

IN THE SUPREME COURT OF OHIO

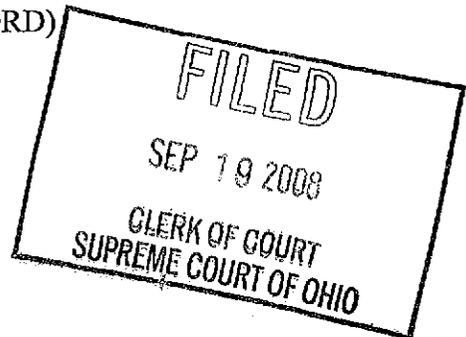
MICHAEL K. CUNDALL, et al.,	:	Case No. 08-0314
	:	
	:	On Appeal from the
Plaintiffs,	:	Hamilton County Court
	:	of Appeals, First
v.	:	Appellate District
	:	
U.S. BANK, TRUST, et al.,	:	Court of Appeals
	:	Case Nos. C 070081
Defendants.	:	C 070082

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II. STATEMENT OF FACTS

A. Procedural Posture

Plaintiff-Appellee Michael Cundall, Sr. (“Michael”) filed his complaint in this action in his capacity as beneficiary and successor trustee of a trust.¹ He asserted breach of fiduciary duty claims (seeking imposition of a constructive trust), as well as declaratory judgment, accounting and related relief against the trustees and other trust beneficiaries.² The complaint named all other current and contingent trust beneficiaries as defendants. He included some of them because he alleged that they were unjustly enriched and others as necessary parties so they could set up their respective claims.³

Michael’s children, Michael Cundall, Jr., Courtney Fletcher Cundall, and Hillary Cundall (“Cross-Claimants”) are named as defendants. They filed an Answer and Cross-Claim in which they essentially admitted all of the Complaint’s allegations and asserted claims against the Estate of John F. Koons III (for breach of fiduciary duty and intentional interference with an expectancy of an inheritance) and against certain trustees and beneficiaries⁴ of the trust alleging unjust enrichment.⁵

¹ 3/24/2006 Plaintiff’s First Amended Complaint for Tortious Breach of Fiduciary Duty, Constructive Trust, Declaratory Judgment, Accounting, and Related Relief (“First Amended Complaint”), Supplement to Merit Brief of Defendants-Petitioners Richard W. Caudill, Executor, Keven E. Shell, Ancillary Administrator, Richard W. Caudill, Successor Trustee, Keven E. Shell, Successor Trustee, William P. Martin II, Successor Trustee, D. Scott Elliott, Successor Trustee, G. Jack Donson, Jr. Successor Trustee, and Michael Caudill, Successor Trustee (the “Koons Estate/Trustees Brief”) at S-1-58.

² *Id.* at S-12.

³ *Id.* at S-8 (The Parties).

⁴ The Cross-Claim lists the Defendant trustees as Keven E. Shell, Richard W. Caudill, William P. Martin II, D. Scott Elliot, and Michael S. Caudill, in their capacity as Current Successor Trustees, and the beneficiaries as Deborah Koons Garcia, Christina N. Koons, John F. Koons IV, James B. Koons, Caroline M. Koons, Kathleen M. Koons, Maura L.

The trial court granted the motions to dismiss filed by Defendants.⁶ Michael and the Cross Claimants appealed the trial court's decision and the Court of Appeals reversed all aspects of the trial court's judgment except its dismissal of U.S. Bank and remanded the case for further proceedings.⁷ Three groups of Defendant-Appellants appealed the Court of Appeals' decision and have filed Merit Briefs in this case: the Christina Koons Beneficiaries,⁸ the Koons Beneficiaries⁹ and the Koons Estate/Trustees.¹⁰

B. Statement of Facts

In 1976, John F. Koons, Sr. and Ethel Bolan Koons set up a trust (the "Grandparents Trust") for the benefit of their two children, John F. Koons III ("Bud") and Betty Lou Cundall.¹¹ They deposited 6,309 shares of their closely-held business, Central Investment Corporation ("CIC"), into the Trust and directed that one-half of

Koons, Nicholas Koons Baker, Carson Nye Koons Baker, Jeremy B. Koons, and Morgan N. Koons.

⁵ 8/30/2006 Answer, Cross Claims, and Third-Party Complaint of Defendants Michael K. Cundall, Jr., Courtney Fletcher Cundall, and Hillary Cundall ("Cross Claims"), Supplement to Koons Estate/Trustees Brief at S-163-174.

⁶ Entry Granting Defendants' Motion to Dismiss, Appx. To Koons Estate/Trustees Brief, at A-37-46.

⁷ Judgment Entry, Appx. To Koons Estate/Trustees Brief, at A-6-36. The Court of Appeals decision will be cited in this Brief as *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481.

⁸ Merit Brief of Defendant-Appellants Christina Koons, Nicholas Koons Baker and Carson Nye Koons Baker. (Nicholas and Carson are Christina's children)(the "Christina Koons Brief").

⁹ Merit Brief of Appellants Deborah Koons Garcia, John F. Koons IV, James B. Koons, Caroline M. Koons, Kathleen M. Koons, Maura L. Koons, Jeremy B. Koons, and Morgan N. Koons (the "Koons Brief"). For ease of reference, the Christina Koons Beneficiaries and the Koons Beneficiaries will be collectively referred to in this Brief as the "Koons Beneficiaries."

¹⁰ Merit Brief of Defendants-Petitioners Richard W. Caudill, Executor, Keven E. Shell, Ancillary Administrator, Richard W. Caudill, Successor Trustee, Keven E. Shell, Successor Trustee, William P. Martin II, Successor Trustee, D. Scott Elliott, Successor Trustee, G. Jack Donson, Jr. Successor Trustee, and Michael Caudill, Successor Trustee. (the "Koons Estate/Trustees Brief").

