SURROGATES COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

****

In the Matter of the Petition of Craig Fisher and Cheryl Glaser, as creditors of the Estate of

LESTER FISHER,

Deceased,

pursuant to SCPA 1809 and 1418.

****

DECISION & ORDER

File No. 2015-83/D

ONOFRY - ACTING SURROGATE

In a proceeding pursuant to SCPA 1809 to determine the validity of the petitioners' claims and for related relief, (1) the petitioners move pursuant to CPLR 3212 (b) for partial summary judgment determining: (a) that they are entitled to one-third of the decedent's net estate and his coin collection; and (b) that they are not liable to the estate for any portion of the estate taxes; and (2) respondents Gwen Fisher, Casey Martin Fisher, Kyle Michael Fisher and Louis Dattilo, as co-executors of the decedent's estate, cross-move pursuant to CPLR 3212 (b) for partial summary judgment determining that (a) the petitioners are not entitled to one-third of the decedent's "net estate"; and (b) that the petitioners are subject to apportionment of estate taxes on their recovery, if any. Respondent Brian K. Fisher, who is also a co-executor of the estate, opposes the petitioners' motion and joins in the cross motion.

In 1949, the decedent married non-party Janice Levin. Together, they had three children: petitioners Craig Fisher ("Craig") and Cheryl Glaser ("Cheryl"), and respondent Brian K. Fisher ("Brian").

The Decedent's and Ms. Levin's Separation Agreement

In December 1978, the decedent and Ms. Levin entered into a Separation Agreement. Insofar as is relevant to this proceeding, that agreement provides as follows:

> 6. Will Provisions. The [decedent] shall forthwith make and keep in full force and effect until his death a Last Will and Testament, in proper form for probate, which shall provide for:
>
> > (a) a bequest to his Children of a sum equal to 1/3 of the [decedent's] net estate. The term 'net estate' shall mean the gross estate of the [decedent] as determined for the purposes of the federal estate tax, less funeral and burial expenses, administration expenses, debts and estate and other death duties and taxes imposed upon the [decedent's] estate; and
> >
> > (b) a bequest to the Children of all of the [decedent's] right, title and interest in and to a coin collection which the [decedent] represents is now located in bank vaults. . . During his lifetime, the [decedent] shall not sell, or transfer, or diminish the value of, the coin collection.
> >
> > In the event the [decedent] shall fail to leave a Last Will and Testament in keeping with the terms and provisions hereof, then, without limiting any other remedies that may be available, the [decedent's] obligations hereunder shall nevertheless be a first charge and lien against the [decedent's] estate and its assets.

The Separation Agreement defined "the Children" as Craig, Cheryl and Brian (hereinafter collectively referred to as "the Children").

In February 1979, the decedent and Ms. Levin were divorced pursuant to a Divorce Decree of a civil court in the Republic of Haiti. Pursuant to that decree, the Separation Agreement was incorporated, but not merged into, the decree.

A few months later, the decedent married respondent Gwen Fisher ("Gwen"). Together, they had two children, respondents Casey Fisher ("Casey") and Kyle Fisher ("Kyle").

On January 6, 2015, the decedent died testate, survived by Gwen and his five children. By decree dated February 26, 2015, this court (Everett, Acting Surrogate) admitted to probate the decedent's Last Will and Testament, dated August 10, 2011, a First Codicil, dated September 1, 2011, and a Second Codicil, dated September 14, 2012 (collectively referred to as "the Will"). Pursuant thereto, letters testamentary issued to Gwen, Brian, Casey, Kyle and the decedent's friend, Louis Dattilo (collectively referred to as "the Executors").

The Decedent's Will

Insofar as is relevant to these motions, in his Will, the decedent bequeathed $2,000,000.00 each to Cheryl and Craig, but he made no such general bequest to Brian. Except for specific bequests of certain real property and all of his tangible personal property to Gwen, and a general bequest of $125,000.00 to his sister, he bequeathed the balance of his estate to two different marital trusts for the benefit of Gwen, with the remainder to be distributed in equal shares to Brian, Kyle and Casey, *per stirpes* (in Articles FIFTH and SEVENTH, respectively). Those Trusts provide for the payment of income to Gwen, but the trustees do not have discretion or authority to invade principal for Gwen's benefit. Nowhere in his Will did he expressly mention or refer to his obligations under the Separation Agreement.

