to Oliver Sr., even if Julian agreed to do it the very next day.

49. On or about February 27, 2013, Julian and Rogers entered into a settlement agreement as to the Texas proceedings (hereinafter "Texas Settlement").

50. The Properties were not the subject of the Texas lawsuit and the Texas Settlement made no provision for them.

51. As part of the Texas Settlement, Julian was required to transfer back to Oliver Sr. all of the Texas real property previously transferred to Julian, except that Julian was permitted to

keep the Ranch and all interim distributions and other proceeds Julian had already received from the real property.

52. The Texas properties were transferred to a trust for the benefit of Julian and Oliver Sr. (hereinafter the "Texas Trust") with Julian having a 37% interest in the Texas Trust and Oliver Sr. having a 63% interest in the Texas Trust.

53. As a major consideration for Julian entering into the Texas Settlement, Rogers was to resign as guardian of Oliver Sr. in Texas and Florida within thirty (30) days of court approval of the Texas settlement, and Steve Kelly was to serve as successor guardian.

54. Rogers was required to, but did not, submit a final accounting and documents necessary to obtain an order of discharge from the Texas and Florida guardianships within 30 days of the approval of the Texas settlement by the Texas and Florida guardianship courts.

55. As part of the Texas Settlement, Rogers was released from liabilities for his errors and omissions and other breaches of his fiduciary obligation, by Julian in his capacity as an interested party and sole beneficiary of Oliver Sr.'s only known will, only through the date of the Texas Settlement. This release was not made on behalf of the Ward, and could not be, whereas Oliver Sr. was alive, and Julian was not and had no authority to release Rogers on behalf of Oliver Sr.

56. The Florida guardianship court approved the settlement on April 1, 2013.

New York Settlement

57. In November 2012, Rogers entered into a contingency fee/hybrid agreement with Ciklin to initiate an action in Florida requesting that the Court presiding over the Lorna estate (the "Lorna Court") give no full faith and credit to the Texas Divorce Decree, so that the Lorna Court

would deem the Properties to pass to Oliver Sr. as though he were still married to Lorna at the time of her death. (“Florida Beneficiary Petition”).

58. In or about October 2012, Rogers also engaged Keith Stein of Beys to partition the 808 Lexington property (“New York litigation”).

59. Prior to initiating the partition action of 808 Lexington, Stein, who was not a litigator, had only prepared, at best, one prior partition action in the course of his more than two decades of practice.

60. At the time of the partition action, and for several years prior, 808 Lexington was encumbered by a mortgage in the original principal sum of \$850,000.00 (“808 Mortgage”).

61. By the time of the partition action, the balance of the mortgage was approximately \$387,000.00, while the value of 808 Lexington was in excess of \$4,000,000.

62. Prior to, and following the date of the Texas Settlement, Rogers failed to take any action to pay, monitor, negotiate, or prevent default, acceleration, or negative consequences to the Ward in connection with the 808 Mortgage.

63. On or about October 5, 2012, unbeknownst to Julian, and presumably because Rogers had not taken any action to manage the 808 Lexington asset or liabilities and the 808 Mortgage was in default, the son of the paralegal of Oliver Jr.’s attorney (who was also a close friend of Oliver Jr.) formed a corporation known as Beachton Tuxedo, LLC (“Beachton”) and surreptitiously acquired the 808 Mortgage via an Assignment of Mortgage (“Assignment”) for the outstanding balance owed on the mortgage.

64. As of the date of the Assignment, the notes secured by the Mortgage were in default, had been accelerated, and gave Beachton the immediate right to foreclose on 808 Lexington. The default interest rate on the Beachton mortgage was 17%.

65. As further consideration for Beachton to acquire the 808 Mortgage and not foreclose on it, Oliver Jr., individually, and as personal representative of the Estate of Lorna, assigned to Beachton a 40% of his and/or the Estate of Lorna's equity interest in 808 Lexington, which, at a bare minimum, gave Beachton an immediate return on its \$387,000 mortgage of far in excess of one million dollars, yet Beachton did not provide a satisfaction of mortgage in exchange for the interest and also continued to charge interest at the maximum rate allowable under the 808 Mortgage.

66. Accordingly, the assignment by Oliver Jr. resulted in a satisfaction of the 808 Mortgage, or alternatively a usurious rate of interest being charged by Beachton on the 808 Mortgage.

67. In July 2013, Rogers, as guardian for Oliver Sr., Oliver Jr., individually and as personal representative of the Estate of Lorna, and Beachton entered into a settlement agreement to settle the Florida Beneficiary Petition and the New York Litigation (hereinafter referred to as the "New York Settlement." A true and correct copy of the New York Settlement Agreement is attached hereto as Exhibit "A" and incorporated herein by reference.

68. Pursuant to the New York Settlement, Oliver Jr. agreed to immediately transfer to Oliver Sr. the 50% interest of the Estate of Lorna in 808 Lexington and Ocean Boulevard, such that as a result of such transfers, Oliver Sr. would own 100% fee simple interest in 808 Lexington and Ocean Boulevard.

69. The Estate of Lorna was required to satisfy all real estate taxes and related charges through May 8, 2013, and one-half of the real estate taxes and related charges from May 9, 2013, through the date immediately prior to the closing date.

70. Additionally, in connection with the New York Settlement, Oliver Jr. and Beachton agreed that the 40% interest in the 808 Lexington that Oliver Jr. had assigned to Beachton when it took over the 808 Mortgage, would be transferred to a 20% interest in the 67th Street property, which continued to amount to an interest by Beachton of well over a million dollars at minimum. (The percentage change in the transfer was due to the fact that the value of the 67th Street property was significantly higher than the value of 808 Lexington.)

71. Notwithstanding Beachton's acceptance of the 20% interest in 67th Street, Beachton continued to charge the maximum interest rate allowable under the 808 Mortgage, plus late fees, which combined with the 20% interest in 67th Street, constituted a satisfaction of the 808 Mortgage, or alternatively, a usurious rate of interest.

72. The closing date under the New York Settlement was to occur within ten (10) business days of the date upon which all approvals have been received from the Florida court, and each such other court. No other such court approval was required to approve the New York Settlement besides the Florida Court, which did so on September 17, 2013. Accordingly, the closing date was October 1, 2013 ("Closing Date").

73. Under the terms of the New York Settlement, Rogers, acting as guardian for Oliver Sr., agreed to waive and/or relinquish in favor of the Estate of Lorna any and all right, title, and interest in and to 67th Street and the London Property.

74. The New York Settlement required Rogers, as guardian of Oliver Sr., to pay the Beachton mortgage debt in full on or before August 31, 2013, and in exchange, Beachton agreed to continue to forebear from taking action based on the purported failure to make payments under the 808 Mortgage that Beachton purchased, including foreclosure.

75. On or about November, 2014, 67th Street sold for \$22.5 million. Accordingly, Beachton's 20% interest in the 67th Street property was worth \$4.5 million.

76. Any claim by Beachton that an outstanding balance was due on the Beachton mortgage was usurious as Beachton became entitled to receive, via its 20% equity interest in 67th Street, more than five (5) times the outstanding balance owed on the 808 Mortgage.

77. Neither Rogers nor his counsel took any action to have a Court declare the 808 Mortgage acquired by Beachton as having been satisfied or otherwise usurious.

78. Moreover, despite representations to the Florida guardianship Court that they would do so, Rogers neither made any genuine efforts to procure substitute financing for the Beachton mortgage at a lower interest rate than the default rate Beachton mortgage was charging, nor undertook any action to remove the Beachton lien from the 808 property due to it being usurious or satisfied, or undertook any action to bring the note current to avoid the default interest being charged.

79. The terms of the New York Settlement, to which Julian, as an interested person and sole beneficiary to Oliver Sr.'s only known will, persistently objected, provided that all interest on the mortgage debt accruing after June 30, 2013, but on or before the date the Beachton mortgage debt is paid in full, was to be payable 50% by the Estate of Lorna and 50% by Rogers, as guardian of Oliver Sr.

80. Moreover, the New York Settlement agreement provides that if "any party fails to comply with any of the party's obligations set forth in Section 2 or 3 of this Agreement, the party to whom the obligation is owed shall have the right to enforce the terms set forth therein and the legal fees and costs incurred by the aggrieved party in enforcing such terms shall be paid by the Party found to be in breach of such terms."

808 Lexington Management

81. Despite the terms of the Texas Settlement and the consideration provided thereunder, Rogers remained in office as guardian for Oliver Sr. until April 23, 2014, when Kelly was appointed by the Court as successor guardian of Oliver Sr.

82. From April 1, 2013 (the date of the Florida Court's approval of the Texas Settlement) until Rogers was discharged by the Court in April 2014, as Florida guardian for Oliver Sr. (the "Interim Guardianship"), Rogers had a duty to properly manage 808 Lexington as a rental property.

83. From April 23, 2014 (the date Kelly was appointed by the Court as successor guardian of Oliver Sr.) until the closing of the sale of 808 Lexington by Kelly, as guardian of Oliver Sr., Kelly had a duty to properly manage 808 Lexington as a rental property.

84. The 808 Lexington Property consisted of four floors. The first floor was rented out by a restaurant, Fig and Olive, which generated approximately \$23,500 per month in rent. The lease for Fig and Olive was set to expire in November 2014.

85. The second floor of 808 Lexington was leased out to Pinafore Nursery and generated approximately \$3,500 per month in rent, which was considerably below market. The lease for Pinafore Nursery expired on December 31, 2010, and there was no new written lease entered into by Pinafore Nursery. Following the expiration of the lease with Pinafore Nursery, it continued to pay a monthly rent of \$3,500, notwithstanding that it was a holdover tenant without a lease.

86. The fourth floor apartment had been rented out to Kimberly Beamis for \$2,300 per month, but she vacated the premises prior to January 1, 2013 due to the failure of Rogers to maintain the unit. Thereafter, fourth floor apartment became occupied by a person related to one

of the owners of Beachton for \$1,500 per month, which amount was paid directly to Oliver Jr. and nothing to the Rogers or Kelly on behalf of the Ward. The \$1500, to the extent it was paid, was well below market value, no lease was in place, and Rogers or Kelly failed to investigate, participate, or take any action for the benefit of the Ward pertaining to this unit.

87. The third floor tenant was evicted in either 2012 or 2013. Neither Rogers nor Kelly undertook any efforts to re-rent this unit, which had a monthly rental value of several thousand dollars.

88. Prior to the New York Settlement, Rogers should have been collecting 50% of the rental income from 808 Lexington, and should have made efforts to obtain full market rent on the second, third, and fourth floor units.

89. Following the Court's approval of the New York Settlement, Rogers should have been collecting all of the rental income from 808 Lexington. Yet, during the period of Interim Guardianship, Rogers only passively collected 50% of the rental income from Fig and Olive. Rogers and Kelly ignored the remaining rent that Oliver Jr. was collecting on the other 50% of the rental income from Fig and Olive and ignored any effort to obtain any rental income from the other units or tenants.

90. Following his appointment as successor guardian, Kelly should have been collecting all of the rental income from 808 Lexington. Yet, until the sale of 808 Lexington, he only passively collected 50% of the rental income from Fig and Olive. Kelly ignored the remaining rent that Oliver Jr. was collecting on the other 50% of the rental income from Fig and Olive and ignored any effort to obtain any rental income from the other units or tenants.

91. Until recent efforts undertaken mainly by Julian at his own expense, Oliver Jr. had not paid any money to the State of New York or to Rogers or Kelly for any past due property taxes

pursuant to the New York Settlement, or for the amount of property taxes on 808 Lexington from May 9, 2013, to the date immediately prior to the Closing Date.

92. Until recent efforts undertaken mainly by Julian at his own expense, Oliver Jr. had not paid any of the interest that accrued on the 808 Mortgage from June 30, 2013, until it was paid in full.

93. During the period of Interim Guardianship, Rogers also failed to take actions for the benefit of the Ward, including, but not limited to, the following acts with respect to 808 Lexington:

- a. Enter into discussions with Fig and Olive regarding renewing its lease or increasing the monthly rental payments;
- b. Enter into discussions with Pinafore Nursery to sign a new lease and increase its rent from the monthly rent it was paying for the previous four years;
- c. Take any action to market the third or fourth floor apartments;
- d. Take any action with respect to repairing, renovating, or maintaining 808 Lexington, including, but not limited to, its common areas, to obtain the highest and best rental values for the property;
- e. Collect the appropriate rental income due Oliver Sr. from the lease of 808 Lexington;
- f. Pursue an action against Oliver Jr. to force Oliver Jr. to use the rental income from 808 Lexington to pay down the Beachton mortgage and to enforce the New York Settlement;
- g. Bring an action against Beachton for usury or satisfaction based upon the interest it received in 808 Lexington and thereafter 67th Street; and

- h. Obtain commercial financing to pay off the 808 Mortgage assigned to Beachton to avoid the default interest rate it was accruing against 808 Lexington.

94. After his appointment as successor guardian of Oliver Sr. on April 23, 2014, Kelly also failed to take actions for the benefit of the Ward, including, but not limited to, the following acts with respect to 808 Lexington:

- a. Enter into discussions with Fig and Olive regarding renewing its lease or increasing the monthly rental payments;
- b. Enter into discussions with Pinafore Nursery to sign a new lease and increase its rent from the monthly rent it was paying for the previous four years;
- c. Take any action to market the third or fourth floor apartments;
- d. Take any action with respect to repairing, renovating, or maintaining 808 Lexington, including, but not limited to, its common areas, to obtain the highest and best rental values for the property;
- e. Collect the appropriate rental income due Oliver Sr. from the lease of 808 Lexington;
- f. Properly pursue an action against Oliver Jr. to force Oliver Jr. to use the rental income from 808 Lexington to pay down the Beachton mortgage and to enforce the New York Settlement;
- g. Bring an action against Beachton for usury or satisfaction based upon the interest it received in 808 Lexington and thereafter 67th Street; and
- h. Obtain commercial financing to pay off the 808 Mortgage assigned to Beachton to avoid the default interest rate it was accruing against 808 Lexington.

Due Diligence as to New York Settlement

95. Prior to entering into the New York Settlement, Rogers failed to do any type of due diligence as to the true fair market value of 808 Lexington and 67th Street, including, but not limited to, obtaining appraisals of the properties. Yet, Rogers and his counsel represented to the Florida Court that the New York Settlement was in the best interests of Oliver Sr. and that the properties were approximately equal in value.

96. On or about the Closing Date, the fair market value of 808 Lexington was approximately \$5 million and the true fair market value of 67th Street was more than \$22.5 million.

97. The fair market value of the London property has never been addressed other than in a cursory fashion by Rogers or the attorneys he hired to protect the Ward's interest, despite the property being located in the most exclusive and high priced rental district in London and documents within the Guardians possession indicating that it had a value far in excess of the Ocean Boulevard property.

98. As a result, contrary to what was represented by Rogers and his counsel to the guardianship court to obtain approval for the settlement, the estate of Oliver Sr. received assets from the New York Settlement with a value substantially less than those received by the Estate of Lorna.

COUNT I

Breach of Fiduciary Duty Against Defendants Rogers, O'Connell, Crispin, Ciklin, Stein, Beys, and Stein Law Firm

99. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 98, *supra*, as if fully set forth herein.

100. During the period of the Interim Guardianship, Rogers had a fiduciary duty to Oliver Sr. to act in his best interest until Rogers was discharged as guardian, including, among other things, a duty of loyalty.

101. O'Connell, Crispin, Ciklin, Stein, Beys, and the Stein Law Firm ("Counsel for Rogers") represented Rogers, in his capacity as guardian for Oliver Sr., in connection with the New York Settlement and thereafter.

102. Counsel for Rogers, while he was acting as guardian for Oliver Sr., owed similar duties to Oliver Sr. and were fully aware that the work they were doing for Rogers, as guardian of Oliver Sr., was for the benefit of Oliver Sr.

103. Rogers, as guardian of Oliver Sr., and Counsel for Rogers were negligent and reckless in the exercise of their fiduciary duties to Oliver Sr., resulting in damages to him.

104. By failing to take actions for the benefit of the Ward, including, but not limited to, failing to, (a) properly manage 808 Lexington, (b) perform proper due diligence of the value of 808 Lexington, 67th Street, Ocean Boulevard, or the London Property to properly evaluate the fairness of the New York Settlement, (c) take prompt or appropriate action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr., (d) failing to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage, (e) arrange for commercially reasonable substitute financing for the Beachton mortgage, and (f) failing to pursue action against Beachton to have its mortgage deemed satisfied or released, Rogers damaged the Estate of Oliver Sr. in contravention of his fiduciary duties to Oliver Sr.

105. At all material times, Counsel for Rogers, as guardian of Oliver Sr., owed fiduciary duties to Oliver Sr. and were involved and participated in Rogers' actions or inactions, resulting in the above described damage.

106. Plaintiff was required to retain the Bleakley Bavol Law Firm to mitigate the damages to the Estate of Oliver Sr. and is required to pay it a reasonable fee for its services.

WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendants Rogers, O'Connell, Crispin, Ciklin, Stein, Beys, and the Stein Law Firm and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

COUNT II
Breach of Fiduciary Duty Against Defendants Kelly,
O'Connell, Crispin, Ciklin, Stein, Beys, and Stein Law Firm

107. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 98, supra, as if fully set forth herein.

108. Following his appointment as successor guardian of Oliver Sr. on April 23, 2014, Kelly had a fiduciary duty to Oliver Sr. to act in his best interest until Kelly was discharged as guardian, including, among other things, a duty of loyalty.

109. O'Connell, Crispin, Ciklin, Stein, Beys, and the Stein Law Firm represented Kelly ("Counsel for Kelly"), in his capacity as successor guardian for Oliver Sr.

110. Counsel for Kelly, while he was acting as guardian for Oliver Sr., owed similar duties to Oliver Sr. and were fully aware that the work they were doing for Kelly, as successor guardian of Oliver Sr., was for the benefit of Oliver Sr.

111. Kelly, as guardian of Oliver Sr., and Counsel for Kelly were negligent and reckless in the exercise of their fiduciary duties to Oliver Sr., resulting in damages to him.

112. By failing to take actions for the benefit of the Ward, including, but not limited to, failing to (a) properly manage 808 Lexington, (b) take prompt or appropriate action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr., (c) failing to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage, (d) arrange for commercially reasonable substitute financing for the Beachton mortgage, (e) entering into an unreasonable exclusive sales agreement with Lipa Lieberman, and (f) failing to pursue action against Beachton to have its mortgage deemed satisfied or released, Kelly damaged the Estate of Oliver Sr. in contravention of Defendants' fiduciary duties.

113. At all material times, Counsel for Kelly, as successor guardian of Oliver Sr., owed fiduciary duties to Oliver Sr. and were involved and participated in Kelly's actions or inactions, resulting in the above described damage.

114. Plaintiff was required to retain the Bleakley Bivol Law Firm to mitigate the damages to the Estate of Oliver Sr. and is required to pay it a reasonable fee for its services.

115. WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendants Kelly, O'Connell, Crispin, Ciklin, Stein, Beys, and the Stein Law Firm and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

COUNT III
Negligence Against Defendant Rogers

116. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 98, *supra*, as if fully set forth herein.

117. Defendant Rogers had a duty to the Ward to administer the guardianship observing

a standard in dealing with guardianship property that would be observed by a prudent person dealing with the property of another, in the best interest of the ward, using such special skills and/or expertise to the extent that any such representation was made as to the special skills or expertise of the guardian.

118. Defendant Rogers, as guardian of the Ward, negligently administered the guardianship by failing to discharge his duties as guardian and by wasting and mismanaging the Ward's property.

119. Defendant Rogers was negligent in the following ways:

- (a) By failing to properly manage 808 Lexington;
- (b) By failing to perform proper due diligence of the value of 808 Lexington and 67th Street to properly evaluate the fairness of the New York Settlement;
- (c) By failing to take action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr.;
- (d) By failing to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage;
- (e) By failing to arrange for commercially reasonable substitute financing for the Beachton mortgage;
- (f) By failing to pursue action against Beachton to have its mortgage deemed satisfied or released;
- (g) By permitting Beachton to collect usurious interest on the 808 Lexington mortgage;
- (h) By permitting the guardianship attorney's to collect unnecessary and excessive fees;
- (i) By failing to monitor or challenge excessive hourly attorney's fees charged by the guardianship attorneys;

- (j) By failing to prepare or implement a guardianship plan;
- (k) By failing to prepare accurate annual reports regarding the guardianship assets;
- (l) By failing to maintain guardianship financial records to accurately track and recover guardianship assets;
- (m) By pursuing needless and wasteful litigation against the Ward's heir;
- (n) By failing to take action against the Ward's former wife, Lorna Bivins, to recover contribution for unpaid taxes; and
- (o) By charging the Ward excessive guardian fees;

120. As a direct and proximate result of the negligence of Defendant Rogers as set forth above, the Ward has suffered damages.

WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendant Rogers and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

COUNT IV
Negligence Against Defendant Kelly

1121. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 98, *supra*, as if fully set forth herein.

122. Defendant Kelly had a duty to the Ward to manage the guardianship observing a standard in dealing with guardianship property that would be observed by a prudent person dealing with the property of another, in the best interest of the ward, using such special skills and/or expertise to the extent that any such representation was made as to the special skills or expertise of the guardian.

123. Defendant Kelly, as guardian of the Ward, negligently administered the guardianship by failing to discharge his duties as guardian and by wasting and mismanaging the Ward's property.

124. Defendant Kelly was negligent in the following ways:

- (a) By failing to properly manage 808 Lexington;
- (b) By failing to take action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr.;
- (c) By failing to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage;
- (d) By failing to arrange for commercially reasonable substitute financing for the Beachton mortgage;
- (e) By failing to pursue action against Beachton to have its mortgage deemed satisfied or released;
- (f) By permitting Beachton to collect usurious interest on the 808 Lexington mortgage;
- (g) By failing to monitor or challenge excessive hourly attorney's fees charged by the guardianship attorneys;
- (h) By failing to prepare or implement a guardianship plan;
- (i) By failing to prepare accurate annual reports regarding the guardianship assets; and
- (j) By failing to maintain guardianship financial records to accurately track and recover guardianship assets.
- (k) By charging the Ward excessive guardian fees;

125. As a direct and proximate result of the negligence of Defendant Kelly as set forth above, the Ward has suffered damages.

WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendant O'Connell and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

COUNT V
Professional Negligence Against Defendant O'Connell

126. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 98, supra, as if fully set forth herein.

127. O'Connell represented both Rogers and Kelly in their capacity guardians for Oliver Sr.

128. During the guardianship, O'Connell undertook to provide legal services to the guardianship, with the full knowledge that Oliver Sr. was an intended beneficiary of his legal services. At all times O'Connell held himself out as competent in the areas of law for which he was retained to provide representation.

129. O'Connell was required to exercise the same legal skill as a reasonably competent attorney and to use reasonable care in determining and implementing a strategy to be followed to achieve the guardianship's goals, or alternatively goals that were in the best interest of Oliver Sr.

130. In the course of handling legal matters for the guardianship, O'Connell negligently failed to act with the degree of competence generally possessed by attorneys in the State of Florida who handle similar matters. Oliver Sr., through his guardians was forced to pay O'Connell a substantial amount of money for his representation.

131. O'Connell was negligent and/or committed malpractice in the following ways:

- (a) By failing to perform proper due diligence of the value of 808 Lexington and 67th Street, or Ocean Boulevard or the London Property to properly evaluate the fairness of the New York Settlement;
- (b) By failing to advise the guardianship regarding the clear discrepancy in the values of the properties involving in the New York Settlement;
- (c) By advising the client to enter into the New York settlement against the best interest of the guardianship and encouraging settlement to obtain fees rather than benefit Oliver Sr.;
- (d) By failing to advise the guardianship to take action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr.;
- (e) By failing to advise the guardianship to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage;
- (f) By failing to advise the guardianship to arrange for commercial reasonable substitute financing for the Beachton mortgage;
- (g) By failing to pursue action against Beachton to have its mortgage deemed satisfied or released;
- (h) By failing to advise the guardianship regarding the usurious interest charged by Beachton;
- (i) By charging and taking from the guardianship excessive attorney's fees; and by failing to prevent Lipa Lieberman from obtaining an exclusive sales agreement or excessive fees because Lieberman had helped O'Connell bolster his fee claim under the hybrid contingency fee claim;
- (j) By failing to properly prosecute claim against Oliver Jr. under Global Settlement and trying to settle for low amount solely to obtain fees as opposed to acting in best interest of

Oliver Sr. and/ or his estate, and engaging in acts constituting a conflict of interest by seeking to avoid recoupment against Oliver Jr. unless she could obtain a release from Julian as to the Guardian; and

(k) By failing to account to the Court or Julian that he and his firm had failed to comply with the Global Settlement Order by improperly holding back several hundred thousand dollars from the proceeds of the sale of 808 Lexington in the firm's trust account.

132. As a direct and proximate result of O'Connell's negligence and/or malpractice, the Ward sustained damages.

133. Ciklin Lubitz & O'Connell is vicariously liable for the negligence of its attorneys including O'Connell.

WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendant O'Connell and Ciklin Lubitz & O'Connell and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

COUNT VI
Professional Negligence Against Defendant Crispin

134. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 98, supra, as if fully set forth herein.

135. Crispin represented both Rogers and Kelly in their capacity guardians for Oliver Sr.

136. During the guardianship, Crispin undertook to provide legal services to the guardianship, with the full knowledge that Oliver Sr. was an intended beneficiary of his legal

services. At all times Crispin held herself out as competent in the areas of law for which she was retained to provide representation.

137. Crispin was required to exercise the same legal skill as a reasonably competent attorney and to use reasonable care in determining and implementing a strategy to be followed to achieve the guardianship's goals, or alternatively goals that were in the best interest of Oliver Sr.

138. In the course of handling legal matters for the guardianship, Crispin negligently failed to act with the degree of competence generally possessed by attorneys in the State of Florida who handle similar matters. Oliver Sr., through his guardians was forced to pay Crispin a substantial amount of money for her representation.

139. Crispin was negligent and/or committed malpractice in the following ways:

- (a) By failing to perform proper due diligence of the value of 808 Lexington and 67th, or Ocean Boulevard or the London Property Street to properly evaluate the fairness of the New York Settlement;
- (b) By failing to advise the guardianship regarding the clear discrepancy in the values of the properties involving in the New York Settlement;
- (c) By advising the client to enter into the New York settlement against the best interest of the guardianship and encouraging settlement to obtain fees rather than benefit Oliver Sr.;
- (d) By failing to advise the guardianship to take action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr.;
- (e) By failing to advise the guardianship to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage;
- (f) By failing to advise the guardianship to seek substitute financing for the Beachton mortgage;

(g) By failing to pursue action against Beachton to have its mortgage deemed satisfied or released;

(h) By failing to advise the guardianship regarding the usurious interest charged by Beachton;

(i) By charging and taking from the guardianship excessive attorney's fees and by failing to prevent Lipa Lieberman from obtaining an exclusive sales agreement or excessive fees because Lieberman had helped Crispin's firm bolster their fee claim under the hybrid contingency fee claim;

(j) By failing to properly prosecute claim against Oliver Jr. under Global Settlement and trying to settle for low amount solely to obtain fees as opposed to acting in best interest of Oliver Sr. and/ or his estate, and engaging in acts constituting a conflict of interest by seeking to avoid recoupment against Oliver Jr. unless she could obtain a release from Julian as to the Guardian; and

(k) By failing to account to the Court or Julian that she and her firm had failed to comply with the Global Settlement Order by improperly holding back several hundred thousand dollars from the proceeds of the sale of 808 Lexington in the firm's trust account.

140. As a direct and proximate result of Crispin's negligence and/or malpractice, the Ward sustained damages.

141. Ciklin Lubitz & O'Connell is vicariously liable for the negligence of its attorneys including Crispin.

WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendant

Crispin and Ciklin Lubitz & O'Connell and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

COUNT VII
Professional Negligence Against Defendant Stein

142. Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, hereby re-alleges and adopts by reference all allegations contained in paragraphs 1 through 98, supra, as if fully set forth herein.

143. Stein represented both Rogers and Kelly in their capacity guardians for Oliver Sr. with the full knowledge and understanding that Oliver Sr. was the intended beneficiary of his legal services.

144. During the guardianship, Stein undertook to provide legal services to the guardianship. At all times Stein held himself out as competent in the areas of law for which he was retained to provide representation.

145. Stein was required to exercise the same legal skill as a reasonably competent attorney and to use reasonable care in determining and implementing a strategy to be followed to achieve the guardianship's goals.

146. In the course of handling legal matters for the guardianship, Stein negligently failed to act with the degree of competence generally possessed by attorneys in the State of Florida who handle similar matters. The guardianship paid Stein a substantial amount of money for the sole purpose of representing the guardianship.

147. Stein was negligent and/or committed malpractice in the following ways:

(a) By failing to perform proper due diligence of the value of 808 Lexington and 67th Street, Ocean Boulevard or the London Property to properly evaluate the fairness of the New York Settlement;

- (b) By failing to advise the guardianship regarding the clear discrepancy in the values of the properties involving in the New York Settlement;
- (c) By advising the client to enter into the New York settlement against the best interest of the guardianship;
- (d) By failing to advise the guardianship to take action against Oliver Jr. to collect rents and taxes owed by the Estate of Lorna or Oliver Jr.;
- (e) By failing to advise the guardianship to ensure that rental income from 808 Lexington was used to pay down the Beachton mortgage;
- (f) By failing to arrange for commercially reasonable substitute financing for the Beachton mortgage, as opposed to preventing such an alternative unless it also included financing to cover attorney's fees for himself, his firm, and the guardians and their other counsel;
- (g) By failing to pursue action against Beachton to have its mortgage deemed satisfied or released;
- (h) By failing to advise the guardianship regarding the usurious interest charged by Beachton;
- (i) By charging and taking from the guardianship excessive attorney's fees;
- (j) By taking large sums of money under the guise of retainers without accounting or documentation therefore; and
- (k) By failing to account to the Court or to Julian regarding the failure to comply with the terms of the Global Settlement Agreement as the closing agent.

148. As a direct and proximate result of Stein's negligence and/or malpractice, the Ward sustained damages.

149. Beys Liston Mobargha & Berland, LLP f/k/a Beys Stein Mobargha & Berland, LLP and The Law Offices of Keith B. Stein, PLLC n/k/a Stein Law, PLLC are vicariously liable for the negligence of their attorneys including Stein.

WHEREFORE, the Plaintiff, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, deceased, requests the Court award damages against Defendants Stein, Beys, and the Stein Law Firm and such other relief as the Court deems just and proper, including an award of attorneys' fees and costs against Defendants.

Jury Demand

Plaintiff demands a trial by jury on all issues so triable.

Dated: January 8, 2016.

Respectfully Submitted,

/s/ J. Ronald Denman

J. Ronald Denman
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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

GUARDIANSHIP

IN RE: GUARDIANSHIP OF:

OLIVER BIVINS,

CASE NO.: 50 2011 GA 000006 XXXX SB
DIVISION: IY – COLIN

An incapacitated person.

**OBJECTION TO FINAL ACCOUNTING (GUARDIANSHIP REPORT) OF GUARDIAN
OF PROPERTY FILED BY CURTIS ROGERS AND SERVED JULY 8, 2015**

COMES NOW, Julian Bivins, as the ancillary personal representative of the Estate of Oliver Bivins in Florida and the temporary administrator of the domiciliary administration of the Estate of Oliver Bivins in Potter County, Texas, by and through his undersigned counsel and hereby files this Objection to Final Accounting (Guardianship Report) of Guardian of Property filed by Curtis Rogers and served upon the undersigned counsel on July 8, 2015, and in support therefore, states as follows:

1. Schedule A (and the exhibit thereto) fails to include the following rental income from 808 Lexington Avenue, New York, New York (“808 Lexington”) that should have been collected by the Guardian from the tenants or Oliver Bivins Jr., as personal representative of the Estate of Lorna Bivins pursuant to the September 17, 2013, Court Approved settlement agreement (the “New York Settlement”) entered into between Rogers, as guardian for Oliver Bivins Sr., Oliver Jr., individually and as personal representative of the Estate of Lorna Bivins, and Beachton Tuxedo, LLC (“Beachton”):

- a. One hundred percent of the rental income from the first floor tenant, Fig and Olive, following the Court’s approval of the New York Settlement;
- b. Rental income from the second floor tenant, Pinafore Nursery; and



c. Rental income from the third and fourth floor units.

2. Schedule A (and the exhibit thereto) also fails to include one-half of the real estate taxes for 808 Lexington and 330 Ocean Boulevard that should have been collected by the Guardian from Oliver Bivins Jr., as personal representative of the Estate of Lorna Bivins pursuant to the New York Settlement.

3. Additionally, Schedule A (and the exhibit thereto) fails to include one-half of the interest on the Beachton Mortgage accruing after June 30, 2013, that should have been collected by the Guardian from Oliver Bivins Jr., as personal representative of the Estate of Lorna Bivins pursuant to the New York Settlement.

4. Finally, Schedule A (and the exhibit thereto) incorrectly identifies income from the first floor tenant of 808 Lexington, Fig & Olive, as income from Royalties.

5. Schedule B (and the exhibit thereto) fails to include any payments of either principal or interest on the Beachton mortgage that encumbered 808 Lexington in contravention of the New York Settlement, any payments of expenses to enforce the satisfaction of the mortgage, or any payments of expenses to find substitute financing for the Beachton mortgage at a lower interest rate than the default rate the Beachton mortgage was charging.

6. Schedule B (and the exhibit thereto) also fails to include any expenses for repairs, renovations, or maintenance to 808 Lexington to obtain the highest and best rental values of the property.

7. Additionally, Schedule B (and the exhibit thereto) includes an inappropriate payment of \$687.76 on December 6, 2013, to Eastern Consolidated for the Lieberman court hearing that should not have been paid out of the Ward's funds and was not for the benefit of the

Ward. Moreover, the following payments to counsel for the Guardian should not have been paid as a result of their breaches of fiduciary duty to the Ward and failure to benefit the Ward:

- a. \$10,000.00 to Cooperman Lester Miller on April 21, 2014;
- b. \$10,000.00 to Bill T. Smith, Jr. P.A on June 2, 2014; and
- c. \$10,000.00 to Ciklin Lubitz & O'Connell on June 9, 2014.

8. Schedule C (and the exhibit thereto) fails to properly include the Ward's interest in certain real property located at 67th Street, New York, New York and 82 Portland Place, London, England and the value of the same to which the Guardian agreed to waive or relinquish in favor of the Estate of Lorna Bivins in exchange for a 100% fee simple interest in 330 Ocean Boulevard and 808 Lexington. Moreover, Schedule C fails to properly set forth an accurate value of those properties.

9. Exhibit E identifies various law firms to whom the Guardian intends to make payment for fees and cost reimbursement, as well as himself, but fails to identify the specific amounts to be paid; specifically, it fails to identify the amounts as of the date of the accounting. Julian Bivins objects to any further payments to the Guardian or the law firms identified therein.

10. Julian Bivins objects to Exhibit F which provides that the Guardian, who should have already turned over all funds to the successor guardian, Stephen Kelly, will retain assets in Exhibit H to pay or put towards the final costs of administration. Exhibit H further fails to identify the total amount of assets to be turned over to the successor trustee, Stephen Kelly, which Curtis Rogers should have already turned over to Stephen Kelly.

WHEREFORE, Julian Bivins respectfully objects to the Final Accounting (Guardianship Report) of Guardian of Property filed by Curtis Rogers and served upon the undersigned counsel

on July 8, 2015, and requests this Court enter an Order requiring the Guardian to account for the discrepancies set forth above.

Dated: August 7, 2015.

Respectfully Submitted,

THE BLEAKLEY BAVOL LAW FIRM

/s/ J. Ronald Denman

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on August 7, 2015 a true and correct copy has been served on all counsel of record identified on the attached Service List via electronic mail or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

/s/ J. Ronald Denman

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

GUARDIANSHIP

IN RE: GUARDIANSHIP OF:

OLIVER BIVINS,

CASE NO.: 50 2011 GA 000006 XXXX SB
DIVISION: IY – COLIN

An incapacitated person.

**OBJECTION TO FINAL REPORT OF GUARDIAN OF PROPERTY
FILED BY STEPHEN M. KELLY AND SERVED JULY 9, 2015**

COMES NOW, Julian Bivins, as the ancillary personal representative of the Estate of Oliver Bivins in Florida and the temporary administrator of the domiciliary administration of the Estate of Oliver Bivins in Potter County, Texas, by and through his undersigned counsel and hereby files this Objection to Final Report of Guardian of Property filed by Stephen M. Kelly (“Final Report”) and served upon the undersigned counsel on July 9, 2015, and in support therefore, states as follows:

1. Schedule A fails to include the following rental income from 808 Lexington Avenue, New York, New York (“808 Lexington”) that should have been collected by the Guardian from the tenants or Oliver Bivins Jr., as personal representative of the Estate of Lorna Bivins pursuant to the September 17, 2013, Court Approved settlement agreement (the “New York Settlement”) entered into between Curtis Rogers, as guardian for Oliver Bivins Sr., Oliver Jr., individually and as personal representative of the Estate of Lorna Bivins, and Beachton Tuxedo, LLC (“Beachton”):

- a. One hundred percent of the rental income from the first floor tenant, Fig and Olive, following the Court’s approval of the New York Settlement;
- b. Rental income from the second floor tenant, Pinafore Nursery; and



c. Rental income from the third and fourth floor units.

2. Schedule A also fails to include one-half of the real estate taxes for 808 Lexington and 330 Ocean Boulevard that should have been collected by the Guardian from Oliver Bivins Jr., as personal representative of the Estate of Lorna Bivins pursuant to the New York Settlement.

3. Additionally, Schedule A fails to include one-half of the interest on the Beachton Mortgage accruing after June 30, 2013, that should have been collected by the Guardian from Oliver Bivins Jr., as personal representative of the Estate of Lorna Bivins pursuant to the New York Settlement.

4. Schedule B includes a payment for \$550.00 to Vantage Computer Systems for converting emails pursuant to a subpoena that should not have been paid out of the Ward's funds and was not for the benefit of the Ward.

5. Schedule B fails to include any payments of either principal or interest on the Beachton mortgage that encumbered 808 Lexington in contravention of the New York Settlement, any payments of expenses to enforce the satisfaction of the mortgage, or any payments of expenses to find substitute financing for the Beachton mortgage at a lower interest rate than the default rate the Beachton mortgage was charging.

6. Schedule B also fails to include any expenses for repairs, renovations, or maintenance to 808 Lexington that should have been incurred by the Guardian to obtain the highest and best rental values of the property.

7. Schedule C includes unauthorized payments to Ciklin Lubitz & O'Connell and Bill T. Smith, Jr. P.A. for purported contingency fees, the sum of which is not consistent with the total set forth in the May 23, 2014 Order on Hybrid/Contingencies Fee Portion of Application of Attorneys For Ward for Fees and Costs ("Contingency Fee Order"). *See* Contingency Fee Order

attached to Final Report. The sum of the total contingency payments to Ciklin Lubitz & O'Connell and Bill T. Smith, Jr. P.A. set forth on Schedule C equal \$413,343.24; yet, the Contingency Fee Order provides that the contingency fee payment shall be \$394,818.24. Moreover, the Guardian should have sought to reduce the contingency fee payment payable to counsel because the Contingency Fee Order determined the contingency fee based upon a figure of \$435,000.00 for the Beachton mortgage; yet \$596,681.78 was actually paid at closing to satisfy the Beachton mortgage. Had the figure of \$596,681.78 been used to calculate the contingency fee, the contingency fee would have been \$7,900.90 less than the amount set forth in the Contingency Fee Order.

8. Schedule C fails to properly include the Ward's interest in certain real property located at 67th Street, New York, New York and 82 Portland Place, London, England and the value of the same to which the Guardian agreed to waive or relinquish in favor of the Estate of Lorna Bivins in exchange for a 100% fee simple interest in 330 Ocean Boulevard and 808 Lexington. Moreover, Schedule C fails to properly set forth an accurate value of those properties.

9. Schedule D provides that the Guardian is currently holding \$155,383.51 and his counsel, Ciklin Lubitz & O'Connell, is holding \$675,994.35 in trust. Pursuant to the Order on Global Settlement attached to the Final Report, only \$275,000.00 from the closing proceeds of 808 Lexington should be held in trust by Ciklin Lubitz & O'Connell. The remaining \$400,000.00 should have been paid to the Oliver Bivins Management Trust pursuant to paragraph 10 of the Order on Global Settlement. *See* Order on Global Settlement attached to the Final Report. The moneys held by the Guardian in the amount of \$155,383.51 should also be paid to the personal representative of the Estate of Oliver Bivins as the \$125,000.00 being held in trust by the Guardian's counsel, Ciklin Lubitz & O'Connell, is to be utilized for guardianship administration

expenses and is sufficient to cover those expenses. See paragraph 9 of the Order on Global Settlement attached to the Final Report.

10. Lastly, the Statement of Closing of 808 Lexington attached to the Final Report identifies two separate amounts (\$16,093.93 and \$50,000.00) being held by the Guardian's counsel, Beys Stein Mobargha & Berland LLP ("Beys Stein"). See Statement of Closing attached to Final Report. There is no Court order permitting Beys Stein to hold these funds. As such, these funds should have been included in the net proceeds from the sale of 808 Lexington and paid to the Oliver Bivins Management Trust pursuant to paragraph 10 of the Order on Global Settlement.

WHEREFORE, Julian Bivins respectfully objects to the Final Report of Guardian of Property filed by Stephen M. Kelly and served upon the undersigned counsel on July 9, 2015, and requests this Court enter an Order requiring the Guardian to account for the discrepancies set forth above.

Dated: August 10, 2015.

Respectfully Submitted,

THE BLEAKLEY BAVOL LAW FIRM

/s/ J. Ronald Denman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 10, 2015 a true and correct copy has been served on all counsel of record identified on the attached Service List via electronic mail or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

/s/ J. Ronald Denman
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 15-81298-CV-MARRA/MATTHEWMAN

JULIAN BIVINS, as Personal Representative
of the Ancillary Estate of Oliver Wilson Bivins,

Plaintiff,

v.

CURTIS CAHALLONER ROGERS, JR. as
former guardian, STEPHEN M. KELLY, as
successor guardian, BRIAN M. O'CONNELL,
ASHLEY N. CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN, BEYS
LISTON MOBARGHA & BERLAND, LLP
f/k/a BEYS STEIN MOBARGHA & BERLAND,
LLP, and LAW OFFICES OF KEITH B. STEIN,
PLLC, n/k/a STEIN LAW, PLLC,

Defendants.

**DEFENDANTS, KELLY'S, O'CONNELL'S, CRISPIN'S,
STEIN'S, THE CLO LAW FIRM'S, AND THE STEIN LAW FIRM'S,
MOTION TO DISMISS OR STAY, WITH INTEGRATED MEMORANDUM OF LAW**

Defendants, Stephen M. Kelly, Brian M. O'Connell ("O'Connell"), Ashley N. Crispin ("Crispin"), Keith B. Stein, Ciklin Lubitz & O'Connell ("the CLO Law Firm"), and the Law Office of Keith B. Stein, PLLC ("the Stein Law Firm") (collectively "the Moving Defendants"), by and through the undersigned counsel and pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, hereby respectfully submit their Motion to Dismiss or Stay with Integrated Memorandum of Law.

I. SUMMARY OF MOTION

Under the Colorado River doctrine, a federal court should dismiss or abstain from exercising jurisdiction over a case if there is a parallel proceeding in state court and the interests

of wise judicial administration demand abstention. This Court may consider matters outside the pleadings to determine the relevant issues, including (1) whether the proceedings are parallel; (2) the order in which the courts assumed jurisdiction over property; (3) the relative inconvenience of the fora; (4) avoidance of piecemeal litigation; (5) the order in which jurisdiction was obtained and the relative progress of the two actions; (6) whether federal law provides the rule of decision; (7) whether the state court will adequately protect the rights of all parties; (8) forum shopping; and (9) vexatious or reactive nature of the second suit.

Here, Plaintiff seeks to litigate based directly on guardianship proceedings that have been pending in the probate division of a Florida state court since 2011. Over the years, the Plaintiff, as an interested person, has participated in the guardianship proceedings and contested numerous matters therein. Since the ward passed away on March 2, 2015, the Plaintiff, in his purported capacity of personal representative of the former ward's estate, has participated in the guardianship proceedings. The allegations that form the basis for the Plaintiff's Amended Complaint (and initial Complaint) in this federal court are squarely before the state court presiding over the guardianship proceedings, and all of the factors above are either inapplicable or inure in favor of the moving Defendants. Accordingly, as set forth below, Plaintiff's Amended Complaint should be dismissed or this action stayed.

II. INTRODUCTION TO TIMELINE AND PARTIES¹

On or about January 2, 2011, a petition to determine incapacity of Oliver Bivins, Sr. ("Oliver Sr." or "the Ward") was filed in the Probate Division of the Circuit Court of the Fifteen Judicial Circuit in and for Palm Beach County, Florida (hereinafter, "the Florida State

¹ The Moving Defendants accept the Plaintiff's allegations as true solely for the purposes of this Motion.

Probate/Guardianship Court”).² On or about May 10, 2011, the Court appointed Defendant Curtis Cahalloner Rogers, Jr. (“Rogers”) as the limited guardian of the person and property of Oliver Sr. (DE 18, Amended Complaint, ¶ 44).³ According to the Amended Complaint, Rogers retained Defendant Stein and his then-law firm in or about October 2012 concerning certain guardianship properties in New York. (DE 58, and DE 59-80). Again, according to the Amended Complaint, Rogers retained the CLO Firm in November 2012. (DE 57). On April 23, 2014, Kelly was appointed successor guardian. (DE 83, 108). The administration of the guardianship and its properties is set forth in more detail in section III below.

The Ward passed away on March 2, 2015. (DE 1). Plaintiff is the Ward’s son by the Ward’s first marriage. (DE 29). The Plaintiff alleges that he “is the Personal Representative of the ancillary Estate of the deceased Ward in Palm Beach, County, Florida.” (DE 2).⁴ On July 8, 2015 and July 9, 2015, guardians Rogers and Kelly filed and served their respective final accountings and reports of guardianship property with the Florida State Probate/Guardianship Court. On August 7 and 10, 2015, Plaintiff filed his Objections with the Florida State Probate/Guardianship Court. Copies of Plaintiff’s Objections to Rogers’ and Kelly’s accountings/reports are attached as “Exhibits “A” and “B,” respectively.⁵

² See DE 18, Amended Complaint, ¶ 41, and DE 18-1 (caption indicating court).

³ The Florida State Probate/Guardianship Court appointed Defendant Kelly as emergency temporary guardian on January 5, 2011. (DE 41). Kelly’s actions prior to the appointment of Rogers are not at issue. (See DE 1, *passim*).

⁴ That appointment is subject to an action to revoke the appointment and the letters of administration issued to Plaintiff. (See Exhibit 6, Verified Petition for Revocation of Probate).

⁵ In determining a motion based on Colorado River doctrine, the court may consider matters outside the pleadings. E.g., First Keystone Consultants, Inc. v. Schlesinger Electrical Contractors, Inc., 862 F. Supp. 2d 170, 181, 181 n.11 (E.D.N.Y. 2012).

Plaintiff's objections concern property that is the *res* of the guardianship. He contests the guardians' actions concerning that property, and alleges the same or directly related allegations that he alleges in this Court. (See Exhibits 1 & 2, ¶¶ 1-3, 5-6, 8). The Plaintiff also alleges that the CLO Firm⁶ breached its fiduciary duty to the ward and failed to benefit the ward, and, accordingly, should not be paid. The Plaintiff has been actively litigating his Objections in the Florida State Probate/Guardianship Court guardianship proceeding, which are currently pending and have not been ruled upon.

On September 17, 2015, Plaintiff filed his Complaint with this federal court. (DE 1). The allegations raised the same issues as Plaintiff's Objections filed in Florida State Probate/Guardianship Court, and closely derivative or related issues--all challenging the guardians and their attorneys' actions concerning the property of the guardianship. (DE 1, *passim*). Plaintiff then waited more than two months to apply for summonses (see DE 5, 7), and did not serve the first of the summonses until the evening of December 3, 2015, when he served Defendants Crispin and Stein.

Defendants had no prior notice that Plaintiff would attempt to bypass the ongoing guardianship proceedings and obtain review of the actions of the guardians and their attorneys by this federal court. Accordingly, on December 4, 2015, the Moving Defendants herein (and Defendant Rogers) filed and served an Adversarial Proceeding for Declaratory Judgment ("Adversarial Proceeding Complaint") directly raising all of the Plaintiff's issues in the appropriate court; the Florida State Probate/Guardianship Court, where the guardianship

⁶ Defendants O'Connell and Crispin were the only active agents of the CLO Firm. Defendants O'Connell, Crispin, Stein, the CLO Firm, and the Stein Firm shall be hereinafter collectively referred to as "the lawyer Defendants."

proceeding had been pending and litigated for more than five years. A copy of the Adversarial Proceeding Complaint with exhibits thereto is attached as Exhibit “C.”⁷

Plaintiff served the remaining Defendants after December 4, 2015. Plaintiff filed and served his Amended Complaint on January 8, 2016. Like the original, the Amended Complaint alleged that the guardians and their attorneys acted inappropriately regarding guardianship assets. (See DE 18).

III. APPLICATION OF COLORADO RIVER DOCTRINE

In Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the Supreme Court held that abstention may be appropriate where there are parallel state-court proceedings and principles of wise judicial administration warrant a decision to abstain from exercising jurisdiction. Colorado River, 424 U.S. at 818-20. “Wise judicial administration [gives] regard to conservation of judicial resources and comprehensive disposition of litigation.” Id. at 817. The doctrine concerns the situation when one proceeding suddenly becomes two. See D.A. Osguthorpe Family Partnership v. ASC Utah, Inc., 705 F.3d 1223, 1233 (10th Cir. 2013). Under certain “exceptional circumstances” identified by the Colorado River Court, a district court may decline to exercise jurisdiction over a parallel state proceeding. Moorer v. Demopolis Waterworks and Sewer Board, 374 F.3d 994, 997 (11th Cir. 2004).

A. Parallel State Proceedings

“The court must decide whether the [state proceedings] and the ... federal action are ... ‘parallel.’” Amason & Assocs., Inc. v. Columbus Land Dev., LLC, 2014 WL 467509, at *10 (N.D. Ala. Feb. 5, 2014). “Proceedings need not involve exactly identical parties, issues, and

⁷ In determining a motion based on Colorado River doctrine, the court may consider matters outside the pleadings. E.g., First Keystone, 862 F. Supp. 2d at 181, 181 n.11..

requests for relief to be deemed parallel.” Id. (citing Ambrosia Coal and Constr. Co. v. Morales, 368 F.3d 320, 1329 (11th Cir. 2004)). “Rather, the Colorado River analysis applies when state and federal proceedings involve *substantially* the same parties and *substantially* the same issues.” Id. (citing Ambrosia Coal and Constr. Co. v. Morales, 368 F.3d 320, 1330 (11th Cir. 2004)).

Here, the proceedings are parallel. Both involve the same property—the property of the guardianship and actions taken therein. Both fully address—as the primary issues--the Plaintiff’s allegations of breaches of the duties owed to the ward by the guardians and by the lawyer Defendants. (See DE 18, Amended Complaint *passim*, and Ex. 3; Moving Defendants’ Adversary Proceeding for Declaratory Relief, *passim*). Even in specific sub-issues, the proceedings are parallel. For example, failure to properly manage the property known as “808 Lexington” is a sub-issue of the Amended Complaint and Plaintiff’s Objections. (See DE 18, Amended Complaint, ¶¶ 104-05, 112-13, 119, 124 and Exhibits 1 & 2, Plaintiff Objections filed in the Florida State Probate/Guardianship Court, ¶ 1). Plaintiff has been litigating this sub-issue in the Florida State Probate/Guardianship Court since at least February 2015. (See Ex. 5, Objection to Petition for Order, ¶¶ 6-8).⁸

The parties are substantially the same in both proceedings. The Plaintiff was an “interested person” in the Florida State Probate/Guardianship Court and participated in those proceedings. (See Ex. 5, Objection, pg 1, alleging an objection to payment of guardian fees as an “interested person”). He participates now in the Florida State Probate/Guardianship Court proceedings as now as the purported “ancillary representative of the Estate of [the former

⁸ For another example, of parallel sub-issues, the Plaintiff alleges breach of fiduciary duty to the ward and failure to benefit the ward on the part of the CLO Law Firm in both proceedings. (See Amended Complaint ¶¶ 101-03, 105 and Ex. 1, Plaintiff’s Objection to Rogers’ Final Accounting, ¶ 7).

ward].” (See Ex. 1, Objection, pg 1). Defendant Kelly, a one of the guardians, was a formal party in the guardianship. The lawyer Defendants, as agents of the guardians, cannot be considered strangers to the guardianship proceeding. Here, the parties are substantially similar in both proceedings.

According to the Court in Sini v. Citibank, N.A., 990 F. Supp. 2d 1370 (S.D. Fla. 2014), “[t]he crucial question [regarding whether there a parallel state proceeding for Colorado River Doctrine purposes] is whether the ‘similarity between the two cases is sufficient to justify the conclusion that the state court litigation will be an adequate vehicle for the complete and prompt resolution of the issue[s] between the parties.’” Sini v. Citibank, N.A., 990 F. Supp. 2d 1370, 1376 (S.D. Fla. 2014) (citing and quoting Brown v. Blue Cross and Blue Shield of Fla, Inc., 2011 WL 11532078, at *8 (S.D. Fla. Aug. 8, 2011)). Here, the Florida State Probate/Guardianship Court is already intimately familiar with all of the facts, the properties, the actions taken by the guardians, the actions taken by the lawyer Defendants, as well as the orders issued and settlements entered into. The Plaintiff’s Amended Complaint invites this federal court to assume jurisdiction over a dispute that will entail review of years of probate proceedings, and the actions taken therein by the guardians and the guardians’ attorneys’. The Florida State Probate/Guardianship Court is a more than “adequate vehicle for the complete and prompt resolution of the issue[s] between the parties.”

Because here, the state and federal proceedings are parallel, the Court should next consider the factors set forth by the Supreme Court to determine whether abstention from the Court’s exercise of jurisdiction is appropriate. Sini, 990 F. Supp. 2d at 1376, 1377.

B. Jurisdiction Over the Property at Issue

“The first Colorado River factor concerns whether one of the courts has assumed jurisdiction over the property at issue.” Amason, 2014 WL 467509 at *10. Here, although the allegations concern the Moving Defendants actions vis-à-vis property of the guardianship, the Plaintiff does not seek relief against that property, accordingly, the first factor is neutral. See id. (where neither proceeding was *in rem*, “the first factor is neutral”).

C. Relative Inconvenience of the Fora

This factor concerns the physical proximity of the federal forum to the evidence and witnesses. Id. Here, both courts are located within one-half mile of each other, according this factor is also neutral.

D. Avoidance of Piecemeal Litigation and Inconsistent Results

“The third Colorado River factor considers the potential for inconsistency and piecemeal litigation.” Amason, 2014 WL 467509, at *11. Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results.” Id. The circumstances under which the parallel cases would lead to piecemeal litigation must be abnormally excessive and deleterious. Id. Where, as here, “identical litigation has been filed in both federal and state courts, duplicative proceedings would be unduly excessive.” Id. at *12. Here, the mammoth size of the guardianship proceeding indicates the distinct possibility of piecemeal litigation. During the five-plus years of proceedings, there have been four settlement agreements and orders, at least three appeals and 1,176 docket entries to date. (See Ex. 4, State Court Docket Sheet). Plaintiff’s Amended Complaint, in essence, will require that much of that litigation be revisited and the appropriateness of the moving Defendants’ actions taken therein reviewed by this Court, instead of the Court familiar with it. This case should live out the rest of its days in the place where it began years ago and where all

the actions at issue occurred: in the Florida State Probate/Guardianship Court. Accordingly, this factor—avoidance of piecemeal litigation--favors abstention.

Further there are concerns about collateral estoppel if the two cases continue. Because the Florida State Probate/Guardianship Court is intimately familiar with the factual underpinnings of the parties' actions, it will likely conclude first, with will moot the issues before this federal Court. As the Amason Court said, "To continue this action knowing that such an outcome is likely, is an unnecessary waste of judicial resources." Id.; see also, Sini, 990 F. Supp. 2d at 1379 (because one court's rulings on similar or identical claims could have preclusive and binding effect on the other court, a party may try to accelerate or stall action in one case in an effort to win a ruling from the more favorable forum. Given the duplicative claims ... in the state action, the redundant proofs required by the respective claims, and the potential for conflicting rulings, the Court finds that the parallel cases present a serious danger of "abnormally excessive or deleterious" piecemeal litigation, and this factor weighs strongly in favor of abstention.").

Accordingly, the factor of avoiding piecemeal litigation and inconsistent results favors abstention.

E. The Order in which Jurisdiction was obtained and the Relative Progress of the Two Actions

"The order in which jurisdiction was taken is not a mechanical concept automatically favoring the party who files first, but rather a concept that favors the case that is more advanced." Kaplan v. Kaplan, 903 F. Supp. 2d 1304, 1309 (M.D. Fla. 2012), aff'd, 524 F. App'x 547 (11th Cir. 2013). A very similar case, the Kaplan Court explained:

Certainly "more advanced," the probate administration was opened six years ago (four years before the federal action) and contains more than 1,020 docket entries, which include contests over a personal representative, over the settlements of

claims, and over interim accountings. Both from the administration of probate and from Alexander's many associated lawsuits, the state court has acquired a brutally intimate familiarity with the dispute surrounding Leon's administration of Mack's estate. Interference from parallel federal litigation squanders the state court's accumulated investment.

Kaplan, 903 F. Supp. 2d at 1309. This factor also favors abstention.

F. Whether Federal Law Provides the Rule of Decision

Here, all of the claims in the federal court are common law claims based on Florida law, accordingly, this factor favors abstention.

G. Whether the State Court will Adequately Protect the Rights of All Parties

Where as here, the guardian cannot be discharged without court approval and the opportunity for all interested parties to object, and possessing a singular expertise in Florida guardianship proceedings, all parties, including the Plaintiff, will have their rights adequately protected in the state court. State courts are assumed to have developed a proficiency in probate matters. Kaplan, 903 F. Supp. 2d at 1310. Accordingly, this factor favors abstention.

H. Forum Shopping

Having raised his objections and having participated for years in the guardianship proceeding, the Plaintiff is clearly forum shopping by bring his claims in the federal court.

I. Vexatious or Reactive Nature of the Second Suit

As clearly indicated by Plaintiff's lawsuit against the attorneys that represented the guardian and the ward, Plaintiff's suit is vexation and reactive.

Request for Relief

Based on the forgoing, the Moving Defendants respectfully request that this Court enter a stay of this federal action pending the conclusion of the proceedings in the Florida State

Probate/Guardianship Court. See Moorer, 374 F.3d at 998 (stay is preferred remedy for Colorado River abstention).

CERTIFICATE OF GOOD FAITH CONFERENCE
CONFERRED AND UNABLE TO RESOLVE ALL ISSUES PRESENTED IN THE MOTION

Pursuant to Local Rule 7.1(a)(3), I hereby certify that the undersigned counsel for the movants has conferred with all parties or non-parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues. On or about December 22, 2015, counsel for the sole Plaintiff informed me that he opposes the relief sought in the foregoing motion.

Dated: January 19, 2016. Respectfully submitted,

/s/ Charles L. Pickett, Jr.
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Attorneys for Defendants O'Connell, Crispin, Kelly, Stein,
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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of notices of electronic filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically notices of electronic filing.

/s/ Charles L. Pickett, Jr.
Charles L. Pickett (FBN: 0051217)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-81298-CV-MARRA/MATTHEWMAN

JULIAN BIVINS, as Personal Representative
of the Ancillary Estate of Oliver Wilson Bivins,

Plaintiff,

v.

CURTIS CAHALLONER ROGERS, JR. as
former guardian, STEPHEN M. KELLY, as
successor guardian, BRIAN M. O'CONNELL,
ASHLEY N. CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN, BEYS
LISTON MOBARGHA & BERLAND, LLP
f/k/a BEYS STEIN MOBARGHA & BERLAND,
LLP, and LAW OFFICES OF KEITH B. STEIN,
PLLC, n/k/a STEIN LAW, PLLC,

Defendants.

**DEFENDANT, CURTIS CAHALLONER ROGERS, JR.'S
MOTION TO DISMISS OR STAY**

Defendant, Curtis Cahalloner Rogers, Jr. hereby adopts and joins Defendant, Beys Liston Mobargha & Berland, LLP's Amended Motion to Dismiss or Stay, with Integrated Memorandum of Law [D.E. 25], specifically sections III and IV of the Motion, as well as Defendants, Kelly's, O'Connell's, Crispin's, Stein's, the Cloe Law Firm's, and the Stein Law Firm's, Motion to Dismiss or Stay, with Integrated Memorandum of Law [D.E. 20, 21] as if fully stated herein.

WHEREFORE, Defendant, Curtis Cahalloner Rogers, Jr. requests that this Court grant this Motion to Dismiss or Stay, dismiss this action, or enter a stay of this federal action pending the conclusion of the parallel proceedings in the Florida State Probate/Guardianship Court, and for other such relief as the Court deems just and proper.

Dated: January 29, 2016.

Respectfully submitted,

/s/Wendy J. Stein

Wendy J. Stein, Esq., FBN: 389552

D. David Keller, Esq., FBN: 288799

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 29th day of January, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

By: /s/Wendy J. Stein

Wendy J. Stein

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Filing # 37387887 E-Filed 02/03/2016 05:37:15 PM

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

IN RE: GUARDIANSHIP OF: GUARDIANSHIP DIVISION

OLIVER BIVINS, FILE NO: 502011GA000006XXXXSB

Incapacitated.

_____ /

**MOTION FOR ORIGINAL TRIAL JUDGE TO RETAIN AND/OR HANDLE
CASE**

STEPHEN M. KELLY, as Guardian of Oliver Bivins, Sr. ("Kelly"), and CURTIS ROGERS, as the Former Guardian of the Person and Property of Oliver Bivins, Sr., ("Rogers"), moves this Court, and the divisional judge, as applicable, and states as follows:

1. On or about January, 2011, the original trial judge, the Honorable Martin H. Colin, was assigned the above referenced case.

2. Since the inception of the case, numerous adversary proceedings have ensued between the various interested persons, including adversary proceedings filed by a disputed interested person against Kelly and Rogers.

3. Many of the adversary proceedings resulted in comprehensive settlement agreements, which were ultimately court-approved, in total or part (by Judge Colin), but not until substantial litigation was concluded determining whether the agreements were in the best interest of the Ward. Over the tenure of this case, four comprehensive agreements have been litigated before the Judge Colin.

4. The appropriateness of these agreements are, again, the subject of litigation that is pending before the Court (Judge Colin). (Docket Entries 1082, 1083 and 1130)

EXHIBIT "1"

In Re: Guardianship of Oliver W. Bivins
File No: 502011GA0000006XXXXSB

5. Furthermore, despite the Ward's death almost one year ago, litigation continues with the currently appointed personal representative of the Ward's probate estate regarding 1) Rogers and Kelly's Final Reports, including allegations of maladministration which Kelly and Rogers vehemently dispute, this includes the re-litigation of the contents of agreements described in paragraph 3 and 4 above (Docket Entries 1082, 1083, and 1130) and 2) administrative expenses of the guardianship, (Docket Entries 871, 888, 917, 890, 921, 1097, 1175, 920, 1096, 1151, 1176, 1019 plus objections filed on 2/3/16 with no docket entries as of this date). Both pending matters described above will require the Court to review the time spent on the completed matters described in paragraph 3 and 4 above

6. In an attempt to conclude the administration of the guardianship, Judge Colin, is at the near conclusion of an approximately three day trial, spanning three (3) months, regarding the payment of a New York attorney ("Mr. Stein") who rendered services to the Guardian in compliance with FSA 744.108 over a two (2) year period.

7. The objections lodged by one interested person to Mr. Stein's various petition(s) for attorneys fees and costs delayed trial of the matter for approximately one year and include allegations of duplication of services with other service providers whose 1) invoices are intertwined with those of Mr. Stein and 2) petitions are finally scheduled to have their attorney fee and cost petitions heard on March 14 and 15. Further, a one hour closing arguments are/were to be scheduled as soon as practical as it related to Mr. Stein.

8. Judge Colin also set for trial, on February 22 and 23, objections lodged by a disputed interested person on objections to both Rogers and Kelly's Final Reports

In Re: Guardianship of Oliver W. Bivins
File No: 502011GA0000006XXXXSB

pursuant to Florida Probate Rule 5.680. Judge Colin implemented pre-trial procedures given the complicated, and elongated, nature of this guardianship proceeding.

9. The instant case has an approximate total of 1210 docket entries, evidencing the substantial judicial time spent of rendering rulings in this case.

10. Judicial economy refers to efficiency in the operation of the courts and the judicial system. It is the efficient management of litigation so as to minimize duplication of effort. It also avoids wasting the judiciary's time and resources.

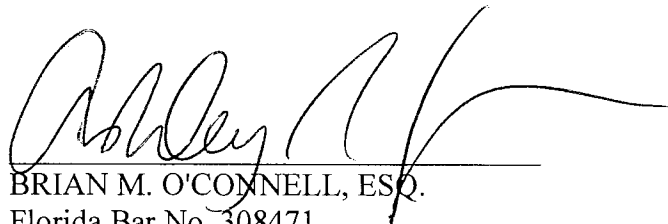
11. If Judge Colin does not retain the case, then the multitude of hearings held for months relating to the attorneys fees and costs petitions will be for naught. The new assigned judge will take time to get up to speed on the entire docket and become familiar with this matter, which spans 5 years of complex, continued and multifaceted litigation.

12. Furthermore, given what has been described above and the fact that Judge Colin has 1) presided over the matter and the items sought to be compensated for by the various service providers, 2) approved, or not, the actions sought to be taken by the guardians and 3) has taken evidence on intertwining petitions for attorneys fees and costs, it would clearly serve judicial economy that the original trial retain the case after his transfer out of the current division.

WHEREFORE, STEPHEN KELLY AND CURTIS ROGERS, in their fiduciary capacity, by and through their undersigned attorney, moves both the original trial judge, the Honorable Martin H. Colin, and the assigned divisional judge, if applicable to retain the instant case upon the original trial judge's transfer out of the instant case's currently assigned division.

In Re: Guardianship of Oliver W. Bivins
File No: 502011GA0000006XXXXSB

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by e-mail service on the 3 day of February, 2016 to J. RONALD DENMAN, ESQ. Attorney for Julian Bivins, J. RONALD DENMAN, ESQ. At rdenman@bleakleybavol.com chebert@bleakleybavol.com and lsmiler@bleakleybavol.com (15170 North Florida Avenue, Tampa, FL 33613); DONNA P. LEVINE, ESQ., Attorney for Oliver Bivins, II, Levine.susaneck.@gmail.com (3003 S. Congress Ave., Suite 1A, Palm Springs, FL 33461); RONDA D. GLUCK, ESQ., Co-Counsel for Curtis Rogers, attorneys@bocaattorney.com (980 N. Federal Highway, Suite 402, Boca Raton, FL 33432).



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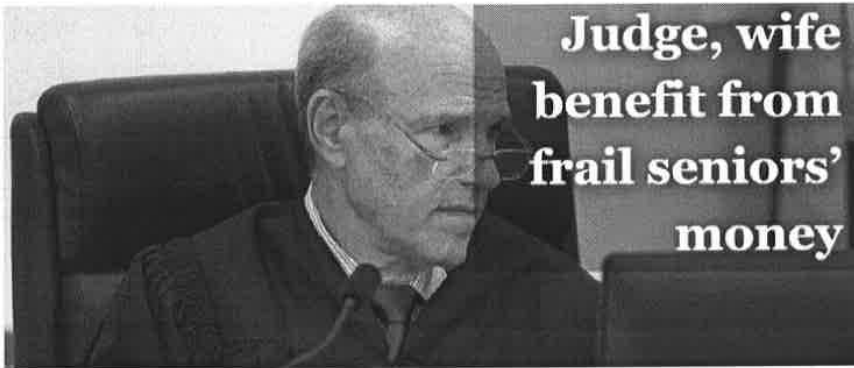
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Florida: Judge, wife benefit from frail seniors' money, Part 1

Posted on January 14, 2016 by Admin in Attorneys actions, Florida, Judicial actions, When Crime Pays



Judge Martin Colin hears guardianship cases, but not those of his wife. However, he hears other cases involving her lawyers. A former Florida high court justice says it looks improper and could violate the Judicial Code of Conduct. Judge Martin Colin, a fixture at the south county courthouse, was admonished by an appeals court in 2007 for conflicts involving Savitt after he represented her in her divorce. (Madellne Gray / The Palm Beach Post)

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The first in a series of articles from Florida's Palm Beach Post, written by John Pacenti, Palm Beach Post Staff Writer, and produced by Kristyn Wellesley and Gurman Bhatia

The savings of incapacitated seniors flow into the household of Palm Beach County Circuit Judge Martin Colin.

This occurs courtesy of Colin's wife — Elizabeth "Betsy" Savitt. She serves as a professional guardian, appointed by judges to make decisions for adults who no longer can take care of themselves.

Savitt makes her money off the nest eggs of the elderly, many suffering from dementia and put in guardianships in the same Probate & Guardianship Division where Judge Colin wields considerable influence. His fellow judges approve Savitt's fees.

Savitt has **taken money** from the elderly people whose lives she controls without first getting a judge's approval as well as **double-billed** their accounts, a Palm Beach Post investigation has uncovered in court records. Families of some of the seniors say the judge's wife and her attorneys drum up **unnecessary litigation** that runs up fees, benefiting herself, the judge and her lawyers.

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'I'm the wife of a Judge': Some families say Elizabeth Savitt, a professional guardian, cites her husband's position when they complain. (Madeline Gray / The Palm Beach Post)

Savitt doesn't appear before her husband, but Judge Colin does oversee other guardianship cases where he is responsible for safeguarding the finances and well-being of these "wards" of the court. Colin's colleague, Circuit Judge David French who lunches with him regularly, has overseen almost two-thirds of Savitt's cases. Some lawyers who have opposed Savitt in Judge French's courtroom say he didn't disclose that Savitt is the wife of a fellow judge or his social connections to the couple.

The lawyers Savitt has hired to represent her also practiced before her husband in other cases, where he had the power to approve their fees. A former Florida Supreme Court chief justice and a law professor say this constitutes, at minimum, an appearance of impropriety and should be investigated.

"This conflict puts the whole courthouse under a cloud because it raises so many questions and there are no answers forthcoming. And that is why we have a judicial canon on the appearance of impropriety, so there are no questions like this," Nova Southeastern law Professor Robert Jarvis said.

The guardianship arena is an attorney's playground. Everyone – the elderly ward, the guardian, relatives of the senior – are lawyered up. And most, if not all, get paid out of the savings of the senior in guardianship.

Families wonder if their lawyers naturally would be gun shy in opposing Savitt, a wife of a judge who they must appear in front of in other, more lucrative, cases.



Lunches with husband: Judge David French hears the majority of Savitt's cases. He lunches with her husband every day. (Damon Higgins/The Palm Beach Post)

This isn't the first time Colin has had a conflict involving his wife and her lawyers. An appeals court in 2007 **barred the judge** from presiding over a case involving Savitt's divorce lawyers, ruling he had an "apparent conflict of interest that would cause a reasonable litigant to have a well-grounded fear of not receiving a fair trial."

115 Recusals in 6 months

This elaborate dance plays out in south county in the lucrative Probate & Guardianship Division, where Colin is a longtime sitting judge.

His wife's job as a professional guardian leaves Judge Colin compromised, handcuffing him from fully doing his job, The Post found. He's recused himself from 115 cases that involve his wife's lawyers in the last six months of 2015 after The Post started asking questions in its investigation.

"When you have a judge suddenly recuse himself of so many cases, it certainly sends up a red flag," Jarvis said. "How did a judge allow himself to be put in such a position? I have never heard of a judge doing such a thing."

But Judge Colin doesn't see a problem. Even before his recent mass recusals, he remarked in a court hearing that in the past he had required his wife's attorneys to tell opposing lawyers that they represented Savitt.

But at least one attorney told The Post that's not always how it worked. Gary Susser gave an

example in which Colin's disclosure policy fell short, saying he was "floored and shocked" when he found out about the conflict.

Attorney Sheri Hazeltine didn't tell Susser until April that she works for Savitt, almost a year into a probate case, Susser said.

"She never disclosed her relationship until she was told by Judge Colin to do so," he said. "It's a huge concern for me when opposing counsel represents the judge's wife."

A transcript of the hearing shows Colin asking Hazeltine to disclose, she does so and then Susser objected to Colin continuing to preside over the case.

"It was news to me what I just found out," Susser tells Colin.

Colin responds, "OK. That's why we make what we call a disclosure."

"Yeah," Susser responds.

Colin then defends the policy that he would change later in the summer: "Can't disclose until it's, you know, ripe to disclose," he tells Susser.

Colin had the case reassigned to another judge.

The judge spoke to The Post for hours, but because of his position, was limited in what he could say. He would only say on the record that he has dealt with the conflict with his wife properly through established methods.

.... To be continued....

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Attorney Gary Susser Attorney Sheri Hazeltine Conflict of interest
Guardian Elizabeth "Betsy" Savitt John Pacenti Judge David French
Judge's recusal Law Professor Robert Jarvis
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Florida: "Judge's history of debt: Foreclosures, IRS liens" Part 2

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Sam Sugar, co-founder of Americans Against Abusive Probate Guardianships, says state bills to rein in professional guardians have wide support this legislative session.

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The second in a series of articles from Florida's Palm Beach Post, written by John Pacenti, Palm Beach Post Staff Writer, and produced by Kristyn Wellesley and Gurman Bhatia

Read Judge, wife benefit from frail seniors' money, Part 1, here.

How do you convince a god he is wrong?

The nation as a whole is beset by unscrupulous guardians, some of whom have been charged with crimes. Florida passed its first effort at reform last legislative session, including applying criminal penalties to guardians found guilty of abuse. Advocates say legislative reform, though, means nothing if judges are complicit in draining the life savings of seniors in guardianships.

Judges like Colin are the main line of defense against guardianship abuse.

Colin, 66, is one of a handful of judges in Palm Beach County Circuit Court who oversee guardians for incapacitated adults. When a senior is found to be incapacitated, they lose all legal rights to make decisions for themselves. So these judges approve expenditures including fees for the guardian and the guardian's attorney — again all coming from the senior's money.

"The problems all arise from the judges and the lawyers and the greed-driven abusive guardians they enable," said Dr. Sam Sugar, co-founder of Americans Against Abusive Probate

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Guardianship, which spearheaded the Florida legislation.

"Judges are extremely insulated. They are legal gods who live in a court bubble in which they only believe what their friendly guardians tell them. I mean how do you convince a god that he or she is wrong? It's a near incestuous fraternity."

The final arbiter for judges' behavior is the Florida Supreme Court. A former chief justice says Colin's conflict needs to be investigated.

"If you are sitting on the bench, you should not be doing things that would put a question in the minds of the public," said Gerald Kogan, who served on the high court from 1987 to 1998.

Judge's history of debt: Foreclosures, IRS liens

Colin and Savitt are positioned as the power couple of the lucrative probate arena. Colin's financial history, however, is littered with debt, including suits for foreclosure on three properties and \$65,000 once owed to the IRS for back taxes.

Savitt also had a recent foreclosure on a property. The couple's financial problems appear to have eased since she became a professional guardian.

Financial records show Savitt's finances are mainly separate from the judge's, but it appears the couple has co-mingled finances at least somewhat, West Palm Beach accountant Richard Rampell said. He pointed to a co-signed \$30,000 loan from Helen Rich, a Wrigley chewing gum heiress who was a former client of Colin's when he practiced as a divorce lawyer.



Photo of Judge Martin Colin's home in Atlantis that was the subject of foreclosure actions indicative of the judge's financial troubles. Address is 501 N. Country Club Drive. Judge Colin was sued for foreclosure in 2009 but told The Post it was a mortgage modification.

And even with couples who keep their finances separate, there is bound to be overlap, Rampell said.

"It's very common, especially if one makes more money than other. And even if they say they don't, they often do," Rampell.

Sugar puts it simply: "Any money she collects would essentially be money he collects."

.... To be continued....

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AAAPG Dr Sam J Sugar Former Florida Supreme Court Justice Gerald Kogan
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Florida: Judge appears to routinely violate Florida Judicial Code of Conduct , Part 3

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Retired teacher Helen O'Grady, who died at 83 in 2012 in Boynton Beach, was a senior "ward" of professional guardlan Elizabeth "Betsy" Savitt, wife of Circuit Judge Martin Colin.

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The third in a series of articles from Florida's Palm Beach Post, written by John Pacenti, Palm Beach Post Staff Writer, and produced by Kristyn Wellesley and Gurman Bhatia

Read Judge, wife benefit from frail seniors' money, Part 1, here.

Read Judge's history of debt: Foreclosures, IRS liens, Part 2, here.

A majority of professional guardians aren't looking to line their pockets.

They can be a godsend, taking over the decision-making for families fighting over a failing relative. But the salvation can be costly. Many of these seniors have substantial savings, and without proper oversight, a guardianship can become a fee frenzy.

Because the cases are in probate, Florida law requires every party to the case to have a lawyer. Many lawyers rely on the judge to approve their fees, paid from the senior's bank account.

Florida judicial canons are explicit in barring judges from appearing to use the bench for their own or their family's benefit.

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A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others. – Canon 2(b) – Florida Judicial Code of Conduct

Former Chief Justice Kogan suggests Colin's and Savitt's conflict could violate the Florida Judicial Code of Conduct and should trigger an investigation by the Judicial Qualifications Commission.

"If I were somebody associated with the JQC, this is something I definitely would want to look into. It gives, if nothing else, an appearance of impropriety," he said.

The JQC has the power to recommend to the Florida high court punishment for judges — from a private reprimand to sanctions to removal from the bench.

Kogan and **Raoul Cantero**, another former high court justice, wonder why Palm Beach County's chief judge didn't remove Colin from the probate division.

"If I were the chief judge, I wouldn't put up with this type of thing because it looks terrible, not only to members of the public but also to members of the legal profession," Kogan said.

Cantero agreed: "One way to handle that as an administrative matter is to have that judge in a division where those conflicts don't occur."

In Palm Beach County, two chief judges have been in a position to move Colin since his wife became a professional guardian in 2011. **But each presided at one time over her divorce case, when Colin was her attorney and her lover.**

'Savitt wasted our money for her personal gain'

Families say they watched slack-jawed as Savitt, 60, and her lawyers siphoned the wealth of their loved ones. They feel they are rendered powerless by judges who rule repeatedly for the judge's wife. Families fighting Savitt say Colin's colleagues allow her and her attorneys to pursue what critics of guardianships call "staged litigation" — pursuit of unnecessary legal issues to run up fees.



Retired teacher Helen O'Grady, who died at 83 in 2012 in Boynton Beach, was a senior "ward" of professional guardian Elizabeth "Betsy" Savitt, wife of Circuit Judge Martin Colin.

"It's his wife, Betsy Savitt, and her attorneys who wasted our family money and time for their personal gain through billing hours due to sibling infighting," said Thomas Mayes, who fought off Savitt's effort to claim \$55,000 from the estate of his mother, Helen O'Grady. "I feel she helps herself and her attorneys and not the client nor the ward of the court."

The seniors might be incapacitated, but some are

dubious of the judge's wife. Albert Vassallo Sr., a retired Brooklyn plumber who is one of Savitt's wards, spoke to The Post at a Deerfield Beach senior center.

"The only one taking money from me is that woman. But I'm going to get on that," he said. "I wish I could stop her."

.... To be continued....

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Former Florida Supreme Court Justice Gerald Kogan

Former Florida Supreme Court Justice Raoul Cantero Judicial Qualifications Commission

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Florida: Attorney – ‘Courts have allowed this culture’, Part 4

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Ellen Morris, attorney for court-appointed guardian John Cramer who works for Savitt, has also practiced in front of Savitt's husband, Judge Colln (Lannis Waters / The Palm Beach Post)

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Read Judge's history of debt: Foreclosures, IRS liens, Part 2, here.

Read Judge appears to routinely violate Florida Judicial Code of Conduct , Part 3, here.

The conflict created for Colin by his wife working as a professional guardian is a frequent topic of conversation among probate and elder law attorneys. But many told The Post that they fear reprisals for themselves or their clients if they speak on the record about Colin, particularly on matters involving his wife.

"I blame the courts because they have allowed this culture," said one attorney, speaking on the condition of anonymity. "Savitt acts with impunity because she has the wind behind her."

Probate attorney Edward Shipe said Colin's conflict of interest at the very least "doesn't look right, doesn't feel right."

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"I can't sit here and deny that," Shipe said. "So we got this wife and she wanted to do guardianship cases so she started a guardianship business. It was talked about before it happened. I was scratching my head a little bit, thinking, 'You are going to have problems doing this.'"

Professor Jarvis questioned whether attorneys who represent Savitt hope to get an edge in front of Colin.

"Are they doing this either to curry favor with Judge Colin or to avoid his wrath?" Jarvis said.

Savitt often hires attorneys Hazeltime, Ellen Morris and John Pankauski, prolific practitioners in elder law. They or members of their firms practiced in front of Colin before he began recusing himself from their cases last year. From 2009 to 2014, Colin's recusals totaled 30. Since the beginning of July, he's taken himself off 133 cases — 115 involving his wife's lawyers.



Attorney Sheri Hazeltime, left, during a hearing regarding attorney fees. Elizabeth Savitt, seated right, is the wife of Judge Martin Colin and also a professional guardian. (Madellne Gray / The Palm Beach Post)

Hazeltime, Morris and Pankauski or their firms — as well as the guardians they represent — have had fees in non-Savitt cases repeatedly approved by Judge Colin, The Post found.

Clifford Hark of Boca Raton refers cases to Savitt. He has also earned fees approved by the judge in other cases. For example, Colin signed off on \$51,000 from the estate of retired Judge Stanley Hornstine in September 2013.

One of O'Grady's daughters, Kathleen Osterbuhr of Derby, Kan., wrote the court to say Hark promised the family to fight Savitt's petitions for lucrative fees in court, but never followed through.

Mayes said in another letter that "Hark has made mistakes and prolonged this case for his benefit" and that Savitt's "conflict of interest has caused more problems than it has solved."

Hark told The Post he has been practicing for 28 years in South Florida and does not "rely on Judge Colin for my livelihood."

"I represent and zealously advocate for my client's interest regardless of Ms. Savitt's involvement in the case," he wrote to The Post in an email.

He pointed out that in some guardianship cases Savitt has opposed his fees and that Colin has also not awarded him the entire amount of fees sought by his firm.

Hark did say that he was unaware of complaints about her by attorneys or family members in the

O'Grady case, which he referred to Savitt, and the guardianship of Lorraine Hilton, in which the family accuses the judge's wife of financial mismanagement. But, Hark reiterated that he recommends other guardians besides Savitt and that the decision, in the end, rests with the families.

Most of Savitt's attorneys also spoke to The Post but were limited in what they could say on the record.

O'Grady's son, Mayes, said Savitt capitalized on family turmoil, sending their conflicts to court to be resolved, where the litigation generated more fees.

"That was a fix," Mayes said in an interview. "I was still doing all the work, but she and her attorneys were billing and kept stirring it up with the family."

The family learned that Savitt was married to a judge when Judge Rosemarie Scher, then presiding over their case, said she'd been out to dinner with the couple and described the judge's wife as "part of the judicial community."

"Savitt never told us beforehand, which I thought she should have," said Mayes. "The lawyers never told us. I figured he was in another division, but he was in probate."

.... To be continued

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Florida: Chief judges presided over guardian's divorce while judges take vacations together, Part 5

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Chief Circuit Judge Jeffrey Colbath, who presides over Palm Beach County Circuit Judge Martin Collin. (Lannis Waters / The Palm Beach Post)

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Read Judge appears to routinely violate Florida Judicial Code of Conduct , Part 3, here.

Read Attorney – 'Courts have allowed this culture', Part 4, here.

Collin has been allowed to remain in probate under Peter Blanc and Jeffrey Colbath, chief judges since Savitt became a registered guardian four years ago. While other judges rotate, Collin hasn't been moved out of the south county courthouse since at least 2008.

Blanc and Colbath, the current chief judge, presided separately over Savitt's divorce and made rulings favorable to her.

Blanc said he worked in Collin's law firm for about nine months as an "independent contractor." He

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told The Post that when Savitt became a guardian there was some discussion about a potential conflict, but he felt satisfied not moving him out of probate because Colin vowed not to preside over any of her cases. The Post has not found any of Savitt's cases where he did.

Chief Judge Colbath declined to answer questions for this story, but he has the power to move Colin to another division if he suspects impropriety.

Florida Supreme Court Chief Justice Jorge Labarga in 2013 issued an administrative order to emphasize that the chief judges of circuit courts have the duty to take "corrective action as may be appropriate" if they feel a judge is acting inappropriately. Labarga declined to comment for this story.

Judges socialize, planned trip together

Judge Colin and his wife have socialized with one of the judges she appears in front of regularly, The Post has learned.

Colin and Circuit Judge David French eat lunch together nearly every day. Colin and French co-hosted a trivia night in May for the South Palm Beach Bar Association. The event was co-sponsored by Pankauski's firm. French did not return repeated attempts for comment.

French's first ex-wife Gayle Smith said her son, now grown, grew up in French's household and knew Colin as his father's running "mate" and that they often went on trips together.

French's second ex-wife, Christine Connelly, said she and Judge French were friends with Colin and Savitt. The two couples had planned a cruise vacation about five years ago, but it fell through when Colin didn't have his passport.

"We hung out, played tennis," she said.

French apparently doesn't always disclose this information to lawyers opposing Savitt in his courtroom on issues such as fees or her activities as a guardian.

Thomas Dougherty said he would have liked to have known that the judges socialized when he opposed Savitt in front of French.

Colin heads up elder-care pilot program

Any conflicts aside, Chief Judge Colbath has faith in Colin.

In September, Colbath announced an **Eldercare Coordination Pilot Program** headed by Colin to resolve family disputes in guardianship cases outside court will become permanent. The program is meant to decrease costs for families by bypassing attorneys and sending them to mediation.

Colin is excited.

"This pilot program is designed to put in place a conflict dispute mechanism that will allow guardians and family members to deal with nonlegal matters in a conference room setting and not in a courtroom ...with less cost and tension," he said.

Palm Beach County joined seven other circuits in Florida as well as Indiana, Minnesota, Idaho and Ohio in testing the program.

Are recusals enough to end conflict?

In the courtroom, Colin is trying to shed any conflict, but a divorce case illustrates how treacherous it can become.



Attorney John Pankauski makes arguments before Judge David French at the South County Courthouse Thursday, May 21, 2015, during a hearing surrounding the guardianship of James Vassallo's father. (Damon Higgins/The Palm Beach Post)

Amber Larkin accused her ex-husband, Andrew, of hiring trust attorney Pankauski because Andrew knew Colin would have to recuse himself. Judge Colin had indicated he would rule in her favor on a life insurance issue and even throw her husband in jail, according to court transcripts.

In addition to the recusal allegation, Pankauski was forced to defend himself on accusations that he was part of a strategy to get Colin recused.

The judge at a Sept. 29 hearing in the case explained why after four years he now recuses himself from cases involving his wife's lawyers.

Colin said that requiring attorneys to disclose that they work for Savitt used to be "a 100 percent acceptable procedure" and that there had never been a complaint.

But Colin said automatic recusals assure there is a court record, so there is no question about whether opposing lawyers know of the potential conflict.

"We have adopted long-standing approved methods to properly deal with such potential conflicts," he told The Post.

Colin's previous policy may have been flawed. A 2005 opinion by the Supreme Court's Judicial Ethics Advisory Committee said judges are the ones who are supposed to disclose.

This is not the first time Colin has been called out for conflict of interest. **Complaints surfaced in 2009** about him favoring attorneys who represented Savitt in her divorce after he became a judge. Colin says he wasn't punished. But the JQC can choose to reprimand a judge in private.

Colin was removed from the family division briefly and put into probate. Within two years, his wife was working as a professional guardian.

Despite his financial difficulties, Colin oversees divorce and probate cases in which he makes crucial rulings on money.

"By staying in the probate division, he put himself in a position to influence what work his wife gets," said Jarvis, who teaches a class on professional responsibility. "In fact, having this many recusals shows that something is amiss. It is all just rationalization – he should have avoided putting himself in a position where he has had to recuse himself so often."

To read this complete article (which we've broken up into 5 articles) online at the Palm Beach Post website, click here.

attorney John Pankauski attorney Thomas Dougherty Conflict of interest
Eldercare Coordination Pilot Program Florida Supreme Court Chief Justice Jorge Labarga
Guardian Elizabeth "Betsy" Savitt Judge David French Judge Jeffrey Colbath
Judge Peter Blanc Judge's 2nd ex-wife Christine Connelly Judge's ex-wife Gayle Smith
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POST INVESTIGATION GUARDIANSHIPS

Chief judge investigating Post's findings on Colin, Savitt

Updated: 7:06 p.m. Wednesday, Jan. 20, 2016

Posted: 6:52 p.m. Wednesday, Jan. 20, 2016



By John Pacenti - Palm Beach Post Staff Writer

The chief judge for Palm Beach County said Wednesday that he is investigating what needs to be done to address concerns brought forth by The Palm Beach Post's stories on Circuit Judge Martin Colin's role in adult guardianship.

Circuit Judge Jeffrey Colbath said in an email to The Post that he is in fact-finding mode and "is preparing to make appropriate changes to address concerns."



,Elizabeth Savitt appears at a hearing with Attorney Sheri Hazeltine to discuss attorney fees for Albert Bach on Thursday, August 20, ... [Read More](#)

Colin oversees family and probate matters in Delray Beach, including guardianships of adults no longer able to care for themselves. Colin's wife, Elizabeth "Betsy" Savitt, is a former tennis pro turned professional guardian who operates in the same division and appears in front of Colin's colleagues.

But Colbath and the chief judge before him, Peter Blanc, took no action to eliminate potential conflicts caused by the close relationships in the south county courthouse.

Colbath has the power to transfer Colin out of the Probate & Guardianship Division, where he has been since about 2009. He also has the power to transfer Circuit Judge David French, who has been a close friend of both Colin and Savitt and oversees many of her guardianships.



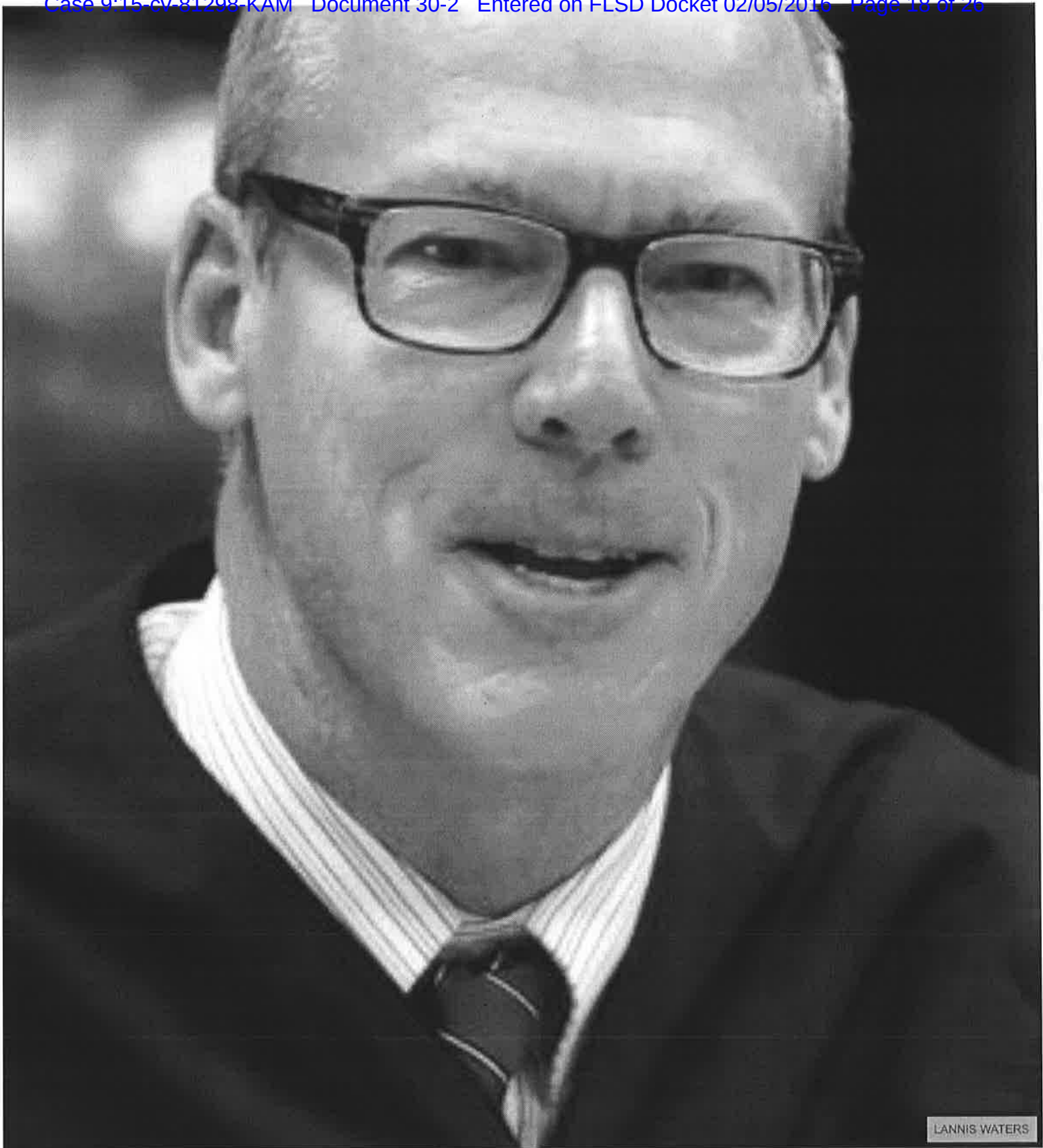
Judge Martin Colin presides over a hearing on Thursday, August 20, 2015, at the South County Courthouse in Delray Beach. Judge ... [Read More](#)

The Post found Colin's colleagues must approve Savitt's fees and fees for attorneys who represent her in guardianships of incapacitated senior citizens, many with sizable life savings. Families have accused Savitt, a guardian since 2011, of double-billing, taking fees without prior court approval and pursuing unnecessary litigation to drum up fees.

Several families separately told The Post that Savitt openly cites her husband's powerful position when confronted over her actions.

Savitt does not appear directly in front of her husband, but the attorneys who represent her litigated cases in front of him and relied on him at times to approve lucrative fees.





Palm Beach County Chief Circuit Judge Jeffrey Colbath

Two former Florida Supreme Court justices and a legal ethics expert told The Post the relationships pose a conflict of interest and appear improper.

After The Post started investigating last year, Colin recused himself from 115 cases in six months involving those

Case 9:15-cv-81298-KAM Document 30-2 Entered on FLSD Docket 02/05/2016 Page 19 of 26
attorneys who represent Savitt in guardianships, such as Ellen Morris, Sheri Hazeltine and John Pankauski, The Post reported Sunday. Previously, Colin said he required the attorneys to disclose their professional relationship with his wife, but The Post found that didn't happen in at least one case.

"We have adopted long-standing approved methods to properly deal with such potential conflicts," Colin told The Post.

Colbath has the power to transfer Colin or French out of the probate division. It's common for judges to be rotated every few years.

Savitt pointed out that she has never been sanctioned by any of her husband's colleagues and that complaints were from "disgruntled" family members. She also accused the paper of holding a grudge against her and her husband.

Families with seniors in Savitt's guardianships told The Post that their complaints about her financial management of seniors' life savings were ignored by Colin's colleagues, especially French.

Of particular issue is the tens of thousands of dollars Savitt has taken in fees prior to judicial approval in either guardianships or probate cases after the senior has died. Overwhelmingly, attorneys in the elder law field told The Post that state guardianship law does not allow guardians to take fees before a judge gives the OK.

This week it has been business as usual in Colin's courtroom in Delray Beach. Several attorneys told The Post they are not comfortable with the relationships in the probate division but fear repercussions if they speak out.

The families of some of Savitt's current and former wards did not hold back.

"They should be moved out of probate, and if possible, moved off the bench," said Jodi Rich, niece of Robert Paul Wein, who was in a Savitt guardianship before he died at 89 on Dec. 1.

"They are not abiding by ethical standards," she said.

Thomas Mayes, whose mother, Helen O'Grady, was in a Savitt guardianship, said there needs not only to be further guardianship reform by state lawmakers but a criminal investigation into Savitt. He doubted, though, anything would be done.

"They will just sweep the dirt under the rug or in a corner," he said.

Skender Hoti, a Lake Worth restaurant owner, watched Savitt in February 2012 try to assist a family guardian in seizing nearly every possession in a house he owned before she was stopped by sheriff's deputies.

"All their cases should be reviewed," he said of Colin and French. "No judge should be able not to rotate and stay in the probate arena."

What the Post found

Palm Beach County Circuit Judge Martin Colin is compromised by his wife's work as a professional guardian in the same probate and guardianship division where he has presided for years. His wife, Elizabeth "Betsy" Savitt, took fees without court approval and in some instances double-billed. Read all the stories and see the documents at myPalmBeachPost.com/guardianships-colin-savitt.

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rw_PnwWvMAw28uCIF9WI1_OB2LU

Report

Thank you

7:43 p.m. Jan. 20, 2016



mcfinn25

Report

Well, honestly, Judge Colbath is a person named in the article under not so ethical circumstances. Is he reliable to make a proper inquiry?

9:29 p.m. Jan. 20, 2016



CaptfFoyd

Report

This just seems to say that The Good Old Days are still here!!!
Palm Beach County is STILL the COUNTY of CORRUPTION!!!!!!!!!!!!!!
Office Of Inspector General still has a massive Clean p Job to do!!!!!!!!!!!!!!!!!!!!!!

I am guessing that they see it in the POTUS's Staff!
US Sec. Kerry's family is married to IRAN's Official!!
The top White House Advisor was born in IRAN & her family was under FBI investigation & has 24/7 Secret Security Detail and was not elected!!!!
Solar company that was given US Funds & then went bankrupt & the money was never repaid!! This same Solar company was given another even ore US Funds!!! They are also Obama's Donors!

Elected Official need to be in office 1 Term! The 2nd Term in JAIL!!!!

10:55 p.m. Jan. 20, 2016



Floridawalker

Report

They just should be removed altogether for the misery they have caused in the courtrooms

11:17 p.m. Jan. 20, 2016



citizenobserver

Report

Kudos to the Palm Beach Post for exposing this egregious mess! Wish they had a larger staff so they could take on irregularities at the municipal and county levels,also. There is plenty to investigate, but their corporate parent doesn't value the value of role the newspaper at the local level and continues to cut staff non stop. We need good reporting like this and other investigations they have done recently to keep our community healthy and corruption free. It forces people to stop looking the other way with a nod and a wink while corruption runs rampant.

1:07 a.m. Jan. 21, 2016



pepper38

Report

'Citizenobserver' said it so well, much better than I ever could. I wish someone would take the suggestions seriously.

10:08 a.m. Jan. 21, 2016

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Chief judge shakes up guardianship system after Post series

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Updated: 11:12 a.m. Wednesday, Feb. 3, 2016 | Posted: 4:20 p.m. Tuesday, Feb. 2, 2016

By Pat Beall and John Pacenti - Palm Beach Post Staff Writers

Palm Beach County Chief Judge Jeffrey Colbath announced Tuesday sweeping changes for guardianship of incapacitated seniors. The actions come amid revelations by The Palm Beach Post that the savings of these elderly wards flow into the household of Circuit Judge Martin Colin via his wife's work as a professional guardian in his division.



Also Tuesday, Colin announced that he won't be running for re-election.



Chief Circuit Judge Jeffrey Colbath reads the jury instructions to the jury in John Goodman's retrial Monday afternoon. October 27, 2014. Read More

The chief judge's reforms come in response to last month's Post series examining the role of Judge Colin and his wife — former tennis pro Elizabeth "Betsy" Savitt — in guardianship cases. Among the changes is requiring all of Colin's current colleagues in south county to recuse themselves from her cases.

READ: Post investigative series Guardianships: A Broken Trust

Some of the changes by Colbath were unspecific, leaving more questions than they answered. The announcement does not mention Colin by name, though sources have told The Post that Colin is indeed going to be transferred.



Judge Madeline Gray presiding over a hearing on Thursday, August 20, 2015 at the South County Courthouse in Delray Beach. [Read More](#)

The changes are:

- Rotation of personnel to be effective Feb. 15.
- In-house training for probate judges and court staff.
- The establishment of a guardianship wheel to provide random assignment of professional guardians to cases.
- Standardization of bill practices for guardians and attorneys.
- Recusal of the current south county judges from Savitt's cases.

Colin, 66, said on Tuesday that he had planned not to run because he would not be able to complete his term before reaching the mandatory retirement age of 70.

- Stopping corrupt guardians: Advocates say start by capping fees

A Florida Supreme Court justice told The Post Savitt's role as a guardian created an appearance of impropriety for Colin, which could violate the state's judicial canons. While Savitt doesn't

- POST INVESTIGATION: Judge, wife benefit from frail seniors' money

appear in front of her husband, attorneys who represent her did regularly, relying on him at times to grant lucrative fees.

Colin recused himself of 115 cases between July and December involving Savitt's attorneys after The Post started investigating. Colin denied any conflict involving Savitt because he does not hear her cases.

Seniors in guardianships often lose all of their legal rights. If a family member can't serve as guardian, then the court can appoint a professional to manage the incapacitated senior's finances, their medical care and where they live.

In 2011, Colin's wife became a professional guardian, working in the same Probate & Guardianship Division where her husband presides. Since that time, Savitt has generated complaints from families on several fronts.

The Post's series revealed how Savitt took tens of thousands of dollars from the bank accounts of seniors without prior judicial approval, double-billed and funneled money to key relatives of the seniors in her care, including one son who had been accused of physical abuse and one daughter who had been accused of loaning herself \$140,000 from her father's bank accounts.

