

STATE OF NEW YORK
SURROGATE'S COURT: COUNTY OF NEW YORK

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Accounting of

WALLACE BOCK and IRVING KAMSLER,

as Attorneys-in-Fact for

HUGUETTE M. CLARK,

Deceased.
----- X

**MEMORANDUM OF
LAW IN OPPOSITION TO
MOTION TO
INTERVENE**

File No. 1995-1375/A

Of Counsel:

Francesca Morris
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Wallace Bock ("Bock") and Irving H. Kamsler ("Kamsler"), the petitioners in the above-captioned proceeding, respectfully submit this memorandum in opposition to the November 28, 2011 motion by Karine Albert McCall, Paul F. Albert, John Hudson Hall, III, Rodney W. Devine, Thomas Christopher Clark, Alice Gray Coelho, Lisa Lewis, Lewis R. Hall, Gerald Gray, Clifford Berry, William A.C. Berry, Celia Gray Cummings, Katherine Hall Friedman, Ian C. Devine, Mallory Culver Devine Goewey, Edith Williams MacGuire, Patrick Baeyens, Ambassador Andre Baeyens, and Jacqueline Baeyens-Clerte (collectively, the "Family Members") to intervene in this proceeding by Bock and Kamsler to settle their accounting as attorneys-in-fact for decedent Huguette M. Clark ("Mrs. Clark").

STATEMENT OF FACTS

The facts relevant to this motion are not in dispute and are summarized as follows.¹

Huguette M. Clark was born on June 9, 1906 and died on May 24, 2011. During the latter part of her lifetime Bock and Kamsler acted as attorneys-in-fact to Mrs. Clark pursuant to powers-of-attorney which have been submitted to this Court with the Verified Petition for Settlement of Accounting, dated September 28, 2011 (the "Accounting Petition"). This Court ordered Petitioners to account by order dated August 17, 2011. Mrs. Clark's will dated April 19, 2005 (the "Will") has been offered for probate in the separate probate proceeding. The Family Members have appeared in the probate proceeding and now seek to intervene in this accounting proceeding.

¹ The very colorful affidavit of Mr. Morken, discussed at Point II, presents no facts to this Court, is unsupported, irrelevant to this motion, and should be disregarded.

ARGUMENT

POINT I

THE FAMILY MEMBERS' INTERVENTION IS NOT WARRANTED

A. The Family Members Are Not "Persons Interested" in This Proceeding

The Family Members, as potential beneficiaries of Mrs. Clark's Estate who stand to receive a share of the Estate only if the Will is not admitted to probate, claim that they are "persons interested" in Mrs. Clark's Estate within the meaning of that term for purposes of SCPA 103(39), and argue that, as "persons interested" in the Estate, they should be permitted to intervene in this accounting proceeding. SCPA 103(39) defines "Person interested" as follows: "Any person entitled or allegedly entitled to share as beneficiary in the estate or the trustee in bankruptcy or receiver of such person."

Even accepting that the Family Members are "persons interested" in *Mrs. Clark's Estate*, it does not follow that they are "persons interested" in the *within proceeding* to settle Bock's and Kamsler's accounting as attorneys-in-fact for Mrs. Clark. Indeed, the fact that they were not required by the Court to be cited in this proceeding is evidence that the Family Members are not "persons interested" in the within proceeding. See 4C N.Y. Prac., Com. Litig. In New York State Courts § 106.17 (3d ed.) ("A petition must set forth the names of, and citation must issue to, all 'persons interested' in the subject of the application.") (citing SCPA §§ 304(3), 306(1)(b)).

Further, it is sometimes the case that parties who are "persons interested" in a decedent's estate, and who are required to be cited in a proceeding for probate of the decedent's will, nevertheless are not "persons interested" in a separate proceeding related to the decedent's estate; are not required to be cited in such a proceeding; and may not be permitted to intervene in such a proceeding. See, e.g., Matter of Gregory, 102 Misc.2d 735, 424 N.Y.S.2d 641 (Surr. Ct.