¹¹ Cross Claim, Supplement to Koons Estate/Trustees Brief at S-169, ¶6.

those shares should be held in Fund A for the benefit of Bud and his children and grandchildren (who include the Koons Beneficiaries and the beneficiaries of the trusts held by the Koons Trustees), and the other half should be held in Fund B for the benefit of Betty Lou Cundall and her children and grandchildren (the “Cundall Beneficiaries”). Bud was trustee of the Grandparents Trust until his death on March 3, 2005.¹²

In 1984, when he was CEO and majority shareholder of CIC as well as the trustee of the Grandparents Trust, Bud sold all of the Fund B CIC shares back to CIC for \$210/share and also forced other Cundall family members to sell all of their CIC shares back to CIC for the same price.¹³ U. S. Bank, as Trustee of the Betty Lou Cundall Trust dated August 10, 1977, for the benefit of the Cundall Beneficiaries (the “1977 Cundall Trust”), also sold CIC shares held by the 1977 Cundall Trust back to CIC for this price.¹⁴ No court approval of the sale was sought or obtained; the price paid was for less than the fair value of the stock; Bud used fraud, duress and undue influence to obtain the Cundall family’s consent to the sale; the sale violated a material purpose of the Grandparents Trust to hold the CIC shares for the benefit of Betty Lou Cundall’s family until the death of the last to die of Betty Lou and her brother Bud; and Bud and the other Koons family

¹² Id. at S-169, ¶6.

¹³ Id. at S-169-70, ¶7. As the Court of Appeals noted in its opinion, Michael alleged that Bud had approached him and his siblings and “told them that he would stop distributing dividends and that the CIC shares would be worth nothing if they did not sell” and “Bud had the unfettered power to distribute income or principal as he saw fit.” The court noted also that this \$210 purchase price was \$118 less per share than what another shareholder, Lloyd Miller, had received for his shares. *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶6.

¹⁴ Id.

members, including the Koons Beneficiaries, were unjustly enriched by the sale by reason of the corresponding increase in the value of their CIC shares.¹⁵

As beneficiaries of Fund A and of the other Ohio trusts subsequently established for their benefit, the Koons Beneficiaries have had substantial contacts with the State of Ohio, including receiving disbursements from these trusts and dividends from CIC. The Grandparents Trust property has been located, managed and administered in Ohio.¹⁶

Cross-Claimants are Cundall Beneficiaries who were minors at the time of the sale.¹⁷ They did not have guardians ad litem appointed for them and were otherwise unrepresented.¹⁸ In January 2005, all of the outstanding shares of CIC stock, including the shares held in Fund A, were sold to PepsiAmericas, Inc. for approximately \$340 million. At the time of Bud's death in 2005, the Cundall Trust was valued at \$536,431.¹⁹

III. ARGUMENT

Proposition of Law No. 1: A TRUSTEE SHALL NOT ENGAGE IN DOUBLE DEALING TO HIS OWN ADVANTAGE AND PROFIT. A PRESUMPTION ARISES THAT ANY SUCH TRANSACTION IS INVALID AND THE PRESUMPTION MAY NOT BE OVERCOME BY GENERAL TRUST LANGUAGE GRANTING THE TRUSTEE BROAD AUTHORITY TO SELL TRUST ASSETS.

As this Court has previously recognized, "The law is jealous to see that a trustee shall not engage in double dealing to his own advantage and profit. The reason is not difficult to discover when it is remembered that a trusteeship is primarily and of necessity a position of trust and confidence, and that it offers an opportunity, if not a temptation, to disloyalty and self-aggrandizement. The connotation of the word and name 'trustee'

¹⁵ Cross Claim, Supplement to Koons Estate/Trustees Brief at S-169-70 ¶7.

¹⁶ Id. at S-167, ¶1.

¹⁷ Id. at S-170, ¶7.

¹⁸ Id.

¹⁹ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶8, ¶10.

carries the idea of a confidential relationship calling for scrupulous integrity and fair dealing.”²⁰

In its decision, the Court of Appeals held that Bud was a trustee under the Grandparents Trust and therefore undertook a duty of loyalty to the Cundalls.²¹ The court reasoned that this duty arose “not from a provision in the trust, but on account of the trustee-beneficiary relationship,” and that fiduciaries have the burden of proving the “‘perfect fairness and honesty’ of a transaction that was entered into during the fiduciary relationship.”²² The Court of Appeals rejected the Koons Estate/Trustees’ argument that because the Grandparents Trust “gave Bud unfettered discretion to sell assets for cash without ‘being subject to the laws of Ohio,’ Bud’s transaction could not have been fraudulent.”²³ The court held that a trustee “‘may not take advantage of liberal provisions of a trust instrument to relieve himself from the legal responsibility of a fiduciary under the law.’”²⁴

In their Brief, the Koons Estate/Trustees again argue that the power given to Bud by the terms of the Grandparents Trust overcomes the presumption of impropriety of an alleged self-dealing transaction.²⁵ They assert that the trust instrument’s broad

²⁰ *In re Estate of Binder* (1940), 137 Ohio St. 26, 38, 27 N.E.2d 939. See *In re Trusteeship of Stone*, (1941) 138 Ohio St. 293, 34 N.E.2d 755.

²¹ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶ 26.

²² *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶¶26-27. The Court of Appeals cited, inter alia, *Peterson v. Mitchener* (1947), 79 Ohio App. 125, 133, 71 N.E.2d 510, where the court stated: “Equity looks with extreme jealousy on transactions between parties who stand on a confidential relationship. Unless the person who is benefited can show the utmost good faith and that the benefit was conferred with a full knowledge of the circumstances, it will be set aside.”

²³ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶29.

²⁴ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶29, quoting *In re Estate of Binder* (1940), 137 Ohio St. 26, 43-44, 27 N.E.2d 939.

²⁵ Koons Estate/Trustees Brief, at 26.

authorization permitting Bud to “sell any assets” meant that he did not commit a breach of his duty of loyalty in connection with a transaction involving trust property and his own personal account.²⁶ They reason that the grantors, his parents, knew that he would be acting as both trustee and as president of CIC and that the trust would hold CIC stock, and yet they did not limit his authority to sell the CIC stock, so they must have intended that he would be authorized to sell the stock for his own benefit.²⁷ In effect, they equate the trust instrument’s general authority to “sell any assets” with the authority to “sell any assets to himself at any price.”²⁸

Appellants’ argument has been expressly rejected by this Court in *In re Estate of Binder*, where the Court stated:²⁹ “But it must be observed that self-dealing or breach of good faith on the part of a trustee . . . cannot be excused on the ground that the instrument creating the trust and making him trustee has given him broad authority and unlimited discretion in the administration of the trust. The trustee cannot take advantage of liberal provisions of a trust instrument to relieve him from the legal responsibility of a fiduciary under the law.”³⁰

²⁶ Id. at 26-27.

