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STATE OF MAINE
KNOX COUNTY

PROBATE COURT
Docket No. 2018-0145

In Re:

ESTATE OF ROBERT INDIANA
a/k/a ROBERT EARL CLARK,

Deceased

AARON M. FREY,
ATTORNEY GENERAL OF THE
STATE OF MAINE,

Interested Person

v.

JAMES W. BRANNAN,

Personal Representative

HOGAN LOVELLS US LLP,

Interested Person

VENABLE LLP,

Interested Person

PIERCE ATWOOD LLP,

Interested Person

PRETI FLAHERTY BELIVEAU
and PACHIOS, LLP,

Interested Person

ATTORNEY GENERAL'S AMENDED PETITION FOR REVIEW OF REASONABLENESS OF COMPENSATION OF ATTORNEYS AND PERSONAL REPRESENTATIVE AND REQUEST FOR AN ORDER REQUIRING REFUNDS OF EXCESSIVE COMPENSATION

INTRODUCTION

1. The Attorney General commences this civil proceeding against the Personal Representative of the Estate of Robert Indiana a/k/a/ Robert Earl Clark ("Indiana Estate"), and

multiple law firms employed by the Personal Representative, to recover excessive compensation paid by the Personal Representative to himself and the law firms joined in this Petition brought pursuant to Section 3-721 of the Maine Probate Code.

PARTIES IN INTEREST

2. Aaron M. Frey is the Attorney General of the State of Maine and brings this proceeding in furtherance of his statutory and common law duty to enforce due application of funds given to public charities within this state because the sole beneficiary of the Indiana Estate is a charitable corporation organized under the Maine Nonprofit Corporation Act. 5 M.R.S.A. § 194(2).

3. James W. Brannan ("Brannan" or "Personal Representative") is a lawyer with an office in Rockland, Maine, is the Personal Representative of the Indiana Estate, and at all times relevant to this Amended Petition has supplied and continues to supply services to the Indiana Estate within Maine.

4. Hogan Lovells US LLP ("HLUS") is a global law firm with offices in New York, New York, and Washington, D.C., previously engaged and compensated by the Personal Representative of the Indiana Estate. Among other contacts with the state, HLUS contracted with the Personal Representative in 2018 to supply services within Maine and did supply services within Maine in 2018 and 2019. HLUS also transacted business within Maine in 2018 and 2019.

5. Venable LLP ("Venable") is a global law firm with offices in New York, New York, and Washington, D.C., and is currently engaged by and has been compensated by the Personal Representative of the Indiana Estate. Among other contacts with the state, Venable contracted with the Personal Representative in 2019 to supply services within Maine, did supply

services within Maine in 2019, 2020, and 2021, and continues to supply services within Maine. Venable also has transacted business within Maine in 2019, 2020, and 2021, and continues to transact business within Maine.

6. Pierce Atwood LLP ("Pierce Atwood") is a law firm with offices in Portland, Maine, previously engaged and compensated by the Personal Representative of the Indiana Estate to supply services in Maine and did supply services within Maine in 2018.

7. Preti Flaherty Beliveau & Pachios, LLP, ("Preti Flaherty") is a law firm with offices in Portland, Maine, and is currently engaged by and has been compensated by the Personal Representative of the Indiana Estate to supply services in Maine, did supply services in Maine in 2018-2021 and continues to supply services in Maine.

8. The Star of Hope, Inc., ("SoH") is a charity, organized as a public benefit corporation under Maine law, with a registered agent in Bangor, Maine, and is the sole beneficiary of the Indiana Estate. SoH is joined as an interested person – no relief is sought from SoH.

JURISDICTION

9. This Court has jurisdiction over this proceeding pursuant to 4 M.R.S.A. § 251 and 18-C M.R.S.A. § 3-105, concurrent with the Superior Court, and has jurisdiction over each of the Respondents under 14 M.R.S.A. § 704-A.

FACTS

10. Robert Earl Clark, also known as Robert Indiana, a famous American artist, died testate at his home in Vinalhaven, Maine, on May 19, 2018.

