

2011 WL 2098501 (Or.Cir.) (Trial Pleading)
Circuit Court of Oregon.
Multnomah County

Michael GATTUCCIO, as Personal Representative of the Estate of Mary T. Gattuccio Pence, Plaintiff,

v.

ONPOINT COMMUNITY CREDIT UNION, an Oregon state-chartered credit union; Ohio National Financial Services, Inc., an Ohio corporation; New York Life Insurance and Annuity Corporation, a Delaware corporation; New York Life Investment Management LLC, a Delaware limited liability company; Nylife Securities LLC, a Delaware limited liability company; and Does 1-10, unknown individuals or entities, Defendants.

No. 110506352.
May 16, 2011.

(Fraud; Conversion; Securities Fraud; **Elder Abuse**; Negligence)
Claims not Subject to Mandatory Arbitration

Complaint

Black Helterline LLP, [Andrew T. Reilly](#), Osb No. 96560, Email: atr@bhlaw.com, Fax: (503) 224-6148, Of Attorneys for Plaintiff.

For his Complaint against defendants, plaintiff alleges as follows:

PARTIES

1.

Mary T. Gattuccio Pence (“Pence”) was born on XX/XX/1914. At the time of her death on August 16, 2010, Pence was a widow with three children, Leonard Gattuccio, Joyce Bolliger, and Michael Gattuccio, and two grandchildren. Michael Gattuccio (“Michael”) is Pence's youngest child. At all material times herein, Pence lived in Portland, Multnomah County, Oregon.

2.

Pence died on August 16, 2010, at the age of 96. [Michael was appointed as the Personal Representative of Pence's estate on September 13, 2010 in Multnomah County Circuit Court Case No. 1009-91362.](#) Letters Testamentary issued on September 16, 2010.

3.

Defendant OnPoint Community Credit Union (“OnPoint”) is an Oregon state-charted credit union conducting business as such within the state of Oregon.

4.

Ohio National Financial Services, Inc. (“Ohio National”) is an Ohio corporation engaged in business through several wholly owned and controlled subsidiaries, including The O.N. Equity Sales Company (“NESCO”), a registered full-service broker-dealer licensed by the Financial Industry Regulatory Authority (“FINRA”), as a seller of life insurance, annuity, and retirement products, as well as of mutual funds, stocks, bonds, and other securities.

5.

Defendant New York Life Insurance and Annuity Company (“NYLIAC”) is a Delaware corporation engaged in business as an issuer, seller, and/or provider of, among other things, fixed and variable annuity investment products.

6.

Defendant New York Life Investment Management LLC (“NYLIM”) is a New York limited liability company, operating under the registered service mark and name of MainStay Investments (“MainStay”), as a mutual fund manager and seller of mutual fund investment products, as well as related investment advisory products and services.

7.

Defendant NYLIFE Securities LLC (“NYLIFE”) is a Delaware limited liability company, a registered full-service broker-dealer licensed by the Financial Industry Regulatory Authority (“FINRA”), and a seller of annuity and retirement products, as well as of mutual funds, stocks, bonds, and other securities.

8.

Defendants Does 1-10 are unknown individuals or entities who either serve as officers and/or directors of the other named defendants, or who otherwise directly or indirectly control or have a right to control said entities' operations, as well as those of their agents and representatives. The Estate intends to and hereby reserves the right to amend this Amended Complaint to name the individuals or entities in question once it learns their identities.

COMMON FACTUAL ALLEGATIONS

9.

Each and every one of the entities named above in paragraphs 5-7 is a wholly owned and controlled subsidiary of New York Life Insurance Company (“NYLIC”), a New York corporation engaged in business either directly or through its subsidiaries as, among other things, a broker/dealer and a licensed insurance company.

10.

