THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY 6TH CIRCUIT COURT

PROBATE DIVISION CONCORD

JOHN S. DOE, AS LITIGATION TRUSTEE FOR THE XXXXX   
LITIGATION TRUST,   
YYYYY BANK TRUST COMPANY AMERICAS,   
THE ZZZZ TRUST COMPANY,   
AND   
WWWW TRUST COMPANY

v.

JANE ROE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN EDWARD SMITH, III

Docket No.

VERIFIED PETITION IN EQUITY FOR EXTENSIONS PURSUANT TO RSA 556:28

Petitioners — John S. Doe, as Litigation Trustee for the XXXXX Litigation Trust (the "Litigation Trustee"); YYYYY Bank Trust Company Americas ("DBTCA"); the ZZZZ Trust Company (successor trustee-in-interest to Law Debenture Trust Company of New York) ("ZZZZ Trust"); and WWWW Trust Company ("WWWW Trust") (collectively, the "Petitioners")1 — by and through their attorneys, Sheehan Phinney Bass & Green PA, respectfully petition the Court to order the Administratrix of the Estate of John Edward Smith, III (the "Estate") to reopen the Estate; grant the Petitioners an extension under RSA 556:28 to interpose their contingent claims against the Estate pursuant to RSA 556:1-3; and grant the Petitioners an extension under RSA 556:28 to request the Court to direct that Estate assets be set aside in an amount adequate to satisfy the Petitioners' contingent claims pursuant to RSA 556:5-6. In support of their Petition, the Petitioners state as follows:

I DBTCA, ZZZZ Trust, and WWWW Trust will be referred to collectively as the Indenture Trustees.

INTRODUCTION

1. The Petitioners are plaintiffs in In re XXXXX Company Fraudulent Conveyance Litigation, Case No. ------- (the "Litigation"), a multi-district litigation consolidated in the United States District Court for the Southern District of New York (the "District Court") and/or on appeal to the United States Court of Appeals for the Second Circuit (the "Second Circuit").
2. The Litigation comprises approximately seventy federal cases, consolidated pursuant to several orders issued since December 19, 2011 for pre-trial proceedings against more than 5,000 defendants to recover billions of dollars in damages arising out of the leveraged buy­out of the XXXXX Company ("XXXXX") in 2007 (the "LBO").
3. In the LBO, XXXXX took on billions of dollars in debt in order to take XXXXX private and buy the company's outstanding shares at a premium price. The LBO rendered XXXXX insolvent and plunged XXXXX into bankruptcy less than a year later. The plaintiffs in the Litigation are thus seeking to recover the funds transferred by XXXXX in the LBO as fraudulent transfers.
4. Prior to his death, John Edward Smith, III ("Smith") was a named shareholder defendant in two cases included in the Litigation, one prosecuted by the Litigation Trustee (the "FitzSimons Action") and another prosecuted by the Indenture Trustees (the "Sumitomo Action"). See Exhibit A (the FitzSimons Amended Complaint); Exhibit 13 (the Sumitomo Amended Complaint).
5. The Litigation was pending prior to Smith's death and during the administration of the Estate. While the claims against the shareholder defendants in the FitzSimons Action were dismissed by the District Court on January 6, 2017, the dismissal is non-final and interlocutory, and the Litigation Trustee has requested leave to move to amend the

complaint to reinstate the claims and assert additional fraudulent transfer claims against the shareholder transferees. Further, while the Sumitomo Action was dismissed on September 23, 2013 on standing grounds, that dismissal is currently on appeal and pending before the Second Circuit.