11. Brannan was appointed the Personal Representative of the Indiana Estate on May 25, 2018.

12. The sole beneficiary of the Indiana Estate is SoH, a charitable corporation established during Mr. Indiana's lifetime as his legacy for the purpose of promoting the visual arts at his restored residence in Vinalhaven, Maine, and the ultimate successor to outstanding contracts for the production of and representation of Mr. Indiana's art going forward.

13. The day before Mr. Indiana died, he was made a party to a federal lawsuit in the Southern District of New York (the "New York Litigation") initiated by Morgan Art Foundation ("Morgan") against Michael McKenzie/American Image Art ("McKenzie") and Jamie Thomas (Mr. Indiana's caretaker) regarding allegedly unauthorized reproductions of Mr. Indiana's art work. The Indiana Estate stepped into the shoes of Mr. Indiana in that litigation and subsequently filed counterclaims against Morgan and crossclaims against McKenzie, which ultimately generated additional litigation before an American Arbitration Association panel and in a federal lawsuit in Maine.

14. The Personal Representative has hired multiple law firms to represent him in the New York Litigation and its offshoots.

15. SoH has repeatedly requested from the Personal Representative a written cost-benefit analysis of the New York Litigation, starting no later than November 2019. The Personal Representative never provided to SoH a written cost-benefit analysis of the New York Litigation, or any cost-benefit analysis demonstrating to SoH that the value of the ongoing New York Litigation was worth the costs.

16. On December 2, 2019, the Personal Representative filed a Petition for Approval of Interim Probate Account ("Interim Probate Account") with this Court. The Interim Probate Account that was filed included expenses of $3,284,636.59 in attorney's fees and $550,000 in personal representative fees and expenses. The attorney's fees were itemized by firm name, but

otherwise included no detail. The Personal Representative fee included no detail about how it was derived.

17. By petition dated January 6, 2020, the Attorney General requested review by this Court under 18-C M.R.S.A. §3-721 of the reasonableness of the compensation that the Personal Representative had paid to himself and his attorneys as reflected in the Interim Probate Account.

18. By Stipulation to Voluntary Dismissal of Pending Petitions without Prejudice dated January 23, 2020, the Personal Representative dismissed his request for approval of the Interim Probate Accounting and the Attorney General, in turn, dismissed his request for review of reasonableness of compensation. The Attorney General dismissed his January 6, 2020, based on representations that serious settlement talks were underway relative to the New York Litigation and that the Personal Representative wanted to be able focus his energies on that settlement process.

19. Through 2020, SoH repeatedly expressed concerns to the Personal Representative about the costs of the New York Litigation and lack of corresponding benefits, and encouraged the Personal Representative to settle the New York Litigation.

20. Increasingly concerned about the mounting litigation expense, SoH negotiated with Morgan Art Foundation directly and reached an agreement in September 2020 (the "SoH Agreement") that set forth parameters of a modified business relationship going forward, as well as a process for resolving past accounting and royalties disputes raised by the Personal Representative's counterclaims in the New York Litigation. The SoH Agreement effectively mooted all remaining issues in the New York Litigation.

21. On September 21, 2020, SoH asked the Personal Representative to settle the New York Litigation on terms consistent with the SoH Agreement. The Personal Representative

refused, instead opting to unnecessarily continue the New York Litigation, without regard to the expressed wishes of SoH, the sole beneficiary, or the best interest of SoH.

22. SoH filed a Petition for Supervised Administration with this Court dated September 22, 2020, alleging the Personal Representative had incurred legal fees in excess of $6 million through the end of July, 2020, and had sold works of art to pay legal fees and other expenses. According to its Petition, SoH viewed the works of art as critically important to its charitable mission.

23. On November 25, 2020, almost a year after the Personal Representative's December 2019 Interim Probate Accounting triggering the Attorney General's January 2020 opposition and initial request for review of the reasonableness of the Personal Representative's payment of compensation to himself and his attorneys, the Attorney General filed a Renewed Petition for Review of Reasonableness of Compensation of Attorneys and Personal Representative ("AG's Renewed Petition") because the Estate remained an active litigant in multiple cases and the legal and personal representative fees had increased significantly since January 2020.

