SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2010-CA-00014

RICHARD E. WILBOURN III, as **APPELLANT**
Co-Trustee and Remainder Beneficiary
of the Deanna A. Wilbourn Marital Trust B

V.

DEANNA A. WILBOURN, as
Co-Trustee of the Deanna A. Wilbourn Marital Trust B,
ELIZABETH W. WILLIAMSON and
GARNETT W. HUTTON **APPELLEES**

APPEAL FROM THE
CHANCERY COURT OF LAUDERDALE COUNTY, MISSISSIPPI

BRIEF OF APPELLANT RICHARD E. WILBOURN, III

ORAL ARGUMENT REQUESTED

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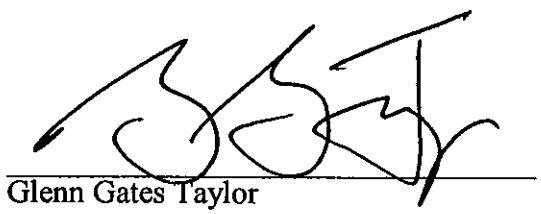
February 11, 2011

CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney for Appellant/Richard III certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Richard E. Wilbourn, III, Appellant and Plaintiff below.
2. Glenn Gates Taylor, Esq., William O. Brown, Jr., and Christy M. Sparks, Esq., of Copeland, Cook, Taylor, & Bush, P. A., attorneys for Appellant.
3. Henry W. Palmer, Esq., attorney for Appellant.
4. Deanna A. Wilbourn, an Appellee and Defendant below.
5. Elizabeth W. Williamson, an Appellee and Defendant below, and her husband Russell Williamson.
6. Garnett Williamson Hutton, an Appellee and Defendant below, and her husband Tom Hutton.
7. Kathryn H. Hester, Esq., of Watkins, Ludlam, Winter & Stennis, P.A., attorney for Appellee Deanna A. Wilbourn.
8. William C. Hammack, Esq., and Kacey Guy Bailey, Esq., of Bourdeaux & Jones, LLP, attorneys for Appellee Deanna A. Wilbourn.
9. W. Wayne Drinkwater, Esq., of Bradley, Arant, Boult, Cummings, LLP, attorneys for Appellees Elizabeth W. Williamson and Garnett Williamson Hutton.
10. Honorable Larry Primeaux, chancellor below.



Glenn Gates Taylor

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. Oral argument will be helpful to the Court, particularly so if, after considering the briefs, the Court has questions concerning the facts and the law. Oral argument will also aid the Court in its decision-making process.

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INTRODUCTION

This case arises out of family disputes that surfaced after the October 2004 death of the family patriarch, Richard E. Wilbourn II ("Richard II"), a lawyer. At his death, Richard II and his family members owned a controlling interest in Citizens National Banc Corp. (the "holding company"), which owns Citizens National Bank of Meridian, Mississippi (the "bank"), and they comprised a majority of the five-member board of the holding company. After Richard II's death, his son, Appellant ("Richard III"), also a lawyer, was elected to fill his father's various positions with the bank and the holding company, and he continued as a board member of each. Richard II's wife, Deanna Wilbourn, became a member of the board of the holding company. She and Richard III also served as co-trustees of a testamentary trust ("Marital Trust B" or the "Trust") that owned a substantial number of shares of stock in the holding company.

In January 2007, Appellees (Defendants below), who are Deanna and the two daughters of Richard II, teamed up at the board level to remove Richard III from all of the board-elected positions that he held with the bank and the holding company so that Appellee Elizabeth Williamson's husband could take over his positions. However, Richard III remained a shareholder-elected director of the holding company, and he was reelected at the March 2007 annual meeting of shareholders. At that meeting, the shares owned by Marital Trust B were not voted because Richard III and his mother disagreed over for whom the shares should be voted.

In an effort to prevent another shareholder reelection of Richard III, and to elect one of Defendants in his place, in April 2007 Defendants declared their removal of Richard III as co-trustee of Marital Trust B on the ground that he was "incompetent." The evidence, however, is overwhelming that Richard III was not incompetent, and that Defendants sought to remove him as co-trustee so that they could control the Trust's shares and vote those shares so as to elect one of them in place of Richard III. In response to Richard III's suit to set aside Defendants' improper attempted removal of him as a co-trustee (a claim on which he won summary judgment), Defendants

belatedly switched to completely new theories to remove him as co-trustee: breach of his fiduciary duties as co-trustee, hostility, and a conflict of interest.

Furious that Richard III recorded some conversations that he had with his mother and one of his sisters over matters that had nothing to do with the Trust, the chancellor disregarded the evidence of what Defendants did, and instead removed Richard III as co-trustee and appointed one of his sisters (Elizabeth Williamson) to take his place as co-trustee. The grounds that the chancellor relied on for removal have nothing to do with any alleged improper administration of the Trust or with Richard III's failure to perform his co-trustee duties. Indeed, a number of the grounds are matters that were not even asserted by Defendants in the pretrial order. The only ground that related to the Trust was the fact that Richard III and his mother disagreed over how to vote the shares for nominees to the board, but their disagreement was not a breach of any co-trustee duties–each of them had the right and discretion to agree or disagree with the other. Other than that disagreement, there is no evidence that Richard III did anything wrong concerning the Trust: he did not misappropriate Trust property, or fail to account for Trust property, or fail to provide his co-trustee or the beneficiaries with information about the Trust, or fail to preserve the property of the Trust.

The chancellor further justified his removal of Richard III by applying the wrong legal standards to erroneously expand Richard III's co-trustee duties to extend to a wide variety of matters that have nothing to do with Marital Trust B, such as: whether he breached a January 1999 agreement with his father (an agreement that is not part of the Trust and did not survive his father's death); whether he had acted contrary to his father's "vision" for the bank; whether he properly performed his work at the bank; whether he had properly promoted Wilbourn family influence and control of the bank; whether he had breached duties to his mother and sisters on unrelated family and business work, as a lawyer, son and brother; and whether his recording of some conversations with his mother and one of his sisters breached his duties.

The chancellor's removal of Richard III is based on errors of law and on factual findings that are manifestly wrong. Accordingly, the chancery court should be reversed.

STATEMENT OF THE ISSUES

1. Under Mississippi law, a chancellor has the power to remove a trustee for "good cause," but that power is not without limits and boundaries. Good cause should be based on matters that concern the administration of the trust, such as a trustee's failure to perform his duties under the trust, or a breach or misconduct by the trustee that endangers trust property, or hostility that has been caused by the trustee, or incapacity.

The chancellor held that Richard III violated his fiduciary duties as co-trustee of Marital Trust B because, at the March 2007 annual meeting of shareholders of the holding company, he and his mother disagreed over how to vote the shares for nominees to the board, and the shares were not voted. The chancellor further held that Richard III violated duties he owed his mother and sisters on other family and business matters that had nothing to do with Marital Trust B, and because he recorded some conversations that he had with his mother and one of his sisters on matters that did not pertain to Marital Trust B. In part, the chancellor improperly went outside the four corners of the Trust and used a January 1999 agreement between Richard III and his father (an agreement that is not referred to in the Trust and did not survive his father's death) and a June 1999 "strategic plan" for the bank to determine the settlor's "intent" and to graft new duties and obligations owed by Richard III on the actual Trust terms.

Did the chancellor err as a matter of law in holding that the disagreement between Richard III and his mother over voting the shares was a breach of *his* fiduciary duties as co-trustee of the Trust? Did the chancellor err as a matter of law by basing his removal of Richard III on breaches of alleged duties concerning other family and business matters that had nothing to do with the Trust or with Richard III's performance of his co-trustee duties? Did the chancellor err as a matter of law in relying on extrinsic evidence to determine the settlor's "intent" and to create additional duties owed by Richard III? Are the chancellor's findings that Richard III breached his co-trustee duties under the Trust manifestly wrong?

2. In the pretrial order that governed the trial of this case, Defendants did not assert any claims that Richard III breached any duties in his handling or involvement in other family and business matters that did not pertain to Marital Trust B or the bank. Specifically, Defendants did not raise any claim, issue of fact, or question of law that Richard III breached any duties or acted improperly in the work that he did for his father's estate, or in his handling of the purchase of a Florida condominium for his mother, or in the formation of the Wilbourn Family, LLC, or in the creation of the Providence Trust. The chancellor, however, departed from the pretrial order and used Richard III's involvement in those other family and business matters as grounds for removal.

Did the chancellor err by basing his removal of Richard III on matters that were not raised by Defendants in the pretrial order?

3. Under the law, a trustee may be removed if there is mutual hostility between the trustee and the beneficiary, and the hostility of the trustee toward the beneficiary could defeat the purpose of the trust. However, a trustee cannot be removed for hostility where the hostility was created by the beneficiary in order to effectuate the removal of the trustee. In this case, the evidence is overwhelming that Defendants picked a fight with Richard III and sought to remove him as co-trustee as part of their plan to get control of the Trust's stock so that they could vote those shares to keep Richard III from being reelected to the board, and elect one of them in his place. Yet, the chancellor erroneously turned the tables on Richard III, holding that he was responsible for the hostility and that Defendants did nothing wrong.

Are the chancellor's findings of fact on the issue of hostility manifestly wrong? Did the chancellor err as a matter of law in removing Richard III because of hostility that was created by Defendants?

4. Did the chancellor err by admitting evidence of compromise and settlement offers and settlement discussions between Richard III and Defendants that occurred during January and February 2007? Was that evidence inadmissible under Mississippi Rule of Evidence 408?

5. Did the chancellor err by denying Richard III's claim to recover the unpaid co-trustee's fee that he was owed for the period of time from April 2007 until the effective date of his removal in January 2010?

6. Did the chancellor err by dismissing Richard III's claims under Rule 41(b)?

7. Did the Chancery Court of Madison County err by transferring this case to Lauderdale County, thereby denying Richard III his choice of a proper venue?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

Richard III filed this action on May 18, 2007 in the Chancery Court of Madison, County, Mississippi. Defendants are Deanna A. Wilbourn ("Deanna"), his mother, and his sisters, Elizabeth Wilbourn Williamson and Garnett Wilbourn Hutton. Richard III sued as a co-trustee of the Deanna A. Wilbourn Marital Trust B ("Marital Trust B" or the "Trust") and as a remainder beneficiary under the Trust. The Trust was established under the Last Will and Testament of Richard III's deceased father, Richard E. Wilbourn, II. His co-trustee is his mother, Deanna Wilbourn. RE 6, RV 1 of 18, pp. 1-21, Exhibit 1.[1]

Richard III sought to declare as improper, unauthorized, void and of no legal effect a "Notice of Removal" dated April 10, 2007 whereby Defendants purported to remove him as co-trustee of the Trust. He also asserted a claim to remove Deanna as a co-trustee of the Trust on the grounds that she had become incompetent or unable to serve, or because she has grossly mismanaged the Trust. He also asserted a claim to declare that neither of his sisters should be able to serve as successor co-trustee because of their wrongful conduct. He also sought an accounting and a judgment for his

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[1] The record of this case consists of 62 volumes of pleadings and testimony, 18 volumes of trial exhibits, and 5 supplemental volumes of corrections to exhibits and testimony. Of the 62 volumes, volumes 1-40 are pleadings and orders, and volumes 41-62 contain the transcript of the trial testimony. An example of our citation to matters in the 62 volumes is "RV 1 of 62, pp. 1," an example of our citation to matters in the 18 volumes of exhibits is "RV 1 of 18, pp. 1, Exhibit 1," and an example of our citation to matters in the 5 supplemental volumes as "SRV 1 of 1, p.1." Record Excerpts are referred to as "RE." Attached as an appendix to this brief is an index to the testimony in the trial transcript.

unpaid co-trustee's fee. RV 1 of 62, pp. 12-67 (original complaint); RV 4 of 62, pp. 533-591 (second amended complaint). Pursuant to Defendants' motion to dismiss for lack of jurisdiction or improper venue, this case was transferred to Lauderdale County. RV 6 of 62, pp. 825-828.

In their original answers filed in November 2007, Defendants did not assert any counterclaim and did not allege that Richard III was hostile to them or that he should be removed because of hostility. RV 3 of 62, pp., 425-442. In December 2007, however, Defendants asserted counterclaims to remove Richard III as a co-trustee, alleging for the first time his breach of fiduciary duties, conflict of interest and personal hostility to Defendants. RV 6 of 62, pp. 854-900; RV 7, pp. 901-940.

On November 21, 2007, the trial court entered an order that, among other things, prohibited the parties from voting or transferring the Trust's shares of stock during the pendency of the case. RE 12, RV 4 of 62, pp. 525-26.[2]

On July 23, 2008, the court entered partial summary judgment for Richard III on his claim to declare the Notice of Removal invalid, improper and unauthorized. RE 13, RV 29 of 62, pp. 4288-4289, 4232-4251. The court also denied his motion in limine, which sought to exclude any evidence about Richard III's job performance in his various positions with the bank and the holding company, or his removal from those positions, and any settlement negotiations. RE 14, RV 29 of 62, pp. 4286-87, 4278-4283.

In November 2008, the court entered its pretrial order to govern the trial of this case. RE 17, RV 33 of 62, pp. 4916-4939. The pretrial order states that Defendants seek to remove Richard III as a co-trustee on the grounds that (1) he breached fiduciary duties that he owed as co-trustee of Marital Trust B, (2) he had a conflict of interest in wanting to vote the Trust's shares for directors who included himself, (3) he engaged in hostile acts toward Defendants that interfered with the

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[2] The order directed that the parties are "to maintain the status quo as relates to the Marital Trust B and the stock, which is the corpus of that Trust. None of the parties shall reissue, transfer, encumber or vote said stock, and the original certificates shall remain in the vault in the safe deposit box of Richard E. Wilbourn, III in Citizens National Bank, Madison, Mississippi." R. 12.

proper functioning of the Trust, and (4) he and Deanna Wilbourn disagreed on how to vote the Trust's shares. RE 17 at pp. 4, 7-11, 15-16, RV 33 of 62, pp. 4916-5004.

The trial was held during December 2008, May 2009 and August 2009. In his case, Richard III called as witnesses Archie McDonnell, Jr. ("McDonnell"), Cindy Wilson, Von Burt, Lee Meyer, Deanna Wilbourn (adverse), Russell Williamson, Jim Wilbourn, Jane Wilbourn, Elizabeth Williamson (adverse), Bill Nunnery, Kirk Reasonover, Janie Goodman, George Hill, Garnett Hutton (adverse) and Richard III. At the conclusion of Richard III's case, the court granted Defendants' motion under Rule 41(b) to dismiss all of Richard III's claims, with the exception of Richard III's claim to declare the Notice of Removal invalid and void. RV 60 of 62, pp. 2920-2994.

For their case, Defendants called McDonnell, Elizabeth Williamson, Garnett Hutton, David Barr, Don Rogers, and Bob Walters as witnesses. None of them presented any testimony or other evidence concerning Marital Trust B. RV 44 of 62, pp. 503-600; RV 45, pp. 601-633; RV 51, pp. 1534-1646; RV 54, pp. 2018-2073; RV 61, pp. 3015-3150; RV 62, pp. 3151-3159. At the conclusion of Defendants' case, Richard III moved the court under Rule 41(b) to dismiss all of Defendants' counterclaims. The court took the motion under advisement. RV 61, pp. 3013-3150; RV 62, pp. 3151-3159.

In defense of Defendants' counterclaims, Richard III testified and the court allowed him to incorporate in his defense of the counterclaims the evidence that he presented during his case. Defendants did not call any rebuttal witness or offer any further evidence. The trial then concluded. RV 62, pp. 3188-3252.

On December 8, 2009, the chancellor issued his seventy-one page opinion which, among other things, removed and disqualified Richard III from serving as co-trustee as Marital Trust B and appointed Elizabeth Williamson as successor co-trustee. The chancellor held that Richard III violated his fiduciary duties by recording conversations, by disagreeing with his mother on voting the shares at the March 2007 annual meeting of shareholders, by his conduct at the bank, by requesting that his mother sign a personal guaranty for the construction of a new family-owned hotel,

by his involvement in his mother's purchase of a Florida condo, by his involvement in the creation of the Wilbourn Family, LLC and the Providence Trust, and because of hostility between him and his mother and sisters. RE 2, RV 40 of 62, pp. 5914-5984 (Opinion).

B. Statement of the Facts

1. An Overview of the Facts

Richard II was an attorney, as is his son, Richard III. At the time of his death, Richard II and Richard III practiced law together. Defendant Deanna Wilbourn is Richard III's mother, and Elizabeth Williamson and Garnett Hutton are his sisters. At his death, Richard II was the largest shareholder of the holding company which owns the bank. Richard II left all of his 41,910 shares in the holding company to a testamentary trust that is referred to as "Marital Trust B." He named his wife and Richard III as co-trustees, and he named his two daughters as successor co-trustees in the event of the resignation or removal of a co-trustee. During her lifetime, Deanna Wilbourn is to receive all of the annual income of the Trust (dividends from the stock). Upon her death, the property of the Trust is to be distributed to all three of his children. RE 6 (Article V, p. 4-8), RV 1 of 18, pp. 4-8.