1. The Estate has since been substituted as a defendant in the Litigation.
2. The Petitioners' claims against the Estate total more than $1,000,000 and could be more than $2,000,000.
3. Despite knowledge that the Litigation existed against Smith and then against the Estate, despite knowledge of the Petitioners' contingent claims, and despite an order in the Litigation requiring that notice of a defendant's death be provided promptly, the Petitioners were not notified of Smith's death until last spring, roughly nineteen months after Smith's death.
4. The Administratrix of the Estate, Jane Roe (the "Administratrix"), moved for summary administration of the Estate on June 19, 2018, which this Court granted on September 28, 2018. Consequently, the Estate was closed on October 19, 2018.
5. Only after all of this occurred, this past November, did the Administratrix, through counsel, disclose to the Petitioners that the administration proceedings had been opened in New Hampshire. Until this time, Smith's last known address in the Litigation was in New Jersey. In November, Petitioners immediately began working to locate New Hampshire counsel and sought relief from this Court the following month, in a Verified Petition to Reopen Estate of John Edward Smith, III and for Extensions Pursuant to RSA 556:28 submitted for filing on December 28, 2018, with courtesy copies forwarded to the other interested parties on December 31, 2018. Pursuant to the directions of this Court, Petitioners re-submit that request for relief in equity through this petition.
6. Accordingly, for the reasons that follow, the Petitioners request that the Court order the Administratrix to reopen the Estate and grant them extensions under RSA 556:28 to interpose their demand to the Administratrix pursuant to RSA 556:1-3 and to request that sufficient funds be set aside to satisfy their contingent claims pursuant to RSA 556:5-6.

INTERESTED PARTIES

1. Petitioner Litigation Trustee is the litigation trustee for the XXXXX Litigation Trust pursuant to the plan of reorganization for XXXXX, confirmed by order of the United States Bankruptcy Court for the District of ZZZZ (the "Bankruptcy Court"). The Litigation Trustee is authorized to prosecute and resolve the claims asserted in the Litigation. The address for the Litigation Trustee is ------- in New York, New York 10128.
2. Petitioner DBTCA is a trustcompany incorporated in New York with a principal place of business at ------ in New York, New York 10005. DBTCA is the successor indenture trustee for a certain series of notes issued by XXXXX. DBTCA has been designated to prosecute and resolve claims asserted in the Litigation.
3. Petitioner ZZZZ Trust is a trust company incorporated in ZZZZ with a principal place of business at ------- in WWWW, ZZZZ 19808. ZZZZ Trust is the successor indenture trustee-in-interest to ----- Company of New York for a certain series of notes issued by XXXXX. ZZZZ Trust has been designated to prosecute and resolve claims asserted in the Litigation.
4. Petitioner WWWW Trust is a trust company incorporated in ZZZZ with a principal place of business at ------ in WWWW, ZZZZ 19890. WWWW Trust isthe successor indenture trustee for acertain series of notes issued by

XXXXX, commonly referred to as the PHONES Notes. WWWW Trust has been designated to prosecute and resolve claims asserted in the Litigation.

1. The Administratrix is an individual, who, upon information and belief, resides at ----- in New York, New York 10024.
2. Ruth Roe is an individual, who, upon information and belief, resides at ----- in Upper Saddle River, New Jersey 07458. Ms. Roe is the sole legatee of the Estate.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to RSA 547:3, RSA 547:3-b, RSA 547:3-1, RSA 547:8, RSA 547:9, and RSA 556:6.
2. Venue is proper in this Court pursuant **to** RSA 507:10.

FACTUAL BACKGROUND

A. XXXXX's LBO: the Basis of the Petitioners' Claims.

1. XXXXX was founded in 1847 and is now a conglomerate of publishing and entertainment companies headquartered in Chicago, Illinois.
2. By 2006, XXXXX was performing well below industry averages and its largest shareholders were agitating for change.
3. Under these dire financial circumstances, XXXXX's board of directors approved and executed the LBO in two steps in 2007. The LBO has been described as one the most highly leveraged buyouts in history and "one of the most absurd deals ever." As set forth in detail in the

appended complaints, in connection with the LBO, XXXXX transferred approximately $8.2 billion to shareholders in exchange for their shares in XXXXX. The Petitioners have alleged that those payments to shareholders constitute intentional and constructive fraudulent transfers.