²⁷ Id. at 30. The Koons Estate/Trustees refer to a sale to CIC, but as the Court of Appeals recognized, Bud was CEO and majority shareholder of CIC, and their technical argument that there was no self-dealing should therefore be rejected. *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶39. See *Magee v. Troutwine* (1957), 166 Ohio St. 466, 143 N.E.2d 581 (finding that a sale by a fiduciary to himself was prohibited and void, and a sale to a spouse was equivalent in legal effect to a sale to himself).

²⁸ See *Sredniawa v. Sredniawa*, 8th Dist. No. 86607, 2006-Ohio-1597, at ¶17 (stating that the defendant trustee’s argument that his authority under the trust agreement to “dispose of” trust assets and to carry out the purposes and intents of the trust gave him the authority to unilaterally transfer trust property to himself was “totally absurd”).

²⁹ (1940), 137 Ohio St. 26, 27 N.E.2d 939.

³⁰ Id. at 30. Contrary to Appellants’ assertion, it is also inconsistent with the new Ohio Trust Code, § 5808.02, which states that any self-dealing transaction by a trustee is voidable by the beneficiaries unless, inter alia, it is authorized by the terms of the trust.

In selling the Cundall CIC shares for the benefit of himself and his family, Bud acted in violation of his fiduciary duty to the Cundall beneficiaries, including Cross Claimants, under Ohio statutory and common law. He did so without any express authority in any trust instrument. This transaction must be presumed to be invalid.³¹

Proposition of Law No. 2: WHERE A TRUSTEE OF AN EXPRESS TRUST HAS ENGAGED IN SELF-DEALING, THE TRANSACTION IS VOIDABLE BY THE BENEFICIARY OF THE TRUST WITHOUT ANY TENDER OF THE AMOUNT RECEIVED BY THE BENEFICIARY OF THE TRUST.

In *In re Estate of Binder*, this Court held: “Where, in a transaction relating to his trust, a trustee has been guilty of self-dealing or breach of good faith, such transaction is voidable and the right of the beneficiary of the trust to rescind does not depend on whether the trust estate has suffered a loss.”³² This rescission right derives from the “rules of law relating to the loyalty of a trustee to his trust” which are “constant and immutable” and “grounded on the principles of honesty and integrity which are changeless and eternal.”³³

In its decision in this case, the Court of Appeals declined to require tender by beneficiaries claiming that their trustee had engaged in self-dealing. The court discussed the unique duty owed by a trustee to the beneficiaries of a trust: “Self-dealing – when trustees use the trust property for their own personal benefit – is considered ‘particularly egregious behavior.’ And any direct dealings between a trustee and a beneficiary are

³¹ *Diamond v. Creager*, 2nd Dist. No. 18819, 2002-Ohio-916, at ¶10; *In re Estate of Anderson*, (Dec. 15, 2000), 11th Dist. No. 99-T-0160, 2000 Ohio App. LEXIS 5928, at *15; *Rudloff v. Efstathiadis Fletcher*, 11th Dist. No. 2002-T-0119, 2003-Ohio-6686, at ¶10; *Bacon v. Donnet*, 9th Dist. No. 21201, 2003-Ohio-1301, at ¶30; *Trust of Broh-Kahn v. Broh-Kahn* (March 24, 1988), 8th Dist. No. 53606, 1988 Ohio App. LEXIS 1088; See *Yost v. Wood* (July 11, 1988), 5th Dist. No. 7357, 1988 Ohio App. LEXIS 2791, at *8.

³² *In re Estate of Binder* (1940), 137 Ohio St. 26, 57, 27 N.E.2d 939.

³³ *In re Estate of Binder* (1940), 137 Ohio St. 26, 56, 27 N.E.2d 939.

‘viewed with suspicion.’”³⁴ The court reasoned that a trustee has a duty of loyalty arising from the trustee-beneficiary relationship, and that the duty of loyalty requires a trustee who has a personal stake in a transaction to adhere to a particularly high standard of behavior.”³⁵ The court noted that “when a fiduciary – or an entity connected with a fiduciary – ends up with property originally in the trust, bells ring and sirens wail.”³⁶

The Koons Estate/Trustees argue that because Bud caused the adult Cundall Beneficiaries to sign releases in conjunction with the stock sale – although the Cross Claimants, minors at the time, did not do so – this rescission right is now qualified and the Cundall Beneficiaries, including the Cross Claimants, must tender back all consideration received for the stock sale (plus interest) before they may pursue their claims. According to the Koons Estate/Trustees, all of the Cundalls and the Cundall Trusts were paid a total of \$3,587,010.00 for all of their stock, so, including interest, Michael should now be required to tender \$20,808,827.06 before bringing suit.³⁷

The barrier to relief being sought by the Koons Estate/Trustees is inconsistent with this Court’s holdings in *In re Estate of Binder* and its progeny. The tender requirement would permit a self-dealing trustee to escape the consequences of his improper actions. A beneficiary’s release obtained by a trustee at the time of the self-dealing transaction would enable the trustee to circumvent Ohio laws designed to require

³⁴ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶32 (citations omitted).

³⁵ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶26.

³⁶ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶31.

³⁷ T.d. 83, Memorandum in Support of Defendants Richard W. Caudill, Keven E. Shell, William P. Martin, II, G. Jack Donson, Michael Caudill, and D. Scott Elliot’s Motion to Dismiss dated June 1, 2006, at 15-16.

him to act with complete loyalty and in good faith by allowing him to rely upon the barrier to relief this release would provide.