Beginning in the late 1980's Averill worked for NYLIC, and was at all material times engaged by NYLIC as a seller of insurance and investment products on its behalf. Averill later became a registered representative of NYLIFE in or around 1990, and remained such until sometime until the summer of 2002. Upon information and belief, after terminating her position as a registered representative with NYLIFE, Averill continued to serve as an employee or agent of NYLIFE, and continued to transact insurance and investment product business on NYLIFE's behalf.

11.

In the mid- to late-1990's, Pence was introduced to Averill by her longtime friend Irene Orselli ("Orselli"), who herself was in her 90's at the time. Averill was introduced to Pence as Orselli's financial advisor, working with or on behalf of NYLIC, and as one who purportedly managed Orselli's investments and other financial affairs in this capacity.

12.

In 1998, Averill - while acting as a registered representative, producer, and/or agent of NYLIFE and NYLIAC - sold Pence a variable annuity issued through NYLIAC for roughly \$31,250; in 2001, Averill - again while acting as a registered representative, producer, and/or agent of NYLIFE and NYLIAC - sold Pence a fixed annuity issued through NYLIAC for roughly \$31,250. Through these transactions and others, Averill was able to use her position as an employee, registered representative, and agent of NYLIFE and NYLIAC to gain Pence's trust and confidence, and to gain access to Pence's personal information and affairs.

13.

Averill became an employee and agent of Ohio National in or around August of 2002, and later (i.e., in or around October of 2002) became a registered representative of Ohio National's wholly owned and controlled subsidiary broker-dealer, ONESCO. In this capacity, and in part through the legitimacy accompanying her relationship with ONESCO, Averill continued to act as Pence's financial and investment advisor, and continued to use this position to build a personal relationship of trust and confidence with Pence.

14.

Based on her status (perceived and actual) with both NYLIFE, NYLIAC, and Ohio National, Averill was able to develop a relationship of trust with Pence, even frequently visiting Pence at home and acting like she was one of Pence's best friends. The increased trust and confidence bestowed upon Averill by Pence through the developing relationship - as well as performing the standard duties of an investment or financial advisor -- allowed Averill access to the details of Pence's most personal information, and made Averill Pence's "go-to" person for financial and investment matters and transactions.

15.

Despite having previously authorized Averill to act on its behalf, and having previously held Averill out to the public and Pence in particular as a trusted employee and agent, at no time did NYLIFE or NYLIAC - or anyone else acting on their behalf or otherwise -- advise Pence that Averill was no longer a registered representative or agent of NYLIFE or NYLIAC, or provide any reason therefor.

16.

Despite having previously authorized Averill to act on its behalf, and having previously held Averill out to the public and Pence in particular as a trusted employee and agent, at no time did Ohio National - or anyone else acting on its behalf or otherwise -- advise Pence that Averill was no longer a registered representative or agent of Ohio National, or provide any reason therefor.

17.

By the end of 2005, Averill had so thoroughly manipulated Pence through the relationship cultivated and developed as a registered representative, employee, and/or agent of Ohio National, NYLIFE, and NYLIAC, that she had access to all of Pence's personal information, and had personally managed Pence's investments and financial affairs such that she knew the locations of and account numbers for all of Pence's various investment and bank accounts.

18.

Pence moved into an assisted living facility in 2005. Upon Averill's advice and with her assistance, Pence sold the home she built with her first husband for \$452,472.25 net, after paying all fees and commissions. Pence invested these sales proceeds with Averill, who used some of the funds to open up Pence's MainStay accounts with NYLIM, with others going toward the purchase of various securities held in an ONESCO brokerage account, or being deposited into Pence's own personal bank account(s) with US Bank.

19.

In February of 2006, Averill - without Pence's knowledge or consent - added Pence as a joint owner on Averill's own checking account at OnPoint. To accomplish this, Averill filled out Pence's portion of the account application and forged Pence's signature thereupon and, on information and belief, the accompanying signature card, if any.

20.