1. Smith received more than $1,000,000 (and potentially more than $2,000,000) in LBO transfers.
2. The debt incurred in the LBO crippled XXXXX, and on December 8, 2008, XXXXX filed for bankruptcy along with the majority of its subsidiaries in the Bankruptcy Court.

B. The Litigation Commences to Claw Back the Transfers to Shareholders in the LBO as Fraudulent.

1. On November 1, 2010, after the Bankruptcy Court granted standing to proceed, the predecessor plaintiff to the Litigation Trustee (the Official Committee of the Unsecured Creditors of XXXXX) initiated the FitzSimons Action in the Bankruptcy Court. The complaint named Smith as one of numerous shareholder defendants and alleged, among other things, that the payments to shareholders during the LBO were made with an actual intent to hinder, delay, or defraud its creditors and thus constitute intentional fraudulent transfers under federal law.
2. In April 2011, the Bankruptcy Court lifted the automatic stay so that the Indenture Trustees and other parties could bring their own claims against the defendants.
3. On June 2, 2011, the Indenture Trustees filed the Sumitomo Action. The complaint named Smith as a shareholder defendant and alleged that the payments to shareholders during the LBO were constructively fraudulent transfers because XXXXX did not receive fair consideration for the payments to shareholders during the LBO.
4. On December 20, 2011, the United States Judicial Panel on Multidistrict Litigation ordered certain actions, including the Sumitomo Action, to be consolidated in the

Litigation. On John 20, 2012, the same panel ordered the FitzSimons Action to also be consolidated in the Litigation.

1. On December 31, 2012, the Litigation Trustee became successor plaintiff to the Committee in the FitzSimons Action.
2. On December 22, 2014, the District Court issued an Order concerning the procedure for notifying parties in the Litigation of a litigant's death pursuant to Rule 25(a) of the Federal Rules of Civil Procedure (the "2014 Order"). See Exhibit C. The 2014 Order serves as an essential mechanism for the plaintiffs of the Litigation to track the more than 5,000 individual defendants from jurisdictions across the country. Upon the death of his or her client, counsel in the Litigation is required to promptly file a "Suggestion of Death" to notify the other parties in the Litigation of the need to substitute an estate as a party and to take other actions as necessary. Exhibit C.
3. On June 29, 2016, the Second Circuit affirmed the District Court's September 23, 2013 order that dismissed the Sumitomo Action. The Indenture Trustees petitioned the Supreme Court of the United States for a writ of certiorari.
4. On January 6, 2017, the District Court dismissed the Count I claims against the shareholder defendants in the FitzSimons Action.
5. On July 18, 2017, the Litigation Trustee requested leave to move to amend the complaint in the FitzSimons Action to include a constructive fraudulent transfer claim.
6. On August 24, 2017, the District Court denied the request to move to amend, without prejudice, noting that affirmance of a United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") decision in FTI Consulting, Inc. v. Merit Mgmt. Grp., LP, 830 F.3d 690 (7th Cir. 2016) ("Merit"), which concerned issues relevant to the Litigation on appeal

before the Supreme Court, would provide the Litigation Trustee a strong argument to amend its complaint.

1. On February 27, 2018, the Supreme Court affirmed the Seventh Circuit's decision in Merit and subsequently remanded the appeal of the Sumitomo Action to the Second Circuit for reconsideration based upon its decision.
2. On June 8, 2018, the Litigation Trustee again requested leave to move to amend its complaint in the FitzSimons Action to include a constructive fraudulent transfer claim.
3. The claims against the Estate in the Litigation are thus still pending and/or on

appeal.