At his death, Richard II was chairman of the board of the holding company and the bank. He and two of his children (Richard III and Garnett Hutton) held three of the five director positions on the board of the holding company, which gave them control of the holding company and the bank. The other two directors were Archie McDonnell, Sr. and his son, Archie McDonnell, Jr. Following Richard II's death, Richard III took his father's place as chairman of the board of the holding company and the bank, and Deanna was elected to the board of the holding company.

The terms of Marital Trust B do not prohibit the co-trustees from voting the Trust's shares for themselves to be directors of the holding company, and they have on occasion done just that. Indeed, at every opportunity on which the Trust's shares have been voted or proposed to be voted, Deanna Wilbourn has sought to vote the shares for nominees that included her. At the 2005 and 2006 annual meetings of shareholders of the holding company, Richard III and Deanna Wilbourn,

as co-trustees, agreed to vote the Trust's shares for a board-nominated slate of directors that included *both* of them and Garnett Hutton. The 2005 vote represented a re-election of Richard III and Garnett, and a first term for their mother. The other two board members were Archie McDonnell, Jr. ("McDonnell") and his father.

As president of the bank, McDonnell ran its day-to-day operations. From time to time, McDonnell and Richard III (who was chairman, an officer and a director of the holding company and the bank) had differences of opinion on matters concerning the bank. McDonnell was irritated by Richard III's questions, his requests for financial information, his discussions with officers and employees, and some of his ideas and suggestions. By the Fall of 2006, McDonnell wanted to be rid of Richard III. By late 2006, McDonnell and Defendants secretly agreed to join together to remove Richard III from all of his board-elected positions with the holding company, except his position as a shareholder-elected director, and all of his positions at the bank,[3] and to replace him with Defendant Elizabeth Williamson's husband (Russell Williamson). They accomplished that at board meetings held on January 9, 2007, at which they also engineered a board-nominated slate of directors for the holding company that excluded Richard III. The day before, McDonnell lied to Richard III and said he knew nothing about the changes that were in store for the next day. Despite what occurred at those board meetings, with the support of other shareholders (including Richard II's brother), Richard III was nominated and reelected as a director of the holding company.[4]

Nominees to the board of the holding company were to be voted on at the March 2007 annual meeting of shareholders. In advance of that meeting, Richard III and Deanna Wilbourn disagreed over her proposal to vote the shares of Marital Trust B for the board-nominated slate of directors that *included her but excluded Richard III.* He requested that they meet to discuss the issue, but she

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[3] Richard III was a director, chairman, secretary, general counsel, compensation committee member and chairman, loan committee member, and Trust committee member.

[4] To this day, with the support of Richard II's brother's family's shares and Richard II's sister's family's shares, Richard III continues to be a director on the holding company board.

declined to meet and reiterated in writing that she wanted to vote the shares for the board-nominated slate. At the annual meeting, however, Deanna Wilbourn flip-flopped: she proposed that Richard III agree to vote the shares for nominees that *included Richard III*, thus abandoning the board-nominated slate that she had insisted on. But she also wanted to vote the shares for herself and McDonnell, which was not agreeable with Richard III. Consequently, the shares of Marital Trust B were not voted at the March 2007 annual meeting of shareholders. Despite that fact, Elizabeth Williamson's husband (Russell Williamson) was elected as a director, and both Richard III and Deanna Wilbourn were reelected to the board. The result was that the "Wilbourn Family" maintained control of the holding company and the bank.

Frustrated by Richard III's reelection as a director, Defendants decided to get control of Marital Trust B and its shares so that they could vote those shares to prevent Richard III from being reelected as a director, and elect one of them in his place. In May 2007, Defendant sent Richard III a Notice of Removal that purported to remove him as co-trustee of Marital Trust B on the ground that he had become "incompetent," a stated ground for removal under the terms of the Trust. However, Richard III's alleged incompetence was not based on any claimed physical, medical or mental disability, or on any misconduct with the Trust. Rather, in the Notice Defendants claimed that Richard III was incompetent because he disagreed with his mother about how to vote the Trust's shares at the March 2007 shareholder meeting, and because of "problems" that McDonnell claimed Richard III caused at the bank. Defendants did not allege that Richard III was "hostile" to them, nor did they allege any of the various and sundry breaches of fiduciary duties that they would later claim or on which the chancellor relied to remove Richard III as co-trustee.

Richard III filed this action to set aside that Notice of Removal,[5] obtain a judgment that Defendants should be removed and/or declared ineligible to serve as co-trustee, and recover his unpaid co-trustee's fee. In answering the complaint, Defendants did not assert a counterclaim and

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[5] The court below granted summary judgment for Richard III that Defendants' Notice of Removal did *not* have the effect of removing him as a co-trustee. RE 13.

did not allege that Richard III was hostile to them. Later, however, Defendants amended their answer to assert counterclaims to remove Richard III as a co-trustee on the grounds of his alleged breach of fiduciary duties, hostility to Defendants, and conflict of interest.

A detailed discussion of the facts follows.

2. Richard II, the Bank and the Holding Company

Richard II practiced law in Meridian Mississippi, and he was also a successful businessman. As the result of a March 1998 tender offer, Richard II and members of his immediate and extended family acquired and owned a controlling interest in the bank.

Under a January 1999 "Memorandum of Agreement" between Richard II and Richard III, Richard III was to be nominated and elected to the board of directors of the bank in March 1999. The agreement provided in part that, *if requested to do so by his father*, Richard III would resign and not offer his name for reelection to the board:

> * * * if in the sole opinion of Richard E. Wilbourn his services as a Board member are no longer advantageous to the Wilbourn family's overall interest then at the request of Richard E. Wilbourn, Richard E. Wilbourn III agrees to resign from the Board and not offer his name for re-election to the Board during the lifetime and service of Richard E. Wilbourn on the Board, unless of course, there is a later request by Richard E. Wilbourn for him to do so.

RE 4, RV 11 of 18, pp. 1628-1638, Exhibit 402, p. 2. That agreement further provided:

> This Agreement recognizes that [Richard III] has a duty and obligation upon accepting the position of director of any bank to represent the best interest of the stockholders and to act prudently and independently on their behalf in all matters and *it is not intended in any way and does not require that [Richard III] agree with [his father] or vote as [his father] might vote, but he should vote his conscience and best judgment in complete fulfillment of his obligation as a director for so long as he serves in that capacity.*

Exhibit 402, p. 3 (emphasis added). Nothing in that agreement states or implies that it will survive the death of Richard II, or that anyone other than Richard II can request that Richard III resign.

In March 1999, Richard II became chairman of the board and a director of the bank, and Richard III became a director. Prior to his death, Richard II never asked Richard III to resign or not offer his name for reelection to the board. To the contrary, when the holding company was formed

in 2002, Richard II took steps to make sure that Richard III was elected as a director of the holding company in addition to continuing as a director of the bank. Richard II never requested that Richard III sign any agreement to serve as a director of the holding company. As a continued sign of his confidence in Richard III, by the time of his death Richard II had made Richard III his law partner, he had put him on the bank's compensation committee, he had made arrangements for Richard III to have a law office at the bank's Madison, Mississippi branch, and he had directed McDonnell to assign the bank's site acquisition work to Richard III. RV 55 of 62, p. 2158 (Richard III).

The holding company was formed for the purpose of owning all of the stock of the bank. The holding company acquired all of the shares of stock in the bank, and the persons who were shareholders in the bank became shareholders in the holding company.

Richard II died suddenly in October 2004. At the time of his death, Richard II was the largest single stockholder in the holding company.[6] He was survived by his wife and his three children.

3. Richard II's Estate, His Will and Marital Trust B

Richard II's Last Will and Testament, dated May 7, 1999 (the "Will"), names Deanna Wilbourn to serve as executrix of the estate, and she so served.[7] RE 6, RV 1 of 18, pp. 1-21, Exhibit 1. Don Rogers, a law partner of Richard II and Richard III, was hired to be an attorney for the estate. Regular "Estate Progress Committee" meetings were held and attended by, among others, Deanna Wilbourn, Don Rogers, Richard III, Mike Crosby (a CPA), Elizabeth Williamson and Garnett Hutton. RV 1 of 18, pp. 74-379, Exhibit 17 (minutes of meetings).

Upon request by Deanna and/or Don Rogers, Richard III performed various legal work for the estate. Among other things, Richard III obtained information that was needed for an appraisal of the holding company stock, and identified an expert to make that appraisal and deal with any challenges by the Internal Revenue Service. RV 56 of 62, pp. 2260, 2276; RV 60, p., 2889 (Richard

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[6] He owned 41,910 shares, slightly less than 30% of all outstanding shares.

[7] There is no evidence to support the chancellor's finding that Richard III was the executor of the estate. RE 2 (Opinion at pp. 20, 23).

III). At trial, Deanna testified that she thought that Richard III did a good job on the estate matters that he handled, on the sale of the "Limerock Farm" that his father had owned, and on matters for the Wilbourn Family, LLC. RV 46 of 62, pp. 838-840; RV 47, p. 1007 (Deanna).

Item V of the Will left to Marital Trust B all of the stock that Richard II owned in the bank (a total of 41,910 shares), with Richard III and Deanna Wilbourn as co-trustees.[8] The provisions of the Trust are not ambiguous. Annually, all of the net income of Marital Trust B is to be distributed to Deanna during her life, subject to the payment of an annual fee to the co-trustees equal to 6% of the income. At Deanna Wilbourn's death, the co-trustees have the power to invade the principal of the Trust to pay estate taxes, after which the co-trustees are to terminate the Trust and distribute all of its assets equally to Richard II's three children. Item V(f). The Trust directs that the co-trustees shall not "sell this stock or vote in favor of any merger or other corporate action which is calculated to lead to a merger which would dilute the voting power or ownership of the stock in [the bank] or would lead to the sale or exchange of the stock" *unless* all of the beneficiaries (income and principal) agree in writing. *See* RE 6, Item V(d). Since Richard II's death, there has never been any proposed sale or exchange of the stock or merger of the bank. RV 58 of 62, pp. 2573, 2578 (Richard III).

With the exception of the limitations set forth in Item V(d), the provisions of the Trust do not dictate whether or how the co-trustees are to vote the shares, do not prohibit the co-trustees from voting the shares for director-candidates who include one or both of the co-trustees, do not require the co-trustees to vote for only the board-nominated slate of directors, and do not give Deanna, as a co-trustee power, the right to control or to demand deference from the other co-trustee. Item V(g) of the Trust provides that a co-trustee can be removed "*if and only if* a Co-Trustee shall become incompetent, unable to serve or grossly mismanages the trust." (emphasis added).

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[8] The Will was probated, but was later reformed in one respect. At the death of Richard II, his stock ownership was in the holding company, not in the bank. A July 2005 decree of the Lauderdale County Chancery Court reformed the Will to make it clear that the assets of Marital Trust B are the shares of stock that Richard II owned in the holding company. *See* Exhibits 45 and 46 (petition and order for reformation of Marital Trust B).

In July 2005, Richard III and Deanna began serving as co-trustees of Marital Trust B. From then until May 2007 when he received the "Notice of Removal," Richard III handled all of the routine administration of the Trust such as keeping the stock certificates for the Trust's shares in the holding company, maintaining a bank account for the Trust, receiving and distributing the monthly bank account statements, receiving and depositing distribution checks from the holding company, and distributing the Trust's income (less a trustee's fee) to Deanna Wilbourn. *See, e.g.,* RV 1 of 18, pp. 54-73, Exhibit 16 (bank statements), RV 4 of 18, pp. 583-84, Exhibit 80 (example of report to Deanna Wilbourn).

At the 2006 annual meeting of the shareholders of the holding company, Deanna Wilbourn and Richard III agreed to vote the Trust's shares for the board-nominated slate of directors, a slate that included both of them and Garnett. No member of the family took the position that there was anything wrong with Deanna and Richard III voting the shares for nominees who included themselves. RV 47 of 62, p. 942 (Deanna); RV 57, p. 2481 (Richard III); RV 54, p. 1968 (Garnett).

4. Richard III's Tenure As Chairman

After the Richard II's death, it was agreed among his wife and children and McDonnell that Richard III should take his father's positions at the holding company and the bank because, among other things, that was Richard II's desire. RV 1 of 18, pp. 29-41, Exhibit 4, transcripts of discussions.[9] In November 2004, Richard III was elected to serve as chairman of the board of both the holding company and the bank, and he was elected to serve as general counsel of the bank. He also continued to be a shareholder-elected director of the holding company, and a director of the bank. RV 57 of 62, p. 2490 (Richard III). Richard III served as chairman of the holding company and the bank from November 2004 until January 9, 2007. During that time, McDonnell was president of the bank, and the directors of the holding company were Richard III, Deanna Wilbourn,

[9] In speaking with Deanna shortly after Richard II died, McDonnell stated that "[Y]our husband's goal was for Young Richard to assume his position as chairman of the board at some point and time in the future. . . . Ultimately, Big Richard chose him for this job." RV 1 of 18, pp. 29-41, Exhibit 4, pp. 2-3.

Garnett Hutton, McDonnell, and McDonnell's father, Archie McDonnell, Sr. RV 55 of 62, p. 2201; RV 59, 2705 (Richard III).

During his tenure as chairman of the board, Richard III's father had not been a "hands-off" chairman. To the contrary, he frequently had discussions with various bank employees (including the chief financial officer, Cindy Wilson), involved himself in matters such as whether and where the bank would open a new branch, deciding who would handle site acquisitions for new branches, participating in the negotiations for branch sites, and being involved in the architectural design of new branches right down to the color of the roof (blue). RV 56 of 62, pp. 2178-86 (Richard III).

After he became chairman of the bank and the holding company, Richard III was also a hands-on chairman and officer. Richard III in some cases followed his father's practices, adapting them to the bank's present circumstances, and in other cases he attempted to look at challenges anew, asking questions and learning as much as he could about the bank's operations. For example, early in his tenure, Richard III sent McDonnell a memo dated November 10, 2004, in which he asked McDonnell for information that would help Richard III get a better handle on certain bank matters, and he floated some ideas. RV 1 of 18, pp. 46-48, Exhibit 9. Certain aspects of that memo angered McDonnell, and McDonnell essentially disregarded Richard III's requests and ideas. RV 1 of 18, pp. 49-51, Exhibits 10 and 11; RV 55 of 62, pp. 2222-2232 (Richard III).

Nevertheless, Richard III continued to try to make helpful suggestions and to float ideas. *See, e.g.*, RV 1 of 18, p. 53, Exhibit 13 ("Charles Reasonover may have a good point about the CNB name being too common"); RV 3 of 18, p. 430, Exhibit 44 (potential repayment of trust preferred securities). One of Richard III's suggestions was to merge the bank's "profit sharing plan" with its 401(k) retirement plan. RV 6 of 18, pp. 764-765, Exhibit 151 (emails of September 15 and 28, 2006). McDonnell rejected that idea (Exhibit 151) because he said it would have had a detrimental effect on most lower-paid employees. RV 44 of 62, pp. 566-569. However, Lee Meyer, the bank's chief trust officer, testified that after Richard III was removed as chairman, the bank did *precisely*

what Richard III had suggested: the bank merged its profit sharing plan into the 401(k) plan because it "made administrative sense." RV 46 of 62, pp. 818-819.

In April 2005, Richard III contacted Bill Meredith, a bank consultant, asking him to give Richard III "independent input and analysis" on the bank that would include "what you think a good chairman should be doing to provide strong leadership." RV 3 of 18, pp.. 403-406, Exhibit 30. Richard III had become acquainted with Bill Meredith when Richard II invited him to come to the bank to conduct a board retreat shortly after Richard II became chairman. Moreover, as stated in the January 1999 agreement, Richard II had often used banking consultants and advisors without telling the McDonnells he was doing so.[10]

While chairman of the bank and the holding company, Richard III also visited and communicated with various directors, officers and employees of the bank on matters that included requests for information and financial data on the bank. In particular, Richard III asked Cindy Wilson, the bank's chief financial officer ("CFO"), for various financial information on the bank. McDonnell said that he had told all executive officers to provide Richard III with whatever financial information he requested[11], but in practice McDonnell acted otherwise, such as having Wilson forward to him all emails she received from Richard III and reporting to him whenever Richard III came to meet with her, and having Wilson withhold information that Richard III requested. RV 60 of 62, p. 2885 (Richard III); RV45, pp. 733-736 (Cindy Wilson); discussion at pp. 17, *infra*.