Westchester Cty. 1980) (finding that the Attorney General, who had appeared and been involved in the contested probate of a decedent's will, was not permitted to intervene in a proceeding to determine the validity of a claim against the decedent's estate). Here, the Family Members, contingent intestate beneficiaries of Mrs. Clark's Estate in the event that her Will, which is entitled to a presumption of validity (see In re Will of Schlaeger, 74 A.D.3d 405, 903 N.Y.S.2d 12 (1st Dept. 2010) (where an attorney-drafter supervises the execution of a will, there is a presumption of regularity that the will was properly executed in all respects); In re Estate of Besdansky, 31 Misc.3d 1210(A), 929 N.Y.S.2d 198, 2011 WL 1366620 (Surr. Ct. Kings Cty. 2011) (until the contrary is established a testator is presumed to be sane and have sufficient mental capacity to make a valid will)), is ultimately denied probate, have no direct interest in the outcome of the accounting proceeding and should not be permitted to intervene.

Moreover, the cases cited by the Family Members in support of their claim that they are "persons interested" in the within proceeding are not on point. Matter of Morse, 177 Misc.2d 43, 676 N.Y.S.2d 407 (Surr. Ct. N.Y. Cty. 1998), held that a sprinklee of a trust under a prior will of the decedent had standing to object to the validity of decedent's propounded will. Here, there is no question that the Family Members have standing to object to the probate of Mrs. Clark's Will; however, this does not give them standing to appear in this proceeding by Mrs. Clark's attorneys-in-fact to settle their account.

In Benjamin v. Morgan Guar. Trust Co. of N.Y., 163 A.D.2d 135, 557 N.Y.S.2d 360 (1st Dept. 1990), another case cited by the Family Members, the contingent remaindermen of a testamentary trust were found to have standing under SCPA 2205 to object to certain acts by the trustee of the trust that, the contingent remaindermen alleged, violated the provisions of the decedent's will, which had been admitted to probate. Similarly, in Matter of Cowles, 22 A.D.2d

365, 255 N.Y.S.2d 160 (1st Dept. 1965), infants who had been joined as proper parties to a trust construction and accounting proceeding, as parties interested in the trust, and who had been allowed to object to the trustee's account and who were subsequently determined to have only a contingent interest in the trust, were permitted to stay in the proceeding and litigate their objections.

It was clear in both Benjamin and Cowles that the contingent trust beneficiaries were "persons interested" in the subject matter of the proceedings, i.e., the estate or trust at issue. Neither Benjamin nor Cowles involved a claim, as here, by alleged beneficiaries of a decedent's estate, *before* a determination of the validity of the decedent's will, involving acts by a fiduciary for the decedent *before* the decedent's death. Further, the Courts in both cases noted that, unlike in the case at bar, there was no fiduciary or other party already appearing and representing the interests of the contingent beneficiaries. Here, as noted *infra*, the New York Public Administrator, as temporary administrator of Mrs. Clark's Estate, is fully capable of representing the interests of the Family Members in this proceeding by pursuing discovery into the acts of Bock and Kamsler as attorneys-in-fact for Mrs. Clark during her lifetime.

The Family Members have provided no precedent for their intervention in this accounting proceeding or for the Court to view them as interested parties in the proceeding.

B. If the Family Members Are "Persons Interested", Their Interests in the Proceeding Are Adequately Represented by the Temporary Administrator

CPLR 1013 provides that any person may, upon timely motion and pursuant to the court's discretion, be permitted to intervene in an action, *inter alia*, "when the person's claim or defense and the main action have a common question of law or fact." The questions of law and fact in the pending proceeding for probate of Mrs. Clark's Will, leaving the bulk of Mrs. Clark's Estate to charity and to Mrs. Clark's goddaughter and longtime nurse, are distinct from the questions of

law and fact raised by this proceeding by Bock and Kamsler to settle their accounting of their acts as Mrs. Clark's attorneys-in-fact. Thus, the Family Members' standing to appear in the probate proceeding does not afford them the right to intervene in this proceeding.

