

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

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RADIO DRAMA NETWORK, INC,

Petitioner,

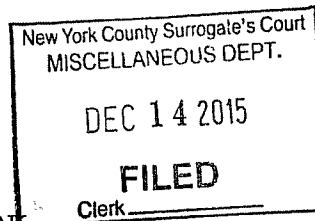
- against -

RICHARD L. KAY, Individually; as trustee of
the HIMAN BROWN REVOCABLE TRUST;
as trustee of the HIMAN BROWN
CHARITABLE TRUST; and as director of
RADIO DRAMA NETWORK; and the HIMAN
BROWN CHARITABLE TRUST,

Respondents.
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File No. 2010-2056

VERIFIED PETITION FOR
REFORMATION OF PROVISIONS
OF THE HIMAN BROWN
REVOCABLE TRUST, Himan
Brown, Grantor and Richard L. Kay,
Trustee; AND RELATED RELIEF



TO THE SURROGATE'S COURT, COUNTY OF NEW YORK.

Radio Drama Network, Inc. ("Petitioner" or "Radio Drama Network"), a New York Not-for-Profit Corporation, having an address at 7 Times Square, New York, New York, by Melina Brown, its President and Director, by and through its attorneys, Carter Ledyard & Milburn LLP, alleges as follows:

1. This petition concerns the actions of Richard L. Kay ("Kay"), a partner and co-leader of the Trusts and Estates practice at Pryor Cashman LLP, who fraudulently misled the then 94-year old Himan Brown ("Mr. Brown") into directing \$100 million away from Radio Drama Network, the charitable foundation Mr. Brown had established and to which he intended to leave his property. Instead, the \$100 million Mr. Brown intended Radio Drama Network to receive was diverted to a newly created charitable trust of which Kay serves as sole trustee (the "Charitable Trust"), to Kay's substantial personal benefit.

2. To effectuate this scheme, Kay drafted and fraudulently induced Mr. Brown to execute misleading will and trust instruments, including two misleading and contradictory instruments executed the same day. On that day, October 20, 2004, Mr. Brown signed a deceptively simple will (the "Will") in front of four Pryor Cashman lawyers that led Mr. Brown to believe that he was leaving his entire estate to Radio Drama Network as planned. However, at a separate meeting at Pryor Cashman's office that same day, with only Kay and one associate present, Mr. Brown was induced to sign a Restatement of his lifetime trust (the "Revocable Trust") that changed the residuary beneficiary of the Revocable Trust from Radio Drama Network to a new charity organized by Kay that was misleadingly described to resemble Radio Drama Network. The effect of this change was to divert \$100 million from Radio Drama Network to Kay's new foundation.

3. To prevent discovery of his fraudulent scheme, Kay concealed facts in violation of his fiduciary duties and exploited his multiple conflicting roles as will drafter, sole executor, sole trustee of the Revocable Trust, trustee of the benefiting Charitable Trust, and board member of Radio Drama Network. Kay's wrongful acts of concealment included arranging for notices intended for Radio Drama Network in the Himan Brown probate proceeding (the "Probate Proceeding") to be served only on himself, thereby concealing the 2004 events from Radio Drama Network; and creating falsified minutes of a Radio Drama Network board meeting that purported to make Kay a permanent member of Radio Drama Network who could not be removed, thereby obstructing Radio Drama Network from investigating and pursuing its claims.

4. Accordingly, as set forth below, this Petition seeks to invalidate the fraudulently induced provisions of the Revocable Trust, Articles 3(F) and 4(B); impose a constructive trust on the Charitable Trust and obtain turnover of its remaining assets; disgorge amounts improperly distributed by Kay to himself; for damages for fraud, breach of fiduciary duty, and violations of Judiciary Law Section 487, including punitive damages and treble damages of up to \$300 million; and for removal of Richard L. Kay as a director and purported member of Radio Drama Network.

BACKGROUND

5. Radio Drama Network is a New York private foundation dedicated to creating, promoting, and distributing radio dramas and supporting educational initiatives related to radio programming.

6. Himan Brown was the groundbreaking producer and creator of classic radio programs including “Dick Tracy,” “Adventures of the Thin Man,” and “Inner Sanctum Mysteries.”

7. Mr. Brown established Radio Drama Network in 1984, and, from that time forward, he participated actively in Radio Drama Network’s activities.

8. Mr. Brown often spoke to family, friends, and business associates about his intent to leave the bulk of his estate to Radio Drama Network.

9. Himan Brown died on June 4, 2010.

KAY'S FRAUDULENT SCHEME

The Overall Scheme

10. Kay's fraudulent scheme to divert Himan Brown's assets to benefit Kay personally was accomplished through changes to the Himan Brown Revocable Trust ("Revocable Trust").

11. In 2002, Kay drafted the Revocable Trust instrument. In that version, Radio Drama Network was the residuary beneficiary which would receive the majority of Mr. Brown's approximately \$100 million in assets upon his death.

12. At a deposition on May 24, 2011, taken in discovery for a challenge to the will by Himan Brown's son, Barry Brown (the "Kay Deposition"), Kay testified that between 2002 and 2004, all but a modest amount of Mr. Brown's assets were transferred into that Revocable Trust. Court papers filed by Kay in the Probate Proceeding indicate that only about \$200,000 in cash and securities plus two promissory notes remained in Mr. Brown's testamentary estate at the time of his death.

13. In 2003 and 2004, Kay drafted significant revisions to the Revocable Trust that diverted funds from Radio Drama Network and benefited Kay.

14. Upon information and belief, Mr. Brown made changes to distributions to family members, which served as the pretext for the various Restatements and amendments to the trust, and provided Kay with the opportunity to include undisclosed and unexplained changes that did not reflect the intentions of Mr. Brown.

15. In the 2003 revision to the Revocable Trust that increased Kay's commissions by up to \$1.7 million, the Revocable Trust was also amended to remove an

annuity for one family member and to distribute additional real property to a granddaughter.

16. Over a five-year period, Kay progressively increased the personal benefits to himself from Mr. Brown's assets, tightened his control over Mr. Brown's estate plan, and took steps to insulate himself from challenge.

17. As part of his scheme, Kay exploited the pride of Mr. Brown, who graduated from Brooklyn Law School in the early 1930s but had never practiced law, to suggest to Mr. Brown that he did not require a detailed explanation of the significant changes Kay had made to Mr. Brown's estate planning documents.

Chronology of Events

18. The key events are as follows:

2002

November 20, 2002 Revocable Trust Agreement

- Principal beneficiary (after distributions to family members) receiving the entire residuary is Radio Drama Network
- Kay, with Arnold Sheiffer ("Sheiffer"), is co-successor to Himan Brown as trustee of Revocable Trust

December 17, 2002 Will

- Bequeaths entire estate to Revocable Trust (which in turn directs funds to Radio Drama Network)
- Kay and Sheiffer are co-executors, each entitled to half executor commissions

2003

July 8, 2003 Trust "Restatement"

- Trustee of Revocable Trust to receive commissions at the executor rate rather than the trustee rate (a \$1.7 million increase)
- Sheiffer is removed as co-trustee of Revocable Trust and instead is named as Kay's successor

Same day: new Will

- Kay made sole executor and Sheiffer is removed as co-executor

2004

October 20, 2004 Trust Restatement

- By this date, all but a modest amount of Mr. Brown's assets have been moved to the Revocable Trust
- Assets (after distributions to family members) to Kay's newly created Charitable Trust instead of Radio Drama Network
- Kay and Sheiffer to be co-trustees of Charitable Trust

Same day: new Will

- Estate to Radio Drama Network, but nearly all assets already have been transferred to Revocable Trust

2005

February 8, 2005 Assignment of Tangible Property

- Mr. Brown's tangible personal property transferred to Revocable Trust

November 21, 2005 Trust Restatement

- Trustee can employ own firm as Trust's counsel
- Trustee given absolute discretion to impose conditions on distribution to Mr. Brown's granddaughter, Melina Brown

2006

December 1, 2006 First Amendment to Trust

- Kay can designate own successor for Revocable and Charitable Trust
- Sheiffer removed as co-trustee of Charitable Trust

Radio Drama Network

- Certificate of incorporation amended to require "members"

2007

Radio Drama Network

- Minutes of February 7, 2007 board meeting purportedly appoint Kay as a "permanent member" of Radio Drama Network who cannot be removed
- Minutes falsely state that Eli Kopelman was present and voted for this action, although Mr. Kopelman never acted as a director during Mr. Brown's lifetime
- Minutes signed by Kay as Secretary list membership of the Board of Directors inconsistently with state and federal filings for Radio Drama Network signed by Kay on penalty of perjury

2010

Probate of Himan Brown's Estate

- Himan Brown dies on June 4, 2010
- Petition for Probate and Letters Testamentary executed by Kay on June 17, 2010 lists approximately \$200,000 in cash and securities plus two promissory notes remaining in Mr. Brown's probate estate for Radio Drama Network

- Charitable Trust's 2010 filing for the year ending March 31, 2011 lists approximately \$98 million in assets transferred from Revocable Trust to the Charitable Trust

The Critical October 20, 2004 Amendments

19. The critical event of Kay's scheme took place on October 20, 2004, when Mr. Brown was fraudulently induced to execute documents that diverted the bulk of his estate away from Radio Drama Network to a new Charitable Trust controlled by Kay.