Beginning in March 2005 and continuing to June 2006, and in advance of the monthly meeting of the bank board, Richard III sent a monthly memo to Kirk Reasonover and Elizabeth, both of whom served as directors of the bank. RV 3 of 18, pp. 392-395, 409-412, 425, 428, Exhibits 25, 32, 41; RV 4 of 18, pp. 461-464, 477-478, 487-490, 493-497, 569-576, 592, Exhibits 47, 53, 59, 61,

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[10] "Whereas, he [Richard II] continued his purchase of said stock requiring many hours of thought, research, analysis, and negotiations, seeking advise from lawyers and others in a confidential relationship which lasted for a period of approximately twenty-five (25) years." RE 4, p. 1, Exhibit 402.

[11] "I had standing instructions with all of the executive officers that reported to me that they could provide Richard with whatever financial information that he requested of them, but I would like to know what he requested." RV 42 of 62, p. 182.

77, 89; RV 5 of 18, pp. 616-630, 712, 717, 720-722, Exhibits 98, 122, 127, 129. The memos offered Richard III's analysis on aspects of the bank's financial performance. Richard III viewed his memos as a continuation of his father's practice of sending monthly financials along with his comments to Richard III and one or two other bank directors in advance of meetings. RV 53 of 62, pp. 1802-1803 (Reasonover); RV 56 of 62, pp. 2264-2266 (Richard III). Garnett Hutton and Elizabeth Williamson's husband (Russell Williamson) received some of Richard III's monthly memos. Neither Elizabeth nor Garnett ever told Richard III that they thought that Richard III was doing anything wrong by sending the memos. RV 49 of 62, pp. 1318-1319 (Elizabeth); RV 54, pp. 2001-2002 (Garnett).

By February 2006, McDonnell had become irritated with Richard III's "hands-on" approach as chairman of the board, so much so that he instructed Cindy Wilson, the bank's CFO, to withhold some financial information requested by Richard III, and later professed not recalling that he did that. In preparation for the February 2006 meeting of the bank board, Richard III had questions about the budget and the "stakeholders model" (an employee incentive compensation plan) that McDonnell supported. RV 60 of 62, pp. 2893-2899 (Richard III). Richard III asked Cindy Wilson to run an alternative scenario of the stakeholder's model. In the past, Richard III and Russell Williamson had requested and received alternative scenarios for the bank's proposed capital plan. RV 3 of 18, p. 429 Exhibit 42 (email dated June 8, 2005); RV 45 of 62, pp. 725-733 (Wilson). Although Wilson had in hand the alternative scenario document (entitled "Revised for Richard")[12] that Richard III had requested, McDonnell told Wilson not to give it to Richard III:

> Q: * * * The only reason you didn't give it to Richard was because Archie McDonnell, Jr. told you not to. Right?
>
> A: That's correct.

RV 45, pp. 733-734.

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[12] The email and attached "Revised for Richard" document appears at RV 5 of 18, pp. 602-608, Exhibit 94.

After the February 2006 board meeting, McDonnell requested a meeting with Richard III and they met on February 16. At that meeting, McDonnell complained about Richard III having had conversations with various bank employees, about Richard III contacting one of the many bank consultants (Mike Higgins), about Richard III asking the CFO for financial information, and about a remark that Richard III had made to Bob Walters, another consultant, that McDonnell was a "silver-tongued devil." Richard III acknowledged that he had made the remark to Walters, and he immediately apologized for it. RV 44 of 62, pp. 523-526, 532 (McDonnell). They also discussed whether a CFO should report to the board of directors of the bank instead of to the president. McDonnell, to whom the bank's CFO (Cindy Wilson) reported, did not want that to be the practice at the bank, and Richard III never proposed that the board adopt that policy. RV 56 of 62, pp. 2366-2368 (Richard III).[13]

By late 2006, McDonnell was clearly annoyed with how Richard III was performing his work at the bank, especially with Richard III's discussions with bank officers and employees. However, nothing in the by-laws, rules, regulations or resolutions of either the holding company[14] or the bank[15] restricted or limited the chairman's general executive powers, or prohibited the chairman or a director from communicating with or asking questions of bank officers and employees, or from requesting information and data from bank officers and employees, or from attending meetings of bank officers and employees—the very things that irritated McDonnell. There has also never been

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[13] Richard III's idea was not novel to the banking industry. Richard III gave unrebutted testimony that the chief financial officer at Trustmark National Bank, BankPlus, State Bank and Trust Bank, and Merchants and Farmers Bank attend board meetings and gives financial reports to the board. RV 60 of 62, pp. 2875-2876.

[14] Article VI of the By-Laws of the holding company pertains to "Officers, Agents And Employees." Section 5 provides that the chairman serves at the pleasure of the board, the chairman "shall supervise the carrying out of the policies adopted or approved by [the board] and shall have general executive powers as well as any specific powers conferred by the By-Laws or [the board]." *See* RV 6 of 18, pp.792-834, Exhibit 164, holding company By-Laws, p. 8 (E&G 0268) (emphasis added).

[15] Article IV of the By-Laws of the bank pertains to "Officers and Employees." Section 4.1 provides that the chairman serves at the pleasure of the board, he shall supervise the carrying out of the policies adopted or approved by the board, and "[h]e shall have general executive powers, as well as the specific powers conferred by these Bylaws." Exhibit 164, By-Laws of Bank, p. 5 (E&G 0283) (emphasis added).

any rule, regulation or resolution of the bank or the holding company that purports to require the chairman or a director to obtain the permission of McDonnell to communicate with or ask questions of or obtain information from bank officers and employees.

The morning after their February 16 meeting, McDonnell woke up worried that Richard III might try to get him fired, *even though Richard III had never threatened to fire him.* RV 42 of 62, pp. 260-261 (McDonnell). McDonnell went to meet with Deanna in her home on the following Saturday to tell Deanna about the February 16th discussion and what Richard III was doing at the bank. During a two hour meeting, McDonnell gave Deanna his side of the story. RV 42 of 62, pp. 262-264(McDonnell). Richard III was not invited to that meeting, nor was he ever told about it. Either McDonnell or Deanna relayed that information to Elizabeth and Garnett, and a telephone conference followed between Richard III and Defendants in which Defendants complained about Richard III's job performance *based on what McDonnell told them.* RV 50 of 62, pp. 1367-68, 1382-83 (Elizabeth).

Meanwhile, on February 26, 2006, Richard III sent a letter to McDonnell which he had drafted before the telephone conference with his Mother and sisters. In it he apologized for his remark to Bob Walters. RV 5 of 18, pp. 645-646, Exhibit 106. A few days later, McDonnell sent Richard III a birthday card in which he stated, "We appreciate your leadership & your commitment to making/assisting us in our efforts to both become a high performer & to fulfill our destiny of becoming 'Mississippi's Community Bank.'" RV 5 of 18, pp. 658-666, Exhibit 112 (emphasis original). Taking the card at face value, Richard believed it signaled that McDonnell wanted to work cooperatively with him for the best interests of the bank, a belief that later proved to be misplaced. RV 56 of 62, pp. 2387-2390 (Richard III); RV 42 of 62, pp. 268-269 (McDonnell).

At trial, McDonnell, David Barr and Cindy Wilson were the only bank employees who testified about what Defendants alleged was Richard III's "disruptive" behavior at the bank. McDonnell and Barr testified that Richard III's governance style was different from what his father's had been, he tried to involve himself in management of the bank, he irritated employees, some

employees complained about him, and he did not "honor the line of communication" in talking to employees. *However, McDonnell and Barr both admitted that they did not have first-hand knowledge of Richard III acting improperly toward any bank employee. See, e.g.*, RV 61 of 62, pp. 3042, 3045-3049, 3052 (Barr).

Cindy Wilson testified that sometimes Richard III would ask her for monthly financial information before she had it ready, and on one occasion in the middle of 2006, Richard III told her that she was "just like McDonnell, that I manipulated the details to fit my needs." However, she further testified that Richard III was always pleasant and courteous, and he was not abusive. RV 45 of 62, pp. 718-722 (Cindy Wilson). She also testified that, when Elizabeth came to see her at the end of 2006 to discuss Richard III, the only problem she said that she had with Richard III was that he would request financial information too early in the month. RV 45, p. 737 (Wilson).

By contrast, a number of long-time officers and directors of the bank testified that he or she *never* had any problems with Richard III, *never* had observed any inappropriate behavior by Richard III, and *never* heard of anyone else having any problems with Richard III. Each of them considered that he did a good job as chairman.[16]

It is undisputed that none of the minutes of any board or committee meetings of either the bank or the holding company contains any mention of any problems with or disruptive behavior by Richard III. There is also no evidence that the personnel file for Richard III contains any mention of any problems with or disruptive behavior by him. RV 42 of 62, pp. 259-260 (McDonnell); RV 10 & 11 of 18, pp. 1475-1537, Exhibit 303 (personnel file).

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[16] Von Burt, who was then and had been Meridian regional president of the Bank for nine years (RV 46 of 62, pp. 793-806); Lee Meyer, who was then and had been chief trust officer of the bank for five years and who attended all directors trust committee meetings (RV 46, pp. 807-822); George Hill and Bill Nunnery, both of whom had been long-term directors of the bank, and who also served on various committees within the bank (RV 52, pp. 1722-1783; RV 53, pp. 1923-1950; RV 54, pp. 1951-1957); Kirk Reasonover, a director of the bank (RV 52, pp. 1783-1800; RV 53, pp. 1801-1900); and Janie Goodman, a long-time employee who was acting head of the internal audit and risk management department of the bank (RV 53, pp. 1900-1923) Each of those witnesses was an officer or director in a significant position within the bank. None of them had ever had or heard of any problem with Richard III.

It is undisputed that during the time that Richard III served as chairman of the boards and as a director of the holding company and of the bank, the bank grew in assets, branches and customers, the value of shares in the holding company appreciated substantially, and distributions to shareholders increased. Thus, there was no interruption in distributions to the shareholders, including to Marital Trust B and its income beneficiary, Deanna.[17] In addition, no employee of the bank quit or threatened to quit because of Richard III. *See, e.g.*, RV 43 of 62, pp. 413 (McDonnell); RV 61, pp. 3040-3041 (Barr)..

5. Richard III's Recordings of Conversations

On October 24, 2006, and for reasons that had *nothing* to do with Marital Trust B, Richard III recorded a conversation that he had with his mother. RV 8 of 18, pp. 1162-1166, Exhibit 297. He had legitimate reasons to record that conversation.

On October 23, 2006, Deanna Wilbourn told Richard III that she wanted to meet with him to discuss his future at *the bank*. RV 57 of 62, pp. 2433. Richard III did not know what kind of mood she would be in for that conversation. Deanna had a history of alternately praising and criticizing Richard III as to how he was performing in his positions at the bank. At trial, Deanna admitted that she had a habit or practice of contradicting herself and not remembering what she or Richard III had said on a given occasion, a habit that she agreed sometimes drove other people crazy. RV 47 of 62, pp. 1007-1010 (Deanna). On any number of occasions, Deanna had accused Richard III of making statements that he had not made, she forgot statements that Richard III had made, she forgot statements that she had made, and she claimed to have made statements that she never made. Richard III testified that it was sometimes difficult to follow her train of logic. RV 57 of 62, pp. 2434-38. Given the totality of the circumstances, Richard III decided to record the conversation of

[17] Because the bank and the holding company are "subchapter S" corporations, dividends are referred to as distributions.

October 24, 2006 so he would have an accurate record of what was said by each of them. RV 57 of 62, pp. 2432- 38.[18]

The subject of the October 24 meeting was Richard III's job performance at the Bank. Deanna read a prepared statement to Richard III—her "ultimatum." After praising Richard III for his help with the estate, she stated:

> . . . . But now I need to talk about another subject–your role in the bank. . . . first, what you are doing in the bank is not in the best interest of our family–which also means the bank. . . . You must put yourself under the authority of the bank and not think of yourself as in authority. . . .
>
> Secondly, the other thing that you must do is to find a mentor (someone I agree with you on), and meet with him regularly. . . .
>
> These requirements are not negotiable.

RV 6 of 18, pp. 771-774, Exhibit 156. Neither Deanna's statement nor the ensuing discussion had anything to do with Marital Trust B.

Richard III subsequently recorded other conversations that he had with Deanna during October, November and December 2006 and early January 2007, but none had anything to do with Marital Trust B. Those conversations covered a wide range of subjects such as the bank, Richard III's job performance at the bank, what Deanna believed were Richard III's personal shortcomings, Richard III's marital dispute, his children, and the relationship between Deanna and her husband, Richard II. When on January 1, 2007, Deanna asked Richard III if he was recording their conversation, he answered truthfully that he was and that he had recorded other conversations. RV 57 of 62, pp. 2457-2460 (Richard III).

Richard III recorded Elizabeth Williamson once, on October 25, 2006, in a discussion that had nothing to do with Marital Trust B. RV 14 of 18, pp. 2000-2002, Exhibit 502. On the night of October 23, 2006 (the night before Deanna read her "ultimatum" to Richard III), Deanna and Elizabeth had a telephone discussion that Richard III knew had occurred. Sensing that Elizabeth had

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[18] On one occasion when her husband was alive, Deanna admitted that she had told him that he should have recorded some conversations over a business transaction. RV 47 of 62, pp. 1014-1016 (Deanna).

a role in the "ultimatum" that Deanna gave him on October 24, Richard III expressed that to his sister Garnett Hutton. On October 25, Elizabeth called Richard III to *deny* that she had any advance knowledge of what Deanna was going to say on October 24, and Richard III recorded that brief discussion. RV 6 of 18, pp. 777-786, Exhibit 159 (transcript of conversation). Nothing about their conversation that day had anything to do with Marital Trust B; it dealt only with matters at the bank.

Richard III recorded Garnett Hutton once on July 24, 2007. That day, Richard III, Deanna and Garnett had a phone conference to discuss financing for the construction of a Homewood Suites hotel, and Richard III recorded that conversation. Nothing about that conversation had anything to do with Marital Trust B. That conversation occurred at a point in time that was over three months after Defendants signed the Notice of Removal (*infra*), and over two months after this suit was filed. RV 58 of 62, pp. 2624-2627 (Richard III); RV 55, pp. 2108-2109 (Garnett).

6. Defendants' Plan to Remove Richard III as Chairman

By October 24, 2006, the day of Deanna's ultimatum to Richard III, Deanna, Elizabeth, Garnett, Russell Williamson and McDonnell were actively discussing among themselves a plan to remove Richard III from his positions with the bank and the holding company. Indeed, on October 25, 2006, the day after Deanna delivered her ultimatum to Richard III, she and McDonnell met to further discuss the matter. RV 46 of 62, pp. 854-859 (Deanna); RV 43 of 62, pp. 320-322 (McDonnell); RV 6 of 18, p. 776, Exhibit 158 (McDonnell's memo of October 25th). As it took shape, the plan included removing Richard III from his positions with the holding company and the bank, nominating a new slate of holding company directors that replaced Richard III with Elizabeth Williamson's husband (Russell Williamson), persuading other shareholders not to vote to reelect Richard III as a director, elect one of Defendants in his place, and appoint Elizabeth Williamson, her husband and Garnett Hutton to additional positions in the holding company and/or the bank. Defendants kept their plans and their accompanying meetings and discussions secret from Richard III. They continued that course of conduct during November and December 2006, and up to the morning of January 9, 2007, when board meetings of the holding company and the bank were held.

During that period of time, Defendants met and/or communicated with and among Russell Williamson and McDonnell and, at McDonnell's suggestion, they also met with attorneys, all to discuss, formulate and plan to remove Richard III from as many holding company and bank positions as they could. RV 46 of 62, p. 864-868, 1048 (Deanna); RV 48 of 62, pp. 1158-1161, 1166, and RV 49, pp. 1203-1205 (Russell Williamson); RV 50 of 62, pp. 1450-1453 (Elizabeth); RE 7, RV 6 of 18, p. 775, Exhibit 157; p. 776, Exhibit 158; pp. 787-788, Exhibit 160; p. 790, Exhibit 162; p. 792, Exhibit 164; p. 852, Exhibit 167; p. 861, Exhibit 172; RV 7 of 18, pp. 918-924, Exhibit 175; p. 926, Exhibit 177; pp. 927-928, Exhibit 178; pp. 927-938, Exhibit 179, pp. 929-932, Exhibit 180; pp. 933-936, Exhibit 181; pp. 937-939, Exhibit 185; p. 943, Exhibit 195; pp. 948-949, Exhibit 196; pp. 950-952, Exhibit 197; p. 953, Exhibit 198; p. 954, Exhibit 199; pp. 955-956, Exhibit 200; pp. 957-959, Exhibit 203.

From October 2006 to January 9, 2007, none of Defendants asked Richard III for his side of the "story" about "problems" that he supposedly was causing at the bank. Other than talking with McDonnell, Deanna and Garnett *never* contacted or were contacted by any of the bank employees who allegedly complained about Richard III's behavior. Elizabeth spoke only with Cindy Wilson who told her that the only problem that she had with Richard III was that he sometimes asked for monthly financial information before it was ready. RV 46 of 62, pp. 850-852 (Deanna); RV 50, pp. 1440-1443 (Elizabeth).