Furthermore, where the interests of a party seeking to intervene in an action or proceeding pursuant to CPLR 1013 are already adequately represented by a fiduciary or another party already appearing in such action or proceeding, a court may properly deny the request for intervention, in order to avoid duplication of efforts and added expense. See, e.g., Matter of Gregory, supra, in which the Westchester County Surrogate's Court denied a request by the New York Attorney General to intervene in a proceeding to determine the validity of a claim against a decedent's estate. The Attorney General argued in Gregory that, because he had appeared and been involved in the contested probate of the decedent's will, which resulted in the will being denied probate, his intervention in the proceeding to determine the validity of the claim was mandated in the interest of justice. The Surrogate's Court disagreed, finding that, besides the fact that the issues being litigated in the proceeding at bar were different from those litigated in the will contest, there was no evidence that the Public Administrator, as the fiduciary of the estate, could not or would not properly defend against the alleged claim, and stating:

There has been no showing that the fiduciary's interest in this proceeding is at variance with the interest of the Attorney-General to justify his intervention. Even such a showing would not make the Attorney-General a necessary party. The petitioner's obligation is no different than that of any other fiduciary, i.e., to honor valid claims and to defend against those of specious origin. This interest is identical to that of the Attorney-General or any other interested party and absent a showing of lack of diligence on the part of the Public Administrator, the Attorney-General's intervention at this juncture would not result in any tangible benefit to the estate and would unduly delay the determination of the claim. The Attorney-General will be a necessary party in the proceeding to settle the account of proceedings of the Public Administrator and will have an opportunity at that time of reviewing the acts and proceedings of the administrator. It is in an accounting proceeding that the conduct of a fiduciary with respect to the disposition of claims against decedent's estate should be reviewed. The settlement of claims is a

fiduciary act for which the fiduciary will be held accountable in the accounting proceeding. To permit legatees, distributees and other interested parties to intervene in a proceeding pursuant to SCPA 1809, would impose delays and unnecessary expense upon a decedent's estate without commensurate benefit and should be discouraged.

Id., 102 Misc.2d at 738 (emphasis added).

Here, as in Gregory, the interests of the parties seeking to intervene are identical to the interests of the Public Administrator, as fiduciary of the Estate, and there has been no showing that the Public Administrator is not adequately equipped and prepared to defend such interests. (Although, as noted *supra*, the Family Members' interests in the probate proceeding are distinct from their interests in the within accounting proceeding, there is no difference between the Family Members' interests in the accounting proceeding and the Public Administrator's interests in the same accounting proceeding.) Indeed, the Public Administrator has served document demands on Bock and Kamsler in this proceeding, has reviewed the Estate's files and been provided with copies of requested documents. Further, if Mrs. Clark's Will is denied probate and the Family Members' contingent interest in her Estate becomes a present interest, the Family Members will have an opportunity to review the Public Administrator's acts as temporary administrator, including the Public Administrator's handling of the attorney-in-fact accounting proceeding, in the proceeding to settle the Public Administrator's final account. Id. As in Gregory, allowing the Family Members to intervene in this proceeding will serve no discernible, legitimate purpose and will delay the proceeding unnecessarily.

There can be no doubt that the Public Administrator, as temporary administrator of Mrs. Clark's Estate, is authorized to examine and approve an accounting by Bock and Kamsler of their acts in their capacity as attorneys-in-fact for Mrs. Clark. As the Family Members acknowledge, while a fiduciary acting in one capacity may not account to himself in another fiduciary capacity,

SCPA 2210(10) permits a fiduciary (here, Bock and Kamsler) to account to an independent co-fiduciary (here, the Public Administrator). That is the situation here. However, the Family Members unsuccessfully attempt to establish that SCPA 2210(10) is not applicable here because the duty of attorneys-in-fact arises from common law rather than under the SCPA. In fact, the Surrogate's Court in Matter of Cohen, 139 Misc.2d 1082, 529 N.Y.S.2d 958 (Surr. Ct. Rensselaer Cty. 1988), cited by the Family Members, found that the Court had jurisdiction over, and authority to compel, an accounting by an attorney-in-fact, due in part to the broad and non-exclusive nature of the SCPA.