Savitt also assisted a family guardian in trying to seize property from a Lake Worth house where an incapacitated senior lived. Deputies stopped Savitt and made her return the possessions that did not belong to the senior.

Savitt told The Post she has done nothing wrong and pointed to the

fact she has never been sanctioned by one of her husband's colleagues. Despite concerns about her work, Colin's fellow judges continued to appoint her to oversee the lives of seniors found incapacitated by the court.

Many of her cases were in front of Circuit Judge David French, a friend of both Colin's and Savitt's who once planned a cruise vacation with the couple. It is unknown what will happen to French amid Colbath's changes.

Colbath's announcement comes on the day the Florida Senate moved forward a bill that would for the first time establish regulatory authority over professional guardians.

Colbath's changes do not bar Savitt from guardianship cases. They do keep her from appearing before her husband's colleagues and fellow judges in south county, where Colin has been in the family and probate division since 2009.

Colbath — who is an elected official — emailed his guardianship changes to The Post's attorneys through his own General Counsel Amy Borman, thus circumventing reporters.

"As you may know, the guardianship process does not have a traditional adversarial system that protects the interests of all parties. The chief judge has determined that improvements can be made here in Palm Beach County," Borman wrote.

When the Post reached out to Borman at home at 6 p.m. she refused to clarify Colbath's changes, such as which judges would be rotated and whether Colin and French would remain in the Probate & Guardianship Division. It was also unclear if Colbath's "standardization of bill practices" includes barring guardians like Savitt from taking money from seniors' bank accounts without prior judicial approval.

"This is my time. I'm not answering any questions," Borman said when contacted on her cellphone. When she was told The Post simply wanted to accurately portray the chief judge's intentions, Borman said, "Call me at work" and hung up.

If Colbath hoped these changes would mollify the families of Savitt's senior wards or advocates for guardianship change, he may be mistaken.

"Sadly, these are not improvements; they are instead a patronizing attempt to protect these judges by changing their address," said Dr. Sam Sugar, co-founder of Americans Against Abusive Probate Guardianship.

James Vassallo, a son of one of Savitt's senior wards, said he planned to move fast in order to protect his father's assets while Savitt still had control.

"So I got to get my lawyer to freeze my father's money so Savitt can't have it and then say, 'Catch me if you can,'" the Deerfield Beach resident said. "The money should be frozen so she can't touch it anymore. This just means I got to get a lawyer to go after her and spend more of my money."

Vassallo said he fears Savitt could move out large chunks of cash like she did in the Helen O'Grady case after O'Grady died. Savitt and her attorney took \$30,000 from O'Grady's savings to be held in trust. A judge made them return all but \$2,600 of it.

Robert Jarvis, ethics law professor at Nova Southeastern University, applauded Colbath for instituting "overdue changes," but added, "One

Jarvis said he hopes other judicial circuits are taking note.

"Hopefully, these sorts of changes will be happening throughout the state," he said. "The real question is, 'Are other courts paying attention?' Is the Florida Supreme Court paying attention?"

What The Post Found

The savings of incapacitated seniors flow into the household of Palm Beach County Circuit Judge Martin Colin courtesy of Colin's wife — professional guardian Elizabeth "Betsy" Savitt. Fees in most of her cases were approved by another judge who is a friend of her husband's. Colin approved the fees of her lawyers in other cases.

Read the story

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All Comments (12)

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1 And I request that your Honor, please,
2 because they have improperly held money pursuant
3 to a court order, they should not be the
4 fiduciaries for this money. The estate has the
5 fiduciary obligation to --

6 THE COURT: What evidence do I have that
7 you're ready to prepare that tells me that
8 there's a lack of trustworthiness that the money
9 will be there to comply with court orders?

10 MR. DENMAN: Because, your Honor, they
11 took the proceeds of the sale, have never
12 brought it to your Honor's attention one time,
13 one time until I brought it, that they have
14 improperly retained money.

15 THE COURT: That's a different subject
16 than the trustworthiness of the escrow being
17 there.

18 Mr. Denman, in this category you are
19 really barking up the wrong tree because despite
20 the contentiousness of this case and now the
21 branches that it is going including federal
22 court and maybe the Florida Bar, I mean, the
23 Ciklin Lubitz law firm has a well-earned
24 reputation of honesty. And this is honesty.
25 Okay.

1 And not for a moment do I have any
2 concern because their reputation is well-earned
3 in this respect. You may disagree agree with
4 the notices and things like that. But I don't
5 have any sense whatsoever, and never have in the
6 years I've dealt with this firm, as a lawyer and
7 a judge, all of which I can take into
8 consideration, that they are not trustworthy to
9 have that money available for control over the
10 jurisdiction so that request is denied.

11 MR. DENMAN: I understand. But
12 respectfully, the Florida Bar Rules prescribe
13 what an escrow agent is required to do, your
14 Honor. An escrow agent it not entitled to hold
15 money without advising. If an order says --

16 THE COURT: All right. But we are passed
17 that point because I entered an order today.
18 And I will enter orders tomorrow or the next day
19 or whenever I have matters, but for today that's
20 my order.

21 MR. DENMAN: All right. I will prepare
22 the order now.

23 THE COURT: All right. And show it to
24 them. Please go outside, I have people waiting.

25 And from now on, please don't, you know,

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO.: 15-81298-CV-MARRA-MATTHEWMAN**

JULIAN BIVINS, as Personal Representative
of the ancillary Estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR.,
as former guardian, STEPHEN M. KELLY,
as successor guardian, BRIAN M. O'CONNELL,
ASHLEY N. CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN,
BEYS LISTON MOBARGHA & BERLAND, LLP
f/k/a BEYS STEIN MOBARGHA & BERLAND, LLP,
and LAW OFFICES OF KEITH B. STEIN, PLLC,
n/k/a STEIN LAW, PLLC,
Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANTS, KELLY'S, O'
CONNELL'S, CRISPIN'S, STEIN'S, THE CIKLIN LUBITZ & O'CONNELL LAW
FIRM'S, AND THE STEIN LAW FIRM'S MOTION TO DISMISS OR STAY**

COMES NOW, the Plaintiff, JULIAN BIVINS as ancillary Personal Representative of the Estate of Oliver Wilson Bivins in Palm Beach County, Florida, by and through his undersigned counsel, ("the Estate") and files its Response to Defendants, Stephen M. Kelly's, Brian M. O'Connell's, Ashley N. Crispin's, Keith B. Stein's, the Ciklin Lubitz & O'Connell Law Firm's, and the Stein Law Firm's (hereinafter referred to collectively as "Defendants") Motion to Dismiss or Stay, and in support thereof provides the following Memorandum of Law.

MEMORANDUM OF LAW

I. Background

The Estate filed the instant Complaint on September 17, 2015 (“The Federal Lawsuit”). On December 4, 2015 the Defendants filed an Adversary Proceeding for Declaratory Judgment (“Declaratory Judgment Proceeding”) in the guardianship court in Palm Beach County, Florida.¹ See Exhibit 3 to Defendants’ Motion to Dismiss or Stay [Docket 21-1]. The Declaratory Judgment Proceeding is an unabashed effort to circumvent the Federal Lawsuit by asking the guardianship court to render an advisory opinion for the purpose of raising a collateral estoppel argument to deprive the Estate of a trial by jury as to the negligence, professional negligence, and breaches of fiduciary duty of the Defendants.

The Defendants have sought a declaratory judgment as to the following:

Have the Petitioners breached their fiduciary duty, if any, to the Ward? In the unlikely case there is a determined breach, to what extent has Julian released the Petitioner(s) or has become barred by the doctrine(s) of laches, estoppel, waiver, satisfaction, set off, offset, payment, res judicata, collateral estoppel, failure to mitigate damages, unclean hands or lack of authority?²

On December 18, 2015, The Estate moved to dismiss or stay the Declaratory Judgment Proceeding pending resolution of the instant action. (See Motion to Dismiss [DE 29]). Despite the fact that the proceedings in the guardianship court concern the administration of the guardianship of the deceased ward, Oliver Wilson Bivins (the “Ward”) (whose guardianship has continued almost a year after he died in Amarillo, Texas), the Defendants are eager to have the

¹ Defendants Ashley Crispin and Keith Stein were served with the instant complaint on December 3, 2015.

² Julian Bivins is the son of Oliver Wilson Bivins Sr. At all times material hereto prior to the death of Oliver Wilson Bivins Sr., Julian Bivins raised various objections to the Defendants’ handling of the guardianship matters, individually, as an interested party, by virtue of his status as the son of Oliver Wilson Bivins Sr. and the sole heir under his will. The instant action is brought on behalf of the Estate of Oliver Wilson Bivins Sr., by its ancillary personal representative, Julian Bivins.

guardianship court rule on the torts the Estate has alleged against them because of the appearance that the guardianship court is a favorable forum.³ (See Motion for Original Trial Judge to Retain and/or Handle Case attached as Ex. 1). The ancillary Personal Representative of the Estate, as an out-of-state litigant, however, is entitled to file this lawsuit brought on behalf of the Estate against the Defendants and have the claims of the Estate heard by a jury in federal court based upon diversity jurisdiction.

II. Diversity Jurisdiction

In the instant case, the Defendants did not raise any issues that would challenge this Court's subject-matter jurisdiction. Thus, this Court has jurisdiction over this case. When a federal court has jurisdiction, it also has a "virtually unflagging obligation ... to exercise" that authority. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

Congress extends the benefits and safeguards of federal courts to "provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries." *Holston Investments, Inc. B.V.I. v. LanLogistics Corp.*, 677 F.3d 1068, 1070 (11th Cir. 2012) (quoting S.Rep. No. 1830, at 3 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3101–02). In the present case, Julian Bivins, the ancillary Personal Representative of the Florida Estate of the deceased Ward, is a domiciliary of the State of Texas.⁴ As the ancillary Personal Representative of the Estate, Julian Bivins filed the instant action in federal court to avoid the prejudices of local courts and local juries against out-of-state litigants.

³ In fact, before the ink had even dried on the Palm Beach Post's February 3, 2016 article (which strongly suggested that Judge Martin Colin – the presiding judge in this guardianship case – may be transferred to another division due to the various facts and issues disclosed in the Palm Beach Post's investigation, the Federal Defendants filed a Motion for Instant Trial Judge to Retain and/or Handle the Case, seeking to retain Judge Colin as the presiding judge, irrespective of bias raised in the investigation and recommendation by Judge Colbath.

⁴ Julian Bivins resides and has his domicile in the State of Arizona.

The Estate requires that this Court exercise jurisdiction so that it can be afforded an impartial and fair trial. Moreover, the recent investigation conducted by The Palm Beach Post has raised serious concerns about the impartiality of Judge Martin Colin, the presiding judge in the guardianship and probate proceeding, and other judges within the Probate and Guardianship Division of Palm Beach County, Florida. The Palm Beach Post articles explore conflict of interest that Judge Colin has because of his wife's role as a guardian and her representation by the attorneys before her husband in the Probate and Guardianship Division of Palm Beach County, Florida. (See Palm Beach Post articles attached hereto as Ex. 2). Further, Judge Colin has already stated his position on this case in response to a December 3, 2015 request of the Estate to have the Defendants reported to the Florida Bar for trust violations and for a direct and secretive violation of a court order regarding disbursement of the proceeds of the sale of a large asset of the Ward for an entire year:

The Court: Mr. Denman, in this category you are really barking up the wrong tree because despite the contentiousness of this case and now the branches that it is going including federal court and maybe the Florida Bar, I mean, the Ciklin Lubitz law firm has a well-earned reputation of honesty. And this is honesty. Okay.

And not for a moment do I have any concern because their reputation is well-earned in this respect. You may disagree agree [sic] with the notices and things like that. But I don't have any sense whatsoever, and never have in the years I've dealt with this firm, as a lawyer and a judge, all of which I can take into consideration, that they are not trustworthy to have that money available for control over the jurisdiction so that request is denied. (December 14, 2015 Hearing Transcript at p. 59.18 to p.60.10 attached hereto as Ex. 3).

The sentiments expressed by Judge Colin exemplify the purpose and function of federal diversity jurisdiction. The Estate requires that this matter be heard before this Court to avoid the

preferences and prejudices of judges and attorneys that have worked with one another throughout long spans of their careers.⁵

Now, the Defendants seek to have this Court abstain from exercising its jurisdiction pursuant to the *Colorado River* doctrine in order to have all of the claims against them resolved by a court that considers them beyond reproach.

III. The Colorado River Doctrine

Contrary to the representation of the law in the Defendant's Motion to Dismiss, the *Colorado River* doctrine is a very narrow exception to the general rule, which requires federal courts to exercise jurisdiction. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River*, 424 U.S. at 813, 96 S.Ct. at 1244 (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188–89, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959)). "[T]he mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction." *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 816 (1976). "Only the clearest of justifications will warrant dismissal." *Id.* at 819.

A. Parallel Proceedings

A threshold requirement for application of the *Colorado River* doctrine is that the federal and state cases be sufficiently parallel.

In the present case, the state court and the federal action are not parallel under the "first-filed rule." The Estate filed the federal lawsuit alleging breaches of fiduciary duties, negligence,

⁵ The Estate will be filing as soon as practicable, a Motion to Disqualify Judge Colin based upon his bias in favor of the Guardians' attorneys and his bias as the husband of a professional guardian whose livelihood depends upon the favorable and consistent rulings from the Palm Beach guardianship judges, as well as positive relationships with the most influential law firms and lawyers in Palm Beach County.

and malpractice against the Defendants in federal court on September 17, 2015 several months before the Defendants filed their petition for declaratory judgment, albeit service was not perfected until the beginning of December, 2015. Accordingly, at the time of filing of the federal action, there was not a state proceeding that was parallel to the federal action. The court in *Freeman v. U.S. Bank, N.A.*, No. 8:13-CV-338-T-26MAP, 2013 WL 2147558, at *2 (M.D. Fla. May 16, 2013) refused to stay an action under the Colorado River doctrine reasoning as follows:

The circumstances of this case fail to satisfy even the first factor of *Colorado River*, because this Court obtained jurisdiction of the declaratory judgment action first.... Piecemeal litigation is avoided by following the first-filed rule, and this action was filed first.

Under the first filed rule, the *Colorado River* doctrine is not applicable.

The threshold requirement for the application of the *Colorado River* doctrine also requires that the federal and state cases must “involve substantially the same parties and substantially the same issues.” *Ambrosia Coal & Const. Co. v. Pages Morales*, 368 F.3d 1320, 1330 (11th Cir. 2004). If the federal and state proceedings are not parallel, then the *Colorado River* doctrine does not apply. *Id.*

For example, in *Acosta v. James A. Gustino, P.A.*, 478 F. App'x 620, 621-22 (11th Cir. 2012), the 11th Circuit Court of Appeals reversed the lower court’s decision to abstain from exercising jurisdiction, concluding that the state and federal proceedings at issue were not parallel. The lower court decided that the actions were substantially similar because, though the state action did not involve the attorneys as defendants, the attorneys acted as agents in the state action and thus the parties were “substantially similar.” *Id.* at 622. The 11th Circuit disagreed reasoning that though the attorneys acted as agents of the state court defendant, there was no precedent standing for the proposition that agency supported substantial similarity of parties for the purposes of applying the *Colorado River* analysis. *Id.*

Similar to the *Acosta* case, the parties in the federal action before this Court are not substantially similar to the parties in the state guardianship proceeding because the Federal Lawsuit seeks damages against the guardians *and* their attorneys for their tortious conduct, not merely a refund of the fees that the guardians and their counsel have charged the guardianship. The Defendants contend that both actions involve the same parties parroting the argument that the 11th Circuit expressly rejected in *Acosta*:

Defendant Kelly, one of the guardians, was a formal party in the guardianship. The lawyer Defendants, as agents of the guardians, cannot be considered strangers to the guardianship proceedings. (DE 20 p. 7).

Based upon *Acosta*, the fact that the lawyer Defendants are alleged “agents of the guardians” and “no strangers to the guardianship proceedings,” does not create similar parties.

Regardless of the Defendant attorneys’ familiarity with the guardianship proceedings and regardless of their claims for fees within those proceedings, the Federal Lawsuit is significantly dissimilar. The Federal Lawsuit involves claims against the Defendants directly by the Estate, not for the return of property misappropriated from the guardianship and not for refunds to the guardianship, but for civil damages from them individually for their professional negligence and breach of fiduciary duty. The guardianship court is not even the appropriate court to bring claims against any of the Defendants. While the guardianship court may entertain an action for surcharge against the guardian, (which is by no means a required venue) no such mechanism exists with respect to a direct claim against attorneys who failed to comply with their professional responsibility to a ward. Yet, in light of the issues with the Palm Beach Probate and Guardianship Division, it should come as no surprise that all of the Defendant attorneys now seek to avail themselves of the jurisdiction of that court to have their actions rubber stamped. (*See Ex. 2*).

Likewise, the issues involved in the Federal Action are completely dissimilar from those concerning the winding down of the guardianship in circuit court and which the Estate has attempted desperately to resolve since the death of Oliver Wilson Bivins Sr. in March, 2015. The Federal Lawsuit concerns issues of negligence, such as duty, breach, causation, and damages; whereas the guardianship merely addresses the final distribution of the guardianship assets in the form of guardianship accountings. To illustrate the clear distinction between civil causes of action and accountings, it is worth noting that in guardianship accountings the burden of proof is on the guardian. *Beck v. Beck*, 383 So. 2d 268, 270-71 (Fla. 3d DCA 1980). This is because an accounting merely considers the disbursement of the guardianship funds. The Estate's objection to the accounting, however, cannot result in an award of damages against the guardians or against the guardians' attorneys.

The Federal Lawsuit, as it pertains to the attorney Defendants, concerns issues of professional liability and the standard of care owed by attorneys to their clients, which is completely foreign to a guardianship court. The Defendants' rationale supporting their argument that the issues in both cases are substantially similar is based on the idea that both cases involve the same property, but again, the distinction is that the Federal Lawsuit is directed at the negligence and the malpractice that has been committed by the Defendants. There is no support for the proposition that attorney negligence or guardianship negligence must be heard in a guardianship court if it takes place in the context of a guardianship. To the contrary, actions involving breaches of fiduciary duty committed by guardians against wards are subject to jury trial, which is an exception to the general rule that probate matters are to be determined by courts of equity. *See e.g. Beck v. Barnett Nat. Bank of Jacksonville*, 117 So. 2d 45, 50-51 (Fla. 1st DCA 1960); *In re Guardianship of Medley*, 587 So. 2d 619 (Fla. 2d DCA 1991).

Further, the idea that the circuit court is an “adequate vehicle for the complete and prompt issue[s] between the parties,”⁶ is belied by the fact that the guardians have not yet been discharged despite the death of the Ward nearly one year ago. The Defendants, of course, prefer the guardianship court because it permits them to continue to draw fees from the Ward’s Estate.⁷ In fact, just since the time of the Ward’s death in March 2015, the attorneys and guardians have sought fees purportedly for the benefit of the Ward that exceed \$200,000. This is in addition to the more than \$2.5 million the guardians’ attorneys have already obtained in fees from the Ward’s assets since he became a Ward in 2011. Remarkably, the guardians and attorneys also have pending fee petitions for more than \$250,000 they claim to have incurred for the Ward’s benefit from May 2014 until the Ward’s death. In fact, just today, the Guardian and his attorneys filed petitions for thousands more in fees and costs, including those incurred defending the instant tort claims in Federal Court.

Indeed, this case has remarkable similarity to *Batzle v. Baraso*, 776 So. 2d 1107, 1109 (Fla. 4th DCA 2001), wherein the guardianship extended for six months after the death of the ward. In that case, the court commented that the lengthy extension of the guardianship was “...outrageous and repugnant to the Florida Probate Code.” *Id.* Yet, in the present case, the guardianship persists, and the guardianship, against the interest of the Ward, now seeks to prolong the guardianship even further with an improper declaratory judgment action. Left to the circuit court, the guardianship

⁶ *Sini v. Citibank*, N.A. 990 F. Supp. 2d 1370, 1376 (S.D. Fla. 2014) (citing and quoting *Brown v. Blue Corss and Blue Shield of Fla. Inc.*, 2011 WL 11532078, at *8(S.D. Fa. Aug. 8, 2011).

⁷ In all guardianship proceedings, costs may be awarded. When the costs are to be paid out of the property of the ward, the court may direct from what part of the property the costs shall be paid. Fla. Stat. § 744.105. Likewise, Fla. Stat. 744.108(1) provides: “(1) A guardian, or an attorney who has rendered services to the ward or to the guardian on the ward’s behalf, is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward.”

will continue to its natural end – the complete exhaustion of the Ward’s estate. Abstention from jurisdiction in this case will only further prolong the guardianship, and thus expand the endless draining of the Ward’s estate by the Defendants.

The parties and the issues in the proceedings are not substantially similar. “If there is any substantial doubt about whether two cases are parallel the court should not abstain.” *See Huon v. Johnson & Bell, Ltd.*, 657 F.3d 641, 646 (7th Cir. 2011) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) *Moses H. Cone*, 460 U.S. at 28, 103 S.Ct. 927). “The decision to invoke *Colorado River* necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the case.” *Moses H. Cone* 460 U.S. 1, 28, 103 S.Ct. 927, 943, 74 L.Ed.2d 765. Accordingly, the guardianship proceeding does not constitute a parallel case within the meaning of the *Colorado River* doctrine, and this Court must exercise its jurisdiction.

B. Application of the Colorado River Doctrine

If, however, this Court chooses to apply the analysis under the *Colorado River* doctrine framework, the analysis favors the exercise of jurisdiction. The *Colorado River* doctrine considers six factors that must be weighed in analyzing the permissibility of abstention: (1) whether one of the courts has assumed jurisdiction over property, (2) the inconvenience of the federal forum, (3) the potential for piecemeal litigation, (4) the order in which the fora obtained jurisdiction, (5) whether state or federal law will be applied, and (6) the adequacy of the state court to protect the parties' rights. *Am. Bankers Ins. Co. of Fla. v. First State Ins. Co.*, 891 F.2d 882, 884 (11th Cir.1990). In *Moses H. Cone*, 460 U.S. at 17 n. 20, 103 S.Ct. at 937, the Supreme Court assessed two additional factors: the vexatious and reactive nature of the second lawsuit and forum shopping. It is also important to note that the *Colorado River* abstention

inquiry must be “heavily weighted in favor of the exercise of jurisdiction,” *Ambrosia Coal & Const. Co.*, 368 F.3d 1320, 1332.

i. Jurisdiction over Property

Neither proceeding at issue in this case constitutes a proceeding in rem. Thus, the first *Colorado River* factor does not favor abstention. *Id.*

ii. The Relative Inconvenience of the Fora

The fora are within one-half mile of one another. (DE 20 Defendants’ Motion to Dismiss or Stay). Thus, there is no hardship for the parties to try this case in federal court. Accordingly, this factor does not weigh in favor of abstention.

iii. Avoidance of Piecemeal Litigation

This factor “does not favor abstention unless the circumstances enveloping those cases will likely lead to piecemeal litigation that is abnormally excessive or deleterious.” *Jackson-Platts v. Gen. Elec. Capital Corp.*, 727 F.3d 1127, 1142 (11th Cir. 2013). This is because if the mere threat of piecemeal litigation warranted abstention, “defendants could always escape federal courts simply by filing parallel state lawsuits.” *Ambrosia Coal and Constr. Co.*, 368 F.3d at 1333. Indeed, the Defendants here have attempted to do this by filing the Declaratory Judgment Proceeding in an effort to have a basis upon which to argue “piecemeal litigation” will exist.

Defendants contend that the size of the guardianship proceeding and the docket entries justify the maintenance of the action in the guardianship court. (DE 20). Additionally, the Defendants argue that the probate and guardianship court is “intimately familiar with... the actions taken by the guardians... [and] the attorneys....” *Id.* The undue familiarity of that court with the guardians and the guardians’ attorneys, however, should not weigh in favor of abstention, but strongly against it.

The Defendants fail to discuss what issues they contend will be litigated multiple times implicating res judicata. The only issue the Defendants cite as being duplicative is the management of a certain property in the Ward's Estate. *Id.* Nevertheless, the issues of negligence, malpractice, and breach of fiduciary duty have not been litigated. The guardianship court has made no ruling on these issues, and any such ruling by the guardianship court on these issues would be improper in that forum. Indeed, the Estate has moved to the stay the guardianship proceedings for that very fact.

Further, even if some of the issues in the Federal Action were impacted by res judicata, it does not warrant abstention. The *Colorado River* doctrine requires that the threat of piecemeal litigation be "abnormally excessive," and the Defendants have not put forth any argument as to why the present case represents a threat to lead abnormal piecemeal litigation within parallel proceedings. Accordingly, this factor does not weigh in favor of abstention.

iv. The Order in Which Jurisdiction was Obtained and the Relative Progress of the Two Actions

Courts in applying the *Colorado River* doctrine have held that the order in which the different fora obtained jurisdiction, is "not measured by which complaint was filed first, but rather by how much progress has been made in the two actions." *Moses H. Cone*, 460 U.S. 1, 21–22, 103 S.Ct. 927, 74 L.Ed.2d 765. However, this factor does not address a situation, like the present case, where the two actions are completely different. The simple fact that the guardianship in whole pre-dated the filing of the Federal Lawsuit does not mean that any progress has been made as to the causes of action raised by the Estate in this Court. In fact, this factor, itself, clarifies the dissimilar nature of the guardianship and the Federal Lawsuit. In the guardianship, there is no proceeding, which has been instituted for damages against the guardians and their counsel for negligence, malpractice, and breaches of fiduciary duties of the Defendants. The only proceeding

stating any of those causes of action in the guardianship case is the Declaratory Judgment Proceeding, which was filed by the Defendants *after* the Federal Lawsuit. Moreover, any issues relating to breaches of fiduciary duty that may arise in the guardianship proceeding cannot be made against the defendant attorneys in the guardianship proceeding and they have not been made against the guardians to obtain an award of damages.

Even if the Court were to accept the Defendants' argument that any action taken in the guardianship dates back to the inception of the guardianship itself, this factor still does not weigh in favor of abstention because no progress has been made in the guardianship court as to the causes of action pled in the instant action in this Court. There have not been depositions of any of the Defendants regarding any of the issues in the Federal Lawsuit, nor has discovery been propounded relating to the elements of the causes of action in the Federal Lawsuit. Mediation has not occurred. Trial has not been set. In fact, none of the claims asserted in the present action in this Court must even be commenced until three years after the resolution or the discharge of the guardianship.⁸ No advancement of the present case has taken place in the guardianship proceedings, and thus this factor does not weigh in favor of abstention.

v. Whether Federal Law Provides the Rule of Decision

This factor only favors abstention if the case involves "complex questions of state law." *Ambrosia Coal and Constr. Co.*, 368 F.3d at 1334; *Noonan South, Inc. v. County of Volusia*, 841 F.2d 380, 382 (11th Cir.1988) (abstention not appropriate where case involves simple tort and contract principles).

⁸ Fla. Stat. § 744.531 provides: "The discharge [of the guardianship] shall operate as a release from the duties of the guardianship and as a bar to any action against the guardian or the guardian's surety *unless the action is commenced within 3 years after the date of the order.* (emphasis supplied).

The instant case does not involve complex questions of state law. The mere presence of state law claims does not weigh in favor of abstention, and lack of a federal substantive issue does not favor dismissal. *American Bankers Insurance Company of Florida v. First State Ins. Co.*, 891 F.2d 882, 886 (11th Cir. 1990). It is only in “rare circumstances” that the presence of a state-law issue may weigh in favor of surrender of jurisdiction. *Moses H. Cone*, 460 U.S. 1, 26, 103 S. Ct. 927, 942. The Defendants do not cite any authority for their assertion that a claim of breach of fiduciary duty is particularly novel, complex, or unsettled. Accordingly, this factor does not weigh in favor of abstention.

vi. Whether the State Court Will Adequately Protect the Rights of All Parties

The sixth factor, the adequacy of the fora to protect the parties' rights, only “weighs in favor of abstention when one of the fora is inadequate.” *Ambrosia Coal and Constr. Co.*, 368 F.3d at 1334. The Defendants have not shown that this Court would inadequately protect the Defendants' rights, and thus, this factor does not favor abstention.

The Estate's rights, on the other hand, are clearly threatened by proceeding in the guardianship court. Most importantly, it would be unable to file any claims against the Defendant attorneys, let alone the New York Defendants. It would also not be able to seek damages for negligence against the Defendants. Moreover, there are questions surrounding conflicts of interest within the very Probate and Guardianship Division in which the guardianship presently resides. Thus, this factor heavily weighs against abstention.

vii. Forum Shopping

The Estate has not filed causes of action against the Defendants in any other forum. This case satisfies the requirements of diversity jurisdiction, and the Defendants have not articulated

any basis to support the contention that the filing of this lawsuit constitutes forum shopping. Accordingly, this factor weighs against abstention.

viii. Vexatious or Reactive Nature of the Second Suit

The Federal Lawsuit is not vexatious or reactive to the guardianship proceeding. In reality, the present action is the first lawsuit that was filed, and the issues raised in the Federal Lawsuit are separate and apart from the issues raised in the guardianship. In fact, the only vexatious and reactive action is the Declaratory Judgment Proceeding filed by the Defendants after they were served with the Complaint in this Court. Accordingly, this factor weighs against abstention.

IV. Conclusion

The present action does not represent parallel proceedings within the meaning of the *Colorado River* doctrine. The Estate is proceeding in this Court with common law claims against the Defendants which are dissimilar from the guardianship and are not appropriate for consideration by the guardianship court. Accordingly, consideration of the *Colorado River* factors is not appropriate.

Even if the *Colorado River* doctrine is applied to this case, abstention is not warranted. The abstention inquiry under the *Colorado River* doctrine must be heavily weighted in favor of the exercise of jurisdiction, and consideration of the factors does not weigh heavily in favor of abstention. Accordingly, this Court must exercise jurisdiction.

The Defendants also move to stay the present action, but they fail to identify any rationale supporting the staying of this action. If this Court were to stay the present action, it would be tantamount to allowing the Defendants to forum shop through their subsequently filed Declaratory Judgment Proceeding with a judge that has already provided glowing support for their purported honesty and integrity, so that they can continue to brazenly bill the Estate, clearly against the

interest of the deceased Ward. The Defendants' maneuvering should not be rewarded, and this action should proceed accordingly.

WHEREFORE based upon the above, JULIAN BIVINS, as ancillary Personal Representative of the Estate of Oliver Wilson Bivins in Palm Beach County, Florida, respectfully requests this Court deny the Defendants' Motion to Dismiss and deny the Defendants' Motion to Stay for the reasons stated therein, and any other relief this Court deems just and proper.

Dated: February 5, 2016.

Respectfully submitted,

THE BLEAKLEY BAVOL LAW FIRM

/s/ J. Ronald Denman

J. Ronald Denman, Esquire

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2016, the foregoing document was served on all counsel of record identified on the attached Service List via CM/ECF.

/s/ J. Ronald Denman

J. Ronald Denman, Esq.

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM
BEACH COUNTY, FLORIDA

IN RE: GUARDIANSHIP OF: GUARDIANSHIP DIVISION

OLIVER BIVINS, FILE NO: 502011GA000006XXXXSB

Incapacitated.

_____ /

Beys Liston Mobargha & Berland, LLP,

Petitioner,

v.

JULIAN BIVINS, purported ancillary personal
representative of the Estate of Oliver Bivins, Sr. by and through
his purported appointment as Temporary Administrator
of the Estate of Oliver Bivins,

Respondent.

_____ /

ADVERSARY PROCEEDING FOR DECLARATORY JUDGMENT

Beys Liston Mobargha & Berland, LLP (“the Beys Firm”), moves this Court to enter a declaratory judgment finding that neither, Curtis Rogers, as former Guardian of Oliver Bivins, Sr. (“Former Guardian”), Stephen M. Kelly, as Guardian of Oliver Bivins, Sr. (“Guardian”) (collectively “The Guardians”), Keith B. Stein, as counsel for The Guardian and/or former Guardian (“Stein”), nor the Beys Firm breached any fiduciary duty to the Ward, Oliver Bivins, Sr. and in support states as follows:

1. The Ward, Oliver Bivins, is the subject of the above captioned guardianship. The Circuit Civil Court, in and for Palm Beach County, Florida, has, and currently retains, jurisdiction, of the person and property of this guardianship. As it relates to the guardianship of the person, The Ward, died on or about March 2, 2015.

EXHIBIT "1"

2. Julian Bivins (“Julian”) has alleged that he is duly serving as the Temporary Administrator for the Estate of the Ward in Texas and as such purportedly had himself appointed as the ancillary Personal Representative in Florida. Julian Bivins, is a court appointed fiduciary of the Estate of Oliver Bivins which is pending before this Court, Julian Bivins, in his capacity as Temporary Administrator, has consented to, and has appeared in all capacities in the above captioned proceeding. Therefore, personal and subject matter jurisdiction is proper in Palm Beach County, Florida and Julian Bivins, in all capacities, is subject to the jurisdiction of this Court.

3. The Former Guardian is a resident of Palm Beach County, Florida and does business in Palm Beach County, Florida.

4. The Guardian is a resident of Palm Beach County, Florida and does business in Palm Beach County, Florida.

5. Stein is a New York resident.

6. The Beys Firm is a limited liability partnership organized under the law of New York that performed services in New York for the Guardian and/or former Guardian and the Word in New York.

7. Venue is proper in Palm Beach County, Florida as the Guardianship and Ancillary Estate are both pending before this Court.

8. The Former Guardian became aware that Julian had improperly transfers or assisted the Ward in transferring substantial assets from the Ward to Julian at a time when Julian was either acting as a fiduciary, by and through a power of attorney, or when the Ward was incapacitated or Julian was exercising undue influence over the Ward in order to effectuate a transfer of wealth from the Ward to Julian. The Former Guardian sought this Court’s approval to file a lawsuit

against Julian. When Julian received notice of the Former Guardians intention to sue him, Julian “beat him to the punch” and sued him for various torts, including breach of fiduciary duty.

9. The lawsuit resulted in a Court-approved Comprehensive Settlement Agreement, whereby a release was given to the Former Guardian, and his agents, by Julian. The Former Guardian was represented in Florida as it related to the described lawsuit, by O’Connell, Crispin and Ciklin Lubitz & O’Connell. See “A,” attached to the Adversary Proceeding for Declaratory Judgment filed herein by Curtis Rogers and others (hereinafter, “the Rogers Adversary Proceeding.”

10. Later, litigation ensued between the Former Guardian, and Oliver Bivins, Jr, the Ward’s other son, over the assets of the Estate of Lorna Bivins, the “divorced”¹ spouse of the Ward, mother of Oliver Bivins, Jr. and step-mother to the Respondent. The Former Guardian was represented as it related to the described lawsuit, and a related New York partition action, by O’Connell, Crispin, (as it related to Florida) Stein and the Beys Firm (as it related to New York) and Ciklin Lubitz & O’Connell (as it related to Florida).

11. That litigation was also settled in a Court-approved Settlement Agreement. Julian objected to the approval of the Settlement Agreement, however, lost and failed to timely appeal. Julian later, as described below, assented to the agreement and order by moving to enforce it. See Exhibit “B,” attached to the Rogers Adversary Proceeding.

12. Litigation then ensued again between the Guardian and Julian over the sale of real property, 808 Lexington Ave., New York, New York, garnered by the Former Guardian in the Settlement Agreement described in paragraph 11 above.

13. That litigation was also settled in a Court –approved Settlement Agreement. As part of

¹ The Divorce was the issue that was contested by the Former Guardian. The Divorce was procured by Julian as part of his scheme to divest the Ward and Lorna Bivins of their assets.

that Settlement Agreement, a release was given to the Guardian by Julian. The Former Guardian was represented in New York as it related to the described lawsuit, by the Beys Firm. See Exhibit "C," attached to the Rogers Adversary Proceeding.

14. Litigation then ensued between the Guardian and Oliver Bivins, Jr. as it related to the management, allocation of expenses, maintenance, encumbrances, among other things, related to, property previously owned by Oliver Bivins, Jr., as the personal representative of the Estate of Lorna Bivins and the Former Guardian/Guardian and then solely by the Former Guardian/Guardian, 808 Lexington Ave., New York, New York. Julian also participated in that lawsuit as an intervenor.

15. Julian, the Guardian and Oliver Bivins, Jr. then settled that lawsuit(s) in a Court-approved Settlement Agreement/ Agreed Order. See attached as Exhibit "D," attached to the Rogers Adversary Proceeding.

16. Despite the above, Julian has alleged that the Beys Firm and its former partner Stein, have acted in manner contrary to the best interests of the Ward, or have failed to uphold their fiduciary duties to the Ward, to the extent they have any. See Exhibit "E," attached to the Rogers Adversary Proceeding (Objections to the Final Accountings filed by both the Former Guardian and the Guardian).

17. At all times material, the Former Guardian, Guardian and their counsel Stein and the Beys Firm were acting in the best interest of the Ward and his guardianship Estate.

18. The Guardians, Stein, and Beys Firm have not breached any duty to the Ward.

19. The Guardians, Stein, and Beys Firm have not caused damages to the Ward or his estate.

20. The Guardians cannot be discharged absent the remedies sought in this Adversary Proceeding.

REQUEST FOR DECLARATORY RELIEF

1. The Petitioner re-alleges each and every allegation in paragraphs 1 through 20 of this Complaint.

2. This is an action brought pursuant to §86.041, Florida Statutes, and seeks a declaration determining a question(s) relating the administration of the Guardianship- Has the Petitioner, Stein, the Guardian and the former Guardian breached their fiduciary duty, if any, to the Ward? In the unlikely case there is a determined breach, to what extent has Julian released the Petitioner or has become barred by the doctrine(s) of laches, estoppel, waiver, satisfaction, set off, offset, payment, res judicata, collateral estoppel, failure to mitigate damages, unclean hands or lack of authority?

3. Given the allegations of the Respondent as described in paragraph 16 above, there is a bona fide, actual, present, practical need for the declaration.

4. The request for declaratory relief relates to a present controversy as to a state of facts.

5. An immunity, power, privilege, or right of the Petitioner is dependent on the facts or the law applicable to the facts.

6. Respondent has an actual, present, adverse, and antagonistic interest in the subject matter of this Adversary Proceeding, either in fact or law.

7. The antagonistic and adverse interests are all before the Court by proper process or representation.

8. The relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

9. Petitioner has retained the services of the undersigned law firm to represent it in this matter and have agreed to pay it reasonable attorney's fees and costs.

WHEREFORE, Petitioner requests this Court enter a declaration, by way of judgment, declaring that the Guardian, the former Guardian, Stein, and Petitioner have acted in the best interest of the Ward and his Estate and have not breached any fiduciary duty to the Ward or in the unlikely case there is a determined breach, finding that Julian has released the Guardian, the former Guardian, Stein, and Petitioner or has become barred by the doctrine(s) of laches, estoppel, waiver, satisfaction, set off, offset, payment, res judicata, collateral estoppel, failure to mitigate damages, unclean hands or lack of authority, and to award Petitioner its their reasonable attorneys' fees and costs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by e-mail service this 22nd day of January, 2016 to J. RONALD DENMAN, ESQ. Registered Agent and Attorney for Julian Bivins, rdenman@bleakleybavol.com chebert@bleakleybavol.com and lsmiler@bleakleybavol.com (15170 North Florida Avenue, Tampa, FL 33613) and by email service to DONNA P. LEVINE, ESQ., Attorney for Oliver Bivins, II, Levine.susaneck.@gmail.com (3003 S. Congress Ave., Suite 1A, Palm Springs, FL 33461); and RONDA D. GLUCK, ESQ., Co-Counsel for Curtis Rogers, attorneys@bocaattorney.com (980 N. Federal Highway, Suite 402, Boca Raton, FL 33432), Ashley Crispin, individually and as counsel for Keith Stein, Stein Law, Stephen Kelly, Curtis Rogers, Brian O'Connell, and Ciklin Lubitz & O'Connell.

/s/ _____ Charles L. Pickett, Jr.
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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

IN RE: GUARDIANSHIP OF: GUARDIANSHIP DIVISION
OLIVER BIVINS, FILE NO: 502011GA000006XXXXSB
Incapacitated.
_____ /

**MOTION FOR ORIGINAL TRIAL JUDGE TO RETAIN AND/OR HANDLE
CASE**

STEPHEN M. KELLY, as Guardian of Oliver Bivins, Sr. ("Kelly"), and CURTIS ROGERS, as the Former Guardian of the Person and Property of Oliver Bivins, Sr., ("Rogers"), moves this Court, and the divisional judge, as applicable, and states as follows:

1. On or about January, 2011, the original trial judge, the Honorable Martin H. Colin, was assigned the above referenced case.

2. Since the inception of the case, numerous adversary proceedings have ensued between the various interested persons, including adversary proceedings filed by a disputed interested person against Kelly and Rogers.

3. Many of the adversary proceedings resulted in comprehensive settlement agreements, which were ultimately court-approved, in total or part (by Judge Colin), but not until substantial litigation was concluded determining whether the agreements were in the best interest of the Ward. Over the tenure of this case, four comprehensive agreements have been litigated before the Judge Colin.

4. The appropriateness of these agreements are, again, the subject of litigation that is pending before the Court (Judge Colin). (Docket Entries 1082, 1083 and 1130)

EXHIBIT "2"

In Re: Guardianship of Oliver W. Bivins
File No: 502011GA0000006XXXXSB

5. Furthermore, despite the Ward's death almost one year ago, litigation continues with the currently appointed personal representative of the Ward's probate estate regarding 1) Rogers and Kelly's Final Reports, including allegations of maladministration which Kelly and Rogers vehemently dispute, this includes the re-litigation of the contents of agreements described in paragraph 3 and 4 above (Docket Entries 1082, 1083, and 1130) and 2) administrative expenses of the guardianship, (Docket Entries 871, 888, 917, 890, 921, 1097, 1175, 920, 1096, 1151, 1176, 1019 plus objections filed on 2/3/16 with no docket entries as of this date). Both pending matters described above will require the Court to review the time spent on the completed matters described in paragraph 3 and 4 above

6. In an attempt to conclude the administration of the guardianship, Judge Colin, is at the near conclusion of an approximately three day trial, spanning three (3) months, regarding the payment of a New York attorney ("Mr. Stein") who rendered services to the Guardian in compliance with FSA 744.108 over a two (2) year period.

7. The objections lodged by one interested person to Mr. Stein's various petition(s) for attorneys fees and costs delayed trial of the matter for approximately one year and include allegations of duplication of services with other service providers whose 1) invoices are intertwined with those of Mr. Stein and 2) petitions are finally scheduled to have their attorney fee and cost petitions heard on March 14 and 15. Further, a one hour closing arguments are/were to be scheduled as soon as practical as it related to Mr. Stein.

8. Judge Colin also set for trial, on February 22 and 23, objections lodged by a disputed interested person on objections to both Rogers and Kelly's Final Reports

In Re: Guardianship of Oliver W. Bivins
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pursuant to Florida Probate Rule 5.680. Judge Colin implemented pre-trial procedures given the complicated, and elongated, nature of this guardianship proceeding.

9. The instant case has an approximate total of 1210 docket entries, evidencing the substantial judicial time spent of rendering rulings in this case.

10. Judicial economy refers to efficiency in the operation of the courts and the judicial system. It is the efficient management of litigation so as to minimize duplication of effort. It also avoids wasting the judiciary's time and resources.

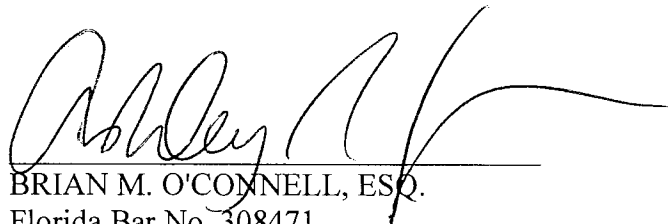
11. If Judge Colin does not retain the case, then the multitude of hearings held for months relating to the attorneys fees and costs petitions will be for naught. The new assigned judge will take time to get up to speed on the entire docket and become familiar with this matter, which spans 5 years of complex, continued and multifaceted litigation.

12. Furthermore, given what has been described above and the fact that Judge Colin has 1) presided over the matter and the items sought to be compensated for by the various service providers, 2) approved, or not, the actions sought to be taken by the guardians and 3) has taken evidence on intertwining petitions for attorneys fees and costs, it would clearly serve judicial economy that the original trial retain the case after his transfer out of the current division.

WHEREFORE, STEPHEN KELLY AND CURTIS ROGERS, in their fiduciary capacity, by and through their undersigned attorney, moves both the original trial judge, the Honorable Martin H. Colin, and the assigned divisional judge, if applicable to retain the instant case upon the original trial judge's transfer out of the instant case's currently assigned division.

In Re: Guardianship of Oliver W. Bivins
File No: 502011GA0000006XXXXSB

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by e-mail service on the 3 day of February, 2016 to J. RONALD DENMAN, ESQ. Attorney for Julian Bivins, J. RONALD DENMAN, ESQ. At rdenman@bleakleybavol.com chebert@bleakleybavol.com and lsmiler@bleakleybavol.com (15170 North Florida Avenue, Tampa, FL 33613); DONNA P. LEVINE, ESQ., Attorney for Oliver Bivins, II, Levine.susaneck.@gmail.com (3003 S. Congress Ave., Suite 1A, Palm Springs, FL 33461); RONDA D. GLUCK, ESQ., Co-Counsel for Curtis Rogers, attorneys@bocaattorney.com (980 N. Federal Highway, Suite 402, Boca Raton, FL 33432).



BRIAN M. O'CONNELL, ESQ.

Florida Bar No. 308471

ASHLEY CRISPIN ACKAL, ESQ.

Florida Bar No. 37495

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81754-9/15774560/RS/smm

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF FLORIDA WEST PALM BEACH DIVISION

JULIAN BIVINS, as Personal
Representative of the ancillary Estate of
Oliver Wilson Bivins,

CASE NO. 9:15-cv-81298-KAM

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS,
JR., as former guardian, STEPHEN M.
KELLY, as successor guardian, BRIAN
M. O'CONNELL, ASHLEY N.
CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN, BEYS
LISTON MOBARGHA & BERLAND,
LLP, and LAW OFFICES OF KEITH
B. STEIN, PLLC n/k/a STEIN LAW,
PLLC,

Defendants.

_____ /

NOTICE OF APPEARANCE

PLEASE take notice that Rachel Studley of the law firm of WICKER SMITH O'HARA MCCOY & FORD, P.A., enters an appearance in the above styled case on behalf of, BRIAN M. O'CONNELL, ASHLEY N. CRISPIN, and CIKLIN LUBITZ & O'CONNELL.

WE HEREBY CERTIFY that a copy hereof has been electronically served via

CASE NO. 9:15-cv-81298-KAM

Florida ePortal to: J. Ronald Denman, Esquire, rdenman@bleakleybavol.com; on April 14, 2016.

/s/ Rachel Studley

Rachel Studley, Esquire

Florida Bar No. 0578088

WICKER SMITH O'HARA MCCOY & FORD, P.A.

Attorneys for BRIAN M. O'CONNELL, ASHLEY

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JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
ASHLEY CRISPIN ACKAL, ESQUIRE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO.: 15-81298-CV-MARRA-MATTHEWMAN

JULIAN BIVINS, as Personal
Representative of the ancillary
Estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR.,
et al.,

Defendants.

DEPOSITION OF: ASHLEY CRISPIN ACKAL, ESQUIRE
DATE: MONDAY, JANUARY 9TH, 2017
TIME: 9:05 A.M. - 1:50 P.M.
TAKEN BY: PLAINTIFF
LOCATION: CLEARLAKE EXECUTIVE SUITES
500 SOUTH AUSTRALIAN AVENUE
SIXTH FLOOR
WEST PALM BEACH, FLORIDA 33401

STENOGRAPHICALLY
REPORTED BY: MARK RABINOWITZ, RPR

JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
ASHLEY CRISPIN ACKAL, ESQUIRE

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1 A P P E A R A N C E S

2

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17

18 WENDY J. STEIN, ESQUIRE (via telephonically)
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21 Appearing on behalf of Curtis Cahalloner Rogers, Jr.

22

23 Also Present: Brian M. O'Connell, Esquire

24

25

1 P R O C E E D I N G S

2 THE REPORTER: Raise your right hand, please.

3 Do you solemnly swear to speak the truth, the

4 whole truth and nothing but the truth, so help you God?

5 THE WITNESS: Yes, I do.

6 ASHLEY CRISPIN ACKAL, ESQUIRE

7 having first been duly sworn, was examined and

8 testified as follows:

9 DIRECT EXAMINATION

10 BY MR. DENMAN:

11 Q. Would you state your full name.

12 A. Ashley Crispin Ackal.

13 Q. Where are you employed?

14 A. Ciklin Lubitz & O'Connell.

15 Q. How long have you been there?

16 A. Over ten years.

17 Q. When did you graduate law school?

18 A. 2006.

19 Q. Are you an associate or a partner there?

20 A. I am an associate with the firm.

21 Q. Are there different tiers -- associate,

22 juniors, seniors?

23 A. No.

24 Q. Do any associates report to you?

25 A. Yes.

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Page 5

1 I N D E X

2

3

4 TESTIMONY OF ASHLEY CRISPIN ACKAL, ESQUIRE PAGE

5 DIRECT EXAMINATION BY MR. DENMAN 4

6 CROSS-EXAMINATION BY MS. SCHULTZ 169

7 REDIRECT EXAMINATION BY MR. DENMAN 178

8 CERTIFICATE OF OATH 182

9 REPORTER'S CERTIFICATE 183

10 ERRATA SHEET 184

11 READ LETTER 185

12

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14

15 EXHIBIT INDEX

16

17 DEFENDANTS' DESCRIPTION PAGE

18 Exhibit 1 6/16/14 Agreement 171

19

20

21

22 S T I P U L A T I O N S

23 It is hereby stipulated and agreed

24 by and between the counsel for the respective parties

25 and the deponent that the reading and signing of the

deposition transcript was reserved.

1 Q. Who?

2 A. Currently?

3 Q. Yes.

4 A. Three.

5 Q. Who are they?

6 A. Joielle Foglietta, Zachary Rothman and Clara

7 Crabtree Ciadella.

8 Q. Do they all primarily do probate guardianship

9 work with you?

10 A. Yes.

11 Q. Who do you report to? Who is your direct

12 supervisor?

13 A. Brian O'Connell.

14 Q. Has he been your supervisor since you've been

15 working with the firm?

16 A. Yes.

17 Q. And what is your area of specialty?

18 A. Litigation, primarily guardianship, estate and

19 trust, but we also handle commercial litigation.

20 Q. What percentage of your work is commercial as

21 opposed to guardianship, estate and trust?

22 A. Five percent.

23 Q. And the rest?

24 (Phone interruption).

25 A. I'm sorry, Ron. My kids just started back to



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1 school and one of them is sick.
 2 **Q. Go ahead.**
 3 A. So I'm just checking.
 4 Okay. Sorry.
 5 **Q. The other 95 percent is guardianship, estate**
 6 **and trust?**
 7 A. Yes, sir.
 8 **Q. And of the guardianship, estate and trust, do**
 9 **you weigh more heavily in guardianship, in estate over**
 10 **trust, or one over the other, or is it pretty much equal**
 11 **across the board?**
 12 A. I think it varies by year, but I would have to
 13 say equal over the ten years, but some years it's more
 14 heavily weighed in one particular area than in others.
 15 **Q. Is Steve Kelly currently a client of yours?**
 16 A. Yes.
 17 **Q. When I say "yours," you understand that to**
 18 **mean of the firm --**
 19 A. Yes.
 20 **Q. -- Ciklin Lubitz O'Connell?**
 21 A. Yes, anything of mine would be of the firm.
 22 **Q. And you worked on matters involving Oliver**
 23 **Bivins, Sr., as a ward of the State of Florida from 2011**
 24 **through current; is that correct?**
 25 A. Yes, I did. I don't know about the ward of

1 2011.
 2 **Q. And then Steve Kelly was removed as the**
 3 **emergency temporary guardian and substituted with Curtis**
 4 **Rogers at some point in 2011, right?**
 5 A. He was not removed. He was succeeded by
 6 Mr. Rogers.
 7 **Q. And once at the point that he was succeeded by**
 8 **Mr. Rogers, did your work cease at that specific point**
 9 **in connection with anything done for Oliver Bivins, Sr.?**
 10 A. We continued to represent Steve Kelly as the
 11 emergency temporary guardian through what would be his
 12 discharge process and the turnover process.
 13 **Q. From the time that Rogers came in as the**
 14 **successor guardian back in 2011 through the time that**
 15 **Kelly came in to succeed Rogers in 2014, did you do any**
 16 **work for Stephen Kelly in connection with Oliver Bivins,**
 17 **Sr.?**
 18 A. I believe so because Steve Kelly was not
 19 discharged as the emergency temporary guardian, so my
 20 representation, I believe, continued. I don't know what
 21 acts I was actually performing and at what particular
 22 time.
 23 **Q. If you performed any services for Steve Kelly**
 24 **as an emergency temporary guardian for Oliver, Sr., from**
 25 **the time that Rogers took over as successor guardian**

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1 the State of Florida, but, yes, we've worked on all
 2 Oliver Bivins, Sr., matters from 2011 to current.
 3 **Q. And just to clarify: For all intent and**
 4 **purposes, you have never been retained by Oliver, Sr.,**
 5 **outside of being a ward; is that correct?**
 6 A. I have never been retained by Oliver Bivins,
 7 Sr., at any time in any capacity.
 8 **Q. At all times that you've worked on any matters**
 9 **pertaining to Oliver Bivins, Sr., he has always been**
 10 **either a ward or deceased; is that correct?**
 11 A. I'm thinking.
 12 He has been a ward, technically. I believe he
 13 was an alleged incapacitated person and not under a
 14 plenary guardian or a limited guardian because I
 15 represented Stephen Kelly as an emergency temporary
 16 guardian. So I don't believe there was an adjudication.
 17 So, I mean, I don't want to be technical, but
 18 I think there was a point where he wasn't actually under
 19 a formal guardianship. It was under an emergency
 20 temporary guardianship.
 21 **Q. And when was that?**
 22 A. In 2011.
 23 **Q. What part of 2011?**
 24 A. I believe my representation of Steve Kelly
 25 began in the first quarter or the second quarter of

1 **through the time that Kelly then took over as successor**
 2 **guardian for Rogers, that would have been something that**
 3 **you billed; is that right?**
 4 A. Oh, most likely.
 5 **Q. And was there a separate matter number that**
 6 **you billed that to for Steve Kelly as the ETG?**
 7 A. I believe so. I want to say, yes, we did,
 8 although, you know, we did have multiple matters going
 9 on at one time. So I don't want to say that each
 10 particular time entry, although billable and
 11 compensable, was, you know, properly billed to the
 12 matter number that we had hoped.
 13 **Q. What I'm trying to understand here, just to**
 14 **make it clear, is: Until Steve Kelly became the**
 15 **successor guardian for Rogers, at best he was ETG?**
 16 MS. STUDLEY: Form.
 17 A. I'm trying to -- until he was discharged he
 18 was ETG, and he wasn't discharged before Curtis Rogers
 19 came on or after Curtis Rogers resigned.
 20 **Q. That sort of answers my question.**
 21 **But until Steve Kelly came on as successor**
 22 **guardian for Curtis Rogers, he was not more than ETG, at**
 23 **best, for Oliver Bivins, Sr.; is that right?**
 24 MS. STUDLEY: Form.
 25 MS. STEIN: Form.

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1 A. I don't know what you're asking me. I know he
 2 was an ETG. You're asking me if he held any other
 3 capacity that I'm aware of?
 4 Q. Yes.
 5 Did he have any -- did Steve Kelly have any
 6 other capacity besides being appointed ETG in early 2011
 7 through the time that he was officially designated as
 8 the successor guardian for Rogers?
 9 A. I don't believe so.
 10 Q. From the time Rogers came on as successor to
 11 Kelly as the ETG, if you worked for Steve Kelly as the
 12 ETG, that's something that you would have billed to
 13 Steve Kelly's ETG, or would you have put that time under
 14 any of the open matters under Curtis Rogers as the
 15 guardian?
 16 A. I don't know.
 17 Q. Okay. Have you ever filed a petition to the
 18 guardianship court for any services that were performed
 19 for Steve Kelly after Curtis Rogers came on, but before
 20 Steve Kelly became the successor guardian to Curtis
 21 Rogers?
 22 A. I don't know, but possibly.
 23 Q. And when you represented Steve Kelly as the
 24 ETG, he was also the ETG for the Estate of -- excuse me,
 25 for Lorna Bivins, correct?

1 **Lorna Bivins after Curtis Rogers became appointed?**
 2 A. I'm trying to understand your question.
 3 Did I meaning the law firm --
 4 Q. Yes.
 5 A. -- ever file a withdrawal?
 6 Q. I didn't say "file a withdrawal."
 7 Did you ever withdraw or resign from
 8 representing Steve Kelly in any capacity after Curtis
 9 Rogers became the guardian? When I say "withdraw,"
 10 withdraw from Lorna's representation.
 11 A. I don't believe -- I don't know the answer to
 12 that.
 13 Q. But prior to Curtis Rogers coming on as
 14 guardian, you were representing Steve Kelly in his
 15 capacity as ETG for Oliver, Sr., as well as ETG for
 16 Lorna Bivins, correct?
 17 MS. STUDLEY: Form.
 18 A. It's possible.
 19 Q. Because you were billing Lorna Bivins as
 20 attorneys for the ETG, correct?
 21 A. I don't remember it, but it's possible.
 22 Q. I mean, your firm got paid for services
 23 performed for Stephen Kelly as the ETG for Lorna,
 24 correct?
 25 A. Again, I don't remember it, but it's possible.

1 A. I can't tell you when Steve was discharged for
 2 Lorna Bivins.
 3 Q. Do you even know if he was discharged?
 4 MS. STUDLEY: Form.
 5 A. At this time, sitting here, no, I don't.
 6 Q. So going back to the time that you were
 7 representing Steve Kelly as the ETG before Rogers came
 8 on, Steve Kelly was also the ETG for Lorna Bivins,
 9 correct?
 10 A. Yes, there was a time when he was the ETG for
 11 Lorna Bivins.
 12 Q. And then at some point in time Donna Levine,
 13 the attorney for Oliver Bivins, Jr., objected to Kelly
 14 being the ETG for both Lorna and Oliver, Sr., correct?
 15 A. I don't remember.
 16 Q. And in May of 2011 Curtis Rogers took over as
 17 the successor guardian for Oliver, Sr., correct?
 18 A. I believe that's true.
 19 Q. Okay. And at that point in time there was no
 20 petition to seek a discharge of Kelly filed as the ETG
 21 for Oliver, Sr., correct?
 22 A. I don't believe so, no.
 23 Q. If the -- well, let me strike that.
 24 Did you ever resign from or withdraw in any
 25 capacity from representing Steve Kelly as the ETG for

1 Q. At any point in time do you remember ever
 2 filing any type of resignation or withdrawal removing
 3 your firm from representing Steve Kelly as the ETG for
 4 Lorna Bivins?
 5 MS. STUDLEY: Form. Asked and answered.
 6 A. Again, I don't -- I don't even know what that
 7 means, to file a resignation or something like that.
 8 Q. Did you ever take any affirmative act to let
 9 Steve Kelly know that Ciklin Lubitz was no longer
 10 representing him as the ETG for Lorna Bivins?
 11 MS. STUDLEY: Form.
 12 A. To the extent that we did represent him in
 13 that capacity, I don't recall that.
 14 Q. You would have some type of documentation of
 15 that if you did, correct?
 16 MS. STUDLEY: Form. Asked and answered.
 17 A. Again, I don't know exactly what that means.
 18 And I don't know if we even and at what point we were
 19 representing Steve Kelly with respect to the
 20 guardianship of Lorna Bivins.
 21 Q. If you were -- if your firm was representing
 22 Steve Kelly as the ETG for Lorna Bivins, you would agree
 23 with me that your firm would have to do something, some
 24 affirmative act, to stop representing Steve Kelly as the
 25 ETG for Lorna Bivins, correct?



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ASHLEY CRISPIN ACKAL, ESQUIRE

1 MS. STUDLEY: Form.
 2 A. I don't know.
 3 **Q. You don't know whether it just ends for doing**
 4 **nothing, or whether you need to take an affirmative act,**
 5 **to end your representation of the firm; is that right?**
 6 MS. STUDLEY: This was asked and answered
 7 several times. Object to form.
 8 MR. DENMAN: Tell her not to answer. It's up
 9 to you.
 10 MS. STUDLEY: Well, you can't keep asking the
 11 same question over and over and over again. So I'll let
 12 her answer it one more time, and then we can move on,
 13 please.
 14 THE WITNESS: I don't know.
 15 BY MR. DENMAN:
 16 **Q. When you were representing -- Well, let me**
 17 **strike that.**
 18 **At some point after Curtis Rogers was**
 19 **appointed as the successor guardian, your firm was**
 20 **retained to assist in litigation for Curtis Rogers,**
 21 **correct?**
 22 A. Yes.
 23 **Q. Okay. Who hired your firm?**
 24 A. Mr. Rogers hired our firm.
 25 **Q. Who is your client?**

1 There were many matters that we handled for
 2 Mr. Rogers with respect to Oliver Bivins. I believe
 3 there may a signed rep agreement for the services for
 4 some of the litigation services, but I can't say for
 5 sure.
 6 **Q. Your firm --**
 7 A. Actually, I'm sorry. I'm pretty sure that
 8 there was a petition that was filed in the guardianship
 9 court for a hybrid contingency fee with respect to the
 10 filing of a petition to determine beneficiaries and
 11 possibly other services that was approved by the Court.
 12 And I believe that representation agreement was Court
 13 approved. So I know of that one.
 14 **Q. Okay. Move to strike.**
 15 **My question to you is: Was there a signed**
 16 **retainer agreement between you and Curtis Rogers once he**
 17 **became successor guardian?**
 18 MS. STUDLEY: Form. Asked and answered.
 19 A. That would be my answer.
 20 **Q. So, then, you don't know if there's an actual**
 21 **signed retainer agreement between your firm and Curtis**
 22 **Rogers; is that right?**
 23 MS. STUDLEY: Form. Argumentative.
 24 A. That would be one that I was just explaining
 25 to you. That would be a representation agreement. That

1 A. In that regard?
 2 **Q. Yes.**
 3 A. With respect to any -- when Curtis Rogers was
 4 guardian of the personal property for Oliver Bivins,
 5 Sr., my client was Mr. Rogers.
 6 **Q. Was Oliver, Sr., your client?**
 7 A. No.
 8 **Q. Okay. Were you performing any services for**
 9 **Oliver, Sr.?**
 10 MS. STUDLEY: Form.
 11 A. I don't believe so.
 12 **Q. Do you believe that you owed any fiduciary**
 13 **duty to Oliver, Sr., while -- during the point in time**
 14 **that Rogers hired your firm while he was successor**
 15 **guardian for Steve Kelly as ETG?**
 16 MS. STUDLEY: Object to form.
 17 A. It's possible, yes.
 18 **Q. You would agree that -- let me strike that.**
 19 **Did Rogers sign a retainer agreement with your**
 20 **firm?**
 21 A. We had various matters that we handled for
 22 him.
 23 **Q. Right now I'm only referring with respect to**
 24 **Oliver, Sr.**
 25 A. I know.

1 would be between myself and Curtis Rogers, or the firm
 2 and Curtis Rogers.
 3 **Q. Maybe it wasn't clear, and I'll try to be**
 4 **clearer.**
 5 A. Okay.
 6 **Q. At least I thought my question was: Is there**
 7 **an agreement that Curtis Rogers signed, a retainer**
 8 **agreement that Curtis Rogers signed, with your firm?**
 9 A. I think so, yes.
 10 **Q. Okay. Do you know if there's more than one?**
 11 A. I don't know that.
 12 **Q. Did you ever review that signed retainer**
 13 **agreement that you think was signed by Curtis Rogers?**
 14 A. I think so.
 15 **Q. Was it your understanding that when your firm**
 16 **entered into a retainer agreement with Curtis Rogers as**
 17 **the successor guardian for Oliver, Sr., that your firm**
 18 **was to provide services for the best interests of**
 19 **Oliver, Sr.?**
 20 MS. STUDLEY: Form. Predicate.
 21 A. I don't have a fee agreement with Oliver
 22 Bivins, Sr. I only have -- anything that I have -- I'm
 23 sorry if I just didn't listen clear enough. I only have
 24 a fee agreement with Curtis Rogers.
 25 **Q. And if I misstated it, I'm sorry. I thought**



JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
ASHLEY CRISPIN ACKAL, ESQUIRE

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1 that I was --

2 A. I think you did.

3 **Q. When you had -- when your firm entered into**
4 **the fee agreement with Curtis Rogers as the successor**
5 **guardian for Oliver Bivins, Sr., you understood that**
6 **that agreement -- that you were acting in the best**
7 **interests of Oliver, Sr., under that agreement; is that**
8 **right?**

9 MS. STUDLEY: Form.

10 A. I was acting under Chapter 744.

11 **Q. Which is to provide for Oliver, Sr., correct?**

12 A. It is to follow the mandates of Chapter 744,
13 which is to provide the representation in accordance
14 with the standards of that chapter and, yes, I believe
15 that that was my obligation.

16 **Q. Which enures to the benefit of Oliver, Sr.,**
17 **correct?**

18 MS. STUDLEY: Form.

19 A. Yes, I believe so.

20 **Q. Do you -- did you ever perform services during**
21 **your representation of Curtis Rogers as the successor**
22 **guardian for Oliver, Sr., that were solely for Curtis**
23 **Rogers and not for the best interests of Oliver, Sr.?**

24 MS. STUDLEY: Form.

25 A. I think the problem is sort of overlapping

1 MS. STUDLEY: Form.

2 MS. STEIN: Form.

3 A. I never did that.

4 **Q. That wasn't my question. My question is:**
5 **Could you?**

6 MS. STUDLEY: Form.

7 MS. STEIN: Form.

8 A. I don't believe I would do that.

9 **Q. So you're saying, then -- my question is: Are**
10 **you permitted, as a Florida lawyer, to represent Curtis**
11 **Rogers as a successor guardian for Oliver, Sr., in any**
12 **capacity that would be against the best interests of**
13 **Oliver, Sr.?**

14 MS. STUDLEY: Calls for speculation. Lack of
15 predicate.

16 A. I'm thinking through your question.

17 MS. STUDLEY: And asked and answered.

18 A. I don't know if you're permitted.

19 **Q. You would agree with me that it would be a**
20 **conflict of interest for you to represent Curtis Rogers**
21 **as successor guardian of Oliver, Sr., in any matter that**
22 **would be against the best interests of Oliver Bivins,**
23 **Sr., the ward, correct?**

24 MS. STUDLEY: I'm going to object. Asked and
25 answered. Lack of predicate. Calls for objection.

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1 of those words because of all of the services that I
2 performed were for Curtis Rogers, all of them. The
3 benefit that you talk about to me is sort of separate
4 and different than sort of who is the client and who
5 you're performing services for.

6 **Q. Were all services that you performed for**
7 **Curtis Rogers as successor guardian for Oliver, Sr.,**
8 **services that you sought to be paid by the guardianship**
9 **of Oliver, Sr.?**

10 A. Yes. I believed -- I believe all of the
11 services that we performed for Mr. Rogers would qualify
12 as compensable services under 744.108.

13 **Q. Which means that they had to be for the**
14 **benefit of Oliver, Sr., correct?**

15 MS. STUDLEY: Form.

16 A. They are actually for the benefit of the ward
17 or the guardian under the rule, under 744.108.

18 **Q. And if the services were to benefit the**
19 **guardian and not benefit Oliver, Sr., would that be a**
20 **conflict of interest?**

21 MS. STUDLEY: Form.

22 A. I don't understand the question.

23 **Q. Could you represent Curtis Rogers as the**
24 **successor guardian in matters that would be against the**
25 **best interests of Oliver, Sr.?**

1 MR. DENMAN: I believe the objection is just
2 to form only, please.

3 BY MR. DENMAN:

4 **Q. Go ahead.**

5 A. I'm not sure because there are situations
6 where -- for example, in a removal proceeding, where --
7 I mean, I can give you tons of examples. I'll just give
8 you one right here where, in a removal proceeding, it
9 really matters how somebody is really quantifying or
10 qualifying benefit to the ward or in the best interests
11 of the ward.

12 So there are times when people would say when
13 a guardian defends themselves in a removal action and is
14 successful. Well, that doesn't benefit the ward. That
15 benefitted the guardian, but that is compensable.

16 So I don't know how to answer the question, I
17 guess, is what I'm trying to say.

18 **Q. At all times that you performed services for**
19 **which you sought compensation from Oliver Bivins, Sr.'s**
20 **money, you understood that you had a fiduciary duty to**
21 **Oliver, Sr., correct?**

22 MS. STUDLEY: Form.

23 MS. STEIN: Form.

24 A. There has been some -- I want to say --
25 uncertainty in the law about the fiduciary duty to the



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1 extent that it is the scope of it. And that has been
2 disputed from the time that I started practicing law in
3 this area until currently. So I can't answer
4 affirmatively yes.

5 I can tell you there is law out there that
6 says that there is a fiduciary duty. I'm aware of it,
7 and I operate under it.

8 **Q. So, then, at all times that you sought**
9 **compensation from Oliver, Sr.'s money for your services**
10 **while retained by Curtis Rogers as successor guardian**
11 **for Oliver, Sr., you understood that you had a fiduciary**
12 **duty to Oliver, Sr., correct?**

13 MS. STUDLEY: Form. Asked and answered.

14 MS. STEIN: Form.

15 A. Again, the nature and scope of it could be
16 disputed. But was there a fiduciary duty? At some
17 point I believe there was.

18 **Q. During the course of representation for --**
19 **well, let me back up for a second.**

20 **After Stephen Kelly took over as successor**
21 **guardian for Curtis Rogers, your firm continued to**
22 **represent Stephen Kelly, correct?**

23 A. Yes.

24 **Q. Was there a signed retainer agreement executed**
25 **between Stephen Kelly as successor guardian for Oliver**

1 **Q. So you do administrative and litigation work,**
2 **correct?**

3 A. Yes. Yes, I do.

4 **Q. Prior to Curtis Rogers being appointed as the**
5 **successor guardian -- and just for purposes of the**
6 **deposition so I don't have to drag these questions out,**
7 **whenever I say "successor guardian," you understand I**
8 **mean successor to Stephen Kelly as the ETG for Oliver**
9 **Bivins, Sr., correct?**

10 A. Yes.

11 **Q. Okay. And when I say Steve Kelly was the**
12 **successor guardian for Curtis Rogers, we're talking**
13 **about for Oliver Bivins, Sr., which took place in --**
14 **I think it was in April of 2014; is that right?**

15 A. I don't know the date, but, yes, I understand
16 what you mean.

17 **Q. So from now on I'm going to either refer to**
18 **Steve Kelly as the ETG, which would have been prior to**
19 **Rogers coming on the successor guardian; and then if I**
20 **refer to Steve Kelly as the successor guardian, that**
21 **means after he took over for Rogers.**

22 **Is that fair enough?**

23 A. Fair.

24 **Q. Okay. And if I want to ask you any questions**
25 **about them in any other capacity, I'll try and make it**

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Page 25

1 **Bivins, Sr., and your firm?**

2 A. I don't know.

3 **Q. Did you ever prepare one?**

4 A. I could have. I just don't remember.

5 **Q. Prior to Stephen Kelly retaining your firm as**
6 **the ETG, had you ever worked with Stephen Kelly in the**
7 **past?**

8 A. Yes.

9 **Q. Had Stephen Kelly ever hired your firm in**
10 **other matters?**

11 A. Before 2014 or 2013?

12 **Q. Before 2011 when he first came on as the ETG.**

13 A. The firm?

14 **Q. Yes.**

15 A. I believe so.

16 **Q. Had you ever worked with him, personally,**
17 **representing him as a guardian prior to him being the**
18 **ETG in this matter?**

19 A. I think so.

20 **Q. Had your firm ever -- let me strike that.**

21 **Your firm represents guardians**
22 **administratively and in litigation, correct?**

23 A. Yes.

24 **Q. Do you represent guardians administratively?**

25 A. Yes, I do.

1 **clear that it's not under those definitions that I've**
2 **laid out.**

3 A. Okay.

4 **Q. Had you ever represented Curtis Rogers outside**
5 **of being the successor guardian in your law firm?**

6 A. At any time?

7 **Q. Prior to him being the successor guardian.**

8 MS. STEIN: Form.

9 A. I don't know if I have. I can't speak for
10 Mr. O'Connell or any other member of the firm.

11 **Q. Do you know how Mr. Rogers got to your firm as**
12 **the successor guardian?**

13 MS. STUDLEY: Form.

14 MS. STEIN: Form.

15 **Q. As far as whether he was referred, whether he**
16 **came to you directly, whether he came through other**
17 **attorneys, do you have any idea how he got to your firm?**

18 MS. STUDLEY: Form.

19 A. I don't remember, I really don't.

20 **Q. You know who Ronda Gluck is?**

21 A. Yes.

22 **Q. And you know that Ronda Gluck was representing**
23 **Curtis Rogers as the successor guardian prior to your**
24 **firm being retained by Curtis Rogers as the successor**
25 **guardian, correct?**



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1 A. Yes, I believe she was the initial -- yeah,
 2 the initial counsel for him. Yes.
 3 **Q. Prior to representing Rogers as the successor**
 4 **guardian, had you ever worked with Ronda Gluck on other**
 5 **matters as co-counsel?**
 6 A. Possibly.
 7 **Q. Since Curtis Rogers became the successor**
 8 **guardian, does your firm represent Curtis Rogers in any**
 9 **capacity outside of Oliver, Sr.?**
 10 A. I can't say. I can't say no or yes because
 11 I just don't know where certain matters are in their
 12 conclusion, but there were other matters that I
 13 represented Mr. Rogers in.
 14 **Q. I'm not asking you whether it's presently. I**
 15 **just mean did your firm represent him after he became**
 16 **successor guardian in other matters. And I guess your**
 17 **answer is yes?**
 18 A. Yes.
 19 MS. STUDLEY: Form.
 20 **Q. Do you know in how many different matters?**
 21 A. Two or three.
 22 **Q. Did your firm work as co-counsel with Ronda**
 23 **Gluck on any matters after Curtis Rogers became**
 24 **successor guardian?**
 25 A. Yes.

1 MS. STUDLEY: Form.
 2 A. No, it's not.
 3 **Q. Do you know who is?**
 4 A. There's a lawyer in Lake Worth that he uses.
 5 I can't recall the name right now.
 6 **Q. Has your firm ever represented -- well, let me**
 7 **strike that.**
 8 **Judge Colin's wife is a guardian, correct?**
 9 A. I think so.
 10 **Q. Has your firm ever represented her in any**
 11 **capacity as the guardian?**
 12 A. No.
 13 **Q. Do you know whether anyone in your firm has**
 14 **ever represented her in any capacity as a guardian?**
 15 A. I'm only speaking for myself because that's
 16 all I know. No, I don't believe so, but we have -- so
 17 Mr. O'Connell and myself work together. And then we
 18 have another lawyer in the firm, Ron Crescenzo, who does
 19 not work on our floor in our department.
 20 I can't tell you what he's done. I don't
 21 believe he has, but I just can't speak for him.
 22 **Q. Have you ever worked on any other matters in**
 23 **which Judge Colin's wife as a guardian was working?**
 24 MS. STUDLEY: Form.
 25 A. Me?

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1 **Q. How many?**
 2 A. Maybe five.
 3 **Q. Did any of those involve Curtis Rogers?**
 4 A. Yes.
 5 **Q. How many?**
 6 A. I think one or two.
 7 **Q. After your firm started representing --**
 8 A. I'm sorry. I'm just approximating here. I
 9 just want to make sure.
 10 **Q. After your --**
 11 A. Probably two. Probably two.
 12 **Q. After your firm started representing Stephen**
 13 **Kelly as successor guardian, has your firm represented**
 14 **Stephen Kelly at any other time?**
 15 A. Yes.
 16 **Q. In other guardianship or estate matters?**
 17 A. Yes, or if he served in other capacities,
 18 which he does. He serves as a healthcare surrogate and
 19 things like that.
 20 **Q. Approximately how many times has your firm**
 21 **represented Stephen Kelly?**
 22 A. More than five, but I don't know if it's six
 23 or ten. I don't know, more than five.
 24 **Q. Do you know whether your firm is a primary**
 25 **firm that Stephen Kelly uses for legal services?**

1 **Q. Yes.**
 2 A. No.
 3 **Q. Do you know whether anyone in your firm has?**
 4 A. I don't know of any.
 5 **Q. I mean, do you know if, for example,**
 6 **Mr. O'Connell has worked in any pending guardianship**
 7 **proceedings in which Judge Colin's wife was the**
 8 **guardian?**
 9 MS. STUDLEY: Form.
 10 **Q. So I'm clear: I'm not saying where your firm**
 11 **was actually retained by her as a guardian. I'm saying**
 12 **where your firm -- Mr. O'Connell worked on a matter in**
 13 **which she was a guardian?**
 14 A. I don't know. I don't know.
 15 **Q. Has your firm ever retained Lipa Lieberman in**
 16 **any capacity other than in connection with Oliver**
 17 **Bivins, Sr.?**
 18 A. My firm has never retained him in any fashion.
 19 I believe the guardian in Oliver, Sr.'s guardianship
 20 did.
 21 **Q. Has your firm ever worked with Lipa Lieberman**
 22 **in any capacity other than in connection**
 23 **with Oliver Bivins, Sr.?**
 24 A. I don't know, but I don't think so.
 25 **Q. Lipa Lieberman served as the expert witness in**



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1 connection with your contingency fee petition, correct?
 2 MS. STUDLEY: Form.
 3 A. Yes, he was an expert witness.
 4 Q. How did you find -- how did your firm find
 5 Lipa Lieberman to work as an expert in that matter?
 6 A. I don't exactly recall.
 7 Q. Did your firm or the guardian at the time,
 8 whether it was Rogers or Kelly, enter into a signed
 9 retainer agreement with Lipa Lieberman to serve as an
 10 expert witness on the contingency fee petition?
 11 A. Did my firm? I don't believe so.
 12 Q. Do you know whether Mr. Rogers did?
 13 A. I don't know.
 14 Q. Have you ever signed a retainer agreement
 15 pertaining to Lipa Lieberman with regard to his services
 16 as an expert witness on the contingency fee petition?
 17 MS. STEIN: Form.
 18 A. I don't know.
 19 Q. Did you ever read Lipa Lieberman's deposition
 20 transcript in this case, not in the federal case? When
 21 I say "this case," I mean in the underlying matters.
 22 A. I think we were on the phone for part of his
 23 deposition, I think. I don't remember. I don't
 24 remember attending that one.
 25 So reading the transcript was your question?

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1 Q. Yes.
 2 A. I don't remember it today.
 3 Q. Did you ever participate in any negotiations
 4 with Lipa Lieberman that his expert fee for serving as
 5 an expert in his capacity with the petition for
 6 contingency fees would be compensated in return for
 7 being the exclusive listing agent on 808 Lexington?
 8 MS. STUDLEY: Form.
 9 MS. SCHULTZ: Form.
 10 THE WITNESS: Well, is this work product? I
 11 don't --
 12 MS. STUDLEY: Can you read back the question,
 13 please.
 14 (Question read back).
 15 MS. STUDLEY: Could we take a quick break?
 16 MR. DENMAN: Okay.
 17 (Recess taken).
 18 MS. STUDLEY: You can read it again.
 19 THE WITNESS: Could you repeat the question.
 20 (Question read back).
 21 MS. STUDLEY: I'm going to object on the
 22 predicate.
 23 If you can answer, you can answer.
 24 THE WITNESS: I don't think so.
 25 BY MR. DENMAN:

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1 Q. Did your firm ever compensate Lipa Lieberman
 2 for his expert testimony in connection with contingency
 3 fee petition?
 4 MS. STUDLEY: Form.
 5 A. When you say "my firm," do you mean the
 6 guardianship as well?
 7 Q. Well, I'm just starting with your firm.
 8 A. Okay.
 9 Q. For example, did he submit an invoice to your
 10 firm that your firm paid on behalf of his services? And
 11 then the next question will be: You know, was that part
 12 of the petition through the guardianship? Just so you
 13 know where I'm going, I'm just trying to take it
 14 logically.
 15 A. Okay, so starting with the firm.
 16 I don't remember. I would have to go back and
 17 look.
 18 Q. If your firm paid Lipa Lieberman for his
 19 expert testimony in connection with the contingency fee
 20 petition, that would be an expense that your firm would
 21 seek reimbursement from Curtis Rogers as the successor
 22 guardian, correct?
 23 MS. STUDLEY: Form.
 24 A. Yes; if we advanced the costs, we would expect
 25 it to be reimbursed from the guardianship.

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1 Q. And the reason for Lipa Lieberman serving as
 2 an expert was so that your firm could get attorneys'
 3 fees in connection with the contingency fee petition,
 4 correct?
 5 MS. STUDLEY: Form.
 6 A. It was in response to an objection to the
 7 petition for the contingency fee. So it was something
 8 that was done because of the objection. He was retained
 9 because of the objection.
 10 Q. You would agree with me in order for your firm
 11 to get a contingency fee award in connection with the
 12 contingency fee petition, there had to be a value set
 13 for the property, correct?
 14 MS. STUDLEY: Form. Predicate.
 15 A. Yes, I would agree.
 16 Q. Without Lipa Lieberman -- let me strike that.
 17 There would have to be some valuation of the
 18 property for you to get fees, a percentage, correct?
 19 MS. STUDLEY: Form. Predicate.
 20 A. I believe so.
 21 Q. Prior to Lipa Lieberman providing testimony as
 22 to the value of 808 Lexington, did your firm or the
 23 guardian have any appraisals of 808 Lexington?
 24 MS. STUDLEY: That is work product, but I
 25 think you can answer.



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1 A. I don't think so.

2 **Q. The same question, but instead of an**

3 **appraisal, any type of market valuation report?**

4 MS. STUDLEY: Form.

5 **Q. Do you want me to ask the whole question**

6 **again, or do you understand it?**

7 A. I understand what you're asking me, I think.

8 Do we have not a formal appraisal, but any

9 valuation --

10 **Q. Yes.**

11 A. -- of any sort?

12 **Q. Yes.**

13 MS. STUDLEY: Form.

14 A. Possibly.

15 **Q. Did your firm actually seek to obtain a**

16 **valuation of 808 Lexington prior to moving for your fees**

17 **under the contingency fee petition?**

18 A. Yes.

19 **Q. From who?**

20 A. I don't know if this is the whole universe,

21 but Lipa Lieberman and his cohorts at his brokerage

22 firm.

23 **Q. And when was that obtained?**

24 A. I can't recall. I mean, possibly 2013.

25 **Q. And when was it obtained?**

1 that the attorney client -- if you're objecting under

2 attorney-client privilege --

3 MS. STUDLEY: And work product.

4 MR. DENMAN: -- and Ms. Crispin cannot waiver

5 the privilege, then I have an issue with you having a

6 consultation with Ms. Crispin over the privilege that

7 you've raised.

8 THE WITNESS: Okay. Well, then let's just

9 keep going.

10 MR. DENMAN: I mean, if you want to withdraw

11 it, that's fine, but if you want to have the privilege,

12 then --

13 MS. STUDLEY: No. Keep going.

14 MR. DENMAN: Okay.

15 BY MR. DENMAN:

16 **Q. Did your firm obtain a valuation from Lipa**

17 **Lieberman for the purpose of the contingency fee**

18 **petition?**

19 MS. STUDLEY: These are all the same

20 questions.

21 MR. DENMAN: No. No. My last question was:

22 Did you obtain -- why did you obtain a valuation from

23 Lipa Lieberman, and that was attorney-client privilege.

24 MS. STUDLEY: Okay.

25 BY MR. DENMAN:

1 A. That would be attorney-client privilege and

2 work product.

3 **Q. Was it obtained for any purpose besides**

4 **seeking recovery for your firm's fees under the**

5 **contingency fee petition?**

6 MS. STUDLEY: Same objection. Obviously, that

7 goes along with the attorney-client privilege and work

8 product.

9 THE WITNESS: Ron, can I have a break to talk

10 to them? I want to make sure if I -- I mean, I want to

11 make -- it is protected. I believe it is protected

12 information. But can I have a moment to speak to them

13 about it to see if it is or isn't, in their opinion?

14 MS. STUDLEY: I think we can --

15 MR. DENMAN: The only problem I have with that

16 is that you're raising the objection on behalf of the

17 guardian because the guardian owns the privilege. So if

18 you're saying that this is a privilege on behalf of the

19 guardian, you also represent Steve Kelly. Then I kind

20 of have an issue with discussing the testimony of the

21 attorney as to whether or not --

22 MS. STUDLEY: Well, the attorney can't waive

23 the privilege, obviously, that we're representing here

24 today.

25 MR. DENMAN: Exactly. So if you're saying

1 **Q. So did your firm obtain a valuation from Lipa**

2 **Lieberman for the purpose of the expert -- as an expert**

3 **for the purpose of the contingency fee petition?**

4 A. Yes, and he testified at a hearing about his

5 findings.

6 **Q. And that was the reason why your firm obtained**

7 **a valuation from Lipa Lieberman; is that correct?**

8 MS. STUDLEY: Form.

9 A. Work product.

10 **Q. Did your firm seek payment for Lipa**

11 **Lieberman's services for providing a valuation in any**

12 **capacity other than as an expert in connection with your**

13 **contingency fee petition?**

14 MS. STUDLEY: Same objections.

15 MR. DENMAN: Off the record.

16 (Fire drill and recess taken).

17 THE WITNESS: Can you read the question again.

18 (Question read back).

19 MS. STUDLEY: To the extent you can answer

20 without waiving work product or attorney-client

21 privilege.

22 THE WITNESS: I'm just going to read this

23 because this is confusing to me. I'm a little confused

24 with the question, and maybe I can tell you, and maybe

25 then you can figure out how to ask it.

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1 The contingency fee petition, the value of the
2 building was not the premise for the petition. The
3 petition was the recovery to the guardianship.

4 I don't know if that helps.

5 BY MR. DENMAN:

6 **Q. Well, the fees that your firm sought was based
7 upon the value of the assets brought back to the
8 guardianship estate, correct?**

9 A. The recovery of the asset to the guardianship,
10 yes, the positive result.

11 **Q. And you're contingency fee provided you a
12 percentage of the value of that, correct?**

13 A. Of the positive result, yes.

14 **Q. So in order to determine what the positive
15 result is, your firm had to have a valuation of the
16 assets brought into the estate, correct?**

17 A. Yes, they needed an expert as it related to
18 the positive result.

19 **Q. And your firm used Lipa Lieberman to provide
20 testimony as to that value of what you're referring to,
21 the positive result, correct?**

22 A. In part.

23 **Q. Did your firm pay Lipa Lieberman for his
24 services?**

25 MS. STUDLEY: Form.

1 A. I don't know.

2 **Q. If it wasn't, do you know why not?**

3 MS. STUDLEY: Form. Asks for speculation.

4 A. I don't know.

5 MS. SCHULTZ: I'm going to join the objection
6 as well.

7 BY MR. DENMAN:

8 **Q. Did you ever tell him that he needed to
9 provide a written invoice?**

10 MS. STEIN: Form.

11 A. I don't recall that, but that doesn't mean it
12 didn't happen. I just don't recall it.

13 **Q. But, as we sit here today, you're not aware of
14 any written invoice?**

15 MS. STUDLEY: Form. Asked and answered.

16 A. Again, I don't know it sitting here today.
17 That doesn't mean it doesn't exist. I just don't know.

18 **Q. Well, if it did exist, you would have produced
19 it at some point throughout the discovery or on the fee
20 petition, correct?**

21 MS. STUDLEY: Form.

22 A. I have no idea. I mean, I assume if it was
23 responsive, that it was produced.

24 **Q. Let me restate the question and quickly get
25 this out of the way.**

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1 A. Which services -- his expert testimony?

2 **Q. Coming up with a value of that positive
3 result.**

4 MS. STUDLEY: Form.

5 MS. SCHULTZ: Form.

6 A. I don't recall how much he was paid for that
7 testimony.

8 **Q. Was he paid for that testimony at or about the
9 time that he provided his services?**

10 MS. STUDLEY: Form.

11 A. Well, nobody in the guardianship that has
12 provided services to a guardian has been paid at or
13 around the time of their services.

14 **Q. Bad question.**

15 **Did he submit an invoice that you're aware of
16 for his services at or about the time that he performed
17 those services?**

18 A. I don't know if he gave an invoice. I believe
19 he did give us his time and expenses. I don't know if
20 it was in a written format, or if he told one of us or
21 the guardian telephonically. But I do believe he gave
22 us information about the time he spent and the expenses
23 that he incurred.

24 **Q. And was that ever sought to be recovered in
25 any fee petition?**

1 **You have never deleted any e-mails between you
2 or anyone else in your firm pertaining to any of the
3 underlying matters involving Oliver Bivins, Sr.,
4 correct?**

5 MS. STUDLEY: Objection to form.

6 A. No.

7 **Q. But you're not aware of anyone else who has
8 deleted -- in your firm who has deleted any e-mails
9 pertaining to the underlying matters with Oliver Bivins,
10 Sr., correct?**

11 MS. STUDLEY: Form.

12 A. No.

13 **Q. Are you aware of any witness who has deleted
14 any documents or communications at all in connection
15 with any services performed relating to Oliver Bivins,
16 Sr.?**

17 MS. STUDLEY: Form. Predicate.

18 A. I don't know of any, but I don't speak for
19 them.

20 **Q. I'm not asking -- I'm just asking if you know
21 of any?**

22 A. No.

23 **Q. Are you aware of either Steve Kelly or Curtis
24 Rogers having deleted any communications pertaining to
25 any of the underlying matters?**



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1 A. No.

2 MS. STUDLEY: Form.

3 MS. STEIN: Form.

4 **Q. Did you, personally, have communications with**

5 **Lipa Lieberman regarding the valuation of 808 Lexington?**

6 A. Yes.

7 **Q. Do you know if anyone else in your firm did?**

8 A. Yes.

9 **Q. Who?**

10 A. Brian O'Connell.

11 **Q. Do you know if anyone else did?**

12 A. I think that would be the universe.

13 **Q. Were you present during any communications**

14 **between Lipa Lieberman and Curtis Rogers regarding the**

15 **valuation of 808 Lexington?**

16 A. I'm sorry. Can you read that back.

17 **Q. I'll say it again.**

18 **Were you present during any communications**

19 **between Curtis Rogers and Lipa Lieberman concerning the**

20 **valuation of 808 Lexington?**

21 A. Possibly.

22 **Q. Were you present during any communications**

23 **between Ronda Gluck and Lipa Lieberman concerning the**

24 **valuation of the property, 808 Lexington?**

25 A. I think so.

1 communication from him?

2 MS. STUDLEY: Just a report, like a hard

3 written something, not a communication; like a written

4 -- any document that was written that you can think of,

5 if you know, of course.

6 THE WITNESS: I don't know. I don't know;

7 with that definition, I don't know.

8 BY MR. DENMAN:

9 **Q. And the definition being any written**

10 **documentation, be it an e-mail, be it a report, be it a**

11 **letter, be it an analysis; any type of written form of**

12 **communication besides simply telling you verbally what**

13 **he thinks his opinion of the value of the property is.**

14 A. I don't know.

15 **Q. Do you know whether one exists?**

16 A. I don't know, but I believe there were --

17 in his capacity as a witness with respect to the

18 contingency fee petition and valuation of the property,

19 at that time I believe there were documents that were

20 provided. But I believe they were exhibits to his

21 deposition or were exhibits at trial.

22 **Q. In connection with the contingency fee**

23 **petition, correct?**

24 A. I believe that's what I'm talking about.

25 **Q. Was there any -- of that type of documentation**

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1 **Q. Did you have any communications with Lipa**

2 **Lieberman regarding -- well, let me strike that.**

3 **Did Lipa Lieberman ever provide you a report**

4 **as to his opinions of the valuation of 808 Lexington?**

5 MS. STUDLEY: Form. Predicate. At what time?

6 MR. DENMAN: Well, just ever first and then

7 I'll go to time.

8 MS. STUDLEY: Where it doesn't impinge on work

9 product, you can answer.

10 THE WITNESS: I can't because I don't know

11 what the timing is.

12 MR. DENMAN: So you don't know -- well,

13 whether he's provided a report is not protected by work

14 product.

15 MS. STUDLEY: Okay.

16 MR. DENMAN: I mean, I think you would agree

17 with that.

18 MS. STUDLEY: Okay.

19 MR. DENMAN: Maybe if you want to withhold it,

20 we can discuss that with the Court, but whether he's

21 provided one, I think would be fair game.

22 MS. STUDLEY: Whether he provided one -- yes

23 or no.

24 THE WITNESS: I don't know if "report" is the

25 right word. I don't want to -- even if it's just a

1 that you're talking about now -- prepared prior to the

2 negotiations for what was considered or what we've

3 termed the New York settlement?

4 A. What do you mean by "the New York settlement"?

5 I want to make sure we're clear.

6 **Q. The one where you and Brian flew to New York**

7 **and met with Keith Stein and Donna Levine to essentially**

8 **settle the 12 or 13 different actions and exchange 808**

9 **and 67th and Portland Place and 330.**

10 A. That's not my definition, but it was the one

11 that resulted in the settlement and mutual release that

12 was eventually approved by the Court.

13 **Q. The one involving Donna and Rogers and your**

14 **firm that Julian objected to, correct?**

15 MS. STUDLEY: Form.

16 MS. SCHULTZ: Form.

17 A. It's just not my definition, but if we can --

18 **Q. Well, you would agree with me that Julian did**

19 **not agree to the New York settlement and actually voiced**

20 **his objection to that and was not a party to it,**

21 **correct?**

22 MS. STUDLEY: Form.

23 MS. SCHULTZ: Form.

24 A. I would not agree with that.

25 **Q. So when you make representations to the Court**



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1 **during hearings, are those truthful representations?**
 2 MS. STUDLEY: I'm going to object to form.
 3 Argumentative.
 4 A. Of course.
 5 **Q. Right.**
 6 **Because if you're going to make a**
 7 **representation to the Court, in order to have the Court**
 8 **grant or deny a motion, you expect the Court can rely**
 9 **upon your representations being truthful, correct?**
 10 MS. STUDLEY: Form. Argumentative and asked
 11 and answered.
 12 A. Yes.
 13 MR. DENMAN: The objection is to form, please;
 14 otherwise, it constitutes coaching. I understand what
 15 you may think I'm doing. I'm proving my case. I
 16 understand the form objection, and if I think it's bad
 17 form, I will ask you or I'll adjust the question. But
 18 please --
 19 MS. STUDLEY: I'm just concerned if this is
 20 going to be read to a jury someday. So I want to make
 21 sure it's on the record, but go ahead.
 22 MR. DENMAN: I can understand your concern.
 23 MS. STUDLEY: Okay. So in that capacity, I'll
 24 make the objections.
 25 THE WITNESS: You were asking me if I was

1 **You've actually used the term, on countless**
 2 **occasions in court in the underlying matters, where**
 3 **you've referenced a settlement as being the New York**
 4 **settlement, correct?**
 5 MS. STUDLEY: Form.
 6 A. I think I've used the New York Settlement
 7 Agreement in a petition before, yes.
 8 **Q. And you would agree with me that you**
 9 **distinguished the New York settlement from the global**
 10 **settlement agreement, correct?**
 11 A. I do.
 12 **Q. And you distinguished the global settlement**
 13 **agreement and the New York settlement from the Texas**
 14 **Settlement Agreement, correct?**
 15 A. Yes, three different agreements.
 16 **Q. So now going back to the original question:**
 17 **You had said that you believed there was some type of**
 18 **documentation, analysis, a report, something of a**
 19 **documentary standpoint from Lipa Lieberman that was**
 20 **provided in connection with his testimony concerning**
 21 **the contingency fee petition; is that right?**
 22 A. Yes.
 23 **Q. Okay. Was that documentation, analysis,**
 24 **report, or whatever that's loosely been described as,**
 25 **provided to you prior to negotiations on the New York**

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1 truthful to the Court?
 2 BY MR. DENMAN:
 3 **Q. No. I'm finished. You already answered.**
 4 A. Okay.
 5 **Q. I fully expect that when you made**
 6 **representations to the Court, you expected the Court to**
 7 **believe that you were telling him the truth, correct?**
 8 MS. STUDLEY: Form.
 9 A. Yes.
 10 **Q. Okay. Julian Bivins was not a signatory to**
 11 **the New York settlement, correct?**
 12 A. He was not.
 13 **Q. Julian Bivins was not a party to the New York**
 14 **settlement, correct?**
 15 MS. STUDLEY: Form.
 16 A. Yes, he was.
 17 **Q. Have you ever represented to the Court that he**
 18 **was not a party to the New York settlement?**
 19 MS. STUDLEY: Form.
 20 A. When I say that he was a party, I mean that he
 21 participated in the negotiations. Is he a party to the
 22 formal written agreement? No, he's not.
 23 **Q. Was there any -- going back to the question**
 24 **that led to the discussions about the New York**
 25 **settlement -- well, let me strike that.**

1 **settlement?**
 2 A. Those exact papers?
 3 **Q. Any reports in documentary -- excuse me, in**
 4 **documentary form from Lipa Lieberman, or from his**
 5 **cohorts as you've referred to them?**
 6 MS. STUDLEY: Form.
 7 THE WITNESS: I think that would be work
 8 product.
 9 MS. STUDLEY: You're saying from the time
 10 period before?
 11 THE WITNESS: He's asking you prior to that
 12 testimony.
 13 MS. STUDLEY: Can I -- okay. Well, I'll
 14 instruct the witness not to answer the work product.
 15 MR. DENMAN: Okay.
 16 BY MR. DENMAN:
 17 **Q. At any time prior -- let me strike that.**
 18 **Did Lipa Lieberman provide --**
 19 A. Well, now on that, because it was a work
 20 product objection, can I speak to her to see if that --
 21 I mean, to the extent I can testify, I will and to the
 22 extent it is, I won't.
 23 **Q. I could be wrong. But my understanding is:**
 24 **The only time that a break can be taken is whether or**
 25 **not a witness has a question about whether it's**

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1 attorney-client privilege. I'm not aware of there being
 2 an ability to take a break as to work-product privilege.
 3 A. Okay. Well, I'm just letting you --
 4 Q. If you want to -- for the sense of not having
 5 to come back and do this deposition again, if you want
 6 to take a break to discuss whether or not it's work
 7 product, I'm going to let that happen.
 8 THE WITNESS: Okay.
 9 MS. STUDLEY: Yes, because I can see both
 10 sides. Okay.
 11 MR. DENMAN: Do you want me step out?
 12 MS. STUDLEY: Yes, please.
 13 (Recess taken).
 14 MS. STUDLEY: Ms. Crispin is going to go ahead
 15 and answer.
 16 BY MR. DENMAN:
 17 Q. Go ahead.
 18 A. I don't remember what the question was, but
 19 whatever it was, I'm going to answer it now.
 20 Q. I think my question was: Did you -- have you
 21 explained to me the type of documentary report or
 22 analysis that you had from Lipa Lieberman in connection
 23 with the contingency fee petition.
 24 My question was: Did you have any of that
 25 type of report or analysis from Lipa Lieberman in any

1 fee petition was in 2014, correct?
 2 A. Yes.
 3 Q. Was there any agreement, of which you were
 4 aware, that Lipa Lieberman was to be compensated for
 5 providing the broker's opinion of value that you've
 6 testified about?
 7 A. I don't understand the question. You're
 8 talking about the hearing, and then you asked me if
 9 there was any -- I'm confused.
 10 Q. I'm talking about the broker's opinion of
 11 value that you said was provided sometime prior to the
 12 May 2013 settlement negotiations.
 13 A. Yes.
 14 Q. So my question is: Are you aware of any
 15 agreement regarding the payment of Lipa Lieberman for
 16 the broker's opinion of value that he provided sometime
 17 before the May 2013 settlement discussions?
 18 A. I don't recall what the compensation
 19 arrangement was.
 20 MS. STUDLEY: Form on the last question.
 21 Q. Who negotiated that? Was that Rogers, Stein,
 22 your firm? Do you know?
 23 A. It wasn't me. I don't recall that, so I don't
 24 know.
 25 Q. Do you know whether anyone paid him any money,

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1 documentary form prior to the hearing on the petition
 2 to approve the New York settlement?
 3 A. Yes.
 4 Q. Was it the same document that we're talking
 5 about or were there different sets?
 6 A. What I recall is a broker's opinion of value
 7 that he gave, Lipa that is, gave to Mr. O'Connell and
 8 myself and, I believe, Mr. Stein.
 9 Q. Do you know when that was received?
 10 A. I'm trying to work backwards.
 11 I recall that settlement agreement was
 12 approved in September of 2013. So it was in 2013.
 13 Q. Was it provided prior to the settlement
 14 conference in New York?
 15 A. Yes.
 16 Q. In the settlement conference in New York, do
 17 you recall that being in approximately May of 2013?
 18 A. That sounds about right.
 19 Q. Do you know whether Lipa Lieberman was
 20 compensated -- let me strike that.
 21 Do you know whether Lipa Lieberman provided a
 22 request for any compensation in 2013 for the services
 23 provided in providing that broker's opinion of value?
 24 A. I don't know.
 25 Q. The hearing on the petition, the contingency

1 paid Lipa Lieberman or his firm or cohorts any money,
 2 in 2013 for the broker's opinion that you -- that we've
 3 been talking about in the last few questions?
 4 MS. STUDLEY: Form. Asked and answered.
 5 MS. SCHULTZ: Form.
 6 A. I don't know.
 7 Q. Do you know whether Lipa Lieberman provided
 8 any broker's opinion of value as to the 67th Street
 9 property?
 10 A. Yes, I believe he did.
 11 Q. And was that also prior to May of 2013?
 12 A. Yes.
 13 Q. And do you know what the value was?
 14 A. It was shared at the settlement conference.
 15 I can't remember today.
 16 Q. Do you have that documentation?
 17 MS. STUDLEY: Form. Predicate.
 18 A. I don't know. I'm not sure on 67th Street
 19 whether that was in a written format.
 20 Q. You don't know one way or another; that could
 21 have been verbal?
 22 A. It could have been verbal.
 23 Q. And, as we sit here today, you have no idea
 24 what his verbal valuation was?
 25 MS. STUDLEY: Form. Asked and answered.