20. On October 20, 2004, Mr. Brown was 94 years old.

21. Kay drafted instruments for execution on October 20, 2004 that changed what had previously been a will directing Mr. Brown's relatively modest remaining assets into a Revocable Trust that held the bulk of Mr. Brown's assets, with Radio Drama Network as residuary beneficiary of that trust.

22. On October 20, 2004, Mr. Brown executed a will that left his entire estate directly to Radio Drama Network, and, according to witnesses to the will's execution and other testimony, Mr. Brown understood that he was leaving his assets to Radio Drama Network, the charitable foundation he had created twenty years earlier.

23. However, at the Kay Deposition, Kay testified that substantially all of Mr. Brown's assets had already been transferred to the Revocable Trust prior to October 20, 2004. Upon Mr. Brown's death, the testamentary estate was valued by Kay at approximately \$200,000 plus two promissory notes, and the Revocable Trust was valued at approximately \$100 million.

24. The October 20, 2004 Restatement of the Revocable Trust changed the principal beneficiary from Radio Drama Network to a new trust (the "Charitable Trust") whose charitable purposes were misleadingly drafted by Kay to resemble those of Radio

Drama Network, but in fact allowed Kay absolute discretion to disregard Mr. Brown's intended charitable focus on radio dramas.

25. Accordingly, the net result of the actions at Pryor Cashman on October 20, 2004 was that Radio Drama Network was removed as the beneficiary of all but a token amount of Mr. Brown's assets.

26. The 2004 Restatement included a co-trustee of the Charitable Trust, but Kay never informed that co-trustee of the Charitable Trust's existence, and Kay drafted a 2006 amendment that eliminated that co-trustee, leaving Kay as sole trustee.

27. In sum, the Revocable Trust gave control over substantially all of Mr. Brown's assets to Kay, who has exploited that control for his personal benefit, in disregard of the express intent of Mr. Brown's will and prior estate plan.

28. Nothing in the testimony of the Pryor Cashman attorneys who supervised, witnessed, and notarized the execution of these instruments on October 20, 2004 indicates that anyone explicitly discussed with Mr. Brown this major change in Mr. Brown's estate planning to disinherit Radio Drama Network and direct substantially all of Mr. Brown's assets to a new entity.

29. Upon information and belief, changes to pre-residuary distributions to family members served as the pretext for Kay's revisions to the Revocable Trust in 2003 and 2004.

30. Under Kay's stewardship, the bulk of the Charitable Trust's donations have been for Kay's own personal charitable goals rather than to further Mr. Brown's longstanding charitable intent to promote the spoken word. These included lavish gifts to

schools attended by Kay and his children and grandchildren, but institutions to which Mr. Brown himself had no connection.

31. Kay has never offered any explanation of these contradictory dispositions of Himan Brown's assets on the same day or documentary evidence suggesting that Mr. Brown intended to disinherit Radio Drama Network as the principal beneficiary of his estate plan.

32. Kay effectuated these changes while acting as a board member of Radio Drama Network and, upon information and belief, never advised Mr. Brown to consult with independent counsel, without conflicting interests and loyalties, to effectuate any changes truly desired by Mr. Brown.

33. Mr. Brown continued to be actively involved in Radio Drama Network until his death in 2010 and generally acted as though he understood that Radio Drama Network would be his primary beneficiary.

34. On June 18, 2010, Kay signed an affirmation swearing that "I was the draftsperson of the last will and testament offered for probate."

35. At the Kay Deposition, Kay testified that he chose not to be present at the October 20, 2004 execution of Mr. Brown's will and that he has no notes regarding the supervision of that will execution. Because he chose not to be present, Kay was also not available to answer any questions that Mr. Brown might have had about the disposition of his assets.

36. The October 20, 2004 Revocable Trust document was executed away from the eyes of three of the four Pryor Cashman lawyers who were present for the will execution the same day.

37. Only Pryor Cashman associate Alan Laufer was present for the execution of both documents.

38. Alan Laufer supervised the execution of Mr. Brown's 2004 will and was deposed in the Probate Proceeding on May 26, 2011 (the "Laufer Deposition"). At his deposition, Alan Laufer testified that the entire process of reading and executing the will took approximately ten to fifteen minutes.

39. Alan Laufer also notarized Mr. Brown's signature on the 2004 Restatement of the Revocable Trust. At the Laufer Deposition, Alan Laufer did not recall Mr. Brown reading the Revocable Trust at the time of execution and could not recall any discussion with Mr. Brown regarding the substantial 2004 changes to the Revocable Trust, which effectively disinherited Mr. Brown's longtime charitable enterprise.

40. Upon information and belief, the two separate execution meetings for the Will and Revocable Trust were designed to prevent discovery and discussion of the relationship between the two documents and the fact that Radio Drama Network would receive almost nothing upon Mr. Brown's death.

41. Mr. Brown made a \$4 million gift to Radio Drama Network in 2004, the same year as the Revocable Trust redirected Mr. Brown's assets to the new Charitable Trust set up and ultimately controlled by Kay.

Misleading and Confusing Statement of Purpose of Charitable Trust

42. The description of the purpose of the Charitable Trust in the 2004 Restatement was drafted to be similar to the purpose of Radio Drama Network in order to mislead Mr. Brown and insulate the instrument from challenge.

43. Consistent with Mr. Brown's life and work, the Certificate of Incorporation for Radio Drama Network, dated June 18, 1984, states that:

"The purpose for which the Corporation is formed is to cultivate, promote, foster, sponsor and develop the appreciation, understanding, taste and love of radio drama and for that purpose" (emphasis supplied) including "(a) to conduct activities which are exclusively charitable ... ; (b) to create, produce, market and distribute radio dramas; (c) To create, produce and distribute cassettes of radio dramas (d) To develop teachers' manuals and training materials in relation to the radio dramas and to distribute these manuals and training materials to libraries, schools, colleges and other educational institutions; (e) To create, produce and distribute documentaries, news programs and other radio series; (f) To adapt radio dramas for use on cable television, broadcast television and other media; (g) To create and produce radio dramas for the Armed Forces Radio Service; and (h) To conduct any and all other activities as shall from time to time be found appropriate in connection with the foregoing, and as are lawful for a Not-for-Profit corporation.

44. Article "THIRD" of the Revocable Trust, dated October 20, 2004, states in paragraph (F)(1) that:

"The primary purposes of the [Charitable Trust] are (1) to sponsor programs and make grants to organizations or institutions, described in Section 501(c)(3) of the Code, sponsoring programs relating to the production and/or distribution of dramatic or documentary productions, whether live or via recorded medium of any kind, and whether such productions are purely audio or include video content, emphasizing the importance and centrality of language and the spoken word as a medium of communication and (2) to provide grants to academic institutions providing education and training in the use and application of the spoken word" (emphasis supplied).