Further, incongruous to their argument that the SCPA does not apply to this accounting proceeding, the Family Members cite *SCPA 2205(2)(b)* in support of the proposition that "the Family Members would have standing to compel an accounting, had the Court not done so *sua sponte*." (See Family Members' November 28, 2011 Memorandum of Law in Support of Motion to Intervene [hereinafter "Family Members' Br."], p. 5). As discussed *infra*, the collection of estate assets is exclusively the duty of the fiduciary of the estate, and only when the fiduciary fails or refuses to perform such duty may the beneficiaries or potential beneficiaries assume this duty.

Matter of Seeger, 20 Misc.3d 1120(A), 867 N.Y.S.2d 378, 2008 WL 2795945 (Surr. Ct. Nassau Cty. 2008), also cited by the Family Members for the proposition that the duty of an attorney-in-fact to account has emerged from common law and is not governed by the SCPA, supports *Bock's and Kamsler's* position, not the Family Members'. In that case, a beneficiary of a decedent's estate sought an accounting from the decedent's attorney-in-fact for alleged misappropriation of decedent's assets during the decedent's lifetime. *Id.* at *1. The attorney-in-fact denied any misappropriation and moved to dismiss the petition, arguing that the

beneficiary's remedy lay in the context of the pending proceeding by the executor of the decedent's estate to settle the executor's accounting. Id. The Court recognized that, because an executor of an estate "stands in the shoes of the deceased principal", "[a]n executor has standing to compel a co-executor, who is an attorney-in-fact, to account, and an executor can commence a proceeding against a co-executor, who was an attorney-in-fact, in order to discover information or seek the return of property to the estate." Id. (citing Matter of Cohen, *supra*).

In addressing the question of whether a *beneficiary* of an estate has standing to compel the attorney-in-fact to account, however, the Court acknowledged that such a proceeding would be proper only "[w]here a fiduciary fails or refuses to bring an action", in which case the beneficiary would need to seek limited letters of administration pursuant to SCPA 702(9) in order to bring such a proceeding. Id. The Court stated: "However, where there is a pending accounting proceeding, the issue as to whether the executrix failed to collect assets of the estate should be resolved in the accounting proceeding." Id. Thus, the Seeger decision confirms that: (1) the Public Administrator has standing to compel and review an accounting by Bock and Kamsler, as attorneys-in-fact for Mrs. Clark; (2) such a proceeding could only be brought by the beneficiaries of Mrs. Clark's Estate if the Public Administrator failed or refused to bring such a proceeding; and (3) the Family Members' remedy in connection with this proceeding is their right to object to the final accounting by the Public Administrator. The Family Members can find no support for their intervention in Seeger, under the holding of which the intervention should be denied.

The remaining decisions cited by the Family Members in support of their motion to intervene are similarly distinguishable and/or not on point. See, e.g., Matter of St. John, 34 N.Y. Civ. Proc. R. 279, 93 N.Y.S. 836 (1st Dept. 1905) (allowing a potential intestate distribute to

intervene and object to an executor's accounting, where no other parties were representing his interests in the proceeding); Matter of Hammond, 94 Misc.2d 760, 405 N.Y.S.2d 594 (Surr. Ct. Dutchess Cty. 1978) (directing service of a trust accounting citation upon the beneficiaries of the trust, and finding that SCPA 2210, the provision permitting an independent trustee to represent the interests of the trust beneficiaries in an accounting by a co-trustee, did not envision a situation where the "independent" trustee was the attorney for the accounting trustee and the drafter of the accounting and, thus, was not truly independent).

