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### **ORAL ARGUMENT**

Appellants respectfully submit to the Court that this case presents an important issue concerning the duty required of a fiduciary in making investments in the stock market. There are no cited cases from the Mississippi Supreme Court or the Mississippi Court of Appeals dealing with the issue of fiduciary investments in the stock market, and therefore, it is respectfully submitted that in order to fully debate and discuss this important issue, the Court should grant oral arguments which it is respectfully submitted will well serve the Court in addressing this important issue.

## **REPLY BRIEF**

RLI Insurance Company has filed its Appellees' Brief, which has been joined in by Margaret McDaniel Harveston, Administratrix, in which, quite naturally, they urge this Court to affirm the chancellor.

In RLI's brief, it states that "the plaintiffs are engaging in second-guessing based upon hindsight. If these same investments had increased over time, the Complaint would never have been filed by the heirs ..." (RLI's Brief, p. 6)

First, plaintiffs are not engaging in "second-guessing based upon hindsight." As stated more fully in the Appellants' Brief, Margaret Harveston was invested in the stock market at a time of great volatility and fluxuations in the market. While we do have the benefit of being able to look back over the time involved to see what the market's actual performance was, it is submitted that a reasonably prudent investor, after having sustained losses within two months of investing in the stock market, would have exercised prudence and altered the investment strategy.

Second, RLI is correct in saying that if the investments had increased over time, the complaint would not have been filed. This is obviously true for the reason that the McGee heirs would have sustained no losses, and therefore, would have had no claim. Respectfully, it was Mrs. Harveston's breach of the fiduciary duty to act as a reasonably prudent investor which brought about the loss, and therefore, the claim for damages.

In its brief, RLI argues that "diligence" is a fundamental requirement of a fiduciary and then takes issue with the plaintiffs' statement on page 23 of the Appellants' Brief which stated, in effect, that the fiduciary duty of a prudent investor did not include the word "diligently." (RLI's Brief, page 12) Plaintiffs' point was that the statutes governing fiduciary investments did

not use the word “diligently”. RLI confuses the statutory definition of the fiduciary’s duty in making investments with the duty which a fiduciary has to those for whom funds are being held. A fiduciary is always required to act diligently in the general performance of their fiduciary duties, however, the point is that even if Mrs. Harveston acted “diligently”, that in and of itself fails to answer the question as to whether or not she breached the fiduciary duty for investing estate funds.

It seems rather strange to be arguing that Margaret Harveston was “diligent” when she made no change in her investments from January 2000 to November 2003, even though substantial sums of money were being lost.

Contrary to RLI’s assertion on page 14 of its brief that the Plaintiffs would “impose upon every administrator a duty to become an investment professional”, that has never been the Plaintiffs’ position. Ms. Harveston was bound by the fiduciary’s standard of care contained in § 91-13-3, Miss. Code Ann. (1972), commonly known as investing as a “prudent man”.

RLI and Mrs. Harveston readily admit her limitations of knowledge and skill in making stock market investments but somehow attempt to extend that as a shield behind which she can successfully hide in defending her action or inactions. The question then becomes how could Mrs. Harveston who had no knowledge or experience in the stock market act as a “reasonably prudent investor”? Certainly she was required to do more than leave the money invested in the stock market even though she was sustaining substantial losses. Does not the reasonably prudent investor at least make an investigation of the stocks in which investments are being held?

While there are no Mississippi cases involving stock market investments by a fiduciary, other jurisdictions may be searched for instructive authorities and cases to assist the Court in deciding this issue.

As the United States Court of Appeals for the 11<sup>th</sup> Circuit has stated:

“... The fiduciary concept derives from trust and agency principles. Actions contrary to the duties of loyalty and care are remedied by giving the beneficiary of the relationship the right to recover for the fiduciary’s breach ...