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1 A. I don't. I don't today. I just recall
2 sharing it with the participants at the settlement
3 conference and having a debate.

4 **Q. Do you know whether the value of 67th Street**
5 **that was shared with you was greater or lower than 808**
6 **Lexington?**

7 A. I don't recall. What I recall was a debate
8 about the value where Oliver Bivins' counsel from New
9 York and Donna Levine were present; Julian Bivins
10 and his wife were present and his lawyer, myself,
11 Mr. O'Connell, Keith Stein and maybe Roy Justice.

12 I don't remember.

13 **Q. Do you recall during the -- well, let me**
14 **strike that.**

15 **Do you know whether the -- let me strike that.**

16 **During the petition to approve the New York**
17 **settlement, do you know whether any representations were**
18 **made by your firm to the Court that the value of 67th**
19 **Street and 808 Lexington were approximately the same?**

20 MS. STUDLEY: Form.

21 A. I don't remember anything with respect to that
22 hearing.

23 **Q. Do you agree with me that as of the time of**
24 **the petition for the New York settlement, you knew from**
25 **Lipa Lieberman that the values of 808 Lexington and 67th**

1 testified to it.

2 **Q. You were at his deposition that was taken**
3 **where he testified as to the valuation, weren't you?**

4 MS. STUDLEY: Form.

5 A. I don't know, and the case has been going on
6 on five years. I don't remember. I think his
7 deposition has been taken more than once.

8 **Q. Do you recall being at the first deposition**
9 **where he testified as to the value of 67th Street being**
10 **between 10 and \$20 million?**

11 MS. STUDLEY: Form.

12 A. I don't recall.

13 **Q. When you presented argument before the Court**
14 **to approve the New York settlement, did you advise the**
15 **Court that the value of 67th Street was substantially**
16 **greater than that of 808 Lexington?**

17 MS. STUDLEY: Form. Predicate.

18 A. I don't recall. I don't recall is what I told
19 you.

20 **Q. But you knew at that time that the value of**
21 **67th Street was much greater than 808 Lexington,**
22 **correct?**

23 MS. STUDLEY: Okay. We've gone through this
24 several times now. Asked and answered.

25 MR. DENMAN: It's form.

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1 **Street were not the same?**

2 MS. STUDLEY: Form.

3 MS. SCHULTZ: Form.

4 A. I don't agree with you.

5 **Q. You think -- so what is your opinion of that?**

6 MS. STUDLEY: Form.

7 A. I don't recall exactly what the broker's
8 opinion of value was with respect to 67th Street and
9 808 at the time that it was given to me, and then the
10 hearing was later. And I don't recall what that was,
11 if there was even --

12 **Q. But you would agree with me at the time of the**
13 **hearing that you knew that the value of 67th Street was**
14 **substantially greater than the value of 808 Lexington,**
15 **correct?**

16 A. No, I wouldn't agree with you on that.

17 MS. STUDLEY: Form. Predicate.

18 MS. SCHULTZ: Form.

19 **Q. You are aware that at the time of the petition**
20 **for the approval of the New York settlement, that**
21 **Oliver, Jr., had testified that he thought the value of**
22 **the building was somewhere between 10 and \$20 million,**
23 **correct?**

24 MS. STUDLEY: Form.

25 A. I don't know what he testified to and when he

1 MS. STUDLEY: I will allow her to answer one
2 more time. It's been asked and answered many times.

3 THE WITNESS: Can you repeat that. I'm sorry.
4 (Question read back).

5 MS. STUDLEY: We need to move on.

6 THE WITNESS: At the time of the hearing?

7 MR. DENMAN: Yes.

8 THE WITNESS: I don't know.

9 BY MR. DENMAN:

10 **Q. So, as we sit here today, you do not recall**
11 **whether you ever knew that the value of 67th Street was**
12 **much greater than 808 Lexington?**

13 MS. STUDLEY: Form. Asked and answered.
14 That's the last time.

15 MR. DENMAN: That's not the same question that
16 I've asked and was answered. I asked her --

17 THE WITNESS: At any time?

18 MR. DENMAN: At any time.

19 MS. STUDLEY: It has been many times. The
20 record will reflect how many times you've asked that
21 question.

22 MR. DENMAN: Please stop interrupting. It's
23 objection to the form. It's getting redundant at this
24 point.

25 BY MR. DENMAN:



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1 **Q. So the question is: Prior to the sale of 808**
 2 **Lexington -- excuse me, prior to the sale of 67th Street**
 3 **property --**
 4 A. The 67th Street property?
 5 **Q. -- you did not know that the value of 67th**
 6 **Street was much greater than 808 Lexington, correct?**
 7 A. Ron, the problem with the question --
 8 MS. STEIN: Form.
 9 A. The problem with the question --
 10 MS. STUDLEY: Form.
 11 A. -- is that 67th Street had a substantial
 12 mortgage associated with it. So when you talk about the
 13 value of the property, there was a netting that was
 14 occurring in 2013 and 2014 when there was an analysis
 15 about the value that was occurring. I don't remember
 16 the exact figures of the mortgages or the liens or the
 17 obligations and encumbrances with respect to 67th Street
 18 and 808 Lexington, but I know that they were considered.
 19 So when you asked me if I knew the values of
 20 808 Lexington and 67th Street, I don't know sitting
 21 here, and I don't remember what I did know. But I do
 22 recall, going through sort of this netting process, to
 23 make a determination about what their value was.
 24 **Q. And when you did the netting process, did you**
 25 **put that into a communication or document?**

1 comments.
 2 **Q. Do you understand the question?**
 3 A. I don't know. I'm not sure. I don't want to
 4 say I do.
 5 **Q. You told me before that you did an analysis.**
 6 **Do you have that in writing somewhere where you analyzed**
 7 **what you considered to be the market value, less**
 8 **encumbrances, to get to a net value of the four**
 9 **properties that were at issue in the New York**
 10 **settlement?**
 11 MS. STUDLEY: Form.
 12 A. I don't know if I have that. I know we were
 13 working through that at the settlement conference. I'm
 14 sure I was taking notes, but I don't recall having that
 15 in my file.
 16 **Q. Did you ever obtain an appraisal of the**
 17 **Portland Place property?**
 18 A. A formal appraisal, no.
 19 **Q. Did you have an informal appraisal?**
 20 A. I had information on value, yes.
 21 **Q. What type of information?**
 22 A. I had information at the settlement conference
 23 that was provided for Mr. O'Connell and I to look at
 24 that, I believe, Oliver Bivins or his lawyer had in
 25 their possession.

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1 A. Yes, it was in a communication. It was part
 2 of the settlement conference there was -- that occurred
 3 during that conference. I mean, I know what occurred
 4 on other occasions. I just don't remember exactly when.
 5 But I remember that settlement conference
 6 having numerous conversations about the value of the
 7 property; looking at the encumbrances associated with
 8 the property and going through that process during the
 9 negotiations which -- you know, particularly on the 67th
 10 Street and Portland Place properties, the position was
 11 that the guardianship had no interest.
 12 So a lot of settlement conference was an
 13 information gathering from Oliver Bivins, which that did
 14 occur during that settlement conference and that netting
 15 occurred then.
 16 **Q. I'm trying to find out -- and I appreciate**
 17 **your answers and arguments. That's wonderful.**
 18 **What I'm trying to find out is: What**
 19 **documentation exists where -- as the lawyers for Curtis**
 20 **Rogers at the time with the duties that you've described**
 21 **to Oliver Bivins, Sr., that you had concerning the net**
 22 **valuation of the four properties in your possession**
 23 **prior to the time that you presented the petition for**
 24 **the New York settlement to be approved by the Court?**
 25 MS. STUDLEY: Move to strike counsel's

1 **Q. Do you know what it would have cost to do an**
 2 **appraisal of the Portland Place property?**
 3 MS. STUDLEY: Form. Predicate.
 4 A. No, I don't.
 5 **Q. Did you ever seek to have an appraisal done of**
 6 **the Portland Place property?**
 7 A. The documents that Mr. O'Connell and I
 8 reviewed were akin to an appraisal, but --
 9 **Q. Well, you know what an appraisal is from a**
 10 **legal standpoint, correct?**
 11 A. I understand what an appraisal is.
 12 **Q. And when you say "the documents were akin,"**
 13 **you understand that those were not an appraisal. There**
 14 **was no appraisal performed of Portland Place that was**
 15 **requested by you, correct?**
 16 MS. STUDLEY: Form.
 17 A. That's not true.
 18 **Q. You did request an appraisal?**
 19 MS. STUDLEY: Form.
 20 A. I reviewed, along with Mr. O'Connell,
 21 valuation documents of Portland Place at that settlement
 22 conference.
 23 **Q. I'm sorry. My question was very limited.**
 24 **Did you ever request an appraisal?**
 25 MS. STUDLEY: Form.

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1 A. From who? No.

2 **Q. For Portland Place.**

3 A. I didn't feel that we needed to.

4 **Q. Okay. Did you ever request an appraisal of**

5 **67th Street?**

6 A. I've discussed with you what we did with

7 respect to 67th Street.

8 **Q. I'm sorry. I'm just asking about an**

9 **appraisal. Did you ever request an appraisal of 67th**

10 **Street?**

11 MS. STUDLEY: Form.

12 You can answer how you deem appropriate.

13 A. We had a broker's opinion of value.

14 **Q. This is a yes or no and then you can explain.**

15 **Did you ever have an appraisal for 67th**

16 **Street?**

17 MS. STUDLEY: And you can answer how you deem

18 appropriate.

19 MR. DENMAN: And you know what, you have to

20 stop coaching her, please. Please. The next time,

21 honestly, I want to get on the phone with Judge

22 Matthewman. I've asked you, please. It's objection to

23 the form. That is an absolute coaching. That is not

24 even an objection.

25 MS. STUDLEY: That's not true.

1 MR. DENMAN: I understand that --

2 MS. STUDLEY: That's not --

3 MR. DENMAN: -- and that's not an objection.

4 MS. STUDLEY: I gave her an instruction,

5 that's why, because of your instruction.

6 MR. DENMAN: If you want to instruct her not

7 to answer, we'll take it up. That's later.

8 MS. STUDLEY: I'm telling her not to answer.

9 MR. DENMAN: Then please, please, please stop

10 coaching, Rachel.

11 MS. STUDLEY: I am not coaching. I am telling

12 you not to tell my client how to answer questions.

13 That's the problem.

14 BY MR. DENMAN:

15 **Q. Yes or no. Did you obtain an appraisal on**

16 **67th Street?**

17 MS. STUDLEY: Move to strike counsel's

18 instructions.

19 But you can answer.

20 THE WITNESS: At what time?

21 MR. DENMAN: Ever.

22 MS. STUDLEY: Same objection.

23 THE WITNESS: I've never sought an appraisal

24 for 67th Street.

25 BY MR. DENMAN:

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1 THE REPORTER: Hold it. Hold it. One at a

2 time. One at a time.

3 MR. DENMAN: That's not an objection. That is

4 answer how you deem appropriate.

5 MS. STUDLEY: You're instructing my client how

6 to answer the question.

7 MR. DENMAN: It's not even evidentiary

8 appropriate.

9 MS. STUDLEY: That you must answer yes or no,

10 and I am moving to strike that.

11 MR. DENMAN: That's not true. I have a right

12 to ask --

13 MS. STUDLEY: She can answer how she wants to.

14 We're not in trial right now.

15 MR. DENMAN: I have a right to ask questions

16 that as though we're in trial. That's what the rules

17 say. I'm asking if she wants to answer yes or no. She

18 can explain as long as she wants, but I'm asking a

19 simple yes or no and then feel free. Take two hours to

20 explain it if you want.

21 I do not want to limit your explanation, but

22 I'm entitled to a yes or no as to whether you obtained

23 an appraisal.

24 MS. STUDLEY: And I think she can answer how

25 she deems appropriate.

1 **Q. Are you aware of anyone who has sought an**

2 **appraisal for 67th Street?**

3 A. Yes.

4 **Q. Who?**

5 A. Oliver Bivins.

6 **Q. Oliver Bivins, Jr.?**

7 A. Jr., or his counsel.

8 **Q. And do you know when that occurred?**

9 A. I don't.

10 **Q. Have you ever seen that appraisal?**

11 A. I don't know.

12 **Q. Do you know if that appraisal was obtained**

13 **prior to the motion to approve the New York settlement?**

14 A. No, I don't know.

15 **Q. Do you know what the value of that appraisal**

16 **was?**

17 A. No, I don't know.

18 **Q. Do you know what the value -- do you know what**

19 **Oliver Bivins, Jr., sold 67th Street for?**

20 A. I believe I have had that information. I just

21 don't recall it sitting here.

22 **Q. Do you recall it being \$22.5 million?**

23 A. I don't recall.

24 **Q. Do you recall it being more than \$20 million?**

25 A. I believe it was around that number. I don't



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1 know the exact figure. I don't know if it was 18. I
2 don't know if it was 25, but I remember it being around
3 that number.

4 **Q. At the time -- okay.**

5 **Do you know when it was sold?**

6 **If I told you in the fall of 2014, would that**
7 **refresh your recollection?**

8 A. I wouldn't dispute it, but I don't know.

9 **Q. And if I told you there was a representation**
10 **in court that the mortgage on the 67th Street property**
11 **was approximately \$2.5 million, do you dispute that?**

12 MS. STUDLEY: Form.

13 A. I don't know what the amount of the mortgage
14 was when it was eventually paid off. I believe it was
15 in default, but I don't know.

16 **Q. Do you recall the value of the mortgage being**
17 **approximately \$2.5 million?**

18 A. I can't say that, no.

19 **Q. Have you ever reviewed documents in connection**
20 **with your work on the underlying matters where you saw**
21 **the amount of the underlying mortgage; I mean, the**
22 **mortgage on the 67th Street property?**

23 MS. STUDLEY: Form.

24 A. I believe so, yes.

25 **Q. I mean, you would agree with me that you had**

1 **or on behalf of Curtis Rogers, obtain an appraisal on**
2 **the 67th Street property prior to the petition seeking**
3 **approval of the New York settlement?**

4 MS. STUDLEY: Form.

5 A. I don't know.

6 **Q. Did you ever obtain an appraisal -- I mean,**
7 **you, your firm, or anyone on behalf of Curtis Rogers --**
8 **that you're familiar with that obtained an appraisal**
9 **prior to the New York settlement motion on 808**
10 **Lexington?**

11 A. I don't know, and on both of these properties
12 I've already explained to you the broker's opinion of
13 value.

14 **Q. Did you ever request from anyone the cost for**
15 **performing an actual appraisal of 808 Lexington or 67th**
16 **Street?**

17 MS. STUDLEY: Form.

18 MS. STEIN: Form.

19 A. At what time?

20 **Q. At any point in time prior to the approval of**
21 **the New York settlement.**

22 A. I don't know. I don't believe so because I
23 had the broker's opinion.

24 **Q. Have you ever seen, in any documentary form,**
25 **a broker's opinion analysis on the 67th Street property?**

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1 **that documentation within the discovery that was**
2 **exchanged in the underlying matters, correct?**

3 MS. STUDLEY: Form.

4 A. I don't know if it was in the discovery
5 process, but I don't dispute that I received the
6 information.

7 **Q. You know what, let me redefine that just to**
8 **make sure it's broad.**

9 **When I say "discovery," whether it's informal**
10 **discovery, or formal discovery, or an exchange, or files**
11 **that were exchanged in the underlying matters, within**
12 **the files and documentation that you had privy to and**
13 **you reviewed, you would agree with me that you saw the**
14 **amount of the underlying mortgage in the 67th -- on the**
15 **67th Street property, correct?**

16 MS. STUDLEY: Form.

17 A. I believe I did.

18 **Q. And you also knew what the mortgage was on the**
19 **808 Lexington property, right?**

20 A. I did. I do and did.

21 **Q. Other than Oliver Bivins -- let me strike**
22 **that.**

23 **Other than your belief that Oliver Bivins at**
24 **some point in time may have obtained an appraisal on the**
25 **67th Street property, did you or anyone in your office,**

1 MS. STUDLEY: Form.

2 A. In a written format?

3 **Q. Yes.**

4 A. Possibly.

5 **Q. Do you know if you've got that in your**
6 **possession?**

7 A. I don't know because -- and the reason I
8 hesitate is because there were communications with Lipa
9 Lieberman, mostly telephonic and also in person. I
10 don't remember. And the reason I'm hesitating is: If
11 he wrote us an e-mail with respect to this, that I don't
12 know, but if he did, it would be in our files.

13 **Q. Were you involved at all in the execution of**
14 **the exclusive listing agreement with Lipa Lieberman?**

15 A. Yes, I believe I was involved. I don't know
16 exactly what you're talking about. I was involved with
17 respect to the sale of the 808 Lexington property.

18 So I say yes because of that, but not because
19 of the exclusive listing agreement that you're talking
20 about. I can't say I wasn't involved in that because I
21 was.

22 **Q. Well, you understand that an exclusive listing**
23 **agreement was executed by Steve Kelly with Lipa**
24 **Lieberman giving him a percentage of the sale price of**
25 **808 Lexington, correct?**



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1 MS. STUDLEY: Form.
 2 A. Yes, as part of our agreement. Yes.
 3 **Q. Part of whose agreement?**
 4 A. Julian Bivins and Mr. Kelly.
 5 **Q. When did Julian Bivins agree to Lipa Lieberman**
 6 **executing a retainer -- excuse me, an exclusive listing**
 7 **agreement?**
 8 A. He agreed to the brokerage fee that would be
 9 paid to Lipa Lieberman.
 10 **Q. The brokerage -- that was after an exclusive**
 11 **listing agreement had been executed in favor of Lipa**
 12 **Lieberman, right?**
 13 MS. STUDLEY: Form.
 14 MS. SCHULTZ: Form.
 15 A. It may have been.
 16 **Q. You don't know?**
 17 A. It may have been.
 18 **Q. Well, Mr. Bivins was not involved at all in**
 19 **the execution of the exclusive listing agreement with**
 20 **Lipa Lieberman, correct?**
 21 MS. STUDLEY: Form.
 22 A. I can't say that, no.
 23 **Q. Well, what evidence do you have at all that**
 24 **Julian Bivins was in any way involved with the execution**
 25 **of the exclusive listing agreement with Lipa Lieberman?**

1 A. Because when the global settlement order was
 2 negotiated, an extreme amount of time was spent about
 3 Lipa Lieberman's involvement after that hearing and what
 4 that involvement would look like.
 5 **Q. What does it mean to execute a contract?**
 6 MS. STUDLEY: Form.
 7 A. I think you mean sign it.
 8 **Q. Exactly, so we both have the same**
 9 **understanding.**
 10 **At the time of the global settlement, the**
 11 **exclusive listing agreement with Lipa Lieberman had been**
 12 **executed, correct?**
 13 A. I can't parse it. It's not that narrow, Ron.
 14 It is much more substantial. Because, yes, I believe
 15 that Mr. Kelly had already agreed for Lipa Lieberman to
 16 be the selected broker; however, during the negotiations
 17 whether he would even continue on was negotiated. And
 18 then how much he would get as a result of his continued
 19 service, that was also negotiated.
 20 So I can't parse it out as narrowly as I think
 21 you believe it is.
 22 **Q. Prior to you walking into court to argue the**
 23 **motion to sell the property in September of 2014, you**
 24 **were involved in obtaining a signature from Steve Kelly**
 25 **giving Lipa Lieberman an exclusive listing on it,**

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1 MS. STUDLEY: Form.
 2 A. Well, he was involved with the fee that was
 3 paid to him --
 4 **Q. That's not what I asked you.**
 5 A. -- pursuant to that contract.
 6 **Q. Pursuant to the contract that had been**
 7 **executed, correct?**
 8 MS. STUDLEY: Form.
 9 A. I don't know the time frame on it, but the fee
 10 was paid pursuant to the contract, and Mr. Bivins agreed
 11 to the fee.
 12 **Q. Ms. Crispin, you said that Mr. Bivins was**
 13 **involved in the execution of the contract?**
 14 A. Well, he was involved.
 15 **Q. Hold on.**
 16 A. Sorry.
 17 **Q. Perhaps I heard you wrong. So I want to make**
 18 **sure we're clear.**
 19 **What evidence do you have that Julian Bivins**
 20 **was involved in any way, shape or form with the**
 21 **execution of the exclusive listing agreement between**
 22 **Lipa Lieberman and Curtis Rogers --**
 23 MS. STUDLEY: Form.
 24 **Q. -- excuse me, and Steve Kelly?**
 25 MS. STUDLEY: Form.

1 **correct?**
 2 MS. STUDLEY: Form.
 3 A. I believe so.
 4 **Q. Prior to walking into court on that motion to**
 5 **sell the property, you had never communicated -- I mean,**
 6 **you or your firm or anyone that you're aware of**
 7 **representing Stephen Kelly had ever communicated to**
 8 **Julian Bivins that Lipa Lieberman had actually executed**
 9 **an exclusive listing agreement, correct?**
 10 MS. STUDLEY: Form.
 11 A. I don't know if that was communicated, but
 12 Mr. Bivins and you were well-aware that Lipa Lieberman
 13 would be involved with the sale of the property.
 14 **Q. My question was clear as day.**
 15 A. And I think I answered it.
 16 **Q. No. No. No. You answered what you wanted to**
 17 **answer.**
 18 **My question was: At the time you walked into**
 19 **court on the motion to sell the property, you know that**
 20 **the exclusive listing agreement, or the fact that one**
 21 **had been executed by Lipa Lieberman, had never been**
 22 **communicated to my client, correct?**
 23 MS. STUDLEY: Move to strike counsel's
 24 comments.
 25 But you can answer again.

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1 A. I believe Mr. Lieberman had explained to you,
2 Ron, that he would be involved, if there was ever going
3 to be a sale. So I think his involvement -- I think --

4 **Q. When did he explain that?**

5 A. I believe it was either -- I believe it was at
6 his deposition. I believe I listened to it.

7 **Q. So you remember that part of his deposition**
8 **where he said that he was hopeful that he would get the**
9 **listing on this property in exchange for providing**
10 **expert services on the petition, on the contingency fee**
11 **petition, correct?**

12 MS. STUDLEY: Form. Move to strike.

13 MS. SCHULTZ: Form.

14 A. I don't believe that was his testimony, and if
15 that was his testimony, that wasn't my understanding.

16 **Q. So at the time of his testimony you understand**
17 **that there was no executed agreement, correct?**

18 A. No, I don't believe there was an executed
19 agreement at that time.

20 **Q. Right.**

21 **As a matter of fact, the executed listing**
22 **agreement was signed by Steve Kelly within two or three**
23 **days of you walking into court to argue the petition to**
24 **sell 808 Lexington, correct?**

25 MS. STUDLEY: Form.

1 **Q. Okay.**

2 A. I'm not --

3 **Q. Exactly.**

4 **There was no agreement to sell it prior to**
5 **Lipa Lieberman entering into the exclusive listing**
6 **agreement, correct?**

7 MS. STUDLEY: Form.

8 MS. SCHULTZ: Form.

9 A. When I say "agreement," I mean the guardian
10 hadn't made a decision --

11 **Q. I'm talking about --**

12 A. -- to sell it.

13 **Q. -- just for purposes so we have a clear**
14 **record. We've already gone through this. You**
15 **understand what an executed contract is, correct?**

16 A. Yes, we have talked about this.

17 **Q. So when we're talking about the executed**
18 **listing agreement, we're talking about the executed**
19 **contract that gave Lipa Lieberman an exclusive right to**
20 **a percentage of commission if the property is sold to**
21 **anyone within a certain period of time.**

22 **You understand that, correct?**

23 MS. STUDLEY: Form.

24 A. Yes, I do.

25 **Q. Okay. Prior to the execution of that listing**

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1 MS. SCHULTZ: Form.

2 A. I don't remember the exact timing, but I do
3 believe that it was in a short time frame before that
4 petition was filed or the hearing was.

5 **Q. And before that exclusive listing agreement**
6 **was executed, Mr. Lieberman had no agreement, had no**
7 **written contract, with the guardian to obtain any**
8 **specific percentage in connection with any sale of 808**
9 **Lexington, correct?**

10 A. I don't believe --

11 MS. STUDLEY: Form.

12 MS. SCHULTZ: Form.

13 MS. STUDLEY: Predicate.

14 A. (Continuing) -- the guardian's petition to
15 sell 808 Lexington is in time with the retaining of
16 Mr. Lieberman as the broker.

17 **Q. Prior to the execution of the exclusive**
18 **listing agreement, Mr. Lieberman had no contractual**
19 **agreement with the guardian as to a percentage that he**
20 **would receive in connection with the sale of 808**
21 **Lexington, correct?**

22 MS. STUDLEY: Form.

23 MS. SCHULTZ: Form.

24 MS. STUDLEY: Predicate.

25 A. There was no agreement to sell it at --

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1 **agreement, Mr. Lieberman did not have a right to a**
2 **specific percentage of the value of the sale price of**
3 **the property to anyone, correct?**

4 MS. SCHULTZ: Form.

5 MS. STUDLEY: Form.

6 A. I agree, I think, if I understand your
7 question.

8 **Q. Right.**

9 **So let's just say hypothetically so we're**
10 **clear here and to make sure I'm clear here. Let's just**
11 **say hypothetically -- let's say it's September 10th of**
12 **2014 is the date that Lipa Lieberman -- or, excuse me,**
13 **Steve Kelly executed the Lipa Lieberman exclusivity**
14 **contract. Are you with me?**

15 A. Okay.

16 **Q. If, on September 9th, a stranger came up to**
17 **you and said I want to pay \$20 million for 808**
18 **Lexington, did Lipa Lieberman have a contractual right**
19 **to a six percent commission of that \$20 million --**

20 MS. STUDLEY: Form.

21 MS. SCHULTZ: Form.

22 **Q. -- on September 9th?**

23 A. I don't believe so.

24 MS. STEIN: Form.

25 **Q. On September 11th if some stranger --**



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1 A. We're using September 10th as the executed
 2 date? I'm sorry. I forgot.
 3 **Q. I'm using that as a hypothetical date because**
 4 **I also don't recall.**
 5 A. Okay.
 6 **Q. I think it was the 14th and the hearing was**
 7 **the 17th. I could be wrong. So let's just use this for**
 8 **the purposes of my hypothetical.**
 9 A. I just forgot what it was.
 10 **Q. Okay. For purposes of my hypothetical, let's**
 11 **say September 10th is the date that the contract was**
 12 **executed.**
 13 A. Okay.
 14 **Q. You've told me under that hypothetical date**
 15 **if someone, a stranger, came in and offered \$20 million**
 16 **and entered into a contract on September 9th to buy**
 17 **the property for \$20 million, Lipa Lieberman had no**
 18 **contractual right to a six percent commission on that**
 19 **\$20 million, correct?**
 20 MS. STUDLEY: Form.
 21 MS. SCHULTZ: Form.
 22 MS. STEIN: Form.
 23 A. Yes, but I believe his contract provided for
 24 like a cooperation broker. I mean, I think there were
 25 more terms. You're saying Lipa Lieberman, six percent.

1 MS. SCHULTZ: Form.
 2 MS. STUDLEY: Predicate.
 3 A. I don't know the timing that's part of your
 4 question, but I believe I received it from Mr. Stein.
 5 **Q. So I just want to make sure I'm clear.**
 6 **Are you saying that there was not an effort on**
 7 **your part with Mr. Stein to get the exclusive listing**
 8 **agreement executed prior to walking into court on**
 9 **September -- on the date of the -- here. I'll tell you**
 10 **exactly.**
 11 **September 19th, 2014, on the petition to sell**
 12 **808 Lexington?**
 13 A. I believe that was --
 14 MS. SCHULTZ: Form.
 15 A. I believe that was one of the motivations to
 16 get it signed. Yes.
 17 **Q. And you also knew, prior to walking into court**
 18 **on September 19th, 2014, that Julian Bivins wanted to**
 19 **purchase 808 Lexington rather than have it sold to a**
 20 **third party, correct?**
 21 MS. STUDLEY: Form.
 22 A. No, I did not.
 23 **Q. I want to make sure we're clear.**
 24 **You're saying right now, that prior to**
 25 **September 19th, 2014, you had absolutely zero knowledge**

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1 I'm not sure, depending on your terms of the
 2 hypothetical, who would get what. But, yes, his
 3 brokerage firm would be entitled to some percentage
 4 after September 10th, your hypothetical date.
 5 **Q. But not before September 10th?**
 6 A. No. No, not before September 10th.
 7 **Q. So on September 11th if somebody came up, a**
 8 **stranger came up to you, and said, hey, I want to buy**
 9 **this property, not a broker, but a stranger came up and**
 10 **said, Ashley, I know you represent the guardian in this**
 11 **matter. I want to buy 808 Lexington for \$20 million.**
 12 **We're now on September 11th.**
 13 **Under that exclusive listing agreement that**
 14 **Steve Kelly executed in favor of Lipa Lieberman, he**
 15 **would be entitled to a commission based upon what's in**
 16 **that exclusive listing agreement, correct?**
 17 A. I believe he would.
 18 **Q. Okay. You reviewed the exclusive listing**
 19 **agreement contract for Steve Kelly before it was**
 20 **executed, correct?**
 21 A. I believe I did.
 22 **Q. As a matter of fact, that contract was**
 23 **provided to you by Mr. Stein to be signed prior to the**
 24 **petition to sell the property hearing, correct?**
 25 MS. STUDLEY: Form.

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1 **that Julian Bivins wanted to buy the property 808**
 2 **Lexington rather than have it go to a third party?**
 3 MS. STUDLEY: Form.
 4 A. Okay. I misunderstood your question.
 5 MS. STEIN: Form.
 6 **Q. Okay. Good. I thought so.**
 7 MS. STUDLEY: Move to strike.
 8 A. I don't remember what I knew about what Julian
 9 Bivins wanted to do with the 808 Lexington property. I
 10 do recall communications earlier on, maybe year or so
 11 prior, about his desire; or maybe it was Oliver's desire
 12 to have him assume a mortgage on 808 Lexington and she
 13 declined. If you're asking me about him purchasing it--
 14 **Q. That's exactly what I'm asking you, and I'll**
 15 **make my question clearer.**
 16 **Isn't it true that you knew that Julian Bivins**
 17 **wanted to purchase 808 Lexington rather than have it go**
 18 **to a third party prior to the date you walked in and**
 19 **argued to sell the property on September 9th, 2014?**
 20 MS. STUDLEY: Form.
 21 MS. SCHULTZ: Form.
 22 A. I remember at the hearing representations
 23 being made that Julian Bivins wanted to have the
 24 property because he did not want it to go to a third
 25 party.



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1 Q. And you remember telling the Court that you
2 knew, prior to September 9th, 2014, during what you
3 termed to be confidential settlement negotiations that
4 Julian Bivins wanted to buy 808 Lexington, correct?

5 MS. STUDLEY: Form.

6 A. I don't remember that.

7 MS. STEIN: Form.

8 A. I don't remember that.

9 Q. But you knew during the settlement
10 negotiations, prior to walking in with the motion to
11 sell the property on September 19th, 2014, that Julian
12 Bivins wanted to purchase the 808 Lexington property
13 directly?

14 MS. STUDLEY: Form.

15 A. I don't remember that.

16 MS. STUDLEY: Asked and answered.

17 MS. SCHULTZ: Form.

18 A. I don't remember that.

19 Q. You knew, prior to having Steve Kelly sign the
20 exclusive listing agreement, that Julian Bivins wanted
21 to buy the property directly from the guardianship,
22 correct?

23 MS. STUDLEY: Form.

24 A. I don't remember that.

25 Q. But you knew at the time that Steve Kelly

1 place it on the market for a potential sale that way.

2 And I believe that's an important analysis.

3 Q. At the hearing you were representing -- the
4 hearing on the motion to sell, you were representing
5 that Lipa Lieberman had brought in offers from \$5.5
6 million to \$6.1 million; is that right?

7 MS. STUDLEY: Form.

8 A. I don't remember what I said in that regard.

9 Q. Did you rely upon Lipa Lieberman for properly
10 assessing the value of the property?

11 MS. STUDLEY: Form.

12 A. At that time I was relying on Lipa Lieberman
13 to bring offers from third parties.

14 Q. Did you rely upon Lipa Lieberman's assessment
15 of the value of the property?

16 MS. STUDLEY: Form.

17 A. At the time of that hearing?

18 Q. Yes.

19 A. I don't believe that was a consideration. I
20 believe he was operating as a broker and obtaining, I
21 guess, offers.

22 Q. Well, isn't it true that you represented to
23 the Court that you wanted the Court to authorize the
24 sale so that one of the offers that Lipa Lieberman had
25 presented at the time of the hearing would be accepted?

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1 signed the exclusive listing agreement with Lipa
2 Lieberman that even if Julian Bivins wanted to buy 808
3 Lexington directly from the guardianship, that Lipa
4 Lieberman would be entitled to a commission of six
5 percent, correct?

6 MS. STUDLEY: Form.

7 MS. SCHULTZ: Form.

8 A. I didn't think of it that way, but I do
9 believe that after the execution of the exclusive
10 listing agreement that there may have been a contractual
11 right to a fee.

12 Q. If Julian Bivins had communicated his intent
13 to buy 808 Lexington prior to the execution of the
14 exclusive listing agreement, but then after the
15 exclusive listing agreement sought to purchase it, that
16 would cost the guardianship of Oliver Bivins, Sr., a six
17 percent commission?

18 MS. STUDLEY: Form.

19 MS. SCHULTZ: Form.

20 A. I just can't answer the question because I
21 don't understand the timing, and initially there's some
22 other factors that are important. Because if Julian
23 Bivins was going to purchase the property for an amount
24 that was lower than what could be received by the
25 market, then it would be beneficial to go ahead and

1 MS. STUDLEY: Form.

2 A. I believe that the petition was -- I believe
3 I said what I said. I don't know what I exactly said at
4 that time.

5 Q. So whatever you said, you would agree was
6 correct and truthful?

7 A. Yeah. I just don't recall exactly what I
8 said, and I don't -- and because of the fact that that
9 hearing was cut short for our settlement negotiations,
10 I don't know what was said sort of pre-settlement
11 negotiations and post-settlement negotiations.

12 Q. One of the representations made by you to the
13 Court to get the petition to sell granted was that the
14 guardianship did not have the funds to be able to pay
15 the mortgage; is that correct?

16 A. I don't remember if I said that, but I do
17 recall that being a problem.

18 Q. Did you ever look at the amount of what was
19 in the guardianship accounts on or about September 19th,
20 2014, to see whether the guardianship could pay the
21 mortgage?

22 MS. STUDLEY: Form.

23 A. I believe the guardian did.

24 Q. Did you ever look at the bank account
25 statements to see how much money was in the guardianship



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1 accounts at the time you came in with the petition to
2 sell the property?

3 MS. STUDLEY: Form.

4 A. I had a working knowledge of what those were.
5 I didn't actually look at the bank statement on that
6 day, but I had a very clear working knowledge, and I
7 also relied upon my client.

8 Q. Do you recall representing to the Court that
9 the Trust was not paying the Ward's current living
10 expenses and, for that reason, the property had to be
11 sold for cash flow purposes?

12 A. I recall that being a problem.

13 Q. Did you ever look at the Trust statements to
14 see whether, in fact, the Trust was actually making
15 payments for the Ward's living expenses at that time?

16 MS. STUDLEY: Form.

17 A. I believe that they were making some payments.
18 I just don't believe they were making all that was being
19 requested by the guardian. So I don't remember which
20 particular expenses, but I do remember that being sort
21 of the theme.

22 Q. Did you ever look at the Trust documents to
23 see what was actually being paid at that time?

24 A. I don't know if my client did. I did not, but
25 I believe my client.

1 respect to the Ocean Boulevard property for the property
2 taxes to be paid. I don't know if that was ever agreed
3 upon or paid by the Oliver Bivins Management Trust, but
4 that's what I recall going on. I did not say that -- or
5 I'm not telling you that the Trust did not make payments
6 for the Ward's providers.

7 It's just that there were payments that were
8 being requested to being made that weren't be made.

9 Q. Isn't it true that the Trust, all the way up
10 through the time you walked into court on the petition
11 to sell the property, had been paying the quarterly
12 condominium association fees for 330?

13 A. It's very possible they were.

14 Q. And isn't it true that in January 2014 that
15 the Trust reimbursed the guardianship for the entire
16 amount of the property taxes that the guardianship had
17 paid for 330 in 2013?

18 MS. STUDLEY: Form.

19 A. Well, that's very possible.

20 Q. And isn't it true that every single monthly
21 expense to nurses, FPL, Comcast, Mermaid, United
22 Nursing, Physician Services were being paid in the same
23 manner on a monthly basis prior to you walking in on the
24 motion to sell 808 Lexington as after you left court on
25 the motion to sell 808 Lexington?

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1 Q. So you relied upon your client?

2 A. It wasn't necessarily a reliance. I was aware
3 at the time. I had a working knowledge of what was
4 being paid and what wasn't being paid.

5 Q. But you didn't look Trust documents to see
6 what was actually being paid and what wasn't being paid,
7 correct?

8 MS. STUDLEY: Form.

9 A. I can't tell you when; there was a time when
10 I did have Trust statements, I just don't -- I can't
11 remember right now during this time frame.

12 Q. So if the same monthly payments on the Trust
13 documents show the same payments to the same providers
14 both prior to the time you came into court on the motion
15 to sell and after the date of the motion to sell, you
16 would agree with me that would show that the same
17 payments were being made and, in fact, the Trust wasn't
18 withholding payments?

19 MS. STUDLEY: Form.

20 A. Actually, what I know -- what I remember is
21 that the Trust was making payments, I believe, for some
22 care services. I think the demand on the Trust was to
23 make real property tax payments and other payments with
24 respect to 808 Lexington, which was declined.

25 I don't know what demands were made with

1 MS. STUDLEY: Form.

2 A. See, the problem with that is this: Before
3 the Texas settlement, my guardian was receiving the
4 royalty interest, or at least what was left of it. And
5 that was being received directly to the guardianship;
6 after that settlement, those payments were going to the
7 Trust. So then the Trust was to pay for the benefit of
8 Oliver.

9 So after that Texas settlement the guardian
10 received less money per month and had to rely on the
11 Oliver Bivins Management Trust to make payments on
12 behalf of the ward. So after that occurred, there was
13 a shift in the guardian paying for some things and the
14 management Trust paying for some things because now the
15 management Trust had assets, which the guardian was
16 previously getting, and assets that were previously held
17 by your client.

18 MR. DENMAN: Would you read back my question,
19 please.

20 (Question read back).

21 THE WITNESS: That's where I go off the rules
22 because there was a change after that Texas settlement.
23 There was a different mechanism of payment after the
24 Texas settlement because guardianship assets that would
25 have been guardianship assets, either that were being

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1 received by the guardian, or were due to the
2 guardianship from Julian Bivins, were paid to the Oliver
3 Bivins Management Trust.

4 So then the Oliver Bivins Management Trust
5 began paying some of Oliver Bivins' expenses.

6 BY MR. DENMAN:

7 **Q. After -- that was in April of 2013, correct?**

8 A. Yes, but --

9 **Q. You said that you --**

10 MS. STUDLEY: She was not finished.

11 Were you finished?

12 THE WITNESS: No, I'm not done.

13 MS. STUDLEY: Let her finish.

14 THE WITNESS: I can be done because you have a
15 follow-up and maybe --

16 BY MR. DENMAN:

17 **Q. April of 2013 is when the management Trust was
18 created and became funded and was supposed to pay the
19 living expenses of Oliver Bivins, Sr., correct?**

20 A. It was supposed to be living expenses and
21 other expenses as dictated by the terms of the agreement
22 and the Trust.

23 **Q. And I probably should have just narrowed my
24 question because I didn't think we were going to go that
25 far back. So let's just go for the year 2014.**

1 MS. STUDLEY: You keep cutting her off.

2 A. Yeah. There were other expenditures, and I
3 believe there was a process by which the Trust would --
4 the guardianship would have to make the payment, and
5 then the Trust would then reimburse the guardianship,
6 thereby the guardian having to have the funds to begin
7 with.

8 **Q. At the time that you walked into court for the
9 motion to sell the property, did you know how many tens
10 of thousands of dollars were sitting in the guardianship
11 account?**

12 MS. STUDLEY: Form.

13 A. I don't know how many tens of thousands were
14 sitting there, no.

15 **Q. Did you ever look at the Trust documents to
16 see whether, in fact, any payments by the Trust were
17 taking longer than 30 days to be paid -- well, let me
18 strike that.**

19 **Is it your testimony that the guardianship
20 throughout 2014 was actually having to pay the expenses
21 and then seek reimbursement from the Trust?**

22 A. Not for all of them, but for some of them.

23 **Q. Like what?**

24 A. The cleaning people, I believe. I don't
25 exactly remember, but I believe there were expenses for

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1 A. Okay.

2 **Q. January 1st, 2014, through September 19th,
3 2014, which we have talked about, is the date that you
4 walked into court on the motion to sell the property?**

5 A. Uh-hum.

6 **Q. You would agree with me that throughout
7 January -- throughout 2014 through the time that you
8 walked into Court and you made representations in order
9 to get the Court to grant an order selling the property,
10 that the Trust was paying on a monthly basis United
11 Nursing, FPL, Comcast, Mermaid, Physician -- I can't
12 read my own handwriting -- for physicians on a monthly
13 basis just as after September 2014?**

14 MS. STUDLEY: Form.

15 A. I don't have an exact knowledge of that right
16 now. I believe that that is correct, but your client
17 received the Trust statements the same as my client
18 either did or should have at the time of September of
19 2014. So everyone was aware of what was being paid and
20 what wasn't being paid. The problem was what wasn't
21 being paid.

22 **Q. And you represented to the Court that the
23 Trust wasn't paying living expenses, correct?**

24 A. I don't know what I said, but there are other
25 expenditures.

1 that that were occurring.

2 **Q. Do you know how much that was?**

3 A. I don't know.

4 **Q. But you would agree with me throughout 2014
5 on monthly basis, every month prior to the time you
6 went into court on the motion to sell and after, that
7 the Trust was paying United Nursing directly?**

8 MS. STUDLEY: Form.

9 A. I don't recall that, but I don't -- I can't
10 say yes or no.

11 **Q. The Trust was paying the income taxes?**

12 A. I don't know.

13 **Q. The Trust was paying FPL on a monthly basis?**

14 A. Again, I don't know sitting here. I was aware
15 of the working -- the inner workings of the expenses at
16 the time of that hearing.

17 **Q. And the Trust was paying Comcast on a monthly
18 basis?**

19 A. My answer would be the same for all of them,
20 as we sit here today.

21 **Q. And the Trust had reimbursed the guardianship
22 for the property taxes paid on 330 in January of 2014,
23 correct?**

24 A. I don't know when that happened.

25 **Q. Do you know how long a period of time went by**



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1 -- let me strike that.

2 Do you know how quickly the Trust paid back

3 the guardianship for the property taxes it paid in 2013?

4 MS. STUDLEY: Form.

5 A. I don't know that.

6 Q. Do you know how quickly the Trust reimbursed

7 the guardianship for any insurance payments that it

8 made?

9 MS. STUDLEY: Form.

10 A. No, I don't, not sitting here today.

11 MS. STUDLEY: We have been going for a couple

12 of hours. Are you okay?

13 THE WITNESS: Yeah.

14 MS. STUDLEY: How about you? Are your fingers

15 okay? Do you need a break?

16 THE REPORTER: Yes, please.

17 MR. DENMAN: Sure. We can take a break.

18 (Recess taken).

19 BY MR. DENMAN:

20 Q. Keith Stein came down to Florida for the

21 hearing on the petition to sell the property; is that

22 right?

23 A. Yes.

24 Q. Without going into the --

25 MR. DENMAN: Well, I assume that you're going

1 But, again, the question is: You would agree

2 that if you made a representation to the Court, you made

3 it truthfully?

4 MS. STUDLEY: Form.

5 A. Like I said, yes.

6 Q. Do you know how much money was actually netted

7 to Oliver, Sr., in connection with the sale of 808

8 Lexington?

9 A. To your client? The sale of 808 Lexington to

10 your client?

11 Q. I think you understand my question,

12 Ms. Crispin.

13 A. I'm just asking.

14 MS. STUDLEY: Form.

15 Q. No. You're being sarcastic.

16 A. No, sir.

17 Q. The question was clear as day.

18 MS. STUDLEY: Form.

19 Q. Do you know how much was netted to Oliver,

20 Sr., as a result of the sale of 808 Lexington?

21 MS. STUDLEY: Move to strike counsel's

22 comments.

23 A. And you want to know how much the guardianship

24 got out of --

25 Q. I want to know how much was netted to Oliver,

1 to maintain an attorney-client privilege with regard to

2 any communications that you had with Keith Stein in

3 preparation for that hearing, correct?

4 MS. STUDLEY: Yes.

5 Q. You did have meetings and communications with

6 Keith Stein to prepare for that hearing, correct?

7 A. I believe so.

8 Q. Okay. I mean, you billed your time for that,

9 correct?

10 A. Yes, I think so.

11 Now, I would need to see my fee petition to

12 know how much I had time-wise or not, but I believe that

13 to be correct.

14 Q. You believed that as a result of the petition

15 to sell the property that Oliver, Sr., his accounts

16 would net approximately \$5 million, correct?

17 A. I don't recall.

18 Q. But if you made that representation to the

19 Court, that would have been a representation that you

20 made truthfully, correct?

21 MS. STUDLEY: Form.

22 A. I would like to see the transcript where I

23 made that representation, maybe it would fresh my

24 recollection.

25 Q. Okay. Well, we'll get there.

1 Sr., as a result of the sale --

2 MS. STUDLEY: Form.

3 Q. -- after fees and costs.

4 A. Fees and costs associated with the sale?

5 Q. Do you recall, in the motion to sell the

6 property, you telling the Court that net of mortgage and

7 net of fees -- let me strike that.

8 Do you recall the representation being made

9 that net of mortgage and net of fees that Oliver, Sr.,

10 would net somewhere around \$5 million if the Court

11 approved the sale of 808 Lexington?

12 MS. STUDLEY: Form.

13 A. I don't know what you're talking about unless

14 I see the transcript. But if your question is not what

15 did I say, but what did it net, of course, that would be

16 different. Because what was being presented to the

17 Court were offers from third-party buyers; what ended up

18 happening was a negotiated-upon sale to Julian Bivins

19 for a negotiated amount.

20 Q. I'm talking about as far as when your side, on

21 behalf of the guardian, made arguments to the Court in

22 order to approve the sale of 808 Lexington. The

23 arguments were that, based upon the offers presented by

24 or received by Lipa Lieberman, that Oliver, Sr., would

25 net, after fees and mortgage, somewhere around \$5

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1 million?

2 A. I would need to see the transcript and the
3 context to understand what you're saying. What I recall
4 was that there were third-party possible buyers.

5 **Q. And you would agree that at the point in time**
6 **of the petition to sell the property, all of the orders**
7 **regarding fees for the contingency fee, for your hourly**
8 **fee, for Stein's fee, for Ronda's fee, all of those had**
9 **already been entered, correct?**

10 MS. STUDLEY: Form.

11 A. They are ongoing.

12 **Q. There were orders as of that time that are**
13 **even part of the global settlement, correct?**

14 MS. STUDLEY: Form.

15 A. Yes. There are orders that are part of that,
16 I believe, but the fees to Ms. Gluck, my firm,
17 Mr. Stein, those fees are ongoing.

18 **Q. And do you --**

19 A. So those orders weren't finite.

20 **Q. Do you deny that representations were made to**
21 **the Court by your side in order to get the Court to**
22 **approve the settlement, that net of all of the fee**
23 **orders existing at that time and net of the mortgage,**
24 **that somewhere around \$5 million would go to Oliver,**
25 **Sr., based upon the offers presented by Lipa Lieberman?**

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1 MS. STUDLEY: Form. Asked and answered.

2 MS. SCHULTZ: Form.

3 A. The settlement with Julian Bivins or --
4 because you said the settlement.

5 **Q. I'm sorry. I'm sorry, if the Court were to**
6 **have approved the sale.**

7 A. The sale, okay.

8 MS. STUDLEY: Same objection.

9 A. Again, I would have to see the transcript to
10 understand what I said and what the context was.

11 **Q. So, as we sit here today, you don't remember**
12 **that argument being made to the judge by your side?**

13 MS. STUDLEY: Form.

14 A. I don't remember it. I don't dispute it. I
15 don't say you're wrong. I don't say you're right. I
16 just don't remember.

17 **Q. And you do know, though, at that time that the**
18 **highest offer by Lipa Lieberman that he had received**
19 **that you presented to the Court was \$6.1 million?**

20 MS. STUDLEY: Form.

21 A. I don't recall.

22 **Q. Okay. Around that amount?**

23 MS. STUDLEY: Form.

24 **Q. Do you recall anything in the sevens?**

25 MS. STUDLEY: Form.

1 A. I don't recall anything in the sevens.

2 **Q. Anything in the eights?**

3 A. I don't recall.

4 **Q. Anything in the nines?**

5 MS. STUDLEY: Form.

6 A. No.

7 **Q. Do you recall your side representing to the**
8 **Court that Lipa Lieberman's exclusive agreement had been**
9 **in place for a year?**

10 A. I don't recall that, but in thinking about his
11 exclusive listing, I know when I previously answered
12 questions I said it was near in time to that hearing. I
13 believe that there may have been an agreement for his
14 exclusive listing in 2014, sometime earlier than August
15 or September.

16 **Q. Do you know if that was ever produced and**
17 **discovered?**

18 A. I don't know. I don't know, and I don't
19 remember the exact date.

20 **Q. I'll represent to you the only -- well, let me**
21 **strike that.**

22 **You were at Stein's fee petition hearing in**
23 **December, correct?**

24 A. Of '14, '15?

25 **Q. '15.**

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1 A. Yes, I was.

2 **Q. And you remember during Stein's fee petition**
3 **hearing that one of the exhibits that came out was the**
4 **exclusive listing agreement with Lipa Lieberman and the**
5 **e-mail exchange leading up to that, correct?**

6 A. I remember that, yes.

7 **Q. And you remember those e-mails and that**
8 **exclusive agreement showing that there was a rush to get**
9 **it signed prior to the petition to sell 808 Lexington,**
10 **correct?**

11 MS. STUDLEY: Form.

12 A. I don't remember the rush part, but I do
13 remember there being e-mails in either August or
14 September attempting to sign a listing agreement.

15 **Q. Let me see if I can help refresh your**
16 **recollection.**

17 **Do you recall that within five days of the fee**
18 **petition hearing that there was an e-mail that came into**
19 **evidence between Lipa and Stein where Stein is kind of**
20 **disparaging you and Brian as to why you guys weren't**
21 **getting off your tails to get the listing agreement**
22 **signed?**

23 MS. STUDLEY: Form.

24 A. I don't remember it exactly, but I remember
25 the tenure of that questioning.



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1 Q. Right.

2 You remember there being a document admitted

3 into evidence showing where Stein was frustrated that he

4 was sending you e-mails -- he was sending e-mails to

5 Lipa Lieberman asking why you guys weren't getting that

6 done as quickly as he wanted it?

7 A. Right. And I remember, in advance of that,

8 having discussions with Lipa about an exclusive listing

9 in advance of that.

10 Q. And during the questioning of Mr. Stein --

11 really, I'm offering this. I'm not asking you to

12 impeach Stein's testimony. I'm trying to refresh your

13 recollection.

14 During the questioning of Mr. Stein questions

15 were asked, are you aware of the existence of any other

16 exclusive contract, a written contract, with

17 Mr. Lieberman prior to that one signed within a few days

18 of the hearing, and he said no. You've now told me that

19 you think there may be another contract.

20 Does that refresh your recollection? Do you

21 still believe there's another written contract someplace

22 with Lipa Lieberman?

23 A. I just --

24 MS. STUDLEY: Wait. If you're going to

25 refresh her recollection, you have to show her the

1 agreements for you to have Kelly sign, through the paper

2 mail these days, are they?

3 MS. STUDLEY: Form.

4 A. I mean, most likely not, but I just can't say

5 for sure.

6 Q. So you could easy go back to your computer,

7 and if there was an exclusive agreement with Lipa

8 Lieberman prior to the one that came out in Stein's

9 testimony in December of 2015, you would be able to

10 easily locate that, correct?

11 MS. STUDLEY: Form.

12 A. You would have to ask my lawyer.

13 Q. Are all of your e-mails still in your system?

14 MS. STUDLEY: Form.

15 A. My e-mails?

16 Q. Yes.

17 A. Yes.

18 Q. So all of the e-mails involving the underlying

19 case are still in your system?

20 MS. STUDLEY: Form.

21 A. I believe so.

22 Q. And what do you use -- Microsoft Office?

23 A. I think so.

24 Q. Outlook?

25 A. I'm not very tech savvy, but I believe it's

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1 document. That's improper.

2 MR. DENMAN: No, I don't.

3 MS. STUDLEY: I believe you do. It's

4 improper.

5 THE WITNESS: I just can't --

6 MR. DENMAN: You can do whatever you want when

7 you question.

8 THE WITNESS: I just can't -- go ahead.

9 Sorry.

10 MS. STUDLEY: In the event it's going to be

11 read to a jury, I think that's improper.

12 MR. DENMAN: Okay.

13 MS. STUDLEY: Okay. Go ahead.

14 THE WITNESS: I can't say for sure.

15 BY MR. DENMAN:

16 Q. Today I've never seen any other contract

17 throughout, you know, the 50,000 documents that have

18 been provided to us, and we've had to painfully go

19 through all of these PDFs.

20 If you had an exclusive listing agreement with

21 Lipa Lieberman, that would be something that would have

22 probably been exchanged in e-mail, correct?

23 MS. STUDLEY: Form.

24 A. I don't know.

25 Q. I mean, nobody is sending you mail, exclusive

1 Outlook.

2 Q. I'm sure you've done Outlook searches before,

3 right?

4 A. Sure.

5 Q. Do you recall the -- you represented Rogers

6 in connection with the Court approving the New York

7 settlement, correct?

8 A. Yes.

9 Q. And you would agree with me that the

10 representations made to the Court to get him to -- to

11 get the approval of the settlement was that the

12 refinancing of the Beachton mortgage was part of the

13 settlement?

14 MS. STUDLEY: Form.

15 A. I don't recall what I said. I would have to

16 see the transcript. I recall Beachton being a party to

17 the agreement.

18 Q. And you recall the refinancing was part of the

19 settlement to have Beachton paid?

20 MS. STUDLEY: Form.

21 A. I recall part of the settlement was to pay

22 Beachton.

23 Q. Through refinancing, correct?

24 MS. STUDLEY: Form.

25 A. The settlement agreement speaks for itself.



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1 Q. So, then, if you made representations to the
2 Court that refinancing was part of the settlement
3 agreement, those were not correct?

4 MS. STUDLEY: Form.

5 A. I would have to see what I said in the context
6 in which I said it.

7 Q. So you can't answer that yes or no, as we sit
8 here today?

9 A. I just can't answer it. I just recall the
10 contract, I mean, the settlement and mutual release, but
11 without it in front of me, I can't recall exactly what
12 it says.

13 Q. Did you ever look at -- let me strike that.
14 Did you ever advise Curtis Rogers not to pay
15 one half of the mortgage -- one half of the Sovereign
16 mortgage when it was due?

17 A. Attorney-client privilege.

18 MS. STUDLEY: I'm going to move for protective
19 order and instruct her not to answer.

20 MS. STEIN: Form.

21 Q. You know that if the mortgage is not paid, it
22 goes into default, correct?

23 MS. STUDLEY: Form. Predicate.

24 A. I believe it's pursuant to whatever the
25 mortgage documents say.

1 court reporter can only record one speaker at a time.

2 So I wanted to make sure mine was lodged in there, too.

3 THE REPORTER: Okay. Would you like to state
4 your objection now so I can get it, please.

5 MS. STUDLEY: You're talking about the
6 question about the advice given?

7 MS. STEIN: Yes. Correct.

8 MS. STUDLEY: Okay. I moved for protective
9 order. That's where the objection goes.

10 MS. STEIN: Okay.

11 THE REPORTER: Okay. Thank you very much.
12 BY MR. DENMAN:

13 Q. Do you remember Deborah Kuhnel's deposition in
14 connection with the motion to compel Oliver, Jr., to
15 comply with the New York Settlement Agreement that we
16 reviewed e-mails between Curtis Rogers and Deborah
17 Kuhnel where it indicates that Curtis Rogers was not
18 paying the mortgage based upon advice of counsel?

19 Do you recall that?

20 A. I don't recall that.

21 MS. STUDLEY: Form.

22 Q. Did you ever examine the bank accounts to
23 determine whether the guardian had sufficient money in
24 the bank to pay one half of the Sovereign mortgage at
25 the time it went into default?

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1 Q. Did you ever review the Sovereign mortgage
2 documents to determine what would occur if the mortgage
3 wasn't paid?

4 A. Yes.

5 Q. And you would agree with me that if the
6 mortgage wasn't paid, it goes into default?

7 MS. STUDLEY: Form.

8 A. The Sovereign documents would be the best
9 descriptor of that, but I believe in summation, yes.

10 MS. STEIN: Can I interrupt for one second. I
11 just want to make sure that the court reporter got my
12 objection. I know that sometimes with a speakerphone if
13 one person is talking, you won't hear the other one. I
14 just want to make sure my -- because it sounded like I
15 objected at the same time as someone else, and I just
16 want to make sure it's on the record.

17 I objected to the previous question as to
18 advice to Curtis Rogers.

19 THE REPORTER: Counsel, this is the reporter.

20 I heard no objection come over the phone line
21 at all, but all previous other objections I've heard and
22 reported.

23 MS. STEIN: Okay. Because I figured since
24 they were talking at the same time as me, it probably
25 didn't come over the speakerphone because I know the

1 MS. STUDLEY: Form.

2 A. At that time was I made aware -- I can't
3 answer the question without revealing attorney-client
4 privilege.

5 Q. The question was whether you reviewed the bank
6 statements to determine whether there was sufficient
7 money in the accounts to pay the mortgage at the time it
8 went into default?

9 A. Again, I can't answer it without attorney-
10 client privilege.

11 Q. So you're saying the act of whether or not you
12 reviewed the bank statements is an attorney-client
13 privilege?

14 MS. STUDLEY: That could be.

15 A. It's the way that you asked the question. You
16 said at the time that it went into default.

17 Q. Do you know when it went into default?

18 A. That's attorney-client privilege. That's why
19 I'm raising it.

20 Q. Did you ever receive any documents from
21 Sovereign Bank showing when the mortgage went into
22 default?

23 A. I did at some point.

24 Q. So based upon documents you have from
25 Sovereign Bank, you know when the mortgage went into

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1 default, correct?
 2 MS. STUDLEY: Form.
 3 A. The documents that I reviewed from Sovereign
 4 Bank were after the time that it went into default.
 5 Q. How long after?
 6 A. That would be attorney-client privilege.
 7 Q. Well, no. The documents you received tell
 8 you when it went into default, and you know when you
 9 received them. Again, that would be communication from
 10 a third party. That would not be attorney-client
 11 privilege. So it's easy to deduce that without actually
 12 telling us attorney-client privilege of when your client
 13 perhaps would have told you it was in default.
 14 Again, I'm only asking you a question. That's
 15 why I'm giving the clarification just with regard to the
 16 document you received from Sovereign Bank.
 17 A. Again, I received it from my client. It's
 18 attorney-client privilege.
 19 Q. It doesn't matter if you received a document
 20 from your client or not; if the document is from
 21 Sovereign Bank, that's not attorney-client privilege.
 22 A. But when I received it, it is.
 23 Q. No. Okay. Let me see if I can back up.
 24 The document you received from Sovereign Bank
 25 tells you when it went into default, correct?

1 Q. Yes, or anyone from your office.
 2 A. I don't know.
 3 Q. Do you know whether your office provided any
 4 communications to Sovereign Bank in any way to try to
 5 negotiate an extension or refinance or some sort manner
 6 of preventing the continued default of the mortgage?
 7 A. Yes, we did take action to try to satisfy the
 8 Beachton mortgage.
 9 Q. I'm talking about -- I thought I was pretty
 10 clear about when it was still Sovereign.
 11 I said did your office reach out to Sovereign?
 12 A. I don't know. I did not, but I don't know.
 13 And this is where my timing problem is: I'm not sure
 14 that I had the information about the default until after
 15 it was -- after or near in time to when it was acquired
 16 by Beachton.
 17 Q. Well, you were present at the deposition of
 18 Curtis Rogers when he testified that he knew the
 19 mortgage was in default, correct?
 20 A. Yes.
 21 Q. And you were also present during the
 22 deposition of Curtis Rogers when he said he did nothing
 23 to prevent the mortgage from going into default?
 24 MS. STUDLEY: Form.
 25 Q. Do you remember that?

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1 A. I didn't receive it from Sovereign Bank.
 2 Q. The document from Sovereign Bank tells you
 3 when it went into default, correct?
 4 A. I believe I have a document that has a
 5 calculation that shows when it went into default.
 6 Q. So based upon you now knowing from that
 7 document when it went into default, the question is:
 8 Did you ever look at the bank statements at around the
 9 time that the mortgage went into default to know whether
 10 or not the guardian had the money to pay one half of the
 11 mortgage?
 12 MS. STUDLEY: Form.
 13 A. I believe so.
 14 Q. And do you know how much money was in the
 15 account?
 16 A. I did at the time.
 17 Q. And was it more than one half of the mortgage?
 18 MS. STUDLEY: Form.
 19 A. It was a communication from my client. So I
 20 don't know. I can't answer.
 21 Q. Did you ever attempt to negotiate -- let me
 22 strike that.
 23 Did you ever reach out to Sovereign Bank
 24 regarding the default?
 25 A. Me, personally?

1 MS. STUDLEY: Form.
 2 A. I don't -- I don't recall what he testified to
 3 in that regard right now. I understand that's what --
 4 you're telling me that he said it, but I just don't know
 5 unless I look at it.
 6 Q. You would agree with me it would not be in the
 7 Ward's best interest for the mortgage on the property to
 8 go into default?
 9 MS. STUDLEY: Form. Predicate.
 10 MS. STEIN: Form.
 11 A. I can't agree with you because given the facts
 12 and circumstances of this guardianship, the guardian
 13 paid for the care and maintenance of the ward as a
 14 primary position of where the assets would be allocated.
 15 Q. And if his care and treatment were being
 16 provided, and there were still assets to pay half of the
 17 mortgage, you would agree that it would not be in the
 18 best interest to the ward to allow the mortgage to go
 19 into default, correct?
 20 MS. STUDLEY: Form.
 21 MS. STEIN: Form.
 22 A. I can't answer your question.
 23 Q. So is it your testimony that there were no
 24 funds available to pay one half of the mortgage and pay
 25 for the care and treatment of the ward? Is that your

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1 testimony?

2 MS. STUDLEY: Form.

3 A. I would have to go back and look at the
4 position of where the guardianship was at the time in
5 which Mr. Rogers was made aware that the mortgage was
6 in default, but I believe he performed that analysis.

7 **Q. Did you ever perform that analysis?**

8 MS. STUDLEY: Form.

9 MS. STEIN: Form.

10 A. I don't remember it specifically, but I do
11 recall participating with Mr. Rogers in the analysis.

12 **Q. Do you recall -- was it your understanding**
13 **that upon the Court's approval of the New York**
14 **settlement, that the rent receipts to Rogers would**
15 **double next month?**

16 MS. STUDLEY: Form.

17 A. I recall it being anticipated that the
18 transfer of the property from the joint status between
19 the Lorna Estate and the guardianship would occur
20 expeditiously.

21 **Q. So, then, you never advised the Court that**
22 **upon the approval of the settlement Rogers' rental**
23 **receipts would double the next month?**

24 MS. STUDLEY: Form.

25 A. I don't recall those exact words because I

1 **The representations to the Court were that the**
2 **ward was in better need of health care, and that's why**
3 **the approval of the New York settlement would**
4 **immediately improve his cash flow?**

5 MS. STUDLEY: Form.

6 MS. SCHULTZ: Form.

7 A. It would improve his cash flow, yes, it would.

8 **Q. And he needed to have his cash flow improved**
9 **because he needed better health care?**

10 MS. STUDLEY: Form.

11 A. I don't recall what circumstances were going
12 on at the time, and I don't know what was said in that
13 regard. If you want to show me the transcript, I will
14 look at it and review the context in whatever you're
15 saying I said was said, and I can explain it if you need
16 further explanation.

17 **Q. Do you deny that representations were made to**
18 **the Court to get the New York settlement approved that**
19 **Oliver, Sr., was in need of cash flow for better care?**

20 MS. STUDLEY: Form. Asked and answered --

21 MS. STEIN: Form.

22 MS. STUDLEY: -- multiple times.

23 MS. SCHULTZ: Form.

24 MS. STUDLEY: You can answer again.

25 A. Without looking at the transcript, I can't say

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1 just don't recall what was said, but I do recall that it
2 was the anticipation of the guardian that the property
3 would be transferred expeditiously, and that the sole
4 ownership would garner Mr. Rogers, or Mr. Kelly
5 eventually, all of the rents associated with the
6 property.

7 **Q. So, then, it's your testimony here today that**
8 **you had no understanding that upon the Court's approval**
9 **the rent receipts would double the next month?**

10 A. No, not that's what I'm saying.

11 MS. STUDLEY: Form.

12 A. That's not what I'm saying. I don't know if
13 -- I don't know if that's what was said, but I think it
14 was anticipated that that would happen.

15 **Q. And, as a matter of fact, that's what was**
16 **represented in order to get the Court to approve the New**
17 **York settlement because of the immediate need for cash**
18 **flow for the ward for his health care; is that right?**

19 MS. STUDLEY: Form. Predicate.

20 Argumentative.

21 A. I don't recall what was stated at the hearing.
22 What you're asking me is: Did I believe that the
23 guardianship would reap a hundred percent of the rent
24 post-settlement and that was the anticipation. Yes.

25 **Q. And the reason the -- let me strike that.**

1 what was said at that hearing.

2 **Q. As we sit here today, do you know whether**
3 **Oliver, Sr., needed the New York settlement to be**
4 **approved so that he could obtain better cash flow, or**
5 **so he could obtain cash flow because he needed better**
6 **health care?**

7 MS. STUDLEY: Form.

8 A. I don't know that, particularly sitting here
9 today. I would have to go back to the context at the
10 time; however, I can tell you the benefits of that
11 agreement, if that's what you're asking me.

12 **Q. You were part of the negotiations of the Texas**
13 **Settlement Agreement, correct?**

14 MS. STUDLEY: Form. Predicate.

15 A. In limited part.

16 **Q. You were part of -- well, you were --**

17 A. I didn't attend the mediation conference. I
18 did participate by phone as needed.

19 **Q. Have you ever prepared a Trust document?**

20 A. Yes.

21 **Q. Is that something that you do as part of your**
22 **business?**

23 A. Yes.

24 **Q. How long have you been preparing Trust**
25 **agreements?**



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1 A. Simple ones, maybe for eight years or so. I
 2 mean, on my own, I mean, I've done -- for the last ten
 3 years I've participated in the drafting of them.
 4 **Q. Have you ever prepared a Trust agreement for**
 5 **Texas?**
 6 A. For Texas?
 7 **Q. Yes.**
 8 A. No.
 9 **Q. Are you familiar with Texas state law**
 10 **regarding Trust agreements?**
 11 MS. STUDLEY: Form. Predicate.
 12 A. I'm not licensed in Texas, and I don't know
 13 their laws. But, as it relates to Oliver, Sr., I did
 14 help negotiate terms of the management Trust.
 15 **Q. I mean, you actually spent dozens of hours**
 16 **revising and editing the Texas Trust Agreement, correct?**
 17 A. Yes.
 18 **Q. And you know that the attorneys in Texas were**
 19 **operating under a contingency fee agreement, correct?**
 20 A. I believe I knew that from their initial
 21 hiring when I came onboard with Mr. Rogers.
 22 **Q. And part of the agreement of the Texas lawsuit**
 23 **would have -- part of the settlement of the Texas**
 24 **lawsuit involved a settlement agreement and Trust**
 25 **agreement, correct?**

1 **reached on behalf of the guardian with Oliver, Jr.,**
 2 **correct?**
 3 MS. STUDLEY: Form.
 4 A. Yes.
 5 **Q. And that was approximately \$120,000, correct?**
 6 MS. STUDLEY: Form.
 7 A. I don't recall what it was.
 8 **Q. But Julian objected to that settlement because**
 9 **he believed it was too low, correct?**
 10 MS. STUDLEY: Form.
 11 A. I don't know if he filed a formal objection
 12 with his position. I don't remember. I remember having
 13 discussions with you outside the courtroom. I don't
 14 remember what they were, but you were objecting.
 15 **Q. And recall that Julian was actually able to**
 16 **negotiate a settlement for \$315,000 in connection with**
 17 **the petition it had filed to compel Oliver to comply**
 18 **with the New York settlement, correct?**
 19 A. I don't think --
 20 MS. STUDLEY: Form.
 21 A. -- it was all your doing. Yes, you were part
 22 of it.
 23 **Q. You recall that the settlement was \$315,000,**
 24 **correct?**
 25 MS. STUDLEY: Form.

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1 A. Yes, it was a settlement agreement and a
 2 Trust.
 3 **Q. And the contingency fee agreement pertained to**
 4 **the entire Texas transaction, correct?**
 5 A. I don't know. I didn't review it for that,
 6 Mr. Heinrich and his peers.
 7 **Q. Did you or your firm ever seek reimbursement**
 8 **for all of the fees that you spent in connection with**
 9 **revising and editing the Texas Trust Agreement from the**
 10 **contingency fee award that Heinrich received?**
 11 A. We petitioned for our fees from the
 12 guardianship with respect to the time that we spent with
 13 respect to the Texas litigation.
 14 **Q. You were involved in negotiation of the New**
 15 **York settlement?**
 16 A. Yes.
 17 **Q. You were involved in the negotiation of the**
 18 **global settlement?**
 19 A. Yes.
 20 **Q. You were involved with the petition to compel**
 21 **compliance by Oliver, Jr., to comply with the New York**
 22 **settlement, correct?**
 23 A. Yes.
 24 **Q. As a matter of fact, you actually filed a**
 25 **motion for court approval of the settlement that you had**

1 A. I remember it was in an order.
 2 **Q. For \$315,000, correct?**
 3 A. I don't know. I don't remember right now.
 4 I'll take your word that's what it was, but I don't
 5 remember.
 6 **Q. And you recall that Julian filed a petition**
 7 **to force Oliver Bivins to comply with the New York**
 8 **settlement in July of 2014, correct?**
 9 A. I know he filed either a petition or a motion.
 10 I don't remember when. But, yes, I don't dispute that
 11 he filed something saying that Oliver was in breach of
 12 the agreement.
 13 **Q. And the breach was that Oliver, Jr., had been**
 14 **keeping half of the Fig & Olive rents as opposed to**
 15 **paying them over pursuant to the New York settlement,**
 16 **correct?**
 17 A. Yes.
 18 **Q. And also that Oliver, Jr., was not paying**
 19 **taxes, correct?**
 20 A. I believe that was Julian's position.
 21 **Q. And that Oliver, Jr., was not paying rental**
 22 **income from Pinafore or his friend on the fourth floor,**
 23 **correct?**
 24 A. I don't remember exactly what Julian said,
 25 but, yes, it was more than just the Fig & Olive rents.

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1 Q. And you understood that as a result of the
2 additional income, that Oliver, Sr., was supposed to
3 receive in connection with 808 Lexington from the New
4 York settlement, that that would have doubled a minimum
5 of the amount of gross income from 808 Lexington,
6 correct?

7 MS. STUDLEY: Form.

8 MS. SCHULTZ: I'm going to join that
9 objection.

10 A. I don't understand exactly what you're asking
11 me, but if -- what was intended to be the guardian
12 owning the entire amount of 808, which was the
13 guardian's position, and he filed a motion, Mr. Kelly
14 did, to get the rents back from the inception of the New
15 York Settlement Agreement.

16 Q. And that was actually filed about six months
17 after the petition filed by Julian in January of 2015,
18 correct?

19 A. It was afterwards. I don't know the timing.

20 Q. Do you dispute that the petition filed by you
21 on behalf of Steve Kelly was filed in January of 2015?

22 MS. STUDLEY: Form.

23 A. I don't dispute that.

24 Q. As a matter of fact, in January of 2015, some
25 six months after Julian filed his same petition, you

1 guardianship estate, correct?

2 MS. STUDLEY: Form. Argumentative.

3 A. No, not at all. We believe that was the best
4 way in which to deal with the matter --

5 Q. And it was not --

6 A. -- was to ensure that we had all of the civil
7 rules available to the guardian, which we believed
8 necessitated the invocation of 5.025.

9 Q. And, as a matter of fact, you also sought
10 approval to go to New York to incur expenses in
11 connection with the motion, your adversary proceeding on
12 the motion to compel enforcement, correct?

13 MS. STUDLEY: Form. Lack of predicate.

14 A. Well, no matter what, whether it was your
15 motion or whether it was my motion, it was going to be
16 an evidentiary hearing. So no matter what, we needed
17 to take the depositions of the people we believed had
18 information. And so we wanted to make sure that they
19 were going to be admissible in Court.

20 At that time I really believed that we had the
21 same -- we, meaning your client and my client, had the
22 same motive, which was to receive back the rental income
23 that was due to the guardianship.

24 Q. But you do agree that we objected to the
25 depositions in New York seeking a much less costly

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1 actually sought to have the petition declared adversary,
2 correct?

3 A. My petition?

4 Q. Yes.

5 A. Against Oliver, Jr.?

6 Q. Yes.

7 A. I believe I did.

8 Q. Okay. As opposed to a motion, a simple
9 motion, to enforce the settlement agreement, correct?

10 A. I know that was always your position. My
11 position was that the guardian properly moved for the
12 relief that he sought.

13 Q. And an adversary proceeding is similar to a
14 full lawsuit invoking all rights of civil procedure,
15 etcetera, and at trial, correct?

16 A. What it says under Rule 5.025, yes.

17 Q. Whereas a motion to compel would be something
18 that is much less formal before the Court who retains
19 jurisdiction to enforce the terms of a settlement
20 agreement, correct?

21 MS. STUDLEY: Form. Predicate.

22 A. I believe it's a distinction without a
23 difference in this matter.

24 Q. Well, the distinction is that the more
25 complex, the more legal fees your firm gets from the

1 alternative first for this motion to compel rather than
2 incurring dozens of attorneys' fees hours and costs
3 going to New York on that, correct?

4 MS. STUDLEY: Form.

5 A. I don't know. I don't remember your position.
6 I know -- I don't dispute your position. My problem
7 then wasn't Julian Bivins. It was Oliver, Jr. He was
8 the adverse party because what the Court had declared
9 was, I believe, that you were able to come in as a
10 intervenor.

11 And I believe we were advocating the same
12 position, and I didn't know what the objections were
13 going to be by Oliver, Jr., which is why we proceeded to
14 take discovery in the formal manner.

15 Q. And, as a matter of fact, we had to come in as
16 an intervenor because -- on behalf of the guardian --
17 you objected to Julian's petition saying that he had --
18 that he was not a party to the New York settlement, and
19 therefore had no standing to enforce the terms of the
20 New York settlement, correct?

21 MS. STUDLEY: Form.

22 A. Agree. Agree that that was part of the
23 argument. I don't recall if there were more matters,
24 but I do remember the objection to him participating in
25 the agreement between him and Oliver Bivins, Jr., and

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1 the guardian.
2 **Q. During the time that Oliver, Jr., was not**
3 **complying with the New York Settlement Agreement, the**
4 **interest on the Beachton mortgage was increasing,**
5 **correct?**

6 MS. STUDLEY: Form.

7 A. I believe it was, but, you know, I don't put
8 them together, I think, in the way that you do.

9 **Q. During the New York settlement conference in**
10 **New York you became aware that Beachton had taken a**
11 **40 percent interest in Oliver, Jr.'s, or the Estate of**
12 **Lorna's, ownership of 808 Lexington in connection with**
13 **the mortgage, correct?**

14 MS. STUDLEY: Form.

15 A. I became aware of that. I don't recall if the
16 problem was just with the Estate's interest, or the
17 whole interest, or whether that was debatable, but I
18 recall learning about --

19 **Q. You recall learning that there was additional**
20 **interest given to Beachton in connection with the**
21 **mortgage upon which they were seeking default interest,**
22 **correct?**

23 MS. SCHULTZ: Form.

24 MS. STUDLEY: Form.

25 A. I remember learning there was a percentage

1 MS. STUDLEY: Form.

2 A. When I was in the settlement negotiations,
3 there were numerous conferences between Oliver, Jr.,
4 counsel and Beachton.

5 **Q. But you did know --**

6 A. I had nothing to do with the negotiation of
7 this 40 percent or this 20 percent.

8 **Q. Okay. But you did know that Beachton got an**
9 **interest, whether it was claimed interest, whether it**
10 **was an absolute interest, whatever it was, you knew that**
11 **Beachton had an interest in 808 Lexington from Oliver,**
12 **Jr., and then that would -- at some point was converted**
13 **to an interest in 67th Street --**

14 MS. STUDLEY: Form. Asked and answered.

15 **Q. -- correct?**

16 MS. SCHULTZ: Form.

17 MS. STUDLEY: Mischaracterization.

18 A. I tell you what I tell you. I learned about
19 the 40 percent and whatever these details were at the
20 settlement conference. I don't believe I knew anything
21 about Beachton having some kind of interest, if they
22 even do in 67th Street, until after the settlement
23 conference.

24 **Q. And how long after the settlement conference**
25 **did you learn about the interest being released from 808**

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1 that was due, that Beachton believed was due to them.
2 But I don't remember whether or not it was on -- if
3 Beachton believed it was on the total, the hundred
4 percent ownership in 808.

5 **Q. Did that matter?**

6 MS. STUDLEY: Form.

7 A. Yes, it did.

8 **Q. Even if it's on half of the ownership, if they**
9 **believed they were entitled to a 40 percent interest and**
10 **half of the ownership of 808 Lexington, did that have a**
11 **value?**

12 A. I don't know.

13 MS. SCHULTZ: Form.

14 A. I believe there was time spent debating it at
15 the settlement conference because of the fact that the
16 guardian did not have anything to do with this
17 agreement, whatever this agreement with Beachton was,
18 about the validity of this agreement.

19 **Q. And you do know at the settlement conference**
20 **that in order to clear 808 Lexington, that Oliver, Jr.,**
21 **had to give Beachton 20 percent interest in 67th Street**
22 **and release the 40 percent interest in whatever he had**
23 **in 808 Lexington -- that they had in 808 Lexington?**

24 MS. SCHULTZ: Form.

25 A. I found that out after the fact.

1 to go into 67th?

2 A. I have no idea.

3 **Q. Well, you knew that by the time you walked**
4 **into court to argue for the approval of the New York**
5 **settlement, correct?**

6 MS. STUDLEY: Form.

7 A. I did not see any documentation with respect
8 to this until, I believe, Beachton filed a lawsuit
9 against Oliver, Jr.

10 **Q. But my question was: You knew about this**
11 **purported release of 808 and interest in 67th Street in**
12 **connection with the Beachton mortgage prior to walking**
13 **in and seeking Court approval of the New York**
14 **settlement, correct?**

15 MS. STUDLEY: Form.

16 A. I knew about it after the conference and
17 before I actually saw the documentation that proved it;
18 where that falls in that line, I don't know.

19 **Q. When you saw the documents, it was prior to**
20 **seeking approval in the New York settlement, correct?**

21 MS. STUDLEY: Form.

22 A. That's what I'm trying to tell you, is that
23 after the settlement conference. And then there was a
24 time when I actually saw a lawsuit where there was
25 purported documents that supported this 20 percent or

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1 not, but whatever they were relying on, I had knowledge
2 of that. That they were going -- that they had some
3 kind of interest in 67th Street in advance of seeing the
4 documents that they were relying on for that.

5 **Q. And if Beachton was correct, based upon what**
6 **you knew at the time of the settlement conference, that**
7 **it had a 40 percent interest in 808, whether this was in**
8 **the whole property or half of the property, if they were**
9 **correct that they were entitled to 40 percent, even in**
10 **half the property, that amount still would have been**
11 **several hundred thousand dollars, correct?**

12 MS. STUDLEY: Form.
13 MS. SCHULTZ: Form.
14 MS. STEIN: Form.
15 MS. STUDLEY: Speculation.

16 A. But it --

17 **Q. But it what?**

18 A. It's not a reality.

19 MS. STUDLEY: Form.

20 A. Because under the agreement we got the
21 property, and there was no Beachton encumbrance other
22 than the takeover of the Sovereign note and the terms
23 associated with the mortgage and note from Sovereign.

24 **Q. Beachton bought the note from Sovereign,**
25 **correct?**

1 know under New York law, but what I do know are the
2 facts of this case, which is that not only -- that that
3 40 percent interest never enured to the property.

4 **Q. Did anyone -- did you ever retain any New York**
5 **counsel to investigate whether, under New York law, the**
6 **fact that Beachton got an interest over and above**
7 **default interest it was claiming under the note would be**
8 **considered either usuary or a novation of the original**
9 **loan document?**

10 MS. STUDLEY: Form.

11 MS. SCHULTZ: Form.

12 A. I mean, Roy Justice and Keith Stein were
13 involved, but there wasn't a need to do that because any
14 percentage that Beachton was claiming was due, they were
15 claiming was due from Oliver, Jr.

16 **Q. In connection with the note that Sovereign had**
17 **on 808 Lexington that they acquired from Sovereign,**
18 **correct?**

19 MS. STUDLEY: Form.

20 A. I don't know what their terms were. They were
21 never part and parcel of the guardianship. The guardian
22 never had anything to do with them, and they enured to
23 the 808 Lexington property.

24 **Q. But you said that you reviewed the Sovereign**
25 **documents, right?**

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1 A. Agree.

2 **Q. Okay. And Beachton --**

3 A. I think it's notes, but yeah.

4 **Q. And then Beachton proceeded to charge default**
5 **interest?**

6 A. Pursuant to the mortgage and note documents,
7 yes.

8 **Q. And if Beachton -- well, let me strike that.**

9 **Well, if Beachton got an additional interest**
10 **in its favor in connection with the note -- you've told**
11 **me that you do commercial litigation -- that would be an**
12 **additional benefit to it under the note, and therefore**
13 **considered part of the interest on the loan, correct?**

14 MS. STUDLEY: Form.

15 MS. SCHULTZ: Form.

16 A. I disagree. Because if you look at the facts
17 of this case, you have that the guardianship did not owe
18 any additional moneys to Beachton under -- other than
19 what was due under the Sovereign note and mortgage.

20 **Q. Does it matter who owes, or does it matter**
21 **whether they are getting an additional benefit under the**
22 **loan that was originally created against the property?**

23 MS. STUDLEY: Form.

24 MS. SCHULTZ: Form.

25 A. I can't answer that question because I don't

1 MS. STUDLEY: Form.

2 A. Yes, I've seen them. Sure.

3 **Q. Did the Sovereign documents provide any**
4 **ability for Sovereign to gain an additional interest in**
5 **connection with the Sovereign loan over and above the**
6 **16 percent default interest?**

7 A. No, and neither did Beachton.

8 **Q. But Beachton did, as you know, according to**
9 **what you learned, obtain an interest in 808 --**

10 A. No, they never did.

11 MS. STUDLEY: Form.

12 **Q. -- in connection with the loan?**

13 MS. SCHULTZ: Form.

14 A. They never did.

15 MS. STUDLEY: Join.

16 A. They asserted that they did, but they -- they
17 asserted at the settlement conference that they did, but
18 they never did.

19 **Q. So Beachton asserted that they got an**
20 **additional interest. So in their mind --**

21 A. No, not --

22 THE REPORTER: Hold it. Hold it.

23 **Q. -- they now have been paid more; in their mind**
24 **they are now being paid more on the underlying loan than**
25 **the default interest?**

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1 MS. STUDLEY: Form.
 2 A. No. Let me be clear.
 3 MS. STUDLEY: Move to strike.
 4 A. When this was being discussed with me, I
 5 recall it being Oliver Bivins, Jr., discussing an
 6 additional -- some obligation that he believed that he
 7 had to Beachton.
 8 **Q. In connection with what?**
 9 A. I don't know. How would I know? The guardian
 10 had nothing to do with it; to me it was completely void.
 11 **Q. Was it in connection with the note?**
 12 A. I have no idea.
 13 **Q. Was it in connection with Beachton forbearing**
 14 **from foreclosing?**
 15 MS. STUDLEY: Form.
 16 MS. STEIN: Form.
 17 MS. SCHULTZ: Form.
 18 A. Well, I never heard that.
 19 **Q. You've never heard that?**
 20 A. No, I've never heard that.
 21 **Q. You never hired Brian O'Connell represent that**
 22 **to Judge Colin in court?**
 23 MS. STUDLEY: Form.
 24 A. Well, that was because --
 25 MS. STEIN: Form.

1 **Q. Hold on.**
 2 **What does it matter whether it made the claim**
 3 **against the guardian? If "A" gives a loan and "A"**
 4 **claims it's in entitled to more than default interest,**
 5 **usurious amounts, what does it matter who it claims it**
 6 **from?**
 7 A. Because how can an agreement --
 8 MS. STUDLEY: Hold on. Object to form.
 9 MS. SCHULTZ: Form.
 10 A. An agreement cannot be made to a -- about a
 11 property without the agreement being made by the people
 12 who own it, and the guardian owned the property. The
 13 agreement -- the guardian had claimed that it owned the
 14 property.
 15 **Q. Did you do research of law to formulate the**
 16 **opinion you've just rendered?**
 17 MS. STUDLEY: Form.
 18 A. No, I didn't make -- I didn't research law to
 19 give you this opinion.
 20 **Q. Did you --**
 21 A. Hold on.
 22 THE REPORTER: Hold it. Hold it.
 23 MS. STUDLEY: Wait. Wait.
 24 A. I'm not done. I'm not done.
 25 Additionally, this 40 percent never came to

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1 MS. SCHULTZ: Form.
 2 A. -- it was part of the settlement.
 3 **Q. Oh, so you did hear it?**
 4 MS. STUDLEY: Form.
 5 A. I don't know what you're talking about because
 6 you need to show me the transcript. But if you read the
 7 settlement agreement and mutual release, you'll see that
 8 Beachton agreed to forebear. So it is --
 9 **Q. Which means that there would be no additional**
 10 **consideration for Beachton to get a percentage of the**
 11 **interest that it claimed that it got in the Lexington**
 12 **property in connection with the same note that it was**
 13 **getting default interest on, correct?**
 14 A. There is not one document --
 15 MS. STUDLEY: Objection to the form.
 16 A. -- to support the fact that Beachton has
 17 claimed an interest in the guardianship's property.
 18 Now, what he's working out --
 19 **Q. I'm sorry. What does that matter whether it's**
 20 **the guardianship's property if the property at issue --**
 21 **the interest that Beachton claims it got was a result of**
 22 **the note, the same note that is attached to Lexington**
 23 **signed by the parties it's claiming this additional**
 24 **interest? What does this matter?**
 25 A. They never got it.

1 fruition.
 2 **Q. Well, isn't Beachton suing in New York Oliver,**
 3 **Jr., for 20 percent of 67th saying in the pleadings that**
 4 **the 20 percent was converted from the 40 percent of the**
 5 **half interest that Oliver provided to Beachton in**
 6 **consideration for Beachton not foreclosing on 808**
 7 **Lexington? You've read the pleadings. Is that not what**
 8 **the pleadings say?**
 9 MS. STUDLEY: Form.
 10 MS. STEIN: Form.
 11 A. The guardian never made any agreement and was
 12 never involved in anything with respect to that.
 13 **Q. Did you hire -- you said that Roy Justice and**
 14 **Keith Stein were New York attorneys.**
 15 A. Yeah.
 16 **Q. That's what you said in response to my**
 17 **question.**
 18 **Did you retain anyone to -- retain or consult**
 19 **with anyone to investigate this issue? You said they**
 20 **were your New York attorneys.**
 21 **My question is: Did you, on behalf of the**
 22 **guardianship, ever specifically retain any New York**
 23 **litigation counsel to evaluate whether there was a**
 24 **viable usuary or novation claim against Beachton in**
 25 **connection with the interest that it claims that it got**

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1 in Lexington and then converted to an interest in 67th?

2 MS. STUDLEY: Objection. Predicate.

3 MS. SCHULTZ: Form.

4 A. No one was hired for that purpose. But, at
5 the same point, you had been telling me about these
6 legal theories for at least over six months. And when
7 your client had the opportunity to purchase it through
8 our agreement, we discussed -- you, myself, Keith Stein,
9 Brian O'Connell, your New York counterpart, I believe --
10 about Julian taking the property and assuming the
11 mortgage so you could bring these legal theories that
12 had never yet been backed up, but that you believed were
13 viable and you failed or refused to do so.

14 Because when we were evaluating this, and you
15 wanted us to evaluate it through our agreement, you made
16 lots of representations to us when we were trying to do
17 this global agreement, about Beachton and about these
18 various sundry legal theories that you believed that
19 could possibly be successful.

20 So we made sure that we negotiated for our
21 client a very limited amount of effort that he would
22 have to undertake to determine whether there could be
23 a reduction in the Beachton mortgage, whether for this
24 legal theory or whatever legal theory. And so that was
25 negotiated that there would be a very minimal

1 keeping his million dollars --

2 MS. STUDLEY: I would ask that you not yell at
3 my client, please.

4 Q. -- agreed?

5 A. You filed an emergency petition to give your
6 client an extension of time. I wrote you and said this
7 is a time of the essence contract. We will close. We
8 are prepared and ready to close, and the terms of what
9 you negotiated for your client was that we kept -- the
10 guardianship kept the million dollars, and we were
11 prepared to continue on with the contract that way.

12 It was your client who chose not to set that
13 petition for hearing, or to not go forward on that
14 petition, or whatever was your choice. But what your
15 client's choice was, was to close and honor the
16 agreement, the global settlement agreement, and the
17 purchase and sale contract and to close and to sign the
18 closing documents as is.

19 Q. As a matter of fact, it was a separate
20 hearing, and Judge Colin cancelled because he was sick
21 and couldn't come in, correct?

22 MS. STUDLEY: Form. Predicate.

23 A. I don't know what it was.

24 Q. So you don't know. So you just testified
25 about this whole thing under oath, but you don't know?

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1 negotiation with Beachton, and that was -- hold on --
2 and that was negotiated in the global settlement.

3 Q. As a matter of fact --

4 A. And then after that, when you continued on
5 about it, we gave you and your client that opportunity
6 to go ahead and assume the mortgage so you could bring
7 these various sundry legal theories, but your client
8 failed and refused to do so.

9 Q. And, as a matter of fact, my client mailed a
10 petition -- well, as a matter of fact, you guys said
11 that if he does not close on the property with his hard
12 money lender, you were going to keep his million
13 dollars?

14 MS. STUDLEY: Form.

15 Q. You specifically wrote correspondence and
16 argued to the Court, Ms. Crispin, that if he did not
17 close exactly as in that settlement agreement, that you
18 were keeping his million dollars -- yes or no?

19 A. You filed --

20 Q. Yes or no?

21 MS. STUDLEY: Form.

22 THE REPORTER: Hold it. Hold it.

23 Q. You can explain whatever you want. Yes or no?

24 You specifically said if he did not close on
25 time exactly as in the settlement agreement, you were

1 MS. STUDLEY: Form. Predicate.

2 Argumentative.

3 A. Well, I said that you did not move forward on
4 your petition.

5 Q. You said --

6 THE REPORTER: Hold it. Hold it. One at a
7 time. One at a time.

8 Q. You said we never set it for hearing.

9 MS. STUDLEY: She wasn't finished.

10 Q. It was set for hearing, was it not?

11 MS. STUDLEY: She was not finished.

12 A. I don't know, but I know it never was heard.

13 Q. And it was not heard, but we had requested the
14 extension to pursue Beachton, and you refused or else he
15 would forfeit the million dollars, correct?

16 MS. STUDLEY: Form.

17 A. And your client closed anyway.

18 Q. Correct?

19 MS. STUDLEY: Form.

20 MS. STEIN: Form.

21 A. Your client closed.

22 Q. Because if he didn't, you said you were
23 keeping his million dollars as a default, correct?

24 A. That was the terms of the contract.

25 MR. HECHTMAN: Well --

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1 MR. DENMAN: Okay. You know, we got the form.
2 She objected.

3 MR. HECHTMAN: (No response).

4 MS. STUDLEY: It's 12:00.

5 MR. DENMAN: Okay. I'm almost done here.

6 BY MR. DENMAN:

7 **Q. You said time was of the essence in your**
8 **statement.**

9 A. The contract said it, so did the global
10 settlement order.

11 **Q. Right.**

12 **Did you guys comply with time of the essence**
13 **in moving Oliver, Sr., back to Texas --**

14 MS. STUDLEY: I'm going to object to form.

15 **Q. -- yes or no?**

16 MS. STUDLEY: Predicate.

17 A. That was not part of the agreement. The
18 agreement was that he would be moved back, and he was.

19 **Q. The agreement -- it was not part of the**
20 **agreement that he would be moved back in a period of**
21 **time?**

22 MS. STUDLEY: Form. Argumentative.

23 A. I don't remember what occurred with the timing
24 of it, but I do recall that he was moved back.

25 **Q. After the deadline set for in the agreement?**

1 **Q. Where was it espoused that the divorce was**
2 **fraudulently procured?**

3 A. In the petition to determine beneficiary filed
4 in the Lorna Estate.

5 **Q. If the divorce order was fraudulently procured**
6 **in Texas, why was there not an attack on the divorce**
7 **order in Texas?**

8 A. The ability to -- in strategizing in the best
9 ability to bring the most to the ward, the legal theory
10 was the full faith and credit in the estate. Because
11 there was an ability under a petition to determine
12 beneficiary if we could get the Florida estate court not
13 to give full faith and credit for the divorce for
14 Oliver, Sr., to at least assert he was a beneficiary of
15 the estate, and thus thereby being able to attempt to
16 attack some of the assets of the Lorna Estate.

17 **Q. And if the divorce order was attacked in**
18 **Texas, then it would be a Texas firm that would have to**
19 **attack it, correct?**

20 MS. STUDLEY: Form.

21 A. I mean, if there was a proceeding in Texas, it
22 would be by a Texas law firm.

23 **Q. Which means that your firm wouldn't be able to**
24 **get the fees under the contingency fee arrangement for**
25 **trying to attack it in Florida under this petition to**

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1 MS. STUDLEY: I'm going to object. Predicate.

2 A. I don't recall.

3 MS. STUDLEY: I want to take a break.

4 MR. DENMAN: I'm almost done. So let's go
5 ahead and get this done.

6 MS. STUDLEY: And you're yelling.

7 MR. DENMAN: I'm not yelling.

8 MS. STUDLEY: It sounds like it.

9 MR. DENMAN: You know what, I am not yelling.

10 MS. STUDLEY: You're getting a little heated
11 is what I meant.

12 MR. DENMAN: Cross-examination is heated.
13 That's part of the litigation. I'm not yelling.

14 MS. STUDLEY: Well, we are not in trial. We
15 are in a deposition.

16 BY MR. DENMAN:

17 **Q. In your answer to the complaint you stated**
18 **that the divorce in Texas was fraudulently procured.**
19 **That it was determined that the divorce in Texas was**
20 **fraudulently procured. Where was that determined?**

21 A. I know that it was the guardian's position
22 in the estate proceeding; that it was fraudulently
23 procured.

24 **Q. Where was that -- I'm sorry. Go ahead.**

25 A. I don't know of an order that says that.

1 **compel beneficiaries?**

2 MS. STUDLEY: Form. Improper. Argumentative.

3 A. Because Mr. Rogers would have had us be
4 admitted pro hac vice.

5 **Q. Why? How would that be in the best interest**
6 **of the ward to have Ronda Gluck involved, your firm pro**
7 **hac vice and then paying Texas attorneys?**

8 MS. STUDLEY: Form.

9 A. It would --

10 **Q. Is that how you would want to have your dad's**
11 **estate handled?**

12 MS. STUDLEY: Form.

13 MS. STEIN: Form. Argumentative.

14 MS. STUDLEY: Speculative.

15 A. Understanding the complexities of this
16 guardianship and the series of events that occurred
17 prior to the inception of the ETG...

18 **Q. But the Heinrich firm had been doing the Texas**
19 **case. It knew everything about it. They could have**
20 **done the case, and you guys wouldn't have had to get**
21 **charged for all of the time and the contingency fee that**
22 **you brought under the petition to determine**
23 **beneficiaries, correct?**

24 MS. STUDLEY: Form.

25 A. I don't know where you are --

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1 MS. STEIN: Form.

2 A. -- gathering this series of information, but

3 the strategy that was laid out proved to be successful.

4 **Q. I'm just going by your answers to the**

5 **complaint that said that the divorce was determined to**

6 **be fraudulently procured. And I know that you moved to**

7 **set aside things in the underlying case when there was**

8 **fraud involved. So I would just wonder why you wouldn't**

9 **want to do that in the divorce case and save Oliver,**

10 **Sr., hundreds of thousands of dollars?**

11 MS. STUDLEY: Form. Predicate.

12 A. It doesn't work like that.

13 **Q. Well, if the order in Texas were set aside,**

14 **you wouldn't need the petition to determine**

15 **beneficiaries, correct?**

16 MS. STUDLEY: Form.

17 A. Well, the strategy --

18 **Q. I'm sorry. Just answer my question.**

19 A. I am. I'm just --

20 THE REPORTER: Hold it. Hold it. One at a

21 time. One at a time.

22 **Q. You can explain. But the question is: If the**

23 **divorce order was set aside in Texas, you wouldn't need**

24 **the petition to determine beneficiaries, correct?**

25 MS. STUDLEY: Form.

1 **explanation.**

2 A. Okay.

3 **Q. As a matter of fact, I want to preserve my**

4 **right to go to the judge to have him compel you to**

5 **answer yes or no on that basic question. So please go**

6 **ahead and answer now.**

7 A. An evaluation was undertaken to determine what

8 the least -- what the path of the least resistance would

9 be to obtain assets that were being claimed by the Lorna

10 Estate, and the strategy was to proceed with the

11 petition to determine beneficiary.

12 **Q. If the divorce order were set aside, then the**

13 **parties were -- for all intent and purposes would have**

14 **been married, correct?**

15 A. You're assuming that that could be done or

16 that was strategically the best thing to be done.

17 **Q. If you can answer. Just answer the question.**

18 **If the divorce were set aside in Texas, for**

19 **all intent and purposes, the parties would still be**

20 **married, correct?**

21 MS. STUDLEY: Objection. Asked and answered.

22 **Q. That would be the legal effect of the divorce**

23 **order being set aside; is that correct or not?**

24 A. I don't know. I mean, I don't know as in the

25 way that you've asked it of me.

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1 A. Valuations were made about what -- hold on.

2 **Q. Is that a correct statement or not?**

3 A. No, I can't answer it. It's not yes or no for

4 me.

5 **Q. Okay. Okay.**

6 A. And I would like to answer it, if I can.

7 MS. STUDLEY: You can answer.

8 **Q. So you can't answer that yes or not?**

9 MS. STUDLEY: You can answer the --

10 THE REPORTER: One at a time. One at a time.

11 MR. DENMAN: No. You can stop interfering and

12 coaching, please.

13 MS. STUDLEY: You're interfering and

14 disrupting the deposition, but not allowing the witness

15 to answer. She's talking --

16 BY MR. DENMAN:

17 **Q. You're telling me that you cannot answer that**

18 **question that I just asked you? It's a yes or no. Is**

19 **that correct?**

20 MS. STUDLEY: I'm going to strike this

21 question. It's not yes or no.

22 A. I can't answer with a yes or no. I would like

23 to answer it.

24 **Q. Please. Go ahead and answer it then. If you**

25 **say you can't answer it yes or no, then please give your**

1 **Q. Let me -- maybe I can make it more basic.**

2 A. Okay.

3 **Q. If the divorce order in Texas were set aside**

4 **in Texas, then the parties would continue to be married**

5 **for all intent and purposes, correct?**

6 MS. STUDLEY: Form.

7 A. It depends, because there are mechanisms by

8 which they are void, and there are mechanisms by which

9 they are voidable. And I was not aware what the

10 positions would be of the parties in that respect.

11 **Q. Okay. I mean --**

12 A. So I can't tell you yes or no, but assuming

13 that you were able to get through what would be a lot of

14 legal hurdles and factual hurdles in Texas, and actually

15 get a court to set aside the divorce order, there is

16 definitely a possibility that the Court could say that

17 they were still validly married.

18 **Q. Well, if the order is set aside, then the**

19 **order has no force and effect, correct?**

20 MS. STUDLEY: Object to the form.

21 **Q. Yes or no?**

22 MS. STUDLEY: Form.

23 A. I would say yes. I would say that there is no

24 legal effect.

25 **Q. So if the order --**

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1 A. I don't know what the practical ramifications
2 are of that.

3 **Q. If the order divorcing the parties is set
4 aside and it's no longer in effect, then the parties are
5 still married, correct?**

6 MS. STUDLEY: Form.

7 A. It's possible.

8 **Q. And if the parties are still married, then the
9 ward would, by virtue of Lorna's intestate death, own
10 all of 808 and all of 330, correct?**

11 MS. STUDLEY: Form.

12 A. All of -- possibly all of 330, but with 808
13 there was a dispute by Oliver, Jr., about how that
14 property was held. So to the extent that there were
15 survivorship issues, and they were not severed through
16 the divorce, then it's possible.

17 But I also want to say in this evaluation that
18 Julian has always contended that the divorce was valid.
19 So there was going to be significant factual hurdles
20 here.