Additionally, Article FIRST of the Will (as amended by the Second Codicil) provides as follows:

> FIRST. All transfer, estate, inheritance, succession and other death taxes which become payable by reason of my death, if and to the extent that such taxes are imposed in respect of property owned by me and passing under this Will, shall be paid on a pro rata basis out of that portion, if any, of my estate for which no marital or charitable deduction is allowed for estate tax purposes.
>
> All other transfer, estate, inheritance, succession and death taxes which become payable by reason of my death in respect of any property not passing under this Will shall be apportioned against and paid by the persons in possession thereof or benefited thereby, in the manner provided by law.
>
> For the foregoing purposes, estate and inheritance taxes shall include any generation-skipping transfer tax on a direct skip taking effect at the time of my death (other than a direct skip from a trust not created by me), but no other generation-skipping transfer tax.

Brian's Waiver and Retraction of Waiver

Meanwhile, on August 5, 2015, Brian executed a "Waiver of Claim," in which he waived "any and all rights, claims, interest and demands" which he had or will have against the decedent's estate "with respect to, in or under" the Separation Agreement ("the Waiver"). However, on October 9, 2015, he executed a "Limited Recission [sic] of Waiver of Claim," in which he stated that in the Waiver, he had "waived any claims [he] had against [the decedent's] estate based upon the Separation Agreement, not any entitlements [he has] under the Separation Agreement" ("the Limited Rescission"). Therefore, he rescinded the Waiver "to whatever extent that [it] can be construed to mean that [he] renounced, waived, released and relinquished any and all rights, claims, interest

or demands which" he has under the Separation Agreement.

Additionally, on April 12, 2017, Brian executed a "Retraction of Waiver of Claim" ("the Retraction of Waiver"). Therein, he "retract[ed], *ab initio*, [the Waiver and the Limited Rescission] in their entireties." Further, he "retain[ed] and reserve[d] unto [himself] any rights, claims, interests and demands to which [he is] entitled or may hereafter acquire or possess against the [decedent's estate], CRAIG FISHER AND CHERYL GLASER" (Motion, Exhibit 8). On or about the same date, he served a Notice of Retraction of Waiver of Claim, along with the Retraction of Waiver, upon the Executors, and on April 19, 2017, he filed them with the court.

The Instant Proceeding

In September 2015, Craig and Cheryl each submitted to the Executors a Statement of Claim pursuant to SCPA 1803, with each seeking one-half of one-third of the decedent's net estate and one-half of the decedent's Coin Collection, with their respective Notice of Claim tracking the language of the Separation Agreement. In December 2015, the Executors rejected those claims.

Thereafter, in March 2017, Craig and Cheryl (collectively "the Petitioners") filed this proceeding pursuant to SCPA 1809 seeking, *inter alia*: (1) to allow their claims against the estate pursuant to SCPA 1809, awarding them one-third of the decedent's net estate (being no less than $85.3 million), with pre-judgment interest; and (2) awarding them the decedent's Coin Collection, as provided for in the Separation Agreement.

In their petition, they allege: (1) that the decedent failed to satisfy his obligations to Craig, Cheryl and Brian under the Separation Agreement, either by bequest in his Will or otherwise; (2) that Brian's Waiver of Claim was irrevocable, and therefore, that Craig and Cheryl are each entitled to one-half of one-third of the decedent's net estate, as required by the Separation Agreement; and (3) that the Executors wrongfully denied their claims.

The Executors and Brian have each filed an Amended Verified Answer in which they/he admit certain allegations, deny others and set forth several affirmative defenses to the petition. In sum, they assert that the Petitioners are not entitled to the relief sought, and they request that the court deny the petition in its entirety.

Now, the Petitioners move, and the Executors cross-move, pursuant to CPLR 3212 (b) for partial summary judgment as stated above. Brian has submitted papers in which he opposes the Petitioners' motion and joins in the Executors' cross motion.

In support of their motion, the Petitioners claim that the Separation Agreement is a valid contract, which the decedent breached by failing to bequeath to them one-third of his net estate and the Coin Collection. More specifically, they assert that the decedent did not satisfy his contractual obligation by making Brian a remainderman of the marital trust for Gwen. Additionally, they note that the decedent's Will contains no reference whatsoever to the Coin Collection.

