2015 WL 4055144 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.

FIRST STATE FIDUCIARIES, LLC, in Its capacity as Trust Protector of The Susan D. Elia Irrevocable Trust U/A Dated September 15, 2011, Petitioner,

v.

MORGAN STANLEY SMITH BARNEY LLC, a Delaware limited liability company, Respondent,

and

Margaret E. Day, in her capacity as Co-Conservator of the Estate of Susan D. Elia for the purpose of matters relating to The Susan D. Elia Irrevocable Trust U/A Dated September 15, 2011, Intervening Respondent.

No. 9472-MA.
June 23, 2015.

**Opening Brief in Support of First State Fiduciaries, LLC'S Motion for Summary Judgment**

Keith R. Sattesahn (No. 2283), Email: keith@sattesahnlaw.com, Phone: 866-930-8440, Fax: 866-925-1188, Law Offices of Keith R. Sattesahn, 300 Delaware Avenue, Suite 210, Wilmington, Delaware 19801, for petitioner, First State Fiduciaries, LLC.

Dated: June 23, 2015

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## *NATURE AND STAGE OF THE PROCEEDING*

On March 24, 2014, Petitioner First State Fiduciaries, LLC ("FSF"), in its capacity as Trust Protector of The Susan D. Elia Irrevocable Trust dated September 15, 2011, a Delaware trust (the "Delaware Trust"), filed its Petition to Enforce Morgan Stanley Smith Barney LLC ("Morgan Stanley") to Release Trust Assets to the Custody of The Bryn Mawr Trust Company of Delaware ("Bryn Mawr").

On May 16, 2014, Intervening Respondent, Counterclaim Plaintiff and Third-Party Plaintiff Margaret E. Day ("Day"), in her capacity as Co-Conservator of the Estate of Susan D. Elia for the purpose of matters relating to the Trust, filed her Motion to Intervene. On May 19, 2014, Morgan Stanley filed its Answer, Affirmative Defenses and Counter-Petition to Interplead Trust assets with the Court. The Court granted Day's Petition to Intervene on June 10, 2014.

In late 2014, the parties briefed Morgan Stanley's Motion to Interplead Trust assets. The Court granted Morgan Stanley's Motion to Interplead Trust assets on April 14, 2015.

On February 23, 2015, FSF filed a Motion for Summary Judgment. This is FSF's opening brief in support of that motion. Discovery has been stayed in this action.

## *STATEMENT OF FACTS*

### A. *MS. ELIA BACKGROUND.*

Ms. Susan Elia ("Ms. Elia") is currently 71 years old, suffers from advanced stages of Parkinson's disease and has had round-the-clock nursing care for more than two years. Affidavit of Renée F. Seblatnigg, in Support of First State Fiduciaries, LLC's Motion for Summary Judgment, dated June 6, 2015 (("Seblatnigg Aff."), ¶¶9 & 13))

On April 3, 1996, Ms. Elia was widowed when an airplane carrying her husband, Claudio Elia, as a part of a trade mission led by then-U.S Secretary of Commerce Ron Brown, crashed in Croatia. (Seblatnigg Aff. ¶ 10)

Her husband's death and settlement of subsequent litigation against the U.S. Government and other liable defendants left Ms. Elia with substantial financial assets. (Seblatnigg Aff. ¶ 11)

Ms. Elia has two adult children, Marc Elia ("Marc") and Christine Elia ("Christine"). (Seblatnigg Aff. ¶ 12)

### B. *MS. ELIA'S RELATIONSHIP WITH RENEE SEBLATNIGG.*

Ren#e Seblatnigg, Esq. ("Seblatnigg") is an attorney in Connecticut and has been a close personal friend of Ms. Elia for over 30 years. (Seblatnigg Aff. ¶¶ 2 & 4)

Since June 9, 2011, Seblatnigg has assisted Ms. Elia in three separate and distinct fiduciary roles. (Seblatnigg Aff. ¶ 5)

On June 9, 2011, Ms. Elia appointed Seblatnigg a co-trustee of The Susan D. Elia Revocable Trust dated April 10, 2007 (the "Revocable Trust"), which is governed by Connecticut law. (Seblatnigg Aff. ¶ 6)

On June 28, 2011, upon the petition of Ms. Elia, the Greenwich, Connecticut Probate Court ("Probate Court") appointed Seblatnigg voluntary conservator of Ms. Elia's estate. (Seblatnigg Aff. ¶ 8a)

Seblatnigg served as Co-Trustee of the Delaware Trust. Seblatnigg served in that role from the inception of the Delaware Trust until she was delivered notice of her removal by the Trust Protectors on January 17, 2014 pursuant to the terms of the Trust. (Seblatnigg Aff. ¶ 7a)

**C. *MS. ELIA'S RELATIONSHIP WITH RICHARD DIPAOLA.***

In 2011, at the time that Seblatnigg first became a fiduciary for her, Ms. Elia was in an intimate relationship with Richard DiPaola ("DiPaola"), who lived with Ms. Elia at her residences and who played a significant role in managing her healthcare, finances and other life decisions. Ms. Elia relied upon DiPaola for many functions of her daily life that she could no longer perform for herself. (Seblatnigg Aff. ¶¶ 14 & 17)

**D. *MS. ELIA'S RELATIONSHIP WITH SALVATORE MULIA.***

DiPaola introduced his close friend Salvatore Mulia ("Mulia") to participate in Ms. Elia's financial affairs. At some point, Mulia served as investment advisor to DiPaola. At the recommendation of DiPaola, Mulia became Ms. Elia's financial advisor beginning in 2010. (Seblatnigg Aff. ¶¶ 18-20)

Mulia also served as co-Trustee of the Delaware Trust from its inception on September 15, 2011 until his removal by notice delivered to him by the Trust Protectors on January 7, 2014 pursuant to the terms of the Trust. (Seblatnigg Aff. ¶ 7b)

**E. MS. ELIA MOVES TO FLORIDA AND ESTABLISHES HER *DOMICILE THERE.***

In 2010, Ms. Elia established a new domicile in Lee County, Florida, outside the territorial jurisdiction of a Connecticut Probate Court. Specifically, on August 12, 2010, Ms. Elia Day Elia registered to vote in Lee County, Florida. Ms. Elia reported an address of 4809 Turban Ct, Ft. Myers, Florida 33908. As of February 2, 2015, her voter registration status in Lee County, Florida remained active. (Certificate of Registration of Sharon L. Harrington, Supervisor of Elections, Lee County, Florida dated February 2, 2015, attached hereto as Exhibit 1)

On November 22, 2010, DiPaola registered to vote in Lee County, Florida. As of February 2, 2015, his voter registration status in Lee County, Florida remained active. (Certificate of Registration of Sharon L. Harrington, Supervisor of Elections, Lee County, Florida dated February 2, 2015, attached hereto as Exhibit 2)

During the same period of time, Ms. Elia also obtained a Florida driver license, began filing federal tax returns that declared her to be domiciled in Florida, and signed a "living will" and other health care documents under Florida law. (Exhibit B to First State Fiduciaries, LLC's Response to Motion for a Protective Order, dated February 6, 2015)

Jeanne M. Stagloff, EA, with The Pennsylvania Trust Co., Radnor, PA 19087, prepared Ms. Elia's federal and state income tax returns for 2010. On the 2010 Connecticut Nonresident/Part-year Resident Income Tax Return, Schedule CT-1040AW, it was indicated, "under penalty of law" that Ms. Elia "moved out of Connecticut 12/10/10." Prakash T. Kasat, CPA, prepared Ms. Elia's federal income tax return for 2011. Page 1 of Form 1040 for 2011 indicates that Ms. Elia's address is, "under penalties of perjury", 966 Cabbage Palm Court, Sanibel, Florida 33957. No Connecticut income Tax return was prepared for 2011 since Ms. Elia was not a Connecticut resident. (Exhibits A, B and C hereto)