45. However, a subsequent paragraph (F)(3) of the Revocable Trust provides that "The Trustees [of the Charitable Trust] shall apply the trust fund, at such times, in such manner, and in such amounts as they may determine, to the uses and purposes set forth in paragraph F. 1., of this Article THIRD or they may make contributions to other charitable organizations or institutions to be used within the United States or any of its possessions." (emphasis supplied)

46. Upon information and belief, Kay has taken full advantage of the exception he drafted in Paragraph (F)(3) of the Revocable Trust: the Charitable Trust has made no contributions for programs to support radio drama or the spoken word since receiving the assets of the Revocable Trust in or around 2010.

47. Since 2010, the Charitable Trust has made gifts of over \$3 million to the 92nd Street Y, where Kay is a member of the Board of Directors; over \$1 million to Cornell University, Kay's undergraduate alma mater, where Kay is a life member of the Cornell University Council; to the University of Michigan Law School, which both Kay and his son attended; and to the Aidan Montessori School, which Kay's grandchild attended at the time of the grants, and to numerous charities based in Miami. While arguably worthy recipients, none of these has any particular connection to Mr. Brown or his interests during his lifetime.

48. Matthew Forman, a paid consultant of the Charitable Trust, has stated that the focus of the Charitable Trust is children's health in south Florida, a cause that was not the subject of Himan Brown's charitable giving during his lifetime.

49. Upon information and belief, in exercising sole control of the Charitable Trust's gift giving, Kay has been motivated by the personal benefits, access, and preferential treatment that accrue from leadership positions at charitable institutions as a result of significant charitable giving, including potential board memberships, influence with charitable institutions and their board members, benefits to his private practice as an attorney, favoritism in academic admissions for his family members, and more. In other words, Kay has been using Mr. Brown's money to further Kay's own personal interests.

Breach of Fiduciary Duty and Conflict of Interest

50. As a member of the board of directors of Radio Drama Network from approximately 2000 to the present, Kay owes Radio Drama Network a fiduciary duty of care; duty of loyalty, and duty of obedience.

51. Kay, in his capacity as Mr. Brown's lawyer, drafted Revocable Trust revisions that, in 2003, increased his commissions by approximately \$1.7 million, at the expense of Radio Drama Network, and, in 2004, diverted a \$100 million benefit from Radio Drama Network.

52. Trustee fees paid to Kay reduce the amount payable to the residuary beneficiary of the Revocable Trust, which in 2003 was Radio Drama Network.

53. Kay's interest in increasing his commissions and directing Radio Drama Network's bequest to the Charitable Trust were directly adverse to Radio Drama Network's interests.

54. Even if Mr. Brown had requested and authorized the 2003 and 2004 revisions to his Revocable Trust that increased Kay's commission and redirected the residuary away from Radio Drama Network, Kay was obligated by the applicable ethical rules to refer Mr. Brown to independent counsel to advise him and effect this transaction. That would have had the additional benefit of documenting and substantiating Mr. Brown's actual intentions with respect to the transaction.

55. Upon information and belief, there is no written record of any disclosure by Kay to Mr. Brown or to Radio Drama Network of Kay's conflicts of interest, much less any waiver of those conflicts through informed consent of the parties.

PERSONAL BENEFIT TO KAY

Revocable Trustee Commissions at Six Times the Otherwise Applicable Rate

56. In 2003, Kay revised the Revocable Trust to provide for trustee commissions at the statutory executor rate.

57. The statutory rate set for executor commissions is higher than the statutory rate for trustee commissions to reflect the greater administrative burden of the probate estate administration process.

58. For a trust of approximately \$100 million, under the statutory rates set forth in SCPA § 2309, commissions at the executor rate would be approximately \$2 million, which is \$1.7 million greater than the trustee rate of approximately \$300,000 per year.

59. Mr. Kay had distributed the approximately \$98 million residuary of the Revocable Trust to the Charitable Trust on or before March 31, 2011, which is within one year of Mr. Brown's death.

60. Increased commissions of approximately \$1.7 million more than the statutory rate of approximately \$300,000 for administering the Revocable Trust assets for less than one year are the functional equivalent of a gift to Kay.

61. Under the Internal Revenue Code, 26 U.S.C. § 2512, and applicable judicial decisions, when property or payment is transferred for less than full value, including overpayment of trustee fees, such overpayment is a gift.

62. Payment of commissions to Kay at the executor rate for his administration of the Revocable Trust constitutes unreasonably excessive compensation for the services performed by Kay.

63. Upon information and belief, there was no arms-length bargaining between Kay and Mr. Brown for the increased commission for Kay or discussion of the appropriate commission amount; the increased commission does not constitute a transaction in the ordinary course of business; there is a substantial disparity between a reasonable fee and commissions at the executor rate; and, thus, Kay's commissions are therefore appropriately treated as a gift; which requires clear and convincing evidence of the donor's intent to establish the alleged gift's validity.

64. Upon information and belief, Mr. Brown would not have voluntarily paid Kay \$1.7 million more than the statutory rate for administering the Revocable Trust.

65. Upon information and belief, Mr. Brown would not have voluntarily paid Kay an amount in a similar range as Mr. Brown was distributing to his granddaughters from the Revocable Trust.

66. In addition to Revocable Trustee fees, Kay has distributed approximately \$550,000 in Charitable Trustee fees to himself to date.

67. Kay has distributed to himself as trustee of the Charitable Trust \$175,000 for the year ending March 31, 2012; \$225,235 for the year ending March 31, 2013, and \$120,000 in the year ending March 31, 2014 for serving as a trustee of the Charitable Trust, evidently availing himself of the statutory commissions for serving as trustee of the Charitable Trust that he organized, for as long as he chooses to act as trustee.

68. Upon information and belief, the amounts Kay distributed to himself as trustee of the Charitable Trust are not reasonable compensation for services actually rendered to the Charitable Trust, and constitute excessive compensation under Section 4941(d)(2)(E) of the Internal Revenue Code and Treasury Regulation 1.162-7.

Lack of Written Authorization

69. A non-lawyer, or a lawyer who was not experienced in trusts and estates practice, would be unlikely to notice or understand the significance of a change in the calculation of commissions from the trustee rate to executor rate.

70. As the drafter of these instruments and as Mr. Brown's attorney, Kay has the burden of demonstrating that the 2003 Restatement of the Revocable Trust that effected this change and provided a personal benefit to Kay was requested and understood by Mr. Brown.

71. Upon information and belief, Kay never disclosed to Mr. Brown that the 2003 and later versions of the Revocable Trust instruments provided for a six-fold increase in trustee fees to be paid to Kay for the Revocable Trust administration, in addition to Charitable Trustee fees to Kay and his successor trustees for the duration of the Charitable Trust.

72. New York State professional ethics rules prohibit attorneys from soliciting gifts from clients.

73. In 2004, Code of Professional Responsibility EC 5-5 provided that:

"[a] lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."

74. Upon information and belief, Kay did not recommend that Mr. Brown seek advice from independent counsel regarding his gift to Kay and did not arrange for independent counsel to draft the trust instrument providing the benefit to Kay.

75. New York Rule of Professional Conduct 1.8(c), which was in effect at the time of Mr. Brown's death, flatly prohibits an attorney from either soliciting or preparing instruments effecting gifts from clients to themselves unless the client is a family member, and even so only upon terms a reasonable attorney would deem fair and reasonable.

76. Upon information and belief, Mr. Brown was not aware or informed of the amount of the commissions that were to be paid to Kay for serving as trustee of either the Revocable Trust or the Charitable Trust.

77. At the Kay Deposition, Kay did not cite to any written communication from Mr. Brown clearly evidencing Mr. Brown's intention to create the Charitable Trust.

78. At the Kay Deposition, Kay admitted "[s]upervising the drafting" of the 2004 changes to the Revocable Trust.

79. At the Laufer Deposition, Alan Laufer testified that he prepared the 2004 Restatement of the Revocable Trust pursuant to Kay's instructions and did not discuss them with Mr. Brown.

80. At the Kay Deposition, Kay stated that the instructions for the 2003 Revocable Trust amendment came directly to him from Himan Brown "orally."

81. Kay claimed that the terms for the 2004 Restatement came from Himan Brown "[p]rimarily to me. ... During communications, ongoing communications with Mr. Brown."

82. Where an attorney-draftsperson drafts a testamentary instrument of which s/he is a beneficiary, the attorney-draftsperson has the burden of proving that there has been no undue influence.