In opposition to the motion and in support of the cross motion, the Executors and Brian assert that nothing in the Separation Agreement required the decedent to make a bequest of one-third of his net estate in equal shares to Craig, Cheryl and Brian. Rather,

they insist, how the bequest would be allocated was left to the decedent's discretion. Next, they claim that the decedent satisfied the requirement contained in the Separation Agreement by the $2 million bequests to Craig and Cheryl and the bequest to Brian of one-third of the remainder of the marital trusts. They also point to the $200,000 annual distributions which he arranged for Craig and Cheryl from his business, plus $2 million in life insurance proceeds to Craig, Cheryl and Brian. Finally, on this issue, the Executors and Brian contend that even if the court determines that the three children must be treated equally, Craig and Cheryl cannot recover one-third of the net estate because Brian has retracted or withdrawn his waiver of claim to share in the one-third of the net estate.

On a motion for summary judgment, the moving party must establish a prima facie case of its entitlement to judgment as a matter of law by submitting admissible evidence demonstrating the absence of any triable issue of fact (*see Erikson v J.I.B. Realty Corp.*, 12 AD3d 344 [2004]; *Taub v Balkany*, 286 AD2d 491 [2001]). "Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers. Moreover, since summary judgment is the procedural equivalent of a trial, any doubt as to the existence of a triable issue, or where the material issue of fact is arguable, the motion should be denied" (*Peerless Ins. Co. v Allied Building Prods. Corp.*, 15 AD3d 373, 374 [2005] [internal quotes and citations omitted]). Once the moving party makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof to establish the existence of material issues of fact which require a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Boz v Berger*, 268 AD2d 453).

More specifically as it relates to this proceeding, it is well settled that a separation agreement which is incorporated, but not merged into a judgment of divorce, is a contract which is enforceable according to its terms. As such, disputes over whether a party has breached its provisions are subject to general principles of contract interpretation (*Cohen v Cohen,* 163 AD3d 762 [2018]). That is, "when the terms of a separation agreement are clear and unambiguous, the general rule is that the intent of the parties is to be found within the four corners of the agreement. Whether an agreement is ambiguous is a question of law for the courts. The resolution of an ambiguous provision, for which extrinsic evidence may be used, is for the trier of fact" (*id.* [internal quotations and citations omitted]; *see Hudson v Hudson,* 163 AD3d 537 [2018]). Additionally, "[i]n interpreting a marital contract, a court should construe it in such a way as to give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (*Matter of Moss v Moss,* 91 AD3d 783, 784 [internal quotations and citations omitted]). However, "[a] court may not write into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning. The words and phrases used in an agreement must be given their plain meaning so as to define the rights of the parties" (*Cleva v Cleva,* 139 AD3d 785, 786 [internal quotations and citations omitted]).

(1) Whether the Decedent Breached the Separation Agreement

The first issue is whether Paragraph 6 of the Separation Agreement, in which the

decedent agreed to bequeath one-third of his net estate to the Children, is enforceable at all. The Executors contend that it is not enforceable because it is not supported by consideration. "An agreement to make a testamentary provision is an enforceable contract provided it is supported by valid consideration" (*Gutman v Gutman*, 31 AD3d 709 [citation omitted]). The Executors' claim is without merit. The Separation Agreement specifically provided that the agreements contained therein were "in consideration of the promises and of the mutual covenants and undertakings set forth herein" (Separation Agreement, p. 1). Regardless of whether or not Ms. Levin could have sought or obtained additional sums from the decedent in a matrimonial action, or that the decedent could not have been obligated to provide child support for the Children at that time, each party determined that their respective "promises and . . .mutual covenants and undertakings set forth" in the Separation Agreement constituted valuable consideration for his/her obligations thereunder. "The parties to a contract are free to make their bargain, even if the consideration is grossly unequal or of dubious value" (*Moezinia v Ashkenazi*, 136 AD3d 988, 989), and "the adequacy of consideration is not subject to judicial review absent fraud or unconscionability" (*159 MP Corp. v Redbridge Bedford, LLC*, 160 AD3d 176, 189; *see Apfel v Prudential-Bache Sec.*, 81 NY2d 470, 475). Here, if nothing else, Ms. Levin's own obligation contained in the Separation Agreement to "make and keep in full force effect" a will which provided for a certain bequest to the Children (Separation Agreement, ¶ 17) constituted sufficient consideration for the decedent's obligation to bequeath one-third of his net estate to the Children (*see Hollander v Lipman*, 63 AD3d 1086 [the fact that

decedent's daughter agreed to suffer a detriment provided sufficient consideration to support the alleged agreement]).