**F. EVENTS LEADING TO THE CREATION OF THE *CONNECTICUT VOLUNTARY CONSERVATORSHIP.***

In the years and months before the winter of 2011, Ms. Elia's relationship with her children had become strained. (Seblatnigg Aff. ¶ 21)

In 2009, at the suggestion of DiPaola, in an effort to appease her children, Ms. Elia, while still a Connecticut resident, made gifts to her adult children of one million dollars ($1,000,000) in cash and five million dollars ($5,000,000) worth of real estate in Connecticut and New York. She also paid approximately $2.52 million in gift taxes on the transactions. (Seblatnigg Aff. ¶ 15)

These gifts, coupled with the gift taxes, reduced Ms. Elia's net worth by approximately $8.52 million. (Seblatnigg Aff. ¶ 16)

Unfortunately, these gifts apparently did not mollify Ms. Elia's children, who evidenced anger, and at times rage, at their own mother, in the two (2) years leading up to creation of the Delaware Trust, on September 15, 2011. For example, the children hired a litigation attorney to represent them in at least one meeting with Ms. Elia's financial advisors and trustees in 2010. (Seblatnigg Aff. ¶¶ 21-27)

In December, 2010, while in Florida recovering from surgery, Ms. Elia had a dramatic reaction to medication and was confined to the “memory unit” of a nursing center. She was unable to speak for herself, or to summon her own physicians to diagnose or treat her. The only doctors in attendance were those on staff at the institution. (Seblatnigg Aff. ¶¶ 23-25)

Although her companion, DiPaola, was with her, he had no authority to act on her behalf, because, at the time, her son, Marc, was her Healthcare Representative. (Seblatnigg Aff. ¶ 25)

To Ms. Elia's dismay, neither Marc nor her daughter, Chris, came to her support or sought to intercede on her behalf. (Seblatnigg Aff. ¶ 26)

After leaving the nursing facility on January 3, 2011, Ms. Elia decided that it was critical for her to select the persons whom she wished to protect her and her money in advance during her remaining lifetime. (Seblatnigg Aff. ¶ 28)

Ms. Elia moved quickly to replace her son as Healthcare Representative with James Ardrey, a friend whom she trusted and who was present in Florida and also a part-time resident of Greenwich, Connecticut. (Seblatnigg Aff. ¶ 29)

When she returned to Connecticut in spring of 2011, Ms. Elia consulted with trusts and estates counsel, seeking ways to protect herself from what she feared would be advances by her children to take over her life and financial resources. (Seblatnigg Aff. ¶ 30)

On the advice of her personal physician, and to create a record, DiPaola and Ms. Elia consulted with Dr. F. Carl Mueller, a practicing psychiatrist in Stamford, Connecticut. By letter dated March 24, 2011, after examining Ms. Elia, Dr. Mueller wrote a report to DiPaola stating that Ms. Elia had some cognitive impairment, but was mentally competent. (Seblatnigg Aff. ¶ 31)

On June 7, 2011, to allay any claim that she was not competent to make changes to her estate plan, Ms. Elia visited Dr. Mueller for a current mental evaluation. After examining Ms. Elia, Dr. Mueller, sent a letter stating that her physical and mental condition remained unchanged, and finding no impairment in her insight or general judgment. (Seblatnigg Aff. ¶ 32)

In June, 2011, Ms. Elia removed the then serving trustees of her Revocable Trust and replaced them with Seblatnigg and Mulia. (Seblatnigg Aff. ¶ 33)

That same week, fearing that her children were planning to seize control of her life and her assets against her will, Ms. Elia applied to Probate Court to establish voluntary conservatorships under Conn. Gen. Stat. § 45a-646. She asked the court to appoint Seblatnigg conservator of her estate and to appoint DiPaola conservator of her person. (Seblatnigg Aff. ¶ 34)

On June 28, 2011, Probate Court Judge David Hopper granted Ms. Elia's petition. (Seblatnigg Aff. ¶35). Under Connecticut law, the appointment of a conservator of the person is *not* a finding that the individual is incapable. Section 45-a-646 of the Connecticut General Statutes provides in part that "any person may make application to the court of probate in the district in which he resides or has his domicile for voluntary representation either for the appointment of a conservator of the person or a conservator of the estate, or both.... After seeing the respondent in person and hearing his or her reasons for the application and after explaining to the respondent that granting the petition will subject the respondent or respondent's property, as the case may be, to the authority of the conservator, the court may grant voluntary representation and thereupon shall appoint a conservator of the person or estate or both, and shall not make a finding that the petitioner is incapable."

Ms. Elia did not request conservators because of a need to bring order into her life, but to add a layer of legal protection from her children whom she feared. (Seblatnigg Aff. ¶¶ 36-37)

**G. MS. ELIA AND DIPAOLA CONTINUE TO LIVE IN FEAR *OF LEGAL ATTACKS BY HER CHILDREN.***

Even with conservators in place, both Ms. Elia and DiPaola continued to fear that her children would somehow bring legal action to take over Ms. Elia's life and finances. (Seblatnigg Aff. ¶ 39)

Ms. Elia and DiPaola told Seblatnigg that on June 28, 2011, following the Probate Court hearing when voluntary conservators were appointed, Ms. Elia lunched with her daughter, Chris, and then continued into a meeting at Ms. Elia's Connecticut apartment with Chris, her son Marc, and DiPaola. (Seblatnigg Aff. ¶41)

Ms. Elia and DiPaola further reported to Seblatnigg that the meeting became rancorous, with anger and accusations all around. Agreeing that Ms. Elia, Chris and Marc could not resolve their family issues on their own, they resolved to seek professional counseling. (Seblatnigg Aff. ¶ 42)

In the weeks that followed, Marc Elia hired a psychiatrist to work with his mother, his sister, and himself. Ms. Elia attended one group counseling session. When she declined to continue, the children became angrier. (Seblatnigg Aff. ¶ 43)

DiPaola feared that the psychiatrist whom the children had found had been hired by a lawyer working for the children in order to ensnare Ms. Elia and have her declared incompetent. Because Marc and Chris were formerly trustees of Ms. Elia's Connecticut Revocable Trust, DiPaola believed that they would use their knowledge to overwhelm their mother and seize control of her assets. (Seblatnigg Aff. ¶ 44)

**H. MS. ELIA SEEKS THE FURTHER PROTECTION OF A *DELAWARE TRUST AS A SHIELD TO HER ASSETS.***

To further protect herself from the designs of her children on her remaining assets, in September, 2011 Seblatnigg suggested that a Delaware irrevocable trust might offer more protection than the Revocable Trust established under the laws of Connecticut. To assist Ms. Elia in this matter, Seblatnigg recommended that she consult with James Attorney G. Holder, Jr. ("Attorney Holder") and Attorney Robert J. Mauceri ("Attorney Mauceri"), experienced trusts and estates attorneys with whom Seblatnigg had worked and who have knowledge of Delaware asset protection trusts. After discussing Seblatnigg's findings with Mulia and explaining the proposal to Ms. Elia, Seblatnigg had several more conversations with Attorney Holder and Attorney Mauceri to seek their opinion regarding the merits of Ms. Elia's adopting a Delaware asset-protection trust. (Seblatnigg ¶¶47-50)

After considering Ms. Elia's case, Attorney Mauceri emailed Seblatnigg a memorandum from him and Attorney Holder containing their analysis and suggestions. (Seblatnigg Aff. ¶ 52)

A true and exact copy of the Memo from Robert J. Mauceri, Esq. and James G. Holder, Jr., Esq. to Seblatnigg re: Ms. Elia D. Elia Self-Settled Delaware Trust, and dated September 12, 2011 ("Mauceri Memo") is attached as Exhibit 11 to Seblatnigg's affidavit. (Seblatnigg Aff. ¶53)

