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414 South State Street
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Re: *Stone v. Stant*
C.A. No. 890-VCN
Date Submitted: August 19, 2011

Dear Counsel:

I write to address what I understand to be the current open issues. If I have omitted any items, please advise.

1. Trustees

In July, the motion to remove Mrs. Stant as trustee was denied, but the Court agreed that Margaret Johnson (Stone) should be designated as co-trustee. The parties were unable to agree upon an implementing order. The debate is about what records should be provided to Ms. Johnson, particularly whether she is entitled to a comprehensive accounting since her earlier service as trustee.

The question of who should be trustee is a narrow one. The motion could not fairly be treated as a request for an accounting. The role of the additional trustee was principally prospective in nature. In order to discharge the responsibilities of a co-trustee, Ms. Johnson reasonably needs current financial records and information. Those records should cover the period since the question of who should be trustee has been at issue. Thus, she should be provided with financial records from March 8, 2011, when the petition for Mrs. Stant's removal was filed, until the present, and continuing thereafter as long as she is a co-trustee. An implementing order accompanies his letter.

I acknowledge receipt of the letter, dated September 13, 2011, from those three Stone siblings who are not parties to this proceeding. I understand their frustration from sitting on the sidelines of a dispute of this nature. They, however, apparently chose consciously not to seek to be parties, and that largely defines their status now. I note that much of what they complain about has already—rightly or wrongly—been resolved in this venue.

2. Petitioners' Application for Attorneys' Fees

A Petition for Attorneys' Fees was filed by the Plaintiffs on July 12, 2011, and an amended petition was filed on September 8, 2011. No response has been filed by the Defendants. It is my understanding that the parties agree that the Bankruptcy stay was not lifted with respect to this aspect of the case. If that understanding is incorrect, I would ask that counsel confer on a schedule for addressing this application.

3. Daytrading

The remaining issue from Plaintiffs' Motion for Reargument involves the claims based on Stant's "daytrading" activities. There had been some thought that additional records of the consequences of that trading could be developed.¹ It turns out that other information could not be obtained. Thus, the Court is left with the question of what should be done about the daytrading?

¹ See *Stone v. Stant*, 2010 WL 4926580, at *4 (Del. Ch. Nov. 30, 2010).

In the Memorandum Opinion, the Court concluded that, at times, Stant acted as Helen's agent and, at times, given her deteriorating condition, Stant acted as a fiduciary. Resolution of the question of when Helen's condition changed was considered unnecessary in light of the grounds for the Court's ruling. Plaintiffs' Motion for Reargument leads the Court, first, to consider when Stant's role changed.

The Court found, based on the record such as it was, that Helen, by the end of 1999, was of an impaired condition and potentially vulnerable to the bad intentions of others. The Court further, although somewhat tentatively, concluded that Helen lost all meaningful capacity as of the beginning of 2002. Although milestones may have been determined, even if somewhat artificially, the uncertainty associated with the financial records makes use of the dates in reference to Helen's holdings at the time problematic. The strategy of daytrading was accepted by Helen when she was competent. The strategy was carried forward as her condition deteriorated. It is difficult to hold Stant responsible for the conduct—with all of its intended consequences—that Helen accepted and, perhaps,

encouraged. Thus, the claim related to the daytrading narrows, not to one of trading losses, but to whether the funds which Stant took from Helen and used for daytrading activities were, after recognizing daytrading losses and other payments made on Helen's behalf from the daytrading funds, returned to her trust or her estate.

Although the Plaintiffs suggest that the shortfall (or funds which have not been accounted for) could reach as much as \$272,972, or perhaps as little as \$113,992,² the better conclusion is that Stant has not accounted for approximately \$47,677.³ There are, in broad brush, two possibilities: (1) that the unaccounted for funds were siphoned off by Stant or (2) that market losses accounted for the shortfall.⁴

² Letter of David N. Rutt, Esq., dated Dec. 21, 2010, at 4.

³ The "unaccounted for" funds approximate \$47,677. This represents the amounts removed from the revocable trust of Helen Stone and used in the daytrading activities (\$238,257) reduced by trading losses (\$148,980), margin interest (\$15,600), and withdrawals (\$26,000). Record citations and limitations on the accuracy of this information are set forth in the letter of Noel E. Primos, Esquire, dated Dec. 21, 2010, at 2.

⁴ Margin interest and withdrawals also need to be considered.

No factual basis exists for concluding that Stant took any of these funds for his own benefit. Although the Defendants' recordkeeping efforts were far from stellar, intentionally hiding the flow of funds or deceit of some nature did not show up during trial. Given the absence of overtly misleading conduct, a reasonable inference would be that the shortfall should be attributed to market failure.⁵ The difficulty with this possible explanation is that such losses should have been documented on Helen's income tax returns.

On the other hand, Stant held Helen's funds as her agent and, as Helen's time drew to an end, he held them subject to fiduciary duties. The evidence, such as it is, demonstrates that Stant is unable to show what happened to the funds. To the extent that he held Helen's funds and invested them and did not return to her the funds that remained net of the investment activities, then, as his responsibility, those funds should be owed to the trust from which they were taken. Stant has offered that the funds were used to buy a car for a terminally ill granddaughter or

⁵ Trading records should have been available for some time. The failure to maintain them may be Stant's fault, but it seems unlikely that he fully appreciated his potential liability for these assets and, thus, lost or misplaced the records purposefully.

were the balance remaining in the Glen Michaels Financial account when it was closed. Unfortunately, other than his, at best, vague recollections, there appears to be no support for this explanation of the shortfall in Helen's funds. It is the burden of an agent, and certainly the burden of a fiduciary, to show that the remainder of entrusted funds is returned to the principal or beneficiary.⁶ Stant simply is unable to do so. That leads to the conclusion that he is liable.

The difficulty in calculating the amount of that shortfall is obvious from a review of the evidence in this trial. At best, any determination will have an aura of estimate; that the calculation of damages is difficult, however, is not a reason for not awarding them. As set forth above, the Court concludes that the fairest number, and a reasonable one, to measure Stant's liability in this regard, results in an award of \$47,677, together with interest at the lawful rate from the date of Helen's death. To this extent, the Plaintiffs' Motion for Reargument is granted.

⁶ "An agent or fiduciary is under a duty to keep and render accounts and, when called upon for an accounting, has the burden of proving that he properly disposed of funds which he is shown to have received for his principal or trust." *Technicorp Int'l II, Inc. v. Johnston*, 2000 WL 713750, at *16 (Del. Ch. May 31, 2000). During the timeframe that matters, Stant was functioning either as an agent or as a fiduciary, and thus it is his burden to explain where Helen's money went.

Stone v. Stant
C.A. No. 890-VCN
November 30, 2011
Page 8

An order addressing the two motions for reargument will be entered. With that, counsel should be able to prepare an order resolving all matters in this action, except for the Plaintiffs' application for an award of attorneys' fees.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K