83. Any testimony Kay may offer regarding Mr. Brown's alleged oral instructions to him would not be admissible at trial under the Dead Man's Statute.

84. Upon information and belief, Kay did not advise Mr. Brown to consult and employ disinterested counsel to draft his Will or any versions of the Revocable Trust or Charitable Trust.

85. Kay cannot meet his burden to show the lack of fraud or undue influence in the drafting of the will and Revocable Trust revisions in 2003 and 2004.

KAY'S CONCEALMENT OF HIS FRAUD

Concealment of 2004 Revocable Trust Amendment

86. Kay selectively disclosed amendments and Restatements of the Revocable Trust and concealed the existence of the 2004 Restatement, preventing his fellow Radio Drama Network directors from discovering what he had done or effectively challenging the changes to the Revocable Trust that harmed Radio Drama Network.

87. On or about September 15, 2010, in registering the Charitable Trust with the Charities Bureau of the New York Attorney General's Office as required by EPTL § 8-1.4, Kay filed only the 2005 and 2006 Revocable Trust instruments as the documents that created the Charitable Trust, and omits mention of the 2003 and 2004 revisions, concealing the fact that there was a trust restatement on the date of the 2004 Will signing that radically altered the disposition of Mr. Brown's assets in a manner that benefited Mr. Kay personally.

88. Upon information and belief, Kay also concealed the 2003 and 2004 revisions by failing to disclose them in the Form 2013 Application for Recognition of Exemption for the Charitable Trust signed by Kay on or about September 14, 2010 under penalty of perjury and submitted to the Internal Revenue Service.

89. By concealing the 2004 revisions to the Revocable Trust, Kay diverted attention from the inexplicable fact that, on the same day Mr. Brown executed a will reaffirming Radio Drama Network as the beneficiary of his estate, Himan Brown also executed an inconsistent document creating the Charitable Trust and leaving it his \$100 million estate instead of leaving it to Radio Drama Network as he planned to do.

90. There is no evidence from the Will witness testimony in depositions that Himan Brown understood that, while he was disposing of the property that would pass through his Will to Radio Drama Network, the bulk of his property would pass through the Revocable Trust to a different charity set up by Kay.

91. There is no evidence from deposition testimony in the Probate Proceeding that Himan Brown understood only \$200,000 would be distributed to Radio Drama Network in his Will after the Revocable Trust amendment was signed.

92. It is customary for trust instruments, like other legal documents, to recite previous versions.

93. Significantly, the 2005 version of the Revocable Trust is entitled the "Restatement" of the 2002 trust, but does not mention the 2003 or 2004 versions in the title of the instrument or in the recitation of previous versions that is included in the first paragraph of the instrument.

94. The 2006 version of the Revocable Trust is entitled the “first amendment” to the 2002 trust, and recites only the 2002 and 2005 versions.

95. By omitting reference to the 2003 and 2004 versions of the Revocable Trust, Kay concealed his diversion of Mr. Brown’s assets.

96. After Himan Brown’s death, Kay sent Melina Brown the Will and the 2005 and 2006 versions of the Revocable Trust, both of which omit any reference to the 2004 version.

Concealment of Probate Filings from Radio Drama Network

97. After Himan Brown’s death, Kay filed a Petition for Probate and Letters Testamentary dated June 16, 2010 in the Probate Proceeding for estate of Himan Brown.

98. In the Petition for Probate, Kay stated that the address of the residuary beneficiary Radio Drama Network was “c/o Pryor Cashman LLP” at 7 Times Square, New York, NY 10036-6569.

99. All probate filings or notices for Radio Drama Network were sent to Pryor Cashman LLP.

100. Despite Radio Drama Network’s obvious interest in the proceedings, Kay did not arrange for or suggest that Radio Drama Network retain counsel to enter an appearance in the Probate Proceeding.

101. Kay did not represent Radio Drama Network as an attorney in the Probate Proceeding.

102. By letter dated August 20, 2010, Pryor Cashman denied that it had any role in the Probate Proceeding.

103. To conceal his wrongdoing and conflicts of interest, Kay failed to distribute court papers, notices, citations, filings and court orders in the Probate Proceeding to Radio Drama Network's other directors.

104. Upon information and belief, Kay failed to inform the Surrogate's Court of his conflict of interest in gathering assets as sole executor for the Estate of Himan Brown, which would require him to determine whether any tangible or intangible property had been transferred to the Revocable Trust and would be transferred to the Charitable Trust that he controlled, or whether it belonged to Himan Brown at his death and would therefore be inherited by Radio Drama Network.

105. Kay did not send the other directors of Radio Drama Network the Surrogate's Court filings disclosing Kay's estimate of only \$200,000 in cash and securities in the estate.

106. Kay refused to discuss the Will, Revocable Trust, or Charitable Trust in response to questions from other directors at Radio Drama Network board meetings.

107. Delay in learning of the status of the Probate Proceeding operated to the detriment of Radio Drama Network.

108. On or about February 8, 2011, Mr. Brown's son, Barry Brown, filed an affirmation opposing the probate of Mr. Brown's will.

109. The challenge to the Will filed by Mr. Brown's son led to the public disclosure of the 2004 changes to the Revocable Trust that established the Charitable Trust.

110. Kay did not send the other Radio Drama Network board members court papers, notices, subpoenas and court orders and decisions in connection with the Barry Brown challenge to the Will.

111. As a result, Radio Drama Network board members other than Kay did not learn of the 2004 amendments to the Revocable Trust until much later.

112. The other directors of Radio Drama Network were not informed of the conference in the Surrogate's Court on April 6, 2011, at which discovery concerning the drafting and execution of Mr. Brown's Will was discussed, and, as a result, did not learn of its rights to obtain information, obtain drafts of the Will and Revocable Trust, and be present at depositions of witnesses including Kay.

113. On or about July 7, 2011, the Surrogate's Court required Kay, as proponent of the Will, to serve a July 7, 2011 Citation pursuant to SCPA § 1411 on Radio Drama Network and the New York State Office of the Attorney General Charities Bureau (the "Citation").

114. The Citation informed Radio Drama Network and the Charities Bureau that "YOU ARE HEREBY CITED TO APPEAR at the Surrogate's Court ... on July 20, 2011 at 9:30 am."

115. The Citation informed Radio Drama Network and the Charities Bureau of the objections to Mr. Brown's Will that were filed by Barry Brown, and stated that

"You have the right to have an attorney appear for you. If you do not appear, you will not be entitled to further notice and each objection may be determined at a trial, or at a conference or hearing on the above date or a date to be fixed by the Court. If a settlement is entered into and agreed to by all parties appearing at the trial, hearing or conference, such settlement and any final determination by the Court will be binding on all persons who have waived or have been served with the Citation and who have failed to appear. Any person so failing to appear may be required to contribute to such settlement an amount which bears the same

proportion to the total amount of the settlement as his or her interest in the estate bears to the aggregate of the interests of all persons required to contribute to the settlement.”

116. The attorneys for Kay, as proponent of the Will, served the Citation for Radio Drama Network only on Kay.

117. On or about July 7, 2011, at 4:41 p.m., Kay accepted service of the Citation on behalf of Radio Drama Network.

118. Kay did not inform the other directors of Radio Drama Network of the July 20, 2011 court date and its significance. Kay thus deprived Radio Drama Network of its right to retain counsel and participate in the proceedings in order to protect its interests.

119. Because of Kay’s fraudulent acts of concealment, Radio Drama Network did not exercise its right to be present at the depositions of Kay and other witnesses or to demand or review documents produced pursuant to SCPA § 1404.

120. The Court indicated in its decision denying Barry Brown’s objections to the Will for lack of standing that Radio Drama Network would have standing in a challenge to the Revocable Trust, stating that “objectant’s theory might have some use on a challenge to the trust” by “someone other than objectant” who had a “beneficial interest in [a] prior version of it” -- in other words, Radio Drama Network.

121. Kay’s court papers submitted in opposition to Barry Brown’s challenge to the Will tacitly acknowledge Radio Drama Network’s interest in the proceedings, by stating on page 4, footnote 3 of the reply memorandum dated April 23, 2012, that if the Revocable Trust were to fail in its entirety, its \$100 million corpus would pass through

the Will, *i.e.*, to Radio Drama Network, and recognizing that the Attorney General has statutory standing to protect the interests of charitable beneficiaries.