The Mauceri Memo states in part:

> We understand that Ms. Elia Elia's assets are currently owned either by her or by a revocable trust established by her. We also understand that her children are attempting to influence Ms. Elia's financial and estate planning. We are also aware that Ms. Elia's net worth is in excess of $5,000,000. We have been informed that Ms. Elia has recently established Florida residency and will be filing income tax returns as a Florida resident for the foreseeable future but perhaps not indefinitely. The issues we see that need addressing are: 1. Ms. Elia's need for assurance that her assets cannot be taken from her involuntarily by her children; 2. Although her plans may change from time to time, Ms. Elia's need for assurance that her estate planning objectives will not be overturned by her children; 3. Ms. Elia's desire that her estate planning minimize potential exposure to federal and Connecticut estate taxes... Although it is a generally accepted legal principle that children have no legal claim to a parent's estate, we're all too familiar with the attempts they make to acquire a parent's assets through manipulation either of the parent directly (by means of undue influence and other conniving behavior) or indirectly through the courts (by means of attempts to declare the parent incompetent). (Seblatnigg Aff. ¶ 54)

On that same day, Seblatnigg forwarded a copy of the Mauceri Memo to Mulia, her co-trustee of the Revocable Trust. In the email Seblatnigg stated, in pertinent part:

> Here is a preliminary memo with recommendations for changes to Susan's trust plan. As I mentioned earlier, I asked Bob [Mauceri] for a preliminary outline of suggestions and thought that you and I could have a conversation with him to determine how to bring any proposal to Ms. Elia. (Seblatnigg Aff. ¶ 55)

That evening, Mulia emailed to Seblatnigg: "will call you in am".Id. (Seblatnigg Aff. ¶ 56)

During that week Seblatnigg had several conversations with Ms. Elia, DiPaola, and Mulia, discussing the procedural aspects of setting up the Delaware trust. (Seblatnigg Aff. ¶60)

Attorney Mauceri and Attorney Holder had requested information regarding whether Ms. Elia wished the new Delaware Trust to reflect any changes from the Revocable Trust. (Seblatnigg Aff. ¶ 61)

On September 13 and 14, Seblatnigg met with Ms. Elia to review details of the proposed Delaware Trust, relay questions from Attorney Mauceri and Attorney Holder, and learn further details of Ms. Elia's wishes regarding safeguards she hoped the Delaware Trust would provide. (Seblatnigg Aff. ¶ 62)

In addition, Attorney Mauceri asked Ms. Elia to select a name for the LLC that would be established to hold assets belonging to the trust. Ms. Elia and DiPaola worked together brain-storming appropriate names and the LLC was ultimately named "Peace at Last" (Seblatnigg Aff. ¶ 63)

Keeping Mulia informed of progress on the proposed new trust, on September 14, 2011, Seblatnigg copied him on an email to Attorney Mauceri and Attorney Holder, in which Seblatnigg answered some questions they had posed, stating:
1. Ms. Elia says no way, no how would she ever leave anything to the children.

2. LLC name suggestions: Failsafe, No Fault, Peace at Last.

3. Did not file an affidavit of Florida residency; she and Richard changed their ID cards (driver's licenses?) and voter registration.

(Seblatnigg Aff. ¶ 64)

After little more than an hour, Mulia emailed back: "She [Ms. Elia] hasn't lost her sense of humor. How about the 'All you need is Love' LLC?" *Id.* (Seblatnigg Aff. T 65)

On September 14, 2011, Seblatnigg sent an email to DiPaola and Ms. Elia, stating as follows:
Bob Mauceri and Jim Holder suggest that they/we arrive c. 1 pm tomorrow to review the documents and have them signed and notarized. (Bob can act as notary so that we do not require another person.)

They are still working diligently to have everything in place for this transaction. Bob reports that the Certificate of Formation for Peace at Last LLC was sent to the Delaware Secretary of State by Fed Ex today and should be filed tomorrow, so the structure is taking shape.

The first two suggested names (Fail Safe and No Fault) were already in use in Delaware, so Peace at Last is the winner. I hope the name will be a good omen!

(Seblatnigg Aff. ¶ 66)

On September 15, 2011, Attorney Mauceri sent an email to Seblatnigg which stated as follows:
Hello Renee

Attached are standard fee agreements that we ask for in connection with the work we are doing for Ms. Elia. Normally we obtain them before doing the work, but due to the urgency in this case we started working before obtaining them. Please review them and let me know if you have any questions. Thank you.

(Seblatnigg Aff. ¶ 67)

On September 15, 2011, Seblatnigg emailed Mulia, who was leaving for Europe that day, attaching the Asset Protection Services Agreement and Attorney Mauceri's Legal Representation Agreement sent by Attorney Mauceri:
This just in from Bob Mauceri. I am reading now. (And you are probably packing.)

The $500/hour fee is lower than two local firms I have worked with (and I do not know what Gilbride Tusa hourly is).

Unless you have concerns, I will forward to Ms. Elia *asap.*

(Seblatnigg Aff. ¶ 69)

On September 15, 2011, Mulia sent an email to Seblatnigg as follows:
I think that they are prompt, efficient and engaged and I would go with them over [Thomas] Spellane, [Ms. Elia's Connecticut estates lawyer] et al. any day.

You have my consent!

(Seblatnigg Aff. ¶ 70)

As previously scheduled, on September 15, 2011 Ms. Elia created the Delaware Trust. Ms. Elia designated Mulia and Seblatnigg, the then serving co-trustees of her Revocable Trust, as co-trustees of the Delaware Trust as of the date she self-settled it. The new Delaware Trust was designed to mirror the existing Connecticut Revocable Trust in pertinent aspects. (Seblatnigg Aff. ¶¶ 71-76)

**I. THE NEW DELAWARE TRUST RECEIVES ASSETS *TRANSFERRED FROM THE REVOCABLE TRUST.***

Continuing their respective roles in the Revocable Trust, Mulia interfaced with investment managers to oversee investments for the new Delaware Trust. (Seblatnigg Aff. ¶ 77)

In July, 2011, Mulia had initiated moving the Revocable Trust accounts from Goldman Sachs to Morgan Stanley, where his son, Adam Mulia, who was a financial advisor, managed these Elia accounts. The new Peace at Last account was, therefore, opened at Morgan Stanley with Adam Mulia as financial advisor. (Seblatnigg Aff. ¶ 78)

On September 19, 2011, Seblatnigg assisted advisors at Morgan Stanley with paperwork to open an account for Peace at Last, LLC ("PAL"). (Seblatnigg Aff. ¶ 79)

That same day, Eugene Parmar, a Client Service Associate at Morgan Stanley, sent to Mulia and Seblatnigg a Letter of Authorization for Ms. Elia, Mulia, and Seblatnigg to sign in order to move assets in the Revocable Trust account into the new account for PAL. (Seblatnigg Aff. ¶¶ 80)

The source account was owned by the Revocable Trust. It held only trust assets that had been transferred there by Goldman Sachs Trust Company after Ms. Elia removed Goldman Sachs as trustee of her Revocable Trust and closed her accounts there. The Revocable Trust account at Morgan Stanley received no assets from the then-conserved personal estate of Ms. Elia, and the account could not be accessed by any conservator or personal representative of Mrs. Elia. As a trust account, it could only be accessed by the trustees, who were, at that time, Mulia and Seblatnigg. (Seblatnigg Aff. ¶¶ 81-85)

**J. MULIA AND SEBLATNIGG CONTINUE WORKING WITH MORGAN STANLEY TO COMPLETE DETAILS REGARDING OPENING THE PEACE AT LAST, LLC *ACCOUNT.***

For approximately one week, Mulia and Seblatnigg continued working with financial advisors at Morgan Stanley as they worked their way through the complexities of opening a new account. (Seblatnigg Aff. ¶ 86)

On the morning of September 28, 2011, Sally Silk ("Silk") of Morgan Stanley emailed Seblatnigg and Mulia that the PAL account had been opened:

> Good morning - the account has been opened and the transfer of security positions is being made. I am sorry that the process has caused you anxiety but the procedures and the questions to be answered in opening a personal Trust account are very different than ones presented to us on opening an LLC. It is a much more cumbersome process. In addition, of the four Goldman Sachs mutual funds still remaining at Goldman, one has been delivered in its' entirety and another has partially been delivered. We are still in the process of trying to retrieve the balance of the one mutual fund and the remaining two funds. The recharacterization of the ROTH IRA has been completed except for two dividends that were credited to the account yesterday. Should you have any further questions, please do not hesitate to contact me.