21 **Q. This whole line of questioning came from the
22 fact that your answer to our lawsuit says that it was
23 determined that the divorce was fraudulently procured.
24 That's how this all started.**

25 MS. STUDLEY: Is that a question?

1 **(Phone interruption).**

2 THE WITNESS: One second.

3 MS. STUDLEY: Hold on one second.

4 Do you need a break?

5 THE WITNESS: No.

6 BY MR. DENMAN:

7 **Q. In paragraph 42 of your Answer and Affirmative
8 Defenses it's indicated that the Court approved the
9 broker to exclusively sell 808. Where was that approved
10 for him to exclusively sell 808?**

11 A. He did exclusively sell 808.

12 **Q. No. Where did the Court approve the broker to
13 exclusively sell 808?**

14 A. In the order in the global settlement.

15 **Q. But never prior to the execution of the
16 exclusive listing agreement, correct?**

17 MS. STUDLEY: Form.

18 MS. SCHULTZ: Form.

19 MS. STUDLEY: Asked and answered.

20 A. Never.

21 **Q. The Court never approved the guardian to enter
22 into an exclusive listing agreement with the broker to
23 sell 808, correct?**

24 MS. STUDLEY: Form. Predicate.

25 MS. SCHULTZ: Form.

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1 MR. DENMAN: Yes.

2 **Q. So having said that, you would agree that the
3 consequence of the Court determining that the divorce
4 was fraudulently procured would be that the parties were
5 still married; and if the parties were still married,
6 then by operation of intestacy law and survivorship law,
7 808 and 330 would go to Oliver, Sr.?**

8 MS. STUDLEY: Object to form.

9 A. I mean, if you were able to do all of this
10 with the factual and legal problems and possibly Statute
11 of Limitations and other defenses, then that is a
12 possibility.

13 **Q. And in instead of doing this, your firm
14 settled 12 other cases, dropped the disgorgement against
15 Oliver, Jr., got several hundred thousand dollars in
16 attorneys' fees, and paid several hundred thousand
17 dollars more on the Beachton mortgage, correct?**

18 MS. STUDLEY: Objection. Mischaracterization
19 of facts.

20 THE WITNESS: No.

21 MS. STUDLEY: How much longer do you think?
22 We've been going a long time.

23 MR. DENMAN: A couple of minutes.

24 BY MR. DENMAN:

25 **Q. In the answer in paragraph 42 --**

1 A. You're talking about other than that global
2 settlement order?

3 **Q. You've said the global settlement order. So
4 all I said in my question, if you didn't understand me,
5 was: Prior to the entry of the global settlement
6 agreement, are you aware of any other court order or
7 approval for the broker to exclusively sell 808?**

8 MS. STUDLEY: Objection. Lack of predicate.

9 A. Your question assumes that that was required,
10 but nonetheless, no.

11 **Q. So in paragraph 42 of your affirmative
12 defenses, when you answered that the Court approved the
13 broker to exclusively sell 808, that's also suggesting
14 there that that's not required, and that's what you
15 meant that the Court approve it?**

16 MS. STUDLEY: Form. Lack of predicate.

17 A. No, what that meant is that the order on the
18 global settlement did that.

19 **Q. So your position in 42 of the affirmative
20 defenses is that the order on the global settlement is
21 the Court approval of the broker to exclusively sell
22 808?**

23 A. Yes.

24 **Q. But nothing else --**

25 MS. STUDLEY: Form.



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1 Q. -- meaning no other orders, no other
 2 approvals, no other pleadings or anything else besides
 3 the order on the global settlement, correct?
 4 MS. STUDLEY: Form. Lack of predicate.
 5 A. I think there are other defenses. I think
 6 there are, you know, waiver, laches and the rest of
 7 those. If you're asking about is there any other court
 8 order, I believe that that provides you not only an
 9 authorization, but a confirmation of that act.
 10 Q. Got it.
 11 Do you know how much money was transferred to
 12 the Trust from your firm after the sale of 808?
 13 A. Not exactly, but I have some idea.
 14 Q. How much?
 15 A. It was a million dollars that was transferred,
 16 I believe, in either December or January after the sale.
 17 I'm just trying to think. I think the sale was in '14.
 18 So it was either in December of '14 or January of '15.
 19 I believe there was another transfer to the
 20 Trust maybe in the summer. I don't -- or maybe the
 21 second quarter of '16, and then there was another order
 22 that had us transfer three or \$400,000 to the Trust.
 23 Q. So my question -- just so we're clear -- is
 24 from the proceeds of the sale of 808. The transfer in
 25 the summer was from the sale of 330, correct?

1 the sale of 808 Lexington was in December of 2014/
 2 January of 2015 was \$250,000, correct?
 3 MS. STUDLEY: Form.
 4 A. I mean, the law -- the legal fees to
 5 Mr. Heinrich are for the benefit of the ward. So a
 6 million dollars is for the benefit of the ward, and he
 7 performed --
 8 MR. DENMAN: Will you read back my last
 9 question, please. Thank you.
 10 (Question read back).
 11 THE WITNESS: That's not correct. I mean, the
 12 administrative costs to the guardian's lawyers are for
 13 the benefit of the ward and our cash flow then available
 14 to pay appropriate expenses of the ward, which the legal
 15 fees were one of them.
 16 BY MR. DENMAN:
 17 Q. You would agree with me that \$250 [sic] net of
 18 the attorneys' fees and net of a mortgage is a lot
 19 different than \$5 million net of attorneys' fees and net
 20 of mortgage, correct?
 21 A. I just think your math is off.
 22 MS. STUDLEY: Object to the form.
 23 THE REPORTER: Excuse me, Counsel. "\$250" was
 24 said on the record.
 25 MR. DENMAN: \$250,000. Excuse me.

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1 A. There was one from 330.
 2 Q. And then there was the other one in December
 3 of 2015 in connection with our motion to enforce
 4 compliance with the global settlement, correct?
 5 A. The order that resulted that's on appeal?
 6 Q. Well, the order on appeal is the amount that
 7 the Court did not transfer, but the amount that you
 8 transferred was based upon our motion to have your law
 9 firm compel with -- to compel compliance of your law
 10 firm to transfer proceeds from the sale of 808, correct?
 11 MS. STUDLEY: Form.
 12 A. I don't recall the timing; I just remember
 13 these transfers.
 14 Q. So in January of 2015, or December of 2014,
 15 right after the sale of 808, a million dollars was
 16 transferred to the Trust?
 17 A. I believe so.
 18 Q. And the sale amount was \$5 million, correct?
 19 A. Yes.
 20 Q. And of that \$1 million that went to the Trust,
 21 750 was immediately paid to Heinrich in connection with
 22 the contingency fee under the Texas settlement, correct?
 23 A. I didn't know that.
 24 Q. Assuming that's the case, then that means that
 25 the total cash flow for the benefit of Oliver, Sr., from

1 THE REPORTER: Thank you, sir.
 2 THE WITNESS: Even so. Your math is off.
 3 BY MR. DENMAN:
 4 Q. Other than the deposition transcripts or
 5 documentary evidence that was exchanged between the
 6 parties in connection with the Texas federal litigation,
 7 are you aware of any other documentary evidence that
 8 supports the contention that Oliver, Sr., lacked
 9 testamentary capacity at the time of the execution of
 10 the Last Will and Testament?
 11 MS. STUDLEY: Form.
 12 A. I'm going to try to do this by process of
 13 elimination. Other than the depositions that were taken
 14 in Texas?
 15 Q. Correct, and the discovery that was exchanged
 16 in Texas, all of the documentation, medical records,
 17 etcetera.
 18 A. Exactly.
 19 Also, the guardian's records, whether it be
 20 Stephen Kelly or Curtis Rogers, stemming back earlier
 21 than January of 2011.
 22 Q. Well, those were all exchanged in the Texas
 23 litigation, correct?
 24 A. I believe so.
 25 Q. Okay.

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1 A. The examining committee reports from December
2 of 2010 or January of 2011. I don't recall exactly
3 when.

4 **Q. January/February of 2011, correct?**

5 A. Those -- the problem is: I don't have a feel
6 of the exact document exchange in the Texas federal
7 case. I didn't review everything that was -- I did
8 review some, but I haven't reviewed everything. I think
9 I have all of the depositions that were transcribed.
10 I'm in the process of going through any of the documents
11 that I didn't go through because there wasn't a need to
12 then.

13 So there might be -- so I guess those were
14 exchanged during that process. I know discovery is
15 ongoing in our case. I mean, not that I can think of
16 right now.

17 **Q. And all of the depositions and discovery in
18 the Texas case pertain to the claim to set aside
19 transfers that occurred in the latter part of 2011,
20 correct?**

21 MS. STUDLEY: Form.

22 A. I don't remember the exact dates and times of
23 all of those documents.

24 **Q. I apologize. 2010.**

25 A. I think a majority of them were 2010. I can't

1 I think that's appropriate, but I can't because it's
2 work product and attorney-client privilege.

3 **Q. Well, your firm brought the claim to set aside
4 the will because you're saying that you're a creditor of
5 the will, and that's why you, your firm, specifically
6 argued to the Court that your firm has the right to set
7 aside and have standing to set aside the will because
8 your firm is a creditor, correct?**

9 A. Ron, I would ask you to get out the petition
10 to revoke because I believe it's Curtis Rogers and
11 Stephen Kelly in their capacity as guardians, not me,
12 Ashley, or Ciklin Lubitz.

13 **Q. So I just want to make sure we're clear then.
14 Your firm is taking the position that your
15 firm is not the creditor to invoke standing under
16 contesting of the will; is that right?**

17 MS. STUDLEY: Form.

18 A. No. Because I just want to clear it up for
19 you. My firm is a creditor of the estate 100 percent.
20 We filed our claim. We have the objections. We're
21 proceeding on the petition for fees. Absolutely. But
22 the petition to revoke the will and challenge Julian
23 Bivins, the will that he's operating under, that's being
24 done by Curtis Rogers and Stephen Kelly in their
25 capacity as guardians.

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1 tell you if there was any from 2009. I don't remember.

2 **Q. Well, that's exactly where I'm going. You
3 know that the Texas case involved allegations of undue
4 influence or lack of capacity to transfer from the time
5 that the divorce decree came out in July of 2010 through
6 the transfers that occurred through November of 2011 --
7 excuse me, November of 2010, correct?**

8 MS. STUDLEY: Form.

9 A. Yes, I recall that.

10 **Q. And all of the evidence and testimony pertains
11 to trying to set aside those transfers in the latter
12 part of 2010, correct?**

13 A. A majority of the evidence does, yes.

14 **Q. And what I'm getting at -- I'm trying to be
15 specific since I understand that, according to the
16 ruling, that I don't have the ability to come back and
17 ask you questions involving your firm's claim to set
18 aside the will from 2009.**

19 **What evidence do you have that at the time the
20 will was signed in 2009 that suggested that there was a
21 lack of evidentiary capacity or undue influence in 2009?**

22 A. I really can't testify to this because it is
23 work product. There's a pending litigation. I'm the
24 lawyer for the client. I'm not personally seeking it.
25 My clients are seeking it. So if you want to ask them,

1 MR. DENMAN: Okay. I am not going to argue
2 with you. I'm just reserving my right to depose you
3 after we, you know, talk with the judges.

4 MS. STUDLEY: And we reserve all objections.

5 MR. DENMAN: Why don't we take a two-minute
6 break, and then we'll see if we want to adjourn. I
7 mean, you guys can ask your questions, or course. I
8 just meant whether we're done. Okay?

9 MS. STUDLEY: Okay.

10 MR. DENMAN: Because I think I'm done. Let me
11 just talk to my client.

12 MS. STUDLEY: All right.

13 (Recess taken).

14 BY MR. DENMAN:

15 **Q. Are you aware that Julian's lender would not
16 permit him to acquire the Beachton mortgage in
17 connection with the closing on the sale of 808
18 Lexington?**

19 MS. STUDLEY: Form. Predicate.

20 A. I did not hear that.

21 **Q. So you don't know?**

22 A. Hold on. I'm thinking, please.

23 I don't believe I heard from his lender. I
24 don't know whether I heard it at any time from his New
25 York lawyer.

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1 Q. You are aware that due to the time
2 requirements, that Julian sought a hard money lender as
3 opposed to a commercial lender in order to meet the
4 closing time limitations, correct?

5 A. I had no idea what he was doing in order to
6 close. I mean, I know that there was a representation.
7 I believe it was from you that that's what he was doing
8 because I think you may have even pled that, possibly.

9 Q. What agreement does your firm have with Steve
10 Kelly that it gratuitously provided him a defense before
11 the insurance company came in?

12 MS. STUDLEY: I'm going to object. That's
13 attorney-client privilege. For us? You're asking us,
14 how we're providing --

15 MR. DENMAN: I asked what agreement did Ciklin
16 Lubitz have with Stephen Kelly --

17 THE WITNESS: You're asking if there is any
18 agreement --

19 BY MR. DENMAN:

20 Q. -- that permitted Ciklin Lubitz to
21 gratuitously represent Stephen Kelly before the
22 insurance company came in.

23 A. It wasn't gratuitous.

24 Q. Stephen Kelly was paying an hourly fee to
25 Ciklin Lubitz to defend this federal lawsuit?

1 BY MR. DENMAN:

2 Q. Do you know why -- let me strike that.
3 Do you know why your insurance company is
4 providing a gratuitous defense to Stephen Kelly?

5 A. Again, I believe that they are -- they can be
6 compensated under 744.108. So I'm not sure that the
7 word "gratuitous" is correct. So I can't answer the
8 question.

9 Q. If you believe that Stephen Kelly can be
10 compensated for representation he receives in connection
11 with this federal action from the guardianship, then to
12 that take that one step further then, any attorney that
13 Stephen Kelly hires to represent him in connection with
14 this federal action can be compensated from the
15 guardianship. Is that your position?

16 A. Yes, I believe so.

17 Q. And your firm chose to represent Stephen Kelly
18 initially before the insurance company came in in
19 connection with this lawsuit with the intent to seek
20 reimbursement for your firm's attorneys' fees as opposed
21 to advising Stephen Kelly to seek independent counsel,
22 correct?

23 MS. STUDLEY: I'm going to object. That's
24 work product and attorney-client.

25 A. I can answer part of the question until you

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1 A. No, it will be compensated through the
2 guardianship courts.

3 Q. So there's fee petitions that Ciklin Lubitz
4 intends to file for its defense of Stephen Kelly in
5 connection with the federal action; is that correct?

6 A. Yes. And I believe that we filed a petition
7 that may include some of those services. I believe that
8 might have been filed in the summer of '16, possibly.

9 Q. And do you know whether an agreement exists
10 with Ciklin Lubitz and its own insurance company to
11 provide a gratuitous defense for Stephen Kelly?

12 A. An agreement between Ciklin Lubitz and Stephen
13 Kelly?

14 Q. An agreement between Ciklin Lubitz and its own
15 insurance company.

16 MS. STUDLEY: I think this is privileged.

17 THE WITNESS: I don't -- can I testify?

18 MS. STUDLEY: Hold on. I'm going to say that
19 that's privileged. I think that's privileged. You're
20 asking whether there's an agreement between Ciklin
21 Lubitz and its insurance company?

22 MR. DENMAN: That provides for the gratuitous
23 defense of Stephen Kelly in this lawsuit.

24 MR. HECHTMAN: Because you're asking for the
25 content of the agreement, it's privileged.

1 got to the last part.

2 Julian Bivins filed a lawsuit, and Mr. Kelly
3 has chosen Ciklin Lubitz to be his counsel and to defend
4 him against the allegations. Those are compensable
5 services pursuant to 744.108 case law.

6 Q. And you don't see any conflict of interest
7 there?

8 MS. STUDLEY: I'm going to object, and I'm
9 going to -- I'm not going allow her to answer that
10 question.

11 MR. DENMAN: Why not?

12 MS. STUDLEY: As far as what --

13 MR. DENMAN: Well, you're objecting. You
14 didn't give a ground other than you're just going to
15 object.

16 MS. STUDLEY: Work product.

17 MR. DENMAN: Work product?

18 MS. STUDLEY: Yeah, and attorney-client, as
19 far as communications with the client. Since the
20 lawsuit was filed, since this federal action was filed
21 you're asking?

22 MR. DENMAN: I'm asking her whether she
23 considers it to be a conflict of interest for her firm
24 to represent Stephen Kelly in connection with this
25 lawsuit with the intent to seek attorneys' fees from the

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1 guardianship court.
 2 MS. STUDLEY: Okay. I'm going to object.
 3 MR. DENMAN: I'm not going to argue with you.
 4 MS. STUDLEY: I'm going to object. I don't
 5 think it's --
 6 MR. DENMAN: Okay.
 7 THE WITNESS: I think you're asking me whether
 8 or not there's some ethical violation. I think that's a
 9 violation of our Bar rules. I don't think you can ask.
 10 That's just my opinion. You can ask me that. I mean,
 11 it's the same thing if I asked you if it's a conflict
 12 of interest to continue in this lawsuit when you
 13 represented Julian Bivins in the guardianship court.
 14 BY MR. DENMAN:
 15 Q. Wait until you're the attorney that gets to
 16 ask me questions, and you can do what you wish.
 17 MS. STUDLEY: You can't.
 18 Q. But right now the question is -- the issue is:
 19 You want -- your firm wants to seek attorneys' fees for
 20 representing Stephen Kelly in an action in which
 21 allegations have been made against your firm and Stephen
 22 Kelly, correct?
 23 A. Yes.
 24 Q. And it's your position that under guardianship
 25 law any firm can -- that represents Kelly in connection

1 A. I don't think I did.
 2 Q. Did your firm at all represent Curtis Rogers
 3 in connection with the federal lawsuit?
 4 MS. STEIN: Form.
 5 A. I don't know. I don't know. I wasn't
 6 admitted at that time.
 7 Q. This federal lawsuit I'm talking about.
 8 A. Yeah.
 9 Q. You said you weren't admitted at that time?
 10 A. Into the Southern District I wasn't admitted
 11 at the time of the filing of the lawsuit.
 12 Q. But I was asking did your firm. I probably
 13 said did your firm represent Curtis Rogers?
 14 A. I don't remember. It may have, but I don't
 15 remember.
 16 Q. Do you know whether your firm has any claims
 17 for fees that it intends to, or that it's been holding
 18 and intends to file in the guardianship court in
 19 connection with the representation of Curtis Rogers in
 20 this lawsuit?
 21 A. I would have to speak to Mr. O'Connell about
 22 that. I don't know.
 23 MR. HECHTMAN: Ron, it's been hours since you
 24 said you were taking a few more minutes.
 25 MR. DENMAN: I'm done.

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1 with this federal lawsuit can seek attorneys' fees,
 2 correct?
 3 A. Well, I don't know if I would go that broad
 4 and tell you that. I think that the Court has to make
 5 an evaluation under Rowe and the standards of 744.108 of
 6 whether or not it's compensable. I don't think it's
 7 just a foregone conclusion, which is why you've been
 8 able to come in and object on behalf of your client.
 9 Q. And did you seek court approval from the
 10 guardianship court for your law firm to represent
 11 Stephen Kelly in connection with the federal lawsuit?
 12 A. Not required.
 13 MS. STEIN: Form.
 14 Q. Listen to my question. Did you?
 15 MS. STUDLEY: Form. Predicate.
 16 A. No, because it's not required.
 17 Q. Have you maintained all of your time that you
 18 spent in connection with the defense of Steve Kelly in
 19 this lawsuit?
 20 A. Not all of it.
 21 Q. Did you represent Steve -- excuse me.
 22 Did you represent Curtis Rogers at all in
 23 connection with the federal lawsuit?
 24 A. I didn't.
 25 Q. Do you intend to make -- okay.

1 THE WITNESS: Just like that?
 2 MR. DENMAN: I mean, I'm just reserving all of
 3 my rights to come back regarding the objections, but I'm
 4 done.
 5 CROSS-EXAMINATION
 6 BY MS. SCHULTZ:
 7 Q. I have a couple of questions.
 8 Ms. Crispin, is it your understanding that
 9 Keith Stein and -- I'm going to refer all of them as the
 10 Stein defendants. I mean, Keith Stein and Beys Liston
 11 and the Law Offices of --
 12 THE REPORTER: I'm sorry. I couldn't hear
 13 you. Please speak up a little bit.
 14 MS. SCHULTZ: Oh, I'm sorry.
 15 BY MS. SCHULTZ:
 16 Q. Keith Stein, Beys Liston and the Law Offices
 17 of Keith, all of whom were brought in as defendants.
 18 I'm just going to refer to them as the Stein defendants.
 19 Is it your understanding that the Stein
 20 defendants were brought in to render legal services that
 21 are required for -- or that were required as necessary
 22 in connection with the litigation relating to 808
 23 Lexington such as title and partition of ownership and
 24 investigating delinquent mortgage issues and the
 25 potential sale of the New York property?



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1 **Would you agree with that?**
 2 MR. DENMAN: Objection. Leading.
 3 A. Yes, I think that's accurate.
 4 MR. DENMAN: It's not cross. This is a
 5 codefendant.
 6 MS. STUDLEY: I think you can do it, but --
 7 MR. DENMAN: Okay, a codefendant. I mean,
 8 it's not cross. This is not an adverse situation.
 9 MR. HECHTMAN: Do you want her to go one by
 10 one and take another hour to do that?
 11 MR. DENMAN: Yes.
 12 MS. STEIN: She doesn't need to do that. It's
 13 cross-examination. Under the deposition rules we're not
 14 in trial. She can ask a leading question.
 15 MS. STUDLEY: Go ahead.
 16 MR. DENMAN: I disagree, but, I mean, I just
 17 voiced my objection. Go ahead.
 18 MS. STUDLEY: Okay.
 19 MR. DENMAN: I can't stop you.
 20 MS. SCHULTZ: That's fine. You voiced your
 21 objection. That's fine.
 22 BY MS. SCHULTZ:
 23 **Q. Was Mr. Stein trained to perform any services**
 24 **in connection with the 67th Street property?**
 25 A. I think that's attorney-client.

1 **Q. So review this agreement. What's the date on**
 2 **this agreement?**
 3 A. June 16th, 2014.
 4 **Q. So this would have been several months before**
 5 **the hearing where the terms of the global settlement**
 6 **were read onto the record; is that right?**
 7 A. Yes, and this is where I think my testimony
 8 was that I was confused.
 9 **Q. And, additionally, it was discussed at the**
 10 **hearing, and also it was discussed earlier in this**
 11 **deposition, that Lipa Lieberman had obtained several**
 12 **letters of interest in terms of purchasing of 808**
 13 **Lexington?**
 14 A. Yes.
 15 **Q. Would you agree with me on that?**
 16 A. Yes.
 17 **Q. And as far as your -- strike that.**
 18 **Would you disagree with me if I told you that**
 19 **the dates of those letters, those offers to purchase,**
 20 **were September 11th, 2014, and September 12th, 2014?**
 21 A. I would it, but I don't dispute that. I don't
 22 dispute that Lipa was seeking those in September.
 23 **Q. And if there had been no exclusive sales**
 24 **agreement in place prior to the time that these offers**
 25 **were obtained, would there have been any reason for**

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1 MS. STUDLEY: Yeah, to the extent that's not
 2 attorney-client, but, yeah.
 3 THE WITNESS: Okay. I'm not sure how to parse
 4 that out.
 5 MS. STUDLEY: I don't know.
 6 BY MS. SCHULTZ:
 7 **Q. Okay. That's fine.**
 8 **There were some discussions before about the**
 9 **timing of the exclusive sales agreement that was entered**
 10 **into by the guardian with Lipa Lieberman. If I told you**
 11 **that there was an agreement dated June 16th, 2014, that**
 12 **sets forth an exclusive sales agreement, would you have**
 13 **any reason to disagree about that?**
 14 MR. DENMAN: Objection to form.
 15 A. Well, I would like to see it. But, I mean, I
 16 think I testified I wouldn't -- I thought that there may
 17 be an agreement that predated the one that Mr. Denman
 18 was discussing with me. I just don't recall it. So I
 19 need to see it.
 20 MR. SCHULTZ: Well, I can show you this, and
 21 perhaps this will refresh your recollection.
 22 We can mark that as Defendants' Exhibit 1.
 23 (Defendants' Exhibit 1 was marked for
 24 identification).
 25 BY MS. SCHULTZ:

1 **Mr. Lieberman to go out and get these offers?**
 2 MR. DENMAN: Objection to form.
 3 A. I don't know, but the agreement that you've
 4 provided me as Exhibit 1 says in Term Number 1 that the
 5 agreement shall commence on the date hereof, which is
 6 June 16th, 2014, and shall continue in effect through
 7 June 16th, 2015. So that's what it says. I don't --
 8 **Q. Okay. So do you have any knowledge as to**
 9 **whether -- at the time that Mr. Lieberman was going out**
 10 **to obtain these letters to find a purchaser for 808**
 11 **Lexington, that he was under the impression that there**
 12 **was an agreement regarding his commission if he found**
 13 **someone who was interested in purchasing the property?**
 14 MR. DENMAN: Objection to form.
 15 A. I don't know. I really don't know right now.
 16 **Q. But would there have been any reason for him**
 17 **to be going out and looking for purchasers if there was**
 18 **no, at least, contemplated agreement in place?**
 19 MR. DENMAN: Objection to form.
 20 A. It would seem so.
 21 **Q. Was Keith Stein ever asked to obtain any kind**
 22 **of appraisal of the 67th Street property?**
 23 MS. STUDLEY: It's attorney-client. I'm going
 24 to -- I don't think you can answer that.
 25 THE WITNESS: Work product.



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1 MS. STUDLEY: Yeah, work product, too. Yeah,
 2 work product.
 3 BY MS. SCHULTZ:
 4 **Q. Well, the 67th Street property, that was in**
 5 **Lorna's -- that was titled in the Estate of Lorna**
 6 **Bivins' name; isn't that right?**
 7 A. Yes.
 8 **Q. So since Oliver, Sr., and Lorna Bivins were**
 9 **divorced and the property was in Lorna Bivins' name,**
 10 **Oliver, Sr., probably wouldn't have had any rights to**
 11 **that property; isn't that right?**
 12 MR. DENMAN: Objection to form.
 13 A. If you continued on the status quo, that's
 14 completely correct. The guardian chose to seek
 15 authorization to pursue an avenue which may have allowed
 16 Oliver Bivins, Sr., to make a claim to the access of the
 17 Lorna Bivins' estate where 67th Street was titled.
 18 **Q. What was that avenue?**
 19 A. It was a petition to determine beneficiary;
 20 the guardian sought approval to file that action, which
 21 is an adversary action in the Estate of Lorna Bivins,
 22 and the guardianship court granted the authorization to
 23 pursue that.
 24 So the guardian pursued that and made the
 25 claim that the divorce should not be given full faith

1 **defendants were retained, was the Beachton -- I'm sorry.**
 2 **At the time that Mr. Stein and the Stein**
 3 **defendants were retained, was the mortgage on the 808**
 4 **Lexington property already in default?**
 5 A. I think so.
 6 **Q. And the loan had already been accelerated at**
 7 **that point, correct?**
 8 A. I think so. I don't exactly remember at that
 9 particular point. So I'm going to have to say I don't
 10 know.
 11 **Q. If I told you that the Sovereign mortgage --**
 12 **they had already notified the owners of the property**
 13 **that the mortgage was in default in August of 2012, and**
 14 **Mr. Stein was retained in November of 2012, it would**
 15 **make sense that that was before Mr. Stein had been**
 16 **retained, correct?**
 17 MR. DENMAN: Form.
 18 A. I can't -- what you've asked me, I don't know;
 19 in the question you've assumed things that I don't know
 20 if they are true or not.
 21 **Q. Was Mr. Stein ever asked to collect real**
 22 **estate taxes from Oliver, Jr., or Lorna Bivins' estate?**
 23 MS. STUDLEY: Any communications between the
 24 lawyers, I'm going to object on work product. I don't
 25 think you can go there.

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1 and credit in the State of Florida because of the fact
 2 that it was void or voidable on various legal bases.
 3 **Q. But was there ever a final determination made**
 4 **on that?**
 5 A. It was settled.
 6 **Q. All right. And this was settled at which**
 7 **point? Was it part of the Texas settlement?**
 8 A. This is part the New York settlement. The
 9 settlement agreement and mutual release was one of the
 10 Exhibit A items, litigations that were settled.
 11 **Q. Was Mr. Stein ever retained to collect rents**
 12 **from the tenants at the 808 Lexington property?**
 13 A. No.
 14 MR. DENMAN: I mean --
 15 **Q. That was "no"?**
 16 MS. STUDLEY: I think I'm going to object on
 17 the form. You can ask it in a different way, but she's
 18 already answered. I think it's done.
 19 THE WITNESS: Well, are --
 20 MS. STUDLEY: Right. Okay.
 21 BY MS. SCHULTZ:
 22 **Q. Was Mr. Stein ever asked to renegotiate any**
 23 **leases with any tenants on the property?**
 24 MS. STUDLEY: Work product.
 25 **Q. At the time that Mr. Stein and the Stein**

1 **Q. Well, as far as your understanding, was that**
 2 **within the scope of his representation to collect taxes**
 3 **from the estate?**
 4 MR. DENMAN: Form.
 5 MS. STUDLEY: Yeah. I think it's the same. I
 6 have to instruct the witness not to answer.
 7 MS. SCHULTZ: Just bear with me.
 8 (Short pause).
 9 BY MS. SCHULTZ:
 10 **Q. Is it your understanding that when Mr. Rogers**
 11 **was retained, or when Mr. Rogers was appointed as the**
 12 **guardian, part of the responsibility that he was allowed**
 13 **to undertake on behalf of the ward included the right to**
 14 **enter into contracts?**
 15 MS. STEIN: Form.
 16 MS. STUDLEY: I think you can answer.
 17 A. Yes.
 18 **Q. So any exclusive sales agreement that he may**
 19 **have entered -- that the guardian may have entered into**
 20 **with Lipa Lieberman would have been acceptable under the**
 21 **responsibilities that the Court allowed the guardian to**
 22 **undertake; isn't that right?**
 23 MR. DENMAN: Form.
 24 MS. STUDLEY: You can answer that.
 25 THE WITNESS: Yes, he can do that.

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1 MS. SCHULTZ: Okay. That's all I have.
 2 MR. DENMAN: May I see Defendants' Exhibit 1.
 3 THE WITNESS: Yeah. This is underlined. Did
 4 you want that?
 5 MS. SCHULTZ: No.
 6 MR. DENMAN: It's an exhibit.
 7 MS. SCHULTZ: That's fine.
 8 THE WITNESS: Well, I didn't know which one,
 9 whether it was inadvertently --
 10 MR. DENMAN: I thought it was underlined, not
 11 from you.
 12 MS. SCHULTZ: It's fine. There aren't any
 13 notes or anything on there.
 14 THE WITNESS: Okay.
 15 REDIRECT EXAMINATION
 16 BY MR. DENMAN:
 17 **Q. Do you know whether Defendants' Exhibit 1 was**
 18 **executed on June 16th, 2014?**
 19 A. I've become confused today about whether it
 20 was, but I don't --
 21 **Q. Have you ever seen any other exclusive listing**
 22 **agreement that has a September date up at the top that**
 23 **would reflect the date that it was signed pursuant to**
 24 **the e-mails that we talked about during my direct**
 25 **examination?**

1 problem with all of us going out and grabbing a bite.
 2 You have my cell phone. If you hear from him, we'll
 3 come back. I think I will be short, much shorter with
 4 Brian. And I'll make an agreement that if we don't
 5 finish with him today, I'm not going to let this thing
 6 go late tonight. I know you have to drive down.
 7 THE WITNESS: He's willing to go late. He
 8 wants to finish. He said he would go late.
 9 MS. STUDLEY: And I think he'll be --
 10 MR. DENMAN: I'll try, but I also have some
 11 commitments after 5:00 today. So I'll try to get him
 12 done today; if not, I'll be here for the next three
 13 days. I think that we'll be able to make up some time,
 14 but I have commitments after 5:00. I can't do tonight.
 15 MS. STUDLEY: And we just want to take a
 16 little lunch break. I have the sense that he's going to
 17 be back around 2:30 or so.
 18 MR. DENMAN: Just text me, and I can get it
 19 done -- I mean, I don't think I have as much with Brian.
 20 MS. STUDLEY: Okay. We'll try to get it done.
 21 THE REPORTER: Ms. Studley, do you want a copy
 22 of the record if this is ordered?
 23 MS. STUDLEY: Yes. Thank you.
 24 THE REPORTER: Thank you very much.
 25 Ms. Schultz, do you want a copy of the record?

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1 MS. STUDLEY: Form.
 2 A. I mean, the best I can remember -- this is the
 3 exclusive right to sell agreement with Mr. Lieberman's
 4 firm, Eastern Consolidated, looked like. Now, are there
 5 two? I don't know. I would be guessing, but I wouldn't
 6 think so. I don't know.
 7 I just don't know, but I can probably go back
 8 to my records and determine whether or not this one with
 9 the June 16th, 2014, date was the one that was signed by
 10 Mr. Kelly in September of 2014.
 11 MR. DENMAN: Off the record.
 12 (Recess taken).
 13 MR. DENMAN: I'm done.
 14 MS. STUDLEY: Okay. Wendy?
 15 MS. STEIN: I have no questions.
 16 THE REPORTER: Read or waive?
 17 THE WITNESS: I'll read.
 18 THE REPORTER: Thank you very much.
 19 MR. HECHTMAN: On the record real quick.
 20 Brian, due to scheduling exigencies, with this
 21 case and other cases he has, was here in the morning.
 22 We didn't get to him in the morning; as soon as he's
 23 done with his other conflicts, he will return and we
 24 will resume his deposition.
 25 MR. DENMAN: Since it's 1:49 p.m., I have no

1 MS. SCHULTZ: Yes.
 2 MR. DENMAN: I want a copy, please.
 3 THE REPORTER: Okay. Do you want it regular
 4 time, sir?
 5 MR. DENMAN: Yes. That's fine.
 6 THE REPORTER: Ms. Stein, this is the
 7 reporter. Do you want a copy of the record, also?
 8 MS. STEIN: I do not want a copy.
 9 THE REPORTER: Okay. Thank you.
 10 (Deposition concluded and signature reserved).
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JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
BRIAN M. O'CONNELL, ESQUIRE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO.: 15-81298-CV-MARRA-MATTHEWMAN

JULIAN BIVINS, as Personal
Representative of the ancillary
Estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR.,
et al.,

Defendants.

DEPOSITION OF: BRIAN M. O'CONNELL, ESQUIRE
DATE: MONDAY, JANUARY 9TH, 2017
TIME: 3:10 P.M. - 5:45 P.M.
TAKEN BY: PLAINTIFF
LOCATION: CLEARLAKE EXECUTIVE SUITES,
500 SOUTH AUSTRALIAN AVENUE
SIXTH FLOOR
WEST PALM BEACH, FLORIDA 33401

STENOGRAPHICALLY
REPORTED BY: MARK RABINOWITZ, RPR

JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
 BRIAN M. O'CONNELL, ESQUIRE

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23
24
25 Also Present: Ashley Crispin Ackal, Esquire

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P R O C E E D I N G S

1
2 THE REPORTER: Raise your right hand, please.
3 Do you solemnly swear to speak the truth, the
4 whole truth and nothing but the truth, so help you God?
5 THE WITNESS: Yes, I do.
6 BRIAN M. O'CONNELL, ESQUIRE
7 having first been duly sworn, was examined and
8 testified as follows:
9 DIRECT EXAMINATION
10 BY MR. DENMAN:
11 Q. Would you state your full name, please.
12 A. Brian McKenna O'Connell.
13 Q. And where are you employed?
14 A. At Ciklin Lubitz & O'Connell.
15 Q. Are you the O'Connell of Ciklin Lubitz &
16 O'Connell?
17 A. It's between my cousin and I; we both are
18 claiming it. It's friendly, of course.
19 Q. You're a partner at the firm?
20 A. Yes.
21 Q. How long have you been a partner?
22 A. Since 1988.
23 Q. And what is your area of specialty?
24 A. Wills, trusts and estates.
25 Q. Is that in administrative or litigation?

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I N D E X

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15	EXHIBIT INDEX	
16	(None marked)	
17		
18		
19		
20	S T I P U L A T I O N S	
21	It is hereby stipulated and agreed	
22	by and between the counsel for the respective parties	
23	and the deponent that the reading and signing of the	
24	deposition transcript was reserved.	
25		

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1 A. Both.
2 Q. Do you do any other type of litigation besides
3 wills, trusts and estates?
4 A. A small amount of commercial litigation.
5 Q. Any other areas, any other small amount areas?
6 A. No, they would all spin off of the wills,
7 trusts and estates primarily; as you indicated,
8 administration and litigation that relate to those
9 areas.
10 Q. How long have you known Curtis Rogers?
11 A. For four or five years at this point,
12 approximately.
13 Q. How did you first meet him?
14 A. I think we met -- I recall first meeting him
15 in connection with the Bivins guardianship.
16 Q. Have you had any other matters that you worked
17 with him on besides Bivins?
18 A. I believe there have been one or two.
19 Q. Where you represent, your firm represents him
20 as a guardian?
21 A. Yes.
22 Q. How long have you known Stephen Kelly?
23 A. Probably approximately ten years.
24 Q. And how many matters -- in how many matters
25 has your firm represented Stephen Kelly?



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BRIAN M. O'CONNELL, ESQUIRE

1 A. In approximately two to three.
 2 **Q. In which he has been the guardian?**
 3 A. Yes.
 4 **Q. Were those two or three matters prior to the**
 5 **Bivins matter?**
 6 A. Yes.
 7 **Q. What about Ronda Gluck, how long have you**
 8 **known Ronda?**
 9 A. Approximately ten years.
 10 **Q. And how many matters have you been co-counsel**
 11 **with her?**
 12 A. Up through the current date?
 13 **Q. Yes.**
 14 A. In approximately eight to ten.
 15 **Q. Do you and Ronda Gluck have a referral where**
 16 **you're refer cases back and forth to each other?**
 17 A. Nothing formalized like that. There are
 18 matters where we'll be brought in as litigation counsel
 19 because her firm does not do litigation.
 20 **Q. Are there times when your firm will refer to**
 21 **her administrative matters?**
 22 A. I think we have done so. I don't remember how
 23 many times.
 24 **Q. Prior to the underlying matter involving**
 25 **Oliver Bivins, Sr., have you ever worked with Lipa**

1 **Q. And did you hire Stein to assist you in that**
 2 **case?**
 3 A. No. No, he actually was involved in it on the
 4 New York end.
 5 **Q. And then he hired you on the Florida end?**
 6 A. No, it was probably the other way around, in a
 7 sense. We were involved in the Florida litigation, and
 8 then I met him separately. The client had engaged him
 9 to do some real estate matters in New York.
 10 **Q. Ms. Crispin has advised us that she's an**
 11 **associate who reports to you, and then she explained the**
 12 **three other associates that report to him.**
 13 A. Her.
 14 **Q. I'm sorry, to her.**
 15 **Do all four of these associates report to you?**
 16 A. Well, ultimately. I guess if you're kind of
 17 painting the chain of command, that would be correct.
 18 That really, on a day-to-day basis, she certainly is
 19 there, I guess, the responsible party in terms of
 20 getting directions, completing tasks and so forth, but
 21 ultimately the buck stops here in a sense.
 22 But she would be sort of the rung below mine,
 23 and then you have the other folks.
 24 **Q. Are there any other attorneys that work under**
 25 **you on a different rung?**

1 **Lieberman?**
 2 A. No.
 3 **Q. Have you ever worked with him since this case?**
 4 A. No.
 5 **Q. What about Keith Stein?**
 6 A. Keith Stein, before this case, yes, I had
 7 handled a matter with him.
 8 **Q. And when was that?**
 9 A. That might have been seven or eight years ago.
 10 Again, I'm approximating all of these time frames.
 11 **Q. Was that a litigation matter or a real estate**
 12 **matter?**
 13 A. It was a litigation matter.
 14 **Q. And did he do the litigation, or did someone**
 15 **else from his firm handle it?**
 16 A. We did the litigation in Florida. There was
 17 a bankruptcy matter that was involved with it, but the
 18 litigation primarily, at least of course, what I was
 19 doing was Florida.
 20 **Q. Were you representing a guardian in that case?**
 21 A. No. No, I represented an individual. It was
 22 a contest -- to summarize it quickly: There was a
 23 contest over a trust where there were competing
 24 arguments as to the validity of a trust and amendments
 25 and so forth.

1 A. No.
 2 **Q. Do you know how much money your firm has**
 3 **billed and received in connection with claims in**
 4 **connection with the underlying matters involving Oliver**
 5 **Bivins, Sr.?**
 6 MS. STUDLEY: Form.
 7 A. I don't.
 8 **Q. Do you know whether it's more than a million**
 9 **dollars?**
 10 A. I don't know. The only way I guess to answer
 11 that accurately is: I would have to go through the
 12 various petitions and also probably, more importantly,
 13 the various orders that would have appropriated certain
 14 amounts towards fees and costs.
 15 **Q. Do you know how much the current petitions are**
 16 **in seeking fees for your firm that are still pending?**
 17 A. I don't recall. Again, I would have to look
 18 at the actual petitions themselves to give you an
 19 accurate answer.
 20 **Q. Well, do you know that matter to be more than**
 21 **400,000?**
 22 A. I would be guessing, and I know you don't want
 23 me to guess.
 24 **Q. You don't get in your firm on a monthly basis**
 25 **some type of ledger that tells you, in your cases,**



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1 **what's either been paid or what's still outstanding,**
2 **outstanding receivables, things of that nature?**
3 A. We get certain items of reporting, but it
4 depends, sometimes if they have been billed, or not
5 billed, or if it's unbilled time. So it sort of depends
6 on what category it is. That's why I'm not sure, and I
7 don't want to give you a wrong answer as to amounts.
8 But I'm happy to look at bills or petitions if
9 that would assist you.
10 **Q. But you do have documents that you receive in**
11 **your firm that tell you what has been billed and, I**
12 **guess, petitions filed and what is pending to have**
13 **petitions filed?**
14 MS. STUDLEY: Form.
15 A. It's not that precise. I think it's a similar
16 billing package to a lot of law firms where we track on
17 files. You have unbilled amount of time on X file. You
18 have billed time; and if it's been billed and not paid,
19 it tracks it by 30, 60, 90, 120 days.
20 There's reporting of that nature.
21 **Q. So, for example, you have a work-in-progress,**
22 **what hasn't been billed?**
23 A. Uh-hum.
24 **Q. If more than -- let's assume that three months**
25 **go by. That you have work in progress before it's**

1 **actually put into a petition and filed with the Court.**
2 **Would all of that time be considered work in progress,**
3 **or is work in progress on month to month?**
4 MS. STUDLEY: Form.
5 A. To me, not being an accountant, I look at it
6 that if there's time that's accrued, you know, in our
7 system, that's what I will probably call work in process
8 [sic].
9 **Q. And once it's been in process -- once it's**
10 **actually been put into a petition and sent to the Court**
11 **to have an ultimate determination, that's where it**
12 **starts to accrue from a time frame of, let's say, 30,**
13 **60, 90, or no?**
14 A. If it's billed, if it's internally billed,
15 I should say, sometimes that process occurs, and
16 sometimes it doesn't where there's a court petition
17 involved as opposed to a bill that might go to a third
18 party.
19 **Q. Right now, from my side of the table, I can**
20 **easily see the orders that have been entered showing how**
21 **much your firm has been paid. I can only see the**
22 **petitions that are currently pending that have not been**
23 **heard by the Court. But what I can't see, and do you**
24 **have any idea, of how much time exists that is still**
25 **waiting to be put into a petition for fees and filed**

1 **with the Court in the underlying matters?**
2 A. I don't.
3 **Q. Do you know if it's more than a couple hundred**
4 **dollars?**
5 A. I'm not sure. Again, I would be speculating.
6 **Q. Do you know whether there's a separate matter**
7 **-- let me strike that.**
8 **I've learned through the underlying matter**
9 **that your firm -- in underlying matters that your firm**
10 **uses a different number for various matters; is that**
11 **right?**
12 A. Correct.
13 **Q. Is there a separate matter number for your**
14 **firm in connection with your firm's representation of**
15 **Stephen Kelly in this federal action?**
16 A. I'm not sure. I understand your question.
17 I'm just not sure if that's been culled out in that
18 fashion. I would have to look at -- if I can look at
19 the accounting records because we do have a matter list
20 that we call it which would say Stephen Kelly. And then
21 underneath that it would have five files or six files or
22 seven files. That's how I can determine that.
23 **Q. Right.**
24 **Who identifies when a new matter should be**
25 **opened? Is that something that you will do and approve**

1 **and sign and tell accounting, okay, open this new matter**
2 **for Stephen Kelly, for example?**
3 A. That's pretty much the process after a
4 conflict check, of course, and after some form of
5 review. And usually Ms. Crispin and I will get together
6 and review a matter to see if it is appropriate or not
7 and decide the manner of billing and so forth, but then
8 from the accounting standpoint internally what you said
9 is accurate.
10 **Q. So, for example, if you're working on a**
11 **guardianship matter for Stephen Kelly for Oliver Bivins,**
12 **Sr., and a matter goes to appeal, you'll open a new**
13 **matter number for that specific appeal, correct?**
14 A. Most of the time.
15 **Q. And if there's a new matter open, that's**
16 **something that you would file, sign the form to**
17 **authorize, right?**
18 A. In that instance there wouldn't be -- if we
19 have an existing -- to give you an example, to use this
20 case to say, well, we have Stephen Kelly as an existing
21 client, on an existing matter, then there's a subsidiary
22 matter. We wouldn't go through the process, at least
23 internally, as a law firm of having a signoff or some
24 other paperwork that's done.
25 It's really a matter of memo. We go to the



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1 accounting department and say please open a matter for
2 Stephen Kelly as guardian called appeal of such and such
3 an order.

4 **Q. And the accounting department will send it**
5 **back and say, okay, the new matter number is under the**
6 **Steve Kelly file?**

7 A. That's right because the client has a unique
8 number. So let's say Steve Kelly is maybe 123.

9 **Q. Right.**

10 A. And then the matter numbers, it just goes
11 sequentially, you know. So we might get to 10,000, then
12 11,000, 12,000, etc.

13 **Q. In this case do you know whether you did a**
14 **memo to accounting asking them to open a separate**
15 **matter, like a new sequential matter, under Steve Kelly**
16 **for the time that your firm spent defending him in this**
17 **federal action?**

18 A. I'm not sure. I don't know.

19 **Q. Okay. Do you know whether your firm has kept**
20 **track of -- let me strike that.**

21 **Do you know whether your firm has represented**
22 **Curtis Rogers in connection with this federal action?**

23 A. I'm not sure.

24 **Q. If your firm was representing Curtis Rogers**
25 **in this federal action in which your firm would seek**

1 deceased at this point in time.

2 **Q. Do you know whether your firm ever filed a**
3 **final accounting for Stephen Kelly in connection with**
4 **his services as the ETG for Oliver Bivins, Sr.?**

5 A. I'm not sure. We filed various sundry
6 accountings of the various guardians, but to give you
7 that hundred percent answer, I would want to look at a
8 docket.

9 **Q. Once Curtis Rogers became the successor**
10 **guardian, then the normal process would be that a**
11 **petition for discharge will be filed as to Stephen Kelly**
12 **as the ETG, correct?**

13 MS. STUDLEY: Form.

14 A. I guess if we can call anything ordinary or
15 normal that a guardian would, at some point, if they
16 have been removed, if they have resigned, what have you,
17 the ward has passed away, there are certain items under
18 the statute that, yes, there's a petition for -- on the
19 property side; on the personal side the statute is that
20 if you're the guardian and the ward dies, of course,
21 you're discharged just as a matter of course.

22 So the only open ends would be someone who's
23 a guardian of a property and a ward dies, etcetera, yes,
24 there would be a petition for a discharge, and a final
25 accounting would typically be the process that you would

1 **reimbursement fees from the guardianship court, would**
2 **that be a situation where your firm would at least get**
3 **another subsequential matter number?**

4 MS. STUDLEY: Form.

5 A. Typically, we would.

6 **Q. Do you know whether that was done?**

7 A. I don't recall whether it's been done.

8 **Q. When your firm first again representing**
9 **Stephen Kelly as the ETG for Oliver Bivins, Sr., you**
10 **were aware that he was also serving as the ETG for the**
11 **guardianship of Lorna Bivins, correct?**

12 A. I'm not sure of the sequence of events in
13 terms of -- I know that Lorna Bivins died several months
14 after the ETG was started. And I thought that our
15 representation of Stephen Kelly started after her death.

16 That's, again, something, to be a hundred
17 percent positive, we probably would need to pull, at
18 least the docket, to be able to say, okay, here's the
19 date of our notice of appearance. And she was, again, I
20 believe deceased at that point in time. But that's what
21 I would need to be a hundred percent sure for you.

22 I know that Steve has not been -- I know we
23 covered this this morning. Steve has not been
24 discharged as the ETG basically due to his accounting
25 needed to be approved, but certainly the ward was

1 follow at that point.

2 **Q. Do you know whether -- at any point during the**
3 **time Curtis Rogers was the successor guardian -- there**
4 **was a petition for discharge ever filed with respect to**
5 **Stephen Kelly pertaining to Oliver Bivins, Sr.?**

6 A. I'm not a hundred percent sure and, again, I
7 could give you the infamous educated guess, but I would
8 rather give you the certainty, which the certainty would
9 be within the docket itself as to whether such a
10 petition is there for discharge, and that we can
11 determine by looking at the docket.

12 **Q. Right.**

13 **And the process would be that if your firm**
14 **filed a petition for discharge of Stephen Kelly as the**
15 **ETG, then interested parties would have an opportunity**
16 **to object within a certain period of time, correct?**

17 A. By statute, of course, it's gets into the
18 definition of what's an interested person and --

19 **Q. Whoever may be the interested person, I won't**
20 **get into that definition right now, but my point is that**
21 **there's an objection time period from the time that a**
22 **petition for discharge is filed, correct?**

23 A. Right, by statute and rule. Correct.

24 **Q. And without getting into who is an interested**
25 **party or not, but if no objections are made within a**

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1 certain period of time, then they are deemed to be
 2 waived, correct?
 3 A. That's true, by statute and rule.
 4 Q. And if the objections are deemed to be waived
 5 because nobody has made an objection on behalf of anyone
 6 in connection with Oliver Bivins, Sr., for the services
 7 of Steve Kelly as the ETG for Oliver Bivins, Sr., then
 8 it would be a matter of going before the judge and
 9 asking him to approve an order of discharge, correct?
 10 A. I guess I -- let me make sure that I got your
 11 hypothetical right. There's a petition for discharge.
 12 There's a final accounting filed and served on all
 13 interested persons, but no timely objections to that.
 14 Q. Exactly.
 15 A. Then the guardian could get discharged if
 16 there's no objections.
 17 Q. And that would be a matter of simply filing a
 18 request to the Court to discharge him and identifying
 19 that the final accounting has been filed; no objections,
 20 please discharge?
 21 A. Well, it would be matter of --
 22 MS. STUDLEY: Form.
 23 A. -- you file your petition for discharge, the
 24 time would run. It would depend on the nature of the
 25 case. You might have to notice it for hearing to bring

1 auditor reviews it, what could be a typical time
 2 frame --
 3 Q. Yes.
 4 A. -- for that?
 5 It could be months, a few months, if it's, you
 6 know, again, ordinary. There's nothing unusual in the
 7 accounting. No one is objecting, items of that nature.
 8 I'm not speaking for the court system exactly, but
 9 that's how things typically move, in my experience.
 10 Q. If there is -- can you think of any reason in
 11 this particular case of why Stephen Kelly would not have
 12 -- why there would not have been a petition to discharge
 13 Stephen Kelly as the ETG under the scenario that we have
 14 laid out?
 15 A. I would have to look at the docket to see if
 16 there was or wasn't such a petition; and if there were
 17 objections, for example, I know Ms. Levine had various
 18 objections to some of Stephen Kelly's actions. I'm just
 19 going from memory, which, again, I would have to piece
 20 together with the docket to say what was done or not,
 21 his compensation, for example.
 22 Q. Do you know whether she filed those objections
 23 in this case or in the Lorna Bivins guardianship case?
 24 MS. STUDLEY: Form.
 25 A. Well, Lorna Bivins, definitely.

1 it to the Court's attention because the auditor may be
 2 looking at it, and not complete with their work.
 3 So I just wanted to make sure that I'm not
 4 saying it's automatic.
 5 Q. I'm not trying overlook any of those little
 6 technical procedures. But the point is: Once you
 7 file -- if you filed a petition for discharge and
 8 there's no objections, then the next aspect would just
 9 essentially be technical and procedural to get him
 10 discharged?
 11 A. Other than the Court auditor also would have
 12 to approve it, examine and approve the accounting.
 13 Q. And if the Court auditor examined the
 14 accounting and didn't approve it, they would give their
 15 recommendations, and it would be your obligation to get
 16 with the guardian and do whatever is necessary to
 17 rectify that?
 18 MS. STUDLEY: Form.
 19 A. Correct.
 20 Q. But that's something that would be weeks, not
 21 years?
 22 MS. STUDLEY: Form. Speculation.
 23 A. I guess I'm just trying to reconstruct this.
 24 If you're saying from filing of the petition for
 25 discharge, a final accounting, no objections, the

1 Q. Right.
 2 So if she filed it in Lorna Bivins, that would
 3 hold up Lorna Bivins, but that would have no impact on
 4 getting the discharge for Oliver, Sr., correct?
 5 MS. STUDLEY: Form.
 6 A. I'm sorry. I'm looking at both Bivins'
 7 matters.
 8 Q. Right. I'm separating it.
 9 I'm just talking about our Oliver, Sr., matter
 10 irrespective of the objection files over there, you
 11 could still get a discharge over here?
 12 A. It could be possible, but, again, I would have
 13 to look and go through that mechanical drill of what was
 14 filed, when the objection times passed, go through those
 15 steps.
 16 Q. But as far as going through those steps of
 17 filing a petition for discharge, making sure that the
 18 accounting is done, making sure to diary whether the
 19 objections are served, making sure that the auditor --
 20 if they have any issues, that those are corrected.
 21 Those are all items that would be within the attorneys'
 22 review and responsibility.
 23 That's not something independent that the
 24 guardian would be overseeing. That's something that you
 25 would be overseeing as their attorney, right?



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1 MS. STUDLEY: Form.
 2 A. You're probably talking about a mixed bag from
 3 the standpoint -- of course, a guardian would have
 4 records as to them filing a petition for discharge and
 5 their accounting. But then we do the -- when we're
 6 representing a professional guardian, we would do the
 7 court filings and so forth. So we're both involved.
 8 That's what I was trying to sketch out for you.
 9 **Q. But from the standpoint that your firm would**
 10 **file the petition for discharge, correct?**
 11 A. Oh, in our hypothetical?
 12 **Q. Yes.**
 13 A. All right.
 14 **Q. Your firm would then notify who you believe**
 15 **would be interested persons to see whether they object,**
 16 **correct?**
 17 MS. STUDLEY: Form.
 18 A. Yes.
 19 **Q. And then your firm would diary when those**
 20 **objections would have to be filed by any interested**
 21 **person, correct?**
 22 A. Yes.
 23 **Q. And if there were no objections within that**
 24 **deadline, then your firm would move forward with the**
 25 **next step, I guess, to determine whether the auditor had**

1 **any issues with the accounting, correct?**
 2 MS. STUDLEY: Form.
 3 A. Well, actually, there's another little step
 4 here to mention. When the auditor goes through their
 5 review, when they approve it, of course, they then do an
 6 approval of it. The judge ultimately then would enter
 7 an order approving the accounting. So that's just a
 8 part. Again, I'm just explaining the internal process
 9 of how sort of a closeout of a guardianship would
 10 typically go.
 11 So there's things that the attorney does.
 12 There's things that the Clerk's Office is doing, just so
 13 you have the totality of this.
 14 **Q. And that's where I'm going with this.**
 15 **If, for example, the auditor had an issue with**
 16 **the accounting, I assume that's something that you would**
 17 **get back with the guardian to rectify any issues there?**
 18 A. Yes, usually there's a report that will come
 19 back.
 20 **Q. Right.**
 21 **So if the auditor had no issues with the**
 22 **accounting and the audit was okay with it, as you said,**
 23 **the next thing would be ministerial, going to the clerk,**
 24 **taking that approval to the judge and the judge**
 25 **approving the final accounting, correct?**

1 A. Right --
 2 MS. STUDLEY: Form.
 3 A. -- or some sort of contact with the Court. We
 4 might send a letter with a proposed order of discharge
 5 if all the boxes are checked off.
 6 **Q. But that's something that the attorney for the**
 7 **guardian would do. The only thing the guardian would**
 8 **get involved with is if there was an objection to the**
 9 **accounting, they would have to go back through -- not an**
 10 **objection to the accounting. I'm sorry. If the auditor**
 11 **had an issue with the accounting, then you would get**
 12 **with the guardian to go through the numbers, right?**
 13 MS. STUDLEY: Form.
 14 A. Oh, we definitely would.
 15 **Q. If there was no issue with the auditor --**
 16 **again, going through what the attorney would do is: It**
 17 **would be within the attorney's job to do these,**
 18 **essentially, ministerial functions of putting it through**
 19 **the system. You wouldn't expect a guardian to do that,**
 20 **right?**
 21 MS. STUDLEY: Form.
 22 A. Well, again, it's sort shared with the
 23 guardian. We're working with the guardian. We're
 24 representing the guardian, but the guardian, of course,
 25 is the fiduciary that gives the information to do the

1 accounting, do the petition for discharge. So they were
 2 both involved. I know you're trying to break it down
 3 in terms of sort of who's doing what at what point in
 4 time.
 5 **Q. I'm saying after you've done the petition,**
 6 **after you've got the information, I'm really talking**
 7 **about after you got it, you file the petition. Once you**
 8 **file the petition, it's now in your hands to make sure**
 9 **and go through it, do the diarying, seeing when the**
 10 **objections, if any, were filed; and, if not, moving it**
 11 **through the system with the courts to get the final**
 12 **discharge.**
 13 **You wouldn't expect a guardian to come forward**
 14 **and say, hey, I see that no objections have been filed**
 15 **within a certain number of days. So now let's set this**
 16 **for hearing before the judge. That's something that you**
 17 **would expect to do, right?**
 18 MS. STUDLEY: Form. Asked and answered.
 19 A. Again, we would do -- there's certainly a lot
 20 of those components that we would do with a guardian, at
 21 least professional guardians typically keep track of the
 22 status of their cases.
 23 I hope I'm answering your question with enough
 24 detail. I think you're trying to say to me, well, who's
 25 involved at this leg of the process. Is it just the

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1 lawyers, or is it the guardian that's supposed to do
2 something.

3 **Q. I guess what I'm trying to find out is: If**
4 **there's no discharge of Steve Kelly as the ETG, is this**
5 **something that Steve Kelly should have made sure was**
6 **done, or is this something that Ciklin Lubitz should**
7 **have made sure was done?**

8 A. I don't know. I would have to start with the
9 premise that I don't know if it's discharged or not.

10 MS. STUDLEY: Objection to the predicate.

11 **Q. Assuming he hasn't been discharged as the ETG,**
12 **and he ended his ETG way back in May of 2011, that we**
13 **can look to Stephen Kelly and say why didn't you do**
14 **this, or is it something that Ciklin Lubitz should have**
15 **made sure that he was discharged?**

16 MS. STUDLEY: Objection. Predicate.
17 Speculation.

18 A. Again, I would have to go back through and
19 look at what was filed when, who was it served on, what
20 did the Court approve as accounting. I would have to
21 look at those items to give you a total answer.

22 **Q. As the attorney for the guardian for the ward,**
23 **Oliver Bivins, Sr., do you believe that you have a**
24 **responsibility to Oliver Bivins, Sr., to make sure that**
25 **once the ETG's run is over, that he is discharged from**

1 thing. Of course, when you're talking about discharge,
2 and you're using the word "responsibility," if you
3 peruse the statute, there really isn't a statute or rule
4 that says someone serving as guardian must be discharged
5 within a certain period of time.

6 So there isn't -- if you're searching for a
7 legal responsibility on those lines, there's isn't one
8 that I'm aware of that a discharge must occur by "X"
9 amount of days or something of that nature, if that's
10 helpful.

11 **Q. Well, I'm asking you for, you know, an**
12 **attorney-client relationship. You are the attorney for**
13 **Stephen Kelly, and Oliver Bivins, Sr., is the intended**
14 **beneficiary of that attorney/client relationship,**
15 **correct?**

16 A. Not necessarily. The standard here would be
17 we, as attorneys, render services either for the benefit
18 of the ward or to the guardian on behalf of the ward.
19 That's what attorneys do in a guardianship setting.

20 **Q. And you seek to have the ward pay for**
21 **everything?**

22 MS. STUDLEY: Form.

23 A. Not necessarily for everything. We seek to
24 have -- we do petitions for fees, or we attach our bills
25 to accountings that the Court then reviews to determine

1 his services?

2 MS. STUDLEY: Form.

3 A. I don't believe there's -- you're talking
4 about a fiduciary duty now?

5 **Q. Yes.**

6 A. All right. Well, that's the subject of a
7 Fourth DCA opinion that I know you're well familiar
8 with, but exactly how that applies, when that applies,
9 the extent that it applies, we don't really have a lot
10 of guidance on that. We have the holding in the case
11 that a lot of us versed in the guardianship world have
12 read, but how that gets interpreted in specific
13 situations is really open ended right now.

14 **Q. Between you and the guardian, whose**
15 **responsibility is it to make sure that he is discharged?**

16 MS. STUDLEY: Form.

17 A. Probably both.

18 **Q. So in the sense of Stephen Kelly, when he**
19 **stopped serving as the ETG because Curtis Rogers came**
20 **in, it was both your law firm's responsibility and**
21 **Stephen Kelly's responsibility to make sure they were --**
22 **that he was discharged as the ETG from the guardianship**
23 **of Oliver Bivins, Sr.?**

24 MS. STUDLEY: Form. Lack of predicate.

25 A. You need to back up a couple of steps, for one

1 if those fees are reasonable. So I wouldn't submit that
2 it's everything.

3 **Q. Well, from the two things you just identified**
4 **that you can either serve the guardian or serve the**
5 **Ward's interests, that you can do?**

6 A. It's the guardian on behalf of the ward.

7 **Q. So you can either serve their interests, but**
8 **when you're serving in those two capacities, you're**
9 **going to seek to have the ward pay for both capacities,**
10 **correct?**

11 MS. STUDLEY: Form.

12 A. Right, when there are appropriate fees to be
13 billed, and like here we filed a petition, you would
14 object. So they would be subject to the Court's review.

15 **Q. But you never filed -- you never sought to**
16 **have the guardians pay for any of your fees in**
17 **connection with any of the services that you rendered**
18 **pertaining to Oliver Bivins, Sr., from their own pocket,**
19 **correct?**

20 MS. STUDLEY: Form.

21 A. From the guardians?

22 **Q. Yes.**

23 A. No.

24 **Q. So if you're getting paid from -- you know**
25 **you're getting paid from Oliver, Sr.'s pot in connection**



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1 with the job that you're doing for the guardians, do you
 2 not agree that once the guardian has been removed, that,
 3 as the attorney, you should make sure and comply with
 4 getting them discharged?
 5 MS. STUDLEY: Form. Lack of predicate.
 6 A. Not necessarily because it depends on the
 7 facts and circumstances. Again, in my little example,
 8 if you had someone who was serving as an ETG of a
 9 person, for example, there's nothing to do.
 10 Q. What about if you entered into -- if you were
 11 a party who negotiated and sought approval from the
 12 Court for settlement that said that the guardian would
 13 be discharged within a certain amount of time after the
 14 settlement, is that something where you would feel like
 15 you owed a duty to Oliver Bivins, Sr., to make sure that
 16 Curtis Rogers was discharged?
 17 MS. STUDLEY: Form. Predicate.
 18 A. I would have to have more facts in terms of
 19 what's in the document. I guess it's a hypothetical, so
 20 what are the terms and conditions and so forth.
 21 Q. How many years passed from the time of the
 22 Texas settlement before your firm did a petition to
 23 discharge Curtis Rogers?
 24 MS. STUDLEY: Form.
 25 A. I don't know the amount of time. Again, I

1 Q. Okay. But that was one of the terms that was
 2 agreed to?
 3 MS. STUDLEY: Form.
 4 A. But not a time frame.
 5 Q. There was no time frame is your position?
 6 That Curtis Rogers could stay on forever, and that would
 7 be no problem under the terms -- under the intent of the
 8 agreement?
 9 MS. STUDLEY: Form. Lack of predicate.
 10 A. That's not what I'm saying.
 11 MS. STUDLEY: Wait.
 12 THE REPORTER: Wait. Wait.
 13 MS. STUDLEY: You have to let him finish.
 14 Q. Help me. Tell me what is --
 15 A. Sure.
 16 Q. Okay. What do you understand the time frame
 17 was to be?
 18 A. Well, I don't understand that there was a time
 19 frame, but the thing that we need to do that what we're
 20 not doing is look at the settlement agreement.
 21 Q. I want to know what -- you were involved in
 22 this intimately. What is your understanding of when
 23 Curtis Rogers was supposed to get off this case?
 24 MS. STUDLEY: Form. Predicate.
 25 A. I don't have such an understanding. I

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1 would have to look at the file.
 2 Q. But you know the idea of the Texas settlement
 3 was that Curtis Rogers was to get off the case as
 4 quickly as possible in exchange for Julian agreeing to
 5 the terms in Texas, correct?
 6 MS. STUDLEY: Form.
 7 A. No. I know what's in the settlement
 8 agreement. So if the --
 9 Q. The settlement agreement doesn't say that?
 10 MS. STUDLEY: You have to let him finish.
 11 A. I can't remember exactly what it says.
 12 Q. At the time of the Texas settlement, you know
 13 there was a pending petition to remove Curtis Rogers,
 14 correct?
 15 A. Yes.
 16 Q. And that that was being litigated and
 17 discovery was being done, correct?
 18 A. Correct.
 19 Q. And in return for dropping that petition to
 20 remove, one of the elements of consideration was that
 21 Curtis Rogers would get off the case so that Steve Kelly
 22 could come on, correct?
 23 A. We could look at the settlement agreement. I
 24 believe that was one of the terms of the settlement
 25 agreement, along with a number of other items.

1 remember there was a negotiated term that he would
 2 resign. Steve Kelly would come on, but the timing of
 3 that, whether it was surefire or rapid or slow, I don't
 4 recall. We would have to look at the agreement to
 5 determine it, if there was such a term.
 6 Q. So you don't think that -- as long as he
 7 resigned within 30 days, your position is: He could
 8 stay on as guardian as long as he wanted until the
 9 discharge took place?
 10 MS. STUDLEY: Form. Mischaracterization.
 11 A. I'm saying it's all governed by what's in the
 12 settlement agreement.
 13 Q. Do you believe that the settlement agreement
 14 had a time frame for Rogers to get off this case?
 15 MS. STUDLEY: Form. Asked and answered.
 16 A. And that's what I don't recall.
 17 Q. Okay. It was at least -- do you know how many
 18 years passed from the time of the Texas settlement to
 19 the time that your firm filed a petition to discharge
 20 Rogers?
 21 A. I don't. I don't know the time frame.
 22 THE WITNESS: Ron, when you're at a stopping
 23 point, can I grab a drink of water?
 24 MR. DENMAN: Sure. Sure. Go ahead.
 25 (Short pause).



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1 BY MR. DENMAN:

2 **Q. When is the last time you looked at the Texas**
3 **settlement?**

4 A. A while ago. I mean, it could be years.

5 **Q. Okay. Did your firm prepare the Texas Trust**
6 **Agreement?**

7 A. We worked -- I remember working on that
8 document, making revisions to it. I'm not exactly sure
9 who -- I think it was sort of a joint drafting effort,
10 is what I remember.

11 **Q. And did your firm seek to be compensated for**
12 **your work through the contingency portion that was**
13 **agreed to in exchange for the settlement?**

14 A. Could you rephrase that because I'm a little
15 -- I know we had a hybrid contingency fee agreement, but
16 that dealt with a different subject matter in Texas.

17 **Q. You know that the settlement of the -- that**
18 **the Texas settlement -- that the agreement was that the**
19 **Heinrich firm, who was working on the Texas settlement**
20 **for a contingency fee, would be paid \$1.5 million plus,**
21 **potentially, a portion of the Pioneer leases and that**
22 **was supposed to be the consideration to those attorneys**
23 **for completing the settlement, correct?**

24 MS. STUDLEY: Form.

25 A. I know there was an amount that was set forth

1 that his firm would be seeking separate fees outside of
2 a \$1.5-million contingency fee agreement to work on the
3 settlement that was part of the contingency fee
4 agreement.

5 MS. STUDLEY: Mischaracterization.

6 MS. STEIN: Objection.

7 MS. STUDLEY: Mischaracterization and invades
8 attorney-client.

9 MR. DENMAN: Okay. So you're telling him not
10 to answer?

11 MS. STUDLEY: Yes.

12 MR. DENMAN: Okay.

13 MS. STEIN: Join.

14 BY MR. DENMAN:

15 **Q. Did you ever notify Julian Bivins or his**
16 **counsel that you would be seeking fees outside of the**
17 **consideration that was paid to complete the Texas**
18 **settlement?**

19 A. We have been billing all along separate and
20 apart in whatever that contingency fee arrangement was
21 in Texas.

22 So certainly part and parcel of that custom
23 and practice that we had bills, we had fees, which I
24 remember discussing some of these issues with you. That
25 it was no surprise that we were billing and definitely

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1 for them, and there was some contingency for some
2 additional assets. I recall that general layout of it,
3 but the exact numbers, I'm not sure whether it was a
4 million three, four, five. I would have to look at it
5 to tell you.

6 **Q. But you understood that they were operating**
7 **under the contingency fee agreement, correct?**

8 A. It had been Court approved, yes.

9 **Q. And did they ask you to do the work on the**
10 **Texas Trust?**

11 A. I don't recall being asked necessarily by
12 them. I just recall being involved in the drafting or
13 redrafting with one of Julian's counsel on the other
14 end, and then eventually there was another -- I think he
15 was a tax expert that got involved.

16 So kind of who was representing who, but I
17 don't remember being specifically asked by someone. I
18 just remember doing the work that needed to be done to
19 sort of move the settlement forward.

20 **Q. Did you advise the guardian that you would be**
21 **seeking your fees outside of the contingency fee for the**
22 **work done on the settlement?**

23 MS. STUDLEY: I think that's privileged.

24 You're asking him would he advise the guardian?

25 MR. DENMAN: Yes. Did he advise the guardian

1 expected to be paid for work we were done on the
2 settlement because it had nothing, in my mind, to do
3 with the contingency fee that was paid to the Texas law
4 firm. That was for their role and their litigation as
5 part of the settlement.

6 **Q. Well, the Trust agreement and the settlement**
7 **agreement were part of the Texas settlement, correct?**

8 A. That wasn't the -- that was part of it, but
9 the so-called Texas settlement covered -- if I can see
10 it, I can probably give you a better answer, but the
11 Texas settlement wasn't just a one-issue resolution.

12 **Q. But the Trust agreement was set up to hold all**
13 **of the Texas royalties that were being fought about in**
14 **Texas, correct?**

15 MS. STUDLEY: Form.

16 A. That's part of the reason. I remember there
17 were tax reasons for creating it as well, the Trust.

18 **Q. But that was all Texas stuff. The Texas Trust**
19 **Agreement was funded completely by the assets in Texas**
20 **that were litigated over in Texas, correct?**

21 A. Which had a significant impact on the ward.

22 **Q. Right.**

23 **That's why the Court approved a contingency**
24 **fee agreement for the Texas attorneys to pursue the**
25 **action and completely resolve it --**



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1 MS. STUDLEY: Form.

2 **Q. -- correct?**

3 A. That's why they were awarded their fees, not

4 necessarily for the agreement in the Trust, but they

5 handled the litigation in Texas; maybe that's why we're

6 looking at it differently.

7 **Q. When a personal injury attorney enters into a**

8 **contingency fee agreement, goes to court, litigates and**

9 **then ends up doing a settlement over that personal**

10 **injury case, are you telling me that that attorney can**

11 **then require that the parties they represent hire**

12 **separate counsel and must pay that separate counsel**

13 **money to do the settlement agreement and release on that**

14 **personal injury action?**

15 MS. STUDLEY: Form. Predicate. Speculation.

16 A. I wouldn't use the word "require," but I can

17 tell you in my practice that I often have, over the

18 years, helped personal injury firms structure various

19 documents, create trusts, determine if an annuity is an

20 appropriate resolution.

21 And that's billed separate and apart from the

22 contingency fee that, say, Lytal Reiter or Searcy Denney

23 or whoever might be collecting.

24 **Q. And they would come to you and say -- and you**

25 **would enter a retainer agreement with the client or with**

1 A. Again, all of this was part and parcel of a

2 settlement of a case that involved more issues. I think

3 this is where we're differing than just what had

4 occurred in Texas with regard to the oral royalties and

5 so forth.

6 **Q. Do you know why the Texas Trust attorneys**

7 **weren't retained to do the Texas Trust in Texas?**

8 MS. STUDLEY: Form.

9 A. Everyone agreed this was -- including Julian's

10 counsel, yourself, everyone knew this was the structure

11 that was being followed in terms of the negotiations of

12 the terms of the Trust. Our involvement on the Trust --

13 let's limit it to that -- being essentially because what

14 went into Trust, the terms and conditions of how it

15 could be disbursed was extremely important for the ward.

16 **Q. Are you saying that there was communication to**

17 **me and to my client letting him know that your firm**

18 **would be billing separately outside of the \$1.5 million,**

19 **and that we approved your firm to proceed to draft trust**

20 **and settlement documents to be compensated outside the**

21 **\$1.5 million settlement amount to the Heinrich firm?**

22 MS. STUDLEY: Form. Predicate. Compound.

23 A. I don't recall sending you a letter that had

24 all of that content in it. What I recall, what I'm

25 trying to recite to you, is the fact that it was a known

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1 **the law firm?**

2 A. I have done both, oral and written.

3 **Q. And if it's with the client, the client pays**

4 **you, correct?**

5 MS. STUDLEY: Form.

6 A. Ultimately.

7 **Q. If it's with the law firm, the law firm pays**

8 **you, correct?**

9 A. And usually charges it at cost to the client;

10 they don't absorb it. I might have an agreement with

11 them, but it shows up as a cost when you get down to a

12 closing statement to resolve a case.

13 **Q. Well, that's between the attorney that hired**

14 **you as part of their contingency fee agreement whether**

15 **they can enter into a separate agreement with the client**

16 **to absorb that cost, right?**

17 MS. STUDLEY: Form.

18 A. We enter -- they enter into it with the

19 client.

20 **Q. Here, did you enter into a separate agreement**

21 **where the client knew that you would be responsible --**

22 **excuse me, the client would be responsible for paying to**

23 **create the agreement documents that were part of the**

24 **Texas settlement?**

25 MS. STUDLEY: Form and predicate.

1 quantity of what we were doing. I think why we were

2 doing it was pretty self-evident as well, and it was

3 something that -- I'll call them the Texas lawyers, like

4 you are, weren't doing.

5 So we did it, which is entirely appropriate

6 because it relates back to the ward, and the ward would

7 be the one that would be charged for those services.

8 **Q. Which is why the Texas attorneys got**

9 **\$1.5 million to finish up the case --**

10 A. No.

11 MS. STUDLEY: Wait. There was no question.

12 I'm sorry.

13 **Q. -- right?**

14 MS. STUDLEY: Form. Predicate.

15 I'm sorry.

16 THE WITNESS: That's all right.

17 A. No. The settlement agreement, again, speaks

18 for itself. What happened after the settlement

19 agreement speaks for itself as well in terms of who did

20 what and why.

21 **Q. Did the Heinrich firm ever request your firm**

22 **to do the trust and settlement documents?**

23 A. We started off with that, and I said I don't

24 recall someone formally requesting us to do them. I

25 just recall being involved necessarily in that process.



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1 I think we were helpful in that process in producing a
 2 better product with regard to the Trust by applying our
 3 expertise to that.
 4 **Q. Why didn't you seek reimbursement from the**
 5 **1.5 paid to the Texas attorneys for the work that you**
 6 **performed to help them close out their case in Texas?**
 7 MS. STUDLEY: Form.
 8 A. Apple and orange. That's why.
 9 **Q. So you're saying it's an apple and an orange.**
 10 **So you're saying that --**
 11 A. They are two separate things.
 12 MS. STUDLEY: You have to let him finish.
 13 THE REPORTER: Hold it. Hold it.
 14 **Q. Your work on the settlement agreement and the**
 15 **Trust agreement, they were part of the Texas settlement**
 16 **and contemplated by the Texas settlement, you're saying**
 17 **is apple and orange?**
 18 A. Right, in terms of -- that's my analogy. They
 19 are two separate things. They are two separate
 20 functions.
 21 **Q. Did you ever advise of that to any of the**
 22 **other parties to that agreement?**
 23 A. Well, absolutely; we petitioned for fees to
 24 which you objected --
 25 **Q. Well, that was months later.**

1 **party to the settlement that you would be seeking**
 2 **compensation outside of the \$1.5 million that the other**
 3 **party agreed to pay to buy the piece in connection with**
 4 **this litigation?**
 5 MS. STUDLEY: Objection. Asked and answered.
 6 I'll let you go one more time.
 7 THE WITNESS: Okay.
 8 A. Again, the 1.5 was compensation paid to --
 9 we'll call them the Texas law firm -- Brian Heinrich and
 10 Mr. Hayes. That was not compensation, and you know that
 11 was paid to us. That was compensation that went to them
 12 as part of a settlement having litigation in which they
 13 claimed fees. What we did and for what we sought
 14 compensation, or were awarded compensation, was a
 15 different matter, a different representation, different
 16 work.
 17 **Q. But, Mr. O'Connell, the settlement in Texas**
 18 **included, as part of the settlement, there would be a**
 19 **mutual release and a Trust agreement that was part of**
 20 **the actual settlement negotiated in Texas under the**
 21 **Texas litigation which was brought by the Heinrich firm,**
 22 **correct?**
 23 MS. STUDLEY: Form. Predicate.
 24 A. Again, the settlement agreement would speak
 25 for itself. So do I recall every term of that agreement

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1 A. -- that the firm --
 2 **Q. I'm sorry. That was months later.**
 3 **I'm talking about the time that you undertook**
 4 **to do this work that you intended to bill outside of the**
 5 **\$1.5 million, did you ever notify the other parties to**
 6 **the agreement that you intended to bill separately**
 7 **outside of the \$1.5 million for the time that you spent**
 8 **doing the settlement agreement and Trust agreement?**
 9 MS. STUDLEY: I'm just going to ask that you
 10 let him finish. You interrupted him several times.
 11 Please let him finish.
 12 **Q. You can answer.**
 13 A. I know we've been over this ground before, and
 14 the answer is going to be the same. If there was some
 15 -- if you're asking was there a formal letter that
 16 contained five or six items that you referenced, no, not
 17 that I recall.
 18 But was there a secret? Was it understood
 19 that we were going to continue to do and be compensated
 20 for the services we had been providing up to that date
 21 such as attending the mediation, negotiating the
 22 settlement agreement, no, that was known. There was no
 23 surprise there.
 24 **Q. So what documentation exists? You say it was**
 25 **known. What documentation exists to advise the other**

1 today? No, but we're happy to take a look at it and see
 2 what it says in that regard.
 3 (Phone interruption).
 4 THE WITNESS: Can we stop here?
 5 MR. DENMAN: Yes, we can.
 6 (Recess taken).
 7 BY MR. DENMAN:
 8 **Q. Were you involved at all in the accounting of**
 9 **the guardian that was approved on June 1st, 2012, May**
 10 **31st, 2013, and November 22nd, 2013?**
 11 MS. STUDLEY: Form.
 12 A. I'm not sure without seeing it.
 13 **Q. Let me strike that question.**
 14 **Were you involved in the guardianship**
 15 **accounting for the period of June 1st, 2012, through May**
 16 **31st, 2013, that was approved on November 22nd, 2013?**
 17 A. I'm not sure, Ron. I need to see the
 18 accounting.
 19 **Q. I'm just reading from your answer to the**
 20 **lawsuit. That was from page 23, paragraph 28.**
 21 MS. STUDLEY: Do you want to show it to him?
 22 MR. DENMAN: It says exactly what I said.
 23 **Q. The Court approved the final accounting. Here**
 24 **(handing document).**
 25 A. Oh, great. Okay. Where are you?



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1 Q. Not approve the final accounting. I'm sorry.
 2 The Court approved the guardianship accounting, page 23,
 3 paragraph 28.
 4 A. Okay. I see that.
 5 Q. So my question is: Did you have any
 6 involvement in the guardianship accounting that was
 7 addressed here?
 8 A. I'm not sure what involvement I had. I would
 9 have to see the accounting.
 10 Q. Do you know whether that accounting was ever
 11 provided to Julian Bivins or his counsel?
 12 A. I don't know. I would have to look at the
 13 accounting and probably some other documents to see who
 14 it was served on because I just don't know sitting here.
 15 MS. STUDLEY: May I see this (indicating)?
 16 THE WITNESS: Sure (handing document).
 17 Q. Did you know -- did you ever meet with Sonia
 18 Kobrin to discuss with her the petition to have Rogers
 19 appointed as permanent guardian?
 20 A. Not that I recall.
 21 Q. Did you ever meet with Sonia Kobrin to discuss
 22 with her anything about a petition for -- a petition to
 23 have an emergency temporary guardian appointed?
 24 A. I just don't recall that.
 25 Q. Did you ever request anyone perform an

1 broker's opinion and a formal appraisal, correct?
 2 A. Yes, in the way you and I are using it.
 3 Q. Right.
 4 Under your definition that you described a
 5 formal appraisal as opposed to a broker's opinion, which
 6 is an opinion provided by a broker based upon their
 7 opinion as to what's going on in the market, correct?
 8 A. Correct.
 9 Q. Did you ever request that anyone perform or
 10 provide a broker's opinion for any of the four
 11 properties that we've discussed? I can go into a better
 12 definition of those, Brian -- excuse me, Mr. O'Connell,
 13 if you have any questions, but I think we all know the
 14 four properties.
 15 MS. STUDLEY: Same objection and instructions.
 16 A. I know that, of course, there were broker
 17 opinions obtained on 330 and 808, and there might have
 18 been -- this is why I'm uncertain -- on 67th Street.
 19 Q. Do you have any idea what value of 67th Street
 20 was under any broker's opinion?
 21 MS. STUDLEY: Form. Predicate.
 22 A. I don't recall. I just recall that there was
 23 some workup done by Mr. Lieberman on that, but --
 24 Q. On 67th Street?
 25 A. On 67th; the amounts, I just don't recall them

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1 appraisal on the 67th Street property?
 2 MS. STUDLEY: Objection. Form.
 3 To the extent it doesn't involve anything
 4 that's privileged, you can answer.
 5 A. Not that I recall.
 6 Q. Did you ever request anyone perform an
 7 appraisal on 808 Lexington?
 8 A. Not that I recall.
 9 Q. Did you ever request anyone perform an
 10 appraisal on the Portland Place property?
 11 A. Not that I recall.
 12 Q. Did you ever request anyone perform an
 13 appraisal on 330?
 14 A. Not that I recall.
 15 Q. Did you ever determine the cost of having an
 16 appraisal performed on any of the four properties that I
 17 just mentioned?
 18 A. I'm using the word "appraisal" as opposed to a
 19 broker's opinion. That's why I'm hesitating because I'm
 20 distinguishing -- a formal appraisal by an MAI
 21 appraiser?
 22 Q. Exactly.
 23 A. I don't recall making such a request, but I
 24 might have. I just don't recall doing so.
 25 Q. You understand the difference between a

1 at this point.
 2 Q. As we sit here today, do you have any -- do
 3 you know what the approximate value was by Mr. Lieberman
 4 and the broker's opinion for 808?
 5 A. I don't, to be certain. I want to be certain.
 6 I don't want to guess.
 7 Q. Do you know whether you were ever provided
 8 with any valuation, a broker's opinion, that put the net
 9 value of 67th Street and 808 to be similar?
 10 MS. STUDLEY: Form.
 11 A. I just don't recall numbers. I remember there
 12 being an analysis and discussion with Mr. Lieberman, but
 13 the exact amounts as were attributed to which property,
 14 I would have to look at some documents, look at the
 15 file.
 16 Q. Did you ever review anything in writing, or
 17 any documentation created by Mr. Lieberman, with respect
 18 to 67th Street?
 19 A. I do remember seeing the -- I believe it was
 20 from him, but it also came up as part of the New York
 21 settlement conference with all of the parties sort of
 22 in attendance talking about values of these various
 23 properties. I can't remember the amounts for you.
 24 I just remember that being the subject matter
 25 early on in the settlement conference that was sort of

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1 a rather intense discussion about what values should be
 2 used or attributed to those properties.
 3 **Q. So you believe that there was actually**
 4 **documentation that was presented during -- actual**
 5 **documentation that was provided to you by Mr. Lieberman**
 6 **with some degree of analysis as to an opinion about the**
 7 **value of 67th Street?**
 8 MS. STUDLEY: Objection.
 9 A. That's not what I'm sure about.
 10 MS. STUDLEY: Just give me a quick pause.
 11 THE WITNESS: Sure.
 12 MS. STUDLEY: That's okay.
 13 Objection. Mischaracterization.
 14 BY MR. DENMAN:
 15 **Q. Do you know whether you have in your files**
 16 **today any documentation from Mr. Lieberman pertaining to**
 17 **any type of valuation analysis of 67th Street at all?**
 18 A. I'm not sure.
 19 **Q. If you did, you would still have that?**
 20 A. Yes.
 21 MS. STUDLEY: Form.
 22 **Q. Do you recall ever reviewing the deposition**
 23 **testimony from Oliver, Jr., that he believed the value**
 24 **of the 67th Street property was between 10 and \$20**
 25 **million?**

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1 A. I don't recall that.
 2 **Q. Do you recall ever telling the Court that you**
 3 **believed that any opinion by Oliver Bivins, Jr., that**
 4 **the value of 67th Street being between 10 and \$20**
 5 **million was a pipe dream?**
 6 MS. STUDLEY: Form.
 7 A. I don't recall saying that. The best way to
 8 determine that would be to look at the transcript; if
 9 you have it, I'm happy to look at it.
 10 **Q. Do you recall the amount of the mortgage on**
 11 **the 67th Street property?**
 12 A. I don't recall this.
 13 **Q. Do you ever advise Curtis Rogers not to pay**
 14 **the Sovereign mortgage?**
 15 MS. STEIN: Objection.
 16 MS. STUDLEY: I'm going to object and direct
 17 you not to answer. Thank you.
 18 **Q. If a failure to pay the Sovereign mortgage**
 19 **would cause the mortgage to go into default, would that**
 20 **be in the best interests of the ward?**
 21 MS. STUDLEY: Form. Predicate.
 22 MS. STEIN: Objection.
 23 MS. STUDLEY: You can answer.
 24 THE WITNESS: I can answer, okay. She was
 25 making a privilege objection.

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1 I'm sorry. Can you read it back. I was
 2 paying too much attention to the objections.
 3 (Question read back).
 4 MS. STUDLEY: Form. Predicate.
 5 THE WITNESS: It would depend on the facts and
 6 circumstances. For example, if the ward was short of
 7 funds, as the ward was here, not paying that mortgage
 8 could well -- would well be in the Ward's best
 9 interests.
 10 BY MR. DENMAN:
 11 **Q. So it depends whether or not the ward had**
 12 **sufficient cash to pay the mortgage at the time; is that**
 13 **right?**
 14 MS. STUDLEY: Form. Predicate.
 15 A. That would be one factor, a significant
 16 factor.
 17 **Q. You would agree with me that refinancing the**
 18 **Beachtown mortgage was part of the settlement to have**
 19 **Beachtown paid in connection with the New York**
 20 **settlement?**
 21 MS. STUDLEY: Form.
 22 A. Again, I would have to look at the settlement
 23 itself. I can recall generally there was language about
 24 dealing with paying the Beachton mortgage, but to really
 25 drill down and be precise, I would want to look at the

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1 settlement agreement itself because that's as far as my
 2 recollection would go as this point.
 3 **Q. But you would agree with me it made commercial**
 4 **sense to pay off the mortgage for Beachton at the time**
 5 **that you were trying to get the New York settlement**
 6 **approved by the Court, correct?**
 7 MS. STUDLEY: Form. Predicate.
 8 MS. SCHULTZ: Form.
 9 A. No, because I'm back to sort of looking at the
 10 totality of the facts and circumstances of that moment,
 11 what was available in the way of financing or not, what
 12 the Ward's situation was at that point in time, how much
 13 of a loan should he obtained, what should it be used
 14 for. All of those issues would have to be analyzed.
 15 And sitting here now it just would be really
 16 tough for me to put that together without reviewing,
 17 I could if I reviewed different documents.
 18 **Q. But when you came into court on September 13th**
 19 **to seek approval of the New York settlement, you wanted**
 20 **the Court to approve the New York settlement, correct?**
 21 MS. STUDLEY: Form.
 22 MS. SCHULTZ: Form.
 23 A. The client, of course. It wasn't me
 24 personally because we were advocating on behalf of the
 25 guardian, and the guardian wanted the settlement



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1 approved as being in the best interests of the ward, in
 2 my opinion, if you're going to ask me that.
 3 **Q. Well, let's get to your opinion because you've**
 4 **now told me that the client, the guardian, wanted the**
 5 **settlement to be approved. You have communication from**
 6 **the --**
 7 A. The petition --
 8 **Q. Hold on.**
 9 **Do you have communication from the guardian**
 10 **to you that he wanted this settlement to be approved?**
 11 MS. STUDLEY: That's attorney-client.
 12 MR. DENMAN: Well, if he -- no. No. No. He
 13 just opened the door and said that the guardian wanted
 14 the settlement to be approved. You can't open the door
 15 on one hand and then close it on the other.
 16 THE WITNESS: Yeah. I can handle this when
 17 you're done with your discussion.
 18 BY MR. DENMAN:
 19 **Q. Okay. Please.**
 20 A. The client signed the petition to have the
 21 settlement approved.
 22 **Q. So other than besides the client signing the**
 23 **petition to have the settlement approved, there's no**
 24 **other communications from the client to you regarding**
 25 **the approval of the settlement; is that right?**

1 MS. STUDLEY: Form.
 2 A. Well, I guess my distinction, Ron, is the "we"
 3 part. We're representing the guardian. The guardian
 4 signed the petition to have the settlement approved, and
 5 we advocated the guardian's position.
 6 **Q. And insofar as advocating the guardian's**
 7 **position, you made representations to the Court,**
 8 **correct?**
 9 A. I don't recall what -- if I made
 10 representations; if I did show, them to me in a
 11 transcript and I'm happy to discuss them. But I just
 12 don't recall what representations I made, if I made any.
 13 **Q. Okay. If you made any, those would have been**
 14 **truthful, correct?**
 15 MS. STUDLEY: Form.
 16 A. To the best of my knowledge, sure, if I made
 17 any.
 18 **Q. Did you rely upon Keith Stein for evaluating**
 19 **-- for valuing the 808 and the 67th Street properties in**
 20 **any way?**
 21 MS. SCHULTZ: Form.
 22 MS. STUDLEY: I'm going to object. Work
 23 product.
 24 MR. DENMAN: Are you instructing him not to
 25 answer?

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1 A. That's privileged.
 2 MS. STUDLEY: That I'm going to direct him not
 3 to answer.
 4 **Q. So we only get a little picture of this?**
 5 A. You get a big picture because the client
 6 signed the petition to have the settlement approved.
 7 **Q. And the client signed the petition after**
 8 **receiving advice from you as his counsel, correct?**
 9 MS. STUDLEY: Now I'm going to direct him not
 10 to answer.
 11 MR. DENMAN: Why?
 12 MS. STUDLEY: You're asking him for attorney-
 13 client communications.
 14 MR. DENMAN: I didn't ask what the advice was
 15 of the communications. I'm saying that the client
 16 wanted to approve -- to sign the petition to approve the
 17 settlement after receiving advice from counsel.
 18 MS. STUDLEY: Yeah, but there's the
 19 implication. I'm not going to allow him to answer that.
 20 MR. DENMAN: Okay. I'm not going to argue
 21 with you because that's why we have courts.
 22 BY MR. DENMAN:
 23 **Q. And when came into court in September of 2013**
 24 **on behalf of the guardian, you sought to have the New**
 25 **York settlement approved by the Court; is that right?**

1 MS. STUDLEY: Yes, work-product communications
 2 between the attorneys.
 3 BY MR. DENMAN:
 4 **Q. If Keith Stein made a representation about the**
 5 **value of one of the properties in court while you were**
 6 **present, and you considered the value to be otherwise,**
 7 **would you have notified the Court?**
 8 MS. STUDLEY: Form. Speculation.
 9 MS. SCHULTZ: Form.
 10 A. I guess it depends. Give me an example. If
 11 it was a \$10 difference, a million dollars' difference,
 12 I would have to have a little more facts to know to be
 13 able to answer that.
 14 **Q. For example, in connection with the petition**
 15 **to approve the hearing on the petition to approve the**
 16 **New York settlement, if Keith Stein represented to the**
 17 **Court that the townhouse on 67th Street is probably**
 18 **equivalent to the 808 property, but you had broker**
 19 **opinions or other documents showing the values to be**
 20 **different, would you have advised the Court otherwise?**
 21 MS. STUDLEY: Form. Predicate.
 22 A. It would depend. Again, are we talking about
 23 net values? Are we talking about values, gross values,
 24 net values?
 25 **Q. So if he said the townhouse on 67th Street**



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1 is probably equivalent to the 808 property and did not
2 specify net values or gross values, is that something
3 you would have discussed with the Court of whether these
4 were net or gross to make sure that the Court did not
5 have a misunderstanding as to whether they were net or
6 gross?

7 MS. STUDLEY: Form. Predicate. Speculation.

8 MS. SCHULTZ: Form.

9 A. Again, it would go back to -- I would have to
10 look at the transcript and see what was submitted to the
11 Court. I know, for example, you submitted an appraisal
12 of 808. I would have to get that totality back in my
13 mind because it's been a few years. I just don't recall
14 who said what at a particular hearing on a particular
15 date.

16 Q. Well, the appraisal that we submitted was
17 several months later in connection with you seeking
18 attorneys' fees for 808, right?

19 MS. STUDLEY: Form.

20 A. It could have been. That's exactly what I
21 mean. That's why I can't give you definite, precise
22 answers without refreshing some recollection and looking
23 at a transcript, it sounds like, primarily.

24 Q. Were you aware that the 67th Street property
25 sold for over \$22 million after the New York settlement

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1 petition hearing, correct?

2 A. I know it was sold for \$20 million or more.
3 The price -- again, the exact amount, I don't know. I
4 realize it was afterwards; how much afterwards, again,
5 I don't know. But I could tell you those two points at
6 least.

7 Q. You know that the mortgage was no more than
8 two-and-a-half million on that property, right?

9 MS. STUDLEY: Form.

10 A. I don't know.

11 Q. If the mortgage was only two-and-a-half
12 million dollars and the property sold for 22-and-a-half
13 million dollars netting \$20 million for that property,
14 you would agree with me that it was considerably more
15 valuable than 808 Lexington, correct?

16 MS. STUDLEY: Form.

17 MS. STEIN: Form.

18 MS. SCHULTZ: Form.

19 A. More valuable than what?

20 Q. More valuable as a cash asset valuation --
21 dollars, cents, numerics, whatever quantification factor
22 you want to use.

23 A. Sure. What I'm talking about with you -- to
24 be clear -- value is a relative subject. Are we talking
25 about value with regard to an appraisal that was done at

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1 a certain point in time, or value in terms of sales
2 actually to a property? Of course, when it's sold to a
3 willing buyer and a willing seller, etc., that's
4 certainly going to set the value of it.

5 Especially with these types of New York
6 properties, appraisals are not a science. They are more
7 of an art because it was a fast-moving market at these
8 points in time. So that's why I wanted to be sure when
9 you use the word "value," that it's a little hard to
10 answer because value -- when something sells, that's its
11 value if it's a fair market sale.

12 MS. STUDLEY: Predicate on the last question.

13 Q. So, as we sit here today, it's your testimony
14 that you've never had -- as we sit here today, your
15 recollection is that you've never had an understanding
16 that the value of 67th Street was considerably -- the
17 net value of 67th Street was considerably greater than
18 808 Lexington --

19 MS. STUDLEY: Form.

20 MS. SCHULTZ: Form.

21 MS. STEIN: Form.

22 A. I mean, I know approximately what 808 sold
23 for. I know approximately what 67th Street sold for.
24 Now you're telling me what the mortgage was on 67th
25 Street, and there was a mortgage on 808. I don't recall

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1 all of the exact amounts, but I can do the math and tell
2 you based on sales prices one netted some amount more
3 than the other, exactly what it was.

4 But that's as far as I can go sitting here
5 today without going back and proving records and so
6 forth.

7 Q. Did you ever have an understanding that if the
8 808 property was sold as requested in the petition to
9 sell 808 Lexington, that the sale would net a mortgage
10 and fees somewhere around \$5 million to the ward?

11 MS. STUDLEY: Form.

12 A. Again, I don't recall what the net would be,
13 sitting here today. I would have to have the facts and
14 figures, look at the file, review, you know, the exact
15 amount of the mortgage, the sales expenses, those types
16 of things, to give you an accurate answer.

17 Q. At the time of the petition to sell -- the
18 hearing on the petition to sell the property, did you
19 have an opinion as to whether the billing had been
20 utterly mismanaged for a number of years?

21 MS. STUDLEY: Form.

22 MS. STEIN: Form.

23 MS. SCHULTZ: Form.

24 A. Again, I'm a little confused. When you say
25 "utterly mismanaged," by whom?



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1 Q. I don't know. I'm asking you.
 2 At the time of the petition to sell the
 3 property, did you have an opinion that the building was
 4 utterly mismanaged for a number of years?
 5 MS. STUDLEY: Form.
 6 A. I just don't recall.
 7 Q. If a representation was made that the building
 8 was utterly mismanaged for a number of years, do you
 9 know who would have been utterly mismanaging the
 10 property for a number of years?
 11 MS. STUDLEY: Form.
 12 MS. STEIN: Form.
 13 A. I don't know.
 14 Q. Did you have an opinion as to whether Curtis
 15 Rogers had utterly mismanaged the property prior to the
 16 petition to sell 808?
 17 MS. STUDLEY: Form.
 18 A. No.
 19 Q. Did you believe that he had properly managed
 20 the property prior to the petition to sell 808?
 21 MS. STUDLEY: Form.
 22 A. Yes.
 23 Q. Did you believe that Steve Kelly had properly
 24 managed 808 Lexington prior to the petition to sell 808?
 25 MS. STUDLEY: Form.

1 Q. And you wanted to sell 808 Lexington to pay
 2 your fees, correct?
 3 MS. STUDLEY: Form.
 4 A. No.
 5 Q. You never represented to the Court that you
 6 wanted to sell the building to pay fees?
 7 A. Not a sole reason, no.
 8 MS. STUDLEY: Objection to predicate.
 9 Q. On any reason?
 10 A. No. What representations, again, were made
 11 on the selling of 808, you would need to look at the
 12 transcript. You need to look at the petition for the
 13 sale. And that would be the reasons for seeking the
 14 sale, whether it was either argued at the hearing, or
 15 presented as evidence at the hearing, or it would be in
 16 a petition of sale.
 17 Q. You would agree that part of the reason for
 18 the petition to sell the property is because you wanted
 19 to pay fees?
 20 MS. STUDLEY: Form. Asked and answered.
 21 A. It would be -- the reason would be what was
 22 argued at the hearing, or represented at the hearing,
 23 evidence presented at the hearing, those would be the
 24 reasons.
 25 Q. Would you agree with the representation made

1 A. Yes.
 2 Q. You agree that Fig & Olive wanted to renew its
 3 lease at 808 Lexington at the time of the hearing on the
 4 petition to sell 808?
 5 MS. STUDLEY: Form. Predicate.
 6 A. I'm trying to recall, and this is where it
 7 gets difficult without a file to look at for
 8 orientation.
 9 At some point I know Fig & Olive had a lease.
 10 Of course, it was coming -- expiring in December. But
 11 in terms of when -- if they had a desire to renew and so
 12 forth, I have a general recollection of that but nothing
 13 specific.
 14 Q. Well, let me ask you this: Do you have any
 15 general recollection that they wanted to vacate the
 16 property at the expiration of their lease?
 17 A. I really don't recall that. I would recall
 18 more if I'm guessing here.
 19 MS. STUDLEY: No. Don't guess.
 20 A. I don't want to get punched for guessing.
 21 Q. Well, you can easily review your records and
 22 communications to determine whether Fig & Olive wanted
 23 to renew its lease or not, right?
 24 A. Right, that's where it would be. There were
 25 definitely communications from someone on that subject.

1 at the hearing on the petition to sell the property that
 2 Julian has no standing in any matters related to 808?
 3 MS. STUDLEY: Form.
 4 A. Again, I would have to go back and say what
 5 has he -- what was being petitioned for what had he
 6 filed at that point in time, and he filed a notice of
 7 appearance or a request for copies. I would have to
 8 look at the procedural posture of the case to determine
 9 whether he was an interested person or not at that
 10 moment.
 11 Q. If the only issue was that Julian was
 12 objecting to the sale of 808 at the hearing on the
 13 petition to sell 808, do you have an opinion as to
 14 whether Julian had a standing, had standing to object to
 15 the petition to sell 808?
 16 MS. STUDLEY: Form.
 17 A. Yeah. I would have to go back and refresh my
 18 recollection on what we filed on behalf of the guardian.
 19 Did he file something in response, what's the basis, I
 20 guess in what capacity was he claiming to object. Those
 21 are things that I just have to review to give you a
 22 precise answer because I don't recall.
 23 Q. Would you agree with the representation that
 24 there's no law that says Julian gains more control at
 25 the end of the Ward's life --



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1 MS. STUDLEY: Form. Predicate.

2 MS. SCHULTZ: Form.

3 **Q. -- made at the hearing by your folks in**
4 **connection with the petition to sell the property?**

5 A. Again, I don't recall that being said. So I
6 would have to have a transcript to give me some sense
7 of remembrance of it. Just sitting here right now -- I
8 don't know how many years ago that was, but I don't have
9 the benefit of that type of a memory.