The Court of Appeals decision is also consistent with the rule under Ohio law that if there is no question that at least the amount originally paid upon the execution of a release is owed, there is no reason to require repayment of the original amount when the release is challenged and an additional amount is sought.³⁸ There can be no question that the Cundalls are owed at least the amount they received from the stock sale in 1984. The Koons are not arguing that the CIC stock was worth less than the amount the Cundalls were paid. Ohio law should not compel them to repay this amount before challenging the release and seeking an additional amount.

The Koons Estate/Trustees argue that the Court of Appeals ruling is inconsistent with *Haller v. Borrer Corporation*.³⁹ In *Haller*, the court held that if a release obtained in the course of the settlement of intentional tort claims against a former employer is procured by fraud in the factum, the release is void and tender is not required, but if it is procured by fraud in the inducement, the release is voidable and the party is required to tender any consideration received in return for the release before filing suit.

The Court of Appeals in this case held that the differentiation of types of fraud in *Haller* did not apply here because *Haller* was a personal injury case involving an arms-

³⁸ *In re Gray's Estate* (1954), 162 Ohio St. 384, 123 N.E.2d 408 (holding that successor fiduciary was not required to tender back the amount received from surety before pursuing its remedies because there was no dispute that at least the amount previously paid was due); *Hoppel v. Farmers Insurance Co.* (June 6, 1990), 7th Dist. No. 88-C-59, 1990 Ohio App. LEXIS 2246, at *4-*5 (holding that where the plaintiff had previously obtained a payment and was entitled to it irrespective of the validity of the settlement, there was no reason why the plaintiff should be compelled to repay the payment to the defendant when requesting rescission of the settlement.)

³⁹ (1990), 50 Ohio St.3d 10, 552 N.E.2d 207.

length transaction where there was no fiduciary relationship between the parties.⁴⁰ The court declined to create a tender requirement “when a fiduciary has allegedly breached its duty by self-dealing.”⁴¹ Assuming arguendo that *Haller* applies to a release signed by the beneficiaries of an express trust releasing the trustee of that trust, by its very nature that release must be void ab initio because it was obtained by fraud in the factum. The beneficiaries of a trust cannot have the capacity to release their trustee from self-dealing absent the appropriate safeguards required by Ohio law.⁴²

Proposition of Law No. 3: RELEASES SIGNED BY THE PARENT OF A MINOR BENEFICIARY PURPORTING TO RELEASE A TRUSTEE FROM CLAIMS RELATING TO THE TRUSTEE'S SELF-DEALING STOCK TRANSACTION CANNOT BE BINDING ON THE MINOR ABSENT PROBATE COURT APPROVAL.

The Koons Estate/Trustees argue that Michael released not only his own claims but also the claims of “his/her heirs” and since Cross Claimants are his heirs under the Ohio descent and distribution statute, Michael’s release of Bud also binds them.⁴³ They assert that under Ohio law Michael was authorized to execute a pre-injury release on behalf of his children without court approval.⁴⁴ They also argue that Cross Claimants cannot sue because they are not in privity with Bud with respect to the final distribution.⁴⁵

⁴⁰ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶21- ¶22.

⁴¹ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶25.

⁴² Under Ohio law, self-dealing by a trustee without the express authority to do so is permitted only with court supervision after full disclosure and independent representation of all beneficiaries, including all minors and unborn remaindermen. See, e.g., *Central National Bank of Cleveland v. Brewer* (1966), 8 Ohio Misc. 409, 220 N.E.2d 846.

⁴³ Koons Estate/Trustees Brief, at 24.

⁴⁴ *Id.*

⁴⁵ *Id.*

A. The Releases Were Not “Pre-Injury” Releases Authorized under Ohio Law.

Appellants’ reliance on the “pre-injury” exception⁴⁶ to the general rule prohibiting parents from signing a release binding their children is misplaced. Unless the release is signed before any injury has occurred, parents ordinarily may not release existing claims of their minor children except under R.C. 2111.18, which requires the parent to obtain the permission of the probate court.⁴⁷ “Under Ohio law, it has been held that parents are not the legal guardians of their children’s personal property and have no power to release a minor’s claim once it has arisen.”⁴⁸

In 1984, when the releases were signed, Cross-Claimants had an existing interest in both the Grandparents Trust and the 1977 Cundall Trust because both trusts named them as contingent beneficiaries.⁴⁹ In 1984, it was undetermined whether or not their parent, Michael, would be alive at the time the final distributions from the trusts were to

⁴⁶ Appellants are referring to an exception to this rule giving parents the authority to bind their children to some pre-injury exculpatory agreements. See *Zivich v. Mentor Soccer Club* (April 18, 1997), No. 95-L-184, 1997 Ohio App. LEXIS 1577, affirmed (1997), 82 Ohio St.3d 367, 1998-Ohio-389, 696 N.E.2d 201 (citations omitted). The Koons Estate/Trustees also argue that the new Ohio Trust Code allows a parent to enter into a release on behalf of a child, but only if there is no conflict of interest. (Koons Estate/Trustees Brief, at 24, n. 108). Contrary to their assertion that this new Code provision applies to the 1984 release signed by Michael, the Code specifically provides that it does “not affect an act done before the effective date of these chapters.” R.C. 5811.03(A)(5).

⁴⁷ See *Brewer v. Akron General Medical Center* (Jan. 27, 1999), 9th Dist. No. 19068, 1999 Ohio App. LEXIS 162.

⁴⁸ *Zivich v. Mentor Soccer Club* (April 18, 1997), 11th Dist. No. 95-L-184, 1997 Ohio App. LEXIS 1577, affirmed (1997), 82 Ohio St.3d 367, 1998-Ohio-389, 696 N.E.2d 201.

⁴⁹ 1977 Cundall Trust, Supplement to Koons Estate/Trustees Brief at S-24; Grandparents Trust, Supplement to Koons Estate/Trustees Brief at S-39-41.

be made. Therefore, absent compliance with R.C. 2111.18, their claims and interests in the Trusts could not be released. Cross-Claimants were injured by the purported release of their claims against Bud and by the contemporaneous sale of the stock.