Commencing at or around the same time, Averill began repeatedly telephoning MainStay to request dispersals from Pence's MainStay accounts. On some occasions, Averill posed as Pence when requesting these dispersals; on others, she identified herself simply as "Colleen Averill, representative code 162905." On information and belief, representative code 162905 is an internally-generated designation assigned to Averill by NYLIFE and/or MainStay (i.e., NYLIM) to Averill as one authorized by it to conduct business on Pence's behalf. MainStay continued to hold Averill out to the public and Pence specifically as one authorized by it to conduct business on Pence's behalf, and dealt with Averill accordingly, through the late spring of 2009.

21.

MainStay repeatedly and without fail dispersed the money requested by Averill from Pence's MainStay accounts, and sent some of the checks to Averill. If and when MainStay sent the checks directly to Pence, it did so via overnight delivery to the front desk of the residential care facility at which Pence resided, without requiring a signature or providing other safeguards against theft, all upon Averill's suggestion. Averill took and deposited all of these checks, after forging Pence's name as endorser thereupon, into the OnPoint account. In total, MainStay sent, and Averill deposited into her own OnPoint account, checks totaling at least \$308,720 out of Pence's MainStay accounts over a roughly 25-month period from February 2006 through March 2008.

22.

In addition to the dispersals from the MainStay accounts, Averill also manipulated Pence into signing partial withdrawal requests from her annuity accounts with NYLIAC under false and fraudulent pretenses, and forged Pence's signature on other forms requesting the total surrender thereof. NYLIAC processed these withdrawal and surrender requests, and again sent the proceeds derived therefrom to Pence without requiring any signature or proof that Pence, in fact, knew of the activity. In total, NYLIAC sent, and Averill deposited into her own OnPoint account, checks totaling at least \$89,633 out of Pence's fixed and variable annuity accounts over a roughly 6-7 month period from October 2008 through early April 2009.

23.

Averill, while acting in her capacity as Pence's financial advisor, also repeatedly advised Pence to invest her cash assets in certificates of deposit ("CD's") and other securities, and instructed her to write checks drawn on Pence's US Bank checking account, or to reinvest funds obtained by selling securities out of her ONESCO brokerage account, for these purposes. Rather than investing these funds as promised, Averill deposited the checks given for these purposes into her own OnPoint checking account, and spent them on herself. In total, Averill stole at least \$100,000 from Pence's US Bank checking account, and at least \$65,500 from Pence's ONESCO brokerage account in this fashion.

24.

The end result of all of this wrongful activity was that, after a lifetime of saving, Averill's raiding of Pence's various bank, investment, and annuity accounts left Pence nearly destitute.

25.

At all material times, Averill acted as a registered representative, employee, and/or agent of Ohio National, NYLIFE, and NYLIAC. In obtaining access to Pence as a financial advisor and licensed insurance agent, and in obtaining control over Pence's investment funds, Averill acted within the course and scope of her agency relationship with and as a registered representative of, Ohio National, NYLIFE, and NYLIAC. Ohio National, NYLIFE, and NYLIAC held Averill out to the public as their agent with rights to sell securities, open new accounts, and otherwise manage the financial assets of, and offer financial advice to, their clients on their behalves. If Averill's authority to so act on behalf of any of these entities was ever revoked or otherwise rescinded, none of them ever conveyed such fact(s) to Pence.

26.

Averill promoted herself as an affiliate and agent of Ohio National, NYLIFE, NYLIAC, and NYLIM, using these firms' prestige to obtain and keep clients. Ohio National, NYLIFE, NYLIAC, and NYLIM similarly promoted their affiliation with Averill, and held Averill out to the public and Pence in particular as one authorized to act on their behalves as well as one authorized to act on Pence's behalf with respect to accounts held and maintained with them. Averill regularly met with Pence to give her financial advice and to sell her securities or other investments or insurance products offered by Ohio National or its subsidiaries, NYLIFE, NYLIAC, and NYLIM. Statements and other account paperwork issued to Pence by both Ohio National, NYLIFE, NYLIAC, and NYLIM over the years continued to refer to Averill as Pence's registered representative or account executive, and Ohio National, NYLIAC, and NYLIM continually and at all material times allowed Averill to transact business dealing with Pence's various accounts with them or their subsidiaries without any actual or knowing authorization from Pence.