C. The Estate Was Not Administered in Good Faith and Was Prematurely Closed.

1. Smith died on October 13, 2016.
2. At the time of his death, Mr. Smith was a defendant in both the FitzSimons Action and the Sumitomo Action. Mr. Smith was represented by counsel in the Litigation as early as July 2011.
3. On December 16, 2016, the Administratrix filed her Petition for Administration, which was granted with conditions on January 6, 2017.
4. On February 8, 2017, the Court issued the Certificate of Appointment in the Estate to the Administratrix.
5. Upon information and belief, prior or incident to her administration of the Estate, the Administratrix knew or became aware that Smith was a defendant in the Litigation and that the Litigation was unresolved.
6. On June 19, 2018, despite her knowledge of Smith's involvement in the Litigation, the Administratrix filed her Motion for Summary Administration. In her Motion for

Summary Administration, the Administratrix represented under oath that "to the best of...[her] knowledge and belief, there are no outstanding debts, obligations or unpaid or unresolved claims attributable to the deceased's estate" and that she attached assents or receipts for all beneficially interested parties.

1. On May 25, 2018, counsel for Smith in the Litigation filed a "Suggestion of Death," which did not provide the date of death or the venue of the probate of the Estate. See Exhibit D. Notwithstanding the 2014 Order's mandate that substitutions of parties be made "promptly" under Rule 25(a) of the Federal Rules of Civil Procedure, the Smith Suggestion of Death was filed over 19 months after Smith's death and long after the deadlines under RSA 556:3 and RSA 556:5 had passed.
2. Upon receipt of the Suggestion of Death on May 25, 2018, the Petitioners, through counsel, searched without success for a probate proceeding in New Jersey, using Smith's last known address in the Litigation. The Petitioners' counsel requested information from the Bergen County Surrogate's Court in Hackensack, New Jersey but was told there was no record of a probate proceeding for Smith. The Petitioners, through counsel, also used the Lexis/Nexis software database, tools and functionality known as "Accurint" to search for the Estate, a last known address, or a probate proceeding, but no results suggested that Smith was deceased. Internet searches performed by the Petitioners' counsel at this time also did not yield information related to Smith's death. Relying upon the Estate's compliance with the 2014 Order (that is, its requirement that notice be provided "promptly"), the Petitioners believed that the lack of information was due to the fact that Smith's death was too recent to show up in search results.
3. On June 15, 2018, the Petitioners, through counsel, filed a Notice of Substitution of Party in the Litigation, with a copy to the Administratrix and counsel for Smith. See Exhibit E.
4. On June 18, 2018, an Endorsed Notice of Substitution Party appeared on the docket in the Litigation, with notice to counsel for Smith.
5. On July 6, 2018, the Petitioners, through counsel, filed a Notice of No Objection to Substitution of Party in the Litigation, with notice to counsel for Smith.
6. This Court granted the Administratrix's Motion for Summary Administration on September 28, 2018.
7. Consequently, the Estate was closed on October 19, 2018.
8. On October 29, 2018, the Petitioners, through counsel, again attempted to locate probate proceedings for the Estate in New Jersey. Lexis/Nexis Accurint records still did not list Smith as deceased. Exhaustive online searches, however, finally yielded some clarity, suggesting that Smith died in October 2016.
9. On October 30, 2018, therefore, the Petitioners, through counsel, contacted Smith's counsel inquiring as to Smith's date of death and the status of probate.
10. On November 1, 2018, Smith's counsel responded that Smith had died on October 13, 2016 and that this Court granted the Administratrix's Motion for Summary Administration.
11. Also on November 1, 2018, the Petitioners, through counsel, requested copies of the Motion for Summary Administration and the Court's order on the motion, but Smith's counsel in the Litigation delayed his response to this request and ultimately did not provide the copies.
12. Between November 2, 2018 and November 20, 2018, the Petitioners, through counsel, made multiple attempts via email and telephone to contact counsel for Smith concerning the disposition of the Estate and whether the Petitioners' claims had been accounted for in the administration of the Estate. Accordingly, the Petitioners sent a representative to the Court to copy the file.
13. On November 20, 2018 (two days before Thanksgiving), counsel for the Petitioners and counsel for Smith spoke by telephone. Counsel for Smith represented that the Administratrix is aware of the claims and that sufficient funds had been set aside to satisfy any potential judgment against the Estate.
14. On November 26, 2018 (the first business day after the Thanksgiving holiday), counsel for the Petitioners sent an email to confirm the November 20, 2018 conversation.
15. On November 30, 2018, upon obtaining the Court's file relevant to the Estate, the Petitioners, through counsel, attempted to locate New Hampshire counsel to appear in this action and take steps deemed necessary.
16. One week after locating New Hampshire counsel, however, a conflict was discovered, so counsel for the Petitioners had to conduct another search to locate New Hampshire counsel.
17. On December 14, 2018, the Petitioners, through counsel, engaged undersigned counsel.
18. Two weeks later, on December 28, 2018, the Petitioners submitted their Verified Petition to Reopen Estate of John Edward Smith, III and for Extensions Pursuant to RSA 556:28 for filing in the Estate. Throughout mid-January, undersigned counsel contacted the clerk on multiple occasions to follow up on the status of the petition and was ultimately informed