(Seblatnigg Aff. ¶ 87)

On September 28, 2011, Seblatnigg sent an email to Ms. Elia and DiPaola, copy to Mulia, stating in pertinent part:
Susan,

I just want to assure you that all of the transfers of your Trust assets out of Goldman Sachs now seem to be complete.

As planned, we moved the assets from your Susan D. Elia Revocable Trust account at Goldman into a Susan D. Elia Revocable Trust account at Morgan Stanley. (This is because investment assets can only be transferred from one account to another account bearing the same name at a different institution.)

Meanwhile, we opened a Peace at Last LLC account at Morgan Stanley and, according to the Letter of Authorization that you, Sal and I all signed, had the assets moved from the Rev Trust account at Morgan Stanley into the new Peace at Last account.

So the bottom line is that the Revocable Trust is now worth about $0; but your investments are safely in your Delaware LLC account.

(Seblatnigg Aff. ¶ 88)

DiPaola replied, “YOUR AND SAL'S GOOD WORK FINNALY WON THE DAY. THANKS” (Seblatnigg Aff. ¶ 89)

On October 5, 2011, after Mulia had returned from Europe, Seblatnigg emailed him as follows: “We need for you to sign the [Delaware] Trust and the Operating Agreement now that you are back. Would you please communicate with Bob Mauceri, copied here, about your availability?” (Seblatnigg Aff. ¶ 90)

In short, the Delaware Trust was positioned to protect most of Ms. Elia's assets located outside the territory and jurisdiction of the Connecticut Probate Court, and to protect Ms. Elia from further mischief by her children or others in the event she was declared incapable in future by the Connecticut Probate Court through an initial strategy of (1) keeping the assets from the jurisdiction of the Connecticut Probate Court; and (2) concealment of the existence of the Delaware Trust and its assets from Ms. Elia's children and others without a need to know. Mulia and Seblatnigg kept the existence of the Delaware Trust secret from anyone who did not have a need to know. (Seblatnigg Aff. ¶¶ 91-95)

The Delaware Trust operated, and is designed to operate, as a source of protected funding for Ms. Elia, whether through her Connecticut conservatorship estate, or directly, providing funds for Ms. Elia's necessary care and maintenance should the Connecticut conservatorship, or Ms. Elia directly, run low on funds to care for Ms. Elia whether she is in Connecticut, or outside Connecticut in a jurisdiction beyond the control of the Connecticut conservator. (Seblatnigg Aff. ¶¶ 113-119)

**K. MS. ELIA'S DAUGHTER AND SON ATTEMPT TO SEIZE CONTROL OF MS. ELIA'S LIFE AND ASSETS BY FORCING HER INTO AN INVOLUNTARY CONSERVATOR-*SHIP IN CONNECTICUT PROBATE COURT.* In 2012, as Ms. Elia had feared, and as Attorney Mauceri predicted, Ms.**

Elia's adult daughter Chris, supported by Ms. Elia's adult son Marc, attempted to force Ms. Elia into an involuntary conservatorship in Connecticut Probate Court in an effort to gain control of her life and her assets. Although her efforts were unsuccessful, she was assisted by the testimony of her brother, Marc Elia, at hearings in Probate Court on May 1, 2012, and August 12, 2012. (Seblatnigg Aff. ¶¶ 96-98)

**L. THE TRUST PROTECTORS REMOVE MULIA AND SEBLATNIGG AND APPOINT BRYN MAWR TRUST *COMPANY OF DELAWARE AS SUCCESSOR TRUSTEE.***

First State Fiduciaries, LLC ("FSF") served as initial sole Protector of the Delaware Trust, with powers to review the performance of the trustees, to remove and replace Trustees and to modify the Trust. Attorney Holder and Attorney Mauceri are co-managers of FSF. (Mauceri Aff. ¶¶8-9) (Holder Aff. ¶¶4 & 9)

FSF met with Seblatnigg and Mulia, the then serving trustees, early in 2013 to review their activities and determine the financial status of the Delaware Trust. (Mauceri Aff. ¶¶ 10-12)

FSF discovered improper trustee activities, in contravention to the terms of the trust indenture, and suggested remedies. (Mauceri Aff. ¶¶12-13)

The Delaware Trust Indenture provides that the actions of the Independent Trustees are subject to prior notice to and approval by the Protectors of the Delaware Trust. (Holder Aff. ¶14)

As permitted by the Delaware Trust, FSF expanded the Protector function into a committee of three (the "Protector Committee"), to perform a thorough investigation into the co-trustees. (Mauceri Aff. ¶¶ 13-14)

The Protector Committee discovered the following serious Trustee breaches of duty:

a) The Co-Trustees failed to seek Protector approval of actions requiring such prior approval, (Holder Aff. ¶¶14, 35 & 44) such as:

i) Purchase a $1,000,000 variable annuity with trust funds without the knowledge and consent of the Protector despite being unsuitable and costly to the Trust (Holder Aff. ¶¶15 through 37)

ii) Taking out a $3,600,000 portfolio line of credit and using it to pay off Ms. Elia's home mortgage and to pay Ms. Elia's personal expenses at unnecessary cost to the Trust and to Ms. Elia (i.e., the loss of an income tax home-mortgage interest deduction, the high cost of the credit and the imprudent use of Trust assets) (Holder Aff. ¶¶ 38-46)

iii) Breaches of fiduciary duty to the Trust and Ms. Elia (violations of Restatement (Third) of Trusts 2007 - section 78, comment (e)(1)) by Mulia's hiring his son, Adam Mulia, to manage the Trust assets and hiring his wife, Rosemary Mulia, to perform bookkeeping/bill paying services for the Trust; Charging excessive fees; Forging the signature of the Co-Independent Trustee on a check and refusing to reimburse the Delaware Trust. (Holder Aff. ¶80)

The Protectors concluded that Ms. Elia should be informed that Mulia, her trusted fiduciary, had been failing her and the Delaware Trust in performing his duties. The Protectors decided that they should communicate their findings to Ms. Elia directly so that the message could not be distorted. When the Protectors attempted to communicate directly with Ms. Elia to explain the results of their investigation, they were denied access to Ms. Elia by her then-litigation attorney, Patricia A. Carpenter ("Ms. Carpenter"). (Mauceri Aff. ¶15)

Having been denied access by Ms. Carpenter, the Protectors unsuccessfully solicited the help of Ms. Elia's sister, Margaret Elizabeth (Betsy) Day ("Ms. Day"), hoping she could gain the Protectors direct access to Ms. Elia. (Mauceri Aff. ¶16, 21)

Unable to communicate directly with Ms. Elia, but nevertheless needing to act, the Protectors voted to remove the then-serving trustees and replace them with Bryn Mawr Trust Company of Delaware ("BMTC") as successor corporate trustee. (Mauceri Aff. ¶¶18-22)