122. Kay's deceptive actions prevented Radio Drama Network from learning the relevant facts and taking action prior to the admission of the Will to probate or prior to the distribution of \$100 million to the Charitable Trust controlled by Kay. This concealment was, among other things, a flagrant breach of his fiduciary duty as a director of Radio Drama Network.

123. Kay also did not inform Radio Drama Network's other directors of a lawsuit filed in the U.S. District Court, Southern District of New York, 11-Civ.-7304, by Barry Brown, against Kay, as executor of the Estate of Himan Brown, against the Revocable Trust, the Charitable Trust, and Kay as trustee of both the Revocable Trust and Charitable Trust.

124. Upon information and belief, Kay used funds that would otherwise be paid to Radio Drama Network as sole beneficiary of Mr. Brown's Will to pay the legal fees for his personal defense to challenges to his fraudulent scheme that harmed Radio Drama Network.

125. On or about November 26, 2015, counsel for Radio Drama Network filed a notice of appearance in the Probate Proceeding for the Estate of Himan Brown.

126. By letter dated December 1, 2015, Kay's attorney informed counsel for Radio Drama Network that the Probate Proceeding had terminated on February 23, 2015.

127. To date, Kay has not informed Radio Drama Network's other directors whether any of the approximately \$200,000 in financial assets or any intangible assets remain in the probate estate for Radio Drama Network to inherit or whether any transfer

of any property from the Estate of Himan Brown to Radio Drama Network has been or will be made; nor has he sent any accounting of estate expenses to the other directors of Radio Drama Network.

Exceedingly Broad Receipt and Release Agreements Obtained Under Duress and Based upon Material Misrepresentations

128. Kay improperly sought to insulate his diversion of Mr. Brown's assets from challenge through *in terrorem* clauses in both the Will and the Revocable Trust instruments, discretion over the terms of certain distributions, and exceedingly broad releases he required before transferring assets from the Revocable Trust to beneficiaries other than the Charitable Trust.

129. Kay intended the Will and Revocable Trust *in terrorem* clauses to threaten Radio Drama Network with the loss of any inheritance it would receive as the sole beneficiary of Mr. Brown's testamentary estate if it challenged the Revocable Trust or Kay's actions as Trustee.

130. The *in terrorem* clauses are invalid and unenforceable and against public policy to the extent they are designed to insulate Kay's misconduct.

131. In addition, Kay's position as a board member of Radio Drama Network and custodian of Radio Drama Network's books and records created substantial logistical difficulties for a legal challenge by Radio Drama Network.

132. Kay attempted to prevent challenge to his fraudulent scheme by forcing the heirs of Mr. Brown to execute receipt and release agreements that even exceeded the *in terrorem* clauses that Kay included in Mr. Brown's Will and trust instruments.

133. A provision of the Revocable Trust that Kay drafted provides that Kay shall determine in his sole discretion what deed restrictions shall apply to the transfer of

real property to Melina Brown. Kay required that, if Melina Brown failed to execute an agreement on the terms set forth by Kay, she would forfeit her interest in that real property. This included her principal residence. This had no purpose other than to prevent Ms. Brown from questioning Kay's actions.

134. Kay, in his capacity as trustee of the Revocable Trust, improperly required Melina Brown to execute a receipt and release that recognized Kay as a permanent member of Radio Drama Network and gave the Charitable Trust ownership of papers of Himan Brown as a condition of receiving her personal bequest from her grandfather provided in the Revocable Trust.

False Board Minutes Purporting to Appoint Kay a Permanent Member

135. Prior to Melina Brown's execution of the Receipt and Release recognizing Kay as a permanent member of Radio Drama Network, Kay created and presented to Melina Brown a document he identified as minutes of a meeting of the Radio Drama Network board of directors on Thursday, February 7, 2007, at which the board purportedly adopted bylaws naming Kay and Himan Brown as permanent members of Radio Drama Network who could never be removed.

136. The minutes of the alleged February 7, 2007 meeting were provided with the intent to deceive Radio Drama Network, and did deceive Radio Drama Network, to its detriment.

137. The minutes of a purported February 7, 2007 meeting signed by Kay as Secretary of Radio Drama Network state that Eli Kopelman was a member of the Board of Directors of Radio Drama Network voting at that meeting.

138. However, as detailed herein, the state and federal filings prepared by Eli Kopelman himself for that year, and certified on penalty of perjury by Kay, state that the only directors were Mr. Brown and Kay.

139. On or about September 10, 2007, Kay, in his capacity as Chief Financial Officer and Secretary of Radio Drama Network, signed the certification under penalty of perjury of the 2006 New York CHAR500 Annual Filing for Charitable Organizations for Radio Drama Network for the year ending June 30, 2007, which enclosed the IRS Form 990-PF for Radio Drama Network (the "2007 Tax Filing").

140. Eli Kopelman is listed as the preparer of the 2007 Tax Filing and audited Radio Drama Network's financial statements for that year.

141. Part VIII of the 2007 Tax Filing lists the only directors of Radio Drama Network as Kay and Mr. Brown, and does not list Melina Brown, Barrie Brown, or Eli Kopelman as directors of Radio Drama Network.

142. Similarly, the state and federal filings for Radio Drama Network for the fiscal year ending on June 30, 2008, also prepared by Eli Kopelman, and also certified by Kay on penalty of perjury on September 2, 2008, list the directors as Kay and Mr. Brown.

143. The state and federal filings for Radio Drama Network for the fiscal year ending on June 30, 2009, also prepared by Eli Kopelman, list the directors as Kay and Mr. Brown. The version on file with the New York State attorney general's office is signed only by Mr. Brown, and not signed by Kay, although two signatures are required.

144. Melina Brown, Barrie Sansted (which name Barrie Brown used while she was married), and Eli Kopelman are first listed as members of the board of directors on

the state and federal tax filings for the fiscal year ending on June 30, 2010, which was the year Mr. Brown died.

145. The New York Not-for-Profit Corporation Law requires not-for-profit corporations to have at least three members, and the minutes of the February 7, 2007 board meeting state that Kopelman was a board member at the beginning of the meeting and that Melina and Barrie Brown (but not Kopelman) were elected as board members during the meeting.

146. The minutes of the February 7, 2007 board meeting were not shared by Kay with Ms. Brown until years later.

147. February 7, 2007 was a Wednesday, not a Thursday as described in the fraudulent minutes.

148. The minutes state that the meeting was held at Pryor Cashman LLP, but, upon information and belief, Mr. Brown had just been released from the hospital and was not well enough to travel at that time.

149. On or about May 25, 2006, Kay sent Melina Brown a letter, signed by Kay, and also signed by Mr. Brown below his printed name on the "cc" line, informing Melina Brown that "at your grandfather's request, you have been named as a Director of Radio Drama Network Inc., effective immediately."

150. Although she was a member of the board of directors of Radio Drama Network, Melina Brown was not notified of the purported February 7, 2007 meeting electing Kay as a permanent member of Radio Drama Network.

151. Based on the evidence, it appears that there was no Radio Drama Network board meeting held on February 7, 2007.

152. Any board meeting held in 2007 without notice to Melina Brown would have been improper and any board actions purportedly approved at such a meeting would be invalid.

153. Although she was appointed a member of the board of directors of Radio Drama Network, Kay did not advise Melina Brown of any Radio Drama Network board meetings held prior to Mr. Brown's death, depriving her of the opportunity attend any such board meetings.

154. Kay's purpose in naming himself as a permanent member became apparent at the Radio Drama Network meeting held on November 20, 2015, at which Kay's misconduct in diverting Mr. Brown's assets was discussed.

155. Upon being informed that he would be excluded from deliberations and voting, as required by Section 715 of the New York Not-for-Profit Corporation Law on November 20, 2015, Kay responded that he could not be excluded because he was a permanent member of Radio Drama Network.