10 **Q. As of the date of the petition to sell, had**
11 **the property been completely transferred but the estate**
12 **was not getting rents --**

13 MS. STUDLEY: Form.

14 **Q. -- the guardianship estate?**

15 A. Because that's what I was -- there was the
16 Lorna estate.

17 **Q. No. No. I'm talking about the guardianship**
18 **estate.**

19 A. When you say "had been transferred," that's
20 what's throwing me off.

21 **Q. Would you agree with me that Julian was not a**
22 **party to the New York settlement?**

23 MS. STUDLEY: Form.

24 MS. SCHULTZ: Form.

25 MS. STEIN: Form.

1 A. Again, I think we're debating the word, what
2 "party" means. He was a participant in the agreement
3 negotiations along with his counsel. And it's at that
4 point in time -- so this, again, gives you the time
5 frame. It's the settlement conference itself. My
6 understanding was that he was in agreement with it.

7 **Q. And when you made a representation on the**
8 **record during -- to the Court in September, on September**
9 **19th, 2014, in connection with the petition to sell the**
10 **property, that Julian wasn't a party to the New York**
11 **settlement, what did you mean by "party" there?**

12 MS. STUDLEY: I'm going to argue lack of
13 predicate.

14 A. Yes. Party would be -- and, again, I don't
15 recall making that comment, but if I did, I'll try to
16 answer your question.

17 That party, then, would be used in the classic
18 sense of someone who has a signature line as a party in
19 line numbers 1, 2, 3, 4, 5 to an agreement.

20 **Q. And if you don't explain what a party means**
21 **each time that you make the representation as to whether**
22 **someone is party or not, how are they supposed to**
23 **differentiate whether it's the classic, as you**
24 **described, or just a participant party, as you've**
25 **described before?**

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1 A. It depends on one's definition of "party."
2 Did he sign the so-called New York settlement document?
3 No. But he was present, had counsel, participated in
4 various sundry negotiations, was present at the end when
5 sort of the agreement was laid out and I understood was
6 consented to it.

7 **Q. What is it that you -- how is it that you**
8 **believe that he consented to it after giving about an**
9 **hour-long objection during the hearing to approve? What**
10 **about that made you believe that he consented to it?**

11 MS. STUDLEY: Move to strike counsel's
12 comments.

13 But you can answer.

14 **Q. You can answer.**

15 A. Again, I'm going back in time to the New York
16 settlement discussion itself where he was present. I
17 felt based that on his presence, comments he made or his
18 counsel made, that he had consented to the New York
19 settlement. I'm not talking about the hearing. I
20 understand when you represented him at the hearing that
21 he objected.

22 **Q. So you're saying that back in May of 2013**
23 **during the settlement conference that because Julian was**
24 **present, you believe that he participated and therefore**
25 **was a party to the New York settlement?**

1 MS. STUDLEY: Objection. Form. Predicate.
2 Argumentative.

3 A. Again, it would depend on the context that it
4 is being used in. That's why I'm explaining it to you
5 now.

6 **Q. And how is the Court supposed to understand**
7 **the difference if you just say the word "party" without**
8 **explaining the context of whether it was just a**
9 **participant or whether it was an actual signing party?**

10 MS. STUDLEY: Objection.

11 A. Again, it depends what's being -- this is
12 where it's difficult. It depends what's being argued
13 over it at that moment where I would have to see a
14 little bit more of the context of who's saying what, has
15 evidence been provided, is there a closing argument, an
16 opening argument.

17 That's where I would need more information.

18 **Q. Prior to the petition to sell the property,**
19 **you knew that Julian wanted to purchase the property,**
20 **correct?**

21 MS. STUDLEY: Form.

22 MS. SCHULTZ: Form.

23 A. I know at one point he had an interest in it
24 and, in fact, purchased a property, but when that
25 happened, I'm not sure sitting here now.



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1 Q. Well, you know that it was prior -- within
2 months of the motion to sell the property, Julian had
3 communicated to you that he wanted to purchase the
4 property, correct?

5 MS. STUDLEY: Form.

6 A. That's what I'm not sure of because it would
7 be a total guess.

8 Q. If Julian purchased the property directly from
9 the guardian prior to Lieberman signing the exclusive
10 listing agreement, then Lieberman would not have been
11 entitled to the six percent commission, correct?

12 MS. STUDLEY: Objection. Predicate.

13 MS. SCHULTZ: Form.

14 A. Not necessarily because we have to analyze it
15 there. I don't know the timing of his commission
16 agreement. I don't know what conversations he may have
17 had, Mr. Lieberman, with Steve Kelly, with Keith Stein.
18 So you're familiar -- I know you do real estate on your
19 own. So you're familiar with how brokerage law works in
20 terms of when someone is entitled to a commission or not
21 a commission.

22 I can't give you an answer to that without
23 knowing who sort of said what to whom, when, where.

24 Q. Well, I mean, you've done procuring cause
25 litigation, haven't you?

1 enough to get the exclusive listing agreement signed by
2 Steve Kelly?

3 MS. STUDLEY: Form.

4 A. And I remember you asked Ms. Crispin that this
5 morning, but I don't know the dates of those. But I
6 heard you, of course, raise that. But I don't have the
7 e-mails in front of me. I don't have the meat and
8 potatoes to give a precise answer.

9 Q. Lipa Lieberman performed a valuation for the
10 purposes of your firm getting the contingency fee award
11 in exchange for an expectation that you would help him
12 become the listing agent for the property, correct?

13 MS. STUDLEY: Form.

14 MS. SCHULTZ: Form.

15 MS. STUDLEY: Predicate. Mischaracterization.

16 A. No, I don't recall that.

17 Q. Did you ever read Lipa Lieberman's deposition
18 transcript?

19 A. At some point, but not recently.

20 Q. And do you recall Lipa Lieberman saying that
21 the only compensation he received for providing expert
22 testimony before -- let me take away the word "expert";
23 for providing testimony on valuation at the hearing for
24 you to get a contingency fee was because he wanted to --
25 or he expected to get the exclusive listing agreement

1 MS. STUDLEY: Form.

2 A. I'm familiar with it, sure.

3 Q. Okay. So if Lieberman was not the procuring
4 cause of Julian Bivins seeking to purchase the property,
5 then Lipa Lieberman would not be entitled to a six
6 percent commission if there was no actual exclusive
7 listing agreement, correct?

8 MS. STUDLEY: Objection. Predicate.
9 Speculation.

10 MS. SCHULTZ: Form.

11 A. Again, I need to know more facts and figures
12 based on how expansive, as you know, the law is on
13 procuring cause especially in Florida. And I don't know
14 New York's.

15 Q. Do you know why it was rushed to have
16 Lieberman sign an exclusive listing agreement prior to
17 the hearing on the petition to sell?

18 MS. STUDLEY: Form. Predicate.

19 MS. SCHULTZ: Form.

20 A. I don't recall that there was a rush. I don't
21 remember the exact sequence of what was signed when in
22 relation to the hearing.

23 Q. Do you recall the e-mails from Keith Stein to
24 Lipa Lieberman that came out during Stein's fee hearing
25 where he was upset that your firm was not moving quick

1 for the property?

2 MS. STUDLEY: Form.

3 MS. SCHULTZ: Form.

4 A. Again, I would have to have his deposition in
5 front of me, and I couldn't tell you what was in his
6 mind either.

7 Q. But your firm never -- you or the firm never
8 told Lipa Lieberman that you would get him the listing
9 agreement on 808 in exchange for him providing testimony
10 on valuation for your contingency fee hearing?

11 MS. STUDLEY: Form. Predicate.

12 A. And I don't recall that. I don't recall that
13 ever being said at all.

14 Q. And if you had an e-mail communication with
15 that, would you still have that today?

16 A. If there was such a communication.

17 Q. Do you recall ever obtaining an invoice from
18 Lipa Lieberman in connection with any services that he
19 provided at your request?

20 MS. STUDLEY: Form. Predicate.

21 A. Again, I know this from the morning session.
22 I don't recall. It could have been an invoice for his
23 travel expenses, his out-of-pocket expenses.

24 Q. I apologize.

25 Aside from out-of-pocket expenses, I mean, his



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1 actual work and the hours of time that he spent, even in
 2 his deposition testimony, did he ever submit an invoice
 3 to your firm for his time?
 4 A. Not that I recall.
 5 Q. Do you find that unusual?
 6 MS. STUDLEY: Form.
 7 A. No.
 8 Q. How many -- you get experts all the time that
 9 just provide free work for you?
 10 MS. STUDLEY: Form. Predicate.
 11 MS. SCHULTZ: Form.
 12 MS. STEIN: Form.
 13 A. Well, again, it depends --
 14 Q. I just want to know who you use so I can start
 15 talking to these guys.
 16 MS. STUDLEY: Form.
 17 A. It depends on what situation we're getting
 18 into, if it's even expert testimony, if it's trial --
 19 Q. So if it's not expert testimony, you then
 20 sometimes --
 21 MS. STUDLEY: You have to let him finish.
 22 MR. DENMAN: I'm sorry. I thought he was
 23 finished.
 24 Q. So the distinction is whether it's expert
 25 testimony or not?

1 A. Not that I recall.
 2 Q. Who asked him to do it?
 3 A. I don't know.
 4 Q. So would we have to ask the person who hired
 5 him to know whether he was paid?
 6 MS. STUDLEY: Form.
 7 MS. SCHULTZ: Form.
 8 A. Yes, or I would say talk to the person who had
 9 those conversations with him, which would be -- to
 10 narrow it down -- I think Mr. Stein or Ms. Crispin.
 11 Q. But you never had any discussions with
 12 Mr. Stein or Ms. Crispin about the retention agreement
 13 with -- or whatever the payment agreement was with
 14 Mr. Lieberman?
 15 MS. STUDLEY: Objection. That's work product.
 16 I'm going to direct him not to answer. You asked him
 17 what he talked to Ashley or Mr. Stein about?
 18 MR. DENMAN: About the expert that they used
 19 to testify in court?
 20 MS. STUDLEY: Yeah. Right. You can't --
 21 that's work product.
 22 MR. DENMAN: Seriously?
 23 MS. STUDLEY: Seriously. Well, am I'm going
 24 to ask you what you talk to your partners about?
 25 MR. DENMAN: About the particular subject of

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1 MS. STUDLEY: Form.
 2 A. Not necessarily; if you're talking about --
 3 well, you have tell me what you're talking about because
 4 I'm a little unclear.
 5 Q. I'm just wondering how it is that -- or what
 6 was the arrangement that you understood when you hired
 7 Lipa Lieberman to perform services that he was to be
 8 compensated?
 9 MS. STUDLEY: Form.
 10 A. I think that's presupposing that we hired him
 11 to perform any services.
 12 Q. So you didn't hire him to perform any
 13 services?
 14 MS. STUDLEY: Objection. Lack of predicate.
 15 A. Not that I recall.
 16 Q. So do you know how it was that he just
 17 happened to provide testimony for you in connection with
 18 the contingency fee hearing?
 19 MS. STUDLEY: Form.
 20 A. That he was familiar with the value of the
 21 property.
 22 Q. And when he went out to do this broker's
 23 opinion that you've talked about so far, was he hired to
 24 do that?
 25 MS. STUDLEY: Form. Predicate.

1 paying an expert to determine what the expert fee
 2 relationship was?
 3 MS. STUDLEY: Yeah.
 4 MR. DENMAN: That's okay. I'm not going to
 5 fight with you.
 6 BY MR. DENMAN:
 7 Q. Do you know whether any type of agreement
 8 existed regarding compensating Lipa Lieberman for the
 9 work that he performed in connection with any of the
 10 properties at issue?
 11 MS. STUDLEY: Form. Asked and answered.
 12 MS. SCHULTZ: Form.
 13 A. I don't know, the same answer.
 14 Q. If such an agreement existed, would that be
 15 within your files?
 16 MS. STUDLEY: Form.
 17 A. If there was a written agreement that was
 18 transmitted to us, yes.
 19 Q. What about if there was just an e-mail
 20 communication understanding what the compensation would
 21 be, would that be within your files?
 22 MS. STUDLEY: Form.
 23 A. I'm using the -- to me that's written even
 24 though it's electronic.
 25 Q. I guess I'm talking about sometimes there are



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1 agreements in e-mails to confirm understandings, and
2 other times there's written contracts such as the
3 exclusive agreement, listing agreement, that was entered
4 into prior to the sale.

5 You've told me that you're not aware of any
6 actual contract that existed?

7 A. Correct.

8 Q. Do you know whether there is any type of
9 e-mail communication regarding the understanding of
10 payment to Lipa Lieberman for his services performed?

11 A. I don't know.

12 Q. If there was any type of understanding
13 regarding a payment to Lipa Lieberman for the services
14 that he was to perform between either Ms. Crispin or
15 Mr. Stein in connection with the litigation ongoing,
16 is that something that you would expect to be copied to
17 you?

18 MS. STUDLEY: Calls for speculation.

19 A. Possibly.

20 Q. I mean, is that the procedure, the way things
21 work? Do you, as the partner overseeing everything,
22 expect to have those communications passed by you?

23 MS. STUDLEY: Same objection.

24 A. Typically.

25 Q. Do you know why a petition to compel Oliver,

1 A. I don't recall what, if any, representations
2 were made to the Court, and the best evidence of that
3 would be the transcript of the hearing.

4 Q. Do you have an understanding, as we sit here
5 today, whether you expected that a month after the
6 approval of the New York settlement, that all of the
7 proceeds from the rental income on 808 Lexington would
8 go to the guardian?

9 MS. STUDLEY: Form.

10 A. Again, without having the transcript and
11 reviewing the settlement, again, I couldn't answer that
12 definitively today.

13 MR. DENMAN: Let's go ahead and take a break.
14 (Recess taken).

15 BY MR. DENMAN:

16 Q. I will give you the amended complaint. Turn
17 to page 5 of the answer.

18 A. Okay. Yes.

19 Q. In paragraph 40 you answer: "Responding to
20 the 40th allegation denies as phrased because it was
21 ultimately determined that the divorce was fraudulently
22 procured by Julian Bivins."

23 Tell me what evidence you have to support the
24 statement that the divorce was -- that it was ultimately
25 determined that the divorce was fraudulently procured by

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1 Jr., to comply with the New York settlement was not
2 filed until 13 months after his noncompliance with the
3 settlement began?

4 MS. STUDLEY: Form.

5 A. I'm not sure, sitting here today, exactly why.
6 I know there were some discussions with Ms. Levine about
7 the agreement and his compliance, but that part I can
8 recall.

9 Q. Do you recall telling the Court, in connection
10 with getting the New York settlement approved, that the
11 guardian would receive double the rent the next month
12 after the settlement was approved?

13 MS. STUDLEY: Form.

14 A. I don't recall that without seeing the
15 transcript.

16 Q. Was that your understanding? That the rental
17 income, the full rental income on 808, was to begin the
18 month after the approval of the agreement?

19 A. I would have to look at the settlement
20 agreement.

21 Q. Do you dispute that your side represented to
22 the Court that rent receipts to Rogers would double the
23 next month during the hearing to seek approval of the
24 New York settlement?

25 MS. STUDLEY: Form.

1 Julian Bivins.

2 MS. STEIN: Form.

3 A. Yeah. Probably the best way to answer that
4 today would be to look at the -- which I don't have, to
5 look at the petition for court approval for us to seek
6 to set aside on full faith and credit grounds the
7 divorce. That would be probably the best document to go
8 to now for that information.

9 Q. You would agree with me there is no -- that
10 there's never been an evidentiary hearing on whether or
11 not the Texas divorce was fraudulently procured by
12 Julian Bivins?

13 MS. STUDLEY: Form.

14 A. Correct. There's never been a hearing on that
15 subject because the case ended up being settled as part
16 of the New York -- that claim ended up being settled as
17 part of the New York settlement.

18 Q. Are you aware of any factual findings by any
19 Court that the divorce of Oliver, Sr., and Lorna Bivins
20 was fraudulently procured by Julian Bivins?

21 A. I'm not aware of findings by a court in that
22 regard.

23 Q. Are you aware of any agreement or admission by
24 Julian Bivins that he fraudulently procured the divorce
25 of Oliver, Sr., and Lorna Bivins?



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1 MS. STUDLEY: Form.
 2 A. Again, on that score I would have to refer
 3 back and look at the petition that was filed with the
 4 court, and look at the files as to the evidence that has
 5 been gathered to that point to answer that.
 6 But do I recall, sitting here today, a classic
 7 admission and writing by Julian to that effect? No, but
 8 I'm not a hundred percent sure that there's no writing
 9 that might relate to that. That's why I'm being
 10 cautious.
 11 **Q. So then right now -- I'm just trying to find**
 12 **out what you based your statement on in paragraph 40 of**
 13 **your answer that it was ultimately determined that the**
 14 **divorce was fraudulently procured by Julian Bivins. And**
 15 **it sounds like the only thing you've told me -- correct**
 16 **me if I'm wrong -- is that if you extrapolate from the**
 17 **order awarding your firm a contingency fee in connection**
 18 **with the petition to determine beneficiaries, that it**
 19 **can be extrapolated that that is a determination that**
 20 **the divorce was fraudulently procured by Julian Bivins;**
 21 **is that right?**
 22 MS. STUDLEY: And nothing to do with any
 23 conversations with counsel.
 24 A. I mean, that would be one implication, but I
 25 think I'm reading this a little bit differently perhaps

1 **Q. And then we filed an objection as to**
 2 **constitutional law as to why we believe that the order**
 3 **should be given full faith and credit, correct?**
 4 A. I recall you filed an objection on what the
 5 bases were.
 6 **Q. A motion to dismiss on constitutional grounds,**
 7 **correct?**
 8 A. Could have. I just don't recall what pleading
 9 was filed.
 10 **Q. The Court did --**
 11 MS. STUDLEY: You have to let him finish.
 12 **Q. The Court did not rule on the merits, but**
 13 **instead said I'm not going to get to the merits. If the**
 14 **question is can they file this in the other court, I'm**
 15 **going to let them file and let the judge there rule on**
 16 **the merits.**
 17 MS. STUDLEY: Form. Asked and answered.
 18 A. And, again, I don't recall precisely what the
 19 Court ruled. That would be in the transcript and the
 20 Court's order. I just know, from recollection, this was
 21 a hearing, as many of these hearings in this case, that
 22 went deeper than the surface.
 23 They took a certain amount of time. There
 24 were various sundry arguments made. I just can't
 25 remember all of them today from three years ago or

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1 than you are.
 2 **Q. Tell me how you're reading what you stated.**
 3 A. We got Court approval over objections from you
 4 and your client to proceed with that litigation. So
 5 there was somewhat of a mini trial, let's call it, on
 6 that, on being able to proceed to set aside the Texas
 7 divorce.
 8 **Q. Well, didn't the Court actually say this is**
 9 **not my jurisdiction as to the merits of your pleading.**
 10 **If it goes to are you asking me whether you can file it**
 11 **before the Lorna court's judge, you can file it, but I**
 12 **am not weighing in on the merits? Isn't that what**
 13 **occurred?**
 14 MS. STUDLEY: Form.
 15 A. Again, we would have to look at the whole
 16 transcript, but, if that's a remark that was made, there
 17 were other arguments or presentations to the Court that
 18 I think are relevant to what you're asking. And the
 19 petition itself would have laid out some of the grounds,
 20 but I don't have any of that here.
 21 **Q. Right.**
 22 **The petition laid out your grounds as to why**
 23 **you thought the order from Texas on the divorce should**
 24 **not be given full faith and credit, correct?**
 25 A. Correct.

1 whenever it was.
 2 **Q. But in that motion to dismiss, the Court**
 3 **didn't take evidence, correct?**
 4 MS. STUDLEY: Form. Asked and answered.
 5 A. Again, I don't recall because this ended up --
 6 the motion to dismiss, as I do recall, was part of the
 7 overall seeking approval to proceed with the case. So
 8 there might have been some evidence taken; for that
 9 part, I need my file. I need some documents to put that
 10 back together.
 11 **Q. Brian, I apologize. I feel like we're**
 12 **spinning in a circle here. I'm trying to find out:**
 13 **When you state as a fact in a pleading that it was**
 14 **ultimately determined that the divorce was fraudulently**
 15 **procured by Julian Bivins, I would like to know what is**
 16 **the evidentiary support or documentary support that you**
 17 **can make the statement that the divorce was fraudulently**
 18 **procured by Julian Bivins.**
 19 MS. STUDLEY: Just a minute. I'm going to
 20 object. Same objection as before.
 21 A. And you've already given the one of -- you
 22 mentioned one of them, the approval of the Court, but I
 23 think also the approval before the settlement. I think
 24 you also have to look at the approval of the Court of
 25 the ability to take the action to start with.



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1 Q. But where is it ever said in there that any
2 finding, any order, anything that says Julian Bivins
3 fraudulently procured that divorce?

4 MS. STUDLEY: Form.

5 A. And I'm not saying there's necessarily a
6 finding that says that, but we were allowed to proceed
7 forward with the action that ultimately sought to
8 overturn the divorce.

9 Q. Would you look at the amended complaint,
10 please.

11 A. Sure. Which paragraph?

12 Q. Paragraph 40.

13 A. Okay.

14 Q. In paragraph 40 it says: "Following the
15 divorce, Oliver, Sr., transferred to Julian interests
16 owned by Oliver, Sr., and several parcels of real
17 property, including the oil and mineral rights in
18 Amarillo, Texas, and a condominium in Amarillo, Texas,"
19 right? That's what the allegations in the complaint
20 say?

21 A. Yes, the amended -- okay. Let's make sure.
22 So the Amended Complaint and Affirmative
23 Defense. This the answer to the amended complaint.
24 That may be where there's a problem.

25 MS. STUDLEY: Let me see.

1 MS. STUDLEY: I'm going to object on
2 predicate.

3 A. And I would say, as we've been going around
4 and around, there have been court orders approving the
5 overall settlement, court orders allowing us to proceed;
6 how one couches them as to whether it's a finding, not a
7 finding, a generalized finding, I think is what you and
8 I are disputing it sounds like.

9 Q. Yeah. I'm just trying to find out: Even
10 whether you say there's a court order approving a
11 settlement, in what court order is there any statement
12 by any court approving a settlement that the divorce was
13 fraudulently procured by Julian Bivins?

14 MS. STUDLEY: I think it has been asked and
15 answered many times, but I will give you one more shot.

16 A. And I think you're struggling to find is there
17 some line that says that. I'm saying by implication I
18 see where one can reach that conclusion. So I differ
19 with you. You differ with me on that.

20 Q. Well, you didn't say in your answer that it
21 was that -- it has been implied by virtue of something.
22 You're saying it was ultimately determined. As a
23 lawyer, you know how orders are important.

24 You would agree with me that what's ultimately
25 determined is different than implication, correct?

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1 MR. DENMAN: That's what I thought.

2 MS. STUDLEY: Okay.

3 THE WITNESS: Go ahead. Sorry.

4 BY MR. DENMAN:

5 Q. Just for the record, I think it's clear that
6 this is the answer to that amended complaint, just so
7 we're clear.

8 A. I wanted to make sure.

9 Q. So you saw the allegation, and your answer to
10 that allegation is: "Denies as phrased because it was
11 ultimately determined that the divorce was fraudulently
12 procured by Julian Bivins"; is that right?

13 A. Yes. I mean, that's what it says, "denies as
14 phrased." And then if you look at paragraph 40, of
15 course, the litigation in Texas centered on the
16 fraudulent transfer, the improper transfer of those
17 mineral interests. So that was at the forefront of the
18 Texas litigation and ultimate settlements. Yes.

19 Q. I guess I'm asking you about just the sentence
20 that you made, which is the divorce was fraudulently
21 procured. Isn't it true that you have no evidence that
22 -- let me strike that.

23 That it has never been determined anywhere
24 that the divorce was fraudulently procured by Julian
25 Bivins?

1 MS. STUDLEY: Objection to form. Predicate.

2 A. Again, it depends on the facts and
3 circumstances of what's being ultimately determined.

4 THE WITNESS: Should I keep this (indicating)?

5 MS. STUDLEY: No, these are your copies, I
6 think, right?

7 THE WITNESS: Thank you.

8 MR. DENMAN: I'll take them, I need them.

9 MS. STUDLEY: I may have some.

10 BY MR. DENMAN:

11 Q. Were you involved at all in the petition to
12 enforce the New York settlement with regards to Oliver,
13 Jr.?

14 A. That was filed by our firm or by you because I
15 remember there being two.

16 Q. I filed a motion to compel compliance pursuant
17 to the terms of the settlement. So just for
18 clarification: I think your firm filed a petition. So
19 that's why I used the word "petition."

20 So, as far as the petition is concerned, were
21 you involved in that?

22 A. I would have had some involvement with it, but
23 exactly what it was, I would have to go back and look at
24 my billing records, the file, to be absolutely sure what
25 it was. I can remember the petition being filed.

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1 Q. Are you aware of anywhere in the petition that
2 was filed by your office where it was sought that, in
3 connection with that petition, that Steve Kelly would
4 get a full release from Julian Bivins and Oliver Bivins,
5 Jr.?

6 A. Without looking at it, I just don't have a
7 specific recollection about what it says. I would have
8 to look at it.

9 Q. Are you familiar with the petition to approve
10 the settlement in that case, the purported settlement
11 that was agreed to by between Ms. Crispin and Ms.
12 Levine, for approximately \$120,000?

13 A. Not specifically. Again, I would have to look
14 at if there's a pleading that says that, for example.

15 Q. Well, these pleadings are something -- like
16 that would have gone through you. You would have
17 reviewed these before they were filed, right?

18 A. Yes.

19 MS. STUDLEY: Form.

20 Q. Are you aware of any requests that a Court
21 approve any provision in that settlement that Steve
22 Kelly be released by Julian Bivins or by Oliver, Jr.?

23 MS. STUDLEY: Form.

24 A. I'm not sure without looking at it.

25 Q. Did you review the Trust document at or around

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1 the time of the petition to sell 808 to determine
2 whether the Trust was making monthly payments to all of
3 Oliver, Sr.'s providers?

4 A. Which Trust?

5 Q. The Bivins Management Trust.

6 A. I don't recall.

7 Q. Your firm got paid on the contingency fee with
8 regard to the net value of 808 after the mortgage was
9 deducted, correct?

10 MS. STUDLEY: Form.

11 A. Again, I would want to look at it to be --
12 that sounds correct, but I would want to look at the
13 Court's order to be a hundred percent sure. But I
14 believe the mortgage was -- if I'm doing the guessing
15 game, I would guess that it was deducted.

16 MS. STUDLEY: We don't want you to guess.

17 Q. What you sought was to be paid a percentage of
18 the proceeds of the sale -- or, excuse me, the value of
19 the property that you brought back into the estate less
20 the mortgage, correct?

21 MS. STUDLEY: Form.

22 Q. That's what you sought?

23 MS. STUDLEY: Form.

24 A. I guess we sought whatever was in the petition
25 seeking a payment of our fees.

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1 Q. And at the time that you sought fees, it was
2 based upon the mortgage value being set at 465 under the
3 New York settlement, right?

4 MS. STUDLEY: Form.

5 A. That's what I don't recall. I would have to
6 -- the numbers, I mean; the concept, yes, but not the
7 numbers.

8 Q. Well, you would agree with me that it would be
9 within your fiduciary duty to your client that if you
10 actually got paid for more than you should have been
11 under the valuation, that you should return that money
12 to the guardianship, correct?

13 MS. STUDLEY: Object to form. Speculation.
14 Predicate.

15 A. I'm not aware that we were overpaid for our
16 services; our experts say we were underpaid for our
17 services.

18 Q. Well, you know that the amount of the mortgage
19 that was actually paid to Beachton to satisfy the
20 Beachton mortgage was approximately 600,000, not 465,
21 correct?

22 MS. STUDLEY: Form.

23 A. Again, it depends on what the value of the
24 mortgage was, what date, what was paid on the closing
25 statement; those are things that I just don't know.

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1 Q. So if you got paid, based upon the mortgage
2 being only 465 as opposed to being 596, then you should
3 reimburse the guardianship for the overage, correct?

4 MS. STUDLEY: Form.

5 A. No.

6 Q. So if the order was that you should be -- you
7 should get paid net of the amount that the estate, the
8 guardianship estate, has to pay on the mortgage and you
9 got paid more than the net amount, wouldn't you agree
10 that you would owe reimbursement to the estate?

11 MS. STUDLEY: Form. Speculation.

12 A. Well, we would have to go back and look at
13 the order. We would have to look at the transcript of
14 the hearing, what was the evidence that was presented,
15 what was argued, what was the amount of the loan, should
16 it be deducted at some level as opposed to another.

17 We would have to have all of those facts and
18 circumstances before us.

19 Q. And the mortgage would have only been 465 had
20 the mortgage been refinanced within a period of time,
21 correct?

22 MS. STUDLEY: Form.

23 A. And, again, that gets to the numbers. That's
24 the part that I can go off on a wild speculation and
25 disappoint my counsel because I just don't know.



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1 **Q. Well, you know that there was an obligation,**
2 **or you know that you -- actually, let me strike that.**
3 **You know that you represented to the Court**
4 **that you would seek to refinance the Beachton mortgage**
5 **with Stein through the use of commercial financing?**
6 MS. STUDLEY: Form.
7 MS. SCHULTZ: Form.
8 MS. STUDLEY: Predicate.
9 A. And we covered this, I believe, before in
10 terms of what was represented and what was argued. We
11 need to look at the transcript as to who exactly said
12 what because I couldn't tell you today three years ago
13 that Mr. Stein said A, B, C.
14 **Q. So you have no recollection of you having an**
15 **understanding that the guardianship would seek**
16 **commercial lenders to refinance Beachton as soon as**
17 **possible after the New York settlement was entered into**
18 **to get rid of the default interest rate?**
19 MS. STUDLEY: Objection. Form.
20 MS. SCHULTZ: Objection. Form.
21 A. Again, I can't tell you that there was this
22 discussion on this date or this date, and I would want
23 to see what does the settlement read and the court order
24 approving it to be definitive.
25 **Q. You were the attorney responsible for filing**

1 **cause of action against Oliver, Jr., regarding**
2 **obligations under the New York settlement, do you know**
3 **why it took another four months for your law firm to**
4 **file that action against Oliver, Jr.?**
5 MS. STUDLEY: Form.
6 A. And in relation to this, I think we covered
7 this before, too; the timing of it, I'm not sure when it
8 was. I do know there were going settlement negotiations
9 with our office and Donna Levine about the enforcement
10 of the settlement agreement with Oliver, II.
11 THE REPORTER: Too or two?
12 THE WITNESS: Or the II, or Roman numeral 2,
13 or junior.
14 THE REPORTER: Okay. Thank you.
15 MR. DENMAN: Let's take a break for a minute.
16 (Recess taken).
17 MR. DENMAN: I have no further questions;
18 however, I reserve the right to resume this deposition
19 by providing copies of all of the transcripts that
20 Mr. O'Connell sought to review. But it's a quarter to
21 6:00, and I have plans this evening I must attend to.
22 We started about 3:15 p.m. I just reserve the
23 right to come back with the transcripts to get further
24 clarification of all those answers that Mr. O'Connell
25 said he could not answer without reviewing the

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1 **the initial verified guardianship report on September**
2 **14th, 2014, correct?**
3 A. I would need to see it for -- which guardian
4 -- Mr. Rogers at that point?
5 **Q. Stephen Kelly.**
6 A. Stephen Kelly. Yeah. That's why I would need
7 the report.
8 **Q. You signed the verified report on behalf of**
9 **Stephen Kelly in September of 2014 acknowledging that**
10 **causes of action existed as to Beachton related to its**
11 **status as a lender and to Oliver, Jr., regarding**
12 **obligations under the New York Settlement Agreement,**
13 **that you would have a duty for the ward to pursue those**
14 **actions?**
15 MS. STUDLEY: Form.
16 A. It depends on at that point in time what
17 causes of action exist, what were the merits behind it,
18 how much would they cost to prosecute. On an inventory
19 you certainly would want to list all possible causes of
20 action. But the answer to your question, which is
21 different than just listing on an inventory, you would
22 need a lot more facts.
23 **Q. On September 14th, 2014, if the initial**
24 **verified guardianship report by Stephen Kelly was signed**
25 **by you indicated that Oliver, Jr. -- that there was a**

1 transcripts to review them in context.
2 MS. STUDLEY: We're here and prepared to go.
3 We have the transcripts. We're ready to go. I don't
4 think that we object to that request. We're ready. We
5 can take the seven hours. Mr. O'Connell is here. He's
6 ready to testify. We don't agree that he's going to
7 come back and answer more questions because you didn't
8 provide him transcripts at the time of questioning.
9 MR. DENMAN: We started in --
10 MS. SCHULTZ: I also have a few questions, but
11 I'll be very fast.
12 MR. DENMAN: Go ahead.
13 CROSS-EXAMINATION
14 BY MS. SCHULTZ:
15 **Q. Who was ultimately responsible for the**
16 **decision to enter into the New York settlement?**
17 A. The guardian.
18 **Q. And who was ultimately responsible for the**
19 **decision to sell 808 Lexington?**
20 A. The guardian.
21 **Q. Are you aware that the foreclosure action was**
22 **instituted by Beachton for 808 Lexington?**
23 A. Yes. I'm aware there was a foreclosure action
24 that was filed. Yes.
25 **Q. And isn't it true that Keith Stein prevented**



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1 that foreclosure action from preceding?
 2 MR. DENMAN: Objection to form.
 3 A. I know he filed -- I'm not sure what
 4 pleadings they were, but, I guess, in effect, the
 5 foreclosure didn't proceed, if that helps you.
 6 Q. Well, that was going to be my next question.
 7 Beachton never actually foreclosed on the
 8 property?
 9 A. Correct.
 10 Q. And funds from the sale of 808 Lexington were
 11 used to pay off the Beachton mortgage, correct?
 12 A. Yes.
 13 Q. And the mortgage on 808 Lexington ultimately
 14 was satisfied, correct?
 15 A. Correct.
 16 MS. SCHULTZ: That's all I have. Thank you.
 17 MR. HECHTMAN: Wendy?
 18 MS. STEIN: (No response).
 19 MS. STUDLEY: Do you have any questions,
 20 Wendy?
 21 MS. STEIN: I'm sorry. No questions.
 22 MS. STUDLEY: I'm sorry. I didn't hear you.
 23 THE WITNESS: Read if it's transcribed.
 24 MS. STUDLEY: Yeah. We'll read.
 25 THE REPORTER: Ms. Studley, do you want a copy

1 CERTIFICATE OF OATH
 2
 3
 4 STATE OF FLORIDA)
 5 COUNTY OF PALM BEACH)
 6
 7
 8 I, MARK RABINOWITZ, Notary Public, State
 9 of Florida, do hereby certify that BRIAN M. O'CONNELL,
 10 ESQUIRE, personally appeared before me and was duly
 11 sworn.
 12 Signed this 9th day of January, 2017.
 13
 14
 15
 16
 17

Mark Rabinowitz

MARK RABINOWITZ, RPR
 Notary Public, State of Florida
 My Commission No.: EE955621
 Expires: 03/01/20

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1 if it's ordered?
 2 MS. STUDLEY: Yes. Yes.
 3 MS. SCHULTZ: I want one as well, please.
 4 THE REPORTER: Thank you.
 5 MR. DENMAN: I want a copy regular time,
 6 please.
 7 THE REPORTER: Thank you, sir.
 8 MS. STEIN: No copy.
 9 THE REPORTER: Thank you.
 10 (Deposition concluded and signature reserved).
 11
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1 REPORTER'S CERTIFICATE
 2
 3
 4 STATE OF FLORIDA)
 5 COUNTY OF PALM BEACH)
 6
 7 I, MARK RABINOWITZ, Notary Public, State
 8 of Florida, certify that I was authorized to and did
 9 stenographically report the deposition of BRIAN M.
 10 O'CONNELL, ESQUIRE; that a review of the transcript was
 11 requested; and the foregoing transcript pages 4 through
 12 99 is a true and accurate record of my stenographic
 13 notes.
 14 I further certify I am not a relative,
 15 employee, or attorney, or counsel of any of the parties,
 16 nor am I a relative or employee of any of the parties'
 17 attorneys or counsel connected with the action, nor am
 18 I financially interested in the action.
 19 DATED this 19th day of January, 2017.
 20
 21
 22
 23
 24
 25

Mark Rabinowitz

MARK RABINOWITZ, RPR



JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
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1 ERRATA SHEET
2 DO NOT WRITE ON TRANSCRIPT - ENTER CHANGES BELOW
3 IN RE: BIVINS VS. ROGERS
4 DATE: JANUARY 9TH, 2017
5 DEPONENT: BRIAN M. O'CONNELL, ESQUIRE

6	PAGE	LINE	CORRECTION/REASON
7	_____	_____	_____
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17	_____	_____	_____
18	_____	_____	_____
19	_____	_____	_____
20	_____	_____	_____
21	_____	_____	_____

22 "Under penalties of perjury, I declare I have read the
23 foregoing document and that the facts stated in it are
24 true."

25 _____
DATE BRIAN M. O'CONNELL, ESQUIRE

1 RACHEL STUDLEY, ESQUIRE
2 Wicker Smith O'Hara McCoy & Ford, P.A.
3 515 North Flagler Drive
4 West Palm Beach, Florida 33486

5 Dear Ms. Studley:

6 This letter is to advise the transcript for
7 the above-referenced deposition has been completed and
8 is available for review. Please contact our office at
9 (800)275-7991 to make arrangements to read and sign or
10 sign below to waive review of this transcript.

11 It's suggested the review of this transcript
12 be completed within 30 days of your receipt of this
13 letter, as considered reasonable under Federal Rules*;
14 however, there is no Florida Statute in this regard.

15 The original of this transcript has been
16 forwarded to the ordering party and your errata, once
17 received, will be forwarded to all ordering parties
18 for inclusion in the transcript.

19 Sincerely,

20 Mark Rabinowitz, RPR

21 cc: J. Ronald Denman, Esquire; Rachel Studley, Esquire;
22 Alexandra Schultz, Esquire; Wendy J. Stein, Esquire

23 Waiver:

24 I, _____, hereby waive the reading and
25 signing of my deposition transcript.

Deponent Signature Date

*Federal Civil Procedure Rule 30(e) and
Florida Civil Procedure Rule 1.310(e)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-81298-CIV-MARRA/MATTHEWMAN

JULIAN BIVINS, as personal representative
of the ancillary estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR. as
former guardian, et al,

Defendants.

ORDER¹

This cause is before the Court upon Plaintiff's Motion to Reopen Discovery and Renew Motions to Compel (DE 201). The Court has carefully considered the Motion and is otherwise fully advised in the premises.

Plaintiff seeks to reopen discovery in light of the recent settlement and waiver of privilege by Defendant Curtis Rogers, and his demand for the attorneys he hired as guardian for Oliver Bivins, Sr. to release all communications subject to attorney client/work product privilege. There are two questions that must be answered to rule on this motion: (1) Can a predecessor guardian waive attorney-client privilege and work product privilege? and (2) Who is the current guardian?

With respect to the first question, the Court concludes that a predecessor guardian cannot waive the attorney-client privilege. The position of a guardian is not personal to the individual appointed. A guardian acts as an arm of the court and effectively is a legal status that exists separate and apart from the person fulfilling the duties and responsibilities of the position. See,

¹ The Court presumes familiarity with its prior Orders.

e.g., Chicago Trust Co. v. Knabb, 196 So. 200, 204 (Fla. 1940) (“The fact that the personnel of the trustees was changed from time to time could have no effect on the rights of the parties. The successor trustee in each instance succeeded to all the rights.”); K.A.S. v. R.E.T., 914 So. 2d 1056, 1061 (Fla. Dist. Ct. App. 2005) (the guardian operates as an “arm of the court”); In re Wright, 668 So 2d 661, 663 (Fla. Dist. Ct. App. 1996) (a “court-appointed guardian [is] not [] a private individual serving a private interest, but rather [] an arm of the court fulfilling a regulated function.”). As a result, only the person currently holding the position or status of guardian can decide whether to waive the privilege.

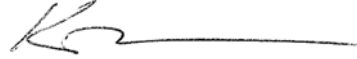
With respect to attorney work product, that privilege is held by both the client and the attorney, and either the client or attorney can assert the privilege. See QBE Ins. Corp. v. Griffin, No. 2:08–cv–949–MEF, 2009 WL 2913478, at * 3 (M.D. Ala. Sept. 4, 2009) (“Unlike the attorney client privilege, which belongs only to the client, the work-product privilege is shared between the attorney and the client.”) (citing In re Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir.1986); Hanson v. U.S. Agency for Intern. Dev., 372 F.3d 286, 294 (4th Cir.2004)); see also In re Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994) (same). Given that the waiver cannot be unilateral, any waiver that is not agreed to by both the attorney and client is invalid.

In reply, Plaintiff states that Defendant Rodgers has not been discharged from his guardianship role, thereby suggesting that he is still guardian and can therefore waive the privileges. Consequently, the Court requests that the parties inform the Court as to the current guardian, as he or she is only the person who can waive the privilege. Once established, the Court can rule on the instant motion consistent with the dictates of this order.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the parties shall inform the Court as to identity of the current guardian **within 10 days of the date of entry of this**

Order.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County,
Florida, this 28th day of February, 2017.



KENNETH A. MARRA
United States District Judge

JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
BRIAN M. O'CONNELL, ESQUIRE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO.: 15-81298-CV-MARRA-MATTHEWMAN

JULIAN BIVINS, as Personal
Representative of the ancillary
Estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR.,
et al.,

Defendants.

_____ /

DEPOSITION OF: BRIAN M. O'CONNELL, ESQUIRE

DATE: MONDAY, JANUARY 9TH, 2017

TIME: 3:10 P.M. - 5:45 P.M.

TAKEN BY: PLAINTIFF

LOCATION: CLEARLAKE EXECUTIVE SUITES,
500 SOUTH AUSTRALIAN AVENUE
SIXTH FLOOR
WEST PALM BEACH, FLORIDA 33401

STENOGRAPHICALLY
REPORTED BY: MARK RABINOWITZ, RPR



JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
BRIAN M. O'CONNELL, ESQUIRE

2

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2

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24

25 Also Present: Ashley Crispin Ackal, Esquire

JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
BRIAN M. O'CONNELL, ESQUIRE

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I N D E X

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EXHIBIT INDEX

(None marked)

S T I P U L A T I O N S

It is hereby stipulated and agreed by and between the counsel for the respective parties and the deponent that the reading and signing of the deposition transcript was reserved.

JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
BRIAN M. O'CONNELL, ESQUIRE

4

1 P R O C E E D I N G S

2 THE REPORTER: Raise your right hand, please.

3 Do you solemnly swear to speak the truth, the
4 whole truth and nothing but the truth, so help you God?

5 THE WITNESS: Yes, I do.

6 BRIAN M. O'CONNELL, ESQUIRE

7 having first been duly sworn, was examined and
8 testified as follows:

9 DIRECT EXAMINATION

10 BY MR. DENMAN:

11 Q. Would you state your full name, please.

12 A. Brian McKenna O'Connell.

13 Q. And where are you employed?

14 A. At Ciklin Lubitz & O'Connell.

15 Q. Are you the O'Connell of Ciklin Lubitz &
16 O'Connell?

17 A. It's between my cousin and I; we both are
18 claiming it. It's friendly, of course.

19 Q. You're a partner at the firm?

20 A. Yes.

21 Q. How long have you been a partner?

22 A. Since 1988.

23 Q. And what is your area of specialty?

24 A. Wills, trusts and estates.

25 Q. Is that in administrative or litigation?

JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
BRIAN M. O'CONNELL, ESQUIRE

5

1 A. Both.

2 Q. Do you do any other type of litigation besides
3 wills, trusts and estates?

4 A. A small amount of commercial litigation.

5 Q. Any other areas, any other small amount areas?

6 A. No, they would all spin off of the wills,
7 trusts and estates primarily; as you indicated,
8 administration and litigation that relate to those
9 areas.

10 Q. How long have you known Curtis Rogers?

11 A. For four or five years at this point,
12 approximately.

13 Q. How did you first meet him?

14 A. I think we met -- I recall first meeting him
15 in connection with the Bivins guardianship.

16 Q. Have you had any other matters that you worked
17 with him on besides Bivins?

18 A. I believe there have been one or two.

19 Q. Where you represent, your firm represents him
20 as a guardian?

21 A. Yes.

22 Q. How long have you known Stephen Kelly?

23 A. Probably approximately ten years.

24 Q. And how many matters -- in how many matters
25 has your firm represented Stephen Kelly?

JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
BRIAN M. O'CONNELL, ESQUIRE

6

1 A. In approximately two to three.

2 Q. In which he has been the guardian?

3 A. Yes.

4 Q. Were those two or three matters prior to the
5 Bivins matter?

6 A. Yes.

7 Q. What about Ronda Gluck, how long have you
8 known Ronda?

9 A. Approximately ten years.

10 Q. And how many matters have you been co-counsel
11 with her?

12 A. Up through the current date?

13 Q. Yes.

14 A. In approximately eight to ten.

15 Q. Do you and Ronda Gluck have a referral where
16 you're refer cases back and forth to each other?

17 A. Nothing formalized like that. There are
18 matters where we'll be brought in as litigation counsel
19 because her firm does not do litigation.

20 Q. Are there times when your firm will refer to
21 her administrative matters?

22 A. I think we have done so. I don't remember how
23 many times.

24 Q. Prior to the underlying matter involving
25 Oliver Bivins, Sr., have you ever worked with Lipa

JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
BRIAN M. O'CONNELL, ESQUIRE

7

1 **Lieberman?**

2 A. No.

3 **Q. Have you ever worked with him since this case?**

4 A. No.

5 **Q. What about Keith Stein?**

6 A. Keith Stein, before this case, yes, I had
7 handled a matter with him.

8 **Q. And when was that?**

9 A. That might have been seven or eight years ago.
10 Again, I'm approximating all of these time frames.

11 **Q. Was that a litigation matter or a real estate
12 matter?**

13 A. It was a litigation matter.

14 **Q. And did he do the litigation, or did someone
15 else from his firm handle it?**

16 A. We did the litigation in Florida. There was
17 a bankruptcy matter that was involved with it, but the
18 litigation primarily, at least of course, what I was
19 doing was Florida.

20 **Q. Were you representing a guardian in that case?**

21 A. No. No, I represented an individual. It was
22 a contest -- to summarize it quickly: There was a
23 contest over a trust where there were competing
24 arguments as to the validity of a trust and amendments
25 and so forth.

JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
BRIAN M. O'CONNELL, ESQUIRE

8

1 Q. And did you hire Stein to assist you in that
2 case?

3 A. No. No, he actually was involved in it on the
4 New York end.

5 Q. And then he hired you on the Florida end?

6 A. No, it was probably the other way around, in a
7 sense. We were involved in the Florida litigation, and
8 then I met him separately. The client had engaged him
9 to do some real estate matters in New York.

10 Q. Ms. Crispin has advised us that she's an
11 associate who reports to you, and then she explained the
12 three other associates that report to him.

13 A. Her.

14 Q. I'm sorry, to her.

15 Do all four of these associates report to you?

16 A. Well, ultimately. I guess if you're kind of
17 painting the chain of command, that would be correct.
18 That really, on a day-to-day basis, she certainly is
19 there, I guess, the responsible party in terms of
20 getting directions, completing tasks and so forth, but
21 ultimately the buck stops here in a sense.

22 But she would be sort of the rung below mine,
23 and then you have the other folks.

24 Q. Are there any other attorneys that work under
25 you on a different rung?

1 A. No.

2 Q. Do you know how much money your firm has
3 billed and received in connection with claims in
4 connection with the underlying matters involving Oliver
5 Bivins, Sr.?

6 MS. STUDLEY: Form.

7 A. I don't.

8 Q. Do you know whether it's more than a million
9 dollars?

10 A. I don't know. The only way I guess to answer
11 that accurately is: I would have to go through the
12 various petitions and also probably, more importantly,
13 the various orders that would have appropriated certain
14 amounts towards fees and costs.

15 Q. Do you know how much the current petitions are
16 in seeking fees for your firm that are still pending?

17 A. I don't recall. Again, I would have to look
18 at the actual petitions themselves to give you an
19 accurate answer.

20 Q. Well, do you know that matter to be more than
21 400,000?

22 A. I would be guessing, and I know you don't want
23 me to guess.

24 Q. You don't get in your firm on a monthly basis
25 some type of ledger that tells you, in your cases,

1 what's either been paid or what's still outstanding,
2 outstanding receivables, things of that nature?

3 A. We get certain items of reporting, but it
4 depends, sometimes if they have been billed, or not
5 billed, or if it's unbilled time. So it sort of depends
6 on what category it is. That's why I'm not sure, and I
7 don't want to give you a wrong answer as to amounts.

8 But I'm happy to look at bills or petitions if
9 that would assist you.

10 Q. But you do have documents that you receive in
11 your firm that tell you what has been billed and, I
12 guess, petitions filed and what is pending to have
13 petitions filed?

14 MS. STUDLEY: Form.

15 A. It's not that precise. I think it's a similar
16 billing package to a lot of law firms where we track on
17 files. You have unbilled amount of time on X file. You
18 have billed time; and if it's been billed and not paid,
19 it tracks it by 30, 60, 90, 120 days.

20 There's reporting of that nature.

21 Q. So, for example, you have a work-in-progress,
22 what hasn't been billed?

23 A. Uh-hum.

24 Q. If more than -- let's assume that three months
25 go by. That you have work in progress before it's

1 actually put into a petition and filed with the Court.
2 Would all of that time be considered work in progress,
3 or is work in progress on month to month?

4 MS. STUDLEY: Form.

5 A. To me, not being an accountant, I look at it
6 that if there's time that's accrued, you know, in our
7 system, that's what I will probably call work in process
8 [sic].

9 Q. And once it's been in process -- once it's
10 actually been put into a petition and sent to the Court
11 to have an ultimate determination, that's where it
12 starts to accrue from a time frame of, let's say, 30,
13 60, 90, or no?

14 A. If it's billed, if it's internally billed,
15 I should say, sometimes that process occurs, and
16 sometimes it doesn't where there's a court petition
17 involved as opposed to a bill that might go to a third
18 party.

19 Q. Right now, from my side of the table, I can
20 easily see the orders that have been entered showing how
21 much your firm has been paid. I can only see the
22 petitions that are currently pending that have not been
23 heard by the Court. But what I can't see, and do you
24 have any idea, of how much time exists that is still
25 waiting to be put into a petition for fees and filed

1 with the Court in the underlying matters?

2 A. I don't.

3 Q. Do you know if it's more than a couple hundred
4 dollars?

5 A. I'm not sure. Again, I would be speculating.

6 Q. Do you know whether there's a separate matter
7 -- let me strike that.

8 I've learned through the underlying matter
9 that your firm -- in underlying matters that your firm
10 uses a different number for various matters; is that
11 right?

12 A. Correct.

13 Q. Is there a separate matter number for your
14 firm in connection with your firm's representation of
15 Stephen Kelly in this federal action?

16 A. I'm not sure. I understand your question.
17 I'm just not sure if that's been culled out in that
18 fashion. I would have to look at -- if I can look at
19 the accounting records because we do have a matter list
20 that we call it which would say Stephen Kelly. And then
21 underneath that it would have five files or six files or
22 seven files. That's how I can determine that.

23 Q. Right.

24 Who identifies when a new matter should be
25 opened? Is that something that you will do and approve

1 and sign and tell accounting, okay, open this new matter
2 for Stephen Kelly, for example?

3 A. That's pretty much the process after a
4 conflict check, of course, and after some form of
5 review. And usually Ms. Crispin and I will get together
6 and review a matter to see if it is appropriate or not
7 and decide the manner of billing and so forth, but then
8 from the accounting standpoint internally what you said
9 is accurate.

10 Q. So, for example, if you're working on a
11 guardianship matter for Stephen Kelly for Oliver Bivins,
12 Sr., and a matter goes to appeal, you'll open a new
13 matter number for that specific appeal, correct?

14 A. Most of the time.

15 Q. And if there's a new matter open, that's
16 something that you would file, sign the form to
17 authorize, right?

18 A. In that instance there wouldn't be -- if we
19 have an existing -- to give you an example, to use this
20 case to say, well, we have Stephen Kelly as an existing
21 client, on an existing matter, then there's a subsidiary
22 matter. We wouldn't go through the process, at least
23 internally, as a law firm of having a signoff or some
24 other paperwork that's done.

25 It's really a matter of memo. We go to the

1 accounting department and say please open a matter for
2 Stephen Kelly as guardian called appeal of such and such
3 an order.

4 Q. And the accounting department will send it
5 back and say, okay, the new matter number is under the
6 Steve Kelly file?

7 A. That's right because the client has a unique
8 number. So let's say Steve Kelly is maybe 123.

9 Q. Right.

10 A. And then the matter numbers, it just goes
11 sequentially, you know. So we might get to 10,000, then
12 11,000, 12,000, etc.

13 Q. In this case do you know whether you did a
14 memo to accounting asking them to open a separate
15 matter, like a new sequential matter, under Steve Kelly
16 for the time that your firm spent defending him in this
17 federal action?

18 A. I'm not sure. I don't know.

19 Q. Okay. Do you know whether your firm has kept
20 track of -- let me strike that.

21 Do you know whether your firm has represented
22 Curtis Rogers in connection with this federal action?

23 A. I'm not sure.

24 Q. If your firm was representing Curtis Rogers
25 in this federal action in which your firm would seek

1 reimbursement fees from the guardianship court, would
2 that be a situation where your firm would at least get
3 another subsequential matter number?

4 MS. STUDLEY: Form.

5 A. Typically, we would.

6 Q. Do you know whether that was done?

7 A. I don't recall whether it's been done.

8 Q. When your firm first again representing
9 Stephen Kelly as the ETG for Oliver Bivins, Sr., you
10 were aware that he was also serving as the ETG for the
11 guardianship of Lorna Bivins, correct?

12 A. I'm not sure of the sequence of events in
13 terms of -- I know that Lorna Bivins died several months
14 after the ETG was started. And I thought that our
15 representation of Stephen Kelly started after her death.

16 That's, again, something, to be a hundred
17 percent positive, we probably would need to pull, at
18 least the docket, to be able to say, okay, here's the
19 date of our notice of appearance. And she was, again, I
20 believe deceased at that point in time. But that's what
21 I would need to be a hundred percent sure for you.

22 I know that Steve has not been -- I know we
23 covered this this morning. Steve has not been
24 discharged as the ETG basically due to his accounting
25 needed to be approved, but certainly the ward was

1 deceased at this point in time.

2 Q. Do you know whether your firm ever filed a
3 final accounting for Stephen Kelly in connection with
4 his services as the ETG for Oliver Bivins, Sr.?

5 A. I'm not sure. We filed various sundry
6 accountings of the various guardians, but to give you
7 that hundred percent answer, I would want to look at a
8 docket.

9 Q. Once Curtis Rogers became the successor
10 guardian, then the normal process would be that a
11 petition for discharge will be filed as to Stephen Kelly
12 as the ETG, correct?

13 MS. STUDLEY: Form.

14 A. I guess if we can call anything ordinary or
15 normal that a guardian would, at some point, if they
16 have been removed, if they have resigned, what have you,
17 the ward has passed away, there are certain items under
18 the statute that, yes, there's a petition for -- on the
19 property side; on the personal side the statute is that
20 if you're the guardian and the ward dies, of course,
21 you're discharged just as a matter of course.

22 So the only open ends would be someone who's
23 a guardian of a property and a ward dies, etcetera, yes,
24 there would be a petition for a discharge, and a final
25 accounting would typically be the process that you would

1 follow at that point.

2 Q. Do you know whether -- at any point during the
3 time Curtis Rogers was the successor guardian -- there
4 was a petition for discharge ever filed with respect to
5 Stephen Kelly pertaining to Oliver Bivins, Sr.?

6 A. I'm not a hundred percent sure and, again, I
7 could give you the infamous educated guess, but I would
8 rather give you the certainty, which the certainty would
9 be within the docket itself as to whether such a
10 petition is there for discharge, and that we can
11 determine by looking at the docket.

12 Q. Right.

13 And the process would be that if your firm
14 filed a petition for discharge of Stephen Kelly as the
15 ETG, then interested parties would have an opportunity
16 to object within a certain period of time, correct?

17 A. By statute, of course, it's gets into the
18 definition of what's an interested person and --

19 Q. Whoever may be the interested person, I won't
20 get into that definition right now, but my point is that
21 there's an objection time period from the time that a
22 petition for discharge is filed, correct?

23 A. Right, by statute and rule. Correct.

24 Q. And without getting into who is an interested
25 party or not, but if no objections are made within a

1 certain period of time, then they are deemed to be
2 waived, correct?

3 A. That's true, by statute and rule.

4 Q. And if the objections are deemed to be waived
5 because nobody has made an objection on behalf of anyone
6 in connection with Oliver Bivins, Sr., for the services
7 of Steve Kelly as the ETG for Oliver Bivins, Sr., then
8 it would be a matter of going before the judge and
9 asking him to approve an order of discharge, correct?

10 A. I guess I -- let me make sure that I got your
11 hypothetical right. There's a petition for discharge.
12 There's a final accounting filed and served on all
13 interested persons, but no timely objections to that.

14 Q. Exactly.

15 A. Then the guardian could get discharged if
16 there's no objections.

17 Q. And that would be a matter of simply filing a
18 request to the Court to discharge him and identifying
19 that the final accounting has been filed; no objections,
20 please discharge?

21 A. Well, it would be matter of --

22 MS. STUDLEY: Form.

23 A. -- you file your petition for discharge, the
24 time would run. It would depend on the nature of the
25 case. You might have to notice it for hearing to bring

1 it to the Court's attention because the auditor may be
2 looking at it, and not complete with their work.

3 So I just wanted to make sure that I'm not
4 saying it's automatic.

5 Q. I'm not trying overlook any of those little
6 technical procedures. But the point is: Once you
7 file -- if you filed a petition for discharge and
8 there's no objections, then the next aspect would just
9 essentially be technical and procedural to get him
10 discharged?

11 A. Other than the Court auditor also would have
12 to approve it, examine and approve the accounting.

13 Q. And if the Court auditor examined the
14 accounting and didn't approve it, they would give their
15 recommendations, and it would be your obligation to get
16 with the guardian and do whatever is necessary to
17 rectify that?

18 MS. STUDLEY: Form.

19 A. Correct.

20 Q. But that's something that would be weeks, not
21 years?

22 MS. STUDLEY: Form. Speculation.

23 A. I guess I'm just trying to reconstruct this.
24 If you're saying from filing of the petition for
25 discharge, a final accounting, no objections, the

1 auditor reviews it, what could be a typical time
2 frame --

3 Q. Yes.

4 A. -- for that?

5 It could be months, a few months, if it's, you
6 know, again, ordinary. There's nothing unusual in the
7 accounting. No one is objecting, items of that nature.
8 I'm not speaking for the court system exactly, but
9 that's how things typically move, in my experience.

10 Q. If there is -- can you think of any reason in
11 this particular case of why Stephen Kelly would not have
12 -- why there would not have been a petition to discharge
13 Stephen Kelly as the ETG under the scenario that we have
14 laid out?

15 A. I would have to look at the docket to see if
16 there was or wasn't such a petition; and if there were
17 objections, for example, I know Ms. Levine had various
18 objections to some of Stephen Kelly's actions. I'm just
19 going from memory, which, again, I would have to piece
20 together with the docket to say what was done or not,
21 his compensation, for example.

22 Q. Do you know whether she filed those objections
23 in this case or in the Lorna Bivins guardianship case?

24 MS. STUDLEY: Form.

25 A. Well, Lorna Bivins, definitely.

1 Q. Right.

2 So if she filed it in Lorna Bivins, that would
3 hold up Lorna Bivins, but that would have no impact on
4 getting the discharge for Oliver, Sr., correct?

5 MS. STUDLEY: Form.

6 A. I'm sorry. I'm looking at both Bivins'
7 matters.

8 Q. Right. I'm separating it.

9 I'm just talking about our Oliver, Sr., matter
10 irrespective of the objection files over there, you
11 could still get a discharge over here?

12 A. It could be possible, but, again, I would have
13 to look and go through that mechanical drill of what was
14 filed, when the objection times passed, go through those
15 steps.

16 Q. But as far as going through those steps of
17 filing a petition for discharge, making sure that the
18 accounting is done, making sure to diary whether the
19 objections are served, making sure that the auditor --
20 if they have any issues, that those are corrected.
21 Those are all items that would be within the attorneys'
22 review and responsibility.

23 That's not something independent that the
24 guardian would be overseeing. That's something that you
25 would be overseeing as their attorney, right?

1 MS. STUDLEY: Form.

2 A. You're probably talking about a mixed bag from
3 the standpoint -- of course, a guardian would have
4 records as to them filing a petition for discharge and
5 their accounting. But then we do the -- when we're
6 representing a professional guardian, we would do the
7 court filings and so forth. So we're both involved.
8 That's what I was trying to sketch out for you.

9 Q. But from the standpoint that your firm would
10 file the petition for discharge, correct?

11 A. Oh, in our hypothetical?

12 Q. Yes.

13 A. All right.

14 Q. Your firm would then notify who you believe
15 would be interested persons to see whether they object,
16 correct?

17 MS. STUDLEY: Form.

18 A. Yes.

19 Q. And then your firm would diary when those
20 objections would have to be filed by any interested
21 person, correct?

22 A. Yes.

23 Q. And if there were no objections within that
24 deadline, then your firm would move forward with the
25 next step, I guess, to determine whether the auditor had

1 any issues with the accounting, correct?

2 MS. STUDLEY: Form.

3 A. Well, actually, there's another little step
4 here to mention. When the auditor goes through their
5 review, when they approve it, of course, they then do an
6 approval of it. The judge ultimately then would enter
7 an order approving the accounting. So that's just a
8 part. Again, I'm just explaining the internal process
9 of how sort of a closeout of a guardianship would
10 typically go.

11 So there's things that the attorney does.
12 There's things that the Clerk's Office is doing, just so
13 you have the totality of this.

14 Q. And that's where I'm going with this.

15 If, for example, the auditor had an issue with
16 the accounting, I assume that's something that you would
17 get back with the guardian to rectify any issues there?

18 A. Yes, usually there's a report that will come
19 back.

20 Q. Right.

21 So if the auditor had no issues with the
22 accounting and the audit was okay with it, as you said,
23 the next thing would be ministerial, going to the clerk,
24 taking that approval to the judge and the judge
25 approving the final accounting, correct?

1 A. Right --

2 MS. STUDLEY: Form.

3 A. -- or some sort of contact with the Court. We
4 might send a letter with a proposed order of discharge
5 if all the boxes are checked off.

6 Q. But that's something that the attorney for the
7 guardian would do. The only thing the guardian would
8 get involved with is if there was an objection to the
9 accounting, they would have to go back through -- not an
10 objection to the accounting. I'm sorry. If the auditor
11 had an issue with the accounting, then you would get
12 with the guardian to go through the numbers, right?

13 MS. STUDLEY: Form.

14 A. Oh, we definitely would.

15 Q. If there was no issue with the auditor --
16 again, going through what the attorney would do is: It
17 would be within the attorney's job to do these,
18 essentially, ministerial functions of putting it through
19 the system. You wouldn't expect a guardian to do that,
20 right?

21 MS. STUDLEY: Form.

22 A. Well, again, it's sort shared with the
23 guardian. We're working with the guardian. We're
24 representing the guardian, but the guardian, of course,
25 is the fiduciary that gives the information to do the

1 accounting, do the petition for discharge. So they were
2 both involved. I know you're trying to break it down
3 in terms of sort of who's doing what at what point in
4 time.

5 Q. I'm saying after you've done the petition,
6 after you've got the information, I'm really talking
7 about after you got it, you file the petition. Once you
8 file the petition, it's now in your hands to make sure
9 and go through it, do the diarying, seeing when the
10 objections, if any, were filed; and, if not, moving it
11 through the system with the courts to get the final
12 discharge.

13 You wouldn't expect a guardian to come forward
14 and say, hey, I see that no objections have been filed
15 within a certain number of days. So now let's set this
16 for hearing before the judge. That's something that you
17 would expect to do, right?

18 MS. STUDLEY: Form. Asked and answered.

19 A. Again, we would do -- there's certainly a lot
20 of those components that we would do with a guardian, at
21 least professional guardians typically keep track of the
22 status of their cases.

23 I hope I'm answering your question with enough
24 detail. I think you're trying to say to me, well, who's
25 involved at this leg of the process. Is it just the

1 lawyers, or is it the guardian that's supposed to do
2 something.

3 Q. I guess what I'm trying to find out is: If
4 there's no discharge of Steve Kelly as the ETG, is this
5 something that Steve Kelly should have made sure was
6 done, or is this something that Ciklin Lubitz should
7 have made sure was done?

8 A. I don't know. I would have to start with the
9 premise that I don't know if it's discharged or not.

10 MS. STUDLEY: Objection to the predicate.

11 Q. Assuming he hasn't been discharged as the ETG,
12 and he ended his ETG way back in May of 2011, that we
13 can look to Stephen Kelly and say why didn't you do
14 this, or is it something that Ciklin Lubitz should have
15 made sure that he was discharged?

16 MS. STUDLEY: Objection. Predicate.
17 Speculation.

18 A. Again, I would have to go back through and
19 look at what was filed when, who was it served on, what
20 did the Court approve as accounting. I would have to
21 look at those items to give you a total answer.

22 Q. As the attorney for the guardian for the ward,
23 Oliver Bivins, Sr., do you believe that you have a
24 responsibility to Oliver Bivins, Sr., to make sure that
25 once the ETG's run is over, that he is discharged from

1 his services?

2 MS. STUDLEY: Form.

3 A. I don't believe there's -- you're talking
4 about a fiduciary duty now?

5 Q. Yes.

6 A. All right. Well, that's the subject of a
7 Fourth DCA opinion that I know you're well familiar
8 with, but exactly how that applies, when that applies,
9 the extent that it applies, we don't really have a lot
10 of guidance on that. We have the holding in the case
11 that a lot of us versed in the guardianship world have
12 read, but how that gets interpreted in specific
13 situations is really open ended right now.

14 Q. Between you and the guardian, whose
15 responsibility is it to make sure that he is discharged?

16 MS. STUDLEY: Form.

17 A. Probably both.

18 Q. So in the sense of Stephen Kelly, when he
19 stopped serving as the ETG because Curtis Rogers came
20 in, it was both your law firm's responsibility and
21 Stephen Kelly's responsibility to make sure they were --
22 that he was discharged as the ETG from the guardianship
23 of Oliver Bivins, Sr.?

24 MS. STUDLEY: Form. Lack of predicate.

25 A. You need to back up a couple of steps, for one

1 thing. Of course, when you're talking about discharge,
2 and you're using the word "responsibility," if you
3 peruse the statute, there really isn't a statute or rule
4 that says someone serving as guardian must be discharged
5 within a certain period of time.

6 So there isn't -- if you're searching for a
7 legal responsibility on those lines, there's isn't one
8 that I'm aware of that a discharge must occur by "X"
9 amount of days or something of that nature, if that's
10 helpful.

11 Q. Well, I'm asking you for, you know, an
12 attorney-client relationship. You are the attorney for
13 Stephen Kelly, and Oliver Bivins, Sr., is the intended
14 beneficiary of that attorney/client relationship,
15 correct?

16 A. Not necessarily. The standard here would be
17 we, as attorneys, render services either for the benefit
18 of the ward or to the guardian on behalf of the ward.
19 That's what attorneys do in a guardianship setting.

20 Q. And you seek to have the ward pay for
21 everything?

22 MS. STUDLEY: Form.

23 A. Not necessarily for everything. We seek to
24 have -- we do petitions for fees, or we attach our bills
25 to accountings that the Court then reviews to determine

1 if those fees are reasonable. So I wouldn't submit that
2 it's everything.

3 Q. Well, from the two things you just identified
4 that you can either serve the guardian or serve the
5 Ward's interests, that you can do?

6 A. It's the guardian on behalf of the ward.

7 Q. So you can either serve their interests, but
8 when you're serving in those two capacities, you're
9 going to seek to have the ward pay for both capacities,
10 correct?

11 MS. STUDLEY: Form.

12 A. Right, when there are appropriate fees to be
13 billed, and like here we filed a petition, you would
14 object. So they would be subject to the Court's review.

15 Q. But you never filed -- you never sought to
16 have the guardians pay for any of your fees in
17 connection with any of the services that you rendered
18 pertaining to Oliver Bivins, Sr., from their own pocket,
19 correct?

20 MS. STUDLEY: Form.

21 A. From the guardians?

22 Q. Yes.

23 A. No.

24 Q. So if you're getting paid from -- you know
25 you're getting paid from Oliver, Sr.'s pot in connection

1 with the job that you're doing for the guardians, do you
2 not agree that once the guardian has been removed, that,
3 as the attorney, you should make sure and comply with
4 getting them discharged?

5 MS. STUDLEY: Form. Lack of predicate.

6 A. Not necessarily because it depends on the
7 facts and circumstances. Again, in my little example,
8 if you had someone who was serving as an ETG of a
9 person, for example, there's nothing to do.

10 Q. What about if you entered into -- if you were
11 a party who negotiated and sought approval from the
12 Court for settlement that said that the guardian would
13 be discharged within a certain amount of time after the
14 settlement, is that something where you would feel like
15 you owed a duty to Oliver Bivins, Sr., to make sure that
16 Curtis Rogers was discharged?

17 MS. STUDLEY: Form. Predicate.

18 A. I would have to have more facts in terms of
19 what's in the document. I guess it's a hypothetical, so
20 what are the terms and conditions and so forth.

21 Q. How many years passed from the time of the
22 Texas settlement before your firm did a petition to
23 discharge Curtis Rogers?

24 MS. STUDLEY: Form.

25 A. I don't know the amount of time. Again, I

1 would have to look at the file.

2 Q. But you know the idea of the Texas settlement
3 was that Curtis Rogers was to get off the case as
4 quickly as possible in exchange for Julian agreeing to
5 the terms in Texas, correct?

6 MS. STUDLEY: Form.

7 A. No. I know what's in the settlement
8 agreement. So if the --

9 Q. The settlement agreement doesn't say that?

10 MS. STUDLEY: You have to let him finish.

11 A. I can't remember exactly what it says.

12 Q. At the time of the Texas settlement, you know
13 there was a pending petition to remove Curtis Rogers,
14 correct?

15 A. Yes.

16 Q. And that that was being litigated and
17 discovery was being done, correct?

18 A. Correct.

19 Q. And in return for dropping that petition to
20 remove, one of the elements of consideration was that
21 Curtis Rogers would get off the case so that Steve Kelly
22 could come on, correct?

23 A. We could look at the settlement agreement. I
24 believe that was one of the terms of the settlement
25 agreement, along with a number of other items.

1 Q. Okay. But that was one of the terms that was
2 agreed to?

3 MS. STUDLEY: Form.

4 A. But not a time frame.

5 Q. There was no time frame is your position?
6 That Curtis Rogers could stay on forever, and that would
7 be no problem under the terms -- under the intent of the
8 agreement?

9 MS. STUDLEY: Form. Lack of predicate.

10 A. That's not what I'm saying.

11 MS. STUDLEY: Wait.

12 THE REPORTER: Wait. Wait.

13 MS. STUDLEY: You have to let him finish.

14 Q. Help me. Tell me what is --

15 A. Sure.

16 Q. Okay. What do you understand the time frame
17 was to be?

18 A. Well, I don't understand that there was a time
19 frame, but the thing that we need to do that what we're
20 not doing is look at the settlement agreement.

21 Q. I want to know what -- you were involved in
22 this intimately. What is your understanding of when
23 Curtis Rogers was supposed to get off this case?

24 MS. STUDLEY: Form. Predicate.

25 A. I don't have such an understanding. I

1 remember there was a negotiated term that he would
2 resign. Steve Kelly would come on, but the timing of
3 that, whether it was surefire or rapid or slow, I don't
4 recall. We would have to look at the agreement to
5 determine it, if there was such a term.

6 Q. So you don't think that -- as long as he
7 resigned within 30 days, your position is: He could
8 stay on as guardian as long as he wanted until the
9 discharge took place?

10 MS. STUDLEY: Form. Mischaracterization.

11 A. I'm saying it's all governed by what's in the
12 settlement agreement.

13 Q. Do you believe that the settlement agreement
14 had a time frame for Rogers to get off this case?

15 MS. STUDLEY: Form. Asked and answered.

16 A. And that's what I don't recall.

17 Q. Okay. It was at least -- do you know how many
18 years passed from the time of the Texas settlement to
19 the time that your firm filed a petition to discharge
20 Rogers?

21 A. I don't. I don't know the time frame.

22 THE WITNESS: Ron, when you're at a stopping
23 point, can I grab a drink of water?

24 MR. DENMAN: Sure. Sure. Go ahead.

25 (Short pause).

1 BY MR. DENMAN:

2 Q. When is the last time you looked at the Texas
3 settlement?

4 A. A while ago. I mean, it could be years.

5 Q. Okay. Did your firm prepare the Texas Trust
6 Agreement?

7 A. We worked -- I remember working on that
8 document, making revisions to it. I'm not exactly sure
9 who -- I think it was sort of a joint drafting effort,
10 is what I remember.

11 Q. And did your firm seek to be compensated for
12 your work through the contingency portion that was
13 agreed to in exchange for the settlement?

14 A. Could you rephrase that because I'm a little
15 -- I know we had a hybrid contingency fee agreement, but
16 that dealt with a different subject matter in Texas.

17 Q. You know that the settlement of the -- that
18 the Texas settlement -- that the agreement was that the
19 Heinrich firm, who was working on the Texas settlement
20 for a contingency fee, would be paid \$1.5 million plus,
21 potentially, a portion of the Pioneer leases and that
22 was supposed to be the consideration to those attorneys
23 for completing the settlement, correct?

24 MS. STUDLEY: Form.

25 A. I know there was an amount that was set forth

1 for them, and there was some contingency for some
2 additional assets. I recall that general layout of it,
3 but the exact numbers, I'm not sure whether it was a
4 million three, four, five. I would have to look at it
5 to tell you.

6 **Q. But you understood that they were operating**
7 **under the contingency fee agreement, correct?**

8 A. It had been Court approved, yes.

9 **Q. And did they ask you to do the work on the**
10 **Texas Trust?**

11 A. I don't recall being asked necessarily by
12 them. I just recall being involved in the drafting or
13 redrafting with one of Julian's counsel on the other
14 end, and then eventually there was another -- I think he
15 was a tax expert that got involved.

16 So kind of who was representing who, but I
17 don't remember being specifically asked by someone. I
18 just remember doing the work that needed to be done to
19 sort of move the settlement forward.

20 **Q. Did you advise the guardian that you would be**
21 **seeking your fees outside of the contingency fee for the**
22 **work done on the settlement?**

23 MS. STUDLEY: I think that's privileged.
24 You're asking him would he advise the guardian?

25 MR. DENMAN: Yes. Did he advise the guardian

1 that his firm would be seeking separate fees outside of
2 a \$1.5-million contingency fee agreement to work on the
3 settlement that was part of the contingency fee
4 agreement.

5 MS. STUDLEY: Mischaracterization.

6 MS. STEIN: Objection.

7 MS. STUDLEY: Mischaracterization and invades
8 attorney-client.

9 MR. DENMAN: Okay. So you're telling him not
10 to answer?

11 MS. STUDLEY: Yes.

12 MR. DENMAN: Okay.

13 MS. STEIN: Join.

14 BY MR. DENMAN:

15 **Q. Did you ever notify Julian Bivins or his**
16 **counsel that you would be seeking fees outside of the**
17 **consideration that was paid to complete the Texas**
18 **settlement?**

19 A. We have been billing all along separate and
20 apart in whatever that contingency fee arrangement was
21 in Texas.

22 So certainly part and parcel of that custom
23 and practice that we had bills, we had fees, which I
24 remember discussing some of these issues with you. That
25 it was no surprise that we were billing and definitely

1 expected to be paid for work we were done on the
2 settlement because it had nothing, in my mind, to do
3 with the contingency fee that was paid to the Texas law
4 firm. That was for their role and their litigation as
5 part of the settlement.

6 Q. Well, the Trust agreement and the settlement
7 agreement were part of the Texas settlement, correct?

8 A. That wasn't the -- that was part of it, but
9 the so-called Texas settlement covered -- if I can see
10 it, I can probably give you a better answer, but the
11 Texas settlement wasn't just a one-issue resolution.

12 Q. But the Trust agreement was set up to hold all
13 of the Texas royalties that were being fought about in
14 Texas, correct?

15 MS. STUDLEY: Form.

16 A. That's part of the reason. I remember there
17 were tax reasons for creating it as well, the Trust.

18 Q. But that was all Texas stuff. The Texas Trust
19 Agreement was funded completely by the assets in Texas
20 that were litigated over in Texas, correct?

21 A. Which had a significant impact on the ward.

22 Q. Right.

23 That's why the Court approved a contingency
24 fee agreement for the Texas attorneys to pursue the
25 action and completely resolve it --

1 MS. STUDLEY: Form.

2 Q. -- correct?

3 A. That's why they were awarded their fees, not
4 necessarily for the agreement in the Trust, but they
5 handled the litigation in Texas; maybe that's why we're
6 looking at it differently.

7 Q. When a personal injury attorney enters into a
8 contingency fee agreement, goes to court, litigates and
9 then ends up doing a settlement over that personal
10 injury case, are you telling me that that attorney can
11 then require that the parties they represent hire
12 separate counsel and must pay that separate counsel
13 money to do the settlement agreement and release on that
14 personal injury action?

15 MS. STUDLEY: Form. Predicate. Speculation.

16 A. I wouldn't use the word "require," but I can
17 tell you in my practice that I often have, over the
18 years, helped personal injury firms structure various
19 documents, create trusts, determine if an annuity is an
20 appropriate resolution.

21 And that's billed separate and apart from the
22 contingency fee that, say, Lytal Reiter or Searcy Denney
23 or whoever might be collecting.

24 Q. And they would come to you and say -- and you
25 would enter a retainer agreement with the client or with

1 the law firm?

2 A. I have done both, oral and written.

3 Q. And if it's with the client, the client pays
4 you, correct?

5 MS. STUDLEY: Form.

6 A. Ultimately.

7 Q. If it's with the law firm, the law firm pays
8 you, correct?

9 A. And usually charges it at cost to the client;
10 they don't absorb it. I might have an agreement with
11 them, but it shows up as a cost when you get down to a
12 closing statement to resolve a case.

13 Q. Well, that's between the attorney that hired
14 you as part of their contingency fee agreement whether
15 they can enter into a separate agreement with the client
16 to absorb that cost, right?

17 MS. STUDLEY: Form.

18 A. We enter -- they enter into it with the
19 client.

20 Q. Here, did you enter into a separate agreement
21 where the client knew that you would be responsible --
22 excuse me, the client would be responsible for paying to
23 create the agreement documents that were part of the
24 Texas settlement?

25 MS. STUDLEY: Form and predicate.

1 A. Again, all of this was part and parcel of a
2 settlement of a case that involved more issues. I think
3 this is where we're differing than just what had
4 occurred in Texas with regard to the oral royalties and
5 so forth.

6 **Q. Do you know why the Texas Trust attorneys**
7 **weren't retained to do the Texas Trust in Texas?**

8 MS. STUDLEY: Form.

9 A. Everyone agreed this was -- including Julian's
10 counsel, yourself, everyone knew this was the structure
11 that was being followed in terms of the negotiations of
12 the terms of the Trust. Our involvement on the Trust --
13 let's limit it to that -- being essentially because what
14 went into Trust, the terms and conditions of how it
15 could be disbursed was extremely important for the ward.

16 **Q. Are you saying that there was communication to**
17 **me and to my client letting him know that your firm**
18 **would be billing separately outside of the \$1.5 million,**
19 **and that we approved your firm to proceed to draft trust**
20 **and settlement documents to be compensated outside the**
21 **\$1.5 million settlement amount to the Heinrich firm?**

22 MS. STUDLEY: Form. Predicate. Compound.

23 A. I don't recall sending you a letter that had
24 all of that content in it. What I recall, what I'm
25 trying to recite to you, is the fact that it was a known

1 quantity of what we were doing. I think why we were
2 doing it was pretty self-evident as well, and it was
3 something that -- I'll call them the Texas lawyers, like
4 you are, weren't doing.

5 So we did it, which is entirely appropriate
6 because it relates back to the ward, and the ward would
7 be the one that would be charged for those services.

8 **Q. Which is why the Texas attorneys got**
9 **\$1.5 million to finish up the case --**

10 A. No.

11 MS. STUDLEY: Wait. There was no question.
12 I'm sorry.

13 **Q. -- right?**

14 MS. STUDLEY: Form. Predicate.

15 I'm sorry.

16 THE WITNESS: That's all right.

17 A. No. The settlement agreement, again, speaks
18 for itself. What happened after the settlement
19 agreement speaks for itself as well in terms of who did
20 what and why.

21 **Q. Did the Heinrich firm ever request your firm**
22 **to do the trust and settlement documents?**

23 A. We started off with that, and I said I don't
24 recall someone formally requesting us to do them. I
25 just recall being involved necessarily in that process.

1 I think we were helpful in that process in producing a
2 better product with regard to the Trust by applying our
3 expertise to that.

4 Q. Why didn't you seek reimbursement from the
5 1.5 paid to the Texas attorneys for the work that you
6 performed to help them close out their case in Texas?

7 MS. STUDLEY: Form.

8 A. Apple and orange. That's why.

9 Q. So you're saying it's an apple and an orange.
10 So you're saying that --

11 A. They are two separate things.

12 MS. STUDLEY: You have to let him finish.

13 THE REPORTER: Hold it. Hold it.

14 Q. Your work on the settlement agreement and the
15 Trust agreement, they were part of the Texas settlement
16 and contemplated by the Texas settlement, you're saying
17 is apple and orange?

18 A. Right, in terms of -- that's my analogy. They
19 are two separate things. They are two separate
20 functions.

21 Q. Did you ever advise of that to any of the
22 other parties to that agreement?

23 A. Well, absolutely; we petitioned for fees to
24 which you objected --

25 Q. Well, that was months later.

1 A. -- that the firm --

2 Q. I'm sorry. That was months later.

3 I'm talking about the time that you undertook
4 to do this work that you intended to bill outside of the
5 \$1.5 million, did you ever notify the other parties to
6 the agreement that you intended to bill separately
7 outside of the \$1.5 million for the time that you spent
8 doing the settlement agreement and Trust agreement?

9 MS. STUDLEY: I'm just going to ask that you
10 let him finish. You interrupted him several times.
11 Please let him finish.

12 Q. You can answer.

13 A. I know we've been over this ground before, and
14 the answer is going to be the same. If there was some
15 -- if you're asking was there a formal letter that
16 contained five or six items that you referenced, no, not
17 that I recall.

18 But was there a secret? Was it understood
19 that we were going to continue to do and be compensated
20 for the services we had been providing up to that date
21 such as attending the mediation, negotiating the
22 settlement agreement, no, that was known. There was no
23 surprise there.

24 Q. So what documentation exists? You say it was
25 known. What documentation exists to advise the other

1 party to the settlement that you would be seeking
2 compensation outside of the \$1.5 million that the other
3 party agreed to pay to buy the piece in connection with
4 this litigation?

5 MS. STUDLEY: Objection. Asked and answered.

6 I'll let you go one more time.

7 THE WITNESS: Okay.

8 A. Again, the 1.5 was compensation paid to --
9 we'll call them the Texas law firm -- Brian Heinrich and
10 Mr. Hayes. That was not compensation, and you know that
11 was paid to us. That was compensation that went to them
12 as part of a settlement having litigation in which they
13 claimed fees. What we did and for what we sought
14 compensation, or were awarded compensation, was a
15 different matter, a different representation, different
16 work.

17 Q. But, Mr. O'Connell, the settlement in Texas
18 included, as part of the settlement, there would be a
19 mutual release and a Trust agreement that was part of
20 the actual settlement negotiated in Texas under the
21 Texas litigation which was brought by the Heinrich firm,
22 correct?

23 MS. STUDLEY: Form. Predicate.

24 A. Again, the settlement agreement would speak
25 for itself. So do I recall every term of that agreement

1 today? No, but we're happy to take a look at it and see
2 what it says in that regard.

3 (Phone interruption).

4 THE WITNESS: Can we stop here?

5 MR. DENMAN: Yes, we can.

6 (Recess taken).

7 BY MR. DENMAN:

8 Q. Were you involved at all in the accounting of
9 the guardian that was approved on June 1st, 2012, May
10 31st, 2013, and November 22nd, 2013?

11 MS. STUDLEY: Form.

12 A. I'm not sure without seeing it.

13 Q. Let me strike that question.

14 Were you involved in the guardianship
15 accounting for the period of June 1st, 2012, through May
16 31st, 2013, that was approved on November 22nd, 2013?

17 A. I'm not sure, Ron. I need to see the
18 accounting.

19 Q. I'm just reading from your answer to the
20 lawsuit. That was from page 23, paragraph 28.

21 MS. STUDLEY: Do you want to show it to him?

22 MR. DENMAN: It says exactly what I said.

23 Q. The Court approved the final accounting. Here
24 (handing document).

25 A. Oh, great. Okay. Where are you?

1 Q. Not approve the final accounting. I'm sorry.

2 The Court approved the guardianship accounting, page 23,
3 paragraph 28.

4 A. Okay. I see that.

5 Q. So my question is: Did you have any
6 involvement in the guardianship accounting that was
7 addressed here?

8 A. I'm not sure what involvement I had. I would
9 have to see the accounting.

10 Q. Do you know whether that accounting was ever
11 provided to Julian Bivins or his counsel?

12 A. I don't know. I would have to look at the
13 accounting and probably some other documents to see who
14 it was served on because I just don't know sitting here.

15 MS. STUDLEY: May I see this (indicating)?

16 THE WITNESS: Sure (handing document).

17 Q. Did you know -- did you ever meet with Sonia
18 Kobrin to discuss with her the petition to have Rogers
19 appointed as permanent guardian?

20 A. Not that I recall.

21 Q. Did you ever meet with Sonia Kobrin to discuss
22 with her anything about a petition for -- a petition to
23 have an emergency temporary guardian appointed?

24 A. I just don't recall that.

25 Q. Did you ever request anyone perform an

1 appraisal on the 67th Street property?

2 MS. STUDLEY: Objection. Form.

3 To the extent it doesn't involve anything
4 that's privileged, you can answer.

5 A. Not that I recall.

6 Q. Did you ever request anyone perform an
7 appraisal on 808 Lexington?

8 A. Not that I recall.

9 Q. Did you ever request anyone perform an
10 appraisal on the Portland Place property?

11 A. Not that I recall.

12 Q. Did you ever request anyone perform an
13 appraisal on 330?

14 A. Not that I recall.

15 Q. Did you ever determine the cost of having an
16 appraisal performed on any of the four properties that I
17 just mentioned?

18 A. I'm using the word "appraisal" as opposed to a
19 broker's opinion. That's why I'm hesitating because I'm
20 distinguishing -- a formal appraisal by an MAI
21 appraiser?

22 Q. Exactly.

23 A. I don't recall making such a request, but I
24 might have. I just don't recall doing so.

25 Q. You understand the difference between a

1 broker's opinion and a formal appraisal, correct?

2 A. Yes, in the way you and I are using it.

3 Q. Right.

4 Under your definition that you described a
5 formal appraisal as opposed to a broker's opinion, which
6 is an opinion provided by a broker based upon their
7 opinion as to what's going on in the market, correct?

8 A. Correct.

9 Q. Did you ever request that anyone perform or
10 provide a broker's opinion for any of the four
11 properties that we've discussed? I can go into a better
12 definition of those, Brian -- excuse me, Mr. O'Connell,
13 if you have any questions, but I think we all know the
14 four properties.

15 MS. STUDLEY: Same objection and instructions.

16 A. I know that, of course, there were broker
17 opinions obtained on 330 and 808, and there might have
18 been -- this is why I'm uncertain -- on 67th Street.

19 Q. Do you have any idea what value of 67th Street
20 was under any broker's opinion?

21 MS. STUDLEY: Form. Predicate.

22 A. I don't recall. I just recall that there was
23 some workup done by Mr. Lieberman on that, but --

24 Q. On 67th Street?

25 A. On 67th; the amounts, I just don't recall them

1 at this point.

2 Q. As we sit here today, do you have any -- do
3 you know what the approximate value was by Mr. Lieberman
4 and the broker's opinion for 808?

5 A. I don't, to be certain. I want to be certain.
6 I don't want to guess.

7 Q. Do you know whether you were ever provided
8 with any valuation, a broker's opinion, that put the net
9 value of 67th Street and 808 to be similar?

10 MS. STUDLEY: Form.

11 A. I just don't recall numbers. I remember there
12 being an analysis and discussion with Mr. Lieberman, but
13 the exact amounts as were attributed to which property,
14 I would have to look at some documents, look at the
15 file.

16 Q. Did you ever review anything in writing, or
17 any documentation created by Mr. Lieberman, with respect
18 to 67th Street?

19 A. I do remember seeing the -- I believe it was
20 from him, but it also came up as part of the New York
21 settlement conference with all of the parties sort of
22 in attendance talking about values of these various
23 properties. I can't remember the amounts for you.

24 I just remember that being the subject matter
25 early on in the settlement conference that was sort of

1 a rather intense discussion about what values should be
2 used or attributed to those properties.

3 Q. So you believe that there was actually
4 documentation that was presented during -- actual
5 documentation that was provided to you by Mr. Lieberman
6 with some degree of analysis as to an opinion about the
7 value of 67th Street?

8 MS. STUDLEY: Objection.

9 A. That's not what I'm sure about.

10 MS. STUDLEY: Just give me a quick pause.

11 THE WITNESS: Sure.

12 MS. STUDLEY: That's okay.

13 Objection. Mischaracterization.

14 BY MR. DENMAN:

15 Q. Do you know whether you have in your files
16 today any documentation from Mr. Lieberman pertaining to
17 any type of valuation analysis of 67th Street at all?

18 A. I'm not sure.

19 Q. If you did, you would still have that?

20 A. Yes.

21 MS. STUDLEY: Form.

22 Q. Do you recall ever reviewing the deposition
23 testimony from Oliver, Jr., that he believed the value
24 of the 67th Street property was between 10 and \$20
25 million?

1 A. I don't recall that.

2 Q. Do you recall ever telling the Court that you
3 believed that any opinion by Oliver Bivins, Jr., that
4 the value of 67th Street being between 10 and \$20
5 million was a pipe dream?

6 MS. STUDLEY: Form.

7 A. I don't recall saying that. The best way to
8 determine that would be to look at the transcript; if
9 you have it, I'm happy to look at it.

10 Q. Do you recall the amount of the mortgage on
11 the 67th Street property?

12 A. I don't recall this.

13 Q. Do you ever advise Curtis Rogers not to pay
14 the Sovereign mortgage?

15 MS. STEIN: Objection.

16 MS. STUDLEY: I'm going to object and direct
17 you not to answer. Thank you.

18 Q. If a failure to pay the Sovereign mortgage
19 would cause the mortgage to go into default, would that
20 be in the best interests of the ward?

21 MS. STUDLEY: Form. Predicate.

22 MS. STEIN: Objection.

23 MS. STUDLEY: You can answer.

24 THE WITNESS: I can answer, okay. She was
25 making a privilege objection.

1 I'm sorry. Can you read it back. I was
2 paying too much attention to the objections.

3 (Question read back).

4 MS. STUDLEY: Form. Predicate.

5 THE WITNESS: It would depend on the facts and
6 circumstances. For example, if the ward was short of
7 funds, as the ward was here, not paying that mortgage
8 could well -- would well be in the Ward's best
9 interests.

10 BY MR. DENMAN:

11 **Q. So it depends whether or not the ward had**
12 **sufficient cash to pay the mortgage at the time; is that**
13 **right?**

14 MS. STUDLEY: Form. Predicate.

15 A. That would be one factor, a significant
16 factor.

17 **Q. You would agree with me that refinancing the**
18 **Beachtown mortgage was part of the settlement to have**
19 **Beachtown paid in connection with the New York**
20 **settlement?**

21 MS. STUDLEY: Form.

22 A. Again, I would have to look at the settlement
23 itself. I can recall generally there was language about
24 dealing with paying the Beachton mortgage, but to really
25 drill down and be precise, I would want to look at the

1 settlement agreement itself because that's as far as my
2 recollection would go as this point.

3 Q. But you would agree with me it made commercial
4 sense to pay off the mortgage for Beachton at the time
5 that you were trying to get the New York settlement
6 approved by the Court, correct?

7 MS. STUDLEY: Form. Predicate.

8 MS. SCHULTZ: Form.

9 A. No, because I'm back to sort of looking at the
10 totality of the facts and circumstances of that moment,
11 what was available in the way of financing or not, what
12 the Ward's situation was at that point in time, how much
13 of a loan should he obtained, what should it be used
14 for. All of those issues would have to be analyzed.

15 And sitting here now it just would be really
16 tough for me to put that together without reviewing,
17 I could if I reviewed different documents.

18 Q. But when you came into court on September 13th
19 to seek approval of the New York settlement, you wanted
20 the Court to approve the New York settlement, correct?

21 MS. STUDLEY: Form.

22 MS. SCHULTZ: Form.

23 A. The client, of course. It wasn't me
24 personally because we were advocating on behalf of the
25 guardian, and the guardian wanted the settlement

1 approved as being in the best interests of the ward, in
2 my opinion, if you're going to ask me that.

3 Q. Well, let's get to your opinion because you've
4 now told me that the client, the guardian, wanted the
5 settlement to be approved. You have communication from
6 the --

7 A. The petition --

8 Q. Hold on.

9 Do you have communication from the guardian
10 to you that he wanted this settlement to be approved?

11 MS. STUDLEY: That's attorney-client.

12 MR. DENMAN: Well, if he -- no. No. No. He
13 just opened the door and said that the guardian wanted
14 the settlement to be approved. You can't open the door
15 on one hand and then close it on the other.

16 THE WITNESS: Yeah. I can handle this when
17 you're done with your discussion.

18 BY MR. DENMAN:

19 Q. Okay. Please.

20 A. The client signed the petition to have the
21 settlement approved.

22 Q. So other than besides the client signing the
23 petition to have the settlement approved, there's no
24 other communications from the client to you regarding
25 the approval of the settlement; is that right?

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BRIAN M. O'CONNELL, ESQUIRE

55

1 A. That's privileged.

2 MS. STUDLEY: That I'm going to direct him not
3 to answer.

4 **Q. So we only get a little picture of this?**

5 A. You get a big picture because the client
6 signed the petition to have the settlement approved.

7 **Q. And the client signed the petition after**
8 **receiving advice from you as his counsel, correct?**

9 MS. STUDLEY: Now I'm going to direct him not
10 to answer.

11 MR. DENMAN: Why?

12 MS. STUDLEY: You're asking him for attorney-
13 client communications.

14 MR. DENMAN: I didn't ask what the advice was
15 of the communications. I'm saying that the client
16 wanted to approve -- to sign the petition to approve the
17 settlement after receiving advice from counsel.

18 MS. STUDLEY: Yeah, but there's the
19 implication. I'm not going to allow him to answer that.

20 MR. DENMAN: Okay. I'm not going to argue
21 with you because that's why we have courts.

22 BY MR. DENMAN:

23 **Q. And when came into court in September of 2013**
24 **on behalf of the guardian, you sought to have the New**
25 **York settlement approved by the Court; is that right?**

1 MS. STUDLEY: Form.

2 A. Well, I guess my distinction, Ron, is the "we"
3 part. We're representing the guardian. The guardian
4 signed the petition to have the settlement approved, and
5 we advocated the guardian's position.

6 **Q. And insofar as advocating the guardian's**
7 **position, you made representations to the Court,**
8 **correct?**

9 A. I don't recall what -- if I made
10 representations; if I did show, them to me in a
11 transcript and I'm happy to discuss them. But I just
12 don't recall what representations I made, if I made any.

13 **Q. Okay. If you made any, those would have been**
14 **truthful, correct?**

15 MS. STUDLEY: Form.

16 A. To the best of my knowledge, sure, if I made
17 any.

18 **Q. Did you rely upon Keith Stein for evaluating**
19 **-- for valuing the 808 and the 67th Street properties in**
20 **any way?**

21 MS. SCHULTZ: Form.

22 MS. STUDLEY: I'm going to object. Work
23 product.

24 MR. DENMAN: Are you instructing him not to
25 answer?

1 MS. STUDLEY: Yes, work-product communications
2 between the attorneys.

3 BY MR. DENMAN:

4 Q. If Keith Stein made a representation about the
5 value of one of the properties in court while you were
6 present, and you considered the value to be otherwise,
7 would you have notified the Court?

8 MS. STUDLEY: Form. Speculation.

9 MS. SCHULTZ: Form.

10 A. I guess it depends. Give me an example. If
11 it was a \$10 difference, a million dollars' difference,
12 I would have to have a little more facts to know to be
13 able to answer that.

14 Q. For example, in connection with the petition
15 to approve the hearing on the petition to approve the
16 New York settlement, if Keith Stein represented to the
17 Court that the townhouse on 67th Street is probably
18 equivalent to the 808 property, but you had broker
19 opinions or other documents showing the values to be
20 different, would you have advised the Court otherwise?

21 MS. STUDLEY: Form. Predicate.

22 A. It would depend. Again, are we talking about
23 net values? Are we talking about values, gross values,
24 net values?

25 Q. So if he said the townhouse on 67th Street

1 is probably equivalent to the 808 property and did not
2 specify net values or gross values, is that something
3 you would have discussed with the Court of whether these
4 were net or gross to make sure that the Court did not
5 have a misunderstanding as to whether they were net or
6 gross?

7 MS. STUDLEY: Form. Predicate. Speculation.

8 MS. SCHULTZ: Form.

9 A. Again, it would go back to -- I would have to
10 look at the transcript and see what was submitted to the
11 Court. I know, for example, you submitted an appraisal
12 of 808. I would have to get that totality back in my
13 mind because it's been a few years. I just don't recall
14 who said what at a particular hearing on a particular
15 date.

16 Q. Well, the appraisal that we submitted was
17 several months later in connection with you seeking
18 attorneys' fees for 808, right?

19 MS. STUDLEY: Form.

20 A. It could have been. That's exactly what I
21 mean. That's why I can't give you definite, precise
22 answers without refreshing some recollection and looking
23 at a transcript, it sounds like, primarily.

24 Q. Were you aware that the 67th Street property
25 sold for over \$22 million after the New York settlement

1 petition hearing, correct?

2 A. I know it was sold for \$20 million or more.

3 The price -- again, the exact amount, I don't know. I
4 realize it was afterwards; how much afterwards, again,
5 I don't know. But I could tell you those two points at
6 least.

7 Q. You know that the mortgage was no more than
8 two-and-a-half million on that property, right?

9 MS. STUDLEY: Form.

10 A. I don't know.

11 Q. If the mortgage was only two-and-a-half
12 million dollars and the property sold for 22-and-a-half
13 million dollars netting \$20 million for that property,
14 you would agree with me that it was considerably more
15 valuable than 808 Lexington, correct?

16 MS. STUDLEY: Form.

17 MS. STEIN: Form.

18 MS. SCHULTZ: Form.

19 A. More valuable than what?

20 Q. More valuable as a cash asset valuation --
21 dollars, cents, numerics, whatever quantification factor
22 you want to use.

23 A. Sure. What I'm talking about with you -- to
24 be clear -- value is a relative subject. Are we talking
25 about value with regard to an appraisal that was done at

1 a certain point in time, or value in terms of sales
2 actually to a property? Of course, when it's sold to a
3 willing buyer and a willing seller, etc., that's
4 certainly going to set the value of it.

5 Especially with these types of New York
6 properties, appraisals are not a science. They are more
7 of an art because it was a fast-moving market at these
8 points in time. So that's why I wanted to be sure when
9 you use the word "value," that it's a little hard to
10 answer because value -- when something sells, that's its
11 value if it's a fair market sale.

12 MS. STUDLEY: Predicate on the last question.

13 **Q. So, as we sit here today, it's your testimony**
14 **that you've never had -- as we sit here today, your**
15 **recollection is that you've never had an understanding**
16 **that the value of 67th Street was considerably -- the**
17 **net value of 67th Street was considerably greater than**
18 **808 Lexington --**

19 MS. STUDLEY: Form.

20 MS. SCHULTZ: Form.

21 MS. STEIN: Form.

22 A. I mean, I know approximately what 808 sold
23 for. I know approximately what 67th Street sold for.
24 Now you're telling me what the mortgage was on 67th
25 Street, and there was a mortgage on 808. I don't recall

1 all of the exact amounts, but I can do the math and tell
2 you based on sales prices one netted some amount more
3 than the other, exactly what it was.

4 But that's as far as I can go sitting here
5 today without going back and proving records and so
6 forth.

7 Q. Did you ever have an understanding that if the
8 808 property was sold as requested in the petition to
9 sell 808 Lexington, that the sale would net a mortgage
10 and fees somewhere around \$5 million to the ward?

11 MS. STUDLEY: Form.

12 A. Again, I don't recall what the net would be,
13 sitting here today. I would have to have the facts and
14 figures, look at the file, review, you know, the exact
15 amount of the mortgage, the sales expenses, those types
16 of things, to give you an accurate answer.

17 Q. At the time of the petition to sell -- the
18 hearing on the petition to sell the property, did you
19 have an opinion as to whether the billing had been
20 utterly mismanaged for a number of years?

21 MS. STUDLEY: Form.

22 MS. STEIN: Form.

23 MS. SCHULTZ: Form.

24 A. Again, I'm a little confused. When you say
25 "utterly mismanaged," by whom?

1 Q. I don't know. I'm asking you.

2 At the time of the petition to sell the
3 property, did you have an opinion that the building was
4 utterly mismanaged for a number of years?

5 MS. STUDLEY: Form.

6 A. I just don't recall.

7 Q. If a representation was made that the building
8 was utterly mismanaged for a number of years, do you
9 know who would have been utterly mismanaging the
10 property for a number of years?

11 MS. STUDLEY: Form.

12 MS. STEIN: Form.

13 A. I don't know.

14 Q. Did you have an opinion as to whether Curtis
15 Rogers had utterly mismanaged the property prior to the
16 petition to sell 808?

17 MS. STUDLEY: Form.

18 A. No.

19 Q. Did you believe that he had properly managed
20 the property prior to the petition to sell 808?

21 MS. STUDLEY: Form.

22 A. Yes.

23 Q. Did you believe that Steve Kelly had properly
24 managed 808 Lexington prior to the petition to sell 808?

25 MS. STUDLEY: Form.

1 A. Yes.

2 Q. You agree that Fig & Olive wanted to renew its
3 lease at 808 Lexington at the time of the hearing on the
4 petition to sell 808?