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... The common law focuses on the fiduciary’s responsibilities as a “prudent man” i.e., **whether the fiduciary conducted an independent investigation of the merits of a particular investment.** (citations omitted) The focus of the inquiry is how the fiduciary acted in his selection of the investment, (citation omitted) and if the fiduciary did breach his duty to his principal, the question then becomes one of causation. Causation is related to but distinct from reliance. The district court found reliance and causation when it explained the breach and concluded ‘but for the breach of duty, the plaintiffs would not have experienced the heavy losses of approximately 25,000’. There is substantial evidence to support this determination, and we do not find it clearly erroneous.” (emphasis added)

*Gochnauer v. AG Edwards & Co., Inc.*, 810 F.2d 1042, 1049-1050 (C.A. 11<sup>th</sup> Cir. 1987)

Also addressing the fiduciary responsibility in investing funds belonging to others, the Court of Appeals of New York has stated:

“At the outset, it should be noted that the co-executors were fiduciaries who owed a duty of undivided loyalty to the decedent and had a duty to preserve the assets that she entrusted to them. In **Meinhard v. Salmon**, 249 N.Y. 458, 464, 164 N.E. 545, as to the level of conduct required for fiduciaries, Chief Judge Cardozo stated:

‘Many forms of conduct permissible in a work-a-day world for those acting at arms length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this, there has developed a tradition that is unbending and inveterate. Uncompromisingly rigidity has been the attitudes of court of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions. (citation omitted) Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this Court.’”

*Estate of Donner*, 606 N.Y.S. 2d 137, 141; 82 N.Y.2d 574 (N.Y. 1993)

The Supreme Court of Colorado has also had occasion to review the “reasonably prudent” standard applied to fiduciary investors. Colorado has a fiduciary investment statute codified as § 15-1-304 of the Colorado Code, which is identical to § 91-13-3, Miss. Code Ann. In affirming the trial court finding that there had been a breach of the reasonably prudent investor standard by the fiduciary in investing in the stock market, the Colorado Supreme Court stated the following:

“The trial court rejected Buder’s argument that since he invested his own funds in the same penny stocks as he invested the children’s funds, he was not accountable for the loss of the children’s money. In essence, Buder argued that the UGMA [Uniform Gift to Minors Act] created a subjective standard whereby his conduct as a custodian would be appropriate so long as he invested his personal capital identical to that of the children. The court pointed out that under **Rippey v. Denver, U.S. Nat’l Bank**, 273 F.Supp. 718 (D. Colo. 1967), the ‘reasonable prudence’ standard applies to protecting and caring for the property and does not permit one to prudently speculate .... The trustee may not subject his trust property to hazards which a man dealing with his own property might consider warranted if to do so would create danger to the trust estate.”

*Buder v. Sartore*, 774 P.2d 1383, 1385-1386 (Colo. 1989)

While Nathan McGee during his lifetime could invest his money in as few or as many stocks as he desired and could even invest in speculative stock, the fiduciary, Margaret Harveston, did not have that same prerogative and freedom, for she was bound by the reasonably prudent investor rule. It is respectfully submitted that merely transferring Nathan McGee’s stock from one brokerage house to another and leaving it invested as Nathan had left it invested was not reasonably prudent under the circumstances. While Nathan McGee made substantial sums of money with his market strategy, Margaret Harveston likewise using that same strategy, lost substantial sums of money. Nathan was not required to be reasonably prudent with his own investments for he was investing his own funds and not those belonging to others.

### CONCLUSION

It is respectfully submitted that if the chancery court's decision finding that Margaret Harveston did not breach her fiduciary duty in making her stock market investments is affirmed by this Court, it is respectfully submitted that no heir, legatee or beneficiary in any estate will ever have a claim for wild and speculative investments by the executor or administrator. It is further submitted that if the chancery court decision is affirmed, the long term effect will be to abolish any meaningful standard of care to be exercised by fiduciaries when they choose to either invest or leave funds invested in the stock market. Therefore, it is respectfully submitted that this Court should find from the record that Margaret Harveston breached the fiduciary duty of the reasonably prudent investor as required of her by § 91-13-3, Miss. Code Ann. (1972), and the Court should further find that as a direct and proximate result of her breach of duty the Nathan McGee heirs (Plaintiffs), sustained their losses and should thereupon reverse the chancellor and render judgment here in favor of the Plaintiffs.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

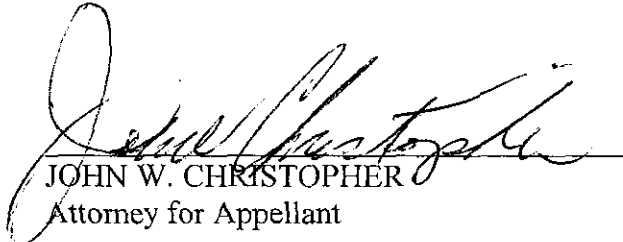
I, JOHN W. CHRISTOPHER, hereby certify that I have this day forwarded a true and correct copy of the above and foregoing **Reply Brief** via United States Mail, postage prepaid, to the following:

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