As discussed *infra*, the Public Administrator is truly independent and is representing the Family Members' interests, such as they are, in the within proceeding. See also Matter of Gall, 20 Bedell 270, 74 N.E. 875 (1905) (involving a question of joinder of an infant distributee as a necessary party to an estate accounting, rather than a question of permissive intervention); In re Trustco Bank, 33 Misc.3d 745, 929 N.Y.S.2d 707 (Surr. Ct. Schenectady Cty. 2011) (recognizing that the Attorney General typically has sole standing to enforce a trust on behalf of potential charitable beneficiaries, but applying a limited case law-made exception to this rule, inapplicable to the facts in the proceeding at bar, allowing a "sharply defined" potential charitable beneficiary to intervene in a proceeding to enforce a trust); Plantech Housing, Inc. v. Conlan, 74 A.D.2d 920 (2d Dept. 1980), *appeal dismissed*, 51 N.Y.2d 862 (1980) (permitting a school district to intervene in a tax assessment proceeding because the district had a direct financial interest in the outcome of the proceeding and, as such, had been entitled to notice of the proceeding); Matter of Raymond v. Honeywell, 58 Misc.2d 963, 297 N.Y.S.2d 66 (Sup. Ct. Dutchess Cty. 1968) (same).²

² The Family Members expound, irrelevantly, upon the nature of Bock's and Kamsler's duty to account as Mrs. Clark's attorneys-in-fact, and the requirements and burdens of proof pertaining to such accounting. (See Family Members' Br., p. 5, fn. 1). As the Family Members correctly speculate that such matters are "perhaps peripheral to the issues of this motion" (*id.*), their discussion shall not be addressed in further detail here. However, it should be

C. Any Potential Prejudice to the Family Members Is Outweighed by the Potential for Undue Delay if They Are Permitted to Intervene

The Family Members claim that they will be substantially prejudiced if their motion to intervene in this proceeding is denied, because they will inherit Mrs. Clark's assets if the Will is denied probate, and this proceeding will affect the assets of the Estate. However, as noted *infra*, the Family Members have available the remedy of objecting to the Public Administrator's final accounting as temporary administrator of the Estate, if the Family Members ultimately believe that the Public Administrator has failed to collect all of the assets of Mrs. Clark's Estate. Matter of Gregory, supra; Matter of Seeger, supra. Further, the Family Members will have ample opportunity in the proceeding for probate of Mrs. Clark's Will to explore and conduct discovery into any allegations of undue influence upon Mrs. Clark by any person, as well as any allegations that Mrs. Clark suffered from diminished capacity, with respect to the propounded Will--which, in any event, is not the subject of this accounting proceeding. The Family Members should not be permitted to use this proceeding to supplement their right to discovery in the probate proceeding. The issues in the probate proceeding are separate and distinct from those in this accounting proceeding. Discovery in this proceeding should be targeted to any issues herein, not those in the probate proceeding. The Court should not allow the Family Members "two bites at the same apple."

Moreover, the potential for delay and added expense, if the Family Members are allowed to intervene, is substantial, and outweighs any potential prejudice to them if their motion to intervene is denied. There are twenty-one intestate distributees of Mrs. Clark, nineteen of whom

noted that Bock and Kamsler do not concede that the Family Members' application of the law is accurate. Furthermore, as already discussed, the interests of the Family Members are represented in the accounting that is the issue of this motion.

are seeking to intervene in this accounting proceeding. Judicial economy calls for the Public Administrator to advance the interests of these numerous individuals in this proceeding.

POINT II

THE FAMILY MEMBERS' MOTION IS UTTERLY LACKING IN SUPPORTING FACTS AND IS REplete WITH SCURRILOUS INNUENDO

The Affidavit of John R. Morken, Esq. of Farrell Fritz, P.C., counsel to the Family Members, sworn to on November 28, 2011 (the "Morken Aff."), is based on nothing more than hearsay and innuendo posing as "facts." It is rather telling that not one of the nineteen Family Members who seek to intervene in this proceeding has submitted an affidavit in support of their motion. The only likely explanation is that none of these Family Members has sufficient personal knowledge of the true facts relevant to this motion and proceeding, having had extremely little or no contact with Mrs. Clark at any time during her nearly 105-year life.