27.

Ohio National and NYLIFE, as broker-dealers with which Averill was registered or affiliated, had an absolute and non-delegable duty to control and supervise Averill in her actions as their registered representative.

28.

On or about October 26, 2009, Averill was arrested and charged with 90 counts of aggravated theft (including theft by deception), criminal mistreatment, and forgery, all related to or arising out of her fraudulent taking of funds held in Pence's accounts with MainStay, Ohio National, and others.

29.

On or about February 23, 2010, Averill pleaded no contest to, and was subsequently convicted of, 16 charges, consisting of: seven counts of aggravated theft in the first degree (including theft by deception); seven counts of criminal mistreatment of an **elderly** person in the first degree; and two counts of forgery in the first degree. Averill was thereafter sentenced to three years in prison and, as mentioned above, is currently residing at Coffee Creek Correctional Facility as a result.

30.

While the particular means by which Averill accomplished her misdeeds varied, the common denominator throughout was her status as Pence's financial advisor and investment broker; a status she attained and was able to maintain through her agency and/or employment relationship with Ohio National, NYLIAC, NYLIFE, and NYLIM.

31.

Pence's losses from Averill's various activities, as set forth above, exceed \$563,851, and together with prejudgment interest from the date of the particular misappropriations total \$755,814.09 as of May 16, 2011. Prejudgment interest continues to accrue thereafter at the rate of \$139.03 per day.

CLAIMS FOR RELIEF

First Claim for Relief

(Elder Abuse)

Count I

(against Ohio National)

32.

The Estate incorporates by reference the allegations and assertions of fact contained in paragraphs 1 through 31, as if fully set forth herein.

33.

Pence turned 65 on May 4, 1979, and was at all material times an “**elderly** person” under [ORS 124.100\(1\)\(a\)](#). As an **elderly** person, Pence was also, by definition and in fact, a “vulnerable person” under [ORS 124.100\(1\)\(e\)\(A\)](#).

34.

As Pence's financial advisor and authorized employee and agent of Ohio National, Averill held or controlled funds that belonged to Pence. Ohio National also held some of these funds and had direct control and a duty to exercise such control over Averill as its agent.

35.

After having established a relationship of trust and confidence with Pence, nurtured through her employment and agency with Ohio National, and utilizing information gathered through this relationship, Averill wrongfully took and appropriated Pence's money, all as described more fully above.

36.

Ohio National, by allowing Averill to operate as its employee or agent, and by holding Averill out to the public as one authorized to conduct business on its and its customers' behalves, and by allowing Averill to access and manage Pence's accounts with ONESCO, and by failing to establish or follow any safeguards against fraud committed by its agents, and by failing to take any steps to ensure that Pence, herself, requested that the funds be transferred and that the funds be made available exclusively to Pence and not to any other person, permitted and in some cases, actively assisted Averill in taking and appropriating Pence's funds from her various banking, investment, and annuity accounts.

37.

Averill's conduct amounts to financial **abuse** of an **elderly** person, as defined in [ORS 124.100](#), which Ohio National permitted, and to some degree, assisted, causing Pence to suffer actual damages in an amount to be proven at trial, but currently estimated at \$755,814.09. In addition or in the alternative to Ohio National's direct liability as a "permitter" or "assister" of the financial **abuse** as set forth above, Ohio National is liable as principal, or vicariously liable as employer, on a joint and several basis for the full amount of Pence's damages which, per [ORS 124.100\(2\)\(c\)](#), shall be trebled and therefore equal roughly \$2,267,442.20, plus prejudgment interest thereupon at the rate of nine percent, and attorney fees.

Count II

(against NYLIFE)

38.

The Estate incorporates by reference the allegations and assertions of fact contained in paragraphs 1 through 33, as if fully set forth herein.

39.