156. Kay should be aware of the rules governing interested party transactions, as the conflict-of-interest policy he filed with the Attorney General's office as part of the Charitable Trust's registration statement provides in Article III that an interested person shall leave the meeting of the board of directors during discussion of and any vote on the interested transaction. The conflict-of-interest policy was also appended to the Charitable Trust's application for tax exempt status filed with the Internal Revenue Service.

Refusal of Access to Books and Records of Foundation

157. Kay has refused Melina Brown's repeated requests for access to the books and records of Radio Drama Network, even though she is President of Radio Drama Network.

158. To this date, Kay has refused to provide Melina Brown with unrestricted access to the books and records of Radio Drama Network.

159. Upon information and belief, after Mr. Brown's death, Kay took possession of the books and records of Radio Drama Network, and those books and records remain within Kay's control at the offices of Pryor Cashman LLP.

Misleading Representations in Surrogate's Court

160. In his defense of the Surrogate's Court proceeding regarding objections to the Will brought by Barry Brown, Kay made misleading representations to the Surrogate's Court that the Charitable Trust effected Himan Brown's intent of benefiting the spoken word.

161. Kay's reply memorandum in opposition to further discovery, dated April 23, 2012, at page 5, addresses testimony that Himan Brown had intended to leave his estate to charities that focus on the spoken word, by representing to the Court that the "primary purposes" of the Himan Brown Charitable Trust are the spoken word.

162. Kay's April 23, 2012 memorandum quotes the description of the primary purposes of the Charitable Trust and Radio Drama Network, but omits the language giving the Trustee the power to ignore this primary purpose.

163. Kay's April 23, 2012 memorandum also states that "the similarity between the affiants' description of Himan's charitable focus and the terms of the 2004

Restatement provides compelling proof that ... the 2004 Restatement embodies Himan's charitable aspirations."

164. This affirmatively misled the Court, which noted on page 3 of its January 6, 2015 decision denying Barry Brown's Will challenge for lack of standing, that the Charitable Trust was "to be devoted in perpetuity to the advancement of 'the spoken word' through grants and various audio and video productions."

KAY'S HISTORY OF MISCONDUCT WITH OTHER ESTATES

Samuel A. Jacobs

165. This is not the first time that Kay has been accused of abusing his position of trust for his personal benefit.

166. In 2003, the sons of Samuel A. Jacobs ("Mr. Jacobs") challenged a will and trust drafted by Kay, allegedly executed on December 19, 2000, which directed 100 per cent of the decedent's assets (over \$1 million) to Kay's client, Benita Lebow, displacing the two adult sons who otherwise would have inherited Mr. Jacobs' estate.

167. According to the Petition filed by Mr. Jacobs' sons in New York County Surrogate's Court, File No. 834/03, when the will and trust of Mr. Jacobs were allegedly executed on December 19, 2000, Mr. Jacobs suffered from moderate to marked cerebral atrophy; spoke haltingly, was disoriented as to person and place and of significantly impaired cognition; was unable to be interviewed by or share information with a medical interviewer; was blind in his right eye and of deteriorating vision in his left eye, due to cataracts, glaucoma, macular degeneration and optic nerve atrophy; had deficits in functioning, particularly in orientation, attention, concentration, short and long-term

memory; verbal fluency and executive functioning; suffered from dementia of the Alzheimer's type; and suffered from depression and confusion.

168. Kay was a witness to Mr. Jacobs' will and supervised the execution of the will.

169. Alan Laufer, the associate at Pryor Cashman LLP who supervised the execution of Mr. Brown's 2004 Will and notarized the Revocable Trust executed the same day, was also a witness to the execution of the will of Mr. Jacobs.

170. Mr. Jacobs' sons challenged the will and trust, and the case was settled, with the assets split 57.5% between the sons and 42.5% to the trustee/beneficiary.

171. Mr. Jacobs' sons then sued Kay, Alan Laufer, and Pryor Cashman LLP in Supreme Court in two related proceedings for malpractice, fraud, and violations of Judiciary Law § 487, among other things. That case was dismissed for lack of privity (because Kay was retained by Lebow, not Mr. Jacobs' sons), because the fraud claim was duplicative of the malpractice claim against Pryor Cashman; because the malpractice claim was time-barred; and the Judiciary Law claim was mooted by the discontinuance of the probate proceeding.

172. According to the complaint in *Jacobs v. Kay et al.*, Index No. 117332/05 and Index No. 117333/05, although the witnesses to the will executed self-proving affidavits swearing that Samuel A. Jacobs could read, Kay admitted under oath that Samuel A. Jacobs could not read the will, and did not read the will, due to his blindness.

Florence R. Rothenberg

173. Kay's attempt to assert control of the \$5 million Merrill Lynch account of his father-in-law's widow, Florence R. Rothenberg, was also the subject of a judicial challenge.

174. Kay and Maurice Paprin, a neighbor of Mrs. Rothenberg's, each had power of attorney for Mrs. Rothenberg's Merrill Lynch account and each asserted authority, causing Merrill Lynch to file a declaratory judgment action in Supreme Court, New York County, on or around September 2, 2002.

175. Upon information and belief, the court appointed a third party as power of attorney, and Mr. Paprin was satisfied with this result.

176. Given Kay's experience with these challenges to his conduct, and his position as a trust and estates partner, he is surely familiar with his fiduciary duties to Mr. Brown and to Radio Drama Network and with the ethical norms and legal requirements governing his receipt of personal benefits from a client's estate. Thus, his breaches of fiduciary duties and flouting of conflicts of interest rules are presumed to be knowing and willful.

DAMAGES TO RADIO DRAMA NETWORK

177. Radio Drama Network has standing as Mr. Brown's sole testamentary beneficiary and successor-in-interest, and, separately and independently, as the party harmed by Kay's fraud, to pursue claims against Kay.

178. Radio Drama Network has the equitable right to the assets unlawfully diverted to the Himan Brown Charitable Trust for Kay's personal benefit.

179. Radio Drama Network is entitled to damages, including punitive and exemplary damages, of not less than an additional \$10 million, for the fraud perpetrated by Kay on Himan Brown and Radio Drama Network.

180. Radio Drama Network is entitled to equitable tolling of any applicable statutes of limitations on the grounds of Kay's fraudulent concealment of information he had a duty to disclose. Radio Drama Network has not made any prior request for the relief requested herein.

181. The Revocable Trust also provides for distributions to Mr. Brown's daughter, Hilda Brown, and his granddaughters, Melina Brown and Barrie Brown, which distributions have been made. Receipts and releases in their individual capacities were executed by Melina Brown and Barrie Brown in exchange for these personal distributions, and, upon information and belief, by Hilda Brown, who is now deceased. The relief requested by Radio Drama Network does not seek to modify those distributions, and accordingly does not impact those distributees.

FIRST CAUSE OF ACTION

(Against Kay for Fraud)

182. The allegations contained in paragraphs 1 to 181 of this Petition are repeated and realleged with the same force and effect as if set forth fully herein.

183. Kay made representations of material facts, which were false, with the intent to deceive, and which did deceive, causing damage to Radio Drama Network, thereby committing fraud.

184. Radio Drama Network has standing as Mr. Brown's sole testamentary beneficiary and successor-in-interest, and, separately and independently, as the party harmed by Kay's fraud.

185. Kay made false statements and material omissions by inserting misleading revisions in 2003 and 2004 to Articles 3(F) and 4(B) of the Revocable Trust and by failing to explicitly disclose to Mr. Brown that revisions in 2003 and 2004 to Articles 3(F) and 4(B) of the Revocable Trust would increase Kay's commissions by up to \$1.7 million and would create a new Charitable Trust that would receive substantially all of Mr. Brown's assets upon Mr. Brown's death and that Kay would control that new Charitable Trust to further his own personal interests rather than Mr. Brown's longstanding charitable interests.

186. Kay's intent to mislead is evidenced by his failure to observe ethical norms and professional rules with respect to conflicts of interest and the receipt of a benefit from a client; by his failure to obtain substantiation of Himan Brown's alleged intentions; by his concealment of the existence of the 2003 and 2004 Restatements, by his failure to recommend that Mr. Brown employ independent counsel in connection with those Restatements, if those changes were truly desired by Mr. Brown; by filing of the 2005 version of the Revocable Trust that concealed the existence of the 2004 version of the Revocable Trust; by drafting and signing false minutes of Radio Drama Network purporting to appoint himself as a permanent member that are inconsistent with Kay's sworn statements to federal and state regulatory authorities; by his unlawful refusal to provide access to the books and records of Radio Drama Network in his possession; and by his concealment of the Probate Proceeding from Radio Drama Network, depriving Radio Drama Network of the opportunity to retain counsel to protect its interests.