during several conversations with Deputy Clerk Robert Regal that the petition should be modified. Accordingly, the Petitioners are filing this equity action.

1. Currently, the Litigation is pending and/or on appeal and the Estate remains a defendant in both the Sumitomo Action and the FitzSimons Action.

COUNT I

THE ESTATE MUST BE REOPENED BECAUSE SUBSTANTIAL GROUNDS EXIST   
THAT RENDER THE COURT'S GRANT OF THE MOTION FOR SUMMARY   
ADMINISTRATION AGAINST CONSCIENCE.

1. The preceding allegations are incorporated into this Count by reference.
2. In furtherance of equity, the probate court may reopen an estate if it finds that a 'substantial ground, such as fraud, accident, or mistake, which render[ed] it against conscience' to execute its prior orders probating the will and closing the estate" exists. In re Estate of Buckless, No. 2015-0064, 2016 N.H. LEXIS 69, at \*4 (Mar. 2, 2016) (non-precedential order) (quoting Knight v. Hollings, 73 N.H. 495, 502 (1906)). The party seeking to reopen the estate must show that he or she was 'prevented ... by fraud, accident, or mistake, unmixed with any fraud or negligence on [his or her] part,' from" bringing its claim while the estate was open and/or within the applicable statute of limitations. Id. at \*4-\*5 (quoting Knight, 73 N.H. at 502); Knight, 73 N.H. at 503-04 (noting that the moving party must exercise reasonable diligence). Reopening an estate may also be appropriate if the moving party's delay is caused by being misled. Knight, 73 N.H. at 503-504.
3. For the reasons further detailed below, here, the Estate should be reopened because the circumstances of this matter "render[] it against conscience' to" enforce the Court's Order allowing the Estate to be summarily administered. Buckless 2016 N.H. LEXIS 69, at \*4-\*5 (non-precedential order); Knight, 73 N.H. at 502-04. The Administratrix's conduct caused the Petitioners' delay in interposing their claims and requesting that the Court order the Administratrix to set aside funds to satisfy their claims. The Administratrix misrepresented the status of the Estate on her Motion for Summary Administration, and Smith's death was not promptly reported, in violation of the 2014 Order. At best, this conduct, including that by the Administratrix, can be defined as an accident or a mistake (which the Petitioners suspect), but, at worst, this conduct, including that by the Administratrix, may be fraudulent. See Buckless 2016 N.H. LEXIS 69, at \*4-\*5; Knight, 73 N.H. at 502-04. Accordingly, in reasonably relying upon the Administratrix's and counsel for Smith's compliance with the 2014 Order, the Petitioners were misled to believe mistakes of fact—that Smith was alive until sometime around May 25, 2018 per the Suggestion of Death and that probate proceedings would be commenced in New Jersey per Smith's last known address. See Buckless, 2016 N.H. LEXIS 69, at \*4-\*5; Knight, 73 N.H. at 502-04. The Petitioners' claims were thus not interposed and funds were not requested to be set aside to satisfy the Petitioners' contingent claim within the statutory framework of RSA 556 because "substantial ground[s]...[of) fraud, accident, [and/]or mistake" exist, "render[ing] it against conscience'" for the Court "to execute its prior orders probating the will and closing the estate" pursuant to the Administratrix's Motion for Summary Administration. See Buckless, 2016 N.H. LEXIS 69, at \*4.