24. On November 30, 2020, SoH filed a letter expressing support for the AG's Renewed Petition.

25. The AG's Renewed Petition requested a *process* for reviewing compensation under 18-C M.R.S.A. § 3-721, but no specific relief to address any excessive compensation this Court might ultimately determine had been paid, pending discovery and more information to enable assessment of the reasonableness of the compensation that had been paid. The AG's Renewed Petition also neither joined nor served the law firms whose compensation would be reviewed.

26. On December 14, 2020, the Personal Representative moved to dismiss or stay the AG's Renewed Petition on the grounds that the Attorney General had no standing to request the review because the Estate assets allegedly were not yet charitable in nature and the Attorney General thus had no oversight role. This Court denied the motion by order dated January 20, 2021, and entered a Scheduling Order dated February 23, 2021, requiring an initial period of expedited, limited discovery and good-faith negotiations to resolve the Attorney General's concerns about excessive compensation.

27. The Personal Representative has responded to preliminary written discovery served by the Attorney General, including providing detailed billing records of the Personal Representative and the law firms he hired and paid from Estate assets.

28. Mediation was held in February and March 2021 relative to the New York Litigation, at which the Personal Representative agreed to settle on terms substantially similar to the terms of the SoH Agreement. Immediately after that settlement agreement was reached, on March 10, 2021, SoH submitted a letter to this Court withdrawing its November 25, 2020, letter expressing support for the AG's Renewed Petition.

29. The Personal Representative's continued incurring of his own fees and legal fees on the New York Litigation through 2020 and into March 2021, contrary to the wishes of the Estate's sole beneficiary SoH, did not benefit the Estate and constituted a breach of the Personal Representative's fiduciary duty to the Estate.

30. All Personal Representative fees and legal fees incurred in connection with the New York Litigation after September 21, 2020, when SoH requested the Personal Representative to endorse its agreement with Morgan Art Foundation, are excessive and should be refunded by

the recipients and/or the Personal Representative, who is jointly and severally liable with the law firms for excessive legal fees.

31. As of March 31, 2021, the Personal Representative has paid from the Indiana Estate legal fees totaling $8,195,861.01 and Personal Representative fees to himself totaling $1,791,388.50.

32. On April 14, 2021, the Personal Representative filed a Motion to Establish Deadline for Office of Attorney General to Serve Formal Notice on All Interested Parties, seeking to require the Attorney General to join and serve the law firms on the basis that the only relief available if this Court were to determine that the Personal Representative had paid excessive compensation to his law firms, would be a refund from the law firms.

33. On April 22, 2021, the Personal Representative filed a Motion for Reconsideration of Order Regarding Standing or Attorney General, or for Dismissal of the Attorney General's Petition for Failure to State a Claim upon Which Relief Can Be Granted, on the basis that the Attorney General had indicated he intended to seek refunds from the Personal Representative alone, who is personally and jointly and severally liable for any overpayments he made to the firms.

34. On May 14, 2021, this Court ordered the Attorney General to give formal notice of its pending November 25, 2020, Renewed Petition, to any law firms he believed to have received excessive compensation within ten days from the date of the order.

35. Court review and approval of the substantial compensation paid is appropriate given that fees being paid from the Indiana Estate are in the millions of dollars, that every dollar paid to lawyers and the Personal Representative is a dollar unavailable to the charitable

beneficiary for the purpose of fulfilling Mr. Indiana's legacy, and that critically important works of art have been sold and pledged as collateral to pay these ongoing fees.

36. The Attorney General has retained experts to assist with his analysis of the reasonableness of the compensation reflected in detailed billing records the Personal Representative has produced covering Personal Representative and attorney fees incurred through January 2021 (or December 2020 in the case of one of the law firms).

37. The Attorney General's experts analyzed the billing records of the Personal Representative and his law firms in light of relevant attorney fee-shifting caselaw and the factors to be considered as guides in determining the reasonableness of a fee as set forth in 18-C M.R.S.A. § 3-721.