187. Mr. Brown relied upon Kay's false statements and omissions of material fact to his detriment, and executed the Revocable Trust amendments in 2003 and 2004

without realizing that the revisions to the Revocable Trust increased Mr. Kay's commissions and directed substantially all of his assets to the Charitable Trust, contrary to Mr. Brown's wishes to leave his assets to Radio Drama Network.

188. Radio Drama Network was damaged by Kay's fraudulent concealment by being deprived of the \$100 million residuary of the Revocable Trust, the amounts paid in trustee commissions that Kay improperly directed to himself, and the amounts of Mr. Brown's assets that Kay spent to defend and conceal this fraudulent scheme.

189. The fact that Mr. Brown was misled and never intended to disinherit Radio Drama Network is further evidenced by his continuing involvement with Radio Drama Network until his death.

190. By reason of the above, Petitioner is entitled to an order (a) invalidating the fraudulently induced Articles 3(F) and 4(B) of the Revocable Trust creating the Charitable Trust and providing commissions to Kay at the executor rate, and (b) reinstating Radio Drama Network as the residuary beneficiary.

191. By reason of the above, Petitioner has sustained damages of not less than \$100 million, reflecting the assets improperly diverted by Kay, plus interest from the date of the fraud, the amount to be determined at trial.

192. By reason of the malicious and/or willful nature of Kay's conduct, Petitioner is also entitled to punitive damages of not less than \$20 million, the amount to be determined at trial.

SECOND CAUSE OF ACTION
(Against Kay for Fraudulent Concealment)

193. The allegations contained in paragraphs 1 to 181 of this Petition are repeated and realleged with the same force and effect as if set forth fully herein.

194. Kay had a duty to disclose material facts; had knowledge of material facts and was bound to make disclosures; failed to discharge his duty to disclose; did so with the intent to deceive; and such false statements were relied upon; causing damage to Radio Drama Network.

195. As attorney for Mr. Brown, Kay had a duty to disclose the material facts that revisions in 2003 and 2004 to Articles 3(F) and 4(B) of the Revocable Trust would increase Kay's commissions by up to \$1.7 million and would create a new Charitable Trust that would receive substantially all of Mr. Brown's assets upon Mr. Brown's death and that Kay would control that new Charitable Trust to further his own personal interests rather than Mr. Brown's longstanding charitable interests.

196. In addition, as director of Radio Drama Network, Kay had a duty to disclose material facts concerning the diversion of the residuary of the Revocable Trust to the Charitable Trust; to disclose the status of the Probate Proceeding after directing that court papers be served upon himself; to disclose the need for Radio Drama Network to retain independent counsel to protect Radio Drama Network's interests in the proceedings; and to provide access to its books and records to the other directors after taking custody of those books and records following Mr. Brown's death.

197. Kay knew the material facts of the Revocable Trust versions, and, as an experienced trusts and estates attorney, knew the harm that would result to Radio Drama Network from the concealment of the existence of the 2003 and 2004 Revocable Trust revisions before and during the Probate Proceeding.

198. Kay failed to discharge his duties to disclose, including by arranging the 2004 will and trust executions in a manner that avoided disclosure and discussion of the

changes that had been made, and by affirmatively concealing the existence of the 2003 and 2004 versions of the Revocable Trust by distributing and filing the 2005 version of the Revocable Trust.

199. Kay's intent to mislead is evidenced by his failure to observe ethical norms and professional rules with respect to conflicts of interest and the receipt of a benefit from a client; by his failure to obtain substantiation of Himan Brown's alleged intentions; by his concealment of the existence of the 2003 and 2004 Restatements, by his failure to recommend that Mr. Brown employ independent counsel in connection with those Restatements, if those changes were truly desired by Mr. Brown; by filing of the 2005 version of the Revocable Trust that concealed the existence of the 2004 version of the Revocable Trust; by drafting and signing false minutes of Radio Drama Network purporting to appoint himself as a permanent member that are inconsistent with Kay's sworn statements to federal and state regulatory authorities; by his unlawful refusal to provide access to the books and records of Radio Drama Network in his possession; and by his concealment of the Probate Proceeding from Radio Drama Network, depriving Radio Drama Network of the opportunity to retain counsel to protect its interests.

200. Radio Drama Network relied upon the information provided by Kay and did not realize that the Charitable Trust was executed under highly suspicious circumstances, nor did it participate in the Probate Proceeding, including discovery and depositions that explored the drafting and execution of the 2004 version of the Revocable Trust.

201. Radio Drama Network was damaged by Kay's fraudulent concealment by being deprived of the \$100 million residuary of the Revocable Trust, the amounts paid in

trustee commissions that Kay improperly directed to himself, and the amounts of Mr. Brown's assets that Kay spent to defend and conceal this fraudulent scheme.

202. By reason of the above, Petitioner is entitled to an order (a) invalidating the fraudulently induced Articles 3(F) and 4(B) of the Revocable Trust creating the Charitable Trust and providing for Kay to obtain commissions at the executor rate and (b) reinstating Radio Drama Network as the residuary beneficiary.

203. By reason of the above, Petitioner has sustained damages of not less than \$100 million, reflecting the assets improperly diverted by Kay, plus interest from the date of the fraud, the amount to be determined at trial.

204. By reason of the malicious and/or reckless nature of Kay's conduct, Petitioner is also entitled to punitive damages of not less than \$20 million, the amount to be determined at trial.

THIRD CAUSE OF ACTION
(Against Kay for Undue Influence)

205. The allegations contained in paragraphs 1 to 181 of this Petition are repeated and realleged with the same force and effect as if set forth fully herein.

206. Kay had the motive and opportunity to exercise undue influence over Mr. Brown, and did actually exercise undue influence over Mr. Brown. Mr. Kay had and exercised undue influence over Mr. Brown; subverted the mind of Mr. Brown at the time of the execution of the Will and Revocable Trust amendments; and caused Mr. Brown to execute Will and Revocable Trust instruments that, but for Kay's undue influence, would not have occurred.

207. Kay's undue influence is demonstrated by the fact that he was Mr. Brown's attorney; Mr. Brown was well into his 90s at the time of the relevant changes;

the 2004 revisions deviated from Mr. Brown's prior testamentary pattern; the lack of independent legal advice as required by applicable professional rules and ethical norms with respect to conflicts of interest and the receipt of benefit from a client; the lack of an unambiguous documentary record substantiating Mr. Brown's alleged intentions; and the misleading descriptions of the changes in the Will and Revocable Trust instruments.

208. Kay's motive to exercise undue influence is demonstrated by the personal benefit to Kay in the form of substantially increased and unreasonable trustee commissions and control of a \$100 million Charitable Trust to make gifts to further his personal interests and those of his family.

209. The trustee commission paid to Kay is excessive and unreasonable, is the functional equivalent of a gift to the lawyer who drafted the will and trust instruments, and therefore gives rise to an inference of undue influence.

210. To be valid, the excessive trustee commission paid to Kay, as the functional equivalent of an outright gift to Kay, would have needed to be supported by clear and convincing evidence of Mr. Brown's donative intent.

211. Radio Drama Network was damaged by Kay's undue influence over Mr. Brown by being deprived of the \$100 million residuary of the Revocable Trust, the amounts paid in trustee commissions that Kay improperly directed to himself, and the amount of the residuary estate that Kay spent to defend and conceal this fraudulent scheme.

212. By reason of the above, Petitioner has sustained damages of not less than \$100 million, the amount to be determined at trial.

FOURTH CAUSE OF ACTION

(Against Kay for Breach of Fiduciary Duties to Radio Drama Network)

213. The allegations contained in paragraphs 1 to 181 of this Petition are repeated and realleged with the same force and effect as if set forth fully herein.

214. Kay had fiduciary duties to Radio Drama Network, breached those duties, and thereby directly caused damage to Radio Drama Network.