B. Cross Claimants Have the Right to Sue Defendants

Appellants also argue that Cross Claimants lack the right to sue Defendants because they “were not in privity with Bud Koons with respect to the final distribution”⁵⁰ and they lack standing to bring their claims because they have no interest in the Grandparents Trust.⁵¹ However, at the time Bud undertook his tortious actions, Cross-Claimants were contingent beneficiaries of this Trust. Their status in 1984, when the tort was committed, is the relevant date for purposes of this action. Even assuming, *arguendo*, that this Court looks instead at their status today, Cross-Claimants’ interests in the Trusts should be sufficient to withstand Appellants’ motion to dismiss.⁵²

This Court has set forth the elements of the tort of interference with an expectancy of inheritance:

1. an existence of an expectancy of inheritance in the plaintiff;
2. an intentional interference by a defendant(s) with that expectancy of inheritance;
3. conduct by the defendant involving the interference which is tortious, such as

⁵⁰ Koons Estate/Trustees Brief, at 25.

⁵¹ Koons Brief, at 22; Koons Estate/Trustees Brief, at 24-25.

⁵² The trial court did not address any of these issues. Its only reference to Cross Claimants was in its holding at the conclusion of its opinion: “For the foregoing reasons, the failure to tender and to allege tender requires dismissal of all claims of all parties related to any claim encompassed in the releases. The Court is not aware of any circumstances that would necessarily foreclose the possibility that Plaintiffs or the Cundalls might tender the consideration received. Accordingly, the dismissal of the claims **and cross-claims** herein based on the failure to tender must be without prejudice.” Entry Granting Defendants’ Motion to Dismiss, Appx. to Koons Estate/Trustees Brief, at A-44-45 (emphasis added).

- fraud, duress or undue influence, in nature;
4. a reasonable certainty that the expectancy of inheritance would have been realized, but for the interference by the defendant; and
 5. damage resulting from the interference.

Firestone v. Galbreath.⁵³ “Any person who can prove the elements of the tort of intentional interference with expectancy of inheritance has the right to maintain the cause of action.”⁵⁴

As the final element of their cause of action for tortious interference with an expectancy of inheritance, Cross-Claimants will be required to show that they have been damaged by Bud’s tortious actions. In the Sixth Circuit’s *Firestone* case, the defendants had argued that this tort “can not be so broad as to protect the vague and undefined expectancy of a prospective residual trust beneficiary.”⁵⁵ The Sixth Circuit rejected this argument, stating that “it is just this very type of expectation of prospective inheritancy, whether in a will or a trust, that falls within the protection of this cause of action.”⁵⁶ The court concluded: “That the plaintiff-grandchildren are residual trust beneficiaries, as opposed to vested beneficiaries of a fully-funded trust, will undoubtedly make it more difficult to prove certain elements of the offense, but it should not automatically preclude them from seeking redress in the proper forum if they can proffer sufficient proof.”⁵⁷

Cross-Claimants’ proof of damage may take one or more of the following forms:

- They may show that Bud’s tort reduced the size of their father Michael’s estate and therefore the amount of their expected inheritance from him;

⁵³ (1993), 67 Ohio St.3d 87, 88, 616 N.E.2d 202.

⁵⁴ Id.

⁵⁵ *Firestone v. Galbreath* (1994), 25 F.3d 323, 326.

⁵⁶ Id.

⁵⁷ Id.

- They may show that Michael has disclaimed or assigned a portion of his interest in any damages he recovers from this lawsuit in his capacity as a beneficiary of one or both of the 1977 Cundall Trust and the Grandparents Trust, and that Cross-Claimants therefore have become direct beneficiaries of these Trust assets;
- They may show that they have entered into a will contract with Michael whereby Michael and his spouse have contracted to leave them their entire estate upon the death of the last of them to die; and
- They may show that they are still contingent beneficiaries of the 1977 Cundall Trust because they will become direct beneficiaries of this Trust in the event Michael dies before final distribution is made.

Even if Cross-Claimants do not become direct beneficiaries of their grandmother Betty Lou Cundall's 1977 Cundall Trust or the Grandparents Trust, their interest in the prospective estate of their father, Michael, should be sufficient to withstand a motion to dismiss. In *Harmon v. Harmon*,⁵⁸ the Maine Supreme Court addressed the issue of whether a son, an expectant legatee, could maintain an action for tortious interference with an intended legacy from his mother while she was still living. The Maine court compared this action to an action for wrongful interference with an expectation of a future business relationship, stating: "[I]t has become a settled rule in the United States that the expectancy of future contractual relations, such as the prospect of obtaining employment or employees, or the opportunity of obtaining customers, will be protected by the law from wrongful interference."⁵⁹ The court concluded: "[W]here a person can

⁵⁸ (1979), 404 A.2d 1020.

⁵⁹ *Id.* at 1023. The court also stated: "If the law protects a person from the interference with an opportunity to receive a benefit by entering into contractual relations in the future, the same protection should be accorded to a person's opportunity to receive a benefit as a prospective legatee. The uncertainty attendant upon the expectancy is

prove that, but for the tortious interference of another, he would in all likelihood have received a gift or a specific profit from a transaction, he is entitled to recover for the damages thereby done to him.”⁶⁰

Ohio also recognizes the tort of interference with a prospective business relationship (also known as the tort of intentional interference with prospective relations). In *Thompson Properties v. Seinsheimer*,⁶¹ the court described the tort of intentional interference with prospective relations as: “[O]ne who, without privilege to do so, induces or otherwise purposely causes a third party not to * * * enter into or continue a business relation with another is liable to the other for the harm caused thereby.”⁶² The court held that the defendant’s claims that “allegations * * * in plaintiff’s Complaint have disrupted and interfered with the business of the defendants” and that “[a]s a direct and proximate result * * * defendants have lost business, prospective business, [and] profits and will continue to suffer such losses in the future” were sufficient to withstand a Rule 12(b)(6) motion to dismiss.⁶³

Likewise, Cross-Claimants have alleged that Bud intentionally interfered with Cross-Claimants’ expectancy of inheritance; that his conduct was tortious in nature and constituted breach of fiduciary duty, fraud, duress and undue influence; that Cross-Claimants had a reasonable certainty that their expectancy of inheritance would have been realized, but for the interference by Bud; and that Cross-Claimants have suffered

equivalent. Neither the employee nor the prospective legatee has any enforceable right to his likely benefit.” Id.