As Pence's financial advisor and authorized employee, registered representative, and agent of NYLIFE, Averill held or controlled funds that belonged to Pence. NYLIFE had direct control and an affirmative, non-delegable duty to exercise such control over Averill as its agent and registered representative.

40.

In her capacity as Pence's financial advisor, and through the relationship developed with Pence as such in her employment or agency with NYLIFE, Averill gained extensive personal and financial information about Pence and used this information to sell Pence investment products with NYLIM, NYLIAC, and others, which she later liquidated for her own purposes through the fraudulent means specified above.

41.

Even after terminating Averill as its registered representative, NYLIFE continued to hold Averill out to the general public, and to Pence specifically, as one authorized to act on its behalf, and to deal with Pence's accounts with NYLIM, NYLIAC, and ONESCO, and failed to take any steps to advise Pence of Averill's termination or the revocation of any such previously granted authority.

42.

While acting as NYLIFE's registered representative, and later under the color of authority granted by NYLIFE, Averill developed a relationship of trust and confidence with Pence that she later **abused** by wrongfully taking and appropriating Pence's money, all as described more fully above, for her own personal gain.

43.

NYLIFE, by allowing Averill to operate as its registered representative, employee, or agent, and by holding Averill out to the public as one authorized to conduct business on its and its customers' behalves, and by allowing Averill to access and manage Pence's accounts with MainStay and NYLIAC, and by failing to establish or follow any safeguards against fraud committed by its agents, and by failing to take any steps to ensure that Pence, herself, requested that the funds be transferred and that the funds be made available exclusively to Pence and not to any other person, permitted and in some cases, actively assisted Averill in taking and appropriating Pence's funds from her various banking, investment, and annuity accounts.

44.

Averill's conduct amounts to financial **abuse** of an **elderly** person, as defined in [ORS 124.100](#), which NYLIFE permitted, and to some degree, assisted, causing Pence to suffer actual damages in an amount to be proven at trial, but currently estimated at \$755,814.09. In addition or in the alternative to NYLIFE's direct liability as a "permitter" or "assister" of the financial **abuse** as set forth above, NYLIFE is liable as principal, or vicariously liable as employer, on a joint and several basis for the full amount of Pence's damages which, per [ORS 124.100\(2\)\(c\)](#), shall be trebled and therefore equal roughly \$2,267,442.20, plus prejudgment interest thereupon at the rate of nine percent, and attorney fees.

Count III

(against NYLIAC)

45.

The Estate incorporates by reference the allegations and assertions of fact contained in paragraphs 1 through 33, as if fully set forth herein.

46.

When Averill developed her relationship of trust and confidence with Pence, she was acting, at least in part, in furtherance of her position as a "producer" or agent of NYLIAC, all of which resulted first in the sale, and then later the wrongful liquidation under false and fraudulent pretenses, of the fixed and variable annuity accounts discussed above.

47.

At the time said annuity accounts were liquidated, NYLIAC had held the same for roughly 7-10 years, without having ever previously made any distributions therefrom. It subsequently liquidated the entire accounts over a 5- or 6-month period supposedly at the request of a 94- or 95-year-old customer without taking any steps to verify that Pence, in fact, understood what was happening or actually requested the liquidation/surrender. In addition to having held Averill out as one qualified and authorized to act on its and its account-holders' behalves, NYLIAC permitted or assisted in Averill's financial **abuse** of Pence by failing to take any steps to protect Pence against such conduct by its agents or others.

48.

Averill's conduct amounts to financial **abuse** of an **elderly** person, as defined in [ORS 124.100](#), which NYLIAC permitted, and to some degree, assisted, causing Pence to suffer actual damages in an amount to be proven at trial, but currently estimated at \$108,726.96, through May 16, 2011. In addition or in the alternative to NYLIAC's direct liability as a "permitter" or "assister" of the financial **abuse** as set forth above, NYLIAC is liable as principal, or vicariously liable as employer, on a joint and several basis for the full amount of Pence's losses from the NYLIAC annuities which, per [ORS 124.100\(2\)\(c\)](#), shall be trebled and therefore equal roughly \$326,180.88, plus additional prejudgment interest thereupon at the rate of nine percent, and attorney fees.