5 MS. STUDLEY: Form. Predicate.

6 A. I'm trying to recall, and this is where it
7 gets difficult without a file to look at for
8 orientation.

9 At some point I know Fig & Olive had a lease.
10 Of course, it was coming -- expiring in December. But
11 in terms of when -- if they had a desire to renew and so
12 forth, I have a general recollection of that but nothing
13 specific.

14 Q. Well, let me ask you this: Do you have any
15 general recollection that they wanted to vacate the
16 property at the expiration of their lease?

17 A. I really don't recall that. I would recall
18 more if I'm guessing here.

19 MS. STUDLEY: No. Don't guess.

20 A. I don't want to get punched for guessing.

21 Q. Well, you can easily review your records and
22 communications to determine whether Fig & Olive wanted
23 to renew its lease or not, right?

24 A. Right, that's where it would be. There were
25 definitely communications from someone on that subject.

1 Q. And you wanted to sell 808 Lexington to pay
2 your fees, correct?

3 MS. STUDLEY: Form.

4 A. No.

5 Q. You never represented to the Court that you
6 wanted to sell the building to pay fees?

7 A. Not a sole reason, no.

8 MS. STUDLEY: Objection to predicate.

9 Q. On any reason?

10 A. No. What representations, again, were made
11 on the selling of 808, you would need to look at the
12 transcript. You need to look at the petition for the
13 sale. And that would be the reasons for seeking the
14 sale, whether it was either argued at the hearing, or
15 presented as evidence at the hearing, or it would be in
16 a petition of sale.

17 Q. You would agree that part of the reason for
18 the petition to sell the property is because you wanted
19 to pay fees?

20 MS. STUDLEY: Form. Asked and answered.

21 A. It would be -- the reason would be what was
22 argued at the hearing, or represented at the hearing,
23 evidence presented at the hearing, those would be the
24 reasons.

25 Q. Would you agree with the representation made

1 at the hearing on the petition to sell the property that
2 Julian has no standing in any matters related to 808?

3 MS. STUDLEY: Form.

4 A. Again, I would have to go back and say what
5 has he -- what was being petitioned for what had he
6 filed at that point in time, and he filed a notice of
7 appearance or a request for copies. I would have to
8 look at the procedural posture of the case to determine
9 whether he was an interested person or not at that
10 moment.

11 Q. If the only issue was that Julian was
12 objecting to the sale of 808 at the hearing on the
13 petition to sell 808, do you have an opinion as to
14 whether Julian had a standing, had standing to object to
15 the petition to sell 808?

16 MS. STUDLEY: Form.

17 A. Yeah. I would have to go back and refresh my
18 recollection on what we filed on behalf of the guardian.
19 Did he file something in response, what's the basis, I
20 guess in what capacity was he claiming to object. Those
21 are things that I just have to review to give you a
22 precise answer because I don't recall.

23 Q. Would you agree with the representation that
24 there's no law that says Julian gains more control at
25 the end of the Ward's life --

1 MS. STUDLEY: Form. Predicate.

2 MS. SCHULTZ: Form.

3 Q. -- made at the hearing by your folks in
4 connection with the petition to sell the property?

5 A. Again, I don't recall that being said. So I
6 would have to have a transcript to give me some sense
7 of remembrance of it. Just sitting here right now -- I
8 don't know how many years ago that was, but I don't have
9 the benefit of that type of a memory.

10 Q. As of the date of the petition to sell, had
11 the property been completely transferred but the estate
12 was not getting rents --

13 MS. STUDLEY: Form.

14 Q. -- the guardianship estate?

15 A. Because that's what I was -- there was the
16 Lorna estate.

17 Q. No. No. I'm talking about the guardianship
18 estate.

19 A. When you say "had been transferred," that's
20 what's throwing me off.

21 Q. Would you agree with me that Julian was not a
22 party to the New York settlement?

23 MS. STUDLEY: Form.

24 MS. SCHULTZ: Form.

25 MS. STEIN: Form.

1 A. It depends on one's definition of "party."
2 Did he sign the so-called New York settlement document?
3 No. But he was present, had counsel, participated in
4 various sundry negotiations, was present at the end when
5 sort of the agreement was laid out and I understood was
6 consented to it.

7 **Q. What is it that you -- how is it that you**
8 **believe that he consented to it after giving about an**
9 **hour-long objection during the hearing to approve? What**
10 **about that made you believe that he consented to it?**

11 MS. STUDLEY: Move to strike counsel's
12 comments.

13 But you can answer.

14 **Q. You can answer.**

15 A. Again, I'm going back in time to the New York
16 settlement discussion itself where he was present. I
17 felt based that on his presence, comments he made or his
18 counsel made, that he had consented to the New York
19 settlement. I'm not talking about the hearing. I
20 understand when you represented him at the hearing that
21 he objected.

22 **Q. So you're saying that back in May of 2013**
23 **during the settlement conference that because Julian was**
24 **present, you believe that he participated and therefore**
25 **was a party to the New York settlement?**

1 A. Again, I think we're debating the word, what
2 "party" means. He was a participant in the agreement
3 negotiations along with his counsel. And it's at that
4 point in time -- so this, again, gives you the time
5 frame. It's the settlement conference itself. My
6 understanding was that he was in agreement with it.

7 **Q. And when you made a representation on the**
8 **record during -- to the Court in September, on September**
9 **19th, 2014, in connection with the petition to sell the**
10 **property, that Julian wasn't a party to the New York**
11 **settlement, what did you mean by "party" there?**

12 MS. STUDLEY: I'm going to argue lack of
13 predicate.

14 A. Yes. Party would be -- and, again, I don't
15 recall making that comment, but if I did, I'll try to
16 answer your question.

17 That party, then, would be used in the classic
18 sense of someone who has a signature line as a party in
19 line numbers 1, 2, 3, 4, 5 to an agreement.

20 **Q. And if you don't explain what a party means**
21 **each time that you make the representation as to whether**
22 **someone is party or not, how are they supposed to**
23 **differentiate whether it's the classic, as you**
24 **described, or just a participant party, as you've**
25 **described before?**

1 MS. STUDLEY: Objection. Form. Predicate.

2 Argumentative.

3 A. Again, it would depend on the context that it
4 is being used in. That's why I'm explaining it to you
5 now.

6 Q. And how is the Court supposed to understand
7 the difference if you just say the word "party" without
8 explaining the context of whether it was just a
9 participant or whether it was an actual signing party?

10 MS. STUDLEY: Objection.

11 A. Again, it depends what's being -- this is
12 where it's difficult. It depends what's being argued
13 over it at that moment where I would have to see a
14 little bit more of the context of who's saying what, has
15 evidence been provided, is there a closing argument, an
16 opening argument.

17 That's where I would need more information.

18 Q. Prior to the petition to sell the property,
19 you knew that Julian wanted to purchase the property,
20 correct?

21 MS. STUDLEY: Form.

22 MS. SCHULTZ: Form.

23 A. I know at one point he had an interest in it
24 and, in fact, purchased a property, but when that
25 happened, I'm not sure sitting here now.

1 Q. Well, you know that it was prior -- within
2 months of the motion to sell the property, Julian had
3 communicated to you that he wanted to purchase the
4 property, correct?

5 MS. STUDLEY: Form.

6 A. That's what I'm not sure of because it would
7 be a total guess.

8 Q. If Julian purchased the property directly from
9 the guardian prior to Lieberman signing the exclusive
10 listing agreement, then Lieberman would not have been
11 entitled to the six percent commission, correct?

12 MS. STUDLEY: Objection. Predicate.

13 MS. SCHULTZ: Form.

14 A. Not necessarily because we have to analyze it
15 there. I don't know the timing of his commission
16 agreement. I don't know what conversations he may have
17 had, Mr. Lieberman, with Steve Kelly, with Keith Stein.
18 So you're familiar -- I know you do real estate on your
19 own. So you're familiar with how brokerage law works in
20 terms of when someone is entitled to a commission or not
21 a commission.

22 I can't give you an answer to that without
23 knowing who sort of said what to whom, when, where.

24 Q. Well, I mean, you've done procuring cause
25 litigation, haven't you?

1 MS. STUDLEY: Form.

2 A. I'm familiar with it, sure.

3 Q. Okay. So if Lieberman was not the procuring
4 cause of Julian Bivins seeking to purchase the property,
5 then Lipa Lieberman would not be entitled to a six
6 percent commission if there was no actual exclusive
7 listing agreement, correct?

8 MS. STUDLEY: Objection. Predicate.
9 Speculation.

10 MS. SCHULTZ: Form.

11 A. Again, I need to know more facts and figures
12 based on how expansive, as you know, the law is on
13 procuring cause especially in Florida. And I don't know
14 New York's.

15 Q. Do you know why it was rushed to have
16 Lieberman sign an exclusive listing agreement prior to
17 the hearing on the petition to sell?

18 MS. STUDLEY: Form. Predicate.

19 MS. SCHULTZ: Form.

20 A. I don't recall that there was a rush. I don't
21 remember the exact sequence of what was signed when in
22 relation to the hearing.

23 Q. Do you recall the e-mails from Keith Stein to
24 Lipa Lieberman that came out during Stein's fee hearing
25 where he was upset that your firm was not moving quick

1 enough to get the exclusive listing agreement signed by
2 Steve Kelly?

3 MS. STUDLEY: Form.

4 A. And I remember you asked Ms. Crispin that this
5 morning, but I don't know the dates of those. But I
6 heard you, of course, raise that. But I don't have the
7 e-mails in front of me. I don't have the meat and
8 potatoes to give a precise answer.

9 Q. Lipa Lieberman performed a valuation for the
10 purposes of your firm getting the contingency fee award
11 in exchange for an expectation that you would help him
12 become the listing agent for the property, correct?

13 MS. STUDLEY: Form.

14 MS. SCHULTZ: Form.

15 MS. STUDLEY: Predicate. Mischaracterization.

16 A. No, I don't recall that.

17 Q. Did you ever read Lipa Lieberman's deposition
18 transcript?

19 A. At some point, but not recently.

20 Q. And do you recall Lipa Lieberman saying that
21 the only compensation he received for providing expert
22 testimony before -- let me take away the word "expert";
23 for providing testimony on valuation at the hearing for
24 you to get a contingency fee was because he wanted to --
25 or he expected to get the exclusive listing agreement

1 for the property?

2 MS. STUDLEY: Form.

3 MS. SCHULTZ: Form.

4 A. Again, I would have to have his deposition in
5 front of me, and I couldn't tell you what was in his
6 mind either.

7 Q. But your firm never -- you or the firm never
8 told Lipa Lieberman that you would get him the listing
9 agreement on 808 in exchange for him providing testimony
10 on valuation for your contingency fee hearing?

11 MS. STUDLEY: Form. Predicate.

12 A. And I don't recall that. I don't recall that
13 ever being said at all.

14 Q. And if you had an e-mail communication with
15 that, would you still have that today?

16 A. If there was such a communication.

17 Q. Do you recall ever obtaining an invoice from
18 Lipa Lieberman in connection with any services that he
19 provided at your request?

20 MS. STUDLEY: Form. Predicate.

21 A. Again, I know this from the morning session.
22 I don't recall. It could have been an invoice for his
23 travel expenses, his out-of-pocket expenses.

24 Q. I apologize.

25 Aside from out-of-pocket expenses, I mean, his

1 actual work and the hours of time that he spent, even in
2 his deposition testimony, did he ever submit an invoice
3 to your firm for his time?

4 A. Not that I recall.

5 Q. Do you find that unusual?

6 MS. STUDLEY: Form.

7 A. No.

8 Q. How many -- you get experts all the time that
9 just provide free work for you?

10 MS. STUDLEY: Form. Predicate.

11 MS. SCHULTZ: Form.

12 MS. STEIN: Form.

13 A. Well, again, it depends --

14 Q. I just want to know who you use so I can start
15 talking to these guys.

16 MS. STUDLEY: Form.

17 A. It depends on what situation we're getting
18 into, if it's even expert testimony, if it's trial --

19 Q. So if it's not expert testimony, you then
20 sometimes --

21 MS. STUDLEY: You have to let him finish.

22 MR. DENMAN: I'm sorry. I thought he was
23 finished.

24 Q. So the distinction is whether it's expert
25 testimony or not?

1 MS. STUDLEY: Form.

2 A. Not necessarily; if you're talking about --
3 well, you have tell me what you're talking about because
4 I'm a little unclear.

5 Q. I'm just wondering how it is that -- or what
6 was the arrangement that you understood when you hired
7 Lipa Lieberman to perform services that he was to be
8 compensated?

9 MS. STUDLEY: Form.

10 A. I think that's presupposing that we hired him
11 to perform any services.

12 Q. So you didn't hire him to perform any
13 services?

14 MS. STUDLEY: Objection. Lack of predicate.

15 A. Not that I recall.

16 Q. So do you know how it was that he just
17 happened to provide testimony for you in connection with
18 the contingency fee hearing?

19 MS. STUDLEY: Form.

20 A. That he was familiar with the value of the
21 property.

22 Q. And when he went out to do this broker's
23 opinion that you've talked about so far, was he hired to
24 do that?

25 MS. STUDLEY: Form. Predicate.

1 A. Not that I recall.

2 Q. Who asked him to do it?

3 A. I don't know.

4 Q. So would we have to ask the person who hired
5 him to know whether he was paid?

6 MS. STUDLEY: Form.

7 MS. SCHULTZ: Form.

8 A. Yes, or I would say talk to the person who had
9 those conversations with him, which would be -- to
10 narrow it down -- I think Mr. Stein or Ms. Crispin.

11 Q. But you never had any discussions with
12 Mr. Stein or Ms. Crispin about the retention agreement
13 with -- or whatever the payment agreement was with
14 Mr. Lieberman?

15 MS. STUDLEY: Objection. That's work product.
16 I'm going to direct him not to answer. You asked him
17 what he talked to Ashley or Mr. Stein about?

18 MR. DENMAN: About the expert that they used
19 to testify in court?

20 MS. STUDLEY: Yeah. Right. You can't --
21 that's work product.

22 MR. DENMAN: Seriously?

23 MS. STUDLEY: Seriously. Well, am I'm going
24 to ask you what you talk to your partners about?

25 MR. DENMAN: About the particular subject of

1 paying an expert to determine what the expert fee
2 relationship was?

3 MS. STUDLEY: Yeah.

4 MR. DENMAN: That's okay. I'm not going to
5 fight with you.

6 BY MR. DENMAN:

7 Q. Do you know whether any type of agreement
8 existed regarding compensating Lipa Lieberman for the
9 work that he performed in connection with any of the
10 properties at issue?

11 MS. STUDLEY: Form. Asked and answered.

12 MS. SCHULTZ: Form.

13 A. I don't know, the same answer.

14 Q. If such an agreement existed, would that be
15 within your files?

16 MS. STUDLEY: Form.

17 A. If there was a written agreement that was
18 transmitted to us, yes.

19 Q. What about if there was just an e-mail
20 communication understanding what the compensation would
21 be, would that be within your files?

22 MS. STUDLEY: Form.

23 A. I'm using the -- to me that's written even
24 though it's electronic.

25 Q. I guess I'm talking about sometimes there are

1 agreements in e-mails to confirm understandings, and
2 other times there's written contracts such as the
3 exclusive agreement, listing agreement, that was entered
4 into prior to the sale.

5 You've told me that you're not aware of any
6 actual contract that existed?

7 A. Correct.

8 Q. Do you know whether there is any type of
9 e-mail communication regarding the understanding of
10 payment to Lipa Lieberman for his services performed?

11 A. I don't know.

12 Q. If there was any type of understanding
13 regarding a payment to Lipa Lieberman for the services
14 that he was to perform between either Ms. Crispin or
15 Mr. Stein in connection with the litigation ongoing,
16 is that something that you would expect to be copied to
17 you?

18 MS. STUDLEY: Calls for speculation.

19 A. Possibly.

20 Q. I mean, is that the procedure, the way things
21 work? Do you, as the partner overseeing everything,
22 expect to have those communications passed by you?

23 MS. STUDLEY: Same objection.

24 A. Typically.

25 Q. Do you know why a petition to compel Oliver,

1 Jr., to comply with the New York settlement was not
2 filed until 13 months after his noncompliance with the
3 settlement began?

4 MS. STUDLEY: Form.

5 A. I'm not sure, sitting here today, exactly why.
6 I know there were some discussions with Ms. Levine about
7 the agreement and his compliance, but that part I can
8 recall.

9 Q. Do you recall telling the Court, in connection
10 with getting the New York settlement approved, that the
11 guardian would receive double the rent the next month
12 after the settlement was approved?

13 MS. STUDLEY: Form.

14 A. I don't recall that without seeing the
15 transcript.

16 Q. Was that your understanding? That the rental
17 income, the full rental income on 808, was to begin the
18 month after the approval of the agreement?

19 A. I would have to look at the settlement
20 agreement.

21 Q. Do you dispute that your side represented to
22 the Court that rent receipts to Rogers would double the
23 next month during the hearing to seek approval of the
24 New York settlement?

25 MS. STUDLEY: Form.

1 A. I don't recall what, if any, representations
2 were made to the Court, and the best evidence of that
3 would be the transcript of the hearing.

4 Q. Do you have an understanding, as we sit here
5 today, whether you expected that a month after the
6 approval of the New York settlement, that all of the
7 proceeds from the rental income on 808 Lexington would
8 go to the guardian?

9 MS. STUDLEY: Form.

10 A. Again, without having the transcript and
11 reviewing the settlement, again, I couldn't answer that
12 definitively today.

13 MR. DENMAN: Let's go ahead and take a break.

14 (Recess taken).

15 BY MR. DENMAN:

16 Q. I will give you the amended complaint. Turn
17 to page 5 of the answer.

18 A. Okay. Yes.

19 Q. In paragraph 40 you answer: "Responding to
20 the 40th allegation denies as phrased because it was
21 ultimately determined that the divorce was fraudulently
22 procured by Julian Bivins."

23 Tell me what evidence you have to support the
24 statement that the divorce was -- that it was ultimately
25 determined that the divorce was fraudulently procured by

1 Julian Bivins.

2 MS. STEIN: Form.

3 A. Yeah. Probably the best way to answer that
4 today would be to look at the -- which I don't have, to
5 look at the petition for court approval for us to seek
6 to set aside on full faith and credit grounds the
7 divorce. That would be probably the best document to go
8 to now for that information.

9 Q. You would agree with me there is no -- that
10 there's never been an evidentiary hearing on whether or
11 not the Texas divorce was fraudulently procured by
12 Julian Bivins?

13 MS. STUDLEY: Form.

14 A. Correct. There's never been a hearing on that
15 subject because the case ended up being settled as part
16 of the New York -- that claim ended up being settled as
17 part of the New York settlement.

18 Q. Are you aware of any factual findings by any
19 Court that the divorce of Oliver, Sr., and Lorna Bivins
20 was fraudulently procured by Julian Bivins?

21 A. I'm not aware of findings by a court in that
22 regard.

23 Q. Are you aware of any agreement or admission by
24 Julian Bivins that he fraudulently procured the divorce
25 of Oliver, Sr., and Lorna Bivins?

1 MS. STUDLEY: Form.

2 A. Again, on that score I would have to refer
3 back and look at the petition that was filed with the
4 court, and look at the files as to the evidence that has
5 been gathered to that point to answer that.

6 But do I recall, sitting here today, a classic
7 admission and writing by Julian to that effect? No, but
8 I'm not a hundred percent sure that there's no writing
9 that might relate to that. That's why I'm being
10 cautious.

11 Q. So then right now -- I'm just trying to find
12 out what you based your statement on in paragraph 40 of
13 your answer that it was ultimately determined that the
14 divorce was fraudulently procured by Julian Bivins. And
15 it sounds like the only thing you've told me -- correct
16 me if I'm wrong -- is that if you extrapolate from the
17 order awarding your firm a contingency fee in connection
18 with the petition to determine beneficiaries, that it
19 can be extrapolated that that is a determination that
20 the divorce was fraudulently procured by Julian Bivins;
21 is that right?

22 MS. STUDLEY: And nothing to do with any
23 conversations with counsel.

24 A. I mean, that would be one implication, but I
25 think I'm reading this a little bit differently perhaps

1 than you are.

2 Q. Tell me how you're reading what you stated.

3 A. We got Court approval over objections from you
4 and your client to proceed with that litigation. So
5 there was somewhat of a mini trial, let's call it, on
6 that, on being able to proceed to set aside the Texas
7 divorce.

8 Q. Well, didn't the Court actually say this is
9 not my jurisdiction as to the merits of your pleading.
10 If it goes to are you asking me whether you can file it
11 before the Lorna court's judge, you can file it, but I
12 am not weighing in on the merits? Isn't that what
13 occurred?

14 MS. STUDLEY: Form.

15 A. Again, we would have to look at the whole
16 transcript, but, if that's a remark that was made, there
17 were other arguments or presentations to the Court that
18 I think are relevant to what you're asking. And the
19 petition itself would have laid out some of the grounds,
20 but I don't have any of that here.

21 Q. Right.

22 The petition laid out your grounds as to why
23 you thought the order from Texas on the divorce should
24 not be given full faith and credit, correct?

25 A. Correct.

1 Q. And then we filed an objection as to
2 constitutional law as to why we believe that the order
3 should be given full faith and credit, correct?

4 A. I recall you filed an objection on what the
5 bases were.

6 Q. A motion to dismiss on constitutional grounds,
7 correct?

8 A. Could have. I just don't recall what pleading
9 was filed.

10 Q. The Court did --

11 MS. STUDLEY: You have to let him finish.

12 Q. The Court did not rule on the merits, but
13 instead said I'm not going to get to the merits. If the
14 question is can they file this in the other court, I'm
15 going to let them file and let the judge there rule on
16 the merits.

17 MS. STUDLEY: Form. Asked and answered.

18 A. And, again, I don't recall precisely what the
19 Court ruled. That would be in the transcript and the
20 Court's order. I just know, from recollection, this was
21 a hearing, as many of these hearings in this case, that
22 went deeper than the surface.

23 They took a certain amount of time. There
24 were various sundry arguments made. I just can't
25 remember all of them today from three years ago or

1 whenever it was.

2 Q. But in that motion to dismiss, the Court
3 didn't take evidence, correct?

4 MS. STUDLEY: Form. Asked and answered.

5 A. Again, I don't recall because this ended up --
6 the motion to dismiss, as I do recall, was part of the
7 overall seeking approval to proceed with the case. So
8 there might have been some evidence taken; for that
9 part, I need my file. I need some documents to put that
10 back together.

11 Q. Brian, I apologize. I feel like we're
12 spinning in a circle here. I'm trying to find out:
13 When you state as a fact in a pleading that it was
14 ultimately determined that the divorce was fraudulently
15 procured by Julian Bivins, I would like to know what is
16 the evidentiary support or documentary support that you
17 can make the statement that the divorce was fraudulently
18 procured by Julian Bivins.

19 MS. STUDLEY: Just a minute. I'm going to
20 object. Same objection as before.

21 A. And you've already given the one of -- you
22 mentioned one of them, the approval of the Court, but I
23 think also the approval before the settlement. I think
24 you also have to look at the approval of the Court of
25 the ability to take the action to start with.

1 Q. But where is it ever said in there that any
2 finding, any order, anything that says Julian Bivins
3 fraudulently procured that divorce?

4 MS. STUDLEY: Form.

5 A. And I'm not saying there's necessarily a
6 finding that says that, but we were allowed to proceed
7 forward with the action that ultimately sought to
8 overturn the divorce.

9 Q. Would you look at the amended complaint,
10 please.

11 A. Sure. Which paragraph?

12 Q. Paragraph 40.

13 A. Okay.

14 Q. In paragraph 40 it says: "Following the
15 divorce, Oliver, Sr., transferred to Julian interests
16 owned by Oliver, Sr., and several parcels of real
17 property, including the oil and mineral rights in
18 Amarillo, Texas, and a condominium in Amarillo, Texas,"
19 right? That's what the allegations in the complaint
20 say?

21 A. Yes, the amended -- okay. Let's make sure.

22 So the Amended Complaint and Affirmative
23 Defense. This the answer to the amended complaint.
24 That may be where there's a problem.

25 MS. STUDLEY: Let me see.

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1 MR. DENMAN: That's what I thought.

2 MS. STUDLEY: Okay.

3 THE WITNESS: Go ahead. Sorry.

4 BY MR. DENMAN:

5 Q. Just for the record, I think it's clear that
6 this is the answer to that amended complaint, just so
7 we're clear.

8 A. I wanted to make sure.

9 Q. So you saw the allegation, and your answer to
10 that allegation is: "Denies as phrased because it was
11 ultimately determined that the divorce was fraudulently
12 procured by Julian Bivins"; is that right?

13 A. Yes. I mean, that's what it says, "denies as
14 phrased." And then if you look at paragraph 40, of
15 course, the litigation in Texas centered on the
16 fraudulent transfer, the improper transfer of those
17 mineral interests. So that was at the forefront of the
18 Texas litigation and ultimate settlements. Yes.

19 Q. I guess I'm asking you about just the sentence
20 that you made, which is the divorce was fraudulently
21 procured. Isn't it true that you have no evidence that
22 -- let me strike that.

23 That it has never been determined anywhere
24 that the divorce was fraudulently procured by Julian
25 Bivins?

1 MS. STUDLEY: I'm going to object on
2 predicate.

3 A. And I would say, as we've been going around
4 and around, there have been court orders approving the
5 overall settlement, court orders allowing us to proceed;
6 how one couches them as to whether it's a finding, not a
7 finding, a generalized finding, I think is what you and
8 I are disputing it sounds like.

9 Q. Yeah. I'm just trying to find out: Even
10 whether you say there's a court order approving a
11 settlement, in what court order is there any statement
12 by any court approving a settlement that the divorce was
13 fraudulently procured by Julian Bivins?

14 MS. STUDLEY: I think it has been asked and
15 answered many times, but I will give you one more shot.

16 A. And I think you're struggling to find is there
17 some line that says that. I'm saying by implication I
18 see where one can reach that conclusion. So I differ
19 with you. You differ with me on that.

20 Q. Well, you didn't say in your answer that it
21 was that -- it has been implied by virtue of something.
22 You're saying it was ultimately determined. As a
23 lawyer, you know how orders are important.

24 You would agree with me that what's ultimately
25 determined is different than implication, correct?

1 MS. STUDLEY: Objection to form. Predicate.

2 A. Again, it depends on the facts and
3 circumstances of what's being ultimately determined.

4 THE WITNESS: Should I keep this (indicating)?

5 MS. STUDLEY: No, these are your copies, I
6 think, right?

7 THE WITNESS: Thank you.

8 MR. DENMAN: I'll take them, I need them.

9 MS. STUDLEY: I may have some.

10 BY MR. DENMAN:

11 Q. Were you involved at all in the petition to
12 enforce the New York settlement with regards to Oliver,
13 Jr.?

14 A. That was filed by our firm or by you because I
15 remember there being two.

16 Q. I filed a motion to compel compliance pursuant
17 to the terms of the settlement. So just for
18 clarification: I think your firm filed a petition. So
19 that's why I used the word "petition."

20 So, as far as the petition is concerned, were
21 you involved in that?

22 A. I would have had some involvement with it, but
23 exactly what it was, I would have to go back and look at
24 my billing records, the file, to be absolutely sure what
25 it was. I can remember the petition being filed.

1 Q. Are you aware of anywhere in the petition that
2 was filed by your office where it was sought that, in
3 connection with that petition, that Steve Kelly would
4 get a full release from Julian Bivins and Oliver Bivins,
5 Jr.?

6 A. Without looking at it, I just don't have a
7 specific recollection about what it says. I would have
8 to look at it.

9 Q. Are you familiar with the petition to approve
10 the settlement in that case, the purported settlement
11 that was agreed to by between Ms. Crispin and Ms.
12 Levine, for approximately \$120,000?

13 A. Not specifically. Again, I would have to look
14 at if there's a pleading that says that, for example.

15 Q. Well, these pleadings are something -- like
16 that would have gone through you. You would have
17 reviewed these before they were filed, right?

18 A. Yes.

19 MS. STUDLEY: Form.

20 Q. Are you aware of any requests that a Court
21 approve any provision in that settlement that Steve
22 Kelly be released by Julian Bivins or by Oliver, Jr.?

23 MS. STUDLEY: Form.

24 A. I'm not sure without looking at it.

25 Q. Did you review the Trust document at or around

1 the time of the petition to sell 808 to determine
2 whether the Trust was making monthly payments to all of
3 Oliver, Sr.'s providers?

4 A. Which Trust?

5 Q. The Bivins Management Trust.

6 A. I don't recall.

7 Q. Your firm got paid on the contingency fee with
8 regard to the net value of 808 after the mortgage was
9 deducted, correct?

10 MS. STUDLEY: Form.

11 A. Again, I would want to look at it to be --
12 that sounds correct, but I would want to look at the
13 Court's order to be a hundred percent sure. But I
14 believe the mortgage was -- if I'm doing the guessing
15 game, I would guess that it was deducted.

16 MS. STUDLEY: We don't want you to guess.

17 Q. What you sought was to be paid a percentage of
18 the proceeds of the sale -- or, excuse me, the value of
19 the property that you brought back into the estate less
20 the mortgage, correct?

21 MS. STUDLEY: Form.

22 Q. That's what you sought?

23 MS. STUDLEY: Form.

24 A. I guess we sought whatever was in the petition
25 seeking a payment of our fees.

1 Q. And at the time that you sought fees, it was
2 based upon the mortgage value being set at 465 under the
3 New York settlement, right?

4 MS. STUDLEY: Form.

5 A. That's what I don't recall. I would have to
6 -- the numbers, I mean; the concept, yes, but not the
7 numbers.

8 Q. Well, you would agree with me that it would be
9 within your fiduciary duty to your client that if you
10 actually got paid for more than you should have been
11 under the valuation, that you should return that money
12 to the guardianship, correct?

13 MS. STUDLEY: Object to form. Speculation.
14 Predicate.

15 A. I'm not aware that we were overpaid for our
16 services; our experts say we were underpaid for our
17 services.

18 Q. Well, you know that the amount of the mortgage
19 that was actually paid to Beachton to satisfy the
20 Beachton mortgage was approximately 600,000, not 465,
21 correct?

22 MS. STUDLEY: Form.

23 A. Again, it depends on what the value of the
24 mortgage was, what date, what was paid on the closing
25 statement; those are things that I just don't know.

1 Q. So if you got paid, based upon the mortgage
2 being only 465 as opposed to being 596, then you should
3 reimburse the guardianship for the overage, correct?

4 MS. STUDLEY: Form.

5 A. No.

6 Q. So if the order was that you should be -- you
7 should get paid net of the amount that the estate, the
8 guardianship estate, has to pay on the mortgage and you
9 got paid more than the net amount, wouldn't you agree
10 that you would owe reimbursement to the estate?

11 MS. STUDLEY: Form. Speculation.

12 A. Well, we would have to go back and look at
13 the order. We would have to look at the transcript of
14 the hearing, what was the evidence that was presented,
15 what was argued, what was the amount of the loan, should
16 it be deducted at some level as opposed to another.

17 We would have to have all of those facts and
18 circumstances before us.

19 Q. And the mortgage would have only been 465 had
20 the mortgage been refinanced within a period of time,
21 correct?

22 MS. STUDLEY: Form.

23 A. And, again, that gets to the numbers. That's
24 the part that I can go off on a wild speculation and
25 disappoint my counsel because I just don't know.

1 Q. Well, you know that there was an obligation,
2 or you know that you -- actually, let me strike that.

3 You know that you represented to the Court
4 that you would seek to refinance the Beachton mortgage
5 with Stein through the use of commercial financing?

6 MS. STUDLEY: Form.

7 MS. SCHULTZ: Form.

8 MS. STUDLEY: Predicate.

9 A. And we covered this, I believe, before in
10 terms of what was represented and what was argued. We
11 need to look at the transcript as to who exactly said
12 what because I couldn't tell you today three years ago
13 that Mr. Stein said A, B, C.

14 Q. So you have no recollection of you having an
15 understanding that the guardianship would seek
16 commercial lenders to refinance Beachton as soon as
17 possible after the New York settlement was entered into
18 to get rid of the default interest rate?

19 MS. STUDLEY: Objection. Form.

20 MS. SCHULTZ: Objection. Form.

21 A. Again, I can't tell you that there was this
22 discussion on this date or this date, and I would want
23 to see what does the settlement read and the court order
24 approving it to be definitive.

25 Q. You were the attorney responsible for filing

1 the initial verified guardianship report on September
2 14th, 2014, correct?

3 A. I would need to see it for -- which guardian
4 -- Mr. Rogers at that point?

5 Q. Stephen Kelly.

6 A. Stephen Kelly. Yeah. That's why I would need
7 the report.

8 Q. You signed the verified report on behalf of
9 Stephen Kelly in September of 2014 acknowledging that
10 causes of action existed as to Beachton related to its
11 status as a lender and to Oliver, Jr., regarding
12 obligations under the New York Settlement Agreement,
13 that you would have a duty for the ward to pursue those
14 actions?

15 MS. STUDLEY: Form.

16 A. It depends on at that point in time what
17 causes of action exist, what were the merits behind it,
18 how much would they cost to prosecute. On an inventory
19 you certainly would want to list all possible causes of
20 action. But the answer to your question, which is
21 different than just listing on an inventory, you would
22 need a lot more facts.

23 Q. On September 14th, 2014, if the initial
24 verified guardianship report by Stephen Kelly was signed
25 by you indicated that Oliver, Jr. -- that there was a

1 cause of action against Oliver, Jr., regarding
2 obligations under the New York settlement, do you know
3 why it took another four months for your law firm to
4 file that action against Oliver, Jr.?

5 MS. STUDLEY: Form.

6 A. And in relation to this, I think we covered
7 this before, too; the timing of it, I'm not sure when it
8 was. I do know there were going settlement negotiations
9 with our office and Donna Levine about the enforcement
10 of the settlement agreement with Oliver, II.

11 THE REPORTER: Too or two?

12 THE WITNESS: Or the II, or Roman numeral 2,
13 or junior.

14 THE REPORTER: Okay. Thank you.

15 MR. DENMAN: Let's take a break for a minute.

16 (Recess taken).

17 MR. DENMAN: I have no further questions;
18 however, I reserve the right to resume this deposition
19 by providing copies of all of the transcripts that
20 Mr. O'Connell sought to review. But it's a quarter to
21 6:00, and I have plans this evening I must attend to.

22 We started about 3:15 p.m. I just reserve the
23 right to come back with the transcripts to get further
24 clarification of all those answers that Mr. O'Connell
25 said he could not answer without reviewing the

1 transcripts to review them in context.

2 MS. STUDLEY: We're here and prepared to go.
3 We have the transcripts. We're ready to go. I don't
4 think that we object to that request. We're ready. We
5 can take the seven hours. Mr. O'Connell is here. He's
6 ready to testify. We don't agree that he's going to
7 come back and answer more questions because you didn't
8 provide him transcripts at the time of questioning.

9 MR. DENMAN: We started in --

10 MS. SCHULTZ: I also have a few questions, but
11 I'll be very fast.

12 MR. DENMAN: Go ahead.

13 CROSS-EXAMINATION

14 BY MS. SCHULTZ:

15 Q. Who was ultimately responsible for the
16 decision to enter into the New York settlement?

17 A. The guardian.

18 Q. And who was ultimately responsible for the
19 decision to sell 808 Lexington?

20 A. The guardian.

21 Q. Are you aware that the foreclosure action was
22 instituted by Beachton for 808 Lexington?

23 A. Yes. I'm aware there was a foreclosure action
24 that was filed. Yes.

25 Q. And isn't it true that Keith Stein prevented

1 that foreclosure action from preceding?

2 MR. DENMAN: Objection to form.

3 A. I know he filed -- I'm not sure what
4 pleadings they were, but, I guess, in effect, the
5 foreclosure didn't proceed, if that helps you.

6 Q. Well, that was going to be my next question.

7 Beachton never actually foreclosed on the
8 property?

9 A. Correct.

10 Q. And funds from the sale of 808 Lexington were
11 used to pay off the Beachton mortgage, correct?

12 A. Yes.

13 Q. And the mortgage on 808 Lexington ultimately
14 was satisfied, correct?

15 A. Correct.

16 MS. SCHULTZ: That's all I have. Thank you.

17 MR. HECHTMAN: Wendy?

18 MS. STEIN: (No response).

19 MS. STUDLEY: Do you have any questions,
20 Wendy?

21 MS. STEIN: I'm sorry. No questions.

22 MS. STUDLEY: I'm sorry. I didn't hear you.

23 THE WITNESS: Read if it's transcribed.

24 MS. STUDLEY: Yeah. We'll read.

25 THE REPORTER: Ms. Studley, do you want a copy

1 if it's ordered?

2 MS. STUDLEY: Yes. Yes.

3 MS. SCHULTZ: I want one as well, please.

4 THE REPORTER: Thank you.

5 MR. DENMAN: I want a copy regular time,
6 please.

7 THE REPORTER: Thank you, sir.

8 MS. STEIN: No copy.

9 THE REPORTER: Thank you.

10 (Deposition concluded and signature reserved).
11
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JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
BRIAN M. O'CONNELL, ESQUIRE

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CERTIFICATE OF OATH

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

I, MARK RABINOWITZ, Notary Public, State
of Florida, do hereby certify that BRIAN M. O'CONNELL,
ESQUIRE, personally appeared before me and was duly
sworn.

Signed this 9th day of January, 2017.

Mark Rabinowitz

MARK RABINOWITZ, RPR
Notary Public, State of Florida
My Commission No.: EE955621
Expires: 03/01/20



JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
BRIAN M. O'CONNELL, ESQUIRE

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REPORTER'S CERTIFICATE

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

I, MARK RABINOWITZ, Notary Public, State of Florida, certify that I was authorized to and did stenographically report the deposition of BRIAN M. O'CONNELL, ESQUIRE; that a review of the transcript was requested; and the foregoing transcript pages 4 through 99 is a true and accurate record of my stenographic notes.

I further certify I am not a relative, employee, or attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED this 19th day of January, 2017.

Mark Rabinowitz

MARK RABINOWITZ, RPR



JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
BRIAN M. O'CONNELL, ESQUIRE

1 RACHEL STUDLEY, ESQUIRE
Wicker Smith O'Hara McCoy & Ford, P.A.
2 515 North Flagler Drive
West Palm Beach, Florida 33486
3

4 Dear Ms. Studley:

5 This letter is to advise the transcript for
the above-referenced deposition has been completed and
6 is available for review. Please contact our office at
(800)275-7991 to make arrangements to read and sign or
7 sign below to waive review of this transcript.

8 It's suggested the review of this transcript
be completed within 30 days of your receipt of this
9 letter, as considered reasonable under Federal Rules*;
however, there is no Florida Statute in this regard.

10 The original of this transcript has been
forwarded to the ordering party and your errata, once
11 received, will be forwarded to all ordering parties
for inclusion in the transcript.

12 Sincerely,

13
14 Mark Rabinowitz, RPR
15

16 cc: J. Ronald Denman, Esquire; Rachel Studley, Esquire;
Alexandra Schultz, Esquire; Wendy J. Stein, Esquire
17

18 Waiver:

19 I, _____, hereby waive the reading and
signing of my deposition transcript.
20

21 _____
Deponent Signature

_____ Date

22 *Federal Civil Procedure Rule 30(e) and
23 Florida Civil Procedure Rule 1.310(e)
24
25



JULIAN BIVINS vs. CURTIS CAHALLONER ROGERS, JR.
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 9:15-cv-81298-KAM/Matthewman

JULIAN BIVINS, as Personal Representative of
the ancillary Estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR., as
former guardian, *et al*,

Defendants.

CLO DEFENDANTS' PROPOSED VOIR DIRE QUESTIONS

Defendants, Brian M. O'Connell, Ashley N. Crispin, and Ciklin Lubitz & O'Connell ("CLO Defendants"), by and through their undersigned counsel, in accordance with this Court's Order Setting Trial Date [DE 51] submit the following proposed *voir dire* questions.

1. Are you familiar with the following individuals or entities?
 - a. The Plaintiff's representative, Julian Bivins?
 - b. Oliver Wilson Bivins, who died in 2015?
 - c. Mr. Bivins' widow, Lorna Bivins?
 - d. The law firm in West Palm Beach, Ciklin, Lubitz & O'Connell?
 - e. Attorneys Brian O'Connell or Ashley Crispin Ackal who work at the Ciklin, Lubitz & O'Connell law firm?
 - f. Attorney Keith Stein, an attorney who works in New York?
 - g. The Beys, Stein, Mobargha and Berland, LLP law firm in New York?
 - h. The lawyers in the Courtroom: Rachel Studley, Brandon Hechtman, Jeffrey Blaker, Alexandra Schultz, or Ron Denman?
2. This case involves a guardianship. Are you familiar with Stephen Kelly or Curtis Rogers, professional guardians?
3. Have any of you ever been involved in a court proceeding where a person has been determined to be mentally disabled? If so, please tell us about that.

4. Have any of you or anyone you know ever been appointed the legal guardian of a mentally disabled or incapacitated person? If so, tell us about that.
5. This case involves claims that attorneys did not do their job properly. Have you or anyone close to you been represented by an attorney in which you felt dissatisfied about how the attorneys handled the lawsuit? If so, tell us about that.
6. Any of you have friends or family who are lawyers? Who? Who employs? What type of law? Does he/she ever discuss his/her job?
7. Anyone have experience with paying legal fees, either hourly or under a contingency agreement. If under a contingency agreement, did you have an understanding as to whether the attorney had the risk of loss if not successful in the lawsuit? What is your experience with that?
8. Does anyone have a belief that lawyers earn too much money?
9. Anyone have any negative or bad feelings about attorneys generally. If so, please tell us about that?
10. Do you, or does anyone close to you, have any knowledge, training, education or experience in the following areas:
 - a. Real Estate Sales,
 - b. Real Estate Brokerage,
 - c. Property Appraisal,
 - d. Mortgages,
 - e. Leases,
 - f. Building Maintenance.
11. Have you ever acted as a trustee of a trust or held a position where you owed a fiduciary duty? Tell us about that.
12. Have you ever been appointed as a Personal Representative of an Estate? Will that experience influence you one way or the other towards or against the Estate in this case?
13. Has anyone here served on a jury in a civil or criminal case? If so, tell us about that. Have you served as a foreperson?
14. Has anyone here ever been involved in a lawsuit as either a plaintiff or as a defendant? If so, please describe the lawsuit and whether you felt you were treated fairly.
15. This case involves a claim involving claims over property of the estate of a person who is now deceased. Have any of you been involved in any type of dispute over wills, trusts or property of a person who has died. If so, please tell us about that.

16. Do you have any feelings one way or the other about someone who already has a lot of money suing for more money?
17. In this case, you are going to be asked to award the Plaintiff money. Does anyone have any reservations in rendering a verdict in favor of the Defendants if the Plaintiff fails to prove that any Defendant was negligent?
18. Does anyone have any thoughts on whether any of the Defendants must have done something wrong just because they have been sued? If so, tell us about that.
19. In this case, the Plaintiff is claiming millions of dollars in damages. Does the fact that Plaintiff is claiming millions of dollars in damages impress upon you that the Plaintiff deserves millions of dollars?
20. Does the fact that the Plaintiff is claiming millions of dollars lead you to have any feelings whatsoever that he deserves at least some money?
21. Do you believe that, just because someone files a lawsuit, that person should recover something? Tell us about that.
22. In this case, the Defendants have contended that the claims being made by the Plaintiff are barred because the claims being made were previously settled. If the Defendants prove their case, do you believe this will be too harsh a result?
23. Is anyone familiar with the phrase "blood is thicker than water", meaning we justify choosing family bonds over anything else. Do you agree with that phrase? What are your thoughts?
24. Does anyone believe that a biological child should have greater rights under the law than an adopted child? Please tell us your thoughts.
25. Do you have any concerns that your emotions may influence you in considering the amount of money if any that should be awarded in this case?
26. Does anyone feel any concern that they would give the benefit of the doubt to an individual over an attorney? Please explain.
27. Do you have any outside commitments such as family or business which would prevent you from serving fairly and impartially as a juror in this case and devoting your full attention to the dispute between the parties in this case?
28. Is there anything about your background experience, training, and beliefs that might impact your ability to be a fair and impartial juror in this case?
29. Is there anything you prefer to discuss in private?

30. Is there anything we have not asked you that you think we should know?
31. Can you think of anything in your own life that reminds you of this case? What is it and how does it remind you?
32. You all know the statue of lady justice, right? What do you notice about her? The scales and that she is blindfolded, right? Why is she blindfolded? Justice is unbiased, no matter rich or poor, likable or unlikable. Do you believe justice should be blind?

Respectfully submitted,

/s/ Rachel Studley
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on counsel for the Plaintiff via email according to the below service list on June 30, 2017 and then a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF system on July 7, 2017, and the foregoing document is being served this day on all counsel or parties of record on the Service List below, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

/s/ Rachel Studley
Rachel Studley, Esquire

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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 benefitted 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 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)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No. 9:15-cv-81298-KAM/Matthewman

JULIAN BIVINS, as Personal
Representative of the ancillary Estate
of Oliver Wilson Bivins,

Plaintiff,

v.

CURTIS CAHALLONER ROGERS, JR.,
as former guardian, *et. al*,

Defendants.

**DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW
AND FOR NEW TRIAL, AND ALTERNATIVE MOTION FOR REMITTITUR**

Defendants, Ciklin Lubitz & O'Connell, and attorneys Ashley N. Crispin and Brian M. O'Connell ("Defendants"), renew their motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 and move for a new trial or remittitur under Fed. R. Civ. P. 59, and state:

INTRODUCTION & OUTLINE OF DEFECTS IN PLAINTIFF'S PROOF

Defendants renew their motion for judgment as a matter of law because Plaintiff failed to present competent proof that Defendants committed legal malpractice or breached a fiduciary duty to Oliver Bivins, Sr. (the "Ward"). Plaintiff failed to present the jury with *any* expert testimony. That alone is fatal to the claims in this case and, by itself, should result in entry of judgment as a matter of law for Defendants under Rule 50.

While Plaintiff disclosed an expert on some of the issues – which expert was stricken – Plaintiff had no expert to testify about numerous critical elements of duty, causation and damages with regard to the Guardian's settlement of thirteen litigated matters. For example, Plaintiff had no expert to testify that "but-for" some breach of duty by Defendants, the Ward would have received a more favorable outcome at the conclusion of the pending complex litigation and appeals

in Texas, New York and Florida.¹ At the risk of oversimplification, absent expert testimony on that "case-within-a-case" issue, Plaintiff's claims all fail as a matter of law.

At most, Plaintiff tried to prove that the value of one property involved in the New York litigation was substantially higher than the broker's opinion relied upon by the Guardian, as a result of Defendants' alleged failure to obtain an MAI appraisal. Again, this case is about far more than just getting an MAI appraisal. But on just that narrow issue, Plaintiff's claims fail on all fronts. First, as to liability, there was no expert testimony that the standard of care in the relevant legal community required an MAI appraisal. The uncontroverted evidence from all three of the Guardian's lawyers and both experts was that using a broker's opinion does not fall below the standard of care. There is no expert testimony that a lawyer representing a Guardian or a Ward must obtain an MAI appraisal, rather than rely on a broker's opinion.

Second, as to causation, there is no proof that an appraisal obtained on or before May 8, 2013, the date of the settlement conference, would have shown a fair market value higher than the broker's opinion. Proof of causation in this case would have required Plaintiff to show, at a minimum, that an MAI appraisal would have been different than the broker's opinion. (And, beyond that, Plaintiff still would have needed to prove the Guardian would have obtained a better net outcome if he was aware of a higher market value at the time of the settlement.)

Third, as to damages, there is no way to sustain an award of any damages, let alone \$16.4 million. There is no competent evidence as to the value of the 67th Street property in May 2013, other than the broker's opinion. Plaintiff failed to call an expert on value; relying solely on a sale nearly 18 months after the valuation date. That sale price – by itself and without the testimony of an expert– is not competent evidence of value. Moreover, the damages awarded in this case are so grossly excessive the Court would have to order a new trial or a remittitur if the claims had been proven.

¹ The multi-facteted New York settlement included the dismissal of an appeal by the Ward's other son, Oliver Bivins, Jr. The appeal challenged a settlement between Julian Bivins and the Guardian over ownership of the Ward's oil, gas and mineral interests, valued at \$20 million. The Florida Petition challenged the full faith and credit to be given to a Texas divorce decree and whether the Ward could receive an intestate share of his former wife's Florida estate. The jury needed expert testimony (perhaps multiple experts from different states) on these issues.

The jury was not free to speculate on the standard of care, without expert testimony. The question is not whether it might be *better* to get an appraisal, but whether the standard of care in the relevant legal community *required* one. The jury was not free to speculate on the outcome of any one issue – the Texas appellate proceedings; the New York partition action; or the Petition to Determine Beneficiaries in Florida – let alone the overall net outcome of this complex litigation. Without expert testimony as to each case, and expert testimony as to the overall net result to the Ward, there is no support for any verdict in favor of Plaintiff. The jury also was not free to speculate on damages. The verdict amount is more than double the amount "computed" by the Plaintiff's damages/math witness, and presupposes complete victory – the best possible outcome for the Ward on every issue in every case. ²

This motion addresses the legal and factual defects of Plaintiff's case which were first addressed when the Court excluded Plaintiff's expert witness, and were raised again at the close of all evidence. The Court reserved ruling, and Defendants timely renew their Rule 50 motion for judgment as a matter of law. For brevity, clarity and judicial economy, Defendants combine in this Motion an alternate request under Rule 59 for a new trial or remittitur.

LIABILITY ISSUES

A. Plaintiff has not put forth ANY expert testimony on the duty owed or proof of a deviation from that standard of care.

Once Plaintiff's expert was stricken, both of Plaintiff's claims for professional negligence and breach of fiduciary duty failed as a matter of law. The Court reserved ruling on the motion for judgment as a matter of law before the verdict, but now should enter judgment in favor of Defendants. In a legal malpractice or breach of fiduciary duty case, each issue implicating a professional duty or exercise of professional judgment requires expert testimony. Plaintiff's counts for malpractice and breach of fiduciary duty are discussed below.

1. Malpractice

² The jury invented a damages number far beyond anything supported by the record evidence. Even a complete victory on the Florida Petition would have yielded only a 50% interest in the 67th Street property, net of mortgage debt and estate obligations under section 733.707.

The two claims at issue in this case are breach of fiduciary duty and legal malpractice concerning the discrete duties owed to the Ward by attorneys for the professional guardians. The underlying litigation involved a complex guardianship, with multiple litigated matters in three different states, and issues concerning the care of the 90-year old Ward. The applicable duty and standard of care for a professional guardian's counsel in this situation are far outside the common knowledge of a jury. Without expert testimony, a lay jury can only speculate as to whether an attorney's actions constituted negligence. *Willage v. Law Offices of Wallace & Breslow, P. A.*, 415 So. 2d 767, 768 (Fla. 3d DCA 1982)³. "Our review of Florida case law indicates that a legal malpractice plaintiff **must** present expert testimony to establish the appropriate standard of care (and breach thereof) unless the lawyer's lack of care and skill is so obvious⁴ that the trier of fact can resolve the issue as a matter of common knowledge." *Evans v. McDonald*, 313 Fed. Appx. 256, 258 (11th Cir. 2009)(applying Fla. Law) (emphasis added). But, as here, "when the facts of the case are such that the duty owed and the standard of care are not common knowledge then an expert opinion is necessary to establish a breach." *Id.* As such, the professional negligence claims against Defendants fail as a matter of law for absence of expert testimony on the standard of care.

2. Breach of Fiduciary Duty

"[C]ourts usually end up analyzing both claims for breach of fiduciary duty and malpractice under the rubric of a malpractice claim." *Brenner v. Miller*, 09-60235-CIV, 2009 WL 1393420, at *2 (S.D. Fla. May 18, 2009). When the "essential thrust" of the breach of fiduciary duty claim is one of legal malpractice the case is evaluated from the lens of legal malpractice. *Jackson v. BellSouth Telecommunications*, 00-7558-CIV, 2002 WL 34382750, at *4-5 (S.D. Fla. Nov. 26, 2002)(Marra, J.).

³ Substantive Florida law applies in this diversity action. *Caster v. Hennessey*, 781 F.2d 1569, 1570 (11th Cir. 1986).

⁴ This case does not involve an obvious neglect of duty, as in *Anderson v. Steven R. Andrews, P.A.*, 692 So. 2d 237, 242 (Fla. 1st DCA 1997)(failure to file notice of appearance); *Suritz v. Kelner*, 155 So. 2d 831, 834 (Fla. 3d DCA 1963)(directing client not to answer on penalty of dismissal); *Galloway v. Law Offices of Merkle, Bright & Sullivan, P.A.*, 596 So. 2d 1205 (Fla. 4th DCA 1992)(failure to file within statute of limitations).

In this case, Plaintiff's claims for legal malpractice and breach of fiduciary duty are identical. A claim by a client against an attorney for breach of fiduciary duties is a claim for legal malpractice. *See* 4 Ronald E. Mallen and Jeffrey M. Smith, *LEGAL MALPRACTICE* § 15:2 (2017 ed.) (“a fiduciary breach is legal malpractice, because it concerns the representation of a client and involves the fundamental aspects of an attorney-client relationship”). As with negligence-based legal malpractice claims, expert evidence is required to establish the appropriate fiduciary duties owed by the attorneys unless such duties are a matter of common knowledge⁵. *Id.* § 34:20 at 1170-71 (“Just as the standard of care usually is beyond common knowledge, so are the often sophisticated issues concerning confidentiality and loyalty.”).

Moreover, Plaintiff must also prove the case within a case – “but for” the settlement, the Ward would have achieved a better result. The duties and issues raised by Plaintiff in the Pretrial Stipulation⁶ are beyond the understanding of a lay jury. Accordingly, Florida law requires Plaintiff to introduce expert testimony to meet its burden of proof in assisting the jury in coming to a conclusion. *Evans*, 313 Fed. Appx. at 258. Likewise, expert testimony is required on the standard for the duty owed by an attorney for breach of a fiduciary duty. The predicate of the breach of fiduciary duty claim is the attorney's duty owed as a lawyer for the guardian, therefore, the fiduciary duty owed is one of professional care and competence. *Supra* 4 *LEGAL MALPRACTICE* § 15:2 at 644-45. To that end, Plaintiff's breach of fiduciary duty claims here fails, because it relies on all of the same allegations as Plaintiff's malpractice claim. (Am. Compl. ¶¶ 100-105; 110-113; 127-133; 136-141 [DE 18]). *See e.g.* 4 *LEGAL MALPRACTICE* § 37:124 (sophisticated issues of breach of fiduciary duty like standard of care are beyond common knowledge requiring an expert); *Id.* at § 37:126 (“In some contexts, expert testimony truly is essential. Expert testimony is mandatory if the attorney purports to be a legal specialist or practiced in a legal specialty. Without expert testimony to establish the standard of care, there would be no basis for evaluating whether the attorney's conduct comported to the standard.”); *Id.* at § 37:135 (“In most respects, the rules

⁵ Mallen's authoritative treatise on attorney liability for malpractice and breach of fiduciary duty relies upon the same standard of law as Florida according to *Evans* discussed above.

⁶ *See* Appendix A, comparing Plaintiff's issues of fact for the jury in the Pretrial Stipulation with the actual testimony at trial.

concerning establishing a fiduciary breach parallel those concerning negligence. Expert testimony usually is necessary to establish the “standard of conduct,” which determines the fiduciary obligations and whether there was a deviation therefrom.”). *Accord Floyd v. Hefner*, 556 F. Supp. 2d 617, 643 (S.D. Tex. 2008)(“Expert testimony is also generally required to establish a fiduciary breach where the issues of confidentiality, loyalty in the context of conflicting interests or adverse representation or causation and damages are beyond common knowledge.”)(Texas and Florida law are in accord).

The issue of whether expert testimony is required to prove a breach of fiduciary duty when the attorney is acting in a professional capacity was resolved by the 11th Circuit, applying Georgia Law, in *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344 (11th Cir. 2008). In that case, the 11th Circuit explained that the failure to provide expert testimony on Plaintiff's negligence claim was case dispositive because the breach of fiduciary duty and unjust enrichment claims incorporated the allegations of legal malpractice without adding any independent factual allegations. *Id.* at 1357, n. 8. *Accord Marciano v. Kraner*, 10 A.3d 572, 577, 578 (Conn. App. Ct. 2011)(“a plaintiff cannot avoid his burden to present expert testimony to articulate the contours of that relationship by styling his cause of action as one for breach of fiduciary duty.”). In sum, the governing treatise on this topic and numerous other jurisdictions agree, expert testimony in cases involving a specialist attorney⁷ requires expert testimony on breach of fiduciary duty.

3. Appraisal

Insofar as Plaintiff's claims are partly based upon the alleged failure to obtain an MAI appraisal on the 67th Street property, there was no expert testimony on liability to prove the standard of care in the relevant legal community required an appraisal. Instead, the uncontroverted evidence established that the use of a broker's opinion met the standard of care, and that Defendants' counseled the guardian based upon the broker's opinions of value. Every witness and both experts testified it was appropriate to rely on a broker's opinion of value.⁸ Plaintiff failed to

⁷ Plaintiff needed an expert with “expertise to be able to say how an attorney for a guardian's supposed to act in all these broad contexts, which we have in this case.” (T. Vol. 8, 32:4-8)

⁸ In the guardianship case, Judge Colin said no appraisal was needed. (T8:113) That was confirmed by Defendants' expert, Skatoff. Attorney Stein testified he prefers broker opinions which are better than appraisals. (T2:95). Robbins (Stein's expert) testified: "when I had a

meet his burden to establish through expert testimony the standard of care in this guardianship matter required an MAI appraisal, not a broker's opinion of value. Likewise, there was no expert testimony that counsel for a ward's professional guardian was required to obtain an MAI appraisal, as opposed to a broker's opinion of value in connection with Manhattan real estate. Further, the absence of an appraisal does not substitute for the necessary expert testimony on multi-state/multi-issue litigation

4. Summary

While there is no doubt Defendants owed some professional duty of care to the Ward, it is incumbent on Plaintiff to prove exactly what that standard of care requires. Here, the New York settlement that involved the Lexington and 67th Street properties also concerned the legal interplay of the settlement of 13 litigated matters as well as the guardian's decision-making as to the best interest of the Ward. Plaintiff had to present expert testimony of the standard of care and the breach of that standard for every issue. Otherwise, it is legally impossible for the jury to find malpractice or breach of fiduciary duty.⁹

In Plaintiff's case, there was no expert testimony of any kind as to the standard of care or Defendants' breach of that standard, as attorneys for a guardian, handling numerous litigated matters or representing the guardian in a complex settlement. Importantly, one of the largest issues was the appeal by Oliver, Jr. of the Texas settlement creating a multi-million dollar trust for the benefit of the Ward. The NY Settlement required a dismissal of that appeal. Thus, expert testimony was needed to view the settlement of Lexington and 67th Street *not* in isolation, but from an overall totality of the various cases.

Plaintiff failed to offer any expert testimony, in part, as a result of the Court striking his chosen expert. Nonetheless, even if that expert had testified, the expert's pretrial, court-ordered disclosure did not cover every issue on which expert testimony was required, including all causation and damages issues necessary to sustain the verdict. Absent expert testimony on any

guardianship and we sold real property, we used a broker price opinion, and **that seems to be the common practice.**" (T8:249)

⁹ *Cronan v. Iwon*, 972 A.2d 172, 175 (R.I. 2009)(absent expert evidence to explain the appropriate standard of conduct owed by attorneys and guardians ad litem to an incapacitated ward, summary judgment was properly granted on plaintiffs' claim for breach of fiduciary duty).

element of the standard of care, the verdict must be vacated and judgment entered as a matter of law in favor of Defendants.

The testimony adduced and the Pretrial Stipulation in this case show the underlying duty and causation issues are multi-faceted and far too complex for a lay jury to decide on their own. "Without expert testimony, a lay jury could only speculate as to whether an attorney's conscious decision not to call a purported witness constituted negligence, where in the attorney's opinion, the witness on cross examination could have given testimony damaging to plaintiff's case." *Willage*, 415 So. 2d at 768.

"When the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict in favor of the defendant." *FDIC v. Icard, Merril, Cullis, Timm, Furen & Ginsburg, P.A.*, No. 8:11-CV-2831-T-33MAP; 13 WL 4402968 at *5 (M.D. Fla. Aug. 15, 2013).

Accordingly, Plaintiff similarly failed to meet his overall burden to establish through expert testimony the standard of care in this guardianship matter with regard to the settlement of thirteen litigated matters in the New York settlement, with particular regard to the difficulties inherent in mounting a successful full faith and credit challenge of a divorce, and vis a vis the needs of a ninety five year old ward.

It is not within the province of a jury to create or define the standard of care without expert testimony, nor can the jury ignore unrebutted expert testimony on the standard of care. Plaintiff's lawyer cannot merely allege what a lawyer is supposed to do; he must prove it. Because Plaintiff failed to prove the relevant standard of care required an appraisal, the verdict cannot stand and judgment as matter of law must be entered in favor of Defendants.

CAUSATION ISSUES

B. **Plaintiff did not prove how the "case-within-the-case" would have turned out but-for Defendants' alleged breaches.**

If there were an appraisal showing 67th Street was worth \$22.5 million, or any number higher than the broker's opinion relied upon by guardian, Plaintiff still would have to establish causation. Such causation would require proof there would have been some outcome more favorable to the Ward than provided by the New York settlement.

In *Keramati v. Schackow*, 553 So. 2d 741, 742 (Fla. 5th DCA 1989), a former client of a law firm alleged she entered into a settlement in an amount substantially less than her claims were worth, because the attorneys forced her to take the settlement or would "no longer represent her, and it would be too expensive to continue the litigation." *Id.* at 743. In such a case, the former client may sue, but must prove at trial both (i) breach of duty and (ii) had the suit been properly handled, the client could have recovered "substantially greater damages than the settlement amount." *Id.* at 746.

There is no evidence that the guardianship would have recovered substantially more than the New York settlement achieved if there have been an appraisal. In fact, a failure to settle coupled with the risk of losing the twenty million dollar trust from the Texas settlement was an unacceptable risk to the Ward. No one testified a more favorable settlement would have been made if Defendants had a \$22.5 million appraisal.

Likewise, and fatally deficient to the claim here, there is no proof the Ward would have prevailed in the underlying litigation especially with regard to the full faith and credit challenge to the Texas divorce and achieved a net result (after fees and costs) better than the New York settlement. For litigation-related malpractice such as negligently settling a case, this is what is often-referred to as the "case-within-a-case." In a malpractice or fiduciary duty case such as this, Plaintiff must prove by a preponderance of evidence he would have won the underlying case. *Keramati*, 553 So. 2d at 742. No such evidence was presented.

Here, that would not only require expert testimony that an MAI appraisal was the standard of care, but also would require a real estate appraiser testifying to the MAI appraised value of both properties on the date of the settlement conference. In addition, the net results of the thirteen litigated matters would also have to be analyzed by a qualified expert. Only by comparing the expected net result of the litigation, as determined by an expert lawyer and appraiser, with the actual value received from the settlement, could one compute any damages in this case. Because there is insufficient evidence of damages, the award must be vacated and judgment entered in favor of Defendants or, alternatively, a new trial would be warranted at least on damages, if not on all issues.

Specifically, Plaintiff must present evidence, which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984) “A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.” *Id.* Expert opinions based on sheer speculation and facts or inference not supported by the evidence should be rejected by the trial court in considering a motion for directed verdict. *Proto*, 788 So. 2d at 395.

The plaintiff must “demonstrate[] that there is *an amount of damages* which [he] would have recovered but for the attorney's negligence.” *Olmsted v. Emmanuel*, 783 So. 2d 1122, 1125 (Fla. 1st DCA 2001) (*citing Sure Snap Corp. v. Baena*, 705 So. 2d 46, 49 (Fla. 3d DCA 1997)). Thus, in a case such as this, the plaintiff has to prove that he “would have prevailed on the underlying action but for the attorney's negligence.” *Id.* “Under the ‘trial within a trial’ standard of proving proximate cause, the jury necessarily has to determine whether the client would have prevailed in the underlying action, [...], before determining whether the client would prevail in the malpractice action.” *Tarleton v. Arnstein & Lehr*, 719 So. 2d 325, 330 (Fla. 4th DCA 1998). “In Florida, unless the fact-finder is presented with evidence which will enable it to determine damages for lost profits with a reasonable degree of certainty, rather than by means of speculation and conjecture, the claimant may not recover such damages.” *Resolution Trust Corp. v. Stroock & Stroock & Lavan*, 853 F. Supp. 1422, 1426 (S.D. Fla. 1994) (*citing Himes v. Brown & Co. Sec. Corp.*, 518 So. 2d 937, 938 (Fla. 3d DCA 1987)). Plaintiff’s burden to prove the case within the case is clearly provided for in the law.

Consequently, Plaintiff is required to prove the Petition to Determine Beneficiaries would have succeeded and the Florida probate court would **not** have given full faith and credit to the Texas divorce. Therefore, Plaintiff had to prove, by a certain amount of money and with a reasonable degree of legal certainty that the Ward would have been better off by continuing to pursue the Petition to Determine Beneficiaries than he was after the New York Settlement. There is no evidence of this. To the contrary, the hearing transcript dated October 26, 2012, in evidence

as [CLO Ex. 64 (68:23-69:1)], evidences Plaintiff's beliefs that the Petition was without merit and that the Plaintiff believed the divorce was valid and should be given full faith and credit.

Plaintiff has **not introduced any evidence** that the jury could rely on to decide the outcomes of the underlying cases, which were supposedly handled negligently. In order to prevail on his theory that the Guardian should not have foregone the Ward's claims to Lorna's property via the Petition to Determine Beneficiaries, Plaintiff was required to prove that the action would have been successful and netted a better result for the Ward. No substantial or component evidence was presented on this point.

Plaintiff has not proven that the Ward would have prevailed in that proceeding. Additionally, Plaintiff has not accounted for how long or how much that litigation would have cost the Ward in order to determine if he would have been better off not entering into the New York Settlement. The guardianship Court however did consider this though in approving the New York Settlement and finding it in the ward's best interest. Plainly, the jury has no evidence to base a finding that the Ward would have obtained a greater amount and what that amount would have been. Plaintiff's damages are purely speculative and accordingly cannot be recovered.

Plaintiff's counsel acknowledged the claim was not easy to win, and never presented evidence of the likelihood of success on the merits. In closing, he stated: "And they told you this wasn't the easiest claim. But what did they do? Well, let's think about it. Do I fight this? Do I give my client the justice he deserves and fight this and get the true value, or ***do I just sell him out and I take the quick settlement?*** Because, you know what, I'll get some money to him, and then I'll get attorney's fees." (9:28)

Even if the Ward's interests were sold out for a quick settlement, which is completely untrue, Plaintiff still had to prove what the Ward would have received-if the case proceeded to final judgment (*i.e.*, the result but-for the settlement). There is a complete absence of any relevant evidence on this point. Indeed, what evidence there is in the record is directly to the contrary.¹⁰

¹⁰ Skatoff testified Defendants' conduct neither fell below the standard of care for guardianship attorney in the community nor constituted a breach of fiduciary duty. (T8:104-07) Skatoff concluded Defendants were faced with "actions coming at the guardianship from every direction, from Lorna's estate, from Julian" and asserted a "**very difficult position**" with the petition to determine beneficiaries to set aside the divorce, filed on behalf of the guardians. (T8:105-06)

There is no evidentiary basis upon which a reasonable jury could conclude the Guardian, on behalf of the Ward, would have prevailed on the merits of *any* of the thirteen pieces of litigation.

Accordingly, because there were multiple pending claims and issues, Plaintiff's expert not only needed to opine that the Texas divorce would not be given full faith and credit in Florida, but also needed to opine the overall net outcome, including prevailing on the appeal of the twenty million dollar (\$20,000,000) Texas settlement, would have been more favorable.

C. Plaintiff failed to prove what an MAI Appraisal would have shown.

As to causation, there is also no proof that an MAI appraisal obtained on or before May 8, 2013, the date of the settlement conference, would have shown a fair market value estimate higher than the broker's opinion of value that is the sole valuation in evidence. Plaintiff not only failed to prove breach of a duty, Plaintiff failed to prove causation. Plaintiff failed to prove that an MAI appraisal would have led to a different outcome. Separate and apart from failing to prove liability for the alleged failure to obtain an appraisal, Plaintiff failed to demonstrate causation from any such failure. The jury had no idea what an appraisal have looked like in May 2013 if Defendants had obtained one. Unless there is competent substantial evidence in the record that an appraisal obtained in May 2013 would show the value of 67th Street at \$22.5 million, there is no causation.

For example, if an appraisal in May 2013 had shown an estimated fair market value of \$7 to \$9 million, the same as the broker's opinion,¹¹ the failure to obtain that appraisal caused no damage. For Plaintiff to succeed on any claim based on Defendants not having an appraisal at the time of the settlement, Plaintiff was required to introduce into evidence an MAI appraisal dated as of May 2013 or, at a minimum, testimony from a qualified expert witness that an appraisal would have shown the \$22.5 million "valuation" Plaintiff argued to the jury.

The issue is not what the 67th Street property sold for eighteen months after the settlement conference; the issue is what a May 2013 appraisal would actually have shown. In the ultimate of ironies, given Plaintiff's vociferous arguments for such an appraisal, no appraisal was presented by Julian Bivins when the guardianship court approved the New York settlement and no such

¹¹ Defendants note that there was an appraisal on the Lexington property as of the settlement approval hearing in September 2013. That appraisal, obtained by Julian Bivins and his then-personal counsel, Mr. Denman, valued Lexington at \$4.4 million. (T7:90) That value is consistent with, and actually slightly below, the low-end of the broker's opinion range of \$4.5 to \$6.5 million.

appraisal was presented by Plaintiff at this trial. Absent that critical evidence, the verdict cannot stand and judgment must be entered for Defendants.

DAMAGES ISSUES

A. There is no logical link from duty to causation to damages in this case.

Florida law requires Plaintiff to "demonstrate[] that there is *an amount of damages* which [he] would have recovered but for the attorney's negligence." *Olmsted v. Emmanuel*, 783 So. 2d 1122, 1125 (Fla. 1st DCA 2001) (citing *Sure Snap Corp. v. Baena*, 705 So. 2d 46, 49 (Fla. 3d DCA 1997)). "In Florida, unless the fact-finder is presented with evidence which will enable it to determine damages for lost profits with a reasonable degree of certainty, rather than by means of speculation and conjecture, the claimant may not recover such damages." *Resolution Trust Corp. v. Stroock & Stroock & Lavan*, 853 F. Supp. 1422, 1426 (S.D. Fla. 1994) (citing *Himes v. Brown & Co. Sec. Corp.*, 518 So. 2d 937, 938 (Fla. 3d DCA 1987)). Without expert testimony that properly analyzed the entire New York settlement and all of its numerous permutations, this vital legal link cannot be established. Without that vital expert testimony any award of damages is total speculation. Thus, judgment should be entered for Defendants.

B. Plaintiff did not prove the fair market value of 67th Street at the time of the New York settlement.

The \$16.4 million damages award in the verdict is not supported by competent evidence. Most importantly, the damages fail as a matter of law because Plaintiff did not prove the value of 67th Street property on May 7 and 8, 2013 (the two-day settlement conference and May 8, 2013 the date the New York Settlement Term Sheet was signed). The only evidence of the property's value at that time is the broker's opinion – \$7 to \$9 million.

Plaintiff could have called a competent expert witness to testify there was no significant increase in New York real estate prices over those 17 months, but did not.¹² Plaintiff presented no

¹² If Plaintiff had called an MAI appraiser, that expert could not rely upon a sale which did not exist in May 2013 as the basis for the valuation as of May 2013. The New York broker, Lipa Lieberman, explained "an appraiser will look at *previous sales* to try to determine what the present

expert testimony, nor any *competent* evidence of value. By itself, a sale, which closed on October 28, 2014 – nearly 18 months later –, is not competent evidence of the value in May 2013. *Zipper v. Affordable Homes, Inc.*, 461 So. 2d 988 (Fla. 1st DCA 1984)("The measure of damages is the difference between the price the buyer agreed to pay for the property and the *fair market value on the date of the breach*," not the price on the date the property was sold to another party.").

Lieberman, the broker who gave the broker's opinion, testified property values had been "soaring" from 2012 to 2015. (T4:44) Plaintiff's witness, Sharp, was not a real estate appraiser nor competent to render any valuation opinion. She was only permitted to testify as to "math." (T. Vol. 1, 84:9-89:17) Sharp confirmed it was "absolutely correct" the numbers she used in her "damages" chart for the four different properties were not "values as of the New York settlement."¹³ (T7:200-01) Indeed, she admitted the "numbers" she plugged in were just "hypothetical future" numbers because "there was no solid evidence of exact values for each of the properties." (*Id.*) Damages must be based upon a solid foundation, not mere guesswork. Damages cannot be established here by a witness doing math.

Absent an appraisal or competent testimony of the fair market value of 67th Street as of May 2013, the verdict cannot stand. Under Florida law, a valuation must be computed as of the appropriate date. *Parisi v. Miranda*, 15 So. 3d 816 (Fla. 4th DCA 2009)(verdict reversed where jury received no evidence of value on the valuation date; therefore, the jury's verdict was contrary to the manifest weight of the evidence); *Morgan Stanley & Co. v. Coleman (Parent) Holdings Inc.*, 955 So. 2d 1124, 1131 (Fla. 4th DCA), *rev. den'd*, 973 So. 2d 1120 (Fla. 2007)(reversing and remanding for entry of a directed verdict when plaintiff failed to present evidence of value on the

value of that property is." (T4:35) Thus, no legitimate MAI appraiser would have relied upon the \$22.5 million sale nearly 18 months after the relevant date.

¹³ Although she was not competent to conduct real estate market research, Sharp agreed that property values were steadily increasing during the relevant time. (T7:172-73) That means there is no competent evidence the \$22.5 sale price from October 2014 is the fair market value as of May 2013 (or even September 2013 at the approval hearing). Without proof of a number, the damages verdict cannot stand.

operative date: plaintiff "was not entitled to have the jury speculate as to the value of the stock on the date of sale. Rather, it was required to prove the stock's value on that date.").¹⁴

Similar to the instant case, in Parisi, the shareholders' agreement provided that if a shareholder was terminated, the terminated shareholder was required to sell his shares to the corporation at a price determined by the market value of all of the corporation's "tangible assets" plus "2 times net annual earnings" of the corporation. It was undisputed that Miranda was terminated on August 31, 2006. At trial, Miranda's expert valued Miranda's shares of stock as of December 31, 2006, because he used the 2006 tax return to plug numbers into the valuation formula. During deliberations, the jury asked what date it should use to value Miranda's shares. The trial court concluded that the shareholders' agreement contemplated using the date of termination to value the shares and instructed the jury to use the August 31, 2006 termination date. The jury received no evidence regarding the value of the shares on August 31, 2006. Therefore, the jury's verdict was contrary to the manifest weight of the evidence since the jury assigned a value to the shares identical to the December 31, 2006 value proffered by Miranda's expert. *Parisi v. Miranda*, 15 So. 3d 816, 817-18 (Fla. 4th DCA 2009).

C. The jury's verdict is grossly excessive; Judgment should be entered for Defendants based upon the lack of proof. Alternatively, there should be a remittitur or new trial.

In diversity cases, Florida law determines whether a jury award is excessive, while federal law governs the procedural question of whether a new trial or remittitur is warranted if the damages are found to be excessive. *Slip-N-Slide Records, Inc. v. TVT Records, LLC*, 05-21113-CIV, 2007 WL 3232274, at *9 (S.D. Fla. Oct. 31, 2007)(citing *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441, 1446 (11th Cir.1991)).

It is well-settled under Florida law that damages must be proved with reasonable certainty. *Zinn v. United States*, 835 F. Supp. 2d 1280, 1328 (S.D. Fla. 2011) (citing *Nebula Glass Intern., Inc. v. Reichhold, Inc.*, 454 F.3d 1203, 1213 (11th Cir.2006)); *W.W. Gay Mech. Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So. 2d 1348, 1350-51 (Fla.1989). As such, a damage award must be

¹⁴ The court rejected plaintiff's argument it should, at the least, be given a new trial to prove damages – "plaintiff is not entitled to a second 'bite at the apple' when there has been no proof at trial concerning the correct measure of damages." *Id.* at 1131; see also, *Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828, 830 (Fla. 4th DCA 1999) (remanding for entry of defense judgment because there was no proof at trial of the correct measure of damages).

based on substantial evidence, not speculation. *Jeffrey O. v. City of Boca Raton*, 511 F. Supp. 2d 1339, 1360 (S.D. Fla. 2007) (citing *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 457 (5th Cir.1979)).

The damages awarded in this case are grossly excessive because they are based upon the \$22.5 million sale on October 28, 2014, not the fair market value of 67th Street in early May 2013 when the New York Settlement was reached. Also, they ignore not only the two and half million dollar mortgage, but Florida law, which would reduce any inheritance by the Ward for fifty (50%) percent of the Lorna estate's taxes, claims, costs of administration and other obligations. Florida Statute 733.707.

Overall, the damages are grossly excessive because they exceed the number computed by Sharp, Plaintiff's math witness. In her "computations," Sharp attempted to reflect what dollar amount it would take to achieve an equal distribution of assets between the Ward and Lorna's estate. Nevertheless, despite Sharp's objectives, there is no competent evidence as to the value of the 67th Street property in May 2013, other than the broker's opinion of value. Plaintiff's valuation issue, which purposely ignores the net effect of the numerous financial issues resolved in the New York settlement, was whether two properties involved in one aspect of the settlement were of roughly equal value, net of mortgages, and they were roughly equal according to the broker's opinion. Thus, even under Plaintiff's improperly narrow factual analysis, there are no recoverable damages. Plaintiff failed to call a competent expert to testify on value, relying solely on a sale nearly eighteen (18) months after the applicable valuation date. The sale price – by itself and without the testimony of an expert– is not competent evidence of value. Moreover, the damages awarded in this case are so grossly excessive the Court would have to order a new trial or a remittitur even if the claims had been proven, as the verdict assumes one hundred percent success of the recovery of one hundred (100%) per cent of the 67th Street property through the denial of full faith and credit, where the best case result was a fifty (50%) percent intestate share **less** a pro rata share of the Lorna Bivins estate claims, taxes, obligations and expenses of administration pursuant to Florida Statute 733.707 and **less** a pro rata share of a two and half million dollar mortgage while “crediting” Defendants with a six million one hundred thousand unaccepted offer

for the 808 Lexington Property (22.5 million 67th Street sales price less 6.1 million 808 Lexington offer equal 16.4 million.)

1. Maximum Damages Improperly Valuing 67th Street at \$22.5 Million.

Bottom line, even assuming 67th Street was worth \$22.5 million, Sharp's maximum damages equaled \$5,940,509:

	OLIVER BIVINS SR.		ESTATE OF LORNA BIVINS	
Property	808 Lexington	330 S. Ocean	39 E. 67th St.	Portland
Estimated "value"	9,750,000	1,205,304	22,500,000	1,205,304
Less: Mortgages/liens	<u>(652,229)</u>	<u>0</u>	<u>(2,500,000)</u>	<u>0</u>
Net Value	9,097,771	1,205,304	20,000,000	1,205,304
Total Value Received	10,303,075		21,205,304	
Mid-Point	15,754,190			
Difference to equalize	<u>5,451,115</u>			
Plus "Other Damages": Commission Expense	300,000			
Lost Rental Expense	273,154			
Excess Interest	171,640			
Less: Received in settlement with Julian	<u>(255,000)</u>			
	Subtotal	\$489,795		
MAX. DAMAGE	5,940,909		Per Kara Sharp	

The above numbers come straight from Sharp's testimony and the demonstrative chart she used while testifying. (T7:166-75) Despite her conclusion, even as improper as it is, the jury awarded \$16.4 million – nearly three times the maximum damages under Plaintiff's flawed theory.

The jury's verdict can only be explained as they took the difference between (A) the value of \$6.1 million which Defendants advised the probate court was the highest offer for Lexington

received as of a September 2013 hearing without further marketing of the property, and (B) the \$22.5 sales price for 67th Street. But in reaching that number, the jury inexplicably ignored (i) the \$2.5 million mortgage on the 67th Street property; and (ii) that Plaintiff's best case was an inheritance from the Lorna Bivins estate of 50% less a pro rata share of estate obligations, not sole ownership of 100% of 67th Street. (There is no expert testimony in this record that any law suit would have vested the Ward with 100% of 67th Street.) Sharp's computation does not make those same two mistakes as the jury, and it yields only \$5.9 million.

2. Analysis of Maximum Damages If Properly Rely on Broker's Opinions.

Because there is no evidence to support the \$22.5 million number, there should be no damages at all. As the guardianship court acknowledged that the benefit of settlement of multiple litigated matters is not subject to a precise formula. (CLO Ex. 30, 35:16-40:3) Even if the jury believed there should be an absolute true-up, Plaintiff's best case is nowhere close to the amount of the verdict.

The only competent record evidence of values are the two broker's opinions by Lieberman. If one uses the mid-points of the ranges set forth in the broker opinions, that would yield only a maximum damages award of \$815,910 as shown in the following chart:

Property	808 Lexington	330 S. Ocean	39 E. 67th St.	Portland
Estimated value	5,500,000	1,205,304	8,000,000	1,205,304
Less: Mortgages/liens	<u>(652,229)</u>	<u>0</u>	<u>(2,500,000)</u>	<u>0</u>
Net Value	4,847,771	1,205,304	5,500,000	1,205,304
Total Value Received	6,053,075		6,705,304	
Mid-Point	6,379,190			
Difference to equalize	<u>326,115</u>		Per Lipa's Opinions , solely related to Petition to Determine Beneficiaries	
Plus: "Other Damages"	<u>489,795</u>			
MAX. DAMAGES	815,910		Per Lipa's Opinions, any and all damages possible	

"In order to shock the sense of justice of the judicial mind the verdict must be so excessive or so inadequate so as to at least imply an inference that the verdict evinces or carries an implication of passion or prejudice, corruption, partiality, improper influences, or the like." *Slip-n-Slide Records*, 2007 WL 3232274, at*9; *Markland v. Norfolk Dredging Co.*, 772 F. Supp. 1241, 1242 (M.D. Fla. 1991) ("A jury award is not to be set aside or a new trial ordered unless the award is so exorbitant as to shock the judicial conscience or indicate bias, passion, prejudice, or other improper motive on the part of the jury.").

In *Martinez v. Brinks*, 410 F. Supp. 2d 1202, 1215 (S.D. Fla. 2004), a case involving malicious prosecution brought by a courier against a secure cash handling company, a jury awarded lost wages of \$1,260,000 when, even under the courier's method of determining lost wages, the courier would have only earned \$644,800. The court found this award, which was double the maximum amount supported by the evidence, was "grossly excessive," and ordered a new trial.

As a general rule, "a remittitur order reducing a jury's award to the outer limit of the proof is the appropriate remedy where the jury's damage award exceeds the amount established by the evidence." *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1266 (11th Cir. 2008) (citing *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1448 (11th Cir. 1985)); see also *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1284 (11th Cir. 2000) ("The rule in this circuit states that where a jury's determination of liability was not the product of undue passion or prejudice, we can order a remittitur to the maximum award the evidence can support.").

In *Rodriguez*, a case involving the violation of the FLSA overtime provision, the court instructed the jury that if they found the defendants violated the provision, it must award payback damages in the amount of unpaid overtime. 518 F. 3d at 1265. Remittitur was granted when, even viewing the evidence in the light most favorable to appellee, the jury awarded damages nearly twice the amount the evidence supported. If the jury's damages verdict far exceed the maximum amount that could have been awarded based on the evidence and the instructions, it must be vacated for new trial or remitted to a number the evidence supports:

we cannot "permit damage speculation where the formula for calculation is articulable and definable. Flexibility beyond the range of the evidence will not be tolerated."

Id. at 1268 (citing *Jamison Co. v. Westvaco Corp.*, 526 F.2d 922, 936 (5th Cir.1976)).

In *Frederick*, the appellant argued that the district court erred in not granting its motion for remittitur, or alternatively, a new trial on damages only, due to the jury's excessive award for maintenance, cure, and unearned wages. 205 F.3d at 1283. The appellant specifically argued that the evidence presented at trial supported a maximum award of only \$107,947.43, well below the jury's award of \$525,069. The Eleventh Circuit agreed the maximum damages number calculated by the plaintiff-appellee's expert was the outer limit of the damages award. *Id.*; see also, *Deakle v. John E. Graham & Sons*, 756 F. 2d 821, 834 (11th Cir. 1985) (remitting damages to maximum possible award reasonably supported by the record evidence).

CONCLUSION

Plaintiffs failed to prove breach of the standard of care or any fiduciary duty by expert testimony, failed to prove causation, and failed to prove damages. This Court should enter judgment as a matter of law for Defendants. Alternatively, and at a minimum, this grossly excessive verdict should be remitted to a number no greater than \$815,795; or the Court should grant a new trial.

WHEREFORE, Defendants request entry of judgment as a matter of law under Rule 50, in their favor and against Plaintiff; alternatively remittitur or a new trial under Rule 59; and an award of reasonable attorneys' fees and costs pursuant to law, including sections 744.108 and 768.89 of the Florida Statutes.

Respectfully submitted,

s/ L. Louis Mrachek

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Attorneys for Ciklin Lubitz & O'Connell

Attorneys for Ashley N. Crispin, Brian M.
O'Connell, and Ciklin Lubitz & O'Connell

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF, or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

s/ L. Louis Mrachek

L. Louis Mrachek, Esq.

Florida Bar No. 182880

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

IN RE: GUARDIANSHIP OF: GUARDIANSHIP DIVISION

OLIVER BIVINS, FILE NO: 502011GA000006XXXXSB

Incapacitated.

ORDER ON MOTION FOR COURT APPROVAL OF SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS CAUSE coming before the Court on the Motion for Court Approval of Settlement Agreement and Mutual Release, the Court having heard argument of counsel, and being otherwise fully advised, it is thereupon

ORDERED AND ADJUDGED as follows:

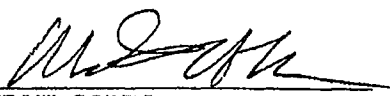
1. The Motion for Court Approval of Settlement Agreement and Mutual Release is

Granted

2.

~~_____~~
~~_____~~
~~_____~~
~~_____~~
~~_____~~

DONE AND ORDERED in Delray Beach, Palm Beach County, Florida on the 17 day of SEPT, 2013.


MARTIN H. COLIN
Circuit Judge

Copies returned:

- Brian M. O'Connell, Esq., 515 N. Flagler Dr., 20th Floor, West Palm Beach, FL 33401
- Ronald Denman, Esq., 1000 Brickell Ave., Suite 600, Miami, FL 33131
- Ronda D. Gluck, Esq., 980 N. Federal Highway, #402, Boca Raton, FL 33432
- Donna P. Levine, Esq., 324 Datura St., #145, West Palm Beach, FL 33401
- Keith Stein, Esq., 405 Lexington Ave., 7th Floor, New York, NY 10174
- Mark N. Axinn, Esq., 845 Third Ave., New York, NY 10022
- Edward Kuhnel, 49 West Lake Stable Rd., Tuxedo Park, NY 10987
- Peter G. Goodman, Esq., 250 Park Avenue, Suite 1900, New York, NY 10177



SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE (this "Agreement") is made this ___ day of July, 2013, by and among Curtis C. Rogers (the "Guardian"), as Guardian of the person and property of Oliver Bivins, Sr. ("Oliver Sr."), Oliver Bivins, in his individual capacity ("Oliver Jr."), Oliver Jr., as the Personal Representative of the Estate of Lorna Bivins (the "Estate"), and Beachton Tuxedo LLC ("BTLLC") (collectively, the "Parties").

WHEREAS, various disputes and litigations exist and are pending in the States of Florida and New York, by and among the Parties, including each of the cases described in Exhibit A annexed hereto (collectively, the "Cases"), which disputes and cases pertain to, *inter alia*, matters related to the guardianship of Oliver Sr. and certain of its properties, and matters related to the property of the Estate and the probate thereof, including without limitation, certain real estate owned by and/or asserted to be owned by Oliver, Sr. and the Estate in the States of Florida and New York, and in London, England;

WHEREAS, the Parties, without acknowledging the existence of any liability or wrongdoing, believe it is in their mutual interests to enter into this Agreement to resolve, settle and compromise the claims and counterclaims filed in the Cases and the certain other matters of dispute (the "Settlement"), in order to avoid the further expense and inconvenience of litigation pursuant to the terms set forth herein;

NOW THEREFORE, in consideration of the promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Incorporation of Recitals. Each of the foregoing recitals is incorporated herein as if fully set forth below.
2. Court Approvals and Closing. The Guardian, Oliver Jr., and the Estate (collectively, the "Petitioners") hereby agree that, no later than ten (10) business days following the execution by all Parties of this Agreement, they will collectively and acting in good faith petition the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Guardianship Division and Probate Division (the "Florida Court"), and within ten (10) business days of any Parties' written notice of any other court whose approval may be needed, the Petitioners will collectively and acting in good faith petition each other court whose approval of this Settlement may be required, for approval of this Settlement and the terms and conditions contained in this Agreement. Each of the actions and transactions set forth in this Agreement, with the exception of the payment of the Mortgage Debt as required by Section 3(F), shall be closed within ten (10) business days of the date upon which all such approvals have been received from the Florida Court and each such other court (the "Closing Date").
3. Property Transfers/Obligations Related to Transfers/Releases.

(A) 808 Lexington Avenue. The Estate, acting by and through Oliver Jr., as personal representative, or acting through his successor or agent or its other appropriate representative,

shall transfer to the Guardian, for the benefit of Oliver Sr., any and all of its right, title and interest in and to that certain parcel of real estate known as 808 Lexington Avenue, New York, New York, also known as Block 1397, Lot 16 on the Tax Map of New York County ("**808 Lexington**"), such that the Guardian shall, as a result of such transfer (the "**808 Conveyance**"), own 100% fee simple title to 808 Lexington. The 808 Conveyance shall be accomplished by a bargain and sale without covenants deed in substantially the form annexed hereto as **Exhibit B**. The Estate and Oliver Jr. hereby agree that neither the Estate nor Oliver Jr. will further encumber, or cause to be encumbered, 808 Lexington prior to the Closing Date with any lien or encumbrance unless such lien or encumbrance is permitted by the Guardian in writing, it being understood that (i) the lien of any unpaid real estate taxes and related charges and (ii) the mortgage described in subparagraph 3(F) below are hereby deemed to be permitted by the Guardian. The Estate shall immediately remedy any failure on its part to comply with the foregoing obligation. With respect to the 808 Conveyance, except as provided below: (i) the Guardian shall pay all New York State and New York City real estate transfer taxes associated with such transfer, (ii) there shall be no adjustment of real estate or related taxes, and (iii) the Guardian shall pay all recording and/or title insurance charges relating thereto. The Estate shall be responsible for satisfying the real estate taxes and related charges through May 8, 2013. The Estate and the Guardian shall each be responsible for half of the real estate taxes and related charges from May 9, 2013 through 11:59PM of the date immediately prior to the Closing Date. As of the Closing Date the Guardian shall be responsible for the real estate taxes and related charges. Any property tax payments for 808 Lexington that are past-due on the Closing Date shall be immediately paid in full (including any interest and/or penalties) to the New York City Department of Finance by the Guardian and the Estate, as apportioned. The Estate shall within ten (10) days of the Closing Date, (x) provide to the Guardian any and all documents relating to 808 Lexington, including but not limited to documents relating to the day to day management of 808 Lexington and documents related to any tenancy or leasehold interest, and (y) transfer to the Guardian any security deposit or other monies held with regard to, or on behalf of, any 808 Lexington tenant and any utility deposits.

(B) 330 Ocean Boulevard. The Estate, acting by and through Oliver Jr., as personal representative, or acting through his successor or agent or its other appropriate representative, shall transfer to the Guardian, for the benefit of Oliver Sr. (the "**330 OB Conveyance**"), any and all right, title and interest in and to that certain real estate known as Unit 5A, 330 Ocean Boulevard, Palm Beach, Florida ("**330 OB**"). Such transfer shall be evidenced by deed in such form as may be reasonably required by the Guardian in order to convey to the Guardian 100% of the Estate's interest in 330 OB. As a result of the 330 OB Conveyance, the Guardian shall own 100% fee simple title to 330 OB. The Estate and Oliver Jr. hereby agree that neither the Estate nor Oliver Jr. will further encumber, or cause to be encumbered, 330 OB prior to the Closing Date with any lien or encumbrance unless such lien or encumbrance is permitted by the Guardian in writing, it being understood that (i) the lien of any unpaid real estate taxes and related charges and (ii) any mortgage affecting 330 OB as of the date hereof are hereby deemed to be permitted by the Guardian. The Estate shall immediately remedy any failure on its part to comply with the foregoing obligation. With respect to the 330 OB Conveyance, except as provided below: (i) the Guardian shall pay all real estate transfer taxes associated with such transfer, (ii) there shall be no adjustment of real estate or related taxes, and (iii) the Guardian shall pay all recording and/or

title insurance charges relating thereto. The Guardian shall be responsible for satisfying the real estate taxes and related charges on 330 OB from and after the date hereof.

(C) 39 East 67th Street. The Guardian, acting on behalf of Oliver Sr., shall waive and/or relinquish, and hereby waives and relinquishes, in favor of the Estate, any and all right, title and interest in and to that certain real estate known as 39 E. 67th Street, New York, New York, also known as Block 1382, Lot 28 on the Tax Map of New York County ("39E67"). If deemed necessary by the Estate, and upon prior written request from the Estate to the Guardian, the Guardian shall evidence such transfer of Oliver Sr.'s interest, if any, in 39E67 to the Estate by delivery of a deed in such form as may be reasonably required by the Estate and/or by delivery of such other documents as requested by the Estate in order to convey marketable fee simple title to 39E67 to the Estate. The Guardian shall execute and deliver such deed to the Estate within five (5) business days following the giving of such written request. The Guardian and Oliver Sr. hereby agree that neither Guardian nor Oliver Sr. will further encumber, or cause to be encumbered, 39E67 prior to the Closing Date with any lien or encumbrance unless such lien or encumbrance is permitted by the Estate in writing, it being understood that (i) the lien of any unpaid real estate taxes and related charges and (ii) the mortgage affecting 39E67 as of the date hereof are hereby deemed to be permitted by the Estate. The Guardian shall immediately remedy any failure on its part to comply with the foregoing obligation. The Estate shall pay all transfer taxes, title charges and recording fees associated with such transfer. The Estate shall be liable for all expenses, maintenance costs and any other liabilities associated with 39E67.

(D) 82 Portland Place. The Guardian, acting on behalf of Oliver Sr., shall transfer and/or relinquish, and hereby waives and relinquishes, to the Estate, any and all right, title and interest in and to the leasehold interest in that certain residential apartment known as Flat V, 82 Portland Place, London, England ("82 Portland"). If deemed necessary by the Estate, and upon prior written request from the Estate to the Guardian, the Guardian shall evidence such transfer of Oliver Sr.'s interest, if any, in 82 Portland to the Estate by delivery of such instruments in such forms as may be reasonably required by the Estate. The Guardian shall execute and deliver such instruments to the Estate within five (5) business days following the giving of such written request. The Guardian and Oliver Sr. hereby agree that neither the Guardian nor Oliver Sr. will encumber 82 Portland prior to the Closing Date with any lien or encumbrance unless such lien or encumbrance is permitted by the Estate in writing, it being understood that (i) the lien of any unpaid real estate taxes and related charges, (ii) the existing ground lease, and (iii) any mortgage affecting 82 Portland as of the date hereof are hereby deemed to be permitted by the Estate. The Guardian shall immediately remedy any failure on its part to comply with the foregoing obligation. The Estate shall pay all taxes associated with such transfer. The Estate shall be liable for all expenses, maintenance costs and any other liabilities associated with 82 Portland.

(E) Cash Payment. The Guardian, acting on behalf of Oliver Sr., will pay to the Estate the amount of \$150,000 in cash, which payment shall be made to the IOLTA account of Levine & Susaneck, P.A. Such payment will be made by the Guardian within thirty (30) days of the Closing Date or upon the sale of 808 Lexington, whichever is first in time.

(F) Mortgage on 808 Lexington. As of the Closing Date, the Guardian on behalf of Oliver Sr., shall become the sole obligor of those certain mortgage notes (the "808 Notes") and all amounts due and owing thereunder (including but not limited to all principal, accrued interest, fees and expenses, including legal fees and disbursements (the "Mortgage Debt") that are secured by, among other things, a consolidation, extension, and modification agreement dated November 19, 2001, and those certain mortgages in the aggregate principal sum of \$850,000 that create a lien on 808 Lexington (the "808 Mortgages"). The 808 Notes and 808 Mortgages are held by BTLLC pursuant to those certain assignment documents dated October 5, 2012 made by Sovereign Bank, N.A. f/k/a Sovereign Bank, successor-by-merger to Independence Community Bank, as Assignor, to Beachton Tuxedo LLC, as Assignee, including that certain Assignment of Mortgage (the "Assignment") recorded in the Office of the City Register of New York County on October 31, 2012 as CRFN 2012000429258 (the 808 Notes, the 808 Mortgages, and the Assignment are collectively referred to herein as, the "Mortgage Loan"). The Guardian shall pay the Mortgage Debt in full, on or before August 31, 2013 (the "Forbearance Expiration Date"), it being understood, agreed, and acknowledged by the Parties that BTLLC or its predecessor(s) previously accelerated the entire principal amount of the Mortgage Loan; provided, however, that to the extent the amount of such total payment owing on the Mortgage Debt exceeds \$465,000 as of June 30, 2013, such excess amount shall be subtracted from the \$150,000 due and payable under (E) above (but shall not be deducted from the Mortgage Debt payable by the Guardian to BTLLC). All interest on the Mortgage Debt accruing after June 30, 2013, and on or before the date the Mortgage Debt is paid in full, shall be payable 50% by the Estate and 50% by the Guardian. Except in the event of a default hereunder by the Guardian, the Estate, or Oliver Jr., BTLLC hereby agrees to continue to forebear from taking action based on the failure to make payments as required under the Mortgage Loan, including foreclosure (the "Forbearance"), until the Forbearance Expiration Date. Notwithstanding anything contained in this Agreement to the contrary (other than the Forbearance), the terms of the 808 Note and the 808 Mortgage shall remain in full-force and effect, and BTLLC shall have all the rights and remedies contained in the documents evidencing the Mortgage Loan, until such time as the Mortgage Debt is paid in full. The Parties agree to execute a stand-alone mortgage assumption agreement (and accompanying affidavits) for recording with the New York County Clerk, in a form reasonably acceptable to the parties, to memorialize the Guardian's assumption of mortgagor's obligations under the Mortgage Loan.

(G) Attorneys Fees and Costs. The Parties acknowledge and agree that there are attorneys fees and costs due Ciklin Lubitz Martens & O'Connell ("Ciklin Lubitz") and Bill T. Smith, P.A. pursuant to the fee agreement approved by the Florida Court on November 30, 2012 and the positive result or recovery attained by this Agreement. The Parties further acknowledge and agree that such attorneys' fees and costs shall be satisfied from 808 Lexington and 330 OB in accordance with the Compromised Settlement Agreement approved by the Texas Court on March 13, 2013 and the Florida Court on April 1, 2013.

(H) Guardianship of Lorna Bivins. Ciklin Lubitz is holding \$41,973.03 in its Trust account. The Parties agree that the funds shall be utilized to partially satisfy compensation obligations incurred in the Guardianship of Lorna Bivins, Case No. 502011GA000007XXXXSB. From such funds the following payments shall be made: Steve Kelly, Legal Management Services, Inc. in the amount of \$6,500; Ciklin Lubitz Marten's & O'Connell in the amount

\$11,000.00; Hark Yon et al in the amount of \$22,473.03; Lavalle, Brown & Ronan in the amount of \$2,000. The Parties acknowledge the above payments are being made as "partial" payments.

(I) Stipulation and Dismissal. On the Closing Date, the Parties will collectively (i) execute all stipulations of dismissal and other pleadings necessary and appropriate to voluntarily dismiss, with prejudice, all of the Cases (described on Exhibit A attached hereto) and any other claims by or among any of the Parties against one another, including without limitation all appeals, and as otherwise related to the foregoing described properties and ownership matters, excepting only the excluded claims as described on Exhibit A; (ii) file with the appropriate courts all such stipulations of dismissal and other documents and pleadings required to effectuate such dismissals, and (iii) take all steps reasonably necessary to effectuate all of the foregoing as soon as reasonably practicable.

(J) Releases.

(i) Subject to the performance in full by each of (a) Oliver Jr., acting individually and as personal representative on behalf of the Estate, and (b) BTLLC, of their respective promises and covenants herein, the failure of which shall void this paragraph (J)(i), the Guardian, acting on behalf of Oliver Sr. and each and all of Oliver, Sr.'s past, present and future heirs, successors, predecessors, assigns, advisors, attorneys, representatives and agents (collectively including the Guardian, the "Oliver Sr. Persons"), hereby release, acquit, and forever discharge Oliver Jr., individually, and each and all of his respective past and present heirs, successors, predecessors, assigns, advisors, attorneys, representatives and agents (collectively including Oliver Jr., the "Oliver Jr. Persons"), the Estate and each and all of its respective past, present and future heirs, successors, predecessors, assigns, advisors, attorneys, representatives and agents (collectively including the Estate, the "Estate Persons"), and BTLLC and each and all of its respective past, present and future heirs, successors, predecessors, assigns, advisors, attorneys, representatives and agents (collectively including BTLLC, the "BTLLC Persons"), from any and all claims, counterclaims, demands, causes of actions, liabilities, contracts, agreements, promises, obligations or defenses of any kind whatsoever, whether known or unknown, related to or arising out of the matters described herein and in the Cases, which any of the Oliver Sr. Persons have or may have against any or all of the Oliver Jr. Persons, the Estate Persons, the BTLLC Persons, occurring from the beginning of the world to the date of this Agreement, and the Oliver Sr. Persons further agree that this Agreement may be pleaded and shall serve as a full defense to any action, suit or other proceeding covered by the terms of this Agreement which is or may be initiated, prosecuted or maintained, it being agreed and understood, however, that notwithstanding the foregoing, the obligations of this Agreement remain in full force and effect as an agreement of the Parties and as an Order of the Florida Court upon the Florida Court's approval hereof.