⁶⁰ Id. at 1024.

⁶¹ (Feb. 12, 1986), 1st Dist. No. C-850168, 1986 Ohio App. LEXIS 5601.

⁶² Id. at *9 (citations omitted).

⁶³ Id. at *9 -*10.

damages resulting from Bud's interference in an amount to be determined at trial." ⁶⁴

These allegations should be sufficient to withstand a motion to dismiss.

Proposition of Law No. 4: PERSONAL JURISDICTION OF OHIO COURTS OVER OUT-OF-STATE BENEFICIARIES FOR ISSUES RELATING TO THEIR RECEIPT OF DISTRIBUTIONS FROM AN OHIO - ADMINISTERED TRUST IS CONSTITUTIONALLY PERMISSIBLE.

In holding that the Koons Beneficiaries were subject to the jurisdiction of the Ohio trial court, the Court of Appeals relied on the provision of Ohio's long arm statute granting jurisdiction when a person "[transacts] any business in this state."⁶⁵ The court ruled: "A regular beneficiary of an Ohio-administered trust meets the requisite minimum contacts in Ohio to support personal jurisdiction under federal constitutional standards."⁶⁶ In adopting this proposition of law, the court reasoned that "by accepting distributions from an Ohio trust, the Koons defendants carried on activities in Ohio and benefited from its laws. These activities were of a continuous and systemic nature such that maintenance of this suit in Ohio does not offend traditional notions of fair play and substantial justice."⁶⁷

The court reasoned further that under the "reasonableness" inquiry mandated under *Asahi Metals Indus. Co. v. Superior Court*,⁶⁸ "the interstate judicial system's interest in obtaining the most efficient resolution of the controversy weighs heavily against the Koons' position. It is unclear whether Michael would be able to bring suit in

⁶⁴ Cross-Claim, Supplement to Koons Estate/Trustees Brief at S-171, ¶¶ 15-19.

⁶⁵ R.C. 2307.382(A)(1). *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶71.

⁶⁶ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶76.

⁶⁷ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶76.

⁶⁸ (1987) 480 U.S. 102, 108-09, 107 S.Ct. 1026.

any other forum. But even if that is possible, Ohio as the situs of the trust is the best-positioned state to fashion a possible remedy.”⁶⁹

The Koons Beneficiaries argue that the Court of Appeals ruling is “contrary to other case law in which courts have held that the mere creation of an Ohio trust ‘is not sufficient to invest [a] Court with personal jurisdiction over the non-resident defendants.’”⁷⁰ In *Hoover*, the court held that two officers of two corporate trustees were not subject to the personal jurisdiction of an Ohio court where the plaintiffs had not presented any evidence of the officers’ Ohio contacts or activities. The court held, however, that the Ohio court had personal jurisdiction over Caddey, the individual out-of-state trustee, because “the fact that the corporate trustee was an Ohio corporation located in Canton, Ohio and that the trust was established in Ohio indicates that Caddey would have been on notice that he might be haled into court in Ohio and suggests that an assertion of in personam jurisdiction by this court over defendant Caddey is constitutionally permissible.”⁷¹

⁶⁹ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶78. The court’s reasoning is also consistent with well-established Ohio common law principles recognizing the inherent authority of a court to impose a constructive trust remedy that will apply not only to trust assets that happen to remain in this state but also to all out of state trust assets that were distributed from the Ohio trust. See *Ferguson v. Owens* (1994), 9 Ohio St.3d 223, 225, 459 N.E.2d 1293; *Soeder v. Burton* (Dec. 2, 1988), 11th Dist. No. 1361, 1988 Ohio App. LEXIS 4759, at *4 (“In an action imposing a constructive trust, the determination of the status of the property in dispute is an in rem action. Similarly, actions finding a resulting trust would also be in rem. Such actions are not only binding upon the parties in the dispute but upon third parties as well. * * * ‘An adjudication against some person or thing, or upon the status of some subject-matter, which wherever and whenever binding upon any person, is equally binding upon all persons.’”)

⁷⁰ Koons Brief, at 14, citing *Hoover v. Society Bank of Eastern Ohio N.A.* (April 2, 1991), N.D. Ohio No. 5:90 CV 1245, 1991 U.S. Dist. LEXIS 19073, at *36.

⁷¹ *Hoover*, 1991 U.S. Dist. LEXIS 19073, at *40.

The Court of Appeals ruling in this case is entirely consistent with *Hoover*. The fact that the Grandparents Trust and the other Ohio trusts established for the benefit of the Koons Beneficiaries from the distributions from the Grandparents Trust are Ohio trusts formed by Ohio grantors, some of the trustees are Ohio trustees located in or residing in Ohio, and CIC is an Ohio corporation indicates that the Koons Beneficiaries would have been on notice that they might be haled into court in Ohio and suggests that an assertion of in personam jurisdiction by Ohio courts over them is constitutionally permissible.

Proposition of Law No. 5: THE OHIO TRUST CODE PROVIDES FOR OHIO COURT JURISDICTION OVER OUT-OF-STATE BENEFICIARIES REGARDING ANY MATTER INVOLVING THE TRUST AND MAY BE RETROACTIVELY APPLIED TO THEM.

Section 5802.02(B) of the Ohio Trust Code provides for Ohio court jurisdiction over the Koons Beneficiaries regarding any matter involving the Grandparents Trust.⁷² While it did not rely on the Ohio Trust Code in deciding that the trial court had personal jurisdiction over the Koons Beneficiaries,⁷³ the court stated that R.C. 5811.03, which describes the retroactive applicability of R.C. 5802.02, provides that 5802.02 governs all judicial proceedings commenced prior to January 1, 2007 unless it would “substantially

⁷² Section 5802.02(B) provides: “With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. **By accepting a distribution from the trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust**”(emphasis added).