215. Section 717 of the Not-for-Profit Corporation Law provides that “[d]irectors and officers shall discharge the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions.”

216. As a director, Kay owes Radio Drama Network a fiduciary duty of care; duty of loyalty, and duty of obedience, and has a special relationship of trust with Radio Drama Network imposing a duty on Kay to disclose material information to Radio Drama Network and its directors.

217. Kay imparted incorrect information to Radio Drama Network concerning the date of creation of the Charitable Trust, the purported appointment of Kay as permanent member of Radio Drama Network, and the status and impact of the Probate Proceeding.

218. Kay failed to disclose to the other directors of Radio Drama Network that that he had drafted an instrument depriving Radio Drama Network of substantial financial benefit; his many conflicting roles as drafter, executor and trustee of wills and trusts depriving Radio Drama Network of that benefit and insulating the Charitable Trust from challenge; the amount of his personal financial benefit; and the status of the Probate

Proceeding and Radio Drama Network's right to appear and protect its interests through independent counsel.

219. Kay breached his duty of loyalty by drafting the 2003 amendments to the Revocable Trust that increased Kay's commissions by roughly \$1.7 million, and thereby reduced the gift to the residuary beneficiary of the Revocable Trust, then Radio Drama Network, to Kay's substantial personal benefit.

220. Kay breached his duty of loyalty by drafting the 2004 amendments to the Revocable Trust that diverted \$100 million of Mr. Brown's assets from Radio Drama Network to a new entity that Kay would control, and use to further his own charitable interests, to Kay's substantial personal benefit. If that had been Mr. Brown's intent, Kay should have recommended independent counsel.

221. Kay breached his fiduciary duty to disclose by failing to report information concerning the status of the Probate Proceeding that would have allowed the other directors of Radio Drama Network to determine how to proceed in order to protect Radio Drama Network's interests in that proceeding.

222. As executor, Kay has a conflict of interest in attempting to determine whether any tangible or intangible property had been transferred to the Revocable Trust and would be transferred to the Charitable Trust that he controlled, or whether it belonged to Himan Brown at his death and would therefore be inherited by Radio Drama Network.

223. Kay has repeatedly breached his duties to Radio Drama Network, and his breach of fiduciary duty continues to this day.

224. Radio Drama Network was damaged by Kay's breaches of fiduciary duties by being deprived of the \$100 million residuary of the Revocable Trust, the amounts paid in trustee commissions that Kay improperly directed to himself, and the amount of the residuary estate that Kay spent to defend and conceal this fraudulent scheme.

225. By reason of the above, Petitioner has sustained damages of not less than \$100 million, the amount to be determined at trial, is entitled to a constructive trust on the Charitable Trust created by Kay for his personal benefit; and is entitled to an order removing Kay as director of Radio Drama Network.

FIFTH CAUSE OF ACTION

(Against Kay for Violation of Judiciary Law § 487)

226. The allegations contained in paragraphs 1 to 181 of this Petition are repeated and realleged with the same force and effect as if set forth fully herein.

227. Kay has demonstrated an intent to deceive the Court and Radio Drama Network, through a pattern of delinquent, wrongful and/or deceitful behavior in the Probate Proceeding.

228. Kay, in his capacity as executor, deceived the Court and a party, Radio Drama Network, by directing that service on Radio Drama Network be made upon himself, and then failing to forward notices and information regarding the proceedings to Radio Drama Network's other directors.

229. Kay deceived the Court when he represented that the Radio Drama Network was advised of the Probate Proceeding, while concealing from Radio Drama Network's other directors information concerning the Probate Proceeding, the assets in the testamentary estate, and applicable deadlines.

230. Such deceit was chronic, persisting throughout the Probate Proceeding, from the initial service of the petition for letters testamentary, through the citation to appear regarding the objections by Barry Brown, through discovery and depositions concerning the Revocable Trust changes that made the harm to Radio Drama Network apparent; and through briefing of summary judgment and Kay's request to conclude the Probate Proceeding.

231. Kay also committed acts of deceit by affirmatively representing to the Court in motion papers that the purposes of the Charitable Trust and Radio Drama Network were nearly identical. Kay concealed that the Charitable Trust does not make donations to support the spoken word, but, rather, makes donations for other purposes, many of which have personal connections to Kay and his family, such as the undergraduate college and law school Kay attended, and other education institutions attended by his family members. Such deceit was facilitated by the exclusion of Radio Drama Network from the proceedings.

232. Radio Drama Network was damaged by being deprived of the \$100 million residuary of the Revocable Trust, the amounts paid in trustee commissions that Kay improperly directed to himself, and the fees paid from the estate to defend and conceal this fraudulent scheme.

233. By reason of the above, Petitioner has sustained damages of not less than \$100 million, the amount to be determined at trial, plus treble damages pursuant to § 487 of the Judiciary Law.

SIXTH CAUSE OF ACTION

(Against Kay and the Charitable Trust for Unjust Enrichment)

234. The allegations contained in paragraphs 1 to 181 of this Petition are repeated and realleged with the same force and effect as if set forth fully herein.

235. Kay and the Charitable Trust have been enriched, at Radio Drama Network's expense, and it is against equity and good conscience to permit Kay and the Charitable Trust to retain what is sought to be recovered.

236. Kay and the Charitable Trust were enriched by the personal benefit to Kay in the form of substantially increased and unreasonable trustee commissions and control of a \$100 million Charitable Trust to make gifts to further his personal interests.

237. Such enrichment was at the expense of Radio Drama Network, the beneficiary from which the \$100 million in Mr. Brown's assets was diverted.

238. It is against equity and good conscience to permit Kay and the Charitable Trust to retain what is sought to be recovered, because such enrichment was obtained through fraud, fraudulent concealment, and breach of fiduciary duty, and concealed from the Court and Radio Drama Network through violations of the Judiciary Law.

239. By reason of the foregoing unjust enrichment, Petitioner is entitled to disgorgement of payments to Kay and a constructive trust on the assets of the Charitable Trust for the benefit of Radio Drama Network.

WHEREFORE, the Petitioner demands judgment against Kay, individually, as Executor of the Estate of Himan Brown; as Trustee of the Himan Brown Revocable Trust and the Himan Brown Charitable Trust; as director of Radio Drama Network; and the Himan Brown Charitable Trust ("Respondents") as follows:

(A) Declaring that Kay defrauded Himan Brown and Petitioner, unduly influenced Himan Brown, breached his fiduciary duty to Radio Drama Network, and violated Judiciary Law § 487, and that Kay and the Charitable Trust were unjustly enriched; and

(B) Invalidating and setting aside the fraudulently induced Articles 3(F) and 4(B) of the Revocable Trust creating the Charitable Trust and providing for Kay to obtain commissions at the executor rate; and

(C) Reinstating Radio Drama Network as the residuary beneficiary of the Revocable Trust; and

(D) Imposing a constructive trust for the benefit of Petitioner on the assets of the Charitable Trust; and

(E) Ordering Kay to pay compensatory damages to Petitioner of not less than \$100 million, including the amounts fraudulently diverted to the Charitable Trust, disgorgement of fraudulently obtained trustee fees paid to Kay; amounts diverted by Kay from the residuary of the Estate of Himan Brown for the legal defense of Kay's actions; punitive and exemplary damages of not less than \$20 million, and treble damages pursuant to Judiciary Law § 487, in the amount of not less than \$300 million; and

(F) Removing Richard L. Kay as a director of Radio Drama Network; and

(G) Granting the Petitioner such other and further relief as this Court may deem just and proper.


Dated: New York, New York
December 10, 2015

RADIO DRAMA NETWORK, INC.

A handwritten signature in black ink, appearing to be 'Melina Brown', with a long horizontal flourish extending to the right.

By: Melina Brown
As: Director and President, Radio Drama Network

CARTER LEDYARD & MILBURN LLP

By: A handwritten signature in black ink, appearing to be 'Pamela A. Mann', with a long horizontal flourish extending to the right.

Pamela A. Mann
Gary D. Sesser
Judith M. Wallace
Bryce B. Bernards
2 Wall Street
New York, NY 10005
Tel: (212) 732-3200
Fax: (212) 732-3232
Attorneys for Radio Drama Network