The following are just some examples of the unfounded and unsupported statements proffered by counsel for the Family Members.

- Mr. Morken claims: "Before the court are substantial and gravely serious issues of alleged deceit, undue influence and exploitation of a very elderly and extraordinarily wealthy woman at the hands of two professionals who, with the help of certain others, took control of her life, isolated her from family, and ultimately stripped her of her free will, as well as millions of dollars." (Morken Aff., ¶ 9) To the contrary, the only issue before the court in this proceeding is the accuracy, completeness and propriety of Bock's and Kamsler's accounting; and there have been no allegations of "deceit, undue influence [or] exploitation" of Mrs. Clark at the hands of Bock, Kamsler, or anyone else. Nor is

there any evidence before this Court that Bock and Kamsler took control of Mrs. Clark's life, isolated her from her family, or stripped her of her free will or her assets.

- Mr. Morken speculates that Bock and Kamsler accomplished their "exploitation" of Mrs. Clark "through the use of powers of attorney, and by reason of the control these so-called professionals had over all of the Decedent's affairs." (Id.) This baseless allegation is belied by the evidence before the Court, which reveals that for nearly the entire period covered by their account, Bock and Kamsler operated under only limited powers of attorney for Mrs. Clark which empowered them to act on her behalf with respect to certain bank accounts. See Accounting Petition, Tabs A3, A4, and A5.
- Mr. Morken's claim that Mrs. Clark has "fallen victim, it appears, to the greed of persons who had put themselves in a position of trust with [Mrs. Clark], and with the apparent assistance of others, had violated that trust" (Morken Aff., ¶ 11), is nothing more than rank speculation. Further, Mr. Morken observes that the facts at hand "require[] an exhaustive review of every transaction" completed by Bock and Kamsler on behalf of Mrs. Clark. This review is exactly what the Public Administrator is already working to complete. The Public Administrator, represented by both Milbank, Tweed, Hadley & McCloy LLP and Schram & Graber, P.C., does not need nineteen additional parties conducting this same review, and the motion provides no explanation as to how intervention will further the goal of complete review.
- Mr. Morken mischaracterizes Mrs. Clark's Will as "principally benefit[ing] Hadassah Peri..., [Bock and Kamsler], and a foundation controlled by" Bock and Kamsler (Morken Aff., ¶ 14). He conveniently omits the fact that the Will leaves a Monet painting worth millions of dollars, one of the Estate's most valuable assets, to the Corcoran Gallery of

Art in Washington, D.C. --an institute with which Mrs. Clark's family has a longstanding philanthropic relationship--³as well as the fact that Bock and Kamsler stand to receive \$500,000.00 each under the Will and, as such, are by no means "principal beneficiaries" of Mrs. Clark's Estate, valued in excess of \$400 million.

- Mr. Morken's claim that Mrs. Clark's Will "has the effect of changing [her] long-standing (since 1926) testamentary plan, most recently confirmed in a Will dated March 7, 2005, just six weeks before the date of the propounded instrument" (Morken. Aff. ¶ 18) is another blatantly misleading characterization. In fact, Mrs. Clark's 1926 and 1929 wills leave her entire estate to her mother, Anna Clark, who died in the 1960s. Bock and Kamsler do not concede that Mr. Morken's interpretation that the Family Members would have received anything under the 1926 and 1929 wills is correct. Moreover, Mrs. Clark may not have foreseen, in 1926 or 1929, that her mother would predecease her. Thus, any benefit that the Family Members might have stood to receive, by default, from Mrs. Clark's Estate under the 1929 will was merely incidental to the fact that Mrs. Clark's mother did predecease her and, thereafter, Mrs. Clark did not get around to updating her then-40-year-old will for another 40 years, approximately. Further, if Mrs. Clark's March 7, 2005 will "confirmed" anything, it was only Mrs. Clark's commitment to seeing that her long-time nurse Hadassah Peri, who was bequeathed \$5 million under that will, would be taken care of after Mrs. Clark's death.
- Mr. Morken suggests that trusts executed by Mrs. Clark and her mother in 1927 and 1926, respectively, demonstrate Mrs. Clark's testamentary intent to benefit the Family Members, since the Family Members would be entitled to "a substantial share (in the case of the May 1926 instrument) if not the entirety of the trust estate (in the case of the 1927