Appellants’ argument that jurisdiction under the Code is applied only to assets remaining in the Ohio trust (see Christina Koons Brief, at 12-13) is contradicted by the language of the Code emphasized above. As the Official Comment to the Code states: “[U]ntil a distribution is made, jurisdiction over a beneficiary is limited to the beneficiary’s interest in the trust. Personal jurisdiction over a beneficiary is conferred only upon the making of a distribution.” Uniform Trust Code §202 Official Comment.

⁷³ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶69 - ¶80.

interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties.”⁷⁴ The court stated that retroactive application of the Code would not substantially interfere with the judicial proceedings because the case is in its infancy, little, if any discovery has been conducted, and the rights of the parties would not be prejudiced because Ohio courts could have taken jurisdiction over the Koons Beneficiaries even without the statute.⁷⁵

The Koons Beneficiaries argue that retroactive application of the statute “would create jurisdiction where none existed before.”⁷⁶ Their argument ignores the court’s explicit statement that personal jurisdiction exists independent of the statute. The Code

⁷⁴ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶67.

⁷⁵ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶68-¶69.

⁷⁶ Koons Brief, at 29. See Christina Koons Brief, at 11-13. They also argue that retroactive application of the OTC “would ensure a pre-trial judgment in favor of the Koons Beneficiaries on other grounds.” Koons Brief, at 24. First, they argue that R.C. § 5810.09 provides that “a trustee is not liable to a beneficiary who consented to conduct and released the trustee from liability and therefore, Bud is not liable to the Cundalls.” *Id.* Section 5810.09 actually states that the release is valid “unless the beneficiary was induced by improper conduct of the trustee or . . . did not know of the beneficiary’s rights or of the material facts relating to the breach.” The Official Comment to this Section states: “If the beneficiary’s approval involves a self-dealing transaction, the approval is binding only if the transaction was fair and reasonable.”

The Koons Beneficiaries also cite R.C. 5801.10 for the proposition that “the OTC even endorses private settlement agreements, like the releases signed by Plaintiff Cundall, and provides that the trustee represents his/her own individual interests in negotiating these releases, and not those of the beneficiaries.” Koons Brief, at 24. The portion of R.C. 5801.10 cited by the Koons Beneficiaries is intended to clarify the limits of the trustee’s authority to enter into the agreements permitted by that section. R.C. 5803.03 provides that, to the extent there is no conflict of interest, and except as provided in R.C. 5801.10(F), a trustee may bind and represent the beneficiaries of a trust. R.C. 5801.10(F), in turn, provides that with respect to agreements permitted under Section 5801.10, the trustee is not empowered to sign on behalf of any of the beneficiaries, but only on his own behalf.

Finally, the Koons Beneficiaries argue that under R.C. 5801.10 any private settlement agreement is final and binding on all beneficiaries and their heirs, successors, and assigns. Koons Brief, at 24. However, the self-dealing stock transaction engaged in by Bud is not even arguably within any of the permissible subjects of the agreements permitted under R.C. § 5801.10.

is only one of the two bases for the court's decision that Ohio courts have jurisdiction over the Koons Beneficiaries.

Proposition of Law No. 6: STATUTES OF LIMITATION FOR CLAIMS AGAINST BOTH A TRUSTEE AND THOSE TO WHOM THE TRUSTEE WRONGFULLY TRANSFERRED TRUST ASSETS DO NOT APPLY IN THE CASE OF A CONTINUING AND SUBSISTING TRUST.

The Court of Appeals stated that “[t]he statute of limitations for tortious breach of trust begins to run when the trustee ceases to serve as trustee.”⁷⁷ It held that the four-year statute of limitations began running when Bud ceased to be trustee at his death in 2005.⁷⁸ The court rejected the Koons’ argument that the statute of limitations for a constructive trust began to run on the date of the initial transfer in 1984, reasoning that statutes of limitations attach to causes of action and a constructive trust is a remedy that corrects unjust enrichment: “When a person owns legal title to property, but equity recognizes that the person should not retain all or some of the benefit of that property, a court may impose a constructive trust, which converts the owner into a trustee.”⁷⁹ Under the Court of Appeal’s reasoning, if the Cundalls are able to prove that Bud wrongfully acquired the CIC stock and that his descendents are now the legal owners of property that rightfully belongs to the Cundalls, a constructive trust would be appropriate.⁸⁰

For statute of limitations purposes, the Koons Beneficiaries attempt to separate the constructive trust remedy the Cundalls seek to impose upon those unjustly enriched by Bud’s breach of trust from the Cundalls’ tortious breach of trust claims against him.

⁷⁷ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶60, citing *State ex rel. Lien v. House* (1944), 144 Ohio St. 238, 247, 58 N.E.2d 675; *Cassner v. Bank One Trust Co., N.A.*, 10th Dist. No. 03AP-1114, 2004-Ohio-3484, at ¶29; *Hosterman v. First Nat’l. Bank & Trust Co.* (1946), 79 Ohio App. 37, 38, 68 N.E.2d 325.

⁷⁸ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶61.

⁷⁹ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶84-¶85.

⁸⁰ *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶86.

They acknowledge that a constructive trust is a remedy for “wrongful deprivation of property,”⁸¹ but argue that two separate causes of action with two separate statutes of limitations apply – one against express trustee Bud for fraud and breach of fiduciary duty and the other against the Koons Beneficiaries for unjust enrichment.⁸² They assert that “any claim for unjust enrichment against the Koons Beneficiaries would have accrued in 1984, when Bud Koons allegedly forced other Cundall family members to sell all of their [KCM] shares back to CIC for the same price, thereby enriching the Koons

⁸¹ Christina Koons Brief, at 14, quoting *Estate of Cowling v. Estate Of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, 847 N.E.2d 405, ¶¶18-26. This Court in *Cowling* stated: “A constructive trust is an equitable remedy that protects against unjust enrichment and is usually invoked when property has been obtained by fraud. ‘[A] constructive trust may also be imposed where it is against the principles of equity that the property be retained by a certain person even though the property was acquired without fraud.’” *Id.* at 281. (citations omitted).