38. The Attorney General's experts have concluded that, of the $1,637,772.25 in Personal Representative compensation incurred and billed through December 31, 2020, approximately 25% ($403,975.40) was excessive. Among the reasons the experts concluded the fees billed were excessive included without limitation improper block billing (inadequate detail for extended periods of time), billing for clerical or other non-legal tasks at lawyer rates, and improper charging of meals and travel time at full lawyer rates.

39. The Attorney General's experts have concluded that, of the $8,434,661.03 in compensation that the Personal Representative had incurred and been billed by the law firms for the respective time periods (through December 2020 or January 2021, depending on the firm), approximately $3,734,046.46 was excessive. Among the reasons the experts concluded the fees billed were excessive included without limitation improper block billing (inadequate detail for extended periods of time), billing for time spent preparing bills, billing for clerical or other non-legal tasks at lawyer rates, and multiple lawyer and staff attendance at meetings and appearances,

as well as intra-office communication, related to tasks that could have been performed by fewer lawyers.

40. Of the $3,734,046.46 in total excess compensation determined by the Attorney General's experts to have been billed by (and the vast majority already paid by the Personal Representative to) the law firms, the following excessive compensation amounts apply to the Respondent firms joined in this Petition:

a. $878,800.56 in excessive compensation to HLUS;

b. $2,454,765.58 in excessive compensation to Venable;

c. $111,622.89 in excessive compensation to Pierce Atwood; and

d. $129,656.82 in excessive compensation to Preti Flaherty.

41. The above amounts do not include an additional deduction for compensation incurred in connection with the New York Litigation after September 21, 2020. All amounts incurred by the Personal Representative and his current attorneys (Venable and Preti Flaherty) after September 21, 2020, in connection with the New York Litigation should be disallowed and refunded to the Estate by the recipients and/or the Personal Representative, who is jointly and severally liable with the law firms for excessive compensation that he paid to the law firms.

42. The Personal Representative and his current law firms continue to incur fees and continue to be paid by the Personal Representative. No final determination of excessive compensation can be made until all up-to-date billings and payments are produced, reviewed, and analyzed.

43. The Personal Representative's payment of excessive compensation to himself and the law firms he has employed constitutes a breach of his fiduciary duty to the Indiana Estate under 18-C M.R.S.A. § 3-712.

RELEVANT LEGAL FRAMEWORK

44. Section 3-712 of the Maine Probate Code provides:

> If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of the personal representative's fiduciary duty to the same extent as a trustee of an express trust.

18-C M.R.S.A. § 3-712.

45. Under section 3-712, a personal representative is subject to a surcharge for improper payments out of an estate, including excessive fees paid to the personal representative and attorneys. *Estate of Sweetland*, 2001 ME 21, ¶ 7, 770 A.2d 1017 (excessive personal representative fees); *Harrington v. Lord*, 1997 ME 201, ¶ 11, 704 A.2d 1211 (excessive attorney fees).

46. Section 3-719 of the Maine Probate Code provides that "[a] personal representative is entitled to reasonable compensation for the personal representative's services." 18-C M.R.S.A. § 3-719.

47. Section 3-720 of the Maine Probate Code provides: "If any personal representative or person nominated as a personal representative defends or prosecutes any proceeding in good faith, whether successful or not, the personal representative or nominee is entitled to receive from the estate necessary expenses and disbursements including reasonable attorney's fees incurred." 18-C M.R.S.A. § 3-720.

48. Section 3-721 of the Maine Probate Code allows for judicial proceedings for review of employment of agents and compensation of personal representative and employees of the estate. 18-C M.R.S.A. § 3-721. Under that section, the reasonableness of the compensation paid to any person employed by the personal representative, as well as the reasonableness of

compensation determined by the personal representative for his own services, may be reviewed by the court.

49. The factors to be considered under section 3-721 as guides in determining the reasonableness of a fee include the following:

a. The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the service properly;
b. The likelihood, if apparent to the personal representative, that the acceptance of the particular employment will preclude the person employed from other employment;
c. The fee customarily charged in the locality for similar services;
d. The amount involved and the results obtained;
e. The time limitations imposed by the personal representative or by the circumstances; and
f. The experience, reputation and ability of the person performing the services.