In January 2014, the Protectors of the Delaware Trust removed Mulia and Seblatnigg as Trustees and appointed BMTC as successor Trustee. Although Morgan Stanley claims that this removal and replacement with BMTC was defective, as FSF demonstrated on pages 3 to 4 of its December 5, 2014 Response to Interpleader, the actions taken by FSF were in full compliance with the procedures set forth in the Delaware Irrevocable Trust Indenture. (Holder Aff. ¶¶ 72-79)

While the Protectors were attempting to talk to Ms. Elia, and without their knowledge, Ms. Carpenter was secretly isolating Ms. Elia, both from the Protectors and from Seblatnigg, who by this time had been pushed out of Ms. Elia's inner circle by Ms. Carpenter. This raised the question of whether Ms. Carpenter's motivation might be to protect Mulia from his misdeeds as Co-Trustee and to protect herself by preventing Ms. Elia from understanding the full extent of her mishandling of the settlement of a dispute between Ms. Elia and her children over the distribution of trust funds from a trust created by Ms. Elia's deceased husband. The settlement was negotiated and agreed to by Ms. Carpenter despite the objections of Seblatnigg, *who was the then-serving conservator of Ms. Elia's estate.* Ms. Carpenter mishandled the settlement and as a result cost Ms. Elia substantial financial loss. To keep Seblatnigg from seeking recovery for Ms. Elia, as the then serving conservator of Ms. Elia's estate, Ms. Carpenter orchestrated the removal of Seblatnigg as conservator so that only the two people mishandling Ms. Elia's assets would be in charge of her finances and support. (Holder Aff. ¶¶ 49-56)

**M. MS. ELIA'S PROGRESSIVE ILLNESS CONTINUES *TO TAKE ITS TOLL OF HER MENTAL ABILITIES.***

As Ms. Elia's physical condition deteriorated, so did her mental capacity and cognitive abilities diminish. By late 2012 and early 2013, her confusion and inability to focus and comprehend made her judgment unreliable in more than simple and trivial matters. (Seblatnigg Aff. ¶ 99)

In December, 2012, Ms. Elia was present with her lawyer (Ms. Carpenter) at a day-long mediation of a matter brought against her by Goldman Sachs. Her daughter's motion for involuntary conservatorship was also mediated. Unable to stay awake all day because of her frail condition, Ms. Carpenter was allowed to sleep on a sofa in a lawyer's office where the mediation took place. She apparently did not understand that a settlement of the Goldman Sachs matter was discussed and negotiated, even after it was explained to her several times. (Seblatnigg Aff. ¶ 100)

Further, as details of the settlement were negotiated in subsequent months, and Ms. Elia was apparently so informed by her lawyer (Carpenter), she was unable to recall seeing or signing relevant documents or discussions at relevant meetings. (Seblatnigg Aff. ¶ 101)

In addition to Seblatnigg observing Ms. Elia's failing mental ability, others, including her sister and Sal Mulia, frequently commented on her mental decline. On January 14, 2013, Sal Mulia emailed that “Susan is delusional...” (Seblatnigg Aff. ¶ 102, Exhibit 35); on September 27, 2012, Ms. Elia's sister, Betsy Day, wrote about Ms. Elia: “She was buttering the spoon last night and unable to keep anything straight or have a conversation.” (Seblatnigg Aff. ¶ 102, Exhibit 36); and on April 1, 2013, Betsy Day lamented, “We [Betsy and Suzy Day, her sister in law] are both very concerned that Susan is unable to make and keep her decisions - this is a sign of reduced capability on her part.” (Seblatnigg Aff. ¶ 102, Exhibit 37)

On December 8, 2013, a friend described a recent visit with Ms. Elia, stating that “it was practically impossible to have a conversation with Susan. I would ask a question and she would answer, but what she was saying had no relation to my question (or anything else for that matter).” (Seblatnigg Aff. ¶ 103)

Over time Seblatnigg continued to hear reports of Ms. Elia's failing mental competence from her one or two remaining friends. One of them saw Ms. Elia in June, 2014, when she told her, for instance, that all litigation had been settled and that Ms. Elia and Betsy and their sister in law, Suzy, were going to sell the Sanibel, Florida, house. At that time matters concerning Ms. Elia's Delaware Irrevocable Trust were already being litigated in this Court as well as in Connecticut Superior Court, and another matter was and continues to be litigated in Ms. Elia's name in Greenwich Probate Court. Further, Betsy and Suzy Day had already sold their shares of the Sanibel house to the Delaware Irrevocable Trust in January, 2012. (Seblatnigg Aff. ¶ 104)

**N. THE CONNECTICUT PROCEEDINGS AND DAY'S ACTIONS *TO FREEZE THE TRUST ASSETS AT MORGAN STANLEY.***

On December 19, 2013, as the Protector Committee was winding down its investigations into the actions of Seblatnigg and Mulia as trustees of the Delaware Trust, Ms. Carpenter, purportedly representing Ms. Elia, filed an application ("12/19/13 Application") with the Probate Court to appoint Ms. Day as voluntary conservator in place of Mulia in a limited capacity relating to Ms. Elia's interest in the Delaware Trust, and to eliminate all of Mulia's authority with respect to Ms. Elia's interest in the Delaware Trust. (Lewis Aff., Collective Exhibits.) A true and exact copy of Ms. Carpenter's cover letter dated December 19, 2013 ("12/19/13 Cover Letter") and the 12/19/13 Application, and a true but not exact [because it's been reduced in size] copy of the Order of the Probate Court dated January 9, 2014 ("1/9/14 Order") are attached to the Lewis Affidavit as Collective Exhibit 1.

Ms. Carpenter specifically requested that the Probate Court give no notice of her application to Seblatnigg, one of the then-serving co-trustees of the Delaware Trust, or to the Trust Protectors of the Delaware Trust, including FSF, and the Probate Court gave no notice. Ms. Carpenter did give notice, however, to Mulia, the other then-serving co-trustee of the Delaware Trust, who also failed to inform Ms. Seblatnigg, FSF and the other Trust Protectors, of the application. Lewis Aff., Collective Exhibit 1. Mulia's concealment suggests that he was adverse to the Delaware Trust even though he was still serving as a trustee. Although the Protector Committee voted to remove Mulia as trustee on December 12, 2013, the notice of removal was not delivered to him until January 7, 2014, when the Protector Committee still was unaware of the proceedings in Probate Court. (Holder Aff. ¶ 76)

In January, 2014, Ms. Day commenced an action in Connecticut Superior Court in her purported capacity as "co-conservator" to declare the Delaware Trust void ab initio and unenforceable and to compel the transfer of the Delaware Trust assets to the Connecticut conservatorship estate of Ms. Elia on the grounds that the transfer of assets from Ms. Elia's Revocable Trust to the Delaware Trust and to PAL was not approved by the Probate Court and that Ms. Elia's creation of the Delaware Trust was not approved by the Probate Court. Shortly thereafter, on February 4, 2014, Ms. Day, through her Connecticut attorney, Richard E. Castiglioni ("Castiglioni"), wrote a letter to Morgan Stanley officer Silk (the "Castiglioni letter") enclosing a copy of the Connecticut Summons and Complaint. Castiglioni wrote that "[m]y client [Ms. Day] wishes the assets to remain with Morgan Stanley pending a determination by the Superior Court [of Connecticut] regarding our existing claims." Upon information and belief, funding from the Delaware Trust continued to be available upon request for Ms. Elia's benefit until February 4, 2014, the date of the Castiglioni letter, as the successor trustee, BMTC, was in continued communication with Morgan Stanley to transfer assets from accounts of PAL and The Delaware Trust. (Seblatnigg Aff. ¶ 110)

On February 10, 2014, Seblatnigg received a telephone call from Sally Silk of Morgan Stanley informing Seblatnigg that her firm's legal department had just told her that the Trust-related accounts were "frozen." (Seblatnigg Aff. ¶ 100)

As a result of the Castigilioni Letter, Ms. Day induced Morgan Stanley (or Morgan Stanley used the letter as a pretext) to freeze the financial assets and securities account held by PAL. Morgan Stanley also refused to obey PAL's directions with respect to the cash and securities accounts it held, and which PAL was entitled to control. (Holder Aff. ¶ 81)

Although it held the assets which were the object of the freeze Castiglioni demanded, Morgan Stanley was not named as a party defendant in the Connecticut Summons and Complaint, nor were PAL, Bryn Mawr, or other parties to this Delaware suit. (Lewis Aff., Collective Exhibit 1)

The Castiglioni letter states that the Connecticut action "seeks a declaratory judgment that the assets in the [Delaware] Trust be returned to the [Connecticut] conservatorship estate of Susan D. Elia", based upon the failure of an earlier Connecticut conservator, Seblatnigg, to obtain approval of the Probate Court to convey assets from the Revocable Trust [located in Delaware] to PAL [located in Delaware] under Conn. Gen Stat. 45a-655(e).