Count IV

(against NYLIM)

49.

The Estate incorporates by reference the allegations and assertions of fact contained in paragraphs 1 through 33, as if fully set forth herein.

50.

NYLIM held Averill out to the public, and to Pence specifically, as one authorized to act on its and its clients' behalves, and vested Averill with the authority to deal directly with it on all matters related to Pence's MainStay accounts. NYLIM never revoked this authority until after the wrongdoing here at issue came to light in June of 2009.

51.

NYLIM allowed Averill to act on Pence's behalf in liquidating her MainStay investment accounts to the tune of \$308,000 over a roughly two-year period, all while failing to note the "red flags" presented by a 94- or 95-year-old client suddenly, and without precedent, withdrawing or liquidating large sums from her investment accounts, with no apparent need or without first requiring any investigation into whether Pence, in fact, was actually aware of such

52.

Averill's conduct in stealing the funds within Pence's MainStay investment accounts amounts to financial **abuse** of an **elderly** person, as defined in [ORS 124.100](#), which NYLIM permitted, and to some degree, assisted, causing Pence to suffer actual damages in an amount to be proven at trial, but currently estimated at \$419,793.38, through May 16, 2011. In addition or in the alternative to NYLIM's direct liability as a "permitter" or "assister" of the financial **abuse** as set forth above, NYLIM is liable as principal on a joint and several basis for the full amount of Pence's losses from the MainStay accounts which, per [ORS 124.100\(2\)\(c\)](#), shall be trebled and therefore equal roughly \$1,259,380.10, plus additional prejudgment interest thereupon at the rate of nine percent, and attorney fees.

Second Claim for Relief

(Common Law Fraud)

Count I

(against Ohio National)

53.

The Estate incorporates by reference the allegations and assertions of fact contained in paragraphs 1 through 31, as if fully set forth herein.

54.

Averill's representations that she was investing Pence's money for Pence's benefit, and buying certificates of deposit with funds from Pence's various accounts, or otherwise engaging in investment activity on Pence's behalf were, unbeknownst to Pence, false and knowingly so (to Averill) when made.

55.

Pence had no idea that Averill was not acting on her behalf, or was otherwise lying to her about the planned use of monies obtained from Pence various accounts.

56.

Averill was able to accomplish this fraud through the relationship of trust and confidence established with Pence in her capacity as an employee, agent, and registered representative of Ohio National and/or its wholly owned and controlled subsidiaries.

57.

Ohio National is liable to the Estate for the full amount of Pence's losses due to Averill's fraud, in an amount to be proven at trial but currently estimated at \$755,814.09, plus additional prejudgment interest and costs.

Count II

(against NYLIFE)

58.

The Estate incorporates by reference the allegations and assertions of fact contained in paragraphs 1 through 31, 54, and 55 as if fully set forth herein.

59.

Averill was able to accomplish this fraud through the relationship of trust and confidence established with Pence in her capacity as an employee, agent, and registered representative of NYLIFE.

57.

NYLIFE is liable to the Estate for the full amount of Pence's losses due to Averill's fraud, in an amount to be proven at trial but currently estimated at \$755,814.09, plus additional prejudgment interest and costs.

Third Claim for Relief

(Negligence)

(against NYLIM)

58.

The Estate incorporates by reference the allegations and assertions of fact contained in paragraphs 1 through 31 as if fully set forth herein.

59.

As an account-holder with NYLIM, Pence had a special relationship with NYLIM through which NYLIM was obligated to take appropriate steps to ensure or verify the safety of Pence's investment accounts, and to limit access thereto to those specifically authorized by Pence.

60.