67. Moreover, as detailed herein, the Petitioners have acted expeditiously and with reasonable diligence in pursuing their claims against the Estate, monitoring probate proceedings at Smith's last known address simultaneously with receipt of the Suggestion of Death, conducting searches to determine Smith's date of death simultaneously with receipt of the Suggestion of Death, contacting counsel for Smith with regard to the status of the Estate upon passage of a reasonable amount of time, and filing the original Petition promptly, less than two months after discovering the existence of the Estate and roughly two and a half months from the

close of the Estate. See Knight, 73 N.H. at 503-04; cf. RSA 552:7 (1993) (interested parties may petition the probate court to reexamine a will within six (6) months of the probate of that will). The Petitioners have thus timely petitioned the Court to order the Administratrix to reopen the Estate and were not negligent in interposing their claims while the Estate was open. See RSA 552:7; Buckless, 2016 N.H. LEXIS 69, at \*4; Knight, 73 N.H. at 502-04.

1. New Hampshire's public policy to provide plaintiffs accessible relief to recover for damages suffered from fraudulent and otherwise tortious conduct further "render[s] it against conscience" for the Court "to execute its prior orders probating the will and closing the estate" pursuant to the Administratrix's Motion for Summary Administration because the Petitioners' claims sound in tort and arise from fraudulent transfers. Compare Buckless, 2016 N.H. LEXIS 69, at \*4, with Coffey v. Bresnahan, 127 N.H. 687, 693 (1986), and Follett v. Ramsey, 101 N.H. 347, 350-51 (1958).
2. The Petitioners' reasonable diligence, coupled with good cause for delay, mandates that the Administratrix, who, upon information and belief, remains in possession of Estate assets pending resolution of the Litigation, reopen the Estate to allow the Petitioners to argue application of RSA 556:28 to their claims.

COUNT II   
JUSTICE AND EQUITY REQUIRE THAT THE PETITIONERS, WHO ARE NOT   
CHARGEABLE WITH CULPABLE NEGLECT, BE GRANTED EXTENSIONS UNDER   
RSA 556:28 TO COMPLY WITH RSA 556:1-3 AND RSA 556:5-6.

1. The preceding allegations are incorporated into this Count by reference.
2. In New Hampshire, "[n]o action shall be sustained against an Administrator if begun within six months after the original grant of administration, nor unless the demand has been exhibited to the Administrator and payment has been demanded," RSA 556:1 (1960),

"within six months after the original grant of administration, exclusive of the time such administration may have been suspended." RSA 556:3 (1960). Moreover,

[n]o suit shall be maintained against an Administrator for any cause of action against the deceased, unless it is begun within one year next after the original grant of administration, exclusive of the time such administration may have been suspended, except in cases where he has retained estate in his hands for the payment of the claim by order of the judge, and cases provided for by RSA 556:7 and RSA 556:28.

RSA 556:5 (1960).