The Castiglioni letter omitted, however, to inform Ms. Silk: (1) that Ms. Day had not petitioned the Probate Court for an order authorizing her to commence the Connecticut action in her capacity as co-conservator; (2) that as a consequence of that failure to obtain an order, Ms. Day was not acting as co-conservator with the authority of the Probate Court and powers of a co-conservator, but only as "fiduciary of Susan D. Elia", without the judicial immunity or authority of a conservator otherwise conferred by Connecticut law; (3) that paragraph 7 of the complaint, drafted by Castiglioni at the behest of Day, fraudulently or negligently misrepresented to the Connecticut court [and to Morgan Stanley] that Ms. Elia was a resident of Connecticut at that time, when, in fact, she had previously established her legal domicile in Florida; and (4) that as "fiduciary of Susan D. Elia", Ms. Day lacked the capacity as conservator she, through the Castiglioni letter, asserted to Morgan Stanley and in the Connecticut Summons and Complaint, to the Connecticut court.

In response, Morgan Stanley froze the financial assets and securities account it held for PAL, refusing to obey PAL's instructions with respect to the financial assets and financial assets in the securities account in its name.

During the time Mulia and Seblatnigg served as co-trustees of the Delaware Trust (September 15, 2011 through early January 2014), Ms. Elia, her sister Ms. Day, Mulia, Mulia's independent lawyers, DiPaola, Morgan Stanley officers Adam Mulia (Mulia's son) and Silk and all other interested persons were aware of the existence of the Delaware Trust, and made no complaint or objection known to Seblatnigg or FSF about its existence, about the circumstances under which it had been created, or about the source of funding for the Delaware Trust. It was only after Mulia and Seblatnigg were removed as co-trustees of the Trust in early January, 2014 that Ms. Day and her Connecticut lawyers lodged any complaint about the Delaware Trust or the circumstances surrounding its creation and funding; or about Seblatnigg's conduct in working with Attorney Mauceri and Attorney Holder with the full knowledge and consent of Ms. Elia, DiPaola, and Mulia. Nor did anyone raise any question, objection, or complaint about the source of funding for the Delaware Trust as Mulia and Seblatnigg, as co-trustees both of the Revocable Trust and of the Delaware Trust, worked to transfer financial assets, with the assistance of Mulia's son, Adam Mulia, to PAL from the Revocable Trust. (Seblatnigg Aff. ¶ 120)

It was only on January 17, 2014, that Ms. Day and her Connecticut lawyers, alleging that they act at the behest of Ms. Elia, lodged any complaint about the circumstances surrounding the creation of the Delaware Trust. (Seblatnigg Aff. ¶ 121)

Seblatnigg believes that Ms. Day, who resides in the state of Washington and who was not present in Connecticut during relevant events of 2011, has no personal knowledge of the circumstances surrounding the creation of the Delaware Trust. (Seblatnigg Aff. ¶122)

Ms. Day was recruited in furtherance of the apparent motivation to isolate Ms. Elia from learning the truth about the activities of Mulia and Ms. Carpenter. At no time before or after her appointment as special conservator for a limited purpose did Ms. Day contact or attempt to contact any member of the Protector Committee to make any inquiry into the Committee's findings, nor to enquire into the reasons for their actions; nor to aid the Protector Committee to communicate directly with Ms. Elia. Rather than engage in a constructive inquiry into the facts, circumstances and improprieties of Mulia and Ms. Carpenter, she instead initiated a lawsuit in Superior Court of Connecticut to declare the Delaware Trust void, had her Connecticut attorney participate in freezing the assets of the Delaware Trust located at Morgan Stanley, and has intervened in this action. (Mauceri Aff. ¶¶22, 23.) (Holder Aff. ¶81.)

## *STATEMENT OF THE QUESTIONS INVOLVED*

1. Is the Delaware Trust valid and enforceable?

Answer: Yes. Ms. Elia's decision to create the Delaware Trust was well-advised and not the product of undue influence. The Delaware Trust was properly created and funded in full compliance with Delaware law.

2. Does co-conservator Day have authority to bring and maintain her claims in this action?

Answer: No. Day lacks authority to bring or maintain her claims in this action.

***ARGUMENT***

Under Court of Chancery Rule 56, summary judgment "shall be rendered forthwith" if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Ct. Ch. R. 56(c). The moving party bears the initial burden of demonstrating that, even with the evidence construed in the light most favorable to the non-moving party, there are no genuine issues of material fact. *Brown v. Ocean Drilling & Exploration Co.*, 403 A.2d 1114, 1115 (Del. 1979). If the moving party meets this burden, then to avoid summary judgment the non-moving party must "adduce some evidence of a dispute of material fact." *Metcap Sec. LLC v. Pearl Senior Care, Inc.*, Del. Ch., 2009 WL 513756, at *3 (Feb. 27, 2009), aff'd, Del. Supr., 977 A.2d 899 (2009) (TABLE); *accord Brzoska v. Olson*, Del. Supr., 668 A.2d 1355, 1364 (1995).

In her Verified Counterclaim and Third-Party Complaint, Day seeks a declaration that the Delaware Trust is void and unenforceable or, in the alternative, has been revoked. As purported grounds for this relief, Day alleges in Count I that the Delaware Trust was funded in violation of Connecticut law, in Count II that creation and funding of the Trust was not in compliance with Delaware law, and in Count III that Ms. Elia's decision to create the Delaware Trust was the product of undue influence. In Count IV, Day alleges "unclean hands."

Each of Day's claims is without merit. The undisputed facts demonstrate that (1) the Trust was not funded in violation n of Connecticut law, because the funding came entirely from assets outside the jurisdiction of Connecticut; (2) the creation of the Trust was in full compliance with Delaware law; and (3) Ms. Elia was fully competent and well-advised when she decided to create the Delaware Trust, having retained the legal authority and power both to create and to fund the Delaware Trust with assets of her previously-funded Connecticut Revocable Trust. Furthermore, and fundamentally, as discussed in Part II below, Day lacked the authority to commence her counterclaims and third-party claims in this Court, and she lacks the authority to continue them.

In addition, Day alleges a claim of "unclean hands" However, this charge is an affirmative defense and not a cause of action in and of itself.

Day's Verified Counterclaim and Third-Party Complaint should be dismissed in its entirety.