On January 1, 2007, Richard III told Deanna that he had recorded some of their conversations, which he had done since their October 24 meeting. The next day, Deanna told Richard III that she was very angry that he had recorded her and that there would be some changes at the bank. RV 47, of 62, pp. 1018-1025.

7. The January 9, 2007 Board Meetings

On January 8, 2007, Richard III met with McDonnell to get a copy of the agenda for the meetings to be held the next day. At that meeting, McDonnell lied to Richard III and misled him about what would be the agenda for the meeting the next day. McDonnell also gave Richard III a

false agenda, one that *deliberately omitted* what would be the motions and resolutions to remove Richard III from his various positions. McDonnell also denied knowing anything about any effort to remove Richard III from his positions at the holding company and the bank. The truth was that McDonnell knew and was heavily involved in what was in store for Richard III the next day. RV 7 of 18, p. 966, Exhibit 206 (the false agenda); RV 57 of 62, pp. 2464-2466, 2469 (Richard III); RV 60, pp. 2909-2911 (Richard III).

On the morning of January 9, 2007, immediately prior to the holding company board meeting, an attorney representing Defendants asked to meet with Richard III and in that meeting surprised him with a request that he resign from his various positions with the holding company and the bank (except as a shareholder-elected director of the holding company), and as a co-trustee of Marital Trust B and the Providence Trust. RE 8, RV 7 of 18, p. 965, Exhibit 205 (the Notice of Resignation). To that point in time, however, Defendants had never voiced any complaint about Richard III's performance of his duties as co-trustee of Marital Trust B. RV 46, of 62, p. 880 (Deanna); RV 51, p. 1505 (Elizabeth); RV 54, pp. 1966-1969 (Garnett); RV 56, p. 2251 (Richard III). Defendants' request that Richard III resign as co-trustee of Marital Trust B had nothing to do with the Trust itself, but it was a component of Defendants' plan to remove Richard III from his bank and holding company positions.

At the subsequent meetings of the boards of the holding company and the bank, McDonnell, his father, Deanna and Garnett voted to remove Richard III from all of his board-elected positions with the holding company and the bank. The board also nominated a new slate of directors for the holding company to present to the shareholders. For the first time since 1999, that slate did not include Richard III. RV 7 of 18, pp. 967-978, Exhibits 208, 209, 210.

After the events of January 9, 2007, Richard III remained a director of the holding company, a co-trustee of Marital Trust B, and a co-trustee of the Providence Trust. Defendants, however, continued with their plans to try and prevent him from being reelected as a director of the holding company, and to try and remove him from his positions as co-trustee of Marital Trust B and as co-

trustee of the Providence Trust. During January 2007, Deanna and Elizabeth contacted Jim Wilbourn (Richard II's brother and Richard III's uncle), a shareholder, to ask that he and his family not vote to reelect Richard III as a director. However, later in January 2007, Jim Wilbourn timely nominated Richard III for reelection as a director of the holding company. RV 7 of 18, pp. 1032-1037, Exhibit 230 (Jim Wilbourn's nomination letter); RV 49 of 62, pp. 1234, 1237-1239 (Jim Wilbourn).

8. The Events of January, February and March 2007

Over Richard III's objections before and at trial, the chancellor allowed evidence of settlement letters and settlement negotiations between Richard III and Defendants. RV 17 of 62, pp. 2419-2425, motion in limine; RV 44 & 45 of 62, pp. 598-605 (objections, argument, ruling); RV 58, pp. 2693-94 (same); RV 59, pp. 2828-37 (same). The settlement letters appear at RE 9, Exhibits 545, 549, 550, 552.

Those settlement negotiations began with Richard III's settlement offer dated January 30, 2007 addressed to McDonnell and Deanna Wilbourn. RE 9, Exhibit 545. Item 1 of his several settlement terms stated, "The shares of Trust B will not be voted in March 2007." He made that statement because at that point Deanna Wilbourn wanted to vote the Trust's shares for the board-nominated slate that include her but excluded Richard III, and he wanted her to know that he did not agree to so vote the shares. He did *not* make that statement with the intent that he would never agree on how the Trust's shares would be voted. RV 59 of 62, pp. 2844-2847 (Richard III). Subsequent settlement counter-offers followed that letter. RE 9, Exhibits 549, 550, 552.[19]

Independent of any settlement discussions, Richard III, as co-trustee, *twice* wrote to Deanna as co-trustee (letters of February 2 and 9, 2007) asking her to meet with him to discuss voting the shares of Marital Trust B. Richard III wanted Deanna to consider reelecting Richard III and electing new people to the board. RE 10, RV 7 of 18, pp. 1041 and 1047, Exhibits 235 and 246. On

[19] Richard III objected to Defendants' reference to and offer of each of those exhibits.

February 7, Deanna responded that she did not want to meet and that she wanted to vote the Trust's shares for the board-nominated slate. RV 7 of 18, pp. 1046, Exhibit 243 (her letter).

On February 14, 2007, Deanna changed her position and offered to "replace Garnett with [Richard III] on the holding company slate." Exactly how that could occur at that point was not explained, because the nominating committee (with Deanna as a member) had already nominated a slate that included Garnett, and the deadline for the nominating committee to change its mind had passed. RV 7 of 18, pp. 967-968, Exhibit 208 (minutes of January 9, 2007 meetings).

Moments before the March 2007 annual meeting, Deanna, accompanied by one of her attorneys, presented Richard III with an offer to vote the Trust's shares for him and four of the five board-nominated slate—Deanna would "drop" Garnett. Richard III did not agree to her proposal because he did not believe that it was in the best interests of the shareholders of the holding company to elect Deanna, McDonnell and Russell Williamson to the board. Nevertheless, Deanna filled out, signed and took to the counting room a ballot that purported to vote the Trust's shares for Richard and four of the five board-nominated directors.[20] RV 8 of 18, p. 1098, Exhibit 266 (the ballot); RV 47 of 62, pp. 927-932, 984 (Deanna); RV 57, pp. 2518-19 (Richard III). Regardless, other shareholders joined with Richard III to reelect him as a director of the holding company. He was also reelected as a director at the 2008 and 2009 annual meetings.

At that March 2007 meeting, there was a very brief discussion between Richard III and Deanna Wilbourn and her attorney (Kathryn Hester). In response to Deanna's question about "who else" Richard III had in mind to be considered as a director, it is undisputed that Richard III said, *if they had met as he requested*, they "could have considered" other persons, including Kirk Reasonover and Bill Grete. Richard III, however, never said that he wanted to vote the Trust's shares for either of them. RV 57 of 62, pp. 2501 (Richard III) ("I said, 'Well, if we had met, I would

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[20] Deanna was asked, "'Q: All right. Do you recall that you cast a ballot for electors of the bank holding board, which included your son?' What was your answer?" Deanna testified, "I attempted to cast it and it was not counted." RV 47 of 62, pp. 984-985.

have liked to have considered other candidates.' And she said, 'Like whom?' And I said, 'I'd like to consider, like, Bill Grete or Kirk Reasonover.'"); RV 47 of 62, p. 932 (Deanna) ("I don't remember exact words, but his reason was that he had other people in mind, obviously to be on the ballot and elected to the board. I'm not sure if that's–at that time I asked him who but – or whether – I shouldn't guess. But he said Bill Grete and Kirk Reasonover. And those were the people he wanted on the ballot."); Reasonover, a resident of New Orleans, Louisiana, was then and had been director of the bank for several years, having succeeded his father on the bank board. Grete, a lawyer in Jackson, Mississippi, was a friend of Richard III's, but Richard III had never asked him to be on the board. In any event, it is undisputed that Richard III *never* made any nomination for either Grete or Reasonover to be elected as a director of the holding company. RV 57 of 62, pp. 2501-2503 (Richard III).

Whether or not Richard III and Deanna agreed that it was in the best interest of the bank's stockholders to add new directors to the board, it is undisputed that at the March 2007 shareholders' meeting, there was no proposal for any merger of the holding company or the bank, or to sell any stock in the holding company to another bank, bank holding company or individual, or for the sale or exchange of any stock in the holding company. RE 6 at 6 (settlor's directives to the co-trustees of Marital Trust B). The disagreements about how to vote the Trust shares simply did not implicate any of the above terms of the Trust—whether the shares were voted or not. The only occasion on which Richard III and Deanna did not agree on how to vote the Trust's shares was at the March 2007 meeting.[21]

[21] See footnote 2, *supra*.

It is undisputed that the fact that the Trust's shares were not voted at the March 2007 annual meeting (or at the 2008 and 2009 meetings)[22] did not dissipate or devalue the Trust's shares of stock, did not reduce any dividends paid by the holding company, did not reduce or affect any distributions to the Trust, did not affect the growth of the holding company (or the bank), did not result in the bank losing customers or depositors, and did not result in any reduction of the market value or book value of the shares in the holding company[23], nor in any write down of any assets of the Trust. RV 43 of 62, pp. 414-420 (McDonnell). Indeed, the evidence is that since March 2007 the value of the bank and its shares have substantially appreciated in value. *See, e.g.*, RV 43 of 62, pp. 414-420 (McDonnell); RV 8 of 18, pp. 1125-1127, 1143-1146, Exhibits 282, 291, 292; RV 11 of 18, pp. 1611-1615, Exhibits 314 & 315; RV 45 of 62, pp. 633-634 (McDonnell). All the while, Richard III has continued to serve as a director of the holding company.

Further, the fact that the Trust's shares were not voted did not result in any dilution or diminution of power or influence of the family of Richard II. Before the March 2007 annual meeting, three members of Richard II's family sat on the board of the holding company (Deanna, Richard III and Garnett); since then, three members of that family have been on the board of the holding company (Deanna, Richard III and Russell Williamson). Since the March 2007 annual meeting, Richard II's family members have *increased* the number of positions that they hold within the holding company and the bank:

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[22] At the March 2010 annual meeting of shareholders of the holding company, the shares owned by Marital Trust B were voted by Deanna Wilbourn and Elizabeth Williamson, but not for the reelection of Richard III. Nevertheless, he was reelected as a director and continues to serve as a director as of February 2011.

[23] McDonnell admitted to all of those facts in numerous exchanges at trial, such as this: Q: But based on what you've told us, you're not claiming that the inability of the co-trustees to agree on how to vote the shares has interfered with the bank's financial performance one cent, has it? A. Up until now, no, sir." RV 45 of 62, p. 637 (McDonnell).

(1) Garnett became secretary of the board of the holding company, a position she had not held prior to March 2007. For that, she receives the same salary as the other board members.

(2) Garnett was placed on the board of the bank, a position that she had not held prior to March 2007. For that, she receives a director's salary.

(3) Garnett was placed on the audit committee of the bank, a position that she had not held prior to March 2007.

RV 54 of 62, pp. 1962, 1999, 2012, 2018-2019, 2029, 2026-2028, 2033.

(4) Deanna has remained as a director of the holding company.

(5) Elizabeth has remained a director of the bank, and she became a member of the bank compensation committee, a position that she did not hold prior to March 2007.

(6) Elizabeth's husband, Russell Williamson, obtained these positions that he did not hold prior to March 2007: chairman of the holding company, chairman of the bank, executive vice-president of the bank, a member of the trust committee, a member of the loan committee, and chairman of the compensation committee.

RV 46 of 62, pp. 825-827; RV 48, pp. 1189-1193; RV 49, pp. 1283-1286.

9. Defendants' April 2007 Notice of Removal

Marital Trust B allows a non-judicial removal of a co-trustee "*if and only if* a Co-Trustee shall become incompetent, unable to serve or grossly mismanages the trust." RE 6 at 7 (emphasis added). Prior to the March 2007 annual meeting of shareholders, Defendants showed a draft of the Notice of Removal to Elizabeth's husband, Russell Williamson. RV 48 of 62, pp. 1175-1176 (Russell Williamson). On April 10, 2007, Defendants signed the Notice of Removal. RE 11, Exhibit 284. However, Defendants did not send the Notice to Richard III until May 10, 2007. *Id.* Prior to signing the Notice of Removal, neither Russell Williamson nor any of the Defendants ever

told Richard III or sent him anything in writing to the effect that he was not properly performing his duties as co-trustee, or that he was incompetent, or that he had mismanaged the Trust. RV 48 of 62, pp. 1173-1174 (Russell Williamson); RV 47 of 62, pp. 995-996, 1007 (Deanna); RV 50, p. 1420 (Elizabeth); RV 54, p. 1966 (Garnett); RV 55 & 56, pp. 2250-2251 (Richard III).

The Notice of Removal purports to exercise the removal-of-trustee provisions of Item V(g) of the Trust ("if and only if a Co-Trustee shall become incompetent, unable to serve or grossly mismanages the trust. . . ."). The sole ground on which the Notice was based was that Richard III was "incompetent." The Notice alleged that Richard III "has repeatedly vowed to block the voting of the stock," he "refuses to vote the shares . . . in order to obtain concessions for himself," and his "refusal to vote the shares of [the Trust] constitutes a blatant conflict of interest and violates his fiduciary duty as a trustee." The Notice further alleged that the failure to vote the stock "dilutes the interest of the Wilbourn Family" in the holding company. In addition, the Notice stated that Richard III caused problems at the bank. The Notice did not charge Richard III with being hostile to Defendants.

There were no facts to support the accusation that Richard III was incompetent. Defendants did not present any evidence that Richard III was then or had been at any time impaired or incapacitated due to mental illness, advanced age, alcohol or drug use, physical conditions, or imprisonment due to conviction of felony, or that he was incapable of managing his property or attending to his physical needs. Additionally, Deanna admitted that Richard III *never* said that he was going to block the voting of the Trust's shares; he said he would not vote for the board-nominated slate. RV 47 of 62, pp. 920-922 ("I'm not sure he ever used that expression. * * * He said he would not vote the shares of Trust B. * * * Yes, he did say that ['I will not vote the shares of Trust B for the block that has been nominated by management, the slate']".

The Notice of Removal was signed on April 10, 2007, the same day of the Bank's distribution for the first quarter of 2007. RE 11 (the Notice), RV 57 of 62, pp. 2515-2516; RV 62, p. 3237 (Richard III). Defendants signed the Notice that day so that they could withhold payment

of the co-trustee's fee that Richard III was owed for the first quarter of 2007. *Id.* After the Notice of Removal was signed, Deanna and Elizabeth took control of the books, records and bank account of Marital Trust B, they refused to provide Richard III with any accounting, and they refused to pay Richard III the co-trustee fees that he was then owed, as well as the fees he was later owed. As of the end of the third quarter of 2008, Richard III was owed co-trustee fees of $90,663.88, plus interest thereon. He is owed a quarterly co-trustee fee since then as well. RV 11 of 18, p. 1616, Exhibit 320.

10. Unrelated Family Transactions

The chancellor dwelt at considerable length on several family transactions involving Deanna, Richard III, and his sisters that had nothing to do with Richard III's administration of the Marital Trust B. The court improperly relied on these transactions to graft additional duties onto Richard III's performance of his co-trustee responsibilities, and to conclude that Richard III had failed to perform those duties. The factual record, however, demonstrates that these family transactions were not Richard III's ideas, that the Defendants believed that Richard III did a good job in his involvement, and that each of the family members was interested in the transactions, so that any "conflict" the court ascribed to Richard III would be attributable equally (or more so) to the Defendants.

(a) The Providence Trust

Richard III did not originate the idea of creating the "Wilbourn Family Providence Trust" (the "Providence Trust") or of transferring Deanna's personally-held shares to that trust. The idea for what became the Providence Trust originated from Garnett Hutton's suggestion that she, Elizabeth and Richard III buy life insurance on Deanna so that there would be monies to pay estate taxes that would be owed at Deanna's death. RV 51, pp. 1536-1541 (Elizabeth); RV 54, pp. 2076, 2081-2082 (Garnett); RV 57 of 62, pp. 2504-2510 (Richard III). If the children were to buy life insurance, Deanna said that she wanted to go through her certified public accountant, Mike Crosby. Crosby and his business associate, Chris Cooley, made an estate planning presentation to Deanna, Garnett, Elizabeth and Richard III, in which they presented several options to try to reduce Deanna's taxable

estate upon her death. One option was to sell all of the shares that were owned by Deanna and by Marital Trust B to a "defective grantor trust," a complicated transaction that would have the effect of reducing estate taxes that would otherwise be owed on Deanna's death, paying income to Deanna during her lifetime in the form of payments on a note, and maintaining ownership of the shares into future generations without estate taxes being owed. RV 4 of 18, pp. 593-594, Exhibit 90 (Gina Silvestri's letter summarizing the transaction). With the advice of attorneys, a defective grantor trust was the option that Deanna and her children chose. RV 57 of 62, pp. 2503-2511 (Richard III); RV 58, pp. 2586-2609 (Richard III).