(ii) Subject to the performance in full by each of (a) the Guardian, acting on behalf of Oliver Sr., (b) the Estate, and (c) BTLLC, of their respective promises and covenants herein, the failure of which shall void this paragraph (J)(ii), the Oliver Jr. Persons hereby release, acquit, and forever discharge the Oliver Sr. Persons, the Estate Persons, and the BTLLC Persons, from any and all claims, counterclaims, demands, causes of actions, liabilities, contracts, agreements, promises, obligations or defenses of any kind whatsoever, whether known or unknown, related to or arising out of the matters described herein and in the Cases, which any of

the Oliver Jr. Persons have or may have against any or all of the Oliver Sr. Persons, the Estate Persons, or the BTLIC Persons, occurring from the beginning of the world to the date of this Agreement, and the Oliver Jr. Persons further agree that this Agreement may be pleaded and shall serve as a full defense to any action, suit or other proceeding covered by the terms of this Agreement which is or may be initiated, prosecuted or maintained, it being agreed and understood, however, that notwithstanding the foregoing, the obligations of this Agreement remain in full force and effect as an agreement of the Parties and as an Order of the Florida Court upon the Florida Court's approval hereof.

(iii) Subject to the performance in full by each of (a) the Guardian, acting on behalf of Oliver Sr., (b) Oliver Jr., acting individually, and (c) BTLIC, of their respective promises and covenants herein, the failure of which shall void this paragraph (J)(iii), the Estate Persons hereby release, acquit, and forever discharge the Oliver Sr. Persons, the Oliver Jr. Persons, and the BTLIC Persons, from any and all claims, counterclaims, demands, causes of actions, liabilities, contracts, agreements, promises, obligations or defenses of any kind whatsoever, whether known or unknown, related to or arising out of the matters described herein and in the Cases, which any of the Estate Persons have or may have against any or all of the Oliver Sr. Persons, the Oliver Jr. Persons, or the BTLIC Persons, occurring from the beginning of the world to the date of this Agreement, and the Estate Persons further agree that this Agreement may be pleaded and shall serve as a full defense to any action, suit or other proceeding covered by the terms of this Agreement which is or may be initiated, prosecuted or maintained, it being agreed and understood, however, that notwithstanding the foregoing, the obligations of this Agreement remain in full force and effect as an agreement of the Parties and as an Order of the Florida Court upon the Florida Court's approval hereof.

(iv) Subject to the performance in full by each of (a) the Guardian, acting on behalf of Oliver Sr., (b) Oliver Jr., acting individually, and (c) Oliver Jr., acting on behalf of the Estate, of their respective promises and covenants herein, the failure of which shall void this paragraph (J)(iv), the BTLIC Persons, hereby release, acquit, and forever discharge the Oliver Sr. Persons from any and all claims, counterclaims, demands, causes of actions, liabilities, contracts, agreements, promises, obligations or defenses of any kind whatsoever, whether known or unknown, related to or arising out of the matters described herein and in the Cases, which any of the BTLIC Persons have or may have against the Oliver Sr. Persons occurring from the beginning of the world to the date of this Agreement, and the BTLIC Persons further agree that this Agreement may be pleaded and shall serve as a full defense to any action, suit or other proceeding covered by the terms of this Agreement which is or may be initiated, prosecuted or maintained, it being agreed and understood, however, that notwithstanding the foregoing, the obligations of this Agreement remain in full force and effect as an agreement of the Parties.

(v) Nothing in any of the foregoing releases shall be construed to release any of the Parties from their obligations as set forth in this Agreement or shall release any claims specifically excluded on Exhibit A.

4. Enforcement of Obligations. The Parties understand and agree that notwithstanding any contrary terms in this Agreement, in the event any party fails to comply with any of the party's obligations as set forth in Sections 2 and 3 of this Agreement, the party to whom the obligation is owed shall have the right to enforce the terms set forth therein, and the legal fees and costs

incurred by the aggrieved party in enforcing such terms shall be paid by the Party found to be in breach of such terms.

5. No Admission of Liability. The Parties understand and agree that this Agreement is only a compromise in settlement of disputed claims and matters and shall not be construed as an admission of liability or wrongdoing by any party.

6. Waiver of Interim and Final Report. Oliver Jr. hereby waives any and all objections to any interim or final report prepared or to be prepared and submitted by the Guardian to the Florida Court, including without limitation any accounting, plan, discharge, compensation and expenses of the Guardian, attorneys fees and costs. The Guardian hereby waives any and all objections to any interim or final report prepared or to be prepared and submitted by Oliver Jr. as the Personal Representative of the Estate to the Florida Court, including without limitation any accounting, plan, discharge, compensation and expenses of the Personal Representative, attorneys fees and costs.

7. Continued Guardianship. The Parties hereby agree that none shall object, in any manner, to Curtis C. Rogers' continued service as the Guardian at least until the consummation in full of this Settlement or the appointment of the Successor Guardian as contemplated in the Compromised Settlement Agreement, whichever occurs first.

8. Authority. Each Party executing this Agreement hereby represents and warrants that it has full power and authority to enter into this Agreement. Each individual executing this Agreement on behalf of an entity Party hereby represents and warrants that he or she has the full power and authority to so execute this Agreement.

9. No Assignment. Each Party represents and warrants that it is the lawful owner of all claims being released by such Party and has not assigned any released claim or portions thereof to any other person or entity. In the event that a Party shall have assigned, sold, transferred, or otherwise disposed of any claim or other matter herein released, such Party shall hold harmless and indemnify the other Parties to this Agreement from and against any loss, cost, claim or expense, including but not limited to all costs related to the defense of any action, including attorneys' fees, based upon, arising from, or incurred as a result of any such claim or matter.

10. Confidentiality. The terms of this Agreement shall remain confidential, and none of the Parties shall disclose such terms to any third party (other than a Party's affiliates, officers, directors, employees, shareholders, partners, members, managers, attorneys, accountants, auditors, or governmental agencies), except as may be required by law or fiduciary duty. In the event any of the Parties shall receive a subpoena, discovery request or other legal process seeking the production or disclosure of this Agreement or the terms of the Agreement, such party promptly shall notify the other Parties to enable them to seek a protective order. However, no Party shall be precluded by this provision from complying with any such subpoena, discovery request or other legal process seeking production or disclosure of this Agreement unless ordered by a court of competent jurisdiction not to comply. Any failure to keep the terms and conditions of this Agreement confidential shall be a default, entitling the non-defaulting Party to the default remedies set forth in this Agreement or otherwise permitted by law.

11. Understanding and Counsel. The Parties further represent and warrant that:
 - (A) They have read and understand the terms of this Agreement.
 - (B) They have been represented by counsel with respect to this Agreement and all matters covered by and relating to it.
 - (C) They have entered into this Agreement for reasons of their own and not based upon any representation of any other person other than those set forth herein.
12. Legal Fees and Costs. Except as provided herein, each of the Parties shall pay its own respective costs and attorneys' fees.
13. Entire Agreement. This Agreement constitutes the entire agreement with respect to the subject matter addressed herein and supersedes any prior written and/or verbal agreement between the Parties, including the Memorandum of Understanding among the Parties, dated May 8, 2013; but excluding the 808 Notes and the 808 Mortgages, and any other agreement by, between, or among BTLLC, the Estate, and/or Oliver Jr. dated on or after May 7, 2013.
14. Amendments. This Agreement may not be orally modified. This Agreement may only be modified in a writing signed by all of the Parties.
15. Illegality or Unenforceability of Provisions. In the event any one or more of the provisions contained in this Agreement shall for any reason be held by a court of competent jurisdiction in whole or in part to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement. A reviewing court also shall have the authority to amend or "blue pencil" this Agreement so as to make it fully valid and enforceable.
16. Successors, Assigns and Third Party Beneficiaries. This Agreement shall be binding on, inure to the benefit of, and be enforceable by, each of the Parties, and each of their respective personal representatives, heirs, successors and assigns.
17. Headings. All headings and captions in this Agreement are for convenience only and shall not be interpreted to enlarge or restrict the provisions of the Agreement.
18. Waiver and Modification. The failure of a Party to insist, in any one or more instances, upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall not be construed as a waiver, or a relinquishment for the future, of such covenant or option, but the same shall continue and remain in full force and effect.
19. Further Necessary Actions. To the extent that any document or action is reasonably required to be executed or taken by any Party to effectuate the purposes of this Settlement Agreement, the Party will execute and deliver such document or documents to the requesting Party or take such action or actions at the request of the requesting Party.
20. Florida Law. The Parties understand and agree that this Agreement shall be construed and interpreted in accordance with the laws of the State of Florida, without giving effect to

principles of conflicts of law that would require the application of the law of any other jurisdiction; and provided, however, that except as to the location of the realty where specific enforcement is sought, the law of such jurisdiction shall govern. Notwithstanding the foregoing, the laws of the State of New York shall govern and control all controversies arising out of this Agreement which may relate to New York State, including but not limited to 808 Lexington, 39E67, the 808 Notes, the 808 Mortgages, the Mortgage Loan, and the Mortgage Debt (collectively, the "New York Matters").

21. Construction of Settlement Agreement. The Parties acknowledge that this Agreement is the product of negotiations by Parties represented by counsel of their choice and that the language of this Agreement shall not be presumptively construed either in favor or against any of the Parties but shall be given a reasonable interpretation.

22. Notices. Any notices that the Parties may wish to serve upon each other pursuant to this Agreement shall be served by hand, facsimile, email, or overnight courier service as follows:

TO THE GUARDIAN:

Curtis C. Rogers
710 First Avenue South
Lake Worth, FL 33460
Email: rogersdna@gmail.com

With a copy to:

Brian M. O'Connell, Esq.
Ashley N. Crispin, Esq.
Ciklin Lubitz Martens & O'Connell
515 N. Flagler Dr., 20th Floor
West Palm Beach, FL 33401
Facsimile: 561-833-4209
Email: boconnell@ciklinlubitz.com
acrispin@ciklinlubitz.com

And to:

Keith B. Stein, Esq.
Roy C. Justice, Esq.
Beys Stein Morbargha & Berland LLP
405 Lexington Avenue, 7th Floor
New York, NY 10174
Facsimile: 646-755-3599
Email: kstein@beysstein.com
rjustice@beysstein.com

TO OLIVER BIVINS, JR.:

Oliver Bivins, Jr.
39 E. 67th St.
New York, NY 10065
Email: o.bivins.ii@gmail.com

With a copy to:

Donna P. Levine, Esq.
Levine & Susaneck, P.A.
324 Datura Street, Suite 145
West Palm Beach, FL 33401
Facsimile: 561-820-8099
Email: dlevinelaw@aol.com

And to:

Mark N. Axinn, Esq.
Brill & Meisel
845 Third Avenue
New York, NY 10022
Email: markaxinn@hotmail.com

TO BEACHTON TUXEDO LLC:

Edward Kuhnel
49 West Lake Stable Road
Tuxedo Park, NY 10987
Facsimile: N/A
Email: edward.kuhnel@gmail.com

With a copy to:

Peter G. Goodman, Esq.
Benjamin Gorelick, Esq.
Smith, Gambrell & Russell, LLP
250 Park Avenue, Suite 1900
New York, NY 10177
Facsimile: 212-907-9865
Email: pgoodman@srglaw.com;
bgorelick@srglaw.com

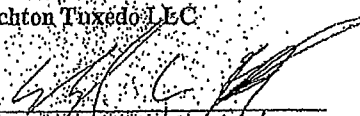
23. Counterparts and Electronic Signature. This Agreement may be executed in one or more counterparts, each of which is deemed to be an original hereof, and all of which shall be considered one and the same document as if all Parties had executed a single original document. This Agreement may be executed in Portable Document Format and each signature thereto shall be and constitute an original signature, again as if all Parties had executed a single original document.

24. Continuing Jurisdiction. The Florida Court shall retain continuing jurisdiction over the Petitioners and enforcement of this Agreement (with respect to the Petitioners only) until all property transfers and monetary payments required by this Agreement have been made. During such period and except with respect to the New York Matters, any disputes or controversies arising with respect to the interpretation, enforcement or implementation of this Agreement shall be resolved by motion to the Florida Court. Notwithstanding anything to the contrary, all disputes and/or controversies arising out of the New York Matters at any time shall be resolved in the New York courts, and the Parties hereby submit to the jurisdiction of such courts for such purpose.

25. Survival. All of the representations, warranties and covenants set forth in this Agreement shall survive the performance by the Parties of their obligations hereunder.

- Remainder of Page Intentionally Left Blank – Signatures Appear on Next Page -

IN WITNESS WHEREOF, the Parties have executed and delivered this Agreement as of the date first set forth above.

<p>Curtis C. Rogers <i>As Guardian for Oliver Bivins, Sr.</i></p> <p>Beachton Tuxedo LLC</p> <p>By: </p> <p>Name: <u>Edward Kuhn</u> Title: <u>Managing Member</u></p>	<p>Oliver Bivins, Jr. <i>Individually, and as Personal Representative of the Estate of Lorna Bivins</i></p>
---	---

Counterparts and Electronic Signature. This Agreement may be executed in one or more counterparts, each of which is deemed to be an original hereof, and all of which shall be considered one and the same document as if all Parties had executed a single original document. This Agreement may be executed in Portable Document Format and each signature thereto shall be and constitute an original signature, again as if all Parties had executed a single original document.

Continuing Jurisdiction. The Florida Court shall retain continuing jurisdiction over the Petitioners and enforcement of this Agreement (with respect to the Petitioners only) until all property transfers and monetary payments required by this Agreement have been made. During such period and except with respect to the New York Matters, any disputes or controversies arising with respect to the interpretation, enforcement or implementation of this Agreement shall be resolved by motion to the Florida Court. Notwithstanding anything to the contrary, all disputes and/or controversies arising out of the New York Matters at any time shall be resolved in the New York courts, and the Parties hereby submit to the jurisdiction of such courts for such purpose.

Survival. All of the representations, warranties and covenants set forth in this Agreement shall survive the performance by the Parties of their obligations hereunder.

- Remainder of Page Intentionally Left Blank - Signatures Appear on Next Page -

IN WITNESS WHEREOF, the Parties have executed and delivered this Agreement as of the date first set forth above.

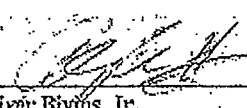
<p>Curtis C. Rogers As Guardian for Oliver Bivins, Sr.</p>	
<p>Beachton Tuxedo LLC</p>	<p>Oliver Bivins, Jr. Individually, and as Personal Representative of the Estate of Lorna Bivins</p>
<p>By: _____ Name: _____ Title: _____</p>	

EXHIBIT A

CASES TO BE DISMISSED AND/OR OBJECTIONS TO BE WAIVED

Dismissed - Petition to Determine Beneficiaries, In Re: Estate of Lorna Bivins, Circuit

EXHIBIT A

CASES TO BE DISMISSED AND/OR OBJECTIONS TO BE WAIVED

1. Dismissed - Petition to Determine Beneficiaries, In Re: Estate of Lorna Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Probate Division, File No. 502011CP001130XXXXMB.
2. Dismissed - Curtis Rogers, as Guardian of Oliver Bivins, Sr. v. Oliver Bivins, as Personal Representative of the Estate of Lorna Bivins Complaint, 502013CA006086XXXXMB/AJ **excepting** COUNT 3- DECLARATORY ACTION - TAXES and any claim by the Guardian for contribution, or otherwise, relating to potential or current income tax liabilities for the period of time predating January 1, 2011 of Oliver Sr, the Guardian and/or the Estate.
3. Waiver - The Estate and/or Oliver Jr.'s objections to Guardian Compensation and Expenses and the Guardian's Attorney's Fees and Costs, including but not limited to Ciklin Lubitz, Bill T. Smith, P.A., and Beys Stein Mobargha & Berland LLP, and any report of the Guardian, including but not limited to any Plans, Accountings, Petition for Discharge, In Re: Guardianship of Oliver Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 502011GA000006XXXXSB.
4. Dismissed - Petition to Order Personal Representative of the Estate of Lorna Bivins to Disgorge Chase Account Funds In Re: Guardianship of Oliver Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 502011GA000006XXXXSB.
5. Dismissed - Petition to Order Oliver Bivins, II to Disgorge Chase Account Funds In Re: Guardianship of Oliver Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 502011GA000006XXXXSB.
6. Dismissed - Petition to Order Personal Representative of the Estate of Lorna Bivins to Disgorge Chase Account Funds In Re: Guardianship of Lorna Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 502011GA000007XXXXSB.
7. Dismissed - Petition to Order Oliver Bivins, II to Disgorge Chase Account Funds In Re: Guardianship of Lorna Bivins, Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, Guardianship Division, File No. 02011GA000007XXXXSB.
8. Dismissed - Curtis C. Rogers, as Guardian of Oliver Bivins, Sr. v. Oliver Bivins, as Personal Representative of the Estate of Lorna Bivins, Oliver Bivins, individually, and Beachton Tuxedo LLC, Supreme Court of the State of New York, County of New York, Index No. 650242/2013.

9. Dismissed- Partition Action- Oliver Bivins, as Personal Representative of the Estate of Lorna vs. Curtis Rogers, as Guardian of Oliver Bivins, File No: 502013CP000632XXXXSB.
10. Dismissed- Appeal by Oliver Bivins, individually and Personal Representative of the Lorna Bivins vs. the Guardianship of Oliver Bivins, Case No: 4D13-1363.
11. Waiver- The Estate and/or Oliver Jr.'s objections to Stephen Kelly, Emergency Temporary Guardian of Lorna Bivins and Oliver Bivins, Petition for Discharge, Final Accounting and any other report, plan, pleading or paper filed by Mr. Kelly.
12. Dismissed - Casey Ciklin v. The Estate of Lorna Bivins, collection of Lorna Bivins Guardianship Attorneys' fees and costs, Circuit Civil Court, Palm Beach County, Florida, File No. 2011CC011689XXXXMB.
13. Dismissed- Steven Kelly v. Estate of Lorna Bivins, collection of ETG compensation and expenses in Lorna Bivins Guardianship, Palm Beach County Circuit Court, Case No. 2011CC011688XXXXMB.

Case 9:15-cv-81298-KAM Document 18-1 Entered on FLSD Docket 01/08/2016 Page 16 of 21

EXHIBIT B

FORM OF DEED

808 Lexington Avenue

NY - 1005 Bargain and Sale Deed, with Covenant against Grantors Acts-Individual or Corporation (Single Sheet)

CONSULT YOUR LAWYER BEFORE SIGNING THIS INSTRUMENT - THIS INSTRUMENT SHOULD BE USED BY LAWYERS ONLY.

THIS INDENTURE, made as of the ____ day of _____, 2013

BETWEEN

Oliver Bivins as Executor of the Estate of Lorna Bivins a/k/a Lorna M. Bivins, c/o Mark N. Axinn, Esq., Brill & Meisel, 845 Third Avenue, New York, NY 10022, and Curtis C. Rogers, as Guardian of the person and property of Oliver Bivins a/k/a Oliver Bivins, III, c/o Beys Stein Mobargha & Berland, LLP, The Chrysler Building, 405 Lexington Avenue, 7th fl., New York, NY 10174,

parties of the first part, and

Curtis C. Rogers, as Guardian of the person and property of Oliver Bivins, c/o Beys Stein Mobargha & Berland, LLP, The Chrysler Building, 405 Lexington Avenue, 7th fl., New York, NY 10174,

party of the second part,

WITNESSETH, that the party of the first part, in consideration of Ten and no/100 (\$10.00) Dollars paid by the party of the second part, does hereby grant and release unto the party of the second part, the heirs or successors and assigns of the party of the second part forever,

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the City, County and State of New York described as follows: 808 Lexington Avenue, New York, NY, Block 1397, Lot 16 on the Tax Map of New York County, and more fully described on Schedule A annexed hereto and made part hereof.

BEING the same premises previously conveyed by deed dated December 27, 1988 from Wilson Furnished Leasing, Inc., as grantor, to Lorna Bivens a/k/a Lorna M. Bivens and Oliver Bivens, III, collectively as grantee, and recorded on January 9, 1989 in Reel 1518, Page 623.

TOGETHER with all right, title and interest, if any, of the party of the first part in and to any streets and roads abutting the above described premises to the center lines thereof;

TOGETHER with the appurtenances and all the estate rights of the party of the first part in and to said premises; **TO HAVE AND TO HOLD** the premises herein granted unto the party of the second part, the heirs or successors and assigns of the party of the second part forever.

AND the party of the first part covenants that the party of the first part has not done or suffered anything whereby the said premises have been encumbered in any way whatever, except as aforesaid.

AND the party of the first part, in compliance with Section 13 of the Lien Law, covenants that the party of the first part will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose. The word "party" shall be construed as if it read "parties" whenever the sense of this indenture so requires.

IN WITNESS WHEREOF, the party of the first part has duly executed this deed the day and year first above written.

Oliver Bivins as Executor of the Estate of Lorna
Bivins

Curtis C. Rogers, as Guardian of the person and
property of Oliver Bivins

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On the ___ day of _____, 2013 before me, the undersigned, personally appeared Curtis C. Rogers, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On the ___ day of _____, 2013 before me, the undersigned, personally appeared Oliver Bivens, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

Case 9:15-cv-81298-KAM Document 18-1 Entered on FLSD Docket 01/08/2016 Page 20 of 21

RECORD AND RETURN TO:

Beys Stein Mobargha & Berland, LLP
The Chrysler Building
405 Lexington Avenue-7th fl.
New York, NY 10174
Attn: Keith B. Stein, Esq.

PROPERTY ADDRESS & TAX MAP DESIGNATION

808 Lexington Avenue, New York, NY
Block: 1397
Lot: 16
County: New York

SCHEDULE A

BEGINNING at a point on the westerly side of Lexington Avenue distant forty feet five inches northerly from the corner formed by the intersection of the westerly side of Lexington Avenue and the northerly side of 62nd Street; running thence WESTERLY parallel with 62nd Street and part of the distance through a party wall eighty feet; thence NORTHERLY parallel with Lexington Avenue twenty feet; thence EASTERLY parallel with 62nd Street, and part of the distance through a party wall eighty feet to the westerly side of Lexington Avenue and thence SOUTHERLY along the westerly side of Lexington Avenue twenty feet to the point or place of BEGINNING.

Said premises being known as and by the street number 808 Lexington Avenue,

The said premises are being sold and are being conveyed subject to Party-wall Agreement, recorded in Liber 3672 of Conveyances, at page 367.

Case 9:15-cv-81298-KAM Document 158-5 Entered on FLSD Docket 10/25/2016 Page 1 of 4

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
PROBATE /GUARDIANSHIP DIVISION "TY"**

CASE NO. 502011GA000006XXXXSB

**IN RE: GUARDIANSHIP OF
OLIVER BIVINS,**
Incapacitated.

**ORDER ON HYBRID/CONTINGENCES FEE PORTION OF APPLICATION
OF ATTORNEYS FOR WARD FOR FEES AND COSTS**

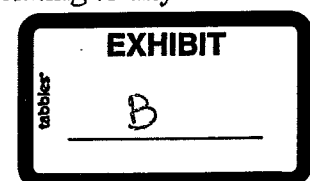
THIS CAUSE came before the Court on the Application of Ciklin, Lubitz & O'Connell and Bill T. Smith, Jr. PA. for attorney fees and costs for representing the Ward pursuant to that certain Representation Agreement dated November 30, 2012, which was approved by Order on Petition for Authorization to Pursue Petition to Determine Beneficiaries and for the Guardian to Enter Into a Hybrid Fee Agreement dated November 30, 2012.

Opposition to this fee request came from Julian Bivins, son of the Ward.

This matter was very well tried by the lawyers.

Based upon the testimony and evidence presented, the Court makes the following findings of facts and conclusions of law.

1. There is no dispute that the Ciklin, Lubitz law firm and Bill T. Smith, Jr., PA. law firm and the Guardian, Curtis Rogers, entered into a Representation Agreement dated November 30, 2012, which was approved by the Court on even date, that contained the following pertinent provisions:
 - a. The lawyers shall bill for legal services performed for the Guardian at a reduced hourly rate.
 - b. In addition to the foregoing, the Guardian agrees to pay the lawyers for any recovery obtained from the litigation and adversary matters relating to any



and all interest that the Ward may have in any property of the Lorna Bivins estate.

2. At the hearing on this matter, the lawyers showed that the legal services performed relating to the Lorna Bivins estate was coded in billing numbers 501 and 514.
3. By separate orders, the parties agreed to the amount of hourly fees to be paid pursuant to the Representation Agreement for matters 501 and 514, as well as all other hourly fees.
4. Left to decide in this order is the contingency fee recovery.
5. Both the attorneys for the Guardian and the attorney for Julian Bivins agreed that the Ward received from the Lorna Bivins estate two parcels of property, commonly referred to as the 330 South Ocean Blvd. Palm Beach, Florida property and the 808 Lexington Avenue New York, New York property.
6. The primary area of dispute were
 - (1) the value of the property recovered.
 - (2) the value of any set offs or debits, if any, to the Ward.
 - (3) the reasonableness of the fee sought, in general.
7. Upon carefully considering the valuation testimony of the witnesses and the exhibits relating thereto, the Court finds that the 50% value of the 333 South Ocean Blvd property recovered is \$602,652.00 and the 50% value of the 808 Lexington Avenue property recovered is \$2,600,000.00 for a gross amount of \$3,202,652.00 less \$232,500.00 which is 50% of the mortgage, leaving a net

50% ownership value of \$2,970,152.00, as of September 13, 2013.

8. To achieve this benefit to the Ward, the parties entered into a Comprehensive Settlement Agreement which was approved by Court order dated September 17, 2013. The next issue is one of set off or debits to the recovery of the Ward as the result of this settlement. It was evident that the Guardian made a cash payment to Oliver Jr's lawyer of \$150,000.00 as a material part of this settlement. Disputed was whether there should also be a \$130,000.00 set off for a purported transfer tax imposed by New York taxing authorities. If this tax is assessed, the Court finds that the amount of the assessment is an appropriate setoff. Julian Bivins' expert claimed the tax would be about \$130,000.00. The Guardian in a letter claimed the tax would be about \$70,000.00. The disposition of this particular dispute will be that once it is determined whether, and if so, the amount of transfer tax actually paid by the Guardian, there shall be a fee adjustment made to counsel. So for calculation purposes, the Court is using \$280,000.00 as a set off on the above mentioned recovery for a net sum of \$2,690,152.00 to which the contingency fee shall apply. If the transfer tax is less, the lawyers are entitled to 12% of the reduced amount.
9. The last issue in whether there should be a further fee reduction on the theory that the total amount of fees, that is, both hourly and contingency fees are unreasonable for this Ward to pay.
10. This Court finds that a guardianship case is an equitable matter and the focus is always on the best interest of the Ward. In this case, the Ward's best interests were extremely well considered by the work and efforts of his lawyers.
11. As a result, the Court declines to make any further fee reduction, and thus the contingency fee will be paid on a recovery amount of \$2,690,152.00, subject to the transfer tax matter.

12. As such, the fee awarded pursuant to the Representation Agreement is as follows:

(1) 18% of \$900,000.00 = \$162,000.00

(2) 15% of 1 million = \$150,000.00

(3) 12% of \$690,152.00 = \$82,818.24

for a total of \$394,818.24, which shall be paid by the Guardian for funds available of the Ward.

13. The Court reserves jurisdiction to enforce the Order.

DONE AND ORDERED in chambers, at Delray Beach, Palm Beach County, Florida this 23rd day of May, 2014.

MARTIN H. COLIN
Circuit Court Judge

SIGNED & DATED
MAY 23 2014
JUDGE MARTIN H. COLIN

Copies furnished:

Brian M. O'Connell, Esquire
515 North Flagler Drive, 20th Floor
West Palm Beach, Fl. 33401

Ronald Denman, Esquire
1000 Brickell Avenue, Suite 600
Miami, Fl. 33131

Donna P. Levine, Esquire
324 Datura Street, Suite 145
West Palm Beach, Fl. 33401

Ronda D. Gluck, Esquire
980 North Federal Highway, Suite 402
Boca Raton, Fl. 33432

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

IN RE: GUARDIANSHIP OF: GUARDIANSHIP DIVISION
OLIVER BIVINS, FILE NO: 502011GA000006XXXXSB
Incapacitated.

**AGREED ORDER ON PETITIONS FOR PAYMENT OF ATTORNEY'S FEES
AND COSTS BY THE LAW FIRM OF CIKLIN LUBITZ MARTENS &
O'CONNELL, BILL T. SMITH, JR. P.A., AND AGREED AWARD OF
ATTORNEY'S FEES AND COSTS TO PERLMAN, BAJANDAS, YEVOLI &
ALBRIGHT, P.L.**

THIS CAUSE coming before the Court on various pending fee petitions filed by the law firm of Ciklin Lubitz Martens & O'Connell and Bill T. Smith, Jr., P.A., the Court having heard argument of counsel, all parties being in agreement, and the Court being otherwise fully advised, it is thereupon

ORDERED AND ADJUDGED as follows:

1. As to Ciklin Lubitz Martens & O'Connell:
 - a. For all attorney's fees incurred through May 6, 2014, and for costs sought in the petitions filed September 10, 2013, October 23, 2013, October 30, 2013, and May 6, 2014, for all matters billed hourly for the representation of Curtis Rogers, as Guardian, and for services and costs awardable pursuant to Florida Statute §744.108 – Fees awarded in the amount of \$370,000.00; Costs awarded in the amount of \$ 74,571.90
2. As to Bill T. Smith, Jr., P.A.:
 - a. For all attorney's fees incurred through May 6, 2014, and for costs sought in the petitions filed May 15, 2013, July 2, 2013, and October 11, 2013,

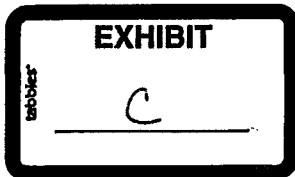


Exhibit 24

In Re: Guardianship of Oliver W. Bivins
File No: 502011GA0000006XXXXSB

for all matters billed hourly for the representation of Curtis Rogers, as Guardian, and for services awardable pursuant to Florida Statute §744.108 – Fees awarded in the amount of \$116,000.00; Costs awarded in the amount of \$ 12,843.89

3. As to Perlman, Bajandas, Yevoli & Albright P.L.:

a. For all attorney's fees and costs incurred through May 6, 2014, for any services relating to the representation of Julian Bivins, with regard to Oliver Bivins, Sr., and for services awardable pursuant to Florida Statute §744.108 – Fees awarded in the amount of \$374,213.72; Costs awarded in the amount of \$59,076.87.

4. The attorney's fee and cost awards above shall be paid as follows:

a. First from the Oliver Bivins Management Trust ("Trust"); should the Trust fail, for any reason, to make full payment of the awards in 1 – 3 above, within thirty (30) days of demand for same, then next from:

(i) The refinance or sale of 808 Lexington Ave., New York, New York; and

(ii) Despite the provisions in number 4 above, at any time from any other assets of the guardianship.

5. No party to this agreed order is waiving any claims or defenses that may be proper with regard to the hybrid contingency portion of the fees sought by Ciklin Lubitz Martens & O'Connell and/or Bill T. Smith, Jr., P.A.

6. The award of the above attorney's fees and costs shall have the effect of a


Case 9:15-cv-81298-KAM Document 228-24 Entered on FLSD Docket 03/03/2017 Page 3 of 3

In Re: Guardianship of Oliver W. Bivins
File No: 502011GA0000006XXXXSB

recordable lien and/or judgment against the guardianship and its assets.

DONE AND ORDERED in Delray Beach, Palm Beach County, Florida on the

23 day of MAY, 2014.



MARTIN H. COLIN
Circuit Judge

Copies returned:

Brian M. O'Connell, Esq., 515 N. Flagler Dr., 20th Floor, West Palm Beach, FL 33401

service@ciklinlubitz.com - slobdell@ciklinlubitz.com

Ronald Denman, Esq., 1000 Brickell Ave., Suite 600, Miami, FL 33131

rjdenman@pbyalaw.com - eservicemia@pbyalaw.com - acarmenate@pbyalaw.com;

Ronda D. Gluck, Esq., 980 N. Federal Highway, #402, Boca Raton, FL 33432

attorneys@bocaattorney.com

Donna P. Levine, Esq., 3003 S. Congress Ave., Suite 1A, Palm Springs, FL 33461

Levine.susaneck@gmail.com

8/19/15 RJD

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

IN RE: GUARDIANSHIP OF: GUARDIANSHIP DIVISION

OLIVER BIVINS, FILE NO: 502011GA000006XXXXSB

Incapacitated.

_____ /

ORDER ON GLOBAL SETTLEMENT

THIS CAUSE coming before the Court on all adversary matters currently pending in this matter and the Petition for Authorization to Sell Ward's Real Property Located at 808 Lexington Ave., New York, New York, dated May 2, 2014, the Court having heard argument of counsel, having made a ruling on the settlement ("settlement") of these matters, and being otherwise fully advised, it is thereupon

ORDERED AND ADJUDGED as follows:

As to real property located at 808 Lexington Ave., New York, New York ("808")

1. 808 is currently titled in the Estate of Lorna Bivins ("Estate") and Oliver Bivins, Sr. ("the Ward") 50/50 as tenants in common.
2. The law firm of Ciklin Lubitz Martens & O'Connell is currently holding, in escrow, a fully executed deed for the transfer of ownership of 808 from Oliver Bivins, a/k/a Oliver Bivins, Jr. as Personal Representative of the Estate of Lorna Bivins a/k/a Lorna M. Bivins, and Stephen M. Kelly (the "Guardian"), as successor limited guardian of the person and property of Oliver Bivins, a/k/a Oliver Bivins, Sr., (a/k/a Oliver Bivins, III in connection with the deed on 808, (sometimes referred to herein as the "Ward"), parties of the first part, to Stephen M. Kelly, as successor limited guardian of the person and property of the Ward, party of the second part, and will hold the deed until further



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order of this Court, or as determined by the Parties. A true and correct copy of the fully executed deed is attached hereto as Exhibit "A".

3. The Guardian shall obtain an estoppel/payoff letter from Beachton Tuxedo, LLC, the holder of the only mortgage on 808, on or before October 31, 2014. The Guardian shall attempt to negotiate a reduction of the amount reported or claimed by Beachton Tuxedo, LLC as due to them pursuant to the mortgage.

4. Julian Bivins ("Julian") is authorized to purchase 808 "As Is" for Five Million Dollars (\$5,000,000.00) under the following terms, conditions and limited contingency:

a. On or before October 6, 2014, Julian shall deposit, by wire transfer to the law firm of Ciklin Lubitz Martens & O'Connell (Florida counsel for the Guardian and the Ward, and the "Escrow Agent" for purposes of holding the Deposit Amount), One Million Dollars (\$1,000,000.00) (the "Deposit Amount"), which shall be held by the Escrow Agent in a non-interest bearing account, as a good faith deposit toward the purchase of 808;

b. No later than 11:59 pm on November 19, 2014, Julian shall obtain, and provide to the Guardian, in writing from a lender of Julian's choice, a commitment for a loan in the amount of Four Million Dollars (\$4,000,000.00), for the purchase of 808 ("Financing Commitment");

c. The closing of the purchase by Julian of 808 will take place on or before December 16, 2014, and there shall be no extension to this date for any reason.

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d. TIME SHALL BE OF THE ESSENCE with respect to each of the dates stated in sections 5.a, 5.b and 5.c above.

e. If Julian has deposited the Deposit Amount and obtained and delivered the Financing Commitment as required by Sections 5.a and 5.b above, and a closing does not take place on or before December 16, 2014, Julian forfeits his One Million Dollar (\$1,000,000.00) deposit to the Guardian on behalf of the Ward, unless the lender is the reason he cannot close ("Lender Failure"), in which case the Deposit Amount shall be returned by the Escrow Agent to Julian; and in any event, Julian's right to purchase 808 is terminated, and any contract, agreement, or otherwise by and between the Guardian and Julian, is deemed null and void and of no further force or effect;

f. Further, if Julian does not comply with the deposit of the Deposit Amount and/or the obtaining of the Financing Commitment on a timely basis, then Julian forfeits all right to purchase 808, and any contract, agreement, or otherwise, is deemed null and void and of no further force or effect;

g. Julian's right to purchase 808 and any contract or agreement for such purchase of 808 is not assignable by Julian, except to an entity owned solely by Julian;

h. For the purposes of any sale to Julian, as provided herein, the purchase of 808 and the taking of title thereto by Julian to 808 is "As Is" and in its then existing condition, with all wear and tear and deterioration from the date of this Order until the closing accepted by Julian, and without any contingencies

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with respect to the condition of 808, or any governmental liens or impositions against 808, or its tenants, or any other aspect of 808, or otherwise;

i. A contract to purchase 808 will contain the terms of this order, and will be initially prepared by Julian's counsel and submitted to counsel for the Guardian, and shall be executed by both the Guardian and Julian on or before October 6, 2014. If the contract is not prepared, or otherwise fully executed, on or before October 6, 2014, this order shall continue to govern the obligations of the parties, however the parties shall be required to execute the contract as soon as practicably possible after October 6, 2014

j. If the Deposit Amount and/or the Financing Commitment and/or the closing provisions are not met, as specified in this order, then the Guardian is authorized to immediately sell 808 to the highest of three third party bidders, for an amount of at least Five Million Dollars (\$5,000,000.00) without any participation by Julian, or any further approval of the court, and Julian shall be deemed to have waived any rights, objections, or otherwise to any sale by the Guardian to any third party, so long as, in connection with the sale, the Guardian, its agents, and its counsel comply with their fiduciary duties to the Ward as provided for by Florida Law.

6. With respect to the sale of 808, whether to Julian for Five Million Dollars (\$5,000,000.00) or to a third party for that amount or greater, through Eastern Consolidated Properties, Inc., a New York real estate broker, acting through its sales agent, Lipa Lieberman ("Lieberman"), will be the exclusive broker for any sale

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effectuated by the Guardian, and will be paid a commission at a rate of 6% of the purchase price, unless another broker is involved in any sale to a third party, in which case the 6% shall be split with a participating broker. In no event shall real estate commissions exceed 6%.

7. This order shall operate as authorization for the Guardian to execute any documents, deeds, or the like to finalize the sale of 808, whether to Julian or to a third party buyer.

8. At the closing of 808 – the following shall be paid from the proceeds of the sale:

a. \$150,000.00 to Ciklin Lubitz Martens & O'Connell, as Escrow Agent with regard to any monies due to Levine & Susaneck pursuant to Settlement Agreement and Mutual Release, pending further Court Order;

b. Attorney fees and cost reimbursement to Julian Bivins, pursuant to Order dated May 23, 2014 awarding fees and costs to Perlman Bajandas Yevoli & Albright P.L. ("PBYA") in the amount of \$374,213.72 in attorney's fees, and \$59,076.87 in costs, which amounts have been paid by Julian Bivins to PBYA;

c. Attorney fees and cost reimbursement, pursuant to Order dated May 23, 2014 awarding fees and costs to Ciklin Lubitz Martens & O'Connell, in the amount of \$444,571.90;

d. Attorney fees and cost reimbursement, pursuant to Order dated May 23, 2014 awarding fees and costs to Ciklin Lubitz Martens & O'Connell, in the amount of \$19,087.50;

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e. Attorney fees and cost reimbursement, pursuant to Order dated May 23, 2014 awarding fees and costs to Ciklin Lubitz Martens & O'Connell, in the amount of \$394,818.24;

f. Attorney fees and cost reimbursement, pursuant to Order dated May 23, 2014, awarding fees and costs to Bill T. Smith, P.A., in the amount of \$128,843.89.

g. Attorney fees and cost reimbursement to the law firm of Beys Stein Mobargha & Berland, LLP pursuant to a court order entered on (last year)..

h. Guardian fees, pursuant to order dated May 23, 2014, (and outstanding amounts) awarding fees and cost to Stephen Kelly, Guardian, in the amounts of \$19,087.30 and \$22,990.88; and

i. Payment of any other court order awarding attorney's fees and costs and/or guardian's fee and expenses entered as of date of closing on sale of 808.

9. An additional \$125,000.00 will be withheld by the Escrow Agent from the closing proceeds, to be utilized for guardianship administration expenses, subject to court approval, provided the sale of 330 does not occur first and a holdback of \$125,000 from the proceeds of that sale has not occurred.

10. After payment and holdback of a. - h. and 9. above, the remaining balance will be transferred to the Oliver Bivins Management Trust in Amarillo, Texas.

As to real property located at 330 South Ocean Blvd., Palm Beach, Florida ("330")

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11. Within thirty (30) days of the Ward's relocation to Childers Place in Amarillo, Texas, Julian shall have the right to make a written election to purchase 330 for the price of One Million One Hundred Fifty Thousand (\$1,150,000.00) Dollars. The Ward's relocation date shall be evidenced by any written communication from the Guardian to Julian, and copied to his counsel of record, stating that the Ward is situated in Texas.

12. If Julian determines that he will purchase 330 for One Million One Hundred Fifty Thousand (\$1,150,000.00) Dollars, within the thirty (30) day period he will notify Brian M. O'Connell, Esq., of Ciklin Lubitz Martens & O'Connell via e-mail, at boconnell@ciklinlubitz.com and acrispin@ciklinlubitz.com, in writing, of his intention to purchase 330 as described above.

13. A fully executed contract to purchase will be submitted by Julian with the election and shall reflect these terms:

a. 330 will be purchased, in cash and "as is", without any warranties, contingencies, or representations as to condition. Julian shall have the right to inspect the premises within ten (10) days of the Ward residing in Texas, but such inspection period shall not extend his option to purchase period;

b. Closing must occur on or before forty-five (45) days from the date of the election. No extensions shall be granted, except as to any issue regarding title and closing that is not the result of any action or inaction on the part of Julian;

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14. This order shall operate as authorization for the Guardian to execute any documents, deeds, or the like to finalize the sale of 330, whether to Julian or to a third party buyer.

15. If any of the above referenced terms for the purchase of 330 are not met, Julian will have waived any rights, objections, or otherwise to any sale by the Guardian to a third party, so long as, in connection with the sale, the Guardian, its agents, and its counsel comply with their fiduciary duties to the Ward as provided for by Florida Law, and the Guardian may immediately sell to a third party for fair market value without further order of the court.

16. If not otherwise paid from the closing proceeds of 808, the following shall be paid from the closing proceeds of 330:

a. Attorney fees and cost reimbursement to Julian Bivins, pursuant to Order dated May 23, 2014 awarding fees and costs to Perlman Bajandas Yevoli & Albright P.L. ("PBYA") in the amount of \$374,213.72 in attorney's fees, and \$59,076.87 in costs, which amounts have been paid by Julian Bivins to PBYA;

b. Attorney fees and cost reimbursement, pursuant to Order dated May 23, 2014 awarding fees and costs to Ciklin Lubitz Martens & O'Connell, in the amount of \$19,087.50;

c. Attorney fees and cost reimbursement, pursuant to Order dated May 23, 2014 awarding fees and costs to Ciklin Lubitz Martens & O'Connell, in the amount of \$394,818.24;

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d. Attorney fees and cost reimbursement, pursuant to Order dated May 23, 2014, awarding fees and costs to Bill T. Smith, P.A., in the amount of \$128,843.89.

e. Attorney fees and cost reimbursement to the law firm of Beys Stein Mobargha & Berland, LLP pursuant to a court order entered on (last year).

f. Guardian fees, pursuant to order dated May 23, 2014, (and outstanding amounts) awarding fees and cost to Stephen Kelly, Guardian, in the amount of \$19,087.30 and \$22,990.88;

g. Payment of any other court order awarding attorney's fees and costs and/or guardian's fee and expenses entered as of date of closing on sale of 330.

17. Provided 330 closes before 808, An additional \$125,000.00 will be withheld by the Escrow Agent from the closing proceeds, to be utilized for guardianship administration expenses, subject to court approval. If 808 closes first, and \$125,000 was held back from the sale proceeds of 808, this holdback provision shall not apply.

18. After payment and holdback of 16. a. - g. and 17. above, if applicable, the remaining balance will be transferred to the Oliver Bivins Management Trust in Amarillo, Texas. If such payments were already made from the proceeds of the sale of 808, the proceeds from the sale of 330 will be transferred to the Oliver Bivins Management Trust in Amarillo, Texas.

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19. The Guardian shall forthwith, but in no event later than 10 days from the date of this Order, change the residence of the Ward from Florida to Amarillo, Texas and Julian consents to same.

a. This Order shall authorize the Guardian to change the residence of the Ward from Florida to Amarillo, Texas without further petition, action or court approval;

b. The Florida Guardian shall initiate proceedings in Potter County, Amarillo, Texas for the appointment of a third party professional guardian of the person (or the equivalent of same pursuant to Texas statutes) (the "Texas Guardian of Person") and a professional guardian shall always remain in that position;

c. The guardianship of the property of the Ward will remain in Florida until further order of this Court and the Florida Guardian shall continue to serve as the guardian of the property of the Ward until discharged by the Florida Court;

d. The Ward will initially reside at Childers Place located in Amarillo, Texas. Once moved to Childers Place, if the Texas Guardian of Person (or Florida Guardian, if a Texas Guardian of Person has not yet been appointed) shall determine that the Ward should be moved, the Ward may be moved to any other suitable facility agreed to by Julian and the Texas Guardian of Person (or Florida Guardian, if a Texas Guardian of Person has not yet been appointed);

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e. The Florida Guardian, and/or the Texas Guardian of Person, at such guardian's sole discretion, will establish nursing care, i.e. Certified Nursing Assistants, or similar qualified professionals, for 24 hours 7 days a week to care for the Ward in Texas and put into place any other care plan or employ any other professional reasonable to effectuate the Ward's transition and stabilization in Texas, any such care plan shall continue unless, and until, further court order is obtained;

f. The Ward will be transported to Texas by suitable method of transport selected by the Florida Guardian in concert with his physician(s) and with whatever medical equipment determined by the Florida Guardian and his physician(s) is reasonably available to ensure the safe transport of the Ward;

g. The cost and payment for the Florida Guardian to initiate any petition or motion in the Florida court to implement guardianship proceedings in Texas, and any costs in Texas for the implementation of a guardianship, including, but not limited to court costs and attorney's fees and costs will be promptly paid by the trustee of the Oliver Bivins Management Trust. If, due to the failure of the Oliver Bivins Management Trust, to advance, or pay for such expenses, or the expenses of the Ward's transport to, or care in Texas, the Florida Guardian shall seek court approval to pay for same from the holdback amount from the proceeds of the 808 or 330 sale, whichever, the case, or for authorization to hold back further proceeds from the sale of 808 or 330.

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General Provisions

20. All pending adversary matters between the Guardian and Julian will be dismissed or withdrawn with prejudice, except as to the motion to enforce-Oliver II to comply with settlement with respect to rent proceeds, and other aspects which pertain to his permission to allow Beachton to use premises, as it affects the payment of the \$150,000 to the Estate of Lorna Bivins, ~~and a set off against amounts owed to Beachton~~ ^{Ms/Ka}


21. The settlement, and all provisions of this order, are subject to the jurisdiction of this Court and this Court will retain jurisdiction until all the terms and conditions of this settlement have been met and this Court shall always retain jurisdiction and authority to enforce this settlement and order as well as any previous orders entered by this Court.

22. Julian Bivins and Stephen Kelly, as Guardian of Oliver Bivins, Sr., shall exchange mutual general releases of all claims that existed on or before September 19, 2014.

23. All parties agree that time is of the essence in complying with all provisions of the contract(s) to purchase and all provisions thereto, the settlement and this order.

DONE AND ORDERED in Delray Beach, Palm Beach County, Florida on the

19 day of August, 2015.



MARTIN H. COLIN
Circuit Judge

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 9:15-cv-81298-KAM/Matthewman

JULIAN BIVINS, as Personal
Representative of the ancillary Estate
of Oliver Wilson Bivins,

Plaintiff,

v.

BRIAN M. O'CONNELL, ASHLEY
N. CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN,
BEYS LISTON MOBARGHA &
BERLAND, LLP and LAW
OFFICES OF KEITH B. STEIN,
PLLC, n/k/a STEIN LAW, PLLC,

Defendants.

**DEFENDANTS', CIKLIN LUBITZ & O'CONNELL, BRIAN M. O'CONNELL,
AND ASHLEY N. CRISPIN, MOTION FOR ENTRY OF FINAL
JUDGMENT ON AFFIRMATIVE DEFENSES OF COLLATERAL
ESTOPPEL/RES JUDICATA AND RELEASE**

Defendants, Ciklin Lubitz & O'Connell ("CLO"), Brian M. O'Connell ("O'Connell"), and Ashley N. Crispin ("Crispin") (collectively "Defendants"), move for final judgment on their affirmative defenses of collateral estoppel/res judicata and release.

I. INTRODUCTION.

This civil action was tried to the jury from July 17 - 20 and 24 - 28, 2017. On July 28, 2017, the jury entered a catastrophic verdict in the amount of \$16.4 million against Crispin and

O'Connell. CLO was not on the verdict form. However, CLO is vicariously liable for the conduct of Crispin and O'Connell.

During the course of the trial on July 27, 2017, the Court indicated to the parties that the issues of collateral estoppel/res judicata and release would be decided by the Court, after the jury verdict was rendered. No party objected to that procedure.¹ T. 8:281-82.²

II. COLLATERAL ESTOPPEL/RES JUDICATA.

Before trial, Defendants, plus Defendant, Stephen M. Kelly, as Successor Guardian ("Kelly"), filed their Motion for Final Summary Judgment on the issues of collateral estoppel/res judicata (DE 227). That motion was fully briefed³ and Defendants adopt herein the arguments made in the motion. The Court granted final summary judgment as to Kelly, but denied it as to Defendants.

A. The Elements of Collateral Estoppel/Res Judicata.

As this Court previously has noted:

Under Florida law,⁴ collateral estoppel will preclude relitigation of an issue when the (1) the identical issue; (2) has been fully litigated; (3) by the same parties or their privies and (4) a final decision has been rendered by a court of competent jurisdiction. See *Wingard v. Emerald Venture Florida LLC*, 438 F.3d 1288, 1293 (11th Cir. 2006); *Quinn v. Monroe County*, 330 F.3d 1320, 1329 (11th Cir. 2003).

¹ The Court indicated that it could deal with these issues by way of a Rule 50 motion. Accordingly, this Motion is filed pursuant to Rule 50 or as a request for the Court to rule on the non-jury aspects of this civil action.

² Trial Transcript shall be "T. vol:page."

³ Plaintiff's Response to Motion for Final Summary Judgment (DE 258); Defendants' Reply in Support of Motion for Final Summary Judgment (DE 274).

⁴ The Court also noted that "[I]n a diversity case, the Court applies Florida law. See *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1132-33 (11th Cir. 2010); *Royal Ins. Co. of America v. Whitaker Contracting Corp.*, 242 F.3d 1035, 1040 (11th Cir. 2001)."

Under res judicata, a final judgment issued by a court of competent jurisdiction bars a subsequent suit between the same parties based upon the same cause of action. *Felder v. State, Dept. of Management Services, Div. of Retirement*, 993 So. 2d 1031, 1034 (Fla. Dist. Ct. App. 2008). Res judicata precludes consideration not only of issues that were raised but also of issues that could have been raised, but were not raised in the prior case. *Fla. DOT v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001). The doctrine of res judicata applies under Florida law when the following conditions are present: "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of quality in persons for or against whom claim is made." *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1332 (11th Cir. 2010) (citing *Fla. Bar v. Rodriguez*, 959 So. 2d 150, 158 (Fla. 2007)); *Bloch v. Home Mortgage*, No. 14-cv-80464, 2014 WL 12580434, at * 1 (S.D. Fla. July 23, 2014).

B. The Court Orders Giving Rise to Collateral Estoppel/Res Judicata.

The Court orders giving rise to collateral estoppel/res judicata include the following:

1. Order on Motion for Court Approval of Settlement Agreement and Mutual Release, dated September 17, 2013 (DE 18-1), (Attached as Exhibit "A") (the "New York Settlement Agreement."). That order has attached to it the Settlement Agreement and Mutual Release.
2. Order on Hybrid/Contingences Fee Portion of Application of Attorneys for Ward for Fees and Costs, dated May 23, 2014 (DE 158-5), (Attached as Exhibit "B").
3. Agreed Order on Petitions for Payment of Attorney's Fees and Costs by the Law Firm of Ciklin Lubitz Martens & O'Connell, Bill T. Smith, Jr., P.A., and Agreed Award of Attorney's Fees and Costs to Perlman, Bajandas, Yevoli & Albright, P.L., dated May 23, 2014 (DE 228-24); (Attached as Exhibit "C").
4. Order Approving Global Settlement Agreement, dated March 19, 2015 (DE 158-9), (Attached as Exhibit "D") ("Global Settlement Agreement"). The Order includes the terms of the Global Settlement Agreement.

Each of the orders above resulted from a settlement, but that is of no consequence when considering the application of Florida preclusion doctrines. That is so because it is the law of Florida that when a settlement becomes approved by a court order, it becomes a final judgment in all respects as to issue preclusion doctrines. *Lee v. State Farm Mutual Ins. Co.*, 303 So. 2d 349, 350 (Fla. 3d DCA 1974); *Baron v. Provencial*, 908 So. 2d 526, 527 (Fla. 4th DCA 2005); *Kaplan v. Kaplan*, 624 Fed.Appx 680, 682 (11th Cir. 2015).⁵

C. The Effect of the Settlement and Attorney Fee Orders.

The effect of the settlements and court orders approving those settlements is simple. They establish that all of Julian's complaints for legal malpractice and breach of fiduciary duty are precluded by the doctrines of collateral estoppel/res judicata. The court-approved settlement agreements fall into one of two categories: (a) the Global Settlement Agreement which Julian entered into and the court approved and (b) the New York Settlement Agreement to which Julian objected, the court approved and Julian never appealed.

By those orders the guardianship court concluded that the settlements were in the best interest of the Ward and those orders are now final and non-appealable. For example, by the order of September 17, 2013, the guardianship court approved the New York Settlement Agreement. Paragraph 16 of that Agreement provides that is binding on the heirs, successors and personal representatives of the parties. One of those parties was the guardian standing in the shoes of the

⁵ Thus the instant case is distinguished from *Keramati v. Schackow*, 553 So. 2d 741 (Fla. 5th DCA 1989). The court in that case addressed the issue of collateral estoppel in the context of a settlement that was not approved by a court order and thus had not become a final judgment for purposes of issue preclusion law.

Ward. (Defendants in this case were the guardian's attorneys.) Under Florida law, that agreement is now binding on Plaintiff as the Ward's personal representative. Plaintiff is the personal representative of a party to the order, the Ward. Thus the Ward's estate is bound to the order, as was the Ward himself, through his guardian. See *Kensington Associates v. Moss*, 426 So. 2d 1076, 1078 (Fla. 4th DCA 1983) and *Davis v. Evans*, 132 So. 2d 476, 481-82 (Fla. 1st DCA 1961). Plaintiff now alleges that the terms of the settlement were not fair to his father's (the Ward's) estate because, for example, according to Plaintiff one piece of property (67th Street) of the four properties involved in the settlement was undervalued.

However, those settlement agreements were either approved by and advocated for by Julian, or they were approved over his objection after he had the full opportunity to be heard. At the time he did so he was the nominated personal representative under his father's last known will, for the entire period of his father's guardianship. Equally important, Julian was the sole beneficiary of his father's estate under that will.⁶

Further, the orders are effective to bar Julian's claims because in each of the orders, attorneys' fees were approved to be paid to the Ciklin law firm on account of the work performed by its lawyers, O'Connell and Crispin. If any party to those agreements and orders wished to challenge those fees on the grounds of legal malpractice or breach of fiduciary duty, they should have done so during the proceeding and, having not done so, they are barred by the doctrine of res

⁶ As the son and sole beneficiary, Julian Bivins was a "next of kin" as defined by Fla. Stat. § 744.102(14). A next of kin is entitled generally to notice of the guardianship proceedings and the opportunity to be heard. In fact, Julian received notice and participated in the guardianship proceedings, after entering an appearance as an "interested person" under Florida law knowing that he was the nominated executor and sole beneficiary of the Ward's last known will.

judicata. The Order on Motion for Court Approval of Settlement Agreement and Mutual Release provided for attorneys' fees in paragraphs 3(g) and (h). The Order on Hybrid/Contingences Fee Portion of Application of Attorneys for Ward for Fees and Costs provided for the payments of fees in paragraphs 11 and 12. Importantly, that order in paragraph 10 held that "[I]n this case, the ward's best interests were extremely well considered by the work and efforts of his lawyers [i.e., the Ciklin law firm]." The Agreed Order on Petitions for Payment of Attorney's Fees and Costs by the Law Firm of Ciklin Lubitz Martens & O'Connell, Bill T. Smith, Jr., P.A., and Agreed Award of Attorney's Fees and Costs to Perlman, Bajandas, Yevoli & Albright, P.L., dated May 23, 2014, provided for the payment of attorneys' fees to the Ciklin law firm in paragraph 1. Finally, the Order Approving Global Settlement Agreement, dated March 19, 2015, provided for the payment of attorneys' fees to the Ciklin law firm in paragraph 8(c), (d), and (e).

If one were a party to the proceeding, as was Julian, in which the Ciklin law firm was awarded fees, then one was under an obligation to assert claims of malpractice and breach of fiduciary duty in opposition to the award of such fees. By way of an analogy, according to well-established bankruptcy law, when an application that approves an award of attorneys' fees becomes a final, non-appealable order, as a matter of law, any parties who could have objected to the application on grounds of malpractice, negligence, breach of fiduciary duty or malfeasance of any kind on the part of the lawyers, are precluded from doing so because of the doctrine of res judicata. Legal malpractice and a breach of fiduciary duty are obviously grounds that could and should be considered by a court in awarding attorneys' fees and, if those grounds are not asserted by parties to the proceeding in opposition to the award, then those parties are barred by the doctrine of res judicata from attempting to re-litigate the fee award by asserting wrongs on the part of the

attorneys. *Capitol Hill Grp. v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 493 (D.C. Cir. 2009)(approving of the district court and bankruptcy court determinations that Capitol Hill "could have pursued claims against Shaw Pittman regarding the adequacy of its representation ... at the bankruptcy fee hearings but that it failed to do so and would therefore be barred from later asserting claims based on Shaw Pittman's representation by the doctrine of res judicata"); *Iannochino v. Rokolakis (In re Iannochino)*, 242 F.3d 36, 47 (1st Cir. 2001) (noting that, during the fee application proceedings, "[a] bankruptcy court . . . makes an implied 'finding of quality and value' in the professional services provided . . . during the bankruptcy," and affirming summary judgment of the malpractice claims on res judicata grounds); *Osherow v. Ernst & Young, LLP (In re Intelogic Trace, Inc.)*, 200 F.3d 382, 387-88 (5th Cir. 2000)(affirming summary judgment on the malpractice claims, and noting that "an award of fees for professionals . . . employed by a bankruptcy estate represents a determination of 'the nature, the extent, and the value of such services,' the same services that were at issue in the trustee's malpractice complaint. Because those issues could have been raised at the fee petition proceedings, they were barred by res judicata, which "bars claims that should have been litigated in a previous proceeding").

As the bankruptcy court cases indicate, when a guardianship court judge enters an order regarding the amount of attorneys' fees to be paid to lawyers providing service to the guardianship, that award of fees must necessarily include an implied "finding of quality and value" in the professional services provided during the course of the guardianship. There could be no doubt that any interested party in the guardianship proceedings could have objected to the amount of the fees awarded and such objection could have been based upon an alleged legal malpractice or breach of fiduciary duty. Julian did not object, although he had every right to do so, and he is

bound by the doctrine of res judicata through the court's explicit finding that the conduct of the Ciklin law firm was in the best interest of the Ward. Thus, both the settlements and the attorneys' fees were approved by the guardianship court, barring by res judicata Plaintiff's claims.

D. The Same Issues Were Litigated in the Guardianship Proceedings Leading to the Cited Court Orders as Were Litigated in This Legal Malpractice Case.

There is no dispute that Plaintiff, through his attorney, Mr. Denman, raised the same issues in opposition to the guardianship court orders as he raised in this malpractice action. For example, as to the failure to obtain MAI appraisals, upon which the jury predicated its malpractice verdict, Mr. Denman, Plaintiff's attorney (then and now), where he unsuccessfully argued on Julian's behalf that the New York Settlement Agreement should not be approved and made an order of the court, made the following arguments to the guardianship court:

MR. DENMAN: He [Julian] is a proper party because all this comes back to is the amount of attorney's fees that are being paid and the amount of payoffs being made between what we call the collusion of parties in order to have this go away. Rogers [the first guardian] is staying in power so he can payoff of his friends, to the expense of Julian. He's made it clear he could care less what happens to Julian. He wants to take care of all these expenses. What we seek to prove is that while maybe a benefit to the ward out of this, we still haven't received the appropriate -- we've been requesting -- what are the valuations? How is the settlement made? Look at the amount of attorney's fees.

DE 395 (CLO Def Ex 35/11:15–12:3) (emphasis added).

MR. DENMAN: ... within -- by August 30. So we object to certain aspects of it because if this were a commercial closing, we would have done -- any attorney would do a considerable amount of due diligence to understand the valuation.

DE 395 (CLO Def Ex 35/62:19–23) (emphasis added).

MR. DENMAN: Your Honor, what all comes into play here is the fact that -- the next thing is, there is four properties. There has been no appraisals that we've seen on the four properties. We just got last week -- there was a letter from a realtor as to her opinion on the two New York properties. I still don't have anything on

London. Rogers has never gone over there. He's never sent anything over there as to full appraisal. We don't have the background on that. We still don't even have an appraisal on 330. So we're doing an exchange of all these properties, supposedly in settlement of -- I'm not exactly sure which claim is being settled here, but then what we --

DE 395 (CLO Def Ex 35/68:23-69:12) (emphasis added).

MR. DENMAN: I think we should at least have an appraisal, not just one realtor's opinion, but an appraisal.

THE COURT: I don't care where that -- first of all, this doesn't even have a value.

DE 395 (CLO Def Ex 35/120:11-15) (emphasis added).

Thus, in the guardianship proceedings, Plaintiff litigated and lost his objection that there were no MAI appraisals. He is not permitted a second bite at the apple. *Carson v. Gibson*, 638 So. 2d 79, 81 (Fla. 2d DCA 1994) ("the estoppel in this case arises from the fact that Carson chose to litigate as affirmative defenses the same issues that he now wishes to litigate as a malpractice cause of action. Estoppel by judgment or collateral estoppel applies when the identical parties wish to relitigate issues that were actually litigated as necessary and material issues in a prior action.")⁷.

E. There Is Privity Between Julian as Personal Representative of the Estate of Oliver Wilson Bivins and Julian as the Nominated Personal Representative and the Sole Beneficiary of the Estate of Oliver Wilson Bivins.

This Court denied the Ciklin law firm's motion for summary judgment on the grounds of res judicata "for the simple reason that the Defendants' attorneys were not parties or in privity with

⁷ This case holds that while the malpractice claim was not barred by res judicata because the parties were not identical in the charging lien dispute, the later malpractice claim would be barred by collateral estoppel. That is so because the same issues that were presented in opposition to the attorney's charging lien were alleged to be the basis of the later legal malpractice case.

any party before the guardianship court" (DE 296, p. 6). The Court cited *Keramati v. Schackow*, 553 So. 2d 741 (Fla. 5th DCA 1989).⁸

In *Keramati*, a minor child, Keramati, and his parents sued Dr. Richardson and Monroe Memorial Hospital for medical malpractice. That case was settled. Then Keramati and his parents sued for legal malpractice the lawyers (Schackow and McGalliard) that represented them in the medical malpractice case. The court held that the doctrine of res judicata could not applied because "the defendants in the prior suit were Dr. Richardson and the hospital. In this case, the defendants are Schackow and McGalliard."

That is a far cry from the case at hand in which Julian during the guardianship proceedings was (1) the nominated personal representative of his father's estate; (2) the sole beneficiary of the estate; (3) an "interested party" and "next of kin" who actively participated in the guardianship proceedings; and (4) one who either approved or objected to the settlements at issue. Now Julian as personal representative of his father's estate brings this malpractice action against Defendants, claiming that during the guardianship proceedings the estate was not in privity with the guardian's attorneys. Julian is wrong. As discussed below, Defendants were either parties before the guardianship court or in privity with a party before the guardianship court or both.

1. Defendants as parties.

When examining the attorneys' fees orders in section II.B. above, it is apparent that the

⁸ The court also observed that the *Keramati* court held that in the context of a settlement agreement "the adequacy of the amount settled for was not litigated." *Id.* at 744. That was true in *Keramati* because that case did not involve a court-approved settlement. However, once and if a settlement becomes approved by a court, it becomes a final order subject to the doctrine of res judicata as discussed in section II(B) above.

Defendants were some of the moving parties pursuant to written petitions under Florida Statutes 744.108 in seeking those orders. Defendants asked the court to authorize them to be paid fees for the legal services they rendered to the guardian. The court awarded the requested fees. Thus, even if limited to those proceedings alone, which encompass all of Plaintiff's alleged wrongful acts of the Defendants, Defendants were "parties ... before the guardianship court." Further, under the Florida Guardianship Law (chapter 744) attorneys for a guardian play an essential role in the entire guardianship administration process and as this very case demonstrates are effectively parties before the guardianship court. **Defendants in privity with a party to the guardianship.**

It is irrefutable that Defendants were in privity with the professional guardians for the Ward. (Orders [DE 132, 167, and 296]) It is also clear that those same guardians were parties to the guardianship. Thus, Defendants were in privity with a party to the guardianship.

F. Florida Law is Well Established That, By Any Test, Julian, as a Nominated Personal Representative, the Sole Beneficiary of the Estate, the Next of Kin, and an Interested Person in the Guardianship Proceedings is in Privity in This Legal Malpractice Case, Where He is the Personal Representative of the Ward's Estate and the Plaintiff.

The law on this issue is as follows:

As to the identity of the persons and parties to the action, in the first case, they sued individually, and in this case they sued in their capacity as trustees. 'The term 'parties' has frequently been given a much broader coverage than merely embracing parties to the record of an action [.]' *Seaboard Coast Line R.R. Co. v. Indus. Contracting Co.*, 260 So. 2d 860, 863 (Fla. 4th DCA 1972). As the supreme court explained later, '[f]or one to be in privity with one who is a party to a lawsuit or for one to have been virtually represented by one who is party to a lawsuit, one must have an interest in the action such that she will be bound by the final judgment as if she were a party.' *Stogniew v. McQueen*, 656 So. 2d 917, 920 (Fla. 1995) (*citing Se. Fid. Ins. Co. v. Rice*, 515 So. 2d 240 (Fla. 4th DCA 1987)). The children, as trustees, fit within that broad definition. While the children also added their father's corporation as a defendant because it was an asset of the void trust, it too can be considered a party for res judicata purposes.

Jasser v. Saadeh, 103 So. 3d 982, 985 (Fla. 4th DCA 2012). The concept of privity is dispositive

here:

'privity' refers to a cluster of relationships ... under which the preclusive effects of a judgment extend beyond a party to the original action and apply to persons having specified relationships to that party....' Restatement (Second) of Judgments: ch. 1, Scope. 'One party may be said to be a privy of another whenever there is a mutual or successive relationship to the same right.' *Osburn v. Stickel*, 187 So. 2d 89, 91-92 (Fla. 3d DCA 1966); see also *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1286 (11th Cir.2004) ("Privity' is a flexible legal term, comprising several different types of relationships and generally applying when a person, although not a party, has his interests adequately represented by someone with the same interests who is a party.'). The existence of a virtual representation relationship is based on 'closely aligned' interests of a party and a person who is not a formal party. *Stogniew*, 656 So. 2d at 920 (quoting *Aerojet-Gen. Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.1975)); see also *Pemco*, 383 F.3d at 1287 (setting forth "four factors [used] in determining whether there is virtual representation: whether there was 'participation in the first litigation, apparent consent to be bound, apparent tactical maneuvering, [and] close relationships between the parties and nonparties."'

Cook v. State, 921 So. 2d 631, 635 (Fla. 2d DCA 2005).

It is well settled that even though a party in a subsequent suit was not a named party in a prior suit, such party is bound by the prior judgment if he participated in the first proceeding or was represented by a party to that proceeding. In *McGregor v. Provident Trust Co. of Philadelphia*, 1935, 119 Fla. 718, 162 So. 323, our Supreme Court stated:

'There can be no question but that, in order for a person or corporation to be brought within the estoppel of the rule of res adjudicata, it is not necessary for him to have been a formal record party. His conduct may have been such as to give him the status of a party in actuality, and in such event the courts will not withhold from him the application of the rule because of the technical objection that he was not a party on the record. See . . . *Plumb v. Crane*, 123 U.S. 560, 8 S.Ct. 216, 31 L.Ed. 268 . . .'

Kline v. Heyman, 309 So. 2d 242, 244-45 (Fla. 2d DCA 1975).

In its broadest sense, privity is defined as "mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right." *Black's Law Dictionary* 1079 (5th ed. 1979). One not a party to a suit is in privity with one who is where his interest in the action was such that he will be bound by the final judgment as if he were a party. *Id.*

Southeastern Fidelity Ins. Co. v. Rice, 515 So. 2d 240 (1987)(going on to discuss collateral estoppel).

A couple of additional points should be made.

First, Plaintiff's case for malpractice and breach of fiduciary duty is based on finding privity between the Ward and the Ciklin law firm through the concept of "intended third-party beneficiary." Before *Saadeh v. Connors*, 166 So. 3d 959 (Fla. 4th DCA 2015), the lack of privity between Julian Bivins and the Ciklin law firm would have foreclosed this action. However, now that there is a duty of care owed by the attorney for the guardian to the Ward, it must follow that Defendants were in privity with the Ward, i.e., the central party to the entire guardianship, and that privity carries over to the Ward's estate, thereby barring Plaintiff's claims. The privity declared by the *Saadeh* court must flow both ways. If the Ward is in privity with Defendants, Defendants must be in privity with the Ward's estate.

Further, defendant guardian Kelly was granted summary judgment in this case. He undisputedly had a fiduciary duty to the Ward. If the defendant guardian, who owed a direct duty to the Ward, was entitled to summary judgment, then likewise the guardian's lawyers, who only owed an indirect third-party beneficiary duty to the Ward, must be protected by the very same doctrines of collateral estoppel and res judicata that protected the guardian.

Finally, during the trial, the Court allowed statements by the now deceased Ward, to be admitted into evidence over hearsay objection under the business record exception finding that the Ward was a necessary part of the guardianship entity. (T. 740-41) If the deceased Ward is a necessary component of the guardianship entity, then the attorneys for the guardianship, i.e. Defendants, are likewise a necessary component of the guardianship entity.

Specifically, there are four essential components to the guardianship: (1) the Court; (2) the ward; (3) the court-appointed guardian; and (4) the guardian's required attorney. There are other non-essential persons involved in a guardianship, but a guardianship cannot exist without counsel for the guardian. "Every guardian [...] shall be represented by an attorney admitted to practice in Florida." *See* Fla. Prob. R. 5.030(a). Thus, there is privity between the guardian's attorneys and the guardianship as they are bound by the guardianship court's decisions effecting the guardian. *Jasser v. Saadeh*, 103 So. 3d 982, 985 (Fla. 4th DCA 2012) ("The term 'parties' has frequently been given a much broader coverage than merely embracing parties to the record of an action [.]")

As the Supreme Court explained, "[f]or one to be in privity with one who is a party to a lawsuit or for one to have been virtually represented by one who is party to a lawsuit, one must have an interest in the action such that she will be bound by the final judgment as if she were a party."(*quoting Seaboard Coast Line R.R. Co. v. Indus. Contracting Co.*, 260 So. 2d 860, 863 (Fla. 4th DCA 1972)). Here there is no doubt that the estate is bound to the orders, even though the estate was not a named party in the guardianship proceedings.

III. RELEASE.

Plaintiff has released all of his claims in this case. The following documents and evidence were admitted into evidence during the trial, which establish the defense of release. First, on

September 17, 2013, the New York Settlement Agreement was entered into and ordered by the Court (Pl. Ex. 78). Second, in the afternoon of September 19, 2014, the Court heard and entered onto the record the terms of the Global Settlement that included mutual releases (CLO Def. Ex. 8, p. 39 lines 15-20). Third, Oliver Bivins, Sr. died on March 2, 2015 (Pl. Ex. 112). Fourth, after the death of his father, Julian, the nominated executor of Oliver, Sr.'s will (Pl. Ex. 45), moved to compel entry of the Order on Global Settlement on March 16, 2015 (CLO Def. Ex. 129). Fifth, on March 19, 2015 the Court entered the Order on Global Settlement (Pl. Ex. 113). Sixth, before trial, the parties stipulated as follows: "The terms of the Global Settlement Agreement entered into between the Guardian, **its attorneys**, and Julian Bivins on September 19, 2014 was read into the court record to document the settlement on September 19, 2014" (DE 318, § 5, ¶ 13) (emphasis added). Seventh, at trial, Stephen Kelly, the Successor Guardian, testified that the mutual release was part of a "total global settlement" that released "myself, Julian [and] the attorneys" (T. 5:289).

Under Florida Statute section 733.601, the actions of Julian after the death of his father bind the estate. As this Court already has ruled, relation back under section 733.601 applies after the death of the testator, Oliver, Sr. (DE 296, p. 8). After the death of his father, Julian moved to compel entry of an order approving the Global Settlement. That Order was entered March 19, 2015. The release approved by that Order includes all of the issues raised as facts to be resolved by the jury outlined in the Pretrial Stipulation because each of those issues predate March 16, 2015 (DE 318, §6). Further, the release includes all of the issues stemming from the New York Settlement Agreement, which was the focus of the trial, because the New York Settlement was approved more than a year before the Global Settlement was entered on March 19, 2015 and 17 days after the Ward's death. Accordingly, Plaintiff's claims all fail because the Estate by operation

of section 733.601 released the Guardians and their attorneys from any claims arising out of the guardianship prior to the date of the Order on Global Settlement, March 19, 2015.

The releases at issue are part of court-approved settlements. As such, they are favored by the courts and should be enforced when possible. *Blunt v. Tripp Scott, P.A.*, 962 So. 2d 987, 989 (Fla 4th DCA 2007; *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours and Co.*, 761 So. 2d 306, 314 (Fla. 2000)("Generally, Florida courts enforce general releases to further the policy of encouraging settlements."); *Hanson v. Maxfield*, 23 So. 3d 736, 739 (Fla. 1st DCA 2009)("Settlements are highly favored and will be enforced whenever possible."); *Hernandez v. Gil*, 958 So. 2d 390, 391 (Fla. 3d DCA 2007)("As reiterated in numerous court decisions, '[t]he public policy of the State of Florida ... highly favors settlement agreement among parties and will seek to enforce them whenever possible."").

IV. CONCLUSION.

In this case, both the application of the doctrines of collateral estoppel/res judicata and the doctrine of release turn on the issue of privity. Over the course of time and during the trial the record has developed to a point where it is clear that Julian, as next of kin, an interested party, the sole beneficiary, and the nominated personal representative of the Ward is in privity with Julian as personal representative of the Ward's estate, its sole beneficiary, and the Defendants in this action. In fact, Julian as Plaintiff stipulated in the Pretrial Stipulation that the attorneys were parties to the Global Settlement Agreement which Julian moved to compel entry of after his father's (the Ward's) death.

The doctrine of privity is not confined to "merely embracing parties to the record." Instead, one must have an interest in the action such that he will be bound by the final judgment.

Julian, as the nominated representative of the estate and its sole beneficiary is bound to the final orders of the guardianship court, just as the estate is bound to those orders.

Further, there is a mutual or successive relationship to the same right between Julian as the nominated personal representative and the sole beneficiary and Julian as the appointed personal representative, the sole beneficiary, and the Plaintiff in this action. Julian as the sole beneficiary, nominated personal representative, and next of kin adequately represented himself in the guardianship proceedings and had the same interest as he does now that he is the actual personal representative of the estate and its sole beneficiary. Julian's interests are closely aligned in the guardianship proceedings and this malpractice action.

Accordingly, final judgment should be entered in favor of Defendants on their affirmative defenses of collateral estoppel/res judicata and release.

Dated: August 25, 2017

Respectfully submitted,

s/ L. Louis Mrachek

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

s/ L. Louis Mrachek

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

CASE NO.: 15-81298-CV-MARRA-MATTHEWMAN

JULIAN BIVINS, as Personal Representative
of the ancillary Estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR.,
as former guardian, STEPHEN M. KELLY,
as successor guardian, BRIAN M. O'CONNELL,
ASHLEY N. CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN,
BEYS LISTON MOBARGHA & BERLAND, LLP
f/k/a BEYS STEIN MOBARGHA & BERLAND, LLP,
and LAW OFFICES OF KEITH B. STEIN, PLLC,
n/k/a STEIN LAW, PLLC,

Defendants.

PLAINTIFF'S MOTION FOR NEW TRIAL AS TO STEIN DEFENDANTS

Plaintiff, JULIAN BIVINS as Personal Representative of the ancillary Estate of Oliver Wilson Bivins (“the Estate”), by and through undersigned counsel, and pursuant to Federal Rule of Civil Procedure 59, hereby files its Motion for New Trial as to only Keith Stein, Beys Liston Mobargha & Berland, LLP f/k/a Beys Stein Mobargha & Berland, LLP, and Law Office of Keith B. Stein, PLLC n/k/a Stein Law, PLLC (collectively, the “Stein Defendants”) and in support thereof provides the following Memorandum of Law.

MEMORANDUM OF LAW

I. Legal Standard

Rule 59, Federal Rules of Civil Procedure, provides that “[t]he court may, on motion, grant a new trial on all or some of the issues ... after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court.” Fed. R. Civ. P. 59(a). “The motion for a new trial ... may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.” *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). As far as the motion for a new trial, the trial judge can grant a new trial if he believes the verdict is contrary to the weight of the evidence. *Id.* “A judge should grant a motion for a new trial when ‘the verdict is against the clear weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.’” *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001) (quoting *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984)). The decision as to whether to grant a new trial is committed to the discretion of the trial judge. *Lambert v. Fulton County, Ga.*, 253 F.3d 588, 595 (11th Cir. 2001).

Prior to assessing the evidence, we must consider the standard of harmless error to be applied in a civil case. In *Conway v. Chemical Leaman Tank Lines*, 525 F.2d 927, 929 n. 3 (5th Cir.1976), the Fifth Circuit ruled that in civil cases courts should apply the same standard as announced in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), a criminal case. In that case, the Supreme Court wrote that if a court

is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.... *But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.* [Emphasis added].

Id. at 764–65, 66 S.Ct. at 1248 (footnote omitted) (citation omitted); *See e.g., Aetna Cas. & Sur. Co. v. Gosdin*, 803 F.2d 1153, 1160 (11th Cir. 1986). To answer the foregoing question, the Eleventh Circuit looks to a number of factors, including the number of errors, the closeness of the factual disputes (i.e., the strength of the evidence on the issues affected by the error), and the prejudicial effect of the evidence at issue, whether counsel intentionally elicited the evidence, whether counsel focused on the evidence during the trial, and whether any cautionary or limiting instructions were given. *Gosdin*, 803 F.2d at 1160; *Nettles v. Electroluz Motor AB*, 784 F.2d 1574, 1581 (11th Cir. 1986); *U.S. Steel, LLC v. Tieco, Inc.* 261 F.3d 1275, 1288 (11th Cir. 2001) (improper admission of state judicial opinion required a new trial where opinion was used by one of the parties “throughout the trial” to help establish disputed facts and counsel told the jury in closing argument “to use the opinion to make credibility determinations”).

II. Striking the Testimony of Irwin Gilbert Based on Lack of Qualification Constitutes an Abuse of Discretion.

A. The Court’s July 26, 2017 Order.

On July 26, 2017, this Court entered an order striking the testimony of the Estate’s expert, Irwin Gilbert (hereinafter “Gilbert”). Specifically, the Order provided:

The Court finds that Mr. Gilbert does not have the qualifications by way of knowledge, education, training or experience to be able to provide testimony as an expert witness relative to the appropriate standard of care to which an attorney representing a professional guardian of an incapacitated ward would be required to adhere. [DE 374].

The Estate contends that the exclusion of Gilbert’s testimony was made in error. Specifically, the Order is overbroad in its exclusion of Gilbert’s testimony because the Order only addresses Gilbert’s qualification to opine on the issue of the appropriate professional standard of care. The Order, however, is silent as to Gilbert’s qualification to opine on the issue of fiduciary duty, which the Estate established during the *Daubert* hearing. Accordingly, Gilbert should have been, at the very least, permitted to testify on the issue of fiduciary duty.

Additionally, the Estate urges the Court for entry of an Order granting a new trial as to its finding that Gilbert did not possess the requisite qualification to opine on the appropriate standard of care concerning the conduct of the Defendants. The Estate contends that the Order

applied an overly-narrow standard to the qualifications required of an expert to be permitted to testify in the 11th Circuit.

B. Legal Authority Concerning Expert Qualification.

The qualification standard for expert testimony is “not stringent,” and “so long as the expert is minimally qualified, objections to the level of the expert’s expertise [go] to credibility and weight, not admissibility.” *Banta Properties, Inc. v. Arch Specialty Ins. Co.*, 2011 WL 7118542 (S.D. Fla. Dec. 21, 2011) (quoting *Hendrix v. Evenflo Co.*, 225 F.R.D. 568, 585 (N.D. Fla. 2009)). “An expert is not necessarily unqualified simply because [his] experience does not precisely match the matter at hand,” so long as the expert is “minimally qualified...” *Kirksey v. Schindler Elevator Corp.*, 101 Fed. R. Evid Serv. 600, 2016 WL 5213928, at *6 (S.D. Ala. 2016). Where an expert does have congruent experience, “[n]othing in this amendment is intended to suggest that experience alone ... may not provide a sufficient foundation for expert testimony.” Fed. R. Evid. 702 Advisory Committee's note (2000 amends).

Determining whether a witness is qualified to testify as an expert “requires the trial court to examine the credentials of the proposed expert in light of the subject matter of the proposed testimony.” *Jack v. Glaxo Wellcome, Inc.*, 239 F.Supp.2d 1308, 1314–16 (N.D.Ga.2002). *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 507 n. 10 (5th Cir.1999); *see also Martinez v. Altec Indus., Inc.*, 2005 WL 1862677, *3 (M.D. Fla. 2005) (quoting *Rushing*, 185 F.3d at 507 (“As long as some reasonable indication of qualifications is adduced, ... qualifications become an issue for the trier of fact rather than for the court in its gate-keeping capacity.”)), *superseded by rule on other grounds as recognized in Mathis v. Exxon Corp.*, 302 F.3d 448, 459 n. 16 (5th Cir.2002)); *Falic v. Legg Mason Wood Walker, Inc.*, 03-80377-CIV, 2005 WL 5955704, at *1 (S.D. Fla. Jan. 10, 2005), *8 (S.D. Fla. Jan. 6, 2005) (Court does not exclude expert testimony merely because his testimony may be based primarily on his professional experience as a litigator.); *Anderson v. State*, ___ So. 3d ___, 2017 WL 930924 (Fla. March 9, 2017) (expert not required to be “certified” in a particular subspecialty in order to offer expert testimony.); *Valentin v. New York City*, No. 94 CV 391 (CLP), 1997 WL 33323099, at *25 (E.D.N.Y. Sept. 9, 1997) (“The fact that a proposed expert may not have the exact qualifications to fit the case does not mean the expert's testimony is automatically inadmissible.”).

“Courts should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility.” *Lord v. Nissan Motor Co.*, 2004 U.S. Dist. LEXIS 25409, at *13, No. 03-3218

(D.Minn. Dec. 13, 2004) (citing *Clark v. Hendrick*, 150 F.3d 912, 915 (8th Cir. 1998)). “In borderline questions, it is more appropriate for a judge to admit the evidence than to exclude it from the fact finder because ‘[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.’” *Tolliver v. Naor*, 2001 U.S. Dist. LEXIS 18267, at *7, No. 99-0586 (E.D. La. Nov. 1, 2001) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. at 596 (1993)).

C. The Estate Established Irwin Gilbert’s Qualification to Provide Expert Testimony on the Issues of Fiduciary Duty and Professional Negligence.

Gilbert is a pre-eminent attorney with over 35 years of experience with vast experience in legal malpractice and fiduciary duty cases, who published on the issue of fiduciary duties and who was instrumental in the formulation of the legal precedent establishing the legal duties in the case at hand. (July 25, 2017 Trial Transcript Vol. VI, [DE 390 at 263:18-25]). During the Court’s *Daubert* hearing, the Estate elicited the following testimony from Gilbert establishing his qualification to opine on the issues of fiduciary duty and professional malpractice:

- a. Perhaps not coincidentally, the issue of whether or not an attorney for a guardian actually owes that duty to the ward was a matter that I litigated and that involves the Saadeh cases, which I believe have been cited in your proceedings, and, in fact, made new law in the Fourth District Court of Appeals, making it clear that, in fact, an attorney... owes the same duty to the ward. It's not merely a duty of care, but there's a duty of loyalty, and a lawyer has to apply skill and must act in the best interest of the ward. (*Id.* at 264:9-17.)
- b. Well, I suppose there are different ways to go about practicing law. The way I go about practicing law involves mastering a subject. And so in some law firms, an attorney may have 30 or 40 or 50 files. I believe I have eight, perhaps 10 active cases at one time, and it's sometimes even fewer than those [...]

I've litigated numerous will contest cases in Florida and in New York, cases that involve, in Florida what we refer to as the Carpenter factors. I've litigated to establish guardianships over objection. That would be in the Annie Owens White guardianship. I've represented the guardianship in that case for more than five years. I represent the professional guardian in the McFarlane guardianship, and have done so, I think, for more than four years. (*Id.* at 265:4-25.)

- c. We were initially engaged by Mr. Saadeh because he was unhappy with his court-appointed lawyer in an involuntary guardianship proceeding, and he was induced to sign what was labeled as a revocable trust, which, in fact, was an irrevocable trust, because it wasn't revocable by him. We had to litigate against opposition to substitute for his court-appointed lawyer. We had to litigate to reinstitute the guardianship

proceedings, which technically had been concluded with a purported settlement order. We had to convince the Court to retreat from that order [...]

We were successful in getting summary judgment. Then had to litigate to get the property that had been taken from the ward back to him and then discovered that a substantial -- in the six figures -- legal fees were taken out of the trust to pay the lawyers that were fighting to maintain the trust. We had to litigate to recover those attorney's fees. In so doing, we had to master the subject matter, again, of what is for the benefit of the ward and for the benefit of the ward's guardianship estate [...]

We had to master that subject in order to recover Mr. Saadeh's fees. And then these matters were all brought on appeal to the Fourth DCA. And, again, we had to drill even deeper into the subject matter and into the controlling law in order to see the trial judge's orders sustained. (*Id.* at 267:2-268:17.)

d. Q. Now, in -- in these efforts by you to put forth the arguments of your client all the way to the Fourth District Court of Appeals, with whom did the Fourth District Court of Appeals agree; with you, or with the probate estate specialist?

A. Well, in this instance, they adopted the legal arguments that we advanced in our briefs in both appeals. (*Id.* at 269:2-8.)

e. Q. Would you explain to the Court the Saadeh case that set forth the duty of lawyers in terms of whether they must act in the best interest of the ward, and it's in privity with the ward. Would you explain that ruling.

A. Well, that was Saadeh versus Connors. In that case, we filed a suit for damages against the attorneys that we say were responsible for causing Mr. Saadeh to incur significant legal fees attempting to end the guardianship and have the trust declared void ab initio, as well as to recover his property. The initial defendant, Connors, was the lawyer hired to draft the trust. This trust, as I said before, was labeled a revocable trust but was, in fact, irrevocable. We also sued the guardian, whose name was Deborah Barfield, and we sued the guardian's attorney, whose name was Collette Meyer. Ms. Meyer made a motion for summary judgment, arguing the absence of a duty to the ward, arguing that the ward was required to engage his own counsel under the guardianship statute, had to be represented independently, and arguing that, in fact, they were adverse toward one another, and so no duty could be owed. But we argued to the Court that since a guardian's primary duty was to benefit the ward and that the guardian owed a fiduciary duty to the ward, the attorney for the guardian likewise owed the same duties to the ward. In their decision, the Fourth DCA pointed out that the ward might, in fact, be the primary intended beneficiary of the services of the attorney and held that that was sufficient for privity purposes. And that was the first such decision reported in a Florida District Court of Appeals relating to the duty owed by an attorney for the guardian of a ward to the ward. (*Id.* at 269:22-271:3.)

f. Q. Would you tell the Court your involvement in the Annie Owens White case.

A. Ms. White suffers from very significant psychiatric problems and was acting in a very self-destructive, in fact, endangering her own life when she didn't take her medication. She needed a guardian. I was asked by the Legal Aid Society to represent Ms. White's sister, Catherine McGrath, and to obtain or to have a petition filed that would result in the creation of a guardianship, and I did that. Soon after, an attorney appeared seeking to have Ms. White declared restored to capacity, and so we had a fully litigated guardianship case with respect to whether or not the guardianship would be maintained. (*Id.* at 271:4-17.)

g. Q. And how long have you been attorney for Catherine McGrath as guardian?

A. I believe it's more than five years. I continue to represent the guardian. I assist the guardian in the preparation of the annual plan. In this case, I assist the guardian in the preparation of her annual report. Ms. White's sister, Catherine McGrath, is a wonderful lady, devoted to her sister, but I don't believe she was able to continue school past the seventh grade, so she needs some assistance, and we assist her every year. We routinely appear in the guardianship court for authorization for disbursements on her behalf. And, likewise, in the McFarlane case, I've been involved in that case more than four years and routinely appear in that Court in various petitions for authorization for the guardian. (*Id.* at 271:18-272:8.)

h. Q. Are you currently litigating a case Haas versus Nacenyager (phonetic)?[...]

A. This is one of the current legal malpractice cases that we're actively litigating. And, of course, at issue in the case is the attorney's duty to a client and whether it was breached.

Q. Have you served on any Florida Bar grievance committees for any length of time?

A. I served a full term on the 15th District grievance committee and served one year as chair. I also have served on I think a total now of eight or nine years on the Florida Client Security Fund and have been co-chair and then chair of that committee. That committee deals with attorney dishonesty and an attorney's failure to render valuable service and reimburses clients that are the victim of dishonest lawyers.

Q. Have you litigated breach of fiduciary duty cases for both plaintiffs and defendants?

A. I have, and that would be throughout the time I'm practicing law. (*Id.* at 273:15-274:11.)

i. Q. For the reasons you have just explained to the Court based upon your involvement as an attorney in the various matters we've discussed, is that why -- do you -- is that why you feel your practice does, indeed, involve complex probate and guardian litigation in both Florida and New York?

A. Yes. (*Id.* at 274:25-275:5.)

- j. I have been involved in numerous guardianship cases, disputed will cases, disputed trust cases over the course of those 35 years. I did not commit to memory the names of all of the cases, nor did I go back and try to make a search of files with respect to the identity of those cases. (*Id.* at 286:7-11.)
- k. A. I have litigated countless lawsuits involving New York real estate transactions, the title to property, the partition of property, and, in fact, have litigated whether or not a divisible marital interest remained in New York property.
- l. Q Okay. But observer is not participants, and you were not the individual that was engaged in the refinancing of it, although you may have observed and looked into it, correct? Is that a fair statement?

A. Well, I had to make sure that the terms of the settlement were met and that the property would be free and clear of liens or any residual claim of interest by the other party. But other than that, I -- I don't do real estate transactions, but as a trial lawyer I sometimes have to clean up the mess that's created from one. (*Id.* at 308:10-19.)

Defendants challenged Gilbert's qualification contending that he was not qualified to render an expert opinion in the matter because Gilbert: (1) had not "represented a ward of Oliver Wilson Bivins, Sr.'s age with his mental or physical conditions" (*Id.* at 311:22-312:2); (2) had not advised a guardian as to how to balance the a ward's property interests in relation to the interests of their physical well-being (*Id.*); had not "finished a guardianship" (*Id.* at 312:21-25); that he was not familiar with the relevant standards of care in the community (no evidence was adduced during the *Daubert* hearing in support of this proposition) (*Id.* at 312-3-12); and that he was not a New York real estate attorney.

Defendants' position, adopted by the Order excluding his testimony, is not consistent with 11th Circuit law on the issue of qualification. Federal law requires merely that the proponent of the expert testimony establish the expert as "minimally qualified" as the qualification relates to the general subject of the proposed testimony. *Banta Properties, Inc. v. Arch Specialty Ins. Co.*, 2011 WL 7118542 (S.D. Fla. Dec. 21, 2011). Defendants were successful in narrowing the range of permissible qualifications to an attorney specializing in representing *professional* guardians overseeing guardianships of the *person and the property* simultaneously involving *elderly, dementia-diagnosed* wards from the beginning of the proceeding through the end of the

guardianship proceeding.¹ Yet, these various items of specialization do not bear on the issues of an attorney's negligence or an attorney's fiduciary duty.

As a result of Defendants' argument at the *Daubert* hearing, the Order excluding Gilbert's testimony provides that he was unqualified to opine on the standard of care of "an attorney representing a *professional* guardian of an incapacitated ward." (emphasis supplied) [DE 374]. Though the distinction between professional guardians and non-professional guardians was the subject of extensive argument by Defendants' counsel, at no point has there been any indication as to why this is a meaningful difference insofar as qualification to testify is concerned regarding the professional and fiduciary duties of the attorney. An attorney's duty of care, as it relates to services provided on behalf of an incapacitated ward² does not change depending on the qualifications of the guardian overseeing the ward. In fact, there is no Florida or 11th Circuit law standing for the proposition that an attorney's duty of care to a third party beneficiary of any kind is diminished based on the status of the client in privity with the attorney.

Moreover, the professional negligence at issue in the case relates to inadequate due diligence concerning property values and conflicts of interest. The opinions on these issues offered by Gilbert fall squarely within the gambit of his expertise as a lawyer with over 35 years of experience in litigating cases, settling those cases, performing due diligence associated with settlements, representing various parties with fiduciary obligations and representing third parties to whom he owed fiduciary obligations. An individual with experience predominantly representing guardians would not actually have the broad legal knowledge and experience of Gilbert who has practiced extensively in the areas of legal malpractice and fiduciary duty, who happens to have the added bonus of experience representing guardians. It appears illogical to narrowly construe *Daubert* to consider an individual with experience only in representing guardians to be in a better position to opine on the actual subject matter of the instant lawsuit, than one with vast knowledge derived from representing clients and litigation issues involving

¹ It is worth noting that the guardianship in question was not concluded because at the time of the trial, no guardian had been discharged.

² Irwin Gilbert is not only qualified to render an opinion concerning the standard of care and duty attorneys and guardians owe to a ward, he was lead counsel in the case that established Florida precedent on the issue. Gilbert was directly involved in the litigation and appeals of the Saadeh cases which actually define the standard of care owed by attorneys to incompetent wards in the State of Florida. *Saadeh v. Connors*, 166 So. 3d 959, 961 (Fla. 4th DCA 2015).

fiduciary matters, malpractice matters (on both sides of the table), real estate transactions, trust issues, and other practice areas as established by Gilbert's testimony. In short, any purported gaps asserted by the Defendants to exist in Gilbert's experience due to the lack of him being essentially recognized as a specialist dedicated solely to representing guardians, does not and should not bear on the opinions reached by Gilbert concerning fiduciary duty or professional malpractice. At most, such assertions should be the subject of cross-examination by the Defendants to attempt to impeach the weight that the jury gives to Gilbert's testimony.

Similarly, Defendants misplace their focus on Gilbert's lack of publication with a specific section regarding "fiduciary duties that guardians owe to wards." (July 25, 2017 Trial Transcript Vol. VI, [DE 390 at 290:2-5].) First, Defendants' inquiry does not actually address the fiduciary duty at issue in the case – an attorney's fiduciary duty to an incapacitated ward. Second, and more importantly, Gilbert provided unrebutted testimony that "[t]here are not two different worlds of fiduciary duty; there is only one." *Id.* at 290:2-13.³

Accordingly, the Order concerning Gilbert's qualification to testify on the issues of professional negligence and fiduciary duties did not properly apply 11th Circuit law by failing to analyze the qualification of the expert in relation to the opinions actually proffered. The Order relies improperly on an analytical scheme put forth by Defendants which demands that the expert have experience representing a guardian in a virtually identical situation and with specific experience concerning every possible issue in the case.

D. The Court Did Not Apply the Same Qualification Standard to Defendant Keith Stein's Expert Edward Robbins.

The Court did not exclude the testimony of Defendant, Keith Stein's (hereinafter "Stein") expert, Edward S. Robbins (hereinafter "Robbins"), permitting his expert to testify unrebutted as to professional negligence and breach of fiduciary duty. Robbins' testimony concerning Stein's

³ "A personal representative is a fiduciary who shall observe the standards of care applicable to trustees." § 733.602(1), Fla. Stat. (2014); *see also* § 733.609(1), Fla. Stat. (2014) ("A personal representative's fiduciary duty is the same as the fiduciary duty of a trustee of an express trust, and a personal representative is liable to interested persons for damage or loss resulting from the breach of this duty."); *State v. Lahurd*, 632 So.2d 1101, 1104 (Fla. 4th DCA 1994) ("The personal representative, like a trustee, is a fiduciary in handling the estate for the beneficiaries. As such, he or she is to observe the standard of care in dealing with the estate as a prudent trustee exercises in dealing with property of the trust.") (citations omitted). A trustee is required to seek only reasonable fees for his or her services and the trustee's agents. *See* §§ 736.0105(1), (2)(b); 736.0801; 736.0802(1), (7)(b), (8), Fla. Stat. (2014).

fiduciary duties and standards of care was permitted at trial despite his testimony on voir dire that he had virtually no recent experience in representing guardians, and to the extent he had any recent guardianship experience, it was significantly less guardianship experience than Gilbert:

Q. And you have only done one guardianship case down here but otherwise have essentially represented guardianships at closings, meaning you've done the real estate as whether it's any entity that you're doing the closing for, right?

A. Correct. And I represented a ward in a matter in Dade County, as well.

Q. You've authored no articles in guardianship matters, correct?

A. I have not. (July 27, 2017 Trial Transcript Vol. VIII [DE 392 at 218:24-219-7].)

The Court's exclusion of Gilbert's testimony on qualification grounds and its allowance of the less qualified opinion from Robbins resulted in a defense verdict for Stein given the more technical nature of his negligence and breaches of fiduciary duty. This outcome resulted from the Estate's inability to challenge the acts of Stein concerning due diligence and fiduciary duty. Further, Stein's conduct was unfairly bolstered by his unrebutted expert. This ruling constitutes an error during the course of the trial adversely affecting the Estate's "substantial rights." *Advantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 37 F.3d 1460, 1465 (11th Cir. 1994). Based on the Court's rulings on the parties' experts, a new trial is warranted.

III. Abuse of Discretion to Exclude of the 67th Street Deeds from Evidence.

On July 19, 2017, this Court ruled that the Estate would not be permitted to enter into evidence Plaintiff's Proposed Exhibit 40, which was a composite of certified deeds for the 67th Street property reflecting Oliver Wilson Bivins, Sr.'s ownership of the property prior to his marriage to Lorna Bivins. The Court ruled as follows regarding the 67th Street deeds based upon a request by Defendants for imposition of a Fed. R. Civ. P. Rule 37 Sanction⁴ for failure to timely disclose:

THE COURT: Okay. But -- all right. Well, whether or not you're going to be able to use it as impeachment of their experts' opinions, I'll deal with that later, but I'm not going to let you use it in your case in chief. (July 19, 2017 Trial Transcript Vol. III [DE 387 at 190:14-17].)

⁴ (*Id.* at 176:1-5.)

At the time of the Court's ruling and thereafter, Defendants had "opened the door" to the introduction of the evidence by attempting to take advantage of its exclusion. Defendants, throughout the course of the trial, relied upon the exclusion of evidence of Oliver Bivins' ownership of the 67th Street property to create a false impression that Oliver Bivins never owned the property, which is not permissible in the 11th Circuit. Further, the Court's exclusion of the 67th Street deeds was predicated upon a misapplication of Fed. R. Civ. P. Rule 37. Accordingly, a new trial is warranted.

A. Defendants Were Improperly Permitted to Take Advantage of the Exclusion of the 67th Street Deeds from Evidence to Create a False Impression in the Minds of the Jury.

If a party "opens the door" to a particular line of inquiry by making certain statements, then the other party may be allowed to offer rebuttal evidence to contradict those statements. *See, e.g., Wood v. Morbark Industries, Inc.*, 70 F.3d 1201, 1208 (11th Cir. 1995) (by offering testimony that its wood chipper had the safest length chute possible, defendant opened door for impeachment such that plaintiff should have been allowed to inquire why defendant modified that design after plaintiff's accident); *United States v. Jacoby*, 955 F.2d 1527, 1540 (11th Cir.1992) (where defendant testified at length about statements in magazine article that government had not been allowed to admit in its case-in-chief, defendant opened door to cross-examination about that article to refute or discredit defendant's direct testimony). The use of otherwise inadmissible evidence is permissible if it promotes the goal of truth-seeking by preventing a party from perverting the evidentiary rules "into a license to use perjury by way of a defense..." *James v. Illinois*, 493 U.S. 307, 313, 110 S. Ct. 648, 652, 107 L. Ed. 2d 676 (1990).

In this case, Defendants, in their opening statements, represented to the jury that Oliver Wilson Bivins, Sr. never had an interest in the 67th Street property:

a. Studley

- i. The 67th Street property was owned by Lorna, and the 808 property was owned by Oliver and Lorna. (July 18, 2017 Trial Transcript Vol. II [DE 386 at 34:19-25].)
- ii. The 67th Street property, that is only Lorna's property. That is a key point that you will see in this case. That is Lorna's property only, and it will always be found to be only Lorna's property. (*Id.* at 36:14-17.)
- iii. The only thing that Lorna has is 67th, which was always in her name. (*Id.* at 42:10-11.)

b. Blaker

iv. Julian wants 67th Street. It's not his. It's not his father's. (*Id.* at 71:11-14.)