**I. *THE DELAWARE TRUST IS VALID AND ENFORCEABLE.***

**A. MS. ELIA'S DECISION TO CREATE THE DELAWARE TRUST WAS WELL-ADVISED AND *NOT THE PRODUCT OF UNDUE INFLUENCE.***

Under the undisputed facts as set out in the Seblatnigg Affidavit, Ms. Elia became concerned about her inevitable future incapacity and the possibility that her children would take advantage of that incapacity to take control of her assets and to undermine her estate-planning desires. In an effort to guard against this future possibility, she applied for a Connecticut voluntary conservatorship. At that time she did not need conservators because she was mentally competent and other arrangements in place to manage her finances - such as a Connecticut Revocable Trust and bill-paying services. Nevertheless, she believed that having voluntary conservators of her own choosing in place would protect her against the possibility that her children might at a future date seek the appointment of an involuntary conservator.

A Connecticut voluntary conservatorship does not require a finding of incapacity. Conn. Gen. Stat. § 45a-646. In addition, a Connecticut conservator does not have plenary authority. The Connecticut statutes are clear that all powers not given to the voluntary conservator by decree remain with the conserved person. Conn. Gen. Stat. § 45a-650(k). The Probate Court decree

appointing Seblatnigg as the voluntary conservator of Ms. Elia's estate was limited in scope and did not preclude Ms. Elia from entering into agreements, such as the creation of the Delaware Trust, which she signed as Grantor.

Furthermore, Ms. Elia retained the power and authority to exercise the powers conferred to her under her Connecticut Revocable Trust. Among those powers was the right to direct the distribution of income and principal either to her or for her benefit (Article III (A), (C), and the right to be involved in decision-making regarding both her financial and personal care (Article III(D)). The foregoing trust provisions allow and require the Trustees to consult with Ms. Elia regarding safeguarding the trust assets to ensure that they will always be available for the purposes set forth in the Revocable Trust agreement. The undisputed facts as set out in the Seblatnigg Affidavit establish that Ms. Elia's fears of her children's attacking her Revocable Trust were the genesis of the plan to safeguard those assets by means of the Delaware Trust. In self-settling the Delaware Irrevocable Trust, she sought advice from her trusted friend Ms. Seblatnigg; her trusted financial advisor, Salvatore F. Mulia; and her companion and confidant, Richard DiPaola. The undisputed facts as set out in the Seblatnigg Affidavit establish that Ms. Elia was a willing participant in the creation of the Delaware Trust by signing it as grantor, and in the funding of the Delaware Trust by signing the authorization to transfer funds to it.

Under the undisputed facts as set out in the Seblatnigg Affidavit, Ms. Elia was mentally competent at the time she created the Delaware Irrevocable Trust, although her mental ability would soon deteriorate. Ms. Elia had grounds to fear for the safety of her financial assets, as well as for the quality of the health care she would receive if she fell under the “care” of her adult children, given her deteriorating relationship with them, and their designs on her assets. Ms. Elia knowingly and intelligently entered into the Delaware Irrevocable Trust, which, in light of subsequent events, provided her with exactly the asset protection she was seeking, and continues to provide her with that protection today. Therefore, there can be absolutely no question that Ms. Elia's decision to create and fund the Delaware Trust was well-advised and not the product of undue influence. Any assertion to the contrary is utterly without foundation or fact and must be rejected. It wasn't until later after Ms. Elia's mental capacity and judgment began to fail did she fall prey to undue influence when the Delaware Trust came under attack. The present controversy precisely illustrates the type of scenario that led to the establishment of the Delaware Trust in the first place. By its terms, the Delaware Trust is protecting Ms. Elia's assets against these attacks. By doing so, the Delaware Trust is operating exactly as Ms. Elia designed and intended. Despite Day's assertion that the Delaware Trust is resisting Ms. Elia and frustrating her current desires, it actually is operating exactly as the trust agreement requires and as Ms. Elia intended - to protect her assets from decisions she is making as a result of diminished capacity and/or undue influence.

**B. THE DELAWARE TRUST WAS PROPERLY CREATED AND *FUNDED IN FULL COMPLIANCE WITH DELAWARE LAW.***

As described in detail in the Seblatnigg, Holder, Mauceri, and Doyle Affidavits, the Delaware Trust was properly created and funded, its trustees were properly appointed and removed, and Bryn Mawr was properly appointed successor trustee and is entitled to administer the trust.

**II. DAY LACKS AUTHORITY TO BRING *OR MAINTAIN HER CLAIMS IN THIS ACTION.***

After the Probate Court entered the January 9, 2014 Order appointing Day “co-conservator,” Day made no further applications for authority of any kind. As a result, Day was unauthorized by Probate Court to intervene in the Delaware action. (Lewis Affidavit). At the time she intervened in this case, Day also failed to comply with 12 *Del. C.* §3904, which requires foreign conservators to first prove their capacities to the Delaware Chancery Court before entering any such appearance. The omission in this case is not merely technical; it is fatal: Day lacked such authority and capacity, and she could not cure the defect, because, as demonstrated below, Connecticut Probate Court itself lacked jurisdiction to grant such authority as to assets located outside the territory of Connecticut.

**A. THE LIMITED JURISDICTION OF THE *CONNECTICUT PROBATE COURT*.**

The Connecticut Probate Court lacks territorial jurisdiction over the Delaware Trust and its assets. As Ralph H. Folsom and Gayle B. Wilhelm, "Incapacity, Powers of Attorney and Adoption in Connecticut" (Connecticut Estates Practice Series 3d ed. Thomson Reuters 2015) ("Folsom") §2.7 at 2-8, entitled "[Connecticut] Probate court jurisdiction over [Connecticut] conservatorships" states in part:

> It is clear that a conservatorship established under the law of this state [Connecticut] has no effect outside the State. If the ward moves to another state, he or she will be *sui juris* in that state and will be liable on contracts made there unless incapacity is proven in accordance with the law of that state. *Gates v Bingham,* 49 Conn 275 (1881). When any person domiciled out of this State and *owning property in this state* is incapable of managing his or her affairs, the Court of Probate for the district where the property or some of it is located has jurisdiction to entertain an application for a conservator. [Conn.] General Statutes § *45a-659; Maloney v. Taplin,* 154 Conn 247, 224 A2d 731 (1966). *Such a conservator would, of course, under the general principles of jurisdiction, have authority only over the property within this State.* (emphasis added).

Further,

> It should also be noted that the disability with respect to the power to contract which arises upon the appointment of a [Connecticut] conservator is created wholly by statute and therefore *does not operate beyond the territorial jurisdiction of the State* [of Connecticut]." *See* [Folsom at] §2.7.

Given that Probate Court lacks jurisdiction over property located outside Connecticut, Day cannot cure her lack of authority to sue in Connecticut with a current or retroactive application to Probate Court. This jurisdictional defect strips her of her capacity as "co-conservator" in the Connecticut Superior Court action, because the subject matter at issue in the declaratory judgment action is assets that are in the state of Delaware. Moreover, the same defect voids her capacity to intervene in the action pending in Delaware, because the power of a Connecticut-appointed conservator cannot extend into this distant state. Ms. Day's lack of authority in the instant action does not by itself, however, terminate this litigation.

As the Connecticut Supreme Court explained in *Gross v. Rell,* 40 A.3d 240, 254-5 (Conn. 2012), Conn. Gen. Stat. §45a-655(a) authorizes a conservator of the estate to "sue for...debts due the conserved person." This is the only statutory authority granted to a Connecticut conservator of a conserved person's estate to bring legal action without first petitioning the Connecticut Probate Court of which she is a representative.