At the recommendation of Chris Cooley, Gina Silvestri, a lawyer in West Hartford, Connecticut, was retained as Deanna's attorney. Silvestri drafted a trust agreement and related documents. Elizabeth and Garnett retained Blanchard Tual, an attorney in Memphis, Tennessee, to represent them. RV 52 of 62, pp. 1656-1664 (Elizabeth); RV 54, pp. 2081-2088 (Garnett); RV 4 of 18, pp. 593-594, Exhibit 90 ("During our conference call with Blanchard Tual . . . "). Richard III provided comments to drafts, but he never drafted any of the documents. RV 58 of 62, pp. 2507. By consensus of Deanna and her children, Richard III and Kirk Reasonover were named as the co-trustees. RV 57, pp. 2503, 2507-2508 (Richard III).

On December 31, 2005, Deanna sold to the Providence Trust the 3,440 shares of her personal stock in the holding company in exchange for a promissory note that was guaranteed by her three children. The Providence Trust instrument is dated December 30, 2005. RV 4 of 18, pp. 508-539, Exhibit 67. Other instruments relating to that trust appear as Exhibit 68 (Purchase Agreement between Deanna and the co-trustees of the trust), Exhibit 72 (Secured Promissory Note from the co-trustees to Deanna, and Guarantee signed by Richard III, Elizabeth and Garnett), and Exhibit 90 (letter from Gina Silvestri summarizing the transaction). RV 4 of 18, pp. 540-547, 561-564, 593-594.

Deanna, Elizabeth, Garnett and Richard III never reached an agreement to transfer Marital Trust B's shares to the Providence Trust; consequently, none of those shares has ever been sold or transferred to the Providence Trust.

(b) The Florida Condominium

Deanna wanted to buy a three bedroom condo in Florida. Mike Crosby, her CPA, suggested the idea that she acquire or put the condo in a family limited partnership as an estate planning tool to reduce estate taxes upon her death. Crosby's idea was that Deanna could gift interests in the LLC to her children to such an extent that the value of the condo would not be includable in her estate. RV 55 of 62, pp. 2241–2242; RV 57, pp. 2538-2540; RV 58, pp. 2611-2613; RV 60, pp. 2870-2872 (all Richard III). All three children discussed the plan; Elizabeth and Garnett had their own attorney (Blanchard Tual) review the proposal. RV 57 of 62, pp. 2417-2418 (Richard III); RV 6 of 18, pp. 756, Exhibit 145 (Email from Garnett to Richard III). All three children stood to benefit identically.

Based on Crosby's advice, the Wilbourn Family, LLC was formed to acquire the condo. Richard III performed some legal work for the LLC. However, it is undisputed that Richard III did not conceive the idea of buying the Florida condominium, that his interest would never be different from that of his sisters, that Deanna would be the manager and that nothing about the acquisition or use of the condo had anything to do with Marital Trust B. *Id.*

(c) The Guaranty That Deanna Wilbourn Was to Sign

In late July 2007, Richard III and Garnett Hutton had a telephone conversation with Deanna Wilbourn about the family's proposed construction of a Homewood Suites hotel in Daphne, Alabama. Richard III informed Deanna that the family was going to have to provide a guaranty for a $12 million construction loan, and did Deanna want to sign the guaranty or did she want the children to sign it. Although Deanna would not own an interest in the proposed hotel, she had in the past signed such a guaranty, as had Richard II. Garnett commented that, "it will be guaranteed by either her [Deanna] or us [the children]. Deanna subsequently declined to sign the guaranty, so the

three children provided it. RV 58 of 62, pp. 2624-2627 (Richard III); RV 55, pp. 2108-2109 (Garnett); RV 10 of 18, pp. 1419-1423 (transcript of that conversation).

(d) Inn Serve

Since 2002, Richard III has served as an officer and director of Inn Serve, a hotel management corporation that is owned by the family and relatives of Richard II. Inn Serve manages hotel and motels that are owned by some of the same family and relatives. Defendants admitted that Richard III has done a good job in representing their interests in Inn Serve and that he has timely provided them with reports and financial information on Inn Serve. RV 46 of 62, pp. 842-843 (Deanna); RV 55, pp. 2158, 2242-2243 (Richard III); RV 5 of 18, p. 738, Exhibit 141 (email transmitted of "10-day report").

SUMMARY OF THE ARGUMENT

The chancellor's removal of Richard III as co-trustee of Marital Trust B was manifestly wrong, clearly erroneous, and applied the wrong legal standard. The chancellor based his removal of Richard III on matters that have nothing to do with Richard III's performance of his duties as co-trustee or the administration of the Trust. Good cause should be based on matters that concern the administration of the trust, such as a trustee's failure to perform his duties under the trust, or a breach or misconduct by the trustee that endangers trust property, or hostility that has been caused by the trustee, or incapacity.

Here, the chancellor held that Richard III violated his fiduciary duties as co-trustee of Marital Trust B. The chancellor improperly went outside the four corners of the unambiguous Trust and considered extrinsic evidence (a January 1999 agreement between Richard III and his father, which is not referred to in the Trust and did not survive his father's death, and a June 1999 "strategic plan" for the bank) to determine Richard II's "intent" and to graft new duties and obligations owed by Richard III on the actual Trust terms. The chancellor wrongly held that Richard III breached his fiduciary duties because, at the March 2007 annual meeting of shareholders of the holding company, he and his mother disagreed over how to vote the shares for nominees to the board, and the shares

were not voted, which he determined allegedly undermined Richard II's "intent." The terms of the Trust, however, do not require the co-trustees to agree, and in any event, this failure to agree or "lack of cooperation" did not defeat or frustrate the purposes of the Trust or substantially impair the administration of the Trust.

The chancellor also based the removal on Richard III's work performance at the bank. However, Richard III's performance of his work at the bank is not a legal basis on which the chancellor could find that he did or did not properly perform his co-trustee duties under the Trust. The provisions of Marital Trust B clearly do *not* condition Richard III's eligibility to serve as a co-trustee on whether Richard III holds any position with the holding company and/or the bank, or on whether someone thinks Richard III did a "good job" in a position that he may hold with either company. Nevertheless, in removing Richard III as a co-trustee of Marital Trust B, the chancellor held that Richard III was unsuitable to continue as co-trustee because of the complaints that Defendants and a few bank officers had with how Richard III performed his responsibilities at the bank. It was reversible error for the chancellor to hold that criticisms of Richard III's job performance at the bank could be used as a basis to remove Richard III as a co-trustee of Marital Trust B. In addition, the chancellor also improperly held that Richard III, as a son and a brother, violated "duties" that he owed his mother and sisters on other family and business matters that had nothing to do with Marital Trust B, and because he recorded some conversations that he had with his mother and one of his sisters on matters that did not pertain to Marital Trust B. Furthermore, in the pretrial order that governed the trial of this case, Defendants did not assert any claims that Richard III breached any duties in his handling or involvement in other family and business matters that did not pertain to Marital Trust B or the bank, and therefore, these issues were waived. The recordings made by Richard III were not illegal and were logical given the circumstances.

The chancellor also removed Richard III on the basis of hostility. A trustee may be removed if there is mutual hostility between the trustee and the beneficiary which could defeat the purpose of the trust. However, a trustee cannot be removed for hostility where the hostility was created by

the beneficiary in order to effectuate the removal of the trustee. In this case, the evidence is overwhelming that Defendants picked a fight with Richard III and sought to remove him as co-trustee as part of their plan to get control of the Trust's stock so that they could vote those shares to keep Richard III from being reelected to the board, and elect one of them in his place. Thus, the chancellor's findings on the hostility issue were manifestly wrong. The chancellor erred as a matter of law in removing Richard III because of hostility where that hostility was created by Defendants.

The chancellor abused his discretion by denying Richard III's claim to recover the unpaid co-trustee's fee that he was owed for his services as co-trustee for the period of time from April 2007 until the effective date of his removal in January 2010. Under the Trust's provisions, Richard III is entitled to this co-trustee fee. The evidence established that after the Defendants took control of Marital Trust B, they refused to pay Richard III the co-trustee fees that he was owed and entitled to.

The chancellor erred by dismissing Richard III's claims to remove Deanna as co-trustee and to declare that neither Garnett nor Elizabeth is eligible to serve as successor co-trustee. The evidence strongly supports the removal and disqualification of Defendants to serve as co-trustees or successor trustees because of their serious breach of the Trust, their intentional wrongful and unauthorized exercise and abuse of the trustee-removal power of the Trust, and their hostility toward Richard III.

If the Court were to remand this action for further proceedings, the Court should remand the case to the Chancery Court of Madison County. Richard III filed this suit in Madison County. However, that court held that because Defendants had "removed" Richard III as trustee by way of the April 2007 "Notice of Removal"—the very document precipitating this action—venue was not proper because no trustee resided in Madison County. That circular conclusion was error. Venue was and remains proper in Madison County, and it was an abuse of discretion for the Madison County Chancery Court to transfer the case to Lauderdale County, thus denying Richard III his choice of a proper venue.

For these reasons, the Court should reverse the chancellor's removal of Richard III, reinstate Richard III, return the administration of the Trust to Richard III, and remand this case to the

Chancery Court of Madison County, Mississippi for the calculation and entry of judgment on all of the co-trustee's fee that is owed to Richard III.

ARGUMENT

A. Standard of Review

The standard of review for a chancellor's findings of fact is abuse of discretion. *McNeill v. Hester*, 753 So. 2d 1057, 1063 (Miss. 2000). When supported by substantial evidence, a chancellor's factual findings will not be disturbed on appeal unless they are manifestly wrong, clearly erroneous, or apply the wrong legal standard. *Biglane v. Under The Hill Corp.*, 949 So. 2d 9, 13-14 (Miss. 2007). Although the standard is deferential, "this Court will not hesitate to reverse a chancellor when his findings are manifestly wrong, or when he has applied an erroneous legal standard." *Mississippi Dep't of Human Services v. Marquis*, 630 So. 2d 331, 334 (Miss. 1993); *see also Lowrey v. Lowrey*, 25 So. 3d 274, 285-291 (Miss. 2009) (reversing the chancery court's decision where the factual findings were not supported by the record); *Lewis v. Lewis*, 2009 WL 4591384, at *1-6, *9 (Miss. Ct. App. Dec. 8, 2009) (reversing the chancellor's decision, stating that "[d]espite the stringent standard of review applicable to this case, we find that the chancellor was manifestly wrong in his treatment of the marital assets"); *Spence v. Spence*, 930 So. 2d 415, 417-19 (Miss. Ct. App. 2005) (reversing the chancery court where, after reviewing the testimony as a whole, the court of appeals determined that the chancellor's decision was manifest error). This deference does not apply to a chancellor's conclusions of law, which are reviewed de novo. *In re Estate of Laughter*, 23 So. 3d 1055 (Miss. 2009).

B. The Chancellor's Findings That Richard III Breached His Co-Trustee Duties under Marital Trust B Are Manifestly Wrong and Against the Overwhelming Weight of the Evidence

One of the grounds cited for removing Richard III was for breach of the Trust. The chancellor erred as a matter of law in holding that Richard III breached his fiduciary duties as co-trustee of Marital Trust B. None of the alleged breaches occurred in connection with the

administration of the Trust, nor did they endanger the Trust property, and most were not even related to Marital Trust B.

The chancellor's reasons for finding breaches of duties by Richard III may be categorized as follows:

(1) Richard III allegedly refused to vote the Trust's shares at the March 2007 shareholder meeting. RE 2 (Opinion at pp. 36-40, 47-49, 59-61).

(2) The way in which Richard III performed his jobs at the bank allegedly caused problems at the bank. (Opinion at pp. 63-64).

(3) Richard III advised and encouraged his mother to take actions in unrelated family matters that would benefit him, but were not in her interest. (Opinion at pp. 61-62).

(4) Richard III tape recorded conversations that he had with his mother and one of his sisters. (Opinion at pp. 29-37, 55-59).

None of the alleged "breaches" provides cause for removal. Under Mississippi law, a chancellor has the power to remove a trustee for "good cause," but that power is not without limits and boundaries. "Good cause" must be based on matters that concern the administration of the trust, such as a trustee's failure to perform his duties under the trust, or a breach or misconduct that endangers trust property, or incapacity or unfitness of the trustee. As this Court has explained, the chancery court's power to remove a trustee for good cause is "incidental to the court's paramount duty to see that trusts are properly executed and the trust estate preserved." *Walker v. Cox*, 531 So. 2d 801, 803 (Miss. 1988). The chancellor acknowledged that principle, explaining in his opinion that "the courts have the authority to remove and replace trustees to protect the best interests of the trust and its beneficiaries; in this regard the view has been followed that the power to remove a trustee should be used only when the objects of the trust are endangered." (Opinion at 43) (emphasis added). In considering whether to remove a trustee for "cause," the question is "whether the circumstances in each case are such that the continuance of the trustee in office would be detrimental to the trust." Scott, *Trusts* § 107 (1960) (emphasis added). Other courts have

determined that removal of a trustee must be based on matters that concern the administration of the trust or that endanger trust property. *See, e.g., Succession of Noe*, 398 So. 2d 1173, 1178 (La. Ct. App. 1981) (refusing to remove a trustee where there was no evidence that the trustee's conduct materially impaired or affected the proper administration of the trust; rather, the claims against the trustee amounted to "nothing more than allegations of social or family animosity and incompatibility"); *Gresham v. Strickland*, 784 So. 2d 578, 581 (Fla. Ct. App. 2001) ("removal of a trustee should be predicated upon a clear showing of abuse or wrongdoing in the actual administration of the trust"); *Betty G. Weldon Revocable Trust ex rel. Vivion v. Weldon*, 231 S.W.3d 158 (Mo. Ct. App. 2007) (explaining that because no evidence was presented of misconduct by the trustee relative to the trust or its assets or that called into question the trustee's capacity or fidelity to the trust or its assets, the court erred in removing the trustee). In removing Richard III, the chancellor relied on the grounds stated in the Uniform Trust Code § 706 and others, all of which suggest that removal for cause must be based on behavior in connection with the trust.

1. Richard III Did Not Violate Any of His Co-Trustee Duties under Marital Trust B by Disagreeing With His Mother About How to Vote the Trust's Shares

The chancellor held that Richard III breached the Trust because he "failed, refused and neglected to cooperate in voting the shares of Marital Trust B, which is the sole discretionary function of the trust." RE 2 (Opinion at p. 66). These findings are manifestly wrong and against the overwhelming weight of the evidence. The chancery court did not have the power to remove Richard III as co-trustee simply because of the disagreement over how the shares should be voted for directors. The issue of voting the shares is a matter of mere discretion for the co-trustees. If a settlor vests sole discretion of a matter in a trustee (a discretionary power without qualification), a court should be reluctant to interfere with the trustee's use of power. Bogert, *The Law of Trusts and Trustees*, § 560 (2d ed. 1980). "While courts typically refrain from intervening in the exercise of mere discretionary powers, a court will depart from this rule upon a showing that the trustee's conduct is arbitrary and capricious; is an abuse of discretion, in bad faith or dishonest; or is made

under a misunderstanding or mistake. *In re Revocable Trust of Marta*, 2003 WL 21998375 (Del. Ch. Aug. 14, 2003) (citing Bogert, *The Law of Trusts and Trustees*, § 560 (2d ed. 1980)).

The overwhelming evidence is that at the March 2007 annual meeting of the shareholders of the holding company, Richard III did not "refuse" to vote Marital Trust B's shares, nor did he ever vow or threaten to "block" the voting of those shares. Rather, the evidence is that he and his mother disagreed about how the shares should be voted, it was a legitimate disagreement that arose out of the events of January 9, 2007, and their disagreement was documented by letters (including settlement offers) that they exchanged with one another. RE 10 (letters). Under the terms of the Trust, each of them had the right and discretion to agree or disagree with one another, neither of them was obligated to agree with the other, and neither of them violated any co-trustee duties by disagreeing with the other.

(a) The Terms of Marital Trust B Are Not Ambiguous

The chancellor erred by admitting evidence of and relying on the January 1999 Agreement to interpret the Trust and to find that Richard III violated duties that are, at best, subjective, vague and arbitrary. The chancellor made extensive use of the 1999 Agreement to "interpret" the unambiguous provisions of Marital Trust B (Opinion at 5-9), to find that Richard III's job performance at the bank was "attacking his father's scheme" (Opinion at 17), to find that Richard III violated the January 1999 agreement by suggesting that Bill Grete or Kirk Reasonover might be considered to be a director of the holding company (Opinion at 38-39), and to find that Richard III violated the Trust by disagreeing with McDonnell on bank matters (Opinion at 66). Whatever may have been his father's "vision" and "goals" for the bank under the 1999 Agreement, those did not become duties and obligations of either Richard III or Deanna as co-trustees of the Trust.