18-C M.R.S.A. § 3-721.

50. Section 3-721 further provides that "[a]ny person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds." 18-C M.R.S.A. § 3-721.

51. Section 3-105 provides that this Court "has exclusive jurisdiction of formal proceedings to determine how decedents' estates subject to the laws of this State are to be administered, expended and distributed" and "has concurrent jurisdiction of any other action or proceeding . . . to which an estate . . . through a personal representative, may be a party . . .." 18-C M.R.S.A. § 3-105.

52. "Civil proceedings" are all proceedings within the concurrent jurisdiction of the Probate Courts. M.R. Prob. Proc. 2(b).

53. This proceeding to recover overcharges from the Personal Representative and the law firms he hired and overpaid is a civil proceeding within the concurrent jurisdiction of this Court and the Superior Court.

COUNT I (Excessive Personal Representative Compensation)

54. The Attorney General repeats and realleges the preceding paragraphs of the Petition.

55. The Personal Representative has received excessive compensation from the Indiana Estate in violation of 18-C M.R.S.A. §§ 3-719 and 3-721.

COUNT II (Excessive Attorney Compensation)

56. The Attorney General repeats and realleges the preceding paragraphs of the Petition.

57. HLUS has received excessive compensation from the Indiana Estate in violation of 18-C M.R.S.A. §§ 3-720 and 3-721.

COUNT III (Excessive Attorney Compensation)

58. The Attorney General repeats and realleges the preceding paragraphs of the Petition.

59. Venable has received excessive compensation from the Indiana Estate in violation of 18-C M.R.S.A. §§ 3-720 and 3-721.

COUNT IV (Excessive Attorney Compensation)

60. The Attorney General repeats and realleges the preceding paragraphs of the Petition.

61. Pierce Atwood has received excessive compensation from the Indiana Estate in violation of 18-C M.R.S.A. §§ 3-720 and 3-721.

COUNT V (Excessive Attorney Compensation)

62. The Attorney General repeats and realleges the preceding paragraphs of the Petition.

63. Preti Flaherty has received excessive compensation from the Indiana Estate in violation of 18-C M.R.S.A. §§ 3-720 and 3-721.

COUNT VI (Breach of Fiduciary Duty)

64. The Attorney General repeats and realleges the preceding paragraphs of the Petition.

65. The Personal Representative's payment of excessive compensation to himself from the Indiana Estate constituted a breach of his fiduciary duty in violation of 18-C M.R.S.A. § 3-712.

COUNT VII (Breach of Fiduciary Duty)

66. The Attorney General repeats and realleges the preceding paragraphs of the Petition.

67. The Personal Representative's payment of excessive compensation to HLUS, Venable, Pierce Atwood, and Preti Flaherty from the Indiana Estate constituted a breach of his fiduciary duty in violation of 18-C M.R.S.A. § 3-712.

COUNT VIII (Breach of Fiduciary Duty)

68. The Attorney General repeats and realleges the preceding paragraphs of the Petition.

69. The Personal Representative's continued incurring of his own fees and legal fees on the New York Litigation after September 21, 2020, when SoH requested the Personal Representative to endorse its agreement with Morgan, did not benefit the Indiana Estate and constituted a breach of the Personal Representative's fiduciary duty to the Indiana Estate in violation of 18-C M.R.S.A. § 3-712.

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ATTORNEY GENERAL OF THE
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v.

JAMES W. BRANNAN,

Personal Representative, et al.

CERTIFICATE OF SERVICE

I, Christina Moylan, counsel for Attorney General, sent via email on June 28, 2021, the Attorney General's Amended Petition for Review of Reasonableness of Compensation of Attorneys and Personal Representative and Request for an Order Requiring Refunds of Excessive Compensation dated June 28, 2021, to:

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Respectfully submitted,

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Dated: June 28, 2021

/s/ Christina M. Moylan

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