While a Connecticut conservator may apply to Connecticut Probate Court for further authority to act in her role as agent of the court, Day made no such application with respect to the action she filed in Connecticut Superior Court, and of which her attorney notified Sally Silk at Morgan Stanley Smith Barney. Indeed, the Connecticut Probate Court lacked territorial jurisdiction to grant Day such capacity, even if she had asked for it. Therefore, following the Connecticut Supreme Court in *Gross v. Rell, infra,* Day's actions in commencing the legal action in Connecticut, and in intervening in the Delaware suit, are neither "authorized or approved by the Probate Court," so she is acting merely as "fiduciary" of Mrs. Elia-not as an agent of Probate Court. Therefore, she may be held personally liable for her negligent or fraudulent actions, as well as for the attorney's fees and other costs of the legal actions, unless and until they are approved by the Connecticut Probate Court:

> When the conservator's acts are not authorized or approved by the [Connecticut] Probate Court, however, we see no reason to depart from the common-law rule that the conservator of the estate is not acting as the agent of that court, but as the fiduciary of the conservatee, and, as such, may be held personally liable. *Elmendorf v. Poprocki,* 230 A.2d 1 (conservator is personally liable for services provided to conservatee until they are approved by Probate Court); *Zanoni v. Hudon,* 708 A.2d 222 ("[a] conservator is a fiduciary and acts at his peril and on his own responsibility unless and until his actions in the management of the ward's estate are approved by the Probate Court" [internal quotation marks omitted]); *see also Murphy v. Wakelee,* 721 A.2d 1181 (Conn.

1998) (plaintiff had burden of proving that conservator's negligence had injured conservatee's estate). Indeed, we have held that, even if expenditures on behalf of the estate are proper and necessary, liability for them "rest[s] on [the conservator] ... until they [are] subsequently approved by the Probate Court"; *Elmendorf v. Poprocki*, 230 A.2d 1; although the conservator may be entitled to reimbursement for proper expenditures from the estate after they are approved. *Id.* Because holding conservators of the estate personally liable under these circumstances does not undermine the independence and integrity of the Probate Court's decisions regarding the conservatee, and because fiduciaries generally may be held liable for their conduct, we conclude that conservators are not entitled to judicial immunity when their acts on behalf of the conservatee are not authorized or approved by the Probate Court.

*Gross v. Rell*, 40 A.3d 240,254-5 (Conn. 2012); *Accord*, *Gross v. Rell*, 695 F.3d 211 (2d Cir. 2012).

Further, Day's attack on the Delaware Trust is for the stated purpose of "returning" [sic] the assets in the Delaware Trust to the Connecticut conservatorship now controlled by the disloyal and conflicted Sal Mulia, the removed trustee of the Delaware Trust, exposing Ms. Elia to even greater risks than she had earlier addressed by creating the Delaware Trust, because Mr. Mulia's conflict and disloyalty now is known to the Trust Protector and to this Court.

As demonstrated in the Seblatnigg Affidavit, Goldman Sachs maintained the securities account and the other financial assets of the Revocable Trust in Delaware. Goldman Sachs then transferred the securities and other financial assets of the Revocable Trust to Morgan Stanley in the name of the Revocable Trust in Delaware. Finally, Mulia and Seblatnigg, as successor co-trustees, conveyed the assets of the Revocable Trust from a Morgan Stanley account located in Delaware to the account of Peace at Last, also a Morgan Stanley account located in Delaware. In short, the assets never were part of Ms. Elia's conservatorship estate, and never were located in Connecticut. 6 *Del.C.* §8-110. The Connecticut conservator lacked authority over them, and the Probate Court lacked jurisdiction over them.

As the Seblatnigg Affidavit establishes, Ms. Elia had a well-founded fear of her adult children. Based upon that fear, it was rational for Ms. Elia to seek a voluntary conservatorship/guardianship and to self-settle and authorize the funding of the Delaware Irrevocable Trust as an added layer of protection.

Making the Delaware Trust irrevocable foreclosed Ms. Elia's children or any other predators from seizing control of all of Ms. Elia's assets, even if she were forced into an involuntary conservatorship. In that event, her conservator would control any assets of her Connecticut conservatorship estate, and possibly any Revocable Trust. The Delaware Irrevocable Trust enabled Ms. Elia to avoid putting all of her eggs in one basket and gave her a safe haven for her valuable Trust assets.

Despite being outside the jurisdiction of the Connecticut Probate court, the assets of the Delaware Irrevocable Trust still remain available for Ms. Elia's support and maintenance: (1) as a backup source of funding for the Connecticut conservatorship; (2) if Ms. Elia were outside the state of Connecticut and beyond the jurisdiction of the Probate Court; or (3) if Ms. Elia were forced into an involuntary conservatorship in Connecticut due to a deterioration of her mental faculties, requiring the successor trustee to act as a brake on an intemperate conservator.

## ***CONCLUSION***

When Robert Mauceri and James G. Holder, Jr. were first approached to give Ms. Elia asset-protection advice, her assets were at risk because under Connecticut law her revocable trust could be easily attacked by her children. The Delaware Irrevocable Trust cured that deficiency. The need to provide Ms. Elia with protection continues today because her Connecticut conservators have no authority to act outside the territorial borders of Connecticut and have no authority to act with respect to non-Connecticut assets (*e.g.*, Florida real estate and Delaware intangibles). The Trust cures those deficiencies.

When FSF and the Protector committee uncovered facts that would compromise the integrity and effectiveness of the Trust and its administration, the Protectors took action to rid the Trust of those elements by replacing the initial Trustees with Bryn Mawr Trust Company of Delaware, a Delaware-based third-party trust company with outstanding credentials in the community, to serve along with Michael Doyle, the Delaware Qualified Trustee who was appointed at the time the Trust was created.

With Ms. Seblatnigg having been successfully excluded from Ms. Elia's inner circle, Ms. Elia, who is certainly no longer competent, may now be surrounded by persons who are not acting in her best interests. This is evidenced by the repeated refusal to allow the Protectors to present their findings directly to Ms. Elia at a time when she was said to be capable of understanding the facts, making judgments and forming opinions. It is also evidenced by the fact that Day (the intervening party here) has no personal knowledge of the relevant facts, while Mulia, who has personal knowledge, remains hidden and protected.

Although the initially perceived risk was an attack by Ms. Elia's children, the need for protection remains today to defend against threats from persons against whom the Protectors acted to safeguard the trust: persons who have positioned themselves to prey on Ms. Elia by isolating her from the facts, by taking advantage of her diminished capacity and by recruiting the unsuspecting Day as a party to this action.

The relief Day seeks is destruction of the Trust, and conveyance of its assets to Salvatore F. Mulia, the disloyal trustee and Ms. Elia's conflicted Connecticut conservator. Except in the context of **elder abuse**, it is inconceivable that Ms. Elia, who desperately needed the protections that the Trust could provide, would now want to destroy those very protections when no other effective means of protection has been advanced, and when the Trust was, and remains, available to her for her needs.

Day, who has no personal knowledge of the relevant facts, nonetheless brought an action in Connecticut, and intervened in this case. FSF is left to conclude that Day's actions were a misguided attempt to help her sister, and that in so doing she is unwittingly shielding and protecting Salvatore Mulia and Patricia A. Carpenter, Esq. from exposure - Mulia of his misdeeds as a trustee of the Trust, and Carpenter of her concealment from Ms. Elia of the extent of Carpenter's possible professional negligence. Although charged with protecting Ms. Elia's estate as it regards her interests in the Trust, Day has shown no interest whatsoever in protecting Ms. Elia's Connecticut estate, which ultimately relies on the Trust for support.

By contrast, FSF here seeks:

(1) a declaration that the Delaware trust is valid and enforceable, and that Bryn Mawr is the lawful successor trustee entitled to administer the assets of the Delaware Trust;

(2) dismissal of Day's counterclaims with prejudice.

Respectfully submitted,

*/s/ Keith R. Sattesahn*

Keith R. Sattesahn (No. 2283)

*Email:* keith@sattesahnlaw.com

*Phone:* 866-930-8440

*Fax:* 866-925-1188

Law Offices of Keith R. Sattesahn

300 Delaware Avenue, Suite 210

Wilmington, Delaware 19801

*Attorney for Petitioner First State Fiduciaries, LLC*

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