The provisions of Marital Trust B are not ambiguous, and no party to this suit has ever claimed that they are.[24] In the absence of an ambiguity, the chancellor and the appellate courts are

[24] For example, the pre-trial order did not identify any issue of an alleged ambiguity in the terms of the Trust. RE 17.

"limited to the 'four corners' of the will" in determining the testator's intent. *Estate of Blount v. Papps*, 611 So. 2d 862, 866 (Miss. 1992) (emphasis added). Where a will is clear and unambiguous, the admission of parol evidence of the testator's intent is improper. *Blount*, 611 So. 2d at 867; *see also In re Roland*, 920 So. 2d 539, 541-42 (Miss. Ct. App. 2006) (where a will is unambiguous, parol evidence is impermissible and unnecessary).

The chancellor made a substantial error of law when he went outside of the terms of the Trust and resorted to extrinsic evidence (such as the January 1999 agreement between Richard II and Richard III, and the bank's June 1999 strategic plan) to determine Richard II's intent and to find duties that Richard III owed to his family members. That error had a pervasive effect on both the chancellor's findings and conclusions. For example, the chancellor relied extensively on the January 1999 agreement to make findings and conclusions about Richard II's intent in the Trust, to find that it imposed obligations on Richard III that included "a continuing duty of fidelity and performance . . . that would continue beyond the death of the father," and to hold that Richard III breached those duties. RE 2 (Opinion, *e.g.*, pp. 5-9, 38-39). However, the Trust is not ambiguous, and therefore, the chancellor erred in using an extrinsic document to purport to determine Richard II's intent.

The chancellor's error of admitting evidence of and relying on the January 1999 Agreement was further compounded by his use of that agreement to create co-trustee duties for Richard III that are not provided for in the Trust itself. For example, the chancellor relied on the January 1999 Agreement to find that Richard III violated his co-trustee duties by his brief discussion with Deanna just before the March 2007 shareholder meeting that, if the two of them had met as Richard III requested, they "could have considered" voting the shares for other persons, including Kirk Reasonover and Bill Grete. Nothing about that statement was a breach of Richard III's duties as co-trustee.

(b) The Co-Trustees Have the Right to Disagree With One Another

Co-trustees are not required to agree with one another, and the failure to agree should not result in removal unless the trustees' failure to agree significantly impairs the administration of the

trust. *See, e.g., In re Charles C. Wells Revocable Trust*, 734 N.W.2d 323 (Neb. Ct. App. 2007) (removing a co-trustee where the trustees' failure to agree significantly impaired the administration of the trust); *In re Rosenfeld*, 2006 WL 3040020 (Pa. Com. Pl. July 31, 2006) (removing a co-trustee where a deadlock among the trustees impaired the trust); *Broeker v. Ware*, 29 A.2d 591 (Del. 1943) (differences of opinion between the trustees and beneficiaries are not grounds for removal unless they make it impossible for the trustees to perform their duties).

With the exception of the limitations set forth in Item V(d),[25] the Trust provisions do not dictate how the co-trustees are to vote the shares for directors, do not obligate them to vote only for the board-nominated slate of nominees, do not prohibit the co-trustees from voting the shares for director-candidates who include one or both of the co-trustees, and do not give Deanna, as a co-trustee the right to control or to demand deference from her co-trustee. Although Richard II could have so provided, he did not include a provision that requires Deanna's co-trustee to vote the shares like Deanna says they should be voted, or a provision that provides for the removal of Deanna's co-trustee if he or she does not agree with Deanna.

Similarly, in *In re Trust of Rosenfeld*, 2004 WL 3186283, at *5 (Pa. Com. Pl. May 19, 2004), a trustee sought judicial relief to break a deadlock among the trustees to attain a diversification of its assets. In refusing to remove the trustee or break the deadlock, the court explained that the trust agreement did not provide a provision to break a deadlock, and the settlor "certainly knew that in designating an even number of trustees, a deadlock or tie vote was a distinct possibility." *Id.* Not only did the settlor provide no mechanism to break such a tie vote, "he also expressly included a provision that certain actions could only be taken by a majority vote." *Id.* Thus, the court concluded that the trust instrument read as a whole evidenced the settlor's intent to allow no action to occur in tie vote or deadlock situations.

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[25] The co-trustees shall not "sell this stock or vote in favor of any merger or other corporate action which is calculated to lead to a merger which would dilute the voting power or ownership of the stock in [the Bank] or would lead to the sale or exchange of the stock" *unless* all of the beneficiaries (income and principal) agree in writing. RE 6 (Item V(d) of the Will).

When Richard II named the trustees, he obviously knew that Deanna and Richard III might not agree on how to vote the Trust's shares. More than anyone, Richard II knew and understood the personalities of his wife and Richard III. He clearly understood that the two of them might not agree on how to vote the Trust's shares. While Richard II could have included some kind of "deadlock" provision to break a disagreement on voting, or a provision that gave one co-trustee more say-so than the other co-trustee, or that provided that a disagreement over voting the shares was a ground for removal of either or both of the co-trustees, *he did not do so*. Richard II's clear intent was that the co-trustees are to have the right, judgment and discretion to agree or not. Thus, the chancellor erred as a matter of law in holding that Richard III breached his co-trustee duties because he disagreed with his mother on for whom to vote the shares.

(c) The Co-Trustees Do Not Breach Their Duties or Create a Conflict of Interest by Proposing to Vote the Trust's Shares for Themselves

Richard III did not breach any duty nor did he have a conflict of interest by wanting to vote the Trust's shares for persons that included himself. If that were a breach of a fiduciary duty or a conflict of interest, or one that merited removal of a trustee, the chancellor would have had to remove Deanna because she wanted to vote the shares for directors who included herself. Indeed, Deanna testified that she did not see anything wrong with voting the Trust's shares for herself or Richard III to be a director. TR. 160-64 (Dec. 19, 2008).

Q: Did you think that either of you had a conflict of interest in wanting to vote the shares for people that included yourselves?

A: No.

Q: Did you think it was wrong or a breach or a violation of any duty for y'all to want to vote the shares of Marital Trust B for people who included yourselves?

A: No.

. . . .

Q: Do you still think that it's okay for you, as co-trustee, to vote the shares of Marital Trust B for people that include yourself?

A: People that include myself? You mean for myself? Yes, I will vote for myself.

RV 47 of 62, pp. 944-945 (Deanna).

It is clear from the language of the Trust and the facts that existed at the time that Richard II signed his Will and created the Trust that he knew and intended that the co-trustees of Marital Trust B would have the right to vote the trust's shares for themselves as directors. It is also clear that Richard II did not intend that the Trust's shares could not be voted in favor of Richard III to be a director. If that were the case, Deanna as co-trustee could likewise not vote the shares for Deanna as a director. At the time that he signed the Will and created Marital Trust B, and he named Richard III as one of the co-trustees, he knew that Richard III was then a director of the bank. He obviously intended that the Trust's shares could be voted for Richard III. Consequently, Richard III did *not* have a conflict of interest in deciding that the Trust's shares should be voted for director-candidates who include himself and/or his co-trustee.

It is well-settled that a real or potential conflict of interest that existed at the time of the trust's creation and was known to the settlor is not a ground or cause to remove a trustee whom the settlor expressly named:

> Ordinarily, a court will not remove a trustee named by the settlor upon a ground that was known to the settlor at the time the trustee was designated, even though a court would not itself have appointed that person as trustee. . . Thus, the fact that the trustee named by the settlor is one of the beneficiaries of the trust, or would otherwise have conflicting interests, is not a sufficient ground for removing the trustee or refusing to confirm the appointment.

Restatement (Third) of Trusts § 37 at 137 (2003). *See also* 76 Am. Jur. 2d *Trusts* § 229 ("In this regard, courts will ordinarily not remove a trustee appointed by the settlor for grounds existing at the time of the trust's creation and known to the settlor, even though the court would not have appointed such person trustee."); *In re Estate of Klarner*, 113 P. 3d 150 (Colo. 2005) (court refused to remove trustee based on conflict of interest, holding that the settlor appointed the trustees despite awareness of the potential conflict of interest, and thus, friction was an insufficient basis for removal); *In re Betty A. Luhrs Trust*, 443 N.W.2d 646 (S.D. 1989) (court declined to remove the sister as co-trustee, stating that the settlor was fully aware of the possible conflict of interest in the sister's dual role as

trustee and remainderman); *Childs v. Nat'l Bank of Austin*, 499 F. Supp. 1096 (N.D. Ill. 1980) (although a conflict existed, the testator has intended that the trustee take an active role in the management of the corporation and the will sanctioned the existence of a conflict); *Matter of Gilliland's Estate*, 140 Cal. Rptr. 795 (Cal. 1977) (removal was not appropriate where the conflict was known to the settlor and expressly sanctioned by her); *In re Weiss' Estate*, 227 N.Y.S.2d 378 (N.Y. 1962) (a fiduciary will not be removed due to a conflict of interest when the situation involving the conflict was created by the testator).

For example, in *City Bank & Trust Co. v. Hawthorne*, 551 So. 2d 658 (La. App. 3d Cir. 1989), the settlor knew of a potential conflict. The parties disputed whether a parent of some of the beneficiaries should have the discretion to disburse trust funds to his or her own children. Notwithstanding that potential conflict, the court held that because the settlor knew of the possible conflict when she created the trust, that alleged conflict did not create a reason to remove the trustee. "As a general rule, neither conflict of interest, particularly where the settlor knew of the *potential conflict* at the time the trust was created and the trustee named, nor hostility, of itself, constitutes sufficient cause for the removal of a trustee." *Id.* at 662 (emphasis added).

Similar to *Hawthorne*, Richard II clearly was cognizant of what might otherwise be considered to be a conflict of interest, that is, a co-trustee of the Trust also being a director of the bank and voting the Trust's shares to remain a director of the bank. Nevertheless, Richard II named Richard III as one of his co-trustees with knowledge that Richard III was then and would continue to be a director of the bank.[26] Furthermore, in express language in the Trust (*see* Item (V)(d) of the Will), Richard II anticipated the presence of family members becoming intricately involved with the board, and the triggering mechanism for such involvement was his bestowing of enough stock to unilaterally prevent the merger of the bank. As such, the express language of the Trust would

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[26] In speaking with Deanna shortly after Richard II died, even McDonnell admitted that "your husband's goal was for Young Richard to assume his position as chairman of the board at some point and time in the future. . . . Ultimately, Big Richard chose him for this job." RV 1 of 18, pp. 29-41, Exhibit 4 at 2-3.

authorize (but not prevent) either one or both of the co-trustees of the Trust to sit on the board of the bank (which became the holding company) in furtherance of Richard II's directive to prevent the bank from being merged. Given the permissive language found in Item (V)(d), Richard III does not have a conflict of interest in seeking to vote the Trust's shares to reelect himself as a director of what is now the holding company. Nor does so voting the shares violate his fiduciary duty as co-trustee. *The same analysis holds true for Deanna.* Because there is no conflict of interest, the chancellor erred by removing Richard III on this ground.

(d) The Disagreement over Voting the Shares for Directors Has Not Defeated or Frustrated the Purpose of the Trust

For removal to be permissible, the breach, deadlock, or conflict must defeat or frustrate the purpose of the trust. *See, e.g., In re Charles C. Wells Revocable Trust*, 734 N.W.2d 323 (Neb. Ct. App. 2007) (removing a co-trustee where the trustees' failure to agree significantly impaired the administration of the trust); *In re Rosenfeld*, 2006 WL 3040020 (Pa. Com. Pl. July 31, 2006) (allowing for removal where the deadlock among trustees impaired the trust); *Bruce v. Bruce*, 1998 WL 972118 (Va. Cir. Ct. Feb. 20, 1998) (removing a trustee where the discord between the co-trustees was detrimental to the management of the estate because the constant bickering over real estate matters resulted in delays in getting trust business done, which militated against profitable management of the estate); *Broeker v. Ware*, 29 A.2d 591 (Del. 1943) (differences of opinion between the trustees and beneficiaries are not grounds for removal unless they make it impossible for the trustees to perform their duties).

For example, in *National City Bank v. Peery*, 1995 WL 737476 (Ohio Ct. App. Nov. 8, 1995), the court removed a co-trustee whose actions were defeating the purposes of the trust. Ms. Peery set up a trust for Patsy, her mentally retarded adult daughter. David, Ms. Perry's son, and National City Bank were named as the trustees. David brought Patsy to live with him, and he sought reimbursement from the trust for monies he expended for Patsy's maintenance and support. When his efforts failed, David took Patsy to a local office of the department of mental health where he left

her with her personal belongings. The agency put her in a home, which subsequently sought reimbursement from the trust. Although National City Bank agreed to pay the expenses, David refused. The court removed David, finding that his refusal to pay the expenditures and the resulting impasse prevented the purposes of the trust from being accomplished to the beneficiary's detriment. During the impasse, which had been ongoing for several years, Patsy was not able to enjoy the benefit of any trust funds, and she would not enjoy those funds for the rest of her life if the impasse was not resolved. *Id.* at *2-4. *See also, e.g., Betty G. Weldon Revocable Trust*, 231 S.W.3d at 181 (holding that the lower court erred in removing a trustee where the evidence demonstrated that the purpose of the trust–to provide for the mother's care–continued to be met and there was no evidence of misconduct by the trustee relative to the trust or its assets).

The disagreement between Richard III and Deanna over how to vote the Trust's shares for directors has not defeated the purpose of the Trust. Richard II intended for Richard III and Deanna to administer the Trust. *The overriding purpose of the Trust is to hold the stock for Deanna during her lifetime and distribute the annual income to her, less the trustees' fees.* Defendants did not offer any evidence that the disagreement over voting the shares for directors has threatened that purpose, or the corpus or value of the stock, or has resulted in any abuse or mismanagement of the Trust. For example, it is undisputed that the stock in the holding company has appreciated in value, the per share distributions have increased, and there has not been any interruption in the distributions of share income to Deanna. Here, Defendants failed to present any evidence that the disagreement over how to vote the shares has resulted in any abuse or mismanagement of Marital Trust B. Because the disagreement has not impaired the administration of the Trust to the detriment of the beneficiaries, the chancellor was manifestly wrong in removing Richard III.

(e) <u>The Chancellor Relied on Inadmissible Settlement Negotiations As the Basis for His Finding that Richard III Refused to Vote the Shares</u>

Over Richard III's objections before and at trial, the chancellor allowed evidence regarding settlement negotiations between Richard III and Defendants. On January 30, 2007, Richard III sent

a settlement offer to McDonnell and Deanna. RV 16 of 18, pp. 2258A-2259, Exhibit 545. One of the several settlement terms stated, "The shares of Trust B will not be voted in March 2007." He made that statement as part of the settlement terms offered. At that point, Deanna knew that Richard III was not agreeable to vote the Trust's shares for the board-nominated slate. He did *not* make that statement with the intent that he would never agree on how the Trust's shares would be voted. *See* the facts at pp. __ , *supra*. Rule 408 excludes evidence of settlements or settlement offers when offered to prove liability for or invalidity of the claim or its amount. Miss. R. Evid. 408.

2. Richard III Did Not Violate Any of His Co-Trustee Duties under Marital Trust B Because of Disagreements over His Work Performance at the Bank

The chancellor erred as a matter of law in holding that the controversy over Richard III's job performance at the bank could be used as a basis to remove him as a co-trustee of Marital Trust B because his work at the bank had nothing to do with Marital Trust B or his co-trustee duties. *See, e.g., Betty G. Weldon Revocable Trust ex rel. Vivion v. Weldon*, 231 S.W.3d 158 (Mo. Ct. App. 2007) (explaining that because no evidence was presented of misconduct by the trustee relative to the trust or its assets or that called into question the trustee's capacity or fidelity to the trust or its assets, the court erred in removing the trustee); *Gresham v. Strickland*, 784 So. 2d 578, 581 (Fla. Ct. App. 2001) ("removal of a trustee should be predicated upon a clear showing of abuse or wrongdoing in the actual administration of the trust").

As the chancellor correctly noted, "[m]uch of the trial in this case focused on Richard III's conduct vis a vis the Bank." RE 2 (Opinion at 63). Approximately eighty percent (80%) of the trial concerned issues, disagreements and disputes over whether one person or the other thought that Richard III did or did not do a good job or bad job at the bank, and did or did not do his work just like his father had. Seeing that so much of the upcoming trial was going to be devoted to matters at the bank, prior to trial Richard III moved the court in limine to exclude as not relevant or admissible any evidence concerning his job performance in his various positions at the bank and the

holding company, and his removal from those positions at the January 2007 board meetings. RV 17 of 62, pp. 2419-2424 (motion in limine). The chancellor denied that motion. RE 14 (order).

The chancellor erred by denying Richard III's motion in limine and by basing his removal on complaints about Richard III's work performance at the bank. The unambiguous terms of Marital Trust B clearly do *not* condition Richard III's eligibility to serve or his tenure as a co-trustee on whether Richard III holds any position with the bank or the holding company, or on whether someone thinks Richard III does a "good job" or a "bad job" in a position that he may hold with either company.