The next issue is whether the decedent breached the Separation Agreement by failing to include a provision by which he bequeathed one-third of his "net estate," as defined by the Separation Agreement, to the Petitioners and/or Brian. And, as framed by the parties on this motion, the determination of this issue necessarily involves the determination of three other issues: (1) the effect of Brian's Waiver and Retraction of Waiver; (2) whether the decedent had to make an outright bequest of one-third of his net estate to Craig, Cheryl and/or Brian, or whether he could satisfy that requirement by making one or more of them remaindermen of a trust; and (3) whether the decedent was required, by the terms of the Separation Agreement, to bequeath one-third of his net estate equally to Craig, Cheryl and Brian.

A waiver "is the voluntary and intentional relinquishment of a contract right" (Stassa v Stassa, 123 AD3d 804, 805 [2014], *lv dismissed* 25 NY3d 960 [2015]). "A waiver, to the extent that it has been executed, cannot be expunged or recalled, but, not being a binding agreement, can, to the extent that it is executory, be withdrawn, provided the party whose performance has been waived is given notice of withdrawal and a reasonable time after notice within which to perform" (*id.* at 806 [internal quotations and citations omitted]). To the extent Brian waived the decedent's performance under the Separation Agreement, his withdrawal of that waiver was effective under the circumstances. Brian gave the Executors notice of his withdrawal of the waiver and a reasonable time within which to perform

whatever obligations they have to him under the Settlement Agreement. Therefore, the Petitioners' claim that they are entitled to share equally one-third of the decedent's net estate is without merit. As the Executors suggest, at most, each petitioner would be entitled to a one-third share of one-third of the net estate.

Next, the court addresses whether the decedent could satisfy his obligation to provide "a bequest to his Children of a sum equal to 1/3 of [his] net estate" by naming one or more of them as a remainder beneficiary/beneficiaries of a trust. Because the Separation Agreement did not define the term "bequest," the court must turn to the definition contained in the SCPA. SCPA 103 (9) defines bequest as "[a] transfer of personal property by will," and that is the same definition which in 1978, when the decedent and Ms. Levin entered into the Separation Agreement. Further, a remainder interest in a testamentary trust is considered a bequest (*see e.g., Matter of Cianciulli,* 159 AD2d 569 [1990]; *Matter of Kander,* 115 Misc.2d 386 [Surr. Ct., Westchester County; 1982]). Therefore, the court concludes, the Separation Agreement permitted the decedent to make a bequest of one-third of his net estate to one or more of the Children, as remainder beneficiary/beneficiaries of a trust.

The court next turns to whether the Separation Agreement required the decedent to bequeath one-third of his net estate in equal shares to Craig, Cheryl and Brian. Simply stated, the Separation Agreement contains no specific or express language which either required the decedent to bequeath one-third of his net estate in equal shares to them, and the court cannot read that requirement into it (*see Matter of Rosen,* 128 AD2d 878 [1987];

Matter of Cali v Cali, ___ AD3d ___ [2d Dept., Nov. 7, 2018] [where separation agreement contained no language for modification thereof based on a party's adherence to agreed-upon schedule of parental access, "to so interpret the stipulation would be to imply a term which the parties themselves failed to insert"]; *Matter of Berlin,* 103 AD3d 797 [2013]). Therefore, the court denies that branch of the Petitioners' motion which is for summary judgment determining that the decedent breached the Separation Agreement in this respect.