³ See Morken Aff., Exh. F (1926 trust) at ¶ Third(c).

instrument) in the event [Mrs. Clark] fails to exercise the powers of appointment granted to her thereunder" (Morken Aff. ¶ 21). Mr. Morken fails to acknowledge that Mrs. Clark did exercise the powers of appointment in favor of the beneficiaries of her Estate, via her Will. If the 1927 trust (of which the named takers in default are Mrs. Clark's mother, Anna Clark, if she survives Mrs. Clark, and otherwise Anna's sister and brother) and the 1926 trust (of which the named takers in default are Mrs. Clark's distributees and the Corcoran Gallery of Art) demonstrate anything about Mrs. Clark, her mother, and their respective testamentary intentions, it is the longstanding divide between the two branches of the Clark family, i.e., those individuals descended from Senator Clark's first marriage (including all of the Family Members), and those descended from Senator Clark's second marriage to Anna Clark (including, of course, Huguette Clark).

- Mr. Morken's indication that the "sudden change" (Morken Aff., ¶ 22) to Mrs. Clark's dispositive testamentary plan in 2005 "will be developed in the probate proceeding" and "will be understood within the context of Bock and Kamsler's stewardship over [Mrs. Clark] and her affairs over the last 15 years of her life" (Morken Aff., ¶ 23) is nothing more than a ploy to commingle the issues in this accounting proceeding with the separate issues in the probate proceeding. Petitioners respectfully submit that this Court should reject the Family Members' attempt to merge the two proceedings into one.
- Mr. Morken's implication that Bock "acted in a questionable manner" (Morken Aff., ¶ 23, fn. 5) by assisting in the preparation of the wills and trust of his partner, Donald L. Wallace, because Mr. Wallace happened to be Kamsler's client for accounting services and worked on Mrs. Clark's legal affairs before his death, is baffling. Is there a rule that

bars an attorney with experience in drafting wills and trusts from preparing such instruments for his law partner?

- Mr. Morken claims that Mrs. Clark "did not always live her life as a recluse." (Morken Aff., ¶ 24). Perhaps not, but there is evidence that Mrs. Clark lived an exceedingly private and solitary life since at least as early as her mother's death in the 1960s, long before she had any contact with Bock or Kamsler. Mr. Morken's insinuation that Mrs. Clark's reclusive tendencies had anything to do with Bock's and Kamsler's introduction to her is completely unfounded. Furthermore, this insinuation is belied by his statement that "by the late 1930s, Huguette essentially disappeared from view, and her activities were virtually unknown to the public." (Morken Aff., ¶ 27). It is worth noting that her activities appear to be similarly unknown to the Family Members who provide no factual evidence of any familiarity with Mrs. Clark or her life.
- The broad statement that Mrs. Clark "well knew and was proud of the fact that she was a Clark, and her family was integral to who she was" (Morken Aff., ¶ 29) is, like much of Mr. Morken's affidavit, pure conjecture, as is his declaration that from the time Bock and Kamsler were introduced to Mrs. Clark, "it appears that [they] controlled [Mrs. Clark's] personal and financial affairs." (Morken Aff., ¶ 31) There is no evidence of that before the Court and the limited powers of attorney Bock and Kamsler received do not suggest such control.
- Mr. Morken states that from 1996 through 2009, Bock and Kamsler were authorized "to have [Mrs. Clark's] vast wealth at their unfettered disposal for themselves and their family members." (Morken Aff., ¶ 32) The accounting does not reflect a single check

written to a member of Bock's or Kamsler's family and Mr. Morken's attempt to besmirch the families of Petitioners is excessive.