On the actual record, the chancellor's findings of fact are manifestly wrong and against the overwhelming weight of the evidence. Six of the nine non-party directors and officers of the bank who testified stated that Richard III did a good job at the bank and did not cause any problems. McDonnell and two of his proteges (David Barr and Cindy Wilson) were the only bank employees who testified about what Defendants claimed was Richard III's alleged disruptive behavior at the bank. McDonnell and Barr are close personal friends, and both Barr and Wilson owed their advancements within the bank to McDonnell. McDonnell and Barr testified that Richard III governance style was different from what Richard II's had been, he tried to involve himself in management of the bank, he irritated employees, some employees complained about him, and he did not "honor the line of communication" in talking to employees. *However, McDonnell and Barr both admitted that they did not have first-hand knowledge of Richard III acting improperly toward any bank employee.* The "worst thing" that Cindy Wilson could come up with was that sometimes Richard III would ask her for monthly financial information before she had it ready, and on one occasion in the middle of 2006, Richard III told her that she was "just like [McDonnell], that [she] manipulated the details to fit [her] needs."

3. Richard III's Involvement in and Handling of Other Family and Business Matters Did Not Breach Any Co-Trustee Duties under Marital Trust B, or Any Other Duties He Had or Create a Conflict of Interest

The chancellor's errors of law continued with his holdings that Richard III's handling of other family and business matters could be used as a basis to remove him as a co-trustee of Marital Trust B. These matters were not done in connection with or in the administration of the Trust and did not endanger any Trust property. His work on those other matters had nothing to do with Marital Trust B or his co-trustee duties. Those other matters concerned his involvement in or handling of his mother's purchase of a Florida condominium, a possible suit against the condo association, the establishment of a family limited liability company (Wilbourn Family, LLC), the creation of a separate trust (the Providence Trust), the filing of this suit, and a conversation that Richard III attempted to have with the chancellor who presided over Richard II's Estate. The chancellor found that in all of those matters Richard III breached duties that he owed one or more of Defendants as an attorney for his mother, as a co-trustee of the Providence Trust, as a son, and as a brother.

The chancellor's errors on those matters began with his departure from the pretrial order that governed the claims, issues and trial of this case. In the pretrial order, Defendants did not assert any claims that Richard III breached any duties in his handling or involvement in other family and business matters that did not pertain to Marital Trust B or the bank. Specifically, Defendants did not raise any claim or issue of fact that Richard III breached any duties or acted improperly in the work that he did for his father's estate, or in his handling of the purchase of the Florida condo for his mother, or in the formation of the Wilbourn Family, LLC or the Providence Trust. The chancellor, however, departed from the pretrial order and went far beyond the stated claims, issues and questions in the pretrial order looking for additional grounds on which he could justify removing Richard III, grounds that were not raised by Defendants in the pretrial order.

Rule 16 of the Mississippi Rules of Civil Procedure authorizes pretrial conferences and provides for the entry of pretrial orders. If such an order is entered it "shall control the subsequent course of the action unless modified." Miss. R. Civ. P. 16. "If a claim or issue is omitted from the

[pre-trial] order, it is waived, even if it appeared in the complaint." *Rogers v. Rausa*, 871 So. 2d 748, 752 (Miss. Ct. App. 2003) (quoting *Elvis Presley Enterprises, Inc. v. Capece*, 141 F.3d 188, 206 (5th Cir.1998)). *See also Hall v. Dillard*, 739 So. 2d 383, 387 (Miss. Ct. App. 1999) (issues not raised in the pretrial order are not considered by the court at trial). The chancellor erred by relying on matters that Defendants waived by failing to include them in the pretrial order.

(a) The Guaranty That Deanna Wilbourn Was Requested to Sign

The chancellor's finding that the guaranty that Richard III asked Deanna Wilbourn to sign would not have benefitted her, but would have been to her detriment, and that Richard III is responsible for that, is manifestly wrong. In addressing this ground for removal, we note that in the pretrial order for this case, Defendants did not raise as a claim or issue or alleged breach anything about the discussion of the guaranty, nor did Deanna offer any testimony that she thought that Richard III had done anything wrong as to that.

There was nothing improper about the discussion that Richard III and Garnett had with their mother about the need to provide a guaranty for a construction loan. In late July 2007, Richard III and Garnett Hutton had a telephone conversation with Deanna Wilbourn about the family's proposed construction of a Homewood Suites hotel in Daphne, Alabama. Richard III informed Deanna that the family was going to have to provide a guaranty for a $12 million construction loan, and did Deanna want to sign the guaranty or did she want the children to sign it. Although Deanna would not own an interest in the proposed hotel, she had in the past signed such a guaranty, as had Richard II. Deanna declined to sign the guaranty, so the three children provided it. RV 58 of 62, pp. 2624-2627 (Richard III); RV 55, pp. 2108-2109 (Garnett).

Finally, it was error and improper for the chancellor to find that Richard III acted improperly by having the "guaranty discussion" with his mother "during a time when Richard III claimed to believe that his mother was incompetent." (Opinion at 61). The issue of Deanna's competence was *not* an issue at trial. Months before trial, the chancellor granted summary judgment that Deanna was *not* incompetent under the removal-of-trustee provisions of the Trust. Consistent with that ruling,

at trial the chancellor prevented Defendants from pursuing the theory that Richard III had somehow taken advantage of Deanna because he had previously claimed she was incompetent. When Defendants attempted to cross-examine Richard III on his prior claim, the chancellor sustained Richard III's objections to that line of inquiry:

> I stand by my prior ruling. If you are going to charge him with that, then he's got a right to put on proof of what he based it on. And I've already disposed of that issue by summary judgment.

RV 58 of 62, pp. 2610-2611. The chancellor was manifestly wrong in finding that the discussion about the guaranty was a breach of any duty that Richard III owed as co-trustee, or otherwise.

(b) The Florida Condominium

The chancellor's finding that Deanna's purchase of the Florida condominium did not benefit Deanna Wilbourn, but was to her detriment, and that Richard III is responsible for that, is manifestly wrong. In the pretrial order for this case, Defendants did not raise as a claim or issue or alleged breach anything about the Florida condo or the Wilbourn Family, LLC, nor did Deanna offer any testimony that she thought that Richard III had done anything wrong in his involvement.

It is undisputed that Richard III did not conceive or suggest the idea of buying the Florida condominium for his mother. It was Deanna who wanted to buy a three bedroom condo in Florida, and it was Mike Crosby, her CPA, who suggested the idea that she acquire or put the condo in a limited liability company as an estate planning tool to reduce estate taxes upon her death. Crosby's idea was that Deanna could gift interests in the LLC to her children to such an extent that the value of the condo would not be includable in her estate. All three children discussed the plan; Elizabeth and Garnett had their own attorney (Blanchard Tual) review the proposal. All three children stood to benefit identically.

Based on *Crosby's advice*, the Wilbourn Family, LLC was formed to acquire the condo. Richard III performed some legal work for the LLC. However, he never even stayed in the condo, and nothing about the acquisition or use of the condo had anything to do with Marital Trust B. The

chancellor was manifestly wrong in finding that there was a breach of any duty that Richard III owed.

(c) The Providence Trust

This is yet another matter that Defendants did not raise as a claim or issue or alleged breach in the pretrial order in this case. Indeed, at trial the chancellor sustained a number of objections by Richard III about the relevance of questions about the Providence Trust, and went so far as to make this comment:

> THE COURT: Unfortunately, it's [the Providence Trust] been gone into on the Plaintiff's side, and I think he's got a right to go into it on the Defendant's side. *You probably won't see much in my final opinion about the Providence Trust, but y'all have the right to make a record.*

RV 58 of 62, p. 2601. Thus, one can well imagine our surprise to find so much reliance by the chancellor on matters concerning the Providence Trust.

The chancellor's finding that the creation of the Providence Trust and that trust's purchase of shares of stock that Deanna Wilbourn owned in the holding company did not benefit Deanna Wilbourn, but was to her detriment, and that Richard III is responsible, is manifestly wrong. The chancellor's findings that Richard III acted improperly by trying to persuade Deanna to put Marital Trust B shares into the Providence Trust from which he cannot be removed as co-trustee is obviously wrong. The language in the Providence Trust allows for removal. Unlike Marital Trust B, there is nothing that prevents judicial removal for common law breach of duty. The testimony established that the Providence Trust benefitted Deanna by creating a dynasty trust with terms that she controlled and converted stock for a promissory note with a personal guaranty signed by her three children.

The evidence is overwhelming (if not undisputed) that Richard III did not originate the idea of creating the "Wilbourn Family Providence Trust" (the "Providence Trust") or transferring Deanna's shares to that trust. The idea for what became the Providence Trust originated from Garnett Hutton's suggestion that she, Elizabeth and Richard III buy life insurance on Deanna so that there would be monies to pay estate taxes that would be owed at Deanna's death. Deanna's accountant, Mike Crosby, at her insistence made an estate planning presentation to Deanna, Garnett,

will not sanction the creation of hostility by a beneficiary in order to effectuate the removal of a trustee."). It would indeed be a poor rule that would permit a beneficiary to remove a trustee for hostility that it itself engendered by demanding the trustee's resignation. *See In re Grave's Estate,* 110 N.Y.S.2d 763, 767 (Surr. Ct. 1952) ("the mere fact of friction between [trustees] and the beneficiaries is not sufficient cause for their removal. . . If it were, an obstreperous malintentioned beneficiary could cause the removal of a competent trustee through no fault on the latter's part"); 2 Scott, *Trusts* § 107, at 109-110 (4th ed. 1987) ("The mere fact that there is. . . . friction or hostility [between the trustee and beneficiaries] is not necessarily a sufficient ground for removal, [because] otherwise the beneficiaries could by quarrelling with the trustee force him out").

1. Defendants Created the Hostility

The chancellor erroneously removed Richard III on the grounds of hostility because that hostility was created and instigated by Defendants in their quest to exclude Richard III from having any position at the bank and the holding company. The evidence overwhelmingly establishes that Defendants banded together and attacked Richard III at the bank and the holding company to remove him from his board-elected offices so that, among other objectives, they could put Elizabeth Williamson's husband in his place as chairman, and get another one of them elected as a director. Frustrated that shareholders voted to reelect Richard III as a director of the holding company, Defendants then attacked him as co-trustee of Marital Trust B so that they could get control the Trust's shares of stock and vote those shares to keep Richard III from being reelected to the board, and elect one of them in his place. Throughout all of those events, *Defendants never once alleged that Richard III was hostile to them.* Their complaints about Richard III concerned how he performed his work at the bank— he upset McDonnell and some of McDonnell's inner circle, and he did his job differently than his father.

At trial, Defendants admitted that on January 9, 2007, the day that their lawyer asked Richard III to resign as co-trustee of Marital Trust B, they did not claim that Richard III had done anything wrong as co-trustee, nor did they claim at the time that he was hostile to them. Not even Defendants'

April 2007 Notice of Removal or their original answers in this suit alleged that Richard III was hostile to them or that he should be removed because of hostility. The first time that Defendants alleged hostility was in their December 2007 counterclaim.

The evidence does not establish that Richard III engaged in hostility toward Defendants concerning Marital Trust B or otherwise. He rightfully responded to Defendants' attacks on him, but he never refused to talk with Defendants, he never refused to make a payment that the Trust owed to the beneficiary (Deanna), and he never refused to provide information on the Trust. He filed this suit in response to Defendants' wrongful purported removal of him as co-trustee, a claim on which Richard III won summary judgment.

The evidence establishes that Defendants' objective in seeking to remove Richard III as co-trustee of Marital Trust B was to put Elizabeth Williamson in his place so that Defendants could control the 41,910 shares of stock that the Trust owned in the holding company. Defendants then planned to vote those shares to keep Richard III from being reelected to the board, and elect Elizabeth's husband, Russell, in Richard III's place. Defendants' control of the holding company board would in turn allow them to control the bank board, allowing them to benefit by keeping and/or appointing themselves as directors of the bank and to various important committees within the bank, and to install Elizabeth's husband (Russell) as chairman of the holding company and the bank (positions that had been held by Richard III since November 2004), as well as executive vice-president exercising day-to-day management duties. Removing Richard III as co-trustee of the Trust would allow Elizabeth Williamson to take control of the bank account and records of the Trust, and receive the co-trustee's fee that is provided for in the Trust (3% of the income of the trust).

The chancellor erred by allowing Defendants to profit and benefit from their own hostile acts toward Richard III. By removing Richard III because of the hostility that Defendants have toward him, the chancellor effectively *rewarded* Defendants for having provoked a fight with Richard III so that they could claim that he was hostile to them, and then use his alleged hostility to further their efforts to remove him as co-trustee and gain control of the shares owned by the Trust.

The fact that Defendants no longer "like" Richard III, or that they are resentful of him, does not amount to hostility by Richard III toward Defendants. "The fact that some of the trust beneficiaries are unhappy with a particular person as trustee is of no importance; without a demonstration that the trust corpus is in danger of dissipation, mere displeasure of a beneficiary is an insufficient reason for removing a testamentary trustee." 76 Am. Jur. 2d *Trusts* § 234 (2007). In any event, whatever personal issues Defendants have with Richard III never prevented him as co-trustee from properly administering the Trust, nor has it defeated the purpose of the Trust.

2. There Is No Evidence That the Hostility Created by Defendants Will Defeat the Purposes of the Trust

Here, the hostility created by Defendants has not defeated the purpose of the Trust, and therefore, does not constitute a sufficient basis for removal. *Walker*, 531 So. 2d at 804 ("hostility of the trustee toward the [beneficiary] could defeat the purpose of the trust"). *See also* Restatement (Third) of Trusts § 37 cmt. e (2003) (stating that friction between the trustee with a co-trustee or with some of the beneficiaries is not a sufficient ground for removing the trustee unless it interferes with the proper administration of the trust). It is undisputed that Richard III efficiently and timely performed his co-trustee duties, including making income distributions to Deanna Wilbourn, and providing accountings of the Trust's property. The only "wrong" he is alleged to have committed is not agreeing with how his mother wanted to vote the Trust's shares at the March 2007 meeting.

D. The Evidence Does Not Establish That Richard III Has Refused to Cooperate in the Administration of the Trust, or That He Has Failed to Administer the Trust

Two related grounds on which the chancellor based his removal of Richard III was a "lack of cooperation among co-trustees that substantially impairs administration of the trust," and "[u]nfitness, unwillingness or persistent failure of the co-trustees to administer the trust effectively." RE 2 (Opinion at p. 66). Obviously, to constitute a sufficient ground for removal, the lack of cooperation must substantially impair the administration of the trust. Administration of a trust may be impaired where a deadlock results in the abuse or mismanagement of the trust, such as where a deadlock prevents the parties from conducting trust business. Other jurisdictions that have the same

or similar lack-of-cooperation removal provisions have explained that *a trustee may not be removed unless the deadlock has materially or substantially impaired the administration of the trust. See, e.g., Bruce v. Bruce*, 1998 WL 972118, at *2 (Va. Cir. Ct. Feb. 20, 1998) (to justify removal for lack of cooperation, there must be a showing of abuse or mismanagement of the trust, and "[t]he antagonism must militate against profitable management of the estate"); *Succession of Noe*, 398 So. 2d 1173, 1178 (La. Ct. App. 1981) (the court refused to remove a trustee where there was no evidence that the trustee's conduct materially impaired or affected the proper administration of the trust; rather, the claims against the trustee amounted to "nothing more than allegations of social or family animosity and incompatibility"). *Compare In re Rosenfeld*, 2006 WL 3040020 (Pa. Com. Pl. July 31, 2006) (deadlock among trustees impaired the trust where, although the stock was sold to diversify the trust, the trustees could not agree on a reinvestment plan; consequently, a third of the value was in cash, which was unwise); *Colorado Nat'l Bank v. Cavanaugh*, 597 P.2d 1049 (Colo. Ct. App. 1979) (impairment of the trust where the trustee engaged in a "campaign" of incessant harassing telephone calls, used insulting language, and caused the estate to incur substantial expenses).

Before Defendants wrongfully attempted to remove Richard III in April 2007, he was not unfit or unwilling to administer Marital Trust B effectively, and he did not fail to do so. Richard III timely and properly received, deposited and distributed the Trust's income to Deanna, he kept the bank account, books and records of the Trust, and he provided written reports and accountings to the other beneficiaries. Simply stated, Richard III performed all of his duties as co-trustee. During the trial, each of the Defendants was asked if she could name anything that Richard III had failed to do as co-trustee as of January 9, 2007 (the day when Defendants had one of their lawyers ask him to resign as co-trustee), and they could not think of anything Richard III had failed to do properly.

When the impasse developed with the voting of the stock, Richard III made a good faith effort to meet with Deanna to see if they could agree on how to vote the shares, but she refused to agree; she wanted to vote the shares for the board-nominated slate. As matters developed, each of

Deanna and Richard III had the right to disagree with one another on how the shares should be voted at the 2007 annual meeting.