The court, however, concludes that the Executors are not entitled to summary judgment determining that the decedent did, in fact, make a bequest of one-third of his net estate to the Children. In short, although Brian has received an indefeasibly vested remainder in the principal of the marital trusts (*see Matter of Junggren,* 48 AD2d 976 [1975]; EPTL § 6-4.7), the Executors have not established a prima facie case that Brian's one-third remainder interest in the marital trusts, plus the general bequests to Craig and Cheryl, amount to one-third of the decedent's net estate, as defined in the Separation Agreement. Notably, as part of their calculations, the Executors claim that the court should include in this calculation that: (1) the decedent arranged for Craig and Cheryl to receive distributions of $200,000.00 per year from his business; and (2) the decedent made each a beneficiary of a life insurance policy in the amount of $2 million. However, neither of these benefits constitutes a "bequest," as defined by SCPA 103 (9). Therefore, whether the decedent did, in fact, make a bequest of one-third of his net estate to the Children, as required by the Separation Agreement, cannot be ascertained until a final accounting by

the Executors (*see Matter of Rosen,* 128 AD2d at 880).

When it comes to the Coin Collection, however, the issue is a little different. Nowhere in his will did the decedent refer to, or make a bequest of, his Coin Collection to Craig, Cheryl and/or Brian. Therefore, the decedent clearly breached the Separation Agreement in this respect. However, that does not mean that Craig and Cheryl are entitled to summary judgment directing the respondents to turn over the Coin Collection to them. Rather, they would be entitled, at most, to two-thirds of the Coin Collection, with Brian being entitled to the remaining one-third of the collection. Moreover, because the court cannot determine the composition of the Coin Collection from the evidence submitted on this motion, it cannot direct the co-executors to turn over two-thirds of the Coin Collection to the petitioners. Questions of fact remain, such as how the collection should be divided between them.

(2) Whether the Petitioners are Liable for Payment of Estate Tax

Next, the court must determine whether the amount, if any, to which the Petitioners are entitled under the Separation Agreement is subject to estate tax. In doing so, the court must determine whether or not to consider the petitioners as creditors of the estate. If the court determines that the Petitioners are creditors of the estate, then any interest which they receive therein in satisfaction of their claim under the Separation Agreement is not subject to apportionment of estate taxes (*see Matter of Porter,* 12 Misc.2d 180 [1958]; *Matter of Brokaw,* 180 Misc. 490 [1943]), whereas if the court determines that they are not creditors, but rather equitable legatees, then any amount to which they are entitled as a

result of the decedent's alleged breach of this obligation under the Separation Agreement, would be subject to a ratable share of estate tax (*see Matter of Lipshie*, 30 Misc. 2d 306 [1961]; *Matter of Searles*, 82 NYS2d 219 [1948]).

In support of their respective motion and cross motion, the parties have each concluded that the case law is settled on this issue and that it unequivocally supports their respective positions. And, based upon the case law cited by the parties, a reading of those cases could, at first glance, lead to the conclusion that two contradictory lines of cases exist in New York when the courts are confronted with this issue. However, a closer reading of the cases reveals that whether the determination of this issue depends upon the underlying facts of each particular case. More specifically, it depends on whether the promise made was intended to satisfy some pre-existing obligation by the decedent, such as the payment of maintenance and/or child support, or whether the promise was merely an agreement to make a testamentary disposition. If it is the former, the claimant is considered a true creditor of the estate, and the obligation is not subject to estate tax. If it is the latter, the obligee under the contract is not considered a true creditor, but rather, an equitable legatee entitled to seek specific performance of the contract, and subject to apportionment of estate tax.

In several instances, the dichotomy is perfectly illustrated in the same matter. For example, in *Matter of Lewis* (4 Misc.2d 937 [Surr. Ct., Westchester County; 1953]), the decedent and his wife entered into a Separation Agreement which provided that he would make payments of $6,000/year to her. In the same Separation Agreement, the decedent

also promised to keep in effect a will pursuant to which he bequeathed his entire residuary estate into two trusts – one which was to pay income to his wife for life, and another for the benefit his two daughters. Following their divorce, the decedent executed a codicil to his will pursuant to which he bequeathed his entire estate, not only his residuary estate, to the two aforementioned trusts. In the meantime, the decedent married another woman, his surviving spouse, who exercised her right of election to take against the decedent's estate.

In the executors' accounting proceeding, the surviving spouse asserted that her right of election was superior to the former spouse's rights under the separation agreement, as well as their rights under the decedent's old will. The former spouse contended that her rights under both instruments, and those of the children under the old will, were superior to those of the surviving spouse under the right of election.