NYLIM breached the duties owed to Pence at common law and by virtue of its account agreement with Pence through one or more of the following acts and/or omissions:

- (a) By failing to exercise due care and caution in distributing funds from Pence's accounts to Averill instead of directly to Pence;
- (b) By failing to properly and appropriately supervise Averill in her relationships with customers she handled on their behalf;
- (c) By failing to inform Pence directly when changes to her accounts took place;
- (d) By failing to have adequate fraud alerts and protections in place to notify Pence of any potentially unauthorized activity; and
- (e) By otherwise engaging in careless and negligent acts.

61.

As a direct and proximate result of NYLIM's breach of its duties of care to Pence through one of the negligent acts or omissions set forth above, Averill was able to access Pence's investment accounts at MainStay and to withdraw the funds held therein for Averill's own use and benefit.

62.

It was reasonably foreseeable that NYLIM's breaches would allow an unscrupulous agent to steal funds in customer accounts held by NYLIM/MainStay

63.

As a result of NYLIM's negligence, Pence suffered actual damages in an amount to be proven at trial, but currently estimated at \$419,793.38 as of May 16, 2011, and accruing thereafter at the rate of \$103.51 per day.

Fourth Claim for Relief

(Conversion)

(against OnPoint)

64.

The Estate incorporates by reference the allegations and assertions of fact contained in paragraphs 1 through 31 as if fully set forth herein.

65.

Averill was able to accomplish her theft of Pence's assets through fraud and forgery, by which she essentially used the "join" OnPoint account as a filter through which she funneled all the funds received from Pence's various investment and bank accounts.

66.

Most of the checks representing the liquidation of Pence's various bank and investment accounts were endorsed by Averill, who forged Pence's signature thereupon.

67.

The forged signature of Mary Pence appearing on the checks deposited into the OnPoint account matched the signature on the joint account application, as that too was forged by Averill.

68.

In total, roughly \$563,851 in forged checks were deposited into the OnPoint account and spent by Averill for her own purposes.

69.

Per [ORS 73.0420](#), OnPoint is liable to the Estate for losses sustained by Pence as a result of Averill's forgeries, in amount equal to \$563,851, which together with prejudgment interest from the date of the particular misappropriations total \$755,814.09 as of May 16, 2011. Prejudgment interest continues to accrue thereafter at the rate of \$139.03 per day.

Fifth Claim for Relief

(Negligence)

(against OnPoint)

70.

The Estate incorporates by reference the allegations and assertions of fact contained in paragraphs 1 through 31 as if fully set forth herein.

71.

As a state-chartered credit union, OnPoint had a duty to refrain from opening accounts on behalf of unknown or unidentified individuals.

72.

By allowing Averill to add Pence to her checking account with OnPoint without ever meeting or verifying Pence's identity, or that she, in fact, wished to be added to Averill's account, OnPoint breached this duty and engaged in activity presenting a clear and unreasonable risk of harm to the public, and here specifically, Pence.

73.

Averill used the account to filter the proceeds of her wrongful and fraudulent activities, to Pence's damage in the amount of \$563,851, which together with prejudgment interest from the date of the particular misappropriations totals \$755,814.09 as of May 16, 2011.

WHEREFORE, the Estate prays for judgment on its Claims for Relief as follows:

- (a) Awarding damages as alleged, pre-judgment interest, treble damages under [ORS 124.100 \(2\)](#), and reasonable attorney fees on the first claim of relief (all counts) for **elder abuse** under [ORS 124.100 \(2\)](#)
- (b) Awarding damages as alleged, plus pre-judgment interest thereupon on the second claim of relief (all counts) for fraud;
- (c) Awarding damages as alleged, plus pre-judgment interest thereupon on the third claim of relief for negligence;
- (d) Awarding damages as alleged, plus pre-judgment interest thereupon on the fourth claim of relief for conversion;
- (e) Awarding damages as alleged, plus pre-judgment interest thereupon on the fifth claim of relief for negligence; and
- (g) Awarding all appropriate costs and disbursements on all claims, and any other relief deemed just equitable, or otherwise appropriate.

DATED this 16th day of May, 2011.