⁸² Christina Koons Brief, at 13-14. In a variation of this argument, the Koons Estate/Trustees argue that the Court of Appeals erroneously decided to “treat constructive trustees identically to express trustees” and that it misread *Peterson v. Teodosio*, (1973), 34 Ohio St.2d 161, 172, 297 N.E.2d 113 in doing so. Koons Estate/Trustees Brief, at 40-47. In *Peterson*, this Court held that “statutes of limitation attach to causes of action and not to the remedial form of action in which the action is brought.” *Peterson*, 34 Ohio St.2d at 172. This Court stated further: “If the cause of action in which imposition of a constructive trust is sought as a remedy is barred by a statute of limitation, the imposition of a constructive trust is likewise barred.” *Id.* The applicable statute of limitations in *Peterson* was the four year statute of limitations for fraud, and the Court held that since the underlying cause of action was barred, the constructive trust remedy was also barred. There was no express trust.

The Court of Appeals relied on *Peterson* to reject the Koons’ argument that “the statute of limitations bars any claim for a constructive trust because the statute of limitations for a constructive trust begins to run on the date of the initial transfer,” reasoning that statutes of limitation attach to causes of action and the Cundalls’ cause of action arose when Bud ceased to be a trustee. *Cundall*, 174 Ohio App.3d, 2007-Ohio-7067, 882 N.E.2d 481 at ¶84. Contrary to the Koons Estate/Trustees’ assertions, the Court of Appeals did not rely on *Peterson* to hold that constructive trusts fall within the express trust exemption from the statute of limitations. On the contrary, the Court of Appeals recognized that there is no statute of limitations applicable to a constructive trust because a constructive trust is not a cause of action, but a remedy.

Beneficiaries”; Ohio’s statute of limitations is six years from the date of the event that caused the unjust enrichment; and as a result the claim expired in 1990.⁸³

Their argument is not in accord with Ohio law or policy. R.C. 2305.22 provides that statutes of limitation (including R.C. 2305.07, the six year statute of limitations relied on by the Koons Beneficiaries)⁸⁴ “do not apply in the case of a continuing and subsisting trust.”⁸⁵ The rationale for delaying the accrual date is founded on the assumption that the “beneficiary has far less reason to know of any breach, and any deleterious consequences thereof, during the administration of the trust than he does after the trust has terminated and the trust res has been surrendered to him.”⁸⁶ If claims against a trustee do not accrue until termination of his trusteeship, the equitable means for reversing the trustee’s unlawful transfers of property should also not accrue until that date. Otherwise, the Cundalls and the court would not have the means to unwind Bud’s distribution of the inflated Koons Fund trust assets.

Cases applying R.C. 2305.22 are consistent with this rationale. In *Brate v. Hurt*,⁸⁷ in the context of a constructive trust being sought by a plaintiff alleging unjust enrichment, the court ruled that no statutes of limitation would run until the trustee disavowed the trust.⁸⁸ In *Estate of Southard v. United States*,⁸⁹ the court held that

⁸³ Christina Koons Brief, at 15-16.

⁸⁴ Christina Koons Brief, at 13.

⁸⁵ See *State ex rel. Lien v. House* (1944), 144 Ohio St. 238, 247, 58 N.E.2d 675.

⁸⁶ *Cassner*, 2004-Ohio-3484, at ¶38. See *Cassner*, id. at ¶43 (referring to “the long-standing and sound view taken by Ohio courts that the beneficiary cannot be expected to act to obtain redress for damages suffered as a result of a trustee’s tortious conduct in violation of the trust, until the trustee has ceased exercise of his powers, made known this fact to the beneficiary and surrendered the trust res.”)

⁸⁷ 174 Ohio App.3d 101, 2007-Ohio-6571, 880 N.E.2d 980.

⁸⁸ 174 Ohio App.3d at 111. See *Bergholtz Coal Holding Company v. Dunning*, 11th Dist. No. 2004-L-209, 2006-Ohio-3401, at ¶42- ¶43; *Barthelmas v. Barthelmas* (January 7,

payments made to the beneficiary of a trust must be repaid to the trust under an unjust enrichment theory because they were in excess of the amounts to which the beneficiary was entitled by the terms of the trust, and under R.C. 2305.22 the unjust enrichment statute of limitations did not apply because the case involved a continuing and subsisting trust and the return of funds rightfully belonging to the trust.⁹⁰

Under the rule advocated by the Koons, any wrongful transfers of property made by a trustee during the term of a trusteeship would not be recoverable after six years, regardless of whether the trustee continued to act as trustee, as Bud did during the entire 21 year period from the 1984 transfer until his death in 2005.⁹¹ As this Court has previously recognized, “no person can claim an interest under a fraud committed by another. However innocent the party may be, if the original transaction is tainted with fraud, that taint runs through the derivative interest, and prevents any party from claiming under it.”⁹² The statute of limitations applicable to the Cundalls’ claims against Bud and the original transaction did not begin to accrue until the termination of his status as trustee upon his death in 2005. The means for unwinding trust distributions tainted with this fraud should likewise not begin to run until this date.

1999), 4th Dist. No. 97 CA 48, 1999 Ohio App. LEXIS 68 (reversing trial court’s granting of summary judgment on statute of limitations grounds where plaintiff sought to impose constructive trust on trust proceeds 27 years after trustee allegedly breached fiduciary duty).

⁸⁹ (Aug. 20, 2002), S.D. Ohio No. 2:05cv416, 2007 U.S. Dist. LEXIS 60957 .

⁹⁰ Id. at *14-24.

⁹¹ None of the cases cited by the Koons Beneficiaries (see Christina Koons Brief, at 13-17) involved the receipt and retention of benefits by some of the beneficiaries of an express trust and the inability of the other beneficiaries to complain about the unjust enrichment until the resignation or termination of the breaching trustee who controlled their trust’s remaining assets.

⁹² *Winder v. Scholey* (1910), 83 Ohio St. 204, 223, 93 N.E. 1098.

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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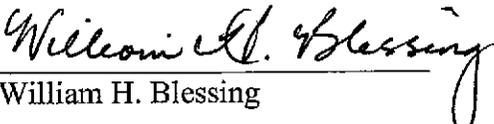
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