Defendants' representation to the jury that Oliver Wilson Bivins, Sr. did not own the 67th Street property was a knowing misrepresentation of the ownership of the property. It is clear that Defendants had reviewed the deed evidence from their Joint Motions *in Limine* which provided:

In particular, it appears the Plaintiff is seeking to introduce a document, a title report, which was first produced May 31, 2017 and was ordered by the Plaintiff on May 16, 2017. This document was not timely produced and should not be admitted, particularly since no party or witness was able to review the same and provide information about the document before the close of discovery in this action. [DE 310].

Given Defendants' knowledge of the deed evidence and their success in excluding the deeds on the basis of non-disclosure, the testimony and argument put forth by Defendants concerning the ownership of 67th Street was improper. Further, Defendants took improper advantage of this ruling throughout the trial. (*See e.g.* July 19, 2017 Trial Transcript Vol. III [DE 387 at 171:6-22]; July 27, 2017 Trial Transcript Vol. VIII [DE 392 at 153:25-154:6]; July 28, 2017 Trial Transcript Vol. IX [DE 393 at 52:7-12].)

The facts of the instant case mirror, *Wood v. Morbark Industries, Inc.*, wherein the trial court granted defendant's motion *in limine* to exclude evidence of post-accident remedial changes to a wood chipper. 70 F.3d at 1208. Although defendant's cross-examination left an impression that no remedial modifications were done to the wood chipper, the trial court would not allow any contrary evidence. *Id.* The Court of Appeals, *reversed the judgment*, holding that the defendant took unfair advantage of the *in limine* ruling, and opened the door for rebuttal and impeachment testimony, thereby substantially affecting the rights of the Plaintiff. *Id.*

B. The Court Incorrectly Applied Fed. R. Civ. P. Rule 37.

Fed. R. Civ. P. Rule 37(c)(1) provides: "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, *unless the failure was substantially justified or is harmless.*" (emphasis supplied).

Here, Defendants conceded that the Estate did not obtain possession of the deed evidence until May 16, 2017. ([DE 310] and July 19, 2017 Trial Transcript Vol. III [DE 387 at 177:1-18].)

Defendants also admit that the Estate produced to Defendants the evidence in question on May 31, 2016. *Id.* Accordingly, the Court did not properly apply Rule 37, which only contemplates exclusion of evidence on the basis of violations of Rule 26(a) or (e). The Estate did not violate Rule 26(a) because at the time of its Rule 26 Disclosures, it was not in possession or control of the evidence. The Estate did not violate Rule 26(e) because it timely (within two weeks) supplemented its disclosure once it obtained the deed evidence.

Further, the Court conceded when assessing the issue, “I’m not saying that you necessarily were not diligent in discovering this...” (*Id.* at 188:1-189:14.) Thus, the Court’s Rule 37 sanction was inappropriate because the Court acknowledged that the delay in production of the document was substantially justified. The Estate established substantial justification because the Estate, during the discovery period, had no reason to believe that the title of 67th Street would be at issue in light of the unrebutted testimony of Julian Bivins. (*Id.* at 178:1-13.)

Additionally, the Rule 37 sanction is improper because the public record of the deed was equally available to the Defendants from another source. *S.E.C. v. Samuel H. Sloan & Co.*, 369 F.Supp. 994, 995–96 (S.D.N.Y.1973) (Ward, D.J.) (“It is well established that discovery need not be required of documents of public record which are equally accessible to all parties.”). Accordingly, to the extent the Estate did not have substantial justification for the delay in obtaining the deeds and producing them, the ready availability of the public records renders any failure harmless as contemplated by Rule 37.

The Court’s exclusion of the 67th Street deeds constitutes an error during the course of the trial adversely affecting the Estate’s “substantial rights.” The exclusion of the deeds was based on an improper application of Rule 37 and resulted in the creation of a false impression regarding the ownership of the 67th Street property in the minds of the jury. The exclusion of this evidence may have resulted in a defense verdict on behalf of Stein because it did not allow the Estate to establish Stein’s negligence in his negotiation of the New York Settlement. Thus, a new trial is warranted as outlined above.

IV. Substantial Error to Allow Prior Acts of Julian Bivins.

A. Defendants' Counsel's Characterization of Improper Acts of Julian Bivins.

On June 22, 2017, the Estate filed a Motion *in Limine* to Exclude Reference to Improper Character Evidence as to Julian Bivins and Julian Bivins' Acts in his Individual Capacity ("Motion *in Limine*") [DE 313]. On July 14, 2017, this Court entered an Order [DE 358] denying without prejudice the Motion *in Limine*. The Order further provided that "[a]cts of Julian Bivins may be mentioned. However, any evidence that falls under the rubric of 'character evidence' should not be mentioned unless the Court permits it after the evidence is proffered outside the presence of the jury." *Id.* The Estate reasserted the underlying arguments in the Motion *in Limine* at trial on July 17, 2017 [DE 385 at 52-75]. As to the issue of character-type evidence regarding Julian Bivins, individually, the Court ruled that:

If they're going to attempt to argue or present in front of the jury any bad character-type evidence, if that's I think what you called it, they can't do it until they get my permission to do it outside the presence of the jury. So they need to come to me and say we want to present this, Judge, to the jury, either in opening or by way of evidence, and this is why we think we – this is why we think it's relevant and it should be presented, and I'll listen and decide whether it can or cannot. But they're not going to be able to do it, just stand up in opening tomorrow and say Mr. Bivins, you know, beat his wife or whatever. [DE 385 at 52:24-25 and 53:1-10].

Indeed, the Court asked Defendants' counsel on at least four occasions what the actions that occurred prior to Mr. Bivins having a guardian appointed for him had to do with the allegations of malpractice and breach of fiduciary duty. [DE 385 at 61-74]. The Court specifically questioned "[a]gain, I'm trying to understand from the defense perspective, what does – what does the initial reasons have to do with the alleged malpractice here, other than that's how you – other than that's how the guardianship got started, what does the malpractice have to do with what happened before to create the guardianship?" [DE 385 at 73:24-25 and 74:1-4].

Counsel for Stein represented to the Court that he had "no intent in getting up in opening, or getting up in the case in chief and, you know, saying Julian was, you know, a parade of horrors." [DE 385 at 69:7-9]. He further assured the Court that "[n]o one is suggesting that Mr. Bivins, Julian Bivins, committed any crime. No one is suggesting that Mr. Bivins committed

any fraud. No one is suggesting that Mr. Bivins, okay, is, you know, quote/unquote unclean hands and isn't entitled to any equitable kind of relief." [DE 385 at 70:5-9].

Notwithstanding the Court's earlier ruling, the Court then went on to state that it was "not going to put any limits on the attorneys for opening statements, and then I'm going to try and figure out what's at issue here. And then when the evidence is presented you can raise your objection." [DE 385 at 80:5-8]. Upon reflection, the next day before opening statements, the Court requested Defendants' counsel, in describing the history of the case and how it all got started, "to phrase the description in terms of there were transactions that took place that caused concern about the competency of Mr. Bivins, which led to the petition, without saying there were allegations of wrongdoing by Mr. Julian Bivins?" [DE 386 at 3:7-12]. Defense counsel agreed to phrase the history in that way. *Id.* at 3:13-19. Yet, immediately in opening statements, counsel for the CLO Defendants made the following statements about Mr. Julian Bivins:

This is a case about the greed of Julian Bivins. In November of 2010, Julian Bivins improperly took very valuable oil and mineral rights from his father related to property in Texas. [DE 386 at 33:10-14].

The Estate objected to the foregoing improper comments by defense counsel regarding Julian Bivin's character, which objection was overruled [DE 386 at 33:15-20].

Counsel for Defendants continued to characterize Julian Bivins as being "greedy" and having committed improper acts in relation to his father's property with the following statements during opening:

This is where the greed starts. November 12th, 2010, there are documents signed, powers of attorney, transfers of property. Texas, Oliver Wilson Bivins, Sr., transfers his property to Julian Bivins. [DE 386 at 37:2-5].

What's going on is the guardian get authorization to go ahead and file suit in Texas to try to get these properties back that Julian now has. *Id.* at 39:16-18.

He's got litigation going on Texas over the property that was improperly taken by Julian here back in November 2010. *Id.* at 40:11-12.

So this is part of the greed. Julian Bivins takes the property for \$5 million. That's 808 Lexington. So what's going on here with the settlement, this property goes to Julian, 5 million. He turns around after saying that and sells it for 9.75 million. *Id.* at 45:9-13.

And the Julian says, I'll take it for five, and he goes and sells it for 9.75. The evidence will show that this is greed. *Id.* at 51:10-12.

In addition to objecting to defense counsel's improper remarks about the character of Julian Bivins, the Estate also moved for a mistrial after the opening statement of the CLO Defendants' counsel. [DE 386 at 52:17-23]. The Court denied the motion even before counsel for the Estate could state the basis for which he was seeking a mistrial. *Id.*

Despite the Court's earlier ruling requesting counsel, in describing the history of the case, to avoid saying there were allegations of wrongdoing by Mr. Julian Bivins, counsel for the Stein Defendants began his opening statement by describing Julian Bivins as Cain from the biblical story of Cain and Abel, who can't accept what his step-brother has [DE 386 at 60:15-23]. Counsel for the Stein Defendants proceeded to then tell the jury that "[w]hat happens then is Julian Bivins starts getting transferred from his father lots of stuff, 400,000 acres of gas rights, 400,000 acres of mineral rights, 400,000 acres of oil rights in the middle of Texas. . . . Julian gets what's known as a power of attorney. . . . A power of attorney . . . basically means that I get whatever you get, and I can do with it whatever I want..." *Id.* at 62:17-63:3; "you have to understand that Julian Bivins wants what's Oliver's, and that, what the story of this case is, Cain and Abel" *Id.* at 63:17-19; "[w]hat the evidence is gonna show is that Cain wants what's Abel's, and he can't get it from him, and so he's just looking at these lawyers." *Id.* at 74:14-16.

The Court permitted Defendants' counsel to question Mr. Julian Bivins on the stand about the transfers to him from his father that occurred prior to the establishment of the guardianship of his father [DE 390 at 227-228].

Q: You had, in November of 2010, you had a mineral deed that was drafted, a warranty deed or a gift deed, and a power of attorney?

A: I think that's correct.

Q: And the deal was that you going to give your dad \$700,000, and in return, he was going to sell you a hundred percent of the Texas minerals, reserving a 25 percent nonparticipating royalty for his lifetime, and then he was going to give you certain properties described in the gift deed?

A: I was going to pay him 700,000 for the purchase side of that transaction.

Q: And there was – but there was – well, you never gave him the \$700,000, true?

A: No, I didn't.

Defense counsel further questioned Mr. Bivins regarding a corrective deed he signed on behalf of his father after the guardianship proceeding had commenced without his father's consent. [DE 390 at 240-242]. Defendants' counsel then proceeded to advise the jury of the factual

allegations made against Julian Bivins in the Texas proceedings brought by his father's guardian to invalidate the transfers of property to Julian Bivins from his father. *Id.* at 257-259.

B. Estate's Substantial Rights Affected by Improper Characterizations of Julian Bivins.

The denial of the Estate's Motion *in Limine* to exclude references to improper character evidence as to Julian Bivins allowed Defendants' counsel to freely mischaracterize Julian Bivins in opening statements and question Mr. Julian Bivins on the stand about the transfers to him from his father that occurred prior to the establishment of the guardianship and the Texas lawsuit [DE 390 at 227-229 and 257-259]. This was a substantial error which swayed a judgment in favor of Stein and adversely affected the Estate's substantial rights.

Evidence of prior bad acts is improper character evidence under Fed. R. Evid. 404. The testimony elicited from Julian Bivins suggesting he improperly influenced his father in connection with the transfer of his assets and failed to pay adequate consideration for the properties is clearly a "wrong or other act" under the plain language of Fed. R. Evid. 404. Courts look at how much of an effect did the improperly admitted or excluded evidence have on the verdict. *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1161 (11th Cir. 2004).

In this case, the evidence of the transactions between Julian Bivins and his father unfairly prejudiced the Estate based upon the factors set forth in *Aetna Cas. & Sur. Co. v. Gosdin*, 803 F.2d 1153, 1160 (11th Cir. 1986). It is clear from defense counsels' opening statement that Defendants clearly intended to present improper character evidence to the jury. In fact, there were at least four references to Mr. Bivins being "greedy" in the opening statements and several references to the fact the transfers were "improper." Although the Court ruled that Defendants required the Court's permission before Defendants could argue or present in front of the jury any bad character-type evidence regarding Julian Bivins, defense counsel elicited such evidence in the presence of the jury without any instructions from the Court to ignore the prejudicial evidence. As such, the Estate's substantial rights were affected and the judgment in favor of Stein could have been easily been swayed by the impermissible evidence.

V. Estate Entitled to Communications with Stein.

A. Communications with Stein Prior to October 2012.

Stein testified that he was not involved in the guardianship case until October, 2012. [DE 386 at 79:25-80:2]. Yet, Crispin provided conflicting testimony that her firm had communications with him earlier than that time. [DE 388 at 178:2-8]. Indeed, based upon

Ciklin Lubitz's billing statements (Exs. 58 and 186 at 11, 13, and 101), Mr. Stein was actually communicating with Mr. O'Connell and Ms. Crispin as early as July 16, July 26, July 30 and July 31, 2012. *Id.* Ms. Crispin confirmed that the billing statements accurately reflected communications she had with Stein on July 16, July 26, July 30, and July 31, 2012. [DE 389 at 111-113]. When Ms. Crispin was asked as to the substance of those communications, counsel objected on the basis of attorney/client privilege. *Id.* at 114:25-115:4. The Court erred in sustaining the objection and not requiring Ms. Crispin to testify as to the purpose of these communications. If Mr. Stein had not yet been retained by Rogers and/or Ciklin Lubitz until October, 2012 as testified, then those communications would not be the subject of any privilege.

It is also clear from the testimony of Ms. Crispin that she or her firm had the following communications with Mr. Stein prior to October, 2012: (1) communication on July 31, 2012 to which was attached an engagement letter from Mr. Stein in connection with the Bivins matter (*Id.* at 128:23-129:7); (2) communications on July 30, 2012 from Mr. Stein regarding fee language (*Id.* at 129:18-24); (3) exchange of information with Mr. Stein on July 26, 2012 regarding the New York buildings (*Id.* at 130:15-24); (4) e-mails on July 30, 2012 with Mr. Stein regarding the Bivins guardianship (*Id.* at 131:10-20); (5) several e-mails with Mr. Stein on August 30, 2012, regarding the Bivins matter (*Id.* at 131:21-132:4); (6) exchanges with Mr. Stein on August 24, 2012 (*Id.* at 132:5-7); (7) communications with Mr. Stein on September 18, 2012 (*Id.* at 132:22-25); (8) six separate communications with Mr. Stein on August 7, 2012 (*Id.* at 134:18-23); (9) six e-mails from Mr. Stein on July 17, 2012 (*Id.* at 135:6-10); (10) four separate phone communications with Mr. Stein on August 15, 2012 regarding Bivins (*Id.* at 135:15-18); (11) copied on e-mails from Mr. Stein on July 16, 2012 and July 19, 2012 (*Id.* at 136:11-21); and (12) e-mails with Mr. Stein on July 19, 2012 (*Id.* at 137:2-5). All of the foregoing communications referenced above were included on a privilege log that Ciklin Lubitz produced to the Estate in response to the Estate's request to produce and the communications identified therein were not produced to the Estate on the basis of privilege. [DE 389 at 126].

The Court should have required Crispin to testify as to the substance of these communication based upon Stein's position at trial that he was not counsel for Ciklin Lubitz or the guardian prior to October, 2012. As such, the Estate is entitled to a new trial because it was denied the ability to introduce evidence concerning those communications which would have

implicated negligence and breaches of fiduciary duty on the part of Stein in the default of the 808 Lexington Mortgage and other possible issues during that timeframe.

B. Denial of Discovery Motions Seeking Communications and Documents for Which Defendants Claimed Attorney-Client Privilege.

Additionally, the Estate is entitled to a new trial on the basis that it was denied the ability to obtain communications between the guardians and counsel retained by the guardians for the benefit of the Ward. The Estate filed multiple motions to compel seeking the foregoing communications. See [DE 112, 113, 116, 117, and 118].⁵ Magistrate Judge William Matthewman entered Omnibus Orders on Discovery Motions on September 9, 2016, and September 16, 2016 denying the Estate's motions. See [DE 132 and 137]. This Court affirmed Judge Matthewman's September 9, 2016, and September 16, 2016, Orders as to the attorney-client privilege issue. See [DE 167].

The Estate also filed multiple motions to compel deposition responses [DE 205, 209, 210] and a motion to reopen discovery and renew motions to compel [DE 201]. On April 27, 2017, Magistrate Judge Matthewman entered an "Omnibus Order on Discovery Motions," which denied all of the Motions to Compel. See [DE 280]. The Magistrate Judge, without reviewing the purported work product, ruled that with respect to information sought which constitutes fact work-product, the Estate did not establish a substantial need for the information or establish that the Estate cannot, without undue hardship, obtain the substantial equivalent of the information by other means. See April 27, 2017 Omnibus Order [DE 280] at pg. 9. This Court affirmed Magistrate Judge Matthewman's April 27, 2017 Order. See [DE 319].

It is important to note that Fla. Stat. § 90.5021⁶ only applies to the attorney-client privilege and not to work product privilege. As such, the line of cases following *Tripp v. Salkovitz*, 919 So.2d 716, 718-719 (Fla. 2d DCA 2006) are controlling and provide that the "privilege belongs to the Estate as the Ward's successor in interest." In *In re Fundamental Long Term Care, Inc.*, 489 B.R. 451 (M.D. Fla. 2013), the former counsel to a subsidiary in

⁵ The Estate maintains and re-asserts the issues it raised in its motions concerning attorney-client and work product privileges.

⁶ The Estate maintains and re-asserts its United States and Florida constitutional challenge to Fla. Stat. 90.5021 on due process grounds on the basis that the statute unfairly deprives a class (incapacitated wards) equal access to courts. The Estate also maintains and re-asserts that Fla. Stat. § 90.5021 does not apply in federal diversity cases because it is procedural as opposed to substantive.

bankruptcy could not use the work product doctrine to deny the bankruptcy trustee, who was now the successor to the bankrupt subsidiary, access to litigation files. Florida law does not permit an attorney to refuse to turn over files to a client willing to pay for them. *Id.* at 473-474. As discussed in *In re Fundamental Long Term Care, Inc.*, although some courts have held that the work product privilege is held by both the client and the attorney, and either can assert the privilege, none of those decisions involve an attorney invoking the work product doctrine to refuse turning over his or her files to a client, the Ward (and the Estate standing in the shoes of the deceased Ward). *Id.* at 474. An attorney cannot withhold documents against their former client based upon the work product privilege. *Id.*

Moreover, the work product doctrine seeks to protect against work product generated in the pending litigation and not disclosure of work product generated in a previous case. *In re Fundamental Long Term Care, Inc.*, 489 B.R. at 475-476. The Estate was not seeking work product generated in this litigation, but rather, it sought the Defendant attorneys' files arising out of the guardianship proceedings. *See Id.*

At a minimum, the Court should have conducted an *in camera* review. *See generally Bridgewater v. Carnival Corp.*, 286 F.R.D. 636 (S.D. Fla. 2011)(citations omitted) (which indicates that affidavits as to underlying basis for the asserted privilege and *in camera* document review are typically necessary to determine the actual application of any claimed work product privilege). Thus, the Court should have, first and foremost, determined whether the withheld information was, in fact, privileged work product made in anticipation of litigation. *See generally Maplewood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550 (S.D. Fla. 2013). Without the Court's examination of such alleged work product for a determination of its character, the Estate was practically foreclosed from meaningfully challenging Defendants' work product claims, in particular, claims that the communications between Stein and Ciklin Lubitz prior to October 2012 somehow constituted work product.

WHEREFORE based upon the above, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, respectfully requests this Court grant Plaintiff's motion for new trial and such other relief as this Court deems just and proper.

RULE 7.1 CERTIFICATION

Pursuant to Local Rule 7.1, undersigned counsel attempted to confer in good faith with counsel for Stein Defendants; however, the undersigned was informed the Stein Defendants' office was closed due to Hurricane Irma. The undersigned then advised, via email, counsel for Stein Defendants of the intent to file this motion given the closure of their office.

Dated: September 8, 2017

Respectfully submitted,

/s/ J. Ronald Denman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF system on September 8, 2017, and the foregoing document is being served this day on all counsel or parties of record, as noted below, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing:

/s/ J. Ronald Denman

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

CASE NO.: 15-81298-CV-MARRA-MATTHEWMAN

JULIAN BIVINS, as Personal Representative
of the ancillary Estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR.,
as former guardian, STEPHEN M. KELLY,
as successor guardian, BRIAN M. O'CONNELL,
ASHLEY N. CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN,
BEYS LISTON MOBARGHA & BERLAND, LLP
f/k/a BEYS STEIN MOBARGHA & BERLAND, LLP,
and LAW OFFICES OF KEITH B. STEIN, PLLC,
n/k/a STEIN LAW, PLLC,

Defendants.

PLAINTIFF'S MOTION FOR NEW TRIAL AS TO STEIN DEFENDANTS

Plaintiff, JULIAN BIVINS as Personal Representative of the ancillary Estate of Oliver Wilson Bivins (“the Estate”), by and through undersigned counsel, and pursuant to Federal Rule of Civil Procedure 59, hereby files its Motion for New Trial as to only Keith Stein, Beys Liston Mobargha & Berland, LLP f/k/a Beys Stein Mobargha & Berland, LLP, and Law Office of Keith B. Stein, PLLC n/k/a Stein Law, PLLC (collectively, the “Stein Defendants”) and in support thereof provides the following Memorandum of Law.

MEMORANDUM OF LAW

I. Legal Standard

Rule 59, Federal Rules of Civil Procedure, provides that “[t]he court may, on motion, grant a new trial on all or some of the issues ... after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court.” Fed. R. Civ. P. 59(a). “The motion for a new trial ... may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.” *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). As far as the motion for a new trial, the trial judge can grant a new trial if he believes the verdict is contrary to the weight of the evidence. *Id.* “A judge should grant a motion for a new trial when ‘the verdict is against the clear weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.’” *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001) (quoting *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984)). The decision as to whether to grant a new trial is committed to the discretion of the trial judge. *Lambert v. Fulton County, Ga.*, 253 F.3d 588, 595 (11th Cir. 2001).

Prior to assessing the evidence, we must consider the standard of harmless error to be applied in a civil case. In *Conway v. Chemical Leaman Tank Lines*, 525 F.2d 927, 929 n. 3 (5th Cir.1976), the Fifth Circuit ruled that in civil cases courts should apply the same standard as announced in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), a criminal case. In that case, the Supreme Court wrote that if a court

is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.... *But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.* [Emphasis added].

Id. at 764–65, 66 S.Ct. at 1248 (footnote omitted) (citation omitted); *See e.g., Aetna Cas. & Sur. Co. v. Gosdin*, 803 F.2d 1153, 1160 (11th Cir. 1986). To answer the foregoing question, the Eleventh Circuit looks to a number of factors, including the number of errors, the closeness of the factual disputes (i.e., the strength of the evidence on the issues affected by the error), and the prejudicial effect of the evidence at issue, whether counsel intentionally elicited the evidence, whether counsel focused on the evidence during the trial, and whether any cautionary or limiting instructions were given. *Gosdin*, 803 F.2d at 1160; *Nettles v. Electroluz Motor AB*, 784 F.2d 1574, 1581 (11th Cir. 1986); *U.S. Steel, LLC v. Tieco, Inc.* 261 F.3d 1275, 1288 (11th Cir. 2001) (improper admission of state judicial opinion required a new trial where opinion was used by one of the parties “throughout the trial” to help establish disputed facts and counsel told the jury in closing argument “to use the opinion to make credibility determinations”).

II. Striking the Testimony of Irwin Gilbert Based on Lack of Qualification Constitutes an Abuse of Discretion.

A. The Court’s July 26, 2017 Order.

On July 26, 2017, this Court entered an order striking the testimony of the Estate’s expert, Irwin Gilbert (hereinafter “Gilbert”). Specifically, the Order provided:

The Court finds that Mr. Gilbert does not have the qualifications by way of knowledge, education, training or experience to be able to provide testimony as an expert witness relative to the appropriate standard of care to which an attorney representing a professional guardian of an incapacitated ward would be required to adhere. [DE 374].

The Estate contends that the exclusion of Gilbert’s testimony was made in error. Specifically, the Order is overbroad in its exclusion of Gilbert’s testimony because the Order only addresses Gilbert’s qualification to opine on the issue of the appropriate professional standard of care. The Order, however, is silent as to Gilbert’s qualification to opine on the issue of fiduciary duty, which the Estate established during the *Daubert* hearing. Accordingly, Gilbert should have been, at the very least, permitted to testify on the issue of fiduciary duty.

Additionally, the Estate urges the Court for entry of an Order granting a new trial as to its finding that Gilbert did not possess the requisite qualification to opine on the appropriate standard of care concerning the conduct of the Defendants. The Estate contends that the Order

applied an overly-narrow standard to the qualifications required of an expert to be permitted to testify in the 11th Circuit.

B. Legal Authority Concerning Expert Qualification.

The qualification standard for expert testimony is “not stringent,” and “so long as the expert is minimally qualified, objections to the level of the expert’s expertise [go] to credibility and weight, not admissibility.” *Banta Properties, Inc. v. Arch Specialty Ins. Co.*, 2011 WL 7118542 (S.D. Fla. Dec. 21, 2011) (quoting *Hendrix v. Evenflo Co.*, 225 F.R.D. 568, 585 (N.D. Fla. 2009)). “An expert is not necessarily unqualified simply because [his] experience does not precisely match the matter at hand,” so long as the expert is “minimally qualified...” *Kirksey v. Schindler Elevator Corp.*, 101 Fed. R. Evid. Serv. 600, 2016 WL 5213928, at *6 (S.D. Ala. 2016). Where an expert does have congruent experience, “[n]othing in this amendment is intended to suggest that experience alone ... may not provide a sufficient foundation for expert testimony.” Fed. R. Evid. 702 Advisory Committee's note (2000 amends).

Determining whether a witness is qualified to testify as an expert “requires the trial court to examine the credentials of the proposed expert in light of the subject matter of the proposed testimony.” *Jack v. Glaxo Wellcome, Inc.*, 239 F.Supp.2d 1308, 1314–16 (N.D.Ga.2002). *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 507 n. 10 (5th Cir.1999); *see also Martinez v. Altec Indus., Inc.*, 2005 WL 1862677, *3 (M.D. Fla. 2005) (quoting *Rushing*, 185 F.3d at 507 (“As long as some reasonable indication of qualifications is adduced, ... qualifications become an issue for the trier of fact rather than for the court in its gate-keeping capacity.”)), *superseded by rule on other grounds as recognized in Mathis v. Exxon Corp.*, 302 F.3d 448, 459 n. 16 (5th Cir.2002)); *Falic v. Legg Mason Wood Walker, Inc.*, 03-80377-CIV, 2005 WL 5955704, at *1 (S.D. Fla. Jan. 10, 2005), *8 (S.D. Fla. Jan. 6, 2005) (Court does not exclude expert testimony merely because his testimony may be based primarily on his professional experience as a litigator.); *Anderson v. State*, ___ So. 3d ___, 2017 WL 930924 (Fla. March 9, 2017) (expert not required to be “certified” in a particular subspecialty in order to offer expert testimony.); *Valentin v. New York City*, No. 94 CV 391 (CLP), 1997 WL 33323099, at *25 (E.D.N.Y. Sept. 9, 1997) (“The fact that a proposed expert may not have the exact qualifications to fit the case does not mean the expert's testimony is automatically inadmissible.”).

“Courts should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility.” *Lord v. Nissan Motor Co.*, 2004 U.S. Dist. LEXIS 25409, at *13, No. 03-3218

(D.Minn. Dec. 13, 2004) (citing *Clark v. Hendrick*, 150 F.3d 912, 915 (8th Cir. 1998)). “In borderline questions, it is more appropriate for a judge to admit the evidence than to exclude it from the fact finder because ‘[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.’” *Tolliver v. Naor*, 2001 U.S. Dist. LEXIS 18267, at *7, No. 99-0586 (E.D. La. Nov. 1, 2001) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. at 596 (1993)).

C. The Estate Established Irwin Gilbert’s Qualification to Provide Expert Testimony on the Issues of Fiduciary Duty and Professional Negligence.

Gilbert is a pre-eminent attorney with over 35 years of experience with vast experience in legal malpractice and fiduciary duty cases, who published on the issue of fiduciary duties and who was instrumental in the formulation of the legal precedent establishing the legal duties in the case at hand. (July 25, 2017 Trial Transcript Vol. VI, [DE 390 at 263:18-25]). During the Court’s *Daubert* hearing, the Estate elicited the following testimony from Gilbert establishing his qualification to opine on the issues of fiduciary duty and professional malpractice:

- a. Perhaps not coincidentally, the issue of whether or not an attorney for a guardian actually owes that duty to the ward was a matter that I litigated and that involves the Saadeh cases, which I believe have been cited in your proceedings, and, in fact, made new law in the Fourth District Court of Appeals, making it clear that, in fact, an attorney... owes the same duty to the ward. It's not merely a duty of care, but there's a duty of loyalty, and a lawyer has to apply skill and must act in the best interest of the ward. (*Id.* at 264:9-17.)
- b. Well, I suppose there are different ways to go about practicing law. The way I go about practicing law involves mastering a subject. And so in some law firms, an attorney may have 30 or 40 or 50 files. I believe I have eight, perhaps 10 active cases at one time, and it's sometimes even fewer than those [...]

I've litigated numerous will contest cases in Florida and in New York, cases that involve, in Florida what we refer to as the Carpenter factors. I've litigated to establish guardianships over objection. That would be in the Annie Owens White guardianship. I've represented the guardianship in that case for more than five years. I represent the professional guardian in the McFarlane guardianship, and have done so, I think, for more than four years. (*Id.* at 265:4-25.)

- c. We were initially engaged by Mr. Saadeh because he was unhappy with his court-appointed lawyer in an involuntary guardianship proceeding, and he was induced to sign what was labeled as a revocable trust, which, in fact, was an irrevocable trust, because it wasn't revocable by him. We had to litigate against opposition to substitute for his court-appointed lawyer. We had to litigate to reinstitute the guardianship

proceedings, which technically had been concluded with a purported settlement order. We had to convince the Court to retreat from that order [...]

We were successful in getting summary judgment. Then had to litigate to get the property that had been taken from the ward back to him and then discovered that a substantial -- in the six figures -- legal fees were taken out of the trust to pay the lawyers that were fighting to maintain the trust. We had to litigate to recover those attorney's fees. In so doing, we had to master the subject matter, again, of what is for the benefit of the ward and for the benefit of the ward's guardianship estate [...]

We had to master that subject in order to recover Mr. Saadeh's fees. And then these matters were all brought on appeal to the Fourth DCA. And, again, we had to drill even deeper into the subject matter and into the controlling law in order to see the trial judge's orders sustained. (*Id.* at 267:2-268:17.)

d. Q. Now, in -- in these efforts by you to put forth the arguments of your client all the way to the Fourth District Court of Appeals, with whom did the Fourth District Court of Appeals agree; with you, or with the probate estate specialist?

A. Well, in this instance, they adopted the legal arguments that we advanced in our briefs in both appeals. (*Id.* at 269:2-8.)

e. Q. Would you explain to the Court the Saadeh case that set forth the duty of lawyers in terms of whether they must act in the best interest of the ward, and it's in privity with the ward. Would you explain that ruling.

A. Well, that was Saadeh versus Connors. In that case, we filed a suit for damages against the attorneys that we say were responsible for causing Mr. Saadeh to incur significant legal fees attempting to end the guardianship and have the trust declared void ab initio, as well as to recover his property. The initial defendant, Connors, was the lawyer hired to draft the trust. This trust, as I said before, was labeled a revocable trust but was, in fact, irrevocable. We also sued the guardian, whose name was Deborah Barfield, and we sued the guardian's attorney, whose name was Collette Meyer. Ms. Meyer made a motion for summary judgment, arguing the absence of a duty to the ward, arguing that the ward was required to engage his own counsel under the guardianship statute, had to be represented independently, and arguing that, in fact, they were adverse toward one another, and so no duty could be owed. But we argued to the Court that since a guardian's primary duty was to benefit the ward and that the guardian owed a fiduciary duty to the ward, the attorney for the guardian likewise owed the same duties to the ward. In their decision, the Fourth DCA pointed out that the ward might, in fact, be the primary intended beneficiary of the services of the attorney and held that that was sufficient for privity purposes. And that was the first such decision reported in a Florida District Court of Appeals relating to the duty owed by an attorney for the guardian of a ward to the ward. (*Id.* at 269:22-271:3.)

f. Q. Would you tell the Court your involvement in the Annie Owens White case.

A. Ms. White suffers from very significant psychiatric problems and was acting in a very self-destructive, in fact, endangering her own life when she didn't take her medication. She needed a guardian. I was asked by the Legal Aid Society to represent Ms. White's sister, Catherine McGrath, and to obtain or to have a petition filed that would result in the creation of a guardianship, and I did that. Soon after, an attorney appeared seeking to have Ms. White declared restored to capacity, and so we had a fully litigated guardianship case with respect to whether or not the guardianship would be maintained. (*Id.* at 271:4-17.)

g. Q. And how long have you been attorney for Catherine McGrath as guardian?

A. I believe it's more than five years. I continue to represent the guardian. I assist the guardian in the preparation of the annual plan. In this case, I assist the guardian in the preparation of her annual report. Ms. White's sister, Catherine McGrath, is a wonderful lady, devoted to her sister, but I don't believe she was able to continue school past the seventh grade, so she needs some assistance, and we assist her every year. We routinely appear in the guardianship court for authorization for disbursements on her behalf. And, likewise, in the McFarlane case, I've been involved in that case more than four years and routinely appear in that Court in various petitions for authorization for the guardian. (*Id.* at 271:18-272:8.)

h. Q. Are you currently litigating a case Haas versus Nacenyager (phonetic)?[...]

A. This is one of the current legal malpractice cases that we're actively litigating. And, of course, at issue in the case is the attorney's duty to a client and whether it was breached.

Q. Have you served on any Florida Bar grievance committees for any length of time?

A. I served a full term on the 15th District grievance committee and served one year as chair. I also have served on I think a total now of eight or nine years on the Florida Client Security Fund and have been co-chair and then chair of that committee. That committee deals with attorney dishonesty and an attorney's failure to render valuable service and reimburses clients that are the victim of dishonest lawyers.

Q. Have you litigated breach of fiduciary duty cases for both plaintiffs and defendants?

A. I have, and that would be throughout the time I'm practicing law. (*Id.* at 273:15-274:11.)

i. Q. For the reasons you have just explained to the Court based upon your involvement as an attorney in the various matters we've discussed, is that why -- do you -- is that why you feel your practice does, indeed, involve complex probate and guardian litigation in both Florida and New York?

- A. Yes. (*Id.* at 274:25-275:5.)
- j. I have been involved in numerous guardianship cases, disputed will cases, disputed trust cases over the course of those 35 years. I did not commit to memory the names of all of the cases, nor did I go back and try to make a search of files with respect to the identity of those cases. (*Id.* at 286:7-11.)
- k. A. I have litigated countless lawsuits involving New York real estate transactions, the title to property, the partition of property, and, in fact, have litigated whether or not a divisible marital interest remained in New York property.
- l. Q Okay. But observer is not participants, and you were not the individual that was engaged in the refinancing of it, although you may have observed and looked into it, correct? Is that a fair statement?

A. Well, I had to make sure that the terms of the settlement were met and that the property would be free and clear of liens or any residual claim of interest by the other party. But other than that, I -- I don't do real estate transactions, but as a trial lawyer I sometimes have to clean up the mess that's created from one. (*Id.* at 308:10-19.)

Defendants challenged Gilbert's qualification contending that he was not qualified to render an expert opinion in the matter because Gilbert: (1) had not "represented a ward of Oliver Wilson Bivins, Sr.'s age with his mental or physical conditions" (*Id.* at 311:22-312:2); (2) had not advised a guardian as to how to balance the a ward's property interests in relation to the interests of their physical well-being (*Id.*); had not "finished a guardianship" (*Id.* at 312:21-25); that he was not familiar with the relevant standards of care in the community (no evidence was adduced during the *Daubert* hearing in support of this proposition) (*Id.* at 312-3-12); and that he was not a New York real estate attorney.

Defendants' position, adopted by the Order excluding his testimony, is not consistent with 11th Circuit law on the issue of qualification. Federal law requires merely that the proponent of the expert testimony establish the expert as "minimally qualified" as the qualification relates to the general subject of the proposed testimony. *Banta Properties, Inc. v. Arch Specialty Ins. Co.*, 2011 WL 7118542 (S.D. Fla. Dec. 21, 2011). Defendants were successful in narrowing the range of permissible qualifications to an attorney specializing in representing *professional* guardians overseeing guardianships of the *person and the property* simultaneously involving *elderly, dementia-diagnosed* wards from the beginning of the proceeding through the end of the

guardianship proceeding.¹ Yet, these various items of specialization do not bear on the issues of an attorney's negligence or an attorney's fiduciary duty.

As a result of Defendants' argument at the *Daubert* hearing, the Order excluding Gilbert's testimony provides that he was unqualified to opine on the standard of care of "an attorney representing a *professional* guardian of an incapacitated ward." (emphasis supplied) [DE 374]. Though the distinction between professional guardians and non-professional guardians was the subject of extensive argument by Defendants' counsel, at no point has there been any indication as to why this is a meaningful difference insofar as qualification to testify is concerned regarding the professional and fiduciary duties of the attorney. An attorney's duty of care, as it relates to services provided on behalf of an incapacitated ward² does not change depending on the qualifications of the guardian overseeing the ward. In fact, there is no Florida or 11th Circuit law standing for the proposition that an attorney's duty of care to a third party beneficiary of any kind is diminished based on the status of the client in privity with the attorney.

Moreover, the professional negligence at issue in the case relates to inadequate due diligence concerning property values and conflicts of interest. The opinions on these issues offered by Gilbert fall squarely within the gambit of his expertise as a lawyer with over 35 years of experience in litigating cases, settling those cases, performing due diligence associated with settlements, representing various parties with fiduciary obligations and representing third parties to whom he owed fiduciary obligations. An individual with experience predominantly representing guardians would not actually have the broad legal knowledge and experience of Gilbert who has practiced extensively in the areas of legal malpractice and fiduciary duty, who happens to have the added bonus of experience representing guardians. It appears illogical to narrowly construe *Daubert* to consider an individual with experience only in representing guardians to be in a better position to opine on the actual subject matter of the instant lawsuit, than one with vast knowledge derived from representing clients and litigation issues involving

¹ It is worth noting that the guardianship in question was not concluded because at the time of the trial, no guardian had been discharged.

² Irwin Gilbert is not only qualified to render an opinion concerning the standard of care and duty attorneys and guardians owe to a ward, he was lead counsel in the case that established Florida precedent on the issue. Gilbert was directly involved in the litigation and appeals of the Saadeh cases which actually define the standard of care owed by attorneys to incompetent wards in the State of Florida. *Saadeh v. Connors*, 166 So. 3d 959, 961 (Fla. 4th DCA 2015).

fiduciary matters, malpractice matters (on both sides of the table), real estate transactions, trust issues, and other practice areas as established by Gilbert's testimony. In short, any purported gaps asserted by the Defendants to exist in Gilbert's experience due to the lack of him being essentially recognized as a specialist dedicated solely to representing guardians, does not and should not bear on the opinions reached by Gilbert concerning fiduciary duty or professional malpractice. At most, such assertions should be the subject of cross-examination by the Defendants to attempt to impeach the weight that the jury gives to Gilbert's testimony.

Similarly, Defendants misplace their focus on Gilbert's lack of publication with a specific section regarding "fiduciary duties that guardians owe to wards." (July 25, 2017 Trial Transcript Vol. VI, [DE 390 at 290:2-5].) First, Defendants' inquiry does not actually address the fiduciary duty at issue in the case – an attorney's fiduciary duty to an incapacitated ward. Second, and more importantly, Gilbert provided unrebutted testimony that "[t]here are not two different worlds of fiduciary duty; there is only one." *Id.* at 290:2-13.³

Accordingly, the Order concerning Gilbert's qualification to testify on the issues of professional negligence and fiduciary duties did not properly apply 11th Circuit law by failing to analyze the qualification of the expert in relation to the opinions actually proffered. The Order relies improperly on an analytical scheme put forth by Defendants which demands that the expert have experience representing a guardian in a virtually identical situation and with specific experience concerning every possible issue in the case.

D. The Court Did Not Apply the Same Qualification Standard to Defendant Keith Stein's Expert Edward Robbins.

The Court did not exclude the testimony of Defendant, Keith Stein's (hereinafter "Stein") expert, Edward S. Robbins (hereinafter "Robbins"), permitting his expert to testify unrebutted as to professional negligence and breach of fiduciary duty. Robbins' testimony concerning Stein's

³ "A personal representative is a fiduciary who shall observe the standards of care applicable to trustees." § 733.602(1), Fla. Stat. (2014); *see also* § 733.609(1), Fla. Stat. (2014) ("A personal representative's fiduciary duty is the same as the fiduciary duty of a trustee of an express trust, and a personal representative is liable to interested persons for damage or loss resulting from the breach of this duty."); *State v. Lahurd*, 632 So.2d 1101, 1104 (Fla. 4th DCA 1994) ("The personal representative, like a trustee, is a fiduciary in handling the estate for the beneficiaries. As such, he or she is to observe the standard of care in dealing with the estate as a prudent trustee exercises in dealing with property of the trust.") (citations omitted). A trustee is required to seek only reasonable fees for his or her services and the trustee's agents. *See* §§ 736.0105(1), (2)(b); 736.0801; 736.0802(1), (7)(b), (8), Fla. Stat. (2014).

fiduciary duties and standards of care was permitted at trial despite his testimony on voir dire that he had virtually no recent experience in representing guardians, and to the extent he had any recent guardianship experience, it was significantly less guardianship experience than Gilbert:

Q. And you have only done one guardianship case down here but otherwise have essentially represented guardianships at closings, meaning you've done the real estate as whether it's any entity that you're doing the closing for, right?

A. Correct. And I represented a ward in a matter in Dade County, as well.

Q. You've authored no articles in guardianship matters, correct?

A. I have not. (July 27, 2017 Trial Transcript Vol. VIII [DE 392 at 218:24-219-7].)

The Court's exclusion of Gilbert's testimony on qualification grounds and its allowance of the less qualified opinion from Robbins resulted in a defense verdict for Stein given the more technical nature of his negligence and breaches of fiduciary duty. This outcome resulted from the Estate's inability to challenge the acts of Stein concerning due diligence and fiduciary duty. Further, Stein's conduct was unfairly bolstered by his unrebutted expert. This ruling constitutes an error during the course of the trial adversely affecting the Estate's "substantial rights." *Advantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 37 F.3d 1460, 1465 (11th Cir. 1994). Based on the Court's rulings on the parties' experts, a new trial is warranted.

III. Abuse of Discretion to Exclude of the 67th Street Deeds from Evidence.

On July 19, 2017, this Court ruled that the Estate would not be permitted to enter into evidence Plaintiff's Proposed Exhibit 40, which was a composite of certified deeds for the 67th Street property reflecting Oliver Wilson Bivins, Sr.'s ownership of the property prior to his marriage to Lorna Bivins. The Court ruled as follows regarding the 67th Street deeds based upon a request by Defendants for imposition of a Fed. R. Civ. P. Rule 37 Sanction⁴ for failure to timely disclose:

THE COURT: Okay. But -- all right. Well, whether or not you're going to be able to use it as impeachment of their experts' opinions, I'll deal with that later, but I'm not going to let you use it in your case in chief. (July 19, 2017 Trial Transcript Vol. III [DE 387 at 190:14-17].)

⁴ (*Id.* at 176:1-5.)

At the time of the Court's ruling and thereafter, Defendants had "opened the door" to the introduction of the evidence by attempting to take advantage of its exclusion. Defendants, throughout the course of the trial, relied upon the exclusion of evidence of Oliver Bivins' ownership of the 67th Street property to create a false impression that Oliver Bivins never owned the property, which is not permissible in the 11th Circuit. Further, the Court's exclusion of the 67th Street deeds was predicated upon a misapplication of Fed. R. Civ. P. Rule 37. Accordingly, a new trial is warranted.

A. Defendants Were Improperly Permitted to Take Advantage of the Exclusion of the 67th Street Deeds from Evidence to Create a False Impression in the Minds of the Jury.

If a party "opens the door" to a particular line of inquiry by making certain statements, then the other party may be allowed to offer rebuttal evidence to contradict those statements. *See, e.g., Wood v. Morbark Industries, Inc.*, 70 F.3d 1201, 1208 (11th Cir. 1995) (by offering testimony that its wood chipper had the safest length chute possible, defendant opened door for impeachment such that plaintiff should have been allowed to inquire why defendant modified that design after plaintiff's accident); *United States v. Jacoby*, 955 F.2d 1527, 1540 (11th Cir.1992) (where defendant testified at length about statements in magazine article that government had not been allowed to admit in its case-in-chief, defendant opened door to cross-examination about that article to refute or discredit defendant's direct testimony). The use of otherwise inadmissible evidence is permissible if it promotes the goal of truth-seeking by preventing a party from perverting the evidentiary rules "into a license to use perjury by way of a defense..." *James v. Illinois*, 493 U.S. 307, 313, 110 S. Ct. 648, 652, 107 L. Ed. 2d 676 (1990).

In this case, Defendants, in their opening statements, represented to the jury that Oliver Wilson Bivins, Sr. never had an interest in the 67th Street property:

a. Studley

- i. The 67th Street property was owned by Lorna, and the 808 property was owned by Oliver and Lorna. (July 18, 2017 Trial Transcript Vol. II [DE 386 at 34:19-25].)
- ii. The 67th Street property, that is only Lorna's property. That is a key point that you will see in this case. That is Lorna's property only, and it will always be found to be only Lorna's property. (*Id.* at 36:14-17.)
- iii. The only thing that Lorna has is 67th, which was always in her name. (*Id.* at 42:10-11.)

b. Blaker

iv. Julian wants 67th Street. It's not his. It's not his father's. (*Id.* at 71:11-14.)

Defendants' representation to the jury that Oliver Wilson Bivins, Sr. did not own the 67th Street property was a knowing misrepresentation of the ownership of the property. It is clear that Defendants had reviewed the deed evidence from their Joint Motions *in Limine* which provided:

In particular, it appears the Plaintiff is seeking to introduce a document, a title report, which was first produced May 31, 2017 and was ordered by the Plaintiff on May 16, 2017. This document was not timely produced and should not be admitted, particularly since no party or witness was able to review the same and provide information about the document before the close of discovery in this action. [DE 310].

Given Defendants' knowledge of the deed evidence and their success in excluding the deeds on the basis of non-disclosure, the testimony and argument put forth by Defendants concerning the ownership of 67th Street was improper. Further, Defendants took improper advantage of this ruling throughout the trial. (*See e.g.* July 19, 2017 Trial Transcript Vol. III [DE 387 at 171:6-22]; July 27, 2017 Trial Transcript Vol. VIII [DE 392 at 153:25-154:6]; July 28, 2017 Trial Transcript Vol. IX [DE 393 at 52:7-12].)

The facts of the instant case mirror, *Wood v. Morbark Industries, Inc.*, wherein the trial court granted defendant's motion *in limine* to exclude evidence of post-accident remedial changes to a wood chipper. 70 F.3d at 1208. Although defendant's cross-examination left an impression that no remedial modifications were done to the wood chipper, the trial court would not allow any contrary evidence. *Id.* The Court of Appeals, *reversed the judgment*, holding that the defendant took unfair advantage of the *in limine* ruling, and opened the door for rebuttal and impeachment testimony, thereby substantially affecting the rights of the Plaintiff. *Id.*

B. The Court Incorrectly Applied Fed. R. Civ. P. Rule 37.

Fed. R. Civ. P. Rule 37(c)(1) provides: "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, *unless the failure was substantially justified or is harmless.*" (emphasis supplied).

Here, Defendants conceded that the Estate did not obtain possession of the deed evidence until May 16, 2017. ([DE 310] and July 19, 2017 Trial Transcript Vol. III [DE 387 at 177:1-18].)

Defendants also admit that the Estate produced to Defendants the evidence in question on May 31, 2016. *Id.* Accordingly, the Court did not properly apply Rule 37, which only contemplates exclusion of evidence on the basis of violations of Rule 26(a) or (e). The Estate did not violate Rule 26(a) because at the time of its Rule 26 Disclosures, it was not in possession or control of the evidence. The Estate did not violate Rule 26(e) because it timely (within two weeks) supplemented its disclosure once it obtained the deed evidence.

Further, the Court conceded when assessing the issue, “I’m not saying that you necessarily were not diligent in discovering this...” (*Id.* at 188:1-189:14.) Thus, the Court’s Rule 37 sanction was inappropriate because the Court acknowledged that the delay in production of the document was substantially justified. The Estate established substantial justification because the Estate, during the discovery period, had no reason to believe that the title of 67th Street would be at issue in light of the unrebutted testimony of Julian Bivins. (*Id.* at 178:1-13.)

Additionally, the Rule 37 sanction is improper because the public record of the deed was equally available to the Defendants from another source. *S.E.C. v. Samuel H. Sloan & Co.*, 369 F.Supp. 994, 995–96 (S.D.N.Y.1973) (Ward, D.J.) (“It is well established that discovery need not be required of documents of public record which are equally accessible to all parties.”). Accordingly, to the extent the Estate did not have substantial justification for the delay in obtaining the deeds and producing them, the ready availability of the public records renders any failure harmless as contemplated by Rule 37.

The Court’s exclusion of the 67th Street deeds constitutes an error during the course of the trial adversely affecting the Estate’s “substantial rights.” The exclusion of the deeds was based on an improper application of Rule 37 and resulted in the creation of a false impression regarding the ownership of the 67th Street property in the minds of the jury. The exclusion of this evidence may have resulted in a defense verdict on behalf of Stein because it did not allow the Estate to establish Stein’s negligence in his negotiation of the New York Settlement. Thus, a new trial is warranted as outlined above.

IV. Substantial Error to Allow Prior Acts of Julian Bivins.

A. Defendants' Counsel's Characterization of Improper Acts of Julian Bivins.

On June 22, 2017, the Estate filed a Motion *in Limine* to Exclude Reference to Improper Character Evidence as to Julian Bivins and Julian Bivins' Acts in his Individual Capacity ("Motion *in Limine*") [DE 313]. On July 14, 2017, this Court entered an Order [DE 358] denying without prejudice the Motion *in Limine*. The Order further provided that "[a]cts of Julian Bivins may be mentioned. However, any evidence that falls under the rubric of 'character evidence' should not be mentioned unless the Court permits it after the evidence is proffered outside the presence of the jury." *Id.* The Estate reasserted the underlying arguments in the Motion *in Limine* at trial on July 17, 2017 [DE 385 at 52-75]. As to the issue of character-type evidence regarding Julian Bivins, individually, the Court ruled that:

If they're going to attempt to argue or present in front of the jury any bad character-type evidence, if that's I think what you called it, they can't do it until they get my permission to do it outside the presence of the jury. So they need to come to me and say we want to present this, Judge, to the jury, either in opening or by way of evidence, and this is why we think we – this is why we think it's relevant and it should be presented, and I'll listen and decide whether it can or cannot. But they're not going to be able to do it, just stand up in opening tomorrow and say Mr. Bivins, you know, beat his wife or whatever. [DE 385 at 52:24-25 and 53:1-10].

Indeed, the Court asked Defendants' counsel on at least four occasions what the actions that occurred prior to Mr. Bivins having a guardian appointed for him had to do with the allegations of malpractice and breach of fiduciary duty. [DE 385 at 61-74]. The Court specifically questioned "[a]gain, I'm trying to understand from the defense perspective, what does – what does the initial reasons have to do with the alleged malpractice here, other than that's how you – other than that's how the guardianship got started, what does the malpractice have to do with what happened before to create the guardianship?" [DE 385 at 73:24-25 and 74:1-4].

Counsel for Stein represented to the Court that he had "no intent in getting up in opening, or getting up in the case in chief and, you know, saying Julian was, you know, a parade of horrors." [DE 385 at 69:7-9]. He further assured the Court that "[n]o one is suggesting that Mr. Bivins, Julian Bivins, committed any crime. No one is suggesting that Mr. Bivins committed

any fraud. No one is suggesting that Mr. Bivins, okay, is, you know, quote/unquote unclean hands and isn't entitled to any equitable kind of relief." [DE 385 at 70:5-9].

Notwithstanding the Court's earlier ruling, the Court then went on to state that it was "not going to put any limits on the attorneys for opening statements, and then I'm going to try and figure out what's at issue here. And then when the evidence is presented you can raise your objection." [DE 385 at 80:5-8]. Upon reflection, the next day before opening statements, the Court requested Defendants' counsel, in describing the history of the case and how it all got started, "to phrase the description in terms of there were transactions that took place that caused concern about the competency of Mr. Bivins, which led to the petition, without saying there were allegations of wrongdoing by Mr. Julian Bivins?" [DE 386 at 3:7-12]. Defense counsel agreed to phrase the history in that way. *Id.* at 3:13-19. Yet, immediately in opening statements, counsel for the CLO Defendants made the following statements about Mr. Julian Bivins:

This is a case about the greed of Julian Bivins. In November of 2010, Julian Bivins improperly took very valuable oil and mineral rights from his father related to property in Texas. [DE 386 at 33:10-14].

The Estate objected to the foregoing improper comments by defense counsel regarding Julian Bivin's character, which objection was overruled [DE 386 at 33:15-20].

Counsel for Defendants continued to characterize Julian Bivins as being "greedy" and having committed improper acts in relation to his father's property with the following statements during opening:

This is where the greed starts. November 12th, 2010, there are documents signed, powers of attorney, transfers of property. Texas, Oliver Wilson Bivins, Sr., transfers his property to Julian Bivins. [DE 386 at 37:2-5].

What's going on is the guardian get authorization to go ahead and file suit in Texas to try to get these properties back that Julian now has. *Id.* at 39:16-18.

He's got litigation going on Texas over the property that was improperly taken by Julian here back in November 2010. *Id.* at 40:11-12.

So this is part of the greed. Julian Bivins takes the property for \$5 million. That's 808 Lexington. So what's going on here with the settlement, this property goes to Julian, 5 million. He turns around after saying that and sells it for 9.75 million. *Id.* at 45:9-13.

And the Julian says, I'll take it for five, and he goes and sells it for 9.75. The evidence will show that this is greed. *Id.* at 51:10-12.

In addition to objecting to defense counsel's improper remarks about the character of Julian Bivins, the Estate also moved for a mistrial after the opening statement of the CLO Defendants' counsel. [DE 386 at 52:17-23]. The Court denied the motion even before counsel for the Estate could state the basis for which he was seeking a mistrial. *Id.*

Despite the Court's earlier ruling requesting counsel, in describing the history of the case, to avoid saying there were allegations of wrongdoing by Mr. Julian Bivins, counsel for the Stein Defendants began his opening statement by describing Julian Bivins as Cain from the biblical story of Cain and Abel, who can't accept what his step-brother has [DE 386 at 60:15-23]. Counsel for the Stein Defendants proceeded to then tell the jury that "[w]hat happens then is Julian Bivins starts getting transferred from his father lots of stuff, 400,000 acres of gas rights, 400,000 acres of mineral rights, 400,000 acres of oil rights in the middle of Texas. . . . Julian gets what's known as a power of attorney. . . . A power of attorney . . . basically means that I get whatever you get, and I can do with it whatever I want..." *Id.* at 62:17-63:3; "you have to understand that Julian Bivins wants what's Oliver's, and that, what the story of this case is, Cain and Abel" *Id.* at 63:17-19; "[w]hat the evidence is gonna show is that Cain wants what's Abel's, and he can't get it from him, and so he's just looking at these lawyers." *Id.* at 74:14-16.

The Court permitted Defendants' counsel to question Mr. Julian Bivins on the stand about the transfers to him from his father that occurred prior to the establishment of the guardianship of his father [DE 390 at 227-228].

Q: You had, in November of 2010, you had a mineral deed that was drafted, a warranty deed or a gift deed, and a power of attorney?

A: I think that's correct.

Q: And the deal was that you going to give your dad \$700,000, and in return, he was going to sell you a hundred percent of the Texas minerals, reserving a 25 percent nonparticipating royalty for his lifetime, and then he was going to give you certain properties described in the gift deed?

A: I was going to pay him 700,000 for the purchase side of that transaction.

Q: And there was – but there was – well, you never gave him the \$700,000, true?

A: No, I didn't.

Defense counsel further questioned Mr. Bivins regarding a corrective deed he signed on behalf of his father after the guardianship proceeding had commenced without his father's consent. [DE 390 at 240-242]. Defendants' counsel then proceeded to advise the jury of the factual

allegations made against Julian Bivins in the Texas proceedings brought by his father's guardian to invalidate the transfers of property to Julian Bivins from his father. *Id.* at 257-259.

B. Estate's Substantial Rights Affected by Improper Characterizations of Julian Bivins.

The denial of the Estate's Motion *in Limine* to exclude references to improper character evidence as to Julian Bivins allowed Defendants' counsel to freely mischaracterize Julian Bivins in opening statements and question Mr. Julian Bivins on the stand about the transfers to him from his father that occurred prior to the establishment of the guardianship and the Texas lawsuit [DE 390 at 227-229 and 257-259]. This was a substantial error which swayed a judgment in favor of Stein and adversely affected the Estate's substantial rights.

Evidence of prior bad acts is improper character evidence under Fed. R. Evid. 404. The testimony elicited from Julian Bivins suggesting he improperly influenced his father in connection with the transfer of his assets and failed to pay adequate consideration for the properties is clearly a "wrong or other act" under the plain language of Fed. R. Evid. 404. Courts look at how much of an effect did the improperly admitted or excluded evidence have on the verdict. *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1161 (11th Cir. 2004).

In this case, the evidence of the transactions between Julian Bivins and his father unfairly prejudiced the Estate based upon the factors set forth in *Aetna Cas. & Sur. Co. v. Gosdin*, 803 F.2d 1153, 1160 (11th Cir. 1986). It is clear from defense counsels' opening statement that Defendants clearly intended to present improper character evidence to the jury. In fact, there were at least four references to Mr. Bivins being "greedy" in the opening statements and several references to the fact the transfers were "improper." Although the Court ruled that Defendants required the Court's permission before Defendants could argue or present in front of the jury any bad character-type evidence regarding Julian Bivins, defense counsel elicited such evidence in the presence of the jury without any instructions from the Court to ignore the prejudicial evidence. As such, the Estate's substantial rights were affected and the judgment in favor of Stein could have been easily been swayed by the impermissible evidence.

V. Estate Entitled to Communications with Stein.

A. Communications with Stein Prior to October 2012.

Stein testified that he was not involved in the guardianship case until October, 2012. [DE 386 at 79:25-80:2]. Yet, Crispin provided conflicting testimony that her firm had communications with him earlier than that time. [DE 388 at 178:2-8]. Indeed, based upon

Ciklin Lubitz's billing statements (Exs. 58 and 186 at 11, 13, and 101), Mr. Stein was actually communicating with Mr. O'Connell and Ms. Crispin as early as July 16, July 26, July 30 and July 31, 2012. *Id.* Ms. Crispin confirmed that the billing statements accurately reflected communications she had with Stein on July 16, July 26, July 30, and July 31, 2012. [DE 389 at 111-113]. When Ms. Crispin was asked as to the substance of those communications, counsel objected on the basis of attorney/client privilege. *Id.* at 114:25-115:4. The Court erred in sustaining the objection and not requiring Ms. Crispin to testify as to the purpose of these communications. If Mr. Stein had not yet been retained by Rogers and/or Ciklin Lubitz until October, 2012 as testified, then those communications would not be the subject of any privilege.

It is also clear from the testimony of Ms. Crispin that she or her firm had the following communications with Mr. Stein prior to October, 2012: (1) communication on July 31, 2012 to which was attached an engagement letter from Mr. Stein in connection with the Bivins matter (*Id.* at 128:23-129:7); (2) communications on July 30, 2012 from Mr. Stein regarding fee language (*Id.* at 129:18-24); (3) exchange of information with Mr. Stein on July 26, 2012 regarding the New York buildings (*Id.* at 130:15-24); (4) e-mails on July 30, 2012 with Mr. Stein regarding the Bivins guardianship (*Id.* at 131:10-20); (5) several e-mails with Mr. Stein on August 30, 2012, regarding the Bivins matter (*Id.* at 131:21-132:4); (6) exchanges with Mr. Stein on August 24, 2012 (*Id.* at 132:5-7); (7) communications with Mr. Stein on September 18, 2012 (*Id.* at 132:22-25); (8) six separate communications with Mr. Stein on August 7, 2012 (*Id.* at 134:18-23); (9) six e-mails from Mr. Stein on July 17, 2012 (*Id.* at 135:6-10); (10) four separate phone communications with Mr. Stein on August 15, 2012 regarding Bivins (*Id.* at 135:15-18); (11) copied on e-mails from Mr. Stein on July 16, 2012 and July 19, 2012 (*Id.* at 136:11-21); and (12) e-mails with Mr. Stein on July 19, 2012 (*Id.* at 137:2-5). All of the foregoing communications referenced above were included on a privilege log that Ciklin Lubitz produced to the Estate in response to the Estate's request to produce and the communications identified therein were not produced to the Estate on the basis of privilege. [DE 389 at 126].

The Court should have required Crispin to testify as to the substance of these communication based upon Stein's position at trial that he was not counsel for Ciklin Lubitz or the guardian prior to October, 2012. As such, the Estate is entitled to a new trial because it was denied the ability to introduce evidence concerning those communications which would have

implicated negligence and breaches of fiduciary duty on the part of Stein in the default of the 808 Lexington Mortgage and other possible issues during that timeframe.

B. Denial of Discovery Motions Seeking Communications and Documents for Which Defendants Claimed Attorney-Client Privilege.

Additionally, the Estate is entitled to a new trial on the basis that it was denied the ability to obtain communications between the guardians and counsel retained by the guardians for the benefit of the Ward. The Estate filed multiple motions to compel seeking the foregoing communications. *See* [DE 112, 113, 116, 117, and 118].⁵ Magistrate Judge William Matthewman entered Omnibus Orders on Discovery Motions on September 9, 2016, and September 16, 2016 denying the Estate's motions. *See* [DE 132 and 137]. This Court affirmed Judge Matthewman's September 9, 2016, and September 16, 2016, Orders as to the attorney-client privilege issue. *See* [DE 167].

The Estate also filed multiple motions to compel deposition responses [DE 205, 209, 210] and a motion to reopen discovery and renew motions to compel [DE 201]. On April 27, 2017, Magistrate Judge Matthewman entered an "Omnibus Order on Discovery Motions," which denied all of the Motions to Compel. *See* [DE 280]. The Magistrate Judge, without reviewing the purported work product, ruled that with respect to information sought which constitutes fact work-product, the Estate did not establish a substantial need for the information or establish that the Estate cannot, without undue hardship, obtain the substantial equivalent of the information by other means. *See* April 27, 2017 Omnibus Order [DE 280] at pg. 9. This Court affirmed Magistrate Judge Matthewman's April 27, 2017 Order. *See* [DE 319].

It is important to note that Fla. Stat. § 90.5021⁶ only applies to the attorney-client privilege and not to work product privilege. As such, the line of cases following *Tripp v. Salkovitz*, 919 So.2d 716, 718-719 (Fla. 2d DCA 2006) are controlling and provide that the "privilege belongs to the Estate as the Ward's successor in interest." In *In re Fundamental Long Term Care, Inc.*, 489 B.R. 451 (M.D. Fla. 2013), the former counsel to a subsidiary in

⁵ The Estate maintains and re-asserts the issues it raised in its motions concerning attorney-client and work product privileges.

⁶ The Estate maintains and re-asserts its United States and Florida constitutional challenge to Fla. Stat. 90.5021 on due process grounds on the basis that the statute unfairly deprives a class (incapacitated wards) equal access to courts. The Estate also maintains and re-asserts that Fla. Stat. § 90.5021 does not apply in federal diversity cases because it is procedural as opposed to substantive.

bankruptcy could not use the work product doctrine to deny the bankruptcy trustee, who was now the successor to the bankrupt subsidiary, access to litigation files. Florida law does not permit an attorney to refuse to turn over files to a client willing to pay for them. *Id.* at 473-474. As discussed in *In re Fundamental Long Term Care, Inc.*, although some courts have held that the work product privilege is held by both the client and the attorney, and either can assert the privilege, none of those decisions involve an attorney invoking the work product doctrine to refuse turning over his or her files to a client, the Ward (and the Estate standing in the shoes of the deceased Ward). *Id.* at 474. An attorney cannot withhold documents against their former client based upon the work product privilege. *Id.*

Moreover, the work product doctrine seeks to protect against work product generated in the pending litigation and not disclosure of work product generated in a previous case. *In re Fundamental Long Term Care, Inc.*, 489 B.R. at 475-476. The Estate was not seeking work product generated in this litigation, but rather, it sought the Defendant attorneys' files arising out of the guardianship proceedings. *See Id.*

At a minimum, the Court should have conducted an *in camera* review. *See generally Bridgewater v. Carnival Corp.*, 286 F.R.D. 636 (S.D. Fla. 2011)(citations omitted) (which indicates that affidavits as to underlying basis for the asserted privilege and *in camera* document review are typically necessary to determine the actual application of any claimed work product privilege). Thus, the Court should have, first and foremost, determined whether the withheld information was, in fact, privileged work product made in anticipation of litigation. *See generally Maplewood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550 (S.D. Fla. 2013). Without the Court's examination of such alleged work product for a determination of its character, the Estate was practically foreclosed from meaningfully challenging Defendants' work product claims, in particular, claims that the communications between Stein and Ciklin Lubitz prior to October 2012 somehow constituted work product.

WHEREFORE based upon the above, JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins, respectfully requests this Court grant Plaintiff's motion for new trial and such other relief as this Court deems just and proper.

RULE 7.1 CERTIFICATION

Pursuant to Local Rule 7.1, undersigned counsel attempted to confer in good faith with counsel for Stein Defendants; however, the undersigned was informed the Stein Defendants' office was closed due to Hurricane Irma. The undersigned then advised, via email, counsel for Stein Defendants of the intent to file this motion given the closure of their office.

Dated: September 8, 2017

Respectfully submitted,

/s/ J. Ronald Denman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF system on September 8, 2017, and the foregoing document is being served this day on all counsel or parties of record, as noted below, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing:

/s/ J. Ronald Denman

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 9:15-cv-81298-KAM

JULIAN BIVINS, as Personal Representative of the
ancillary Estate of OLIVER WILSON BIVINS,

Plaintiff,

v.

CURTIS CAHALLONER ROGERS, JR., as former
guardian; STEPHEN M. KELLY, as successor
guardian; BRIAN M. O'CONNELL; ASHLEY N.
CRISPIN; CIKLIN LUBITZ & O'CONNELL; KEITH
B. STEIN; BEYS LISTON MOBARGHA &
BERLAND, LLP f/k/a BEYS STEIN MOBARGHA
& BERLAND, LLP; and LAW OFFICES OF KEITH
B. STEIN, PLLC n/k/a STEIN LAW, PLLC,

Defendants.

STEIN DEFENDANTS' MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL

Defendants, KEITH B. STEIN, BEYS LISTON MOBARGHA & BERLAND, LLP f/k/a
BEYS STEIN MOBARGHA & BERLAND, LLP and LAW OFFICE OF KEITH B. STEIN,
PLLC n/k/a STEIN LAW, PLLC (hereinafter referred to collectively as "the STEIN

DEFENDANTS”), pursuant to the provisions of Local Rule 7.1(c), file the following Memorandum of Law in Opposition to Plaintiff’s Motion for New Trial (D.E. 419) pursuant to the provisions of Rule 59 of the Federal Rules of Civil Procedure. As the following arguments and citations of authority demonstrate, Plaintiff’s Motion for New Trial must be denied. Plaintiff’s arguments are: (1) unsupported by the record and trial transcript; (2) based on a failure to address and apply the appropriate standards under Daubert¹ and Federal Rule of Evidence 103(a); and (3) ignore that the issues relating to attorney-client and work-product privileges were substantially briefed, argued numerous times, and ruled upon by the trial court. Furthermore, even if the Plaintiff’s expert were permitted to testify to all matters contained in the Rule 26 disclosure, there would have been insufficient evidence to support a verdict, such that the STEIN DEFENDANTS were entitled to judgment as a matter of law.

INTRODUCTION

I. General Background²

As this Court is aware from the pretrial proceedings and trial testimony, this case involves claims of legal malpractice and breach of fiduciary duty against several attorneys and guardians whose actions were approved and/or mandated by orders from a state guardianship court. Defendant, KEITH STEIN, is an attorney who has been practicing real estate law in New York since 1987. Mr. Stein was retained to represent Curtis Rogers and Stephen Kelly, Guardians of the Ward, now-deceased, Oliver Bivins, Sr. (the “Ward”), in a limited capacity to protect the Ward’s interest in real estate located at 808 Lexington Avenue in New York City.

¹ Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993).

² These undisputed facts are based on the STEIN DEFENDANTS’ Statement of Material Facts Not in Dispute filed in support of their Motion for Summary Judgment (D.E. 226) and/or were established by the evidence at trial.

The retainer agreements introduced at trial detailing the limited engagement were not contradicted by any trial testimony.

Plaintiff, JULIAN BIVINS (“JULIAN”), is the Ward’s son and the Personal Representative of the Ward’s Estate. JULIAN has been involved in litigation against his father’s former and current guardians, Curtis Rogers and Stephen Kelly, respectively, dating back to January 2011, when the Ward’s caregiver, Sonja Kobrin, filed a Petition to Determine Incapacity and Petition for the Appointment of an Emergency Temporary Guardian in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida.

The instant suit involved the disposition of four real estate properties located in New York (“808 Lexington” and “67th Street”), Palm Beach (“330 Ocean”), and London (“Portland Place”). Disputes had arisen between JULIAN and Oliver Bivins, Jr. (“Oliver Jr.”), the Ward’s youngest son, regarding these properties. Mr. Stein, a New York attorney, was retained by Rogers, the permanent guardian, in connection with the partition, sale, and delinquent mortgage debt on 808 Lexington. Upon the succession of Kelly to the guardianship, Mr. Stein was retained to defend the foreclosure action instituted against 808 Lexington and to effect the sale of the property.

Over the course of his representation of the Guardians, Mr. Stein filed a Petition to partition 808 Lexington, successfully prevented the foreclosure on the property, and assisted in the negotiation of two settlement agreements, resulting in the Estate of Lorna Bivins relinquishing her half interest in 808 Lexington and 330 Ocean and the ultimate sale of 808 Lexington for \$5,000,000.00.

II. The Amended Complaint And Trial

Plaintiff filed suit in this matter on September 17, 2015, and on January 8, 2016, filed an Amended Complaint. The Amended Complaint, the pleading on which the case was tried, alleged that Mr. Stein: (1) failed to diligently assess the discrepancy in values of 808 Lexington and 67th Street, and, therefore, did not adequately advise the permanent guardian on the fairness of the New York Settlement; (2) failed to advise the permanent guardian to collect rent from the 808 Lexington tenants in order to pay down the mortgage on the property, and relatedly failed to collect taxes and rental income from Lorna's estate; (3) failed to arrange for commercially reasonable substitute financing for the mortgage; (4) failed to have the mortgage deemed satisfied or released; (5) failed to have the mortgage interest declared usurious; (6) charged the guardianship excessive fees and took "large sums of money under the guise of retainers without accounting or documentation;" and (7) failed to "account to the Court or to JULIAN regarding the failure to comply with the terms of the Global Settlement Agreement as the closing agent."

Following a two-week trial, the jury rendered its verdict and found the CIKLIN LUBITZ Co-Defendants³ liable for breach of fiduciary duty and professional malpractice and awarded \$16.4 million in damages. The same jury that heard that same evidence found in favor of the STEIN DEFENDANTS on the identical breach of fiduciary duty and professional malpractice claims.

III. The Motion For New Trial

Despite the jury verdict, Plaintiff JULIAN BIVINS asserts the verdict in favor of the STEIN DEFENDANTS was against the clear weight of the evidence and that evidentiary rulings substantially prejudiced the Plaintiff. As demonstrated herein, however, Plaintiff's arguments

³ Throughout the case and trial the Defendants were referred to generally as the "CIKLIN LUBITZ" Defendants, and the "STEIN DEFENDANTS".

are meritless in that they ignore the record, disregard the standard to be applied under Rule 103(a) of the Federal Rules of Evidence, and fail to recognize or appreciate the import of the verdict Plaintiff obtained against the CIKLIN LUBITZ Co-Defendants in the amount of \$16.4 million.

First, with regard to the argument that the Court abused its discretion in striking Irwin Gilbert as an expert, the Plaintiff's position ignores the wide latitude granted to the Court, ignores substantial testimony regarding the complete lack of qualifications of Irwin Gilbert to opine on STEIN's adherence or lack of adherence to acceptable standards of care, and evades the fact that even if Irwin Gilbert's Rule 26 Disclosure was permitted to be introduced into evidence, there would still have been insufficient evidence to establish a claim against the STEIN DEFENDANTS.

Second, with regard to the Court's exclusion of the excessively late disclosure of a title history on 67th Street, no substantial rights were affected. The Plaintiff JULIAN BIVINS himself testified that his father, Oliver Bivins, Sr., owned the property prior to his marriage to Lorna Bivins. Furthermore, the testimony was uncontradicted it had been transferred to his wife, Lorna Bivins, decades ago. Again, as with the Daubert issue, there was no testimony disclosed in any Rule 26 report or otherwise that would have even established any equitable interest in 67th Street available to Oliver Bivins, Sr.

Third, regarding the "improper acts of JULIAN BIVINS," no substantial rights of the Plaintiff were affected. All testimony regarding deeds, transfer, and the like was necessary background information for the initiation of the guardianship and all that transpired thereafter. Furthermore, Plaintiff and his counsel completely ignore the \$16.4 million verdict obtained

against the CIKLIN LUBITZ Co-Defendants which actually refutes Plaintiff's position. Moreover, the STEIN DEFENDANTS' counsel argued appropriately.

Finally, with regard to the attorney-client privilege and work-product communications between STEIN and his client, the Guardians, this issue was extensively briefed, both before the United States Magistrate and this Court, (D.E. 83, 85, 89, 112, 113) and multiple orders entered upholding objections. (D.E. 132, 137) Yet again, Plaintiff ignores the substantial verdict obtained against the CIKLIN LUBITZ Co-Defendants which vitiates his arguments.

ARGUMENT

As a threshold matter, Plaintiff in reciting the standard this Court must utilize in addressing the Motion for New Trial ignores the great deference afforded to the right to trial by jury and the jury verdict. Hewitt v. B. F. Goodrich Co., 732 F.2d 1554, 1556 (11th Cir. 1984). "The right to trial by jury is also protected by our requirement that 'new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great – not merely the greater – weight of the evidence.'" R. V. Fondren v. Allstate Insurance Co., 790 F.2d 1533, 1534 (11th Cir. 1986), citing Conway v. Chemical Leaman Tank Lines, 610 F.2d 360, 363 (5th Cir. 1980).

Furthermore, the evidentiary rulings on which Plaintiff substantially predicates his Motion for New Trial did not, as demonstrated herein, affect Plaintiff's "substantial rights." Fed. R. Evid. 103(c). The Court should uphold the sanctity of the jury's verdict, and reaffirm its prior rulings, all of which were eminently correct under the applicable legal standards.

I. This Court Appropriately Exercised Its Discretion In Striking Irwin Gilbert Under Daubert

Plaintiff's argument that a new trial is warranted based upon the Court's striking Irwin Gilbert as an expert (D.E. 374) ignores well-established law under Daubert. The record

conclusively establishes that Mr. Gilbert's qualifications as a New York transactional real estate lawyer are non-existent, thereby supporting this Court's order.

A. Daubert Requirements

Because the task of evaluating the reliability of expert testimony is uniquely entrusted to the district Court under Daubert, *see* McCorvey v. Baxter Healthcare Corp., 298 F.3d 1253, 1256 (11th Cir. 2002), this court is given "considerable leeway" in the execution of its duty. Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. at 137, 152 (1998). This Court appropriately exercised its discretion and properly struck Mr. Gilbert as an expert. This was proper for the CIKLIN LUBITZ Co-Defendants and even more importantly for the STEIN DEFENDANTS. By his own admission, Mr. Gilbert never practiced real estate transactional law in New York, the exact services STEIN was retained to perform on behalf of the guardians in New York.

Pursuant to Daubert, in addressing the contours of the trial court's discretion, the admission of expert evidence is governed by Federal Rule of Evidence 702. Under Rule 702 and Daubert, district courts must act as "gatekeepers" which admit expert testimony only if it is both reliable and relevant. *See* Daubert, 509 U.S. at 589. District courts are charged with this gatekeeping function "to ensure that speculative, unreliable expert testimony does not reach the jury" under the mantle of reliability that accompanies the appellation "expert testimony." McCorvey, 298 F.3d at 1256.

To fulfill their obligation under Daubert, district courts must engage in a rigorous inquiry to determine whether: "(1) the expert is qualified to testify competently regarding the matters he intends to address;" (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier-of-fact, through the application of scientific, technical, or specialized

expertise, to understand the evidence or to determine a fact of issue.” City of Tuscaloosa v. Harcross Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998) (footnote omitted). Because the Daubert prongs are conjunctive, the failure to satisfy any of them is fatal. See Id. The party offering the expert has the burden of satisfying each of these three elements by a preponderance of the evidence. See Allison v. McGhan Med. Corp., 184 F.3d 1300, 1306 (11th Cir. 1999).

B. The Court Correctly Held Gilbert Was Not Qualified

Here, the decision to strike Mr. Gilbert was proper based on the first prong of Daubert. At the Daubert hearing Mr. Gilbert, despite his reluctance, admitted he had **never** practiced transaction law; he was a litigator:

Q. Okay. Mr. Stein’s a New York real estate lawyer, right?

A. Yes, he is.

Q. And you are not a specialist in New York real estate transactions, are you?

A. I have litigated countless lawsuits involving New York real estate transactions, the title to property, the partition of property, and, in fact, have litigated whether or not a divisible marital interest remained in New York property.

* * *

Q. In the last five years, you’ve not actually handled a New York real estate transaction for commercial property; is that right?

A. Not for the purchase or sale, but I’ve litigated lease disputes.

Q. So, no?

A. I’m not sure. I think lease disputes would mean yes.

(D.E. 390, p.301-3)

Mr. Gilbert and Plaintiff erroneously assumed that if a lawyer represented a professional, that alone qualified him to testify as to appropriate standards of care. Such a position does not

come even close to even creating an issue that this Court's discretion was abused. The lack of Mr. Gilbert's qualifications are best summarized in the cross-examination at the Daubert hearing when it was pointed out that representation of an orthopedist by an attorney does not render the attorney qualified to perform orthopedic surgery:

Q. Have you ever litigated a medical malpractice case?

A. I've defended a medical malpractice case.

Q. Okay. But you're not a doctor. You don't practice as a doctor, right?

A. I would take it a step further. I would never call myself a medical malpractice lawyer.

Q. Okay.

A. The doctor didn't have insurance and had no means of defense, and so I agreed to defend the doctor.

Q. Okay. But my point being, sir, is that you litigate all different kinds of cases, but it doesn't mean you practice what you're litigating about.

For instance, that medical malpractice case - - and I understand that the doctor, from your testimony, didn't have insurance, okay, and so you stepped in and you defended the doctor. And you defended the doctor, I assume, and you discuss the standard of care, et cetera, correct?

A. Yes.

Q. Okay. But you, yourself, did not practice as a doctor, but you were defending what the doctor did. You see my point?

A. Not really.

Q. Okay.

A. But it is correct, I'm not a doctor.

(D.E. 390, p.305-6)

The inquiry conducted of Gilbert by counsel before this Court established this Court's discretion was appropriately exercised. The evidence established: (1) Mr. Gilbert never provided legal representation to a professional guardian, nor ever administered a guardianship, both of which were at the crux of Plaintiff's case against the STEIN DEFENDANTS; (2) Mr. Gilbert never handled the administration of a guardianship due to incapacitation or degenerative age conditions of a ward which the STEIN DEFENDANTS in this case were appointed to do; (3) Mr. Gilbert never was an emergency temporary guardian; (4) Mr. Gilbert never assisted a guardian in preparing a final accounting; and (5) Mr. Gilbert does not practice real estate law, cannot testify as a real estate expert, and has never conducted real estate transactional representation in New York as Mr. Stein was retained to do. (D.E. 390, p.305) Indeed, Mr. Gilbert **never** has been qualified to testify as an expert on New York real estate transactional legal services.

C. Even If Gilbert Had Been Permitted To Testify, His Rule 26 Report Did Not Establish The Required "But For" Causation

While the foregoing conclusively demonstrates Gilbert was properly stricken based on Daubert, even if Mr. Gilbert was permitted to testify on every issue in his Rule 26 Pre-Trial Disclosure, (D.E. 288-4) Plaintiff's substantial rights could not have been affected because there still would have been insufficient testimony to support a finding in favor of the Plaintiff. See, LeBlanc v. Chevron USA, Inc., 2009 WL 3837397 (E.D. La. Nov. 13, 2009) (holding that even if Daubert motion not granted such testimony would be insufficient to allow a reasonable juror to conclude causation exists and judgment for Defendant proper).⁴ Plaintiff still would have to

⁴ Because a verdict was rendered in favor of the STEIN DEFENDANTS and judgment thereafter entered, the STEIN DEFENDANTS did not need to renew their Motions for Directed Verdict timely made at the conclusion of Plaintiff's case and at the close of evidence. This portion of the argument, however, establishes that even if Gilbert was permitted to testify

establish causation. Such causation would require proof there would have been some outcome more favorable to the Ward than provided by the New York Settlement. There simply existed no such evidence.

In Keramati v. Schackow, 553 So.2d 741, 742 (Fla. 5th DCA 1989), a former client of a law firm alleged she entered into a settlement in an amount substantially less than her claims were worth, because the attorneys forced her to take the settlement or would "no longer represent her, and it would be too expensive to continue the litigation." *Id.* at 743. That court discussed that in such a case the former client may sue, but must prove at trial both (i) breach of duty and (ii) had the suit been properly handled, the client could have recovered "substantially greater damages than the settlement amount." *Id.* at 746.

There is no evidence that the guardian whom STEIN represented in New York with regard to the 808 Lexington Avenue property would have recovered substantially more than the New York Settlement achieved. No one testified, nor did Gilbert's Rule 26 report opine, a more favorable settlement could have been made.

Specifically, Plaintiff must have presented evidence which would have afforded a reasonable basis for the conclusion that it is more likely than not that the conduct of the STEIN DEFENDANTS was a substantial factor in bringing about the result. Gooding v. Univ. Hosp. Bldg., Inc., 445 So.2d 1015, 1018 (Fla. 1984). "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Id.* Expert opinions based on sheer speculation and facts or inference not supported by the

regarding his Rule 26 report, insufficient evidence existed that would have supported a verdict in Plaintiff's favor. This is an additional ground to deny a new trial.

evidence should be rejected by the trial court in considering a motion for directed verdict. Proto v. Graham, 788 So.2d 393, 395 (Fla. 5th DCA 2001).

The plaintiff must "demonstrate[] that there is *an amount of damages* which [he] would have recovered but for the attorney's negligence." Olmsted v. Emmanuel, 783 So.2d 1122, 1125 (Fla. 1st DCA 2001) (citing Sure Snap Corp. v. Baena, 705 So.2d 46, 49 (Fla. 3d DCA 1997)). Thus, in a case such as this, the plaintiff had to prove that he "would have prevailed on the underlying action but for the attorney's negligence." *Id.* "Under the 'trial within a trial' standard of proving proximate cause, the jury necessarily has to determine whether the client would have prevailed in the underlying action, [...], before determining whether the client would prevail in the malpractice action." Tarleton v. Arnstein & Lehr, 719 So.2d 325, 330 (Fla. 4th DCA 1998).

"In Florida, unless the fact-finder is presented with evidence which will enable it to determine damages for lost profits with a reasonable degree of certainty, rather than by means of speculation and conjecture, the claimant may not recover such damages." Resolution Trust Corp. v. Stroock & Stroock & Lavan, 853 F.Supp. 1422, 1426 (S.D. Fla. 1994) (citing Himes v. Brown & Co. Sec. Corp., 518 So.2d 937, 938 (Fla. 3d DCA 1987)). Plaintiff's burden to prove the case within the case is clearly provided for in the law.

Plaintiff introduced no evidence, nor did Gilbert's Rule 26 report opine in any fashion, what the more favorable result would have or could have been. In order to prevail on his theory that the Guardian should not have foregone the Ward's claims to Lorna's 67th Street property Plaintiff was required to prove that the actions of any of the Defendants foreclosed or precluded a better result for the Ward. No substantial or competent evidence was presented on this point.

The only testimony on this issue was that the guardianship court considered all potentialities in approving the New York Settlement and finding it in the Ward's best interest.

Plainly, the jury had no evidence to base a finding that the Ward would have obtained a greater amount or what that amount would have been, again, even if Gilbert testified.

Plaintiff's counsel acknowledged the claim was not easy to win, and never presented evidence of the likelihood of success on the merits. In closing, he stated: "And they told you this wasn't the easiest claim. But what did they do? Well, let's think about it. Do I fight this? Do I give my client the justice he deserves and fight this and get the true value, or do I just sell him out and I take the quick settlement? Because, you know what, I'll get some money to him, and then I'll get attorney's fees." (9:28)

Even if the Ward's interests were "sold out" in the New York Settlement, which is completely untrue, Plaintiff still had to prove what the Ward would have received in all litigation resolved in that settlement if it had proceeded to final judgment (i.e., the result but-for the settlement). There is a complete absence of any relevant evidence on this point. Indeed, what evidence there is in the record is directly to the contrary.⁵ There is no evidentiary basis upon which a reasonable jury could conclude the Guardian, on behalf of the Ward, would have prevailed on the merits of any of the thirteen pieces of litigation.

Plaintiff failed to prove causation. Even assuming Plaintiff had submitted evidence a duty of care was violated by the STEIN DEFENDANTS, Plaintiff failed to demonstrate causation from any such failure. Additionally, unless there is competent substantial evidence in the record that an appraisal obtained in May 2013, the date of the New York Settlement, would

⁵ Skatoff, the CIKLIN LUBITZ Co-Defendants' expert, testified Defendants' conduct neither fell below the standard of care for guardianship attorney in the community nor constituted a breach of fiduciary duty. (T8:104-07) Skatoff concluded Defendants were faced with "actions coming at the guardianship from every direction, from Lorna's estate, from JULIAN" and asserted a "**very difficult position**" with the petition to determine beneficiaries to set aside the divorce, filed on behalf of the guardians. (T8:105-06)

show the value of 67th Street at \$22.5 million, there is no showing the settlement caused damage.

For example, if an appraisal in May 2013 had shown an estimated fair market value of \$7 to \$9 million, the same as the broker's opinion,⁶ the failure to obtain that appraisal caused no damage. For Plaintiff to succeed on any claim based on Defendants not having an appraisal at the time of the settlement, Plaintiff was required to introduce into evidence an MAI appraisal dated as of May 2013 or, at a minimum, testimony from a qualified expert witness that an appraisal would have shown the \$22.5 million "valuation" Plaintiff argued to the jury.

The issue is not what the 67th Street property sold for eighteen months after the settlement conference; the issue is what a May 2013 appraisal would actually have shown. In the ultimate of ironies, given Plaintiff's vociferous arguments for such an appraisal, no appraisal was presented by JULIAN BIVINS when the guardianship court approved the New York Settlement and no such appraisal was presented by Plaintiff at trial. Absent that critical evidence, the STEIN DEFENDANTS were entitled to judgment in their favor as a matter of law.

II. The 67th Street Title History Was Not Properly Disclosed And No Prejudice Resulted From Its Exclusion.

The exclusion of a title report and deeds on the 67th Street Property based upon the Plaintiff's failure to disclose this information until immediately before trial was correct, completely within the Court's discretion, and in no way warrants a new trial. "A district court

⁶ Defendants note that there was an appraisal on the Lexington property as of the settlement approval hearing in September 2013. That appraisal, obtained by JULIAN BIVINS and his then-personal counsel, Mr. Denman, valued Lexington at \$4.4 million. (T7:90) That value is consistent with, and actually slightly below, the low-end of the broker's opinion range of \$4.5 to \$6.5 million.

has broad discretion to determine the admissibility of evidence" U.S. v. McLean, 138 F.3d 1398, 1403 (11th Cir. 1998).

A. Standard On Admissibility Of Evidence

The law is well-established that if a party fails to provide information or identify a witness as required by Federal Rule 26(a) or (e), the party is not allowed to use that information at trial unless the failure was substantially justified or is harmless. Fed.R.Civ.P. 37(c)(1). Barring substantial justification, therefore, a plaintiff should not be able to present documents not disclosed during fact discovery.

Second, even if the ruling was somehow infirm, pursuant to Federal Rules of Evidence 103(a), a court may not overturn a jury's verdict based on alleged errors in evidentiary rulings unless a party's substantial rights have been affected by the rulings. *See Haygood v. Auto-Owners Ins. Co.*, 995 F.2d 1512, 1515 (11th Cir. 1993) ("Evidentiary rulings are reviewed under an abuse of discretion standard [and] [e]rror in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties.").

B. The Exclusion Of The Evidence Was Proper And In No Way Affected Plaintiff's Substantial Rights

The exclusion of this evidence was completely appropriate. Second, even if the exclusion of the evidence was improper, it certainly did not affect Plaintiff's "substantial rights" as: (1) Plaintiff JULIAN BIVINS himself testified regarding the ownership history of 67th Street; (2) there was no testimony disclosed in any Rule 26 Report or offered through any witness regarding any equitable interest in 67th Street; and (3) there was no evidence adduced, nor disclosed pre-trial regarding what any MAI appraisal on 67th Street would have revealed.

It is uncontroverted and indeed admitted by Plaintiff that the 67th Street decades-old deeds were not properly disclosed. There was extensive argument and discussion between the

Court and Plaintiff that Plaintiff failed to disclose this information timely regarding the 67th Street title history, did not seek any continuance, and had the opportunity to obtain this information even prior to suit being filed. In fact, Plaintiff's counsel conceded he did not even order the title report until May 16, 2017 and supplied it May 31, 2017. This disclosure occurred after all witnesses had been deposed, all experts deposed, and all Rule 26 Reports submitted. The refusal to allow Plaintiff to utilize this title history was completely appropriate.

Based upon all of the evidence adduced at trial, it is disingenuous at best to suggest that the exclusion of the 67th Street deed history affected Plaintiff's "substantial rights." Plaintiff himself testified that his father owned 67th Street prior to his marriage. This testimony was never refuted and the one thing the jury heard other than Lorna Bivins owned it alone at the time of her death.

The testimony on direct of Plaintiff by his counsel absolutely forecloses any suggestion that Plaintiff was not able to adduce evidence regarding the ownership history:

- Q. And what was your mother's name?
- A. Dorothy Clarendon, when she passed away a few years ago.
- Q. Okay. And you mentioned that when your parents split, that you moved up to New York. Given or take, when are we talking?
- A. I was six years old. That would have been 1951. And we moved - - my sister and I and mother moved to Manhattan.
- Q. And where was your father when you moved?
- A. He was in Amarillo, Texas. And then shortly after we moved, he moved up to New York, or bought a - - the Scribner mansion in New York to stay when he was there.
- Q. Okay. Did you ever go to the Scribner mansion when you were a kid?

- A. Yes, I did. I can remember playing in the basement there.
- Q. Okay. And was your father married to Lorna at the time that you recall playing in the basement of the Scribner mansion?
- A. No, he wasn't married. I think there was a time when he and Elaine, his second wife, lived there.
- Q. And at some point in time he met Lorna?
- A. Yes.
- Q. And that was - - do you recall about when that was?
- A. Late '50s, I think.

(D.E. 3690, p.121-2)

The jury heard all it needed to hear regarding ownership. Oliver Bivins, Sr. owned it in 1951; he continued to own it when he got married the second time; he owned it when he married Lorna Bivins in 1959; and Lorna owned it alone when they were divorced in 2010. The deeds in any event would have been cumulative. Furthermore, as has been established beyond and to the exclusion of any possible doubt, there was never any testimony adduced or even proffered establishing any equitable interest of Oliver Bivins, Sr. in the 67th Street property after the divorce, the apparent basis for Plaintiff's claim to 67th Street.

The singular case relied upon by Plaintiff, S.E.C. v. Samuel H. Sloan & Co., 369 F.Supp. 994 (S.D.N.Y. 1973), is completely inapplicable. The document in that case was a public record equally accessible to all parties: a transcript of a hearing conducted before the S.E.C. in the case. The appellant there simply did not obtain the hearing transcript because he did not pay for the transcript. The court, therefore, found no error.

In the instant case, however, while the 67th Street title history was available in the public records, these were deeds going back over 50 years and were not part of the District Court

docket. No new trial is warranted for the exclusion of the 67th Street deed history. The assertion in Plaintiff's Motion for New Trial that the exclusion of the deeds created a "false impression regarding the ownership of the 67th Street property in the minds of the jury" completely ignores the verdict in favor of Plaintiff and against the CIKLIN LUBITZ Co-Defendants, ignores the trial testimony, and ignores the import of Rule 103(a) of the Federal Rules of Evidence.

C. No Improper "Character Evidence" Of Julian Bivins Was Elicited.

Plaintiff next argues that somehow a prejudicial character assassination occurred when the CIKLIN LUBITZ Co-Defendants argued about the "greed" of JULIAN BIVINS. The Motion for New Trial contains four references to greed and that pre-guardianship transfers were "improper." Plaintiff, of course, ignores that the STEIN DEFENDANTS never said or adopted those comments. Likewise, the transfers to JULIAN BIVINS prior to the guardianship were mere background information. U.S. v. Butch, 256 F.3d 171, 175-76 (3d Cir. 2001) (evidence is admissible if it is necessary background information rather than an attempt to impugn character).

Counsel for the STEIN DEFENDANTS, on the contrary, argued a "Cain & Abel" theme that JULIAN BIVINS wanted 67th Street which was his brother's. This was absolute fair comment on the evidence by the STEIN DEFENDANTS and, furthermore, no "bad character" evidence was elicited. The history of the Texas mineral, oil and gas deeds and other activity immediately prior to the appointment of an emergency temporary guardian was necessary background information. See Butch, supra. What the STEIN DEFENDANTS' counsel argued, completely properly, was that JULIAN BIVINS wanted that which belonged to his brother - the 67th Street property. This was the crux of the case and the only basis for the award against the Co-Defendants - that JULIAN and his father were entitled to 67th Street.

Of even greater significance is Plaintiff's refusal to acknowledge the \$16.4 million verdict against the CIKLIN LUBITZ Co-Defendants. That substantial verdict vitiates Plaintiff's arguments regarding any possible prejudice under Rule 103(a).

Plaintiff's reliance on Aetna Casualty & Surety Co. v. Gosdin, 803 F.2d 1153 (11th Cir. 1986) is, furthermore, misplaced. Gosdin involved voluminous documents admitted, improperly, in summary form that contained gross hearsay, and conclusory accusations. The Eleventh Circuit cited its own precedent for the proposition that reversal on evidentiary error is not proper unless the verdict was the product of such one-sided evidence. This is simply not the situation presented here.

Moreover, Plaintiff's reliance on Peat, Inc. v. Vanguard Research, Inc., 378 F.3d 1154 (11th Cir. 2004) conclusively establishes the Plaintiff's substantial rights were not affected by any evidence regarding transfers to JULIAN BIVINS from his father that occurred prior to the establishment of the guardianship in the Texas lawsuit. Courts look at how much of an affect the improperly admitted or excluded evidence has on the verdict. Again, it simply defies logic to argue that substantial prejudice occurred when the Plaintiff obtained an award in the amount of \$16.4 million against the CIKLIN LUBITZ Co-Defendants, the same Co-Defendants who characterized the Plaintiff as "greedy."

D. The Attorney/Client Privilege Was Properly Upheld.

Plaintiff spent a substantial amount of time at trial addressing bills from the Co-Defendant CIKLIN LUBITZ firm that included communications with KEITH STEIN prior to STEIN's retention in October 2012. Plaintiff takes the position that the Court should have required Defendant ASHLEY CRISPIN to testify as to the substance of these communications. The argument, however, that Plaintiff is entitled to a new trial because it was denied the ability to

introduce evidence concerning these communications: (1) ignores well-settled law; (2) ignores the fact that these issues were substantially briefed, both before the United States Magistrate and this district Court and at every turn the privilege was upheld; and (3) ignores the fact that it is undisputed STEIN provided no legal services prior to October or November 2012, well after the Beachton mortgage was in default and accelerated.

As Plaintiff himself concedes, Magistrate Matthewman entered two separate orders refuting identical arguments raised in the Motion for New Trial. (D.E. 132 and 137). This Court then affirmed these orders (D.E. 167). Unsatisfied with the extensive briefing and multiple rulings refuting Plaintiff's arguments, further Motions to Compel, Motions to Re-Open Discovery, and Renewed Motions to Compel were filed. (D.E. 205, 209, 210, 201). Again, an omnibus order was entered by Magistrate Matthewman denying all of these Motions. This Court then affirmed the ruling, (D.E. 319). And again, for the seventh time Plaintiff's contentions should be rejected.

In any event, it was absolutely undisputed there was no representation of the guardian by STEIN prior to October 2012, and it certainly cannot be said that any communications affected substantial rights of the Plaintiff in presenting his case as to the STEIN DEFENDANTS. The suggestion that communications emanating from CIKLIN LUBITZ prior to STEIN's representation could somehow impose liability on STEIN for the Beachton mortgage default is absurd.

CONCLUSION

This case was fairly tried over a two-week period. Plaintiff obtained a verdict of \$16.4 million against the STEIN DEFENDANTS' Co-Defendants. Plaintiff's dissatisfaction that the jury returned a verdict in favor the STEIN DEFENDANTS does not warrant a new trial. The

arguments advanced in the Motion for New Trial are unsupported by the record, unsupported by law, and must be denied.

DATED this 22nd day of September, 2017.

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By: /s/ Jeffrey A. Blaker
Jeffrey A. Blaker, Esquire
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 22, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Jeffrey A. Blaker
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 9:15-cv-81298-KAM/Matthewman

JULIAN BIVINS, as Personal
Representative of the ancillary Estate
of Oliver Wilson Bivins,

Plaintiff,

v.

BRIAN M. O'CONNELL, ASHLEY
N. CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN,
BEYS LISTON MOBARGHA &
BERLAND, LLP and LAW
OFFICES OF KEITH B. STEIN,
PLLC, n/k/a STEIN LAW, PLLC,

Defendants.

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that L. Louis Mrachek, Esquire and Alan B. Rose, Esquire of the firm Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A., enter their appearance as counsel of record for Defendant, Ciklin Lubitz & O'Connell, in the above-styled cause and request that all notices, pleadings and other papers filed in this matter be served on the undersigned counsel at the address below.

Additionally, pursuant to Florida Rule of Judicial Administration 2.516, the undersigned designates the following email addresses for the purpose of receiving pleadings, orders, and other papers filed or served in this matter:

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Dated: August 24, 2017

Respectfully submitted,

s/ Alan B. Rose

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Attorneys for Ciklin Lubitz & O'Connell

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

s/ Alan B. Rose

Alan B. Rose (Florida Bar No. 961825)

SERVICE LIST

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United States District Court, Southern District of Florida**

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO: 9:15-CV-81298-KAM

JULIAN BIVINS, as Personal Representative
of the ancillary Estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR.,
as former guardian, STEPHEN M. KELLY,
as successor guardian, BRIAN M. O'CONNELL,
ASHLEY N. CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN, BEYS LISTON
MOBARGHA & BERLAND, LLP f/k/a BES STEIN
MOBARGHA & BERLAND, LLP and LAW OFFICE
OF KEITH B. STEIN, PLLC, n/k/a STEIN LAW, PLLC,

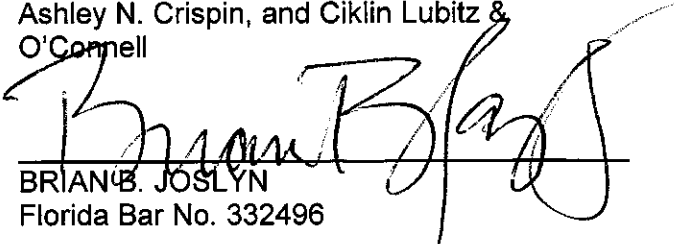
Defendants.

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE the undersigned is entering his appearance as the attorney of record for Defendants Brian M. O'Connell, Ashley N. Crispin, and Ciklin Lubiz and O'Connell. Please serve the undersigned with all future pleadings and papers in this action at the address set forth below.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail to: **J. Ronald Denman, Esq.**, rdenman@bleakleybavol.com, 15170 North Florida Avenue, Tampa, FL 33613 on this 25 day of January, 2016.

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O'Connell


BRIAN B. JOSLYN
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 9:15-cv-81298-KAM

JULIAN BIVINS, as Personal Representative of
the ancillary Estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR., as
former guardian, *et al*,

Defendants.

PLAINTIFF'S NOTICE OF SETTLEMENT

Plaintiff, Julian Bivins, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins ("Plaintiff"), hereby notifies this Court that Plaintiff and Defendants Brian M. O'Connell, Ashley N. Crispin, Ciklin Lubitz & O'Connell, and Stephen M. Kelly, only, have settled this matter. A Joint Stipulation for Dismissal with Prejudice as to only the Defendants Brian M. O'Connell, Ashley N. Crispin, Ciklin Lubitz & O'Connell, and Stephen M. Kelly will be forthcoming.

(this space intentionally left blank)

Dated: September 8, 2017

Respectfully submitted,

/s/ J. Ronald Denman

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(Counsel for the Plaintiff)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF system on September 8, 2017, and the foregoing document is being served this day on all counsel or parties of record, as noted below, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing:

/s/ J. Ronald Denman

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