- Mr. Morken refers vaguely to contact between Mrs. Clark and her family, including "phone calls with certain relatives, as well as some correspondence." (Morken Aff., ¶ 33) If any of the Family Members spoke with Mrs. Clark by phone, Mr. Morken provides no evidence of or reference to it. In Mr. Bock's Affidavit, Exhibit I to the Morken Aff., at ¶ 10(u), Bock refers to monthly telephone calls he arranged and at ¶ 19(b), explains that the calls ended when "her hearing loss became acute." Bock's Affidavit, under oath, is in stark contrast to the unsupported allegations of Mr. Morken.
- Mr. Morken describes an alleged confrontation among Kamsler and certain of the Family Members in December 2008 regarding Kamsler's arrest and conviction earlier that year.⁴ However, in support of his description of this alleged confrontation he cites only to the petition in a 2010 guardianship proceeding commenced by the Family Members, which proceeding was rejected by the New York County Supreme Court because it was based solely on conjecture and was unsupported by any evidence. (Morken Aff., ¶ 36)
- Mr. Morken, after claiming that Bock and Kamsler did not disclose the true facts about Kamsler's conviction to Mrs. Clark, asks: "Would she have understood and appreciated it even if they did?" (Morken Aff., ¶ 39) Mr. Morken and his clients have no evidence that Mrs. Clark suffered from diminished capacity at any time during her life. It appears that the fact that she was over 100 years old is taken as reason enough for the Family Members to assume that she was incapable of understanding and appreciating facts

⁴ These events, recounted in Morken's affidavit, are utterly irrelevant to the within motion. Further, Kamsler consulted with Mr. Morken's law firm, Farrell Fritz, P.C., regarding his arrest and conviction, which calls into question Farrell Fritz's discussion of the matter and use of it against Mr. Kamsler.

disclosed to her. That is in itself an affront to the elderly and betrays a lack of knowledge of the woman at the center of this discussion, Mrs. Clark.

- Mr. Morken claims that Bock's and Kamsler's accounting "leaves issues unresolved, questions unanswered, and much to be clarified and explained." (Morken Aff., ¶ 46) Assuming that clarification and explanation regarding the accounting are needed, they will be addressed by the discovery that is ongoing by the Public Administrator. The Public Administrator does not need nineteen extra sets of eyes to help her read and interpret the accounting.
- Mr. Morken continues his innuendo, hypothesizing, with no supporting evidence whatsoever, that Mrs. Clark's Stradivarius violin and Renoir painting, which were sold during her lifetime, were "two of [her] most prized possessions" and that their sales were "[s]uspicious". (Morken Aff., ¶ 50) Mr. Morken provides no basis for making these assertions.
- Mr. Morken goes on to list the dollar amounts and recipients of various gifts and payments by Mrs. Clark, seemingly incredulous as to Mrs. Clark's generosity and automatically suspicious of Bock and Kamsler for following Mrs. Clark's instructions to make such gifts and payments. (Morken Aff., ¶ 52) The fact, as difficult as it may be for Mr. Morken and the Family Members to believe, is that Mrs. Clark was not the first wealthy individual to give away her fortune, nor will she be the last.

The Family Members' counsel's use of unsupported allegations and innuendo, and unnecessary dismissive treatment of innocent third parties named in the accounting (e.g., Solomon Antar, Esq., whom Mr. Morken brushes off as "the attorney for and relative of the notorious 'Crazy Eddie' Antar" and asks, rhetorically, what Mr. Antar "could [] have possibly

done for" Mrs. Clark (id.)), demonstrate that the Family Members have no interest in the facts; if they did, presumably they would have included some in their motion. The contents of the Affidavit show that the Family Members' intervention in this proceeding will afford no benefit whatsoever to the parties to the proceeding, but will delay the proceeding and confuse and obfuscate the issues.

CONCLUSION

For the reasons stated herein, the Family Members' motion to intervene should be denied.

Dated: December 16, 2011
New York, New York

HOLLAND & KNIGHT LLP

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