In his decision, the Surrogate determined that the former spouse was a creditor of the decedent to the extent that she was entitled to payment of $6,000/year pursuant to the separation agreement, and that the surviving spouse's right of election was "subject and subordinate to" that claim (*id.* at 939). However, the Surrogate also determined that the provision of the separation agreement which provided that his old will was to remain unchanged was an agreement to make a testamentary provision, and therefore, the former spouse and his children were "legatees and not creditors, and the rights of the surviving spouse are paramount to the rights of the widow and children of the former marriage" under the old will (*id.* at 940).

Similarly, in *Matter of Dunham* (63 Misc.2d 1029 [Surr. Ct., Greene County; 1970]), the decedent and his former spouse entered into a separation agreement pursuant to which, inter alia, he agreed: (1) to pay his former spouse $200/week until her death or remarriage; and (2) to bequeath all of his stock in certain corporations to his former spouse. The decedent's will did, in fact, contain such a provision, but his surviving spouse exercised her right of election under EPTL § 5-1.1.

In his decision, the Surrogate determined that the former spouse was a creditor of the estate with respect to the decedent's obligation to pay her $200/week, but a "contract legatee" with respect to his agreement to bequeath her the shares of the corporations. As such, the rights of the former spouse in this respect were subordinate to the surviving spouse's right of election (*id.* at 1034-1035).

Although the issues in those cases were different than the issue raised here, the ultimate question is the same – in the Separation Agreement at issue here, whether the decedent's obligation to bequeath one-third of his net estate to the Children constituted a promise to make a testamentary disposition. The court agrees with the Executors and Brian that it was, and the decedent's alleged breach thereof does "not constitute the [Children]...true creditor[s]; it would merely give rise to a right in equity to enforce the obligation of the [decedent]" (*Matter of Tanenbaum,* 258 AD 285, 289 [1939]; *see Matter of Taylor,* 95 NYS2d 459, 471 [Surr. Ct., Westchester County] [1950]). As such, to the extent that the court ultimately determines that the decedent breached his obligation to bequeath to the Children one-third of his net estate, and to the extent that the Petitioners

are entitled to enforce that obligation to the extent of any shortfall in his bequests to them, the Petitioners (and Brian) must pay their pro rata share of any estate taxes.

Accordingly, the court denies that branch of the Petitioners' motion which is for summary judgment determining that they are not liable to the estate for any portion of the estate taxes, and the court grants that branch of the Executors' cross motion which is for summary judgment determining that any estate tax resulting from the petitioners' recovery, if any, on their claim must be apportioned against them.

Counsel for the parties are to appear in court for a settlement conference on Thursday, January 17, 2019, at 10:00 a.m. Alternatively, counsel may contact the court to arrange a settlement conference on an earlier, mutually convenient date at the undersigned's chambers in Orange County.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

The following papers were considered on this motion:

(1) The Notice of Motion to Dismiss, dated May 29, 2018, and all papers and exhibits submitted therewith;

(2) The Stipulation, dated June 8, 2018;

(3) The Affidavit of Charles T. Scott, Esq., dated June 22, 2018, and all papers and exhibits submitted therewith; and

(4) The Notice of Cross Motion, dated June 22, 2018, and all papers and exhibits submitted therewith;

(5) The Reply Affirmation of Robert M. Abrams, Esq., dated July 18, 2018, and all papers and exhibits submitted therewith.

Dated: White Plains, N.Y.
November 30, 2018

HON. ROBERT A. ONOFRY
Westchester County Acting Surrogate

TO: Joshua S. Rubenstein, Esq.
Katten Muchin Rosenman LLP
575 Madison Avenue
New York, NY 10022

David N. Wechsler, Esq.
Moritt Hock & Hamroff LLP
400 Garden City Plaza, 2nd Floor
Garden City, NY 11530

Charles T. Scott, Esq.
Greenfield Stein & Senior, LLP
600 Third Avenue
New York, NY 10016

Kevin Matz, Esq.
Stroock & Stroock & Lavan LLP
180 Maiden Lane
New York, NY 10038

William D. Zabel, Esq.
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022

Gerald K. Geist, Esq.
Geist Schwarz & Jellinek, PLLC
One North Lexington Avenue, 11th Floor
White Plains, NY 10601