Defendants did not present sufficient evidence to prove that the disagreement over how the shares should be voted for directors has frustrated the purpose of the Trust, has resulted in abuse or mismanagement of the Trust, or has any negative impact on the profitability of the Trust. As co-trustee, Deanna has the right and discretion to agree or disagree with her co-trustee, and Richard III as co-trustee has no less right and discretion. There is also no evidence that the disagreement has resulted in delays in conducting Trust business or any other negative consequences. Because the deadlock has not substantially impaired the administration of the Trust, the trial court could not remove Richard III as co-trustee. Moreover, the lower court did not consider possible remedies to dispel the impasse short of removal. Based on an erroneous reliance on facts not related to the Trust, the court simply determined to remove Richard III. This decision was in error.

E. <u>The Evidence Does Not Establish That There Has Been A Substantial Change of Circumstances</u>

As noted above, Richard II clearly knew and understood the personalities of his wife and Richard III. He clearly understood that the two of them might not agree on how to vote the Trust's shares. Yet, and though he could have done so, he did not include a "deadlock" provision or a provision that gave one co-trustee more say-so that the other co-trustee, nor did he provide that a deadlock or disagreement on how to vote the shares was a breach of duty or a ground for removal. He left his co-trustees with the right, judgment and discretion to agree or not agree. *See* 76 Am. Jur. 2d *Trusts* § 229 ("In this regard, courts will ordinarily not remove a trustee appointed by the settlor for grounds existing at the time of the trust's creation and known to the settlor, even though the court would not have appointed such person trustee.").

The 2007 disagreement that Richard III and Deanna had on how to vote the shares has not had any negative effect on the value of the Trust's assets—the stock—nor on the income of the Trust, nor on the distributions to Deanna as the income beneficiary. The bank has prospered (most

dramatically while Richard III was chairman), the stock has increased in market value, the per share distributions by the bank to the Trust have increased and have been uninterrupted, and the payments to Deanna have been timely and properly made.

The 2007 disagreement has also not resulted in any dilution of or diminution in the power of the Wilbourn Family at the bank or the holding company. Before the disagreement, there were three members of the Richard II Family on the board of the holding company (Deanna, Richard III, Garnett); since then, there have been three members (Deanna, Richard III, Russell). Indeed, since the 2007 annual meeting, the Wilbourn Family (Deanna, Russell, Elizabeth, Garnett and Richard) actually have increased the number of positions that they hold at the holding company and at the bank.

With regard to the "bank concerns" that Richard II commented on in his Will at Item V(d), it is undisputed that there has not been any proposal to merge the bank, or to sell the stock to another bank, bank holding company or individual, or to dilute the voting power or ownership of the stock, or to sell or exchange the stock.

F. Richard III Is Entitled to a Fee for Serving as Co-Trustee

As part of the relief sought, Richard III requested that the chancery court award him the fees for his services as co-trustee of Marital Trust B in an amount that is not less than three percent (3%) of the income of the Trust. *See* RE 6 (Item V(b)-(c)). The chancellor's ruling denying Richard III's claim to recover the unpaid co-trustee's fee is manifestly wrong. Under the Trust's provisions, Richard III is entitled to this co-trustee fee. The evidence established that after the Notice of Removal was signed on April 10, 2007, Defendants took control of the books, records, and bank account of Marital Trust B, they refused to provide Richard III with any accounting, and they refused to pay Richard III the co-trustee fees that he was owed. By the end of the third quarter of 2008, Richard III was owed co-trustee fees of $90,663.88 plus interest thereon. RE 18, Exhibit 320.

G. The Chancellor Erred by Dismissing Richard III's Claims under Rule 41(b)

At the close of Richard III's case in chief, the chancellor granted the Defendants' motion to dismiss his claims in accordance with Rule 41(b) of the Rules of Civil Procedure. In doing so, the court erred. A Rule 41(b) involuntary dismissal must be denied if "the judge would be obliged to find for the plaintiff if the plaintiffs' evidence were all the evidence offered in the case. *Alexander v. Brown*, 793 So. 2d 601, 603 (Miss. 2001). When reviewing a lower court's grant of a "Rule 41(b) motion for involuntary dismissal, [the Court] applies the substantial evidence/manifest error standards." *Id.*

The chancellor erred by dismissing Richard III's claims to remove Deanna as co-trustee and to declare that neither Garnett nor Elizabeth is eligible to serve as successor co-trustee because the evidence strongly supports the removal and disqualification of Defendants to serve as co-trustees or successor trustees because of their serious breach of the Trust, their intentional, wrongful and unauthorized exercise of the trustee-removal power of the Trust, and their hostility toward Richard III. If anything, the chancellor's findings regarding the self-interests of the parties involved supports Richard III's claims, which the court dismissed, as much or more as they do the Defendants' claim for removal of him as co-trustee.

"Disobedience of directions in the trust instrument is usually a ground for removal." Bogert, *The Law of Trusts and Trustees*, § 527 (Rev. 2d ed.). By signing and seeking to remove Richard III pursuant to the April 2007 Notice of Removal, Deanna and the other Defendants breached the Trust and intentionally abused their trustee-removal power. While they predicated their Notice of Removal on the ground that Richard III was "incompetent," they had no reasonable or good faith basis to believe that he was incompetent. *See* RE 13 (order and opinion granting summary judgment for Richard III). In fact, the Defendants were acting out of hostility and self-interest, in an effort to remove Richard III however they could, not for any reason to do with the Trust, but because they wanted to control the bank stock held by the Trust.

Far from supporting dismissal of Richard III's claims, the evidence shows that Deanna viewed the shares held by the Trust as hers (even though as co-trustee *she* owed duties to the beneficiaries, including Richard III). She wanted to vote them in her self-interest, just as the chancellor concluded that Richard III wanted to do. There is also overwhelming evidence in the record that Defendants wanted to be rid of Richard III, because, *inter alia*, they did not agree with decisions he made, they disagreed with him about how to vote the shares, and they wanted to divide up his positions among themselves and Elizabeth's husband. Their Notice of Removal, the plan they hatched before the January and March 2007 board meetings, and the other evidence of record demonstrate that the trial court erred in dismissing Richard III's claims. The evidence establishes that Defendants could not reasonably argue that Richard III was "incompetent" under the unambiguous and restrictive language of the trustee-removal provision of the Trust. In fact, Defendants conferred with one another and with one or more attorneys to formulate their plan and the Notice of Removal. Trying to remove Richard III as co-trustee on a trumped-up ground of incompetence constituted a serious breach of the Trust and of the fiduciary duties that Defendants owed to Richard III as co-trustee and as a beneficiary.

Under the Trust, Defendants were *fiduciaries* with regard to the trustee-removal power of Item V(g) because they held that power for the benefit of all of the beneficiaries of the Trust, Richard III included. If Defendants sought to exercise that power, they had to exercise it in a *fiduciary capacity* for the sole purpose of the proper administration of the Trust, and not to benefit themselves:

> There is no reason to suppose that a power of removal could not be given to a disinterested party, nor why it might not be made exercisable without cause. However, it would seem that such a power would be held under a fiduciary obligation to exercise it only in the interests of the beneficiaries.

Bogert, *The Law of Trusts and Trustees,* § 520 (emphasis added). Another well-recognized treatise on trusts is of the same opinion:

> By the terms of the trust it may be provided that the action of the trustee in certain respects shall be subject to the control of another. . . . The holder of the power is subject to liability for the exercise or nonexercise of the power only if he holds it as a fiduciary and not solely for his own benefit. It is a question of interpretation of the

> trust instrument in the light of all of the circumstances whether the power is conferred on him for his sole benefit or for the benefit of the beneficiaries of the trust. . . . If the holder of the power is one of the trustees, it is ordinarily clear that he owes duties to the beneficiaries with reference to the exercise of the power.

Scott & Fratcher, *The Law of Trusts*, Vol. II.A., § 185 at 562-64 (4th ed. 1987).

Here, Defendants breached the Trust, and they misused and abused their fiduciary trustee-removal power in an attempt to gain control of the Trust's shares so that Defendants and Elizabeth's husband could personally benefit. As a result of these serious breaches, the chancellor should have removed and disqualified Defendants to serve as co-trustees.

Deanna also breached her fiduciary duty in other ways. Her disregard for the distinct identity of the Trust was evident when she took a bank distribution check for the Trust and deposited it in her personal checking account. In the same vein, even though she personally owned no shares in the holding company or the bank, Deanna told Richard, "I'm the biggest shareholder in the bank. The officers know that and Archie knows that." RV 47 of 62, pp. 977-981 (Deanna). Regarding the other employees, she went on to say, "When they know who I am, they stand up and salute." *Id.* at 980. That Deanna considered the Trust *corpus* (the shares) to be her personal property is evident in her description of the Trust at trial: "The Deanna A. Wilbourn Marital Trust B, set up totally for the benefit of my husband's widow: Deanna A. Wilbourn. Doesn't mean I own it, but I want to be very clear as to what the name of the trust is."[27] *Id.* At 981. Deanna's statements and actions amount to a repudiation of the Trust. "[R]epudiation of the trust is a clear ground of removal even though the trust property has not yet been devoted to personal uses." Bogert, *The Law Of Trusts And Trustees*, Section 527 (Rev. 2d. ed.).

In January 2007, shortly after Richard III was removed at chairman of the board but prior to the Notice of Removal, without notifying Richard III, Deanna told the bank to begin sending her the

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[27]Deanna was complaining to Richard III about the monthly budget Richard II had allowed her. R. 950. Deanna then proclaimed, "And he said, 'Well, when I die, you'll have everything.' And I don't. I don't. It's all in trust. It's all in – and – and I – and it's not mine. *And I'm just going to make it mine.*" R. 957 (emphasis added).

Trust's bank statements and shareholder correspondence. Exhibit 250. When Richard III asked twice to meet with Deanna to discuss how the Trust's shares would be voted in March of 2007, she refused to meet with him. RE 10. Then, when Richard III would not sign the proxy statement Deanna and her attorney presented to him moments before the 2007 shareholder meeting, she admitted that she attempted to vote the Trust's shares without Richard III's agreement.[28]

Defendants should also be removed and disqualified to serve as a co-trustee because of their unabashed hostility to Richard III. Under Mississippi law, a chancery court may remove a trustee *if* there is mutual hostility between the trustee and the beneficiary *and* "hostility of the trustee toward the [beneficiary] could defeat the purpose of the trust." *Walker v. Cox*, 531 So. 2d 801, 802 (Miss. 1988). The evidence establishes that Defendants have been and are hostile to Richard III, and that their hostility, far from being inflicted by Richard III, actually arises from their desire to get control of the board of the holding company by casting the Trust's shares in favor of Deanna, Garnett and Elizabeth's husband (Russell Williamson), and against Richard III. Deanna took the position at trial that Richard was obligated to vote as she told him to.[29] RV 47 of 62, pp. 923-925. Also, having previously denied it under oath, Deanna admitted that she had said she intended to treat the shares in Trust B as her personal property. RV 47, pp. 946-958, 969-975. Though Defendants' hostility cannot serve as a ground to remove Richard III as co-trustee, hostility of Deanna *toward* Richard III, who is also a beneficiary of the Trust, is a ground on which to remove her as co-trustee. The chancellor erred in removing Richard III as a co-trustee because of Defendant's hostility, while disregarding Deanna's hostility toward Richard III in dismissing his claims.

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[28]Deanna was asked, "'Question: All right. Do you recall that you cast a ballot for electors of the bank holding board, which included your son?' What was your answer?" Deanna testified, "I attempted to cast it and it was not counted." RV 47 of 62, pp. 984-985.

[29]Deanna was asked, "And do you think that he, as a co-trustee, has that same right, judgment, and discretion to disagree with you?" She responded, "Not necessarily....the Marital Trust B is not for his benefit. It is for mine...." She was then asked, "Are you saying that he has to agree with how you want to vote the share? Yes or no?" "No. I do not – well, yes. I think he should, as a trustee, consider that an obligation." RV 47 of 62, pp. 924-925.

The evidence shows that, in addition to Deanna's hostility toward Richard III, Elizabeth took the lead in instigating the plan to remove him from his positions with the holding company, the bank, and the Trust–and Garnett was a part of it. Elizabeth stood to benefit in at least three ways: she would become the co-trustee of the Trust with its attendant benefits, she would help install and keep her husband in the positions that Richard III had held at the holding company and the bank, and he would help add to her positions at the bank. Garnett too stood to benefit: having not been reelected to the board of the holding company, she would be appointed its "secretary" with an attendant compensation, and she would be placed on the board of the bank and the audit committee of the bank, positions that she had never held before.

Based on this evidence, the chancery court erred by dismissing Richard III's claims to remove Deanna as co-trustee and to declare that neither Garnett nor Elizabeth is eligible to serve as successor co-trustee. The evidence strongly supports the removal and disqualification because of the serious breach of the Trust, the intentional and unauthorized exercise and abuse of the trustee-removal power, and their hostility toward Richard III.

H. Venue in this Action is Proper in Madison, Not Lauderdale County

If the Court were to remand this action for further proceedings, the Court should remand the case to the Chancery Court of Madison County. Richard III filed this suit in Madison County. However, that court held that because Defendants had "removed" Richard III as trustee by way of the April 2007 "Notice of Removal"—the very document precipitating this action—venue was not proper because no trustee resided in Madison County. RV 1 of 62, pp. 147-155 (motion to change venue); RV 3 of 62, pp. 332-350 (Richard III's response); RV 6 of 62, pp. 825-828 (order). That circular conclusion was error.

Venue was and remains proper in Madison County, and it was an abuse of discretion for the Madison County Chancery Court to transfer the case to Lauderdale County, thus denying Richard III his choice of a proper venue. Effectively, the Madison County Chancery Court adjudicated one of the central disputes of this action in the context of a preliminary venue motion—a dispute that was

eventually decided *in Richard III's favor* on the actual record. In its holding that the April 2007 Notice of Removal was not valid, the Lauderdale County Chancery Court destroyed the basis for the Madison County court's transfer of venue.

Venue was proper in Madison County under Miss. Code Ann. §§ 11-5-1 (providing in part that "other suits respecting real or personal property may be brought in the chancery court of the county in which the property, or some portion thereof," is located) and § 91-9-211 ("such jurisdiction is vested in the chancery court of the county of the residence of the individual trustee, or one of them, or of the county in which the office, or one of the offices, of a corporate trustee is located"), because personal property constituting the trust *res* (the stock certificates) was held by Richard III as co-trustee in Madison County, the Trust was administered by Richard III in Madison County, and Madison County is Richard III's county of residence. RV 3 of 62, pp. 332-350 (Richard III's response). As co-trustee of the Marital Trust B, Richard III held legal title to the property of the Trust. *See* Miss. Code Ann. § 91-9-2(3); 90 C.J.S. *Trusts* § 4. The sole assets of Marital Trust B are shares of bank stock. The shares of stock constitute personal property within the meaning of Miss. Code Ann. § 1-3-41. It is undisputed that at the commencement of this action, Marital Trust B's shares of the bank stock were physically located in Madison County in a safe deposit box located in the vault of the Madison County branch of the bank. The fact that the holding company–the company in which Marital Trust B owns shares of stock–is headquartered in Lauderdale County does not control or determine the venue of this case. *See, e.g., HerringGas Company, Inc. v. Newton*, 941 So. 2d 839 (Miss. App. 2006). Quite to the contrary: where venue was otherwise proper under Mississippi law, Richard III as a co-trustee and plaintiff was entitled to his choice of venue.

The result of the Madison County court's transfer of this action to Lauderdale County was the injection of exactly the local prejudice—the court effectively picking sides in a hometown, bitter family dispute—that Richard III sought to avoid by filing suit where the trust property was located and the trust administration actually occurred. The case should have remained in Madison County.

In the event that this Court reverses and remands this action for further proceedings, the Court should remand the case to Madison County Chancery Court.

CONCLUSION

The Court should reverse the chancellor's removal of Richard III, reinstate Richard III, return the administration of the Trust to Richard III, and remand this case to the Chancery Court of Madison County, Mississippi for the calculation and entry of judgment on all of the co-trustee's fee that is owed to Richard III.

Respectfully submitted, this the 11th day of February, 2011.

RICHARD E. WILBOURN III,
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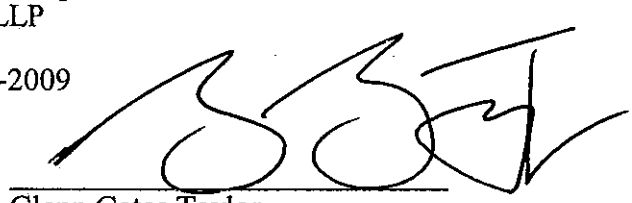

Glenn Gates Taylor

APPENDIX A

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