1. It is well settled that RSA 556:3 and RSA 556:5 apply to existing claims as well as "[d]emands against an estate not due[] and demands depending on a contingency." Compare RSA 556:6, with Am. Univ. v. Forbes, 88 N.H. 17, 17-18 (1936); Walker v. Cheever, 39 N.H. 420, 420, 426 (1859) (holding demands, contingent or not, must timely comply with the statutory framework or be barred).2 Contingent claims, like those in favor of the Petitioners in the Litigation, and those not yet due "may be filed in the court of probate, and the judge, after due notice, may require the Administrator to retain in his hands, on settlement of his account, such sum as may be necessary to pay them; unless the...heirs...shall give bond to the judge for the payment...." RSA 556:6.
2. For the reasons described above, including, without limitation, the very delayed filing of the Suggestion of Death, the repeated efforts to locate the relevant death and probate information, and the efforts to engage New Hampshire counsel, the Petitioners did not interpose their claims within the limitations period of RSA 556:3 or request Estate assets be set aside to satisfy their contingent claims within the limitations period of RSA 556:5.
3. Pursuant to RSA 556:28, however, a creditor who does not exhibit and/or bring a claim within this statutory framework "may apply to the court having subject matter jurisdiction

**2** Upon information and belief, the Administratrix understands the contingent nature of the Petitioners' claims and thus this Petition does not include a detailed discussion of the same.

over the nature of the claim, by petition setting forth all the facts" to request that the court "extend the time for filing and prosecuting the claim to a date certain." RSA 556:28 (1995); see Slcrizowski v. Chandler, 133 N.H. 502, 503-04 (1990) (holding RSA 556:28 applies to the time limitations in both RSA 556:3 and RSA 556:5); Cass v. Ray, 131 N.H. 550, 552 (1989) ("Creditors who fail to meet either of these deadlines may petition the...court for an extension pursuant to RSA 556:28."); W.A. Emerson's Sons v. Cloutman, 88 N.H. 59, 62 (1936) (holding executors are entitled to be informed of indefiniteness). The petition will be granted "if the court shall be of the opinion that justice and equity require it[] and that the claimant is not chargeable with culpable neglect in not bringing or prosecuting his or her suit or claim within the time limited by law...." RSA 556:28.

1. RSA 556:28 thus recognizes that, although RSA 556:3 and RSA 556:5 were enacted "to secure the orderly and expeditious settlement of estates," they "may [also] work hardship...." Sullivan v. Marshall, 93 N.H. 456, 458 (1945); see Skrizowski 133 N.H. at 503-04; Cass, 131 N.H. at 552. Accordingly, "a meritorious claim [under RSA 556:28] may be allowed against the unsettled part of an estate if the delay is not due to the claimant's fault and has not unduly affected the estate's defence against the claim." Smith v. Smith, 90 N.H. 36, 40 (1939).

A. Extensions Under RSA 556:28 Are Appropriate Because the Petitioners' "Delay" Was Due to Smith's Counsel and the Administratrix's Failure to Comply with the 2014 Order Promptly, Rather Than Any Fault of the Petitioners, and Thus They are Not Chargeable with Culpable Neglect.

1. "For purposes of RSA 556:28," New Hampshire law "define[s] culpable neglect as follows:

It is less than gross carelessness, but more than the failure to use ordinary care, it is a culpable want of watchfulness and diligence, the unreasonable inattention and inactivity of creditors who slumber on their rights....It exists [i]f no good reason, according to the standards of ordinary conduct, for the dormancy of the claim is found....In describing what constitutes good reason, according to the standards of

ordinary conduct, for the dormancy of the claim,...culpable neglect would seem to convey the idea of neglect for which the claimant was to blame; that is, the neglect which exists where the loss can fairly be ascribed to his own carelessness, improvidence or folly....

Cass, 131 N.H. at 553; see also In re Will of Bourassa, 159 N.H. 344, 348 (2009); In re Estate of Bennett, 149 N.H. 496, 498-99 (2003); Stewart v. Farrel, 131 N.H. 458, 462 (1989).

1. "[G]ood reason, according to the standards of ordinary conduct," may include reliance on fraud, misrepresentation, or deceit by the estate; reliance on a mistake of law or fact; reliance on a relationship of trust or confidence between the parties; the estate was aware of the claim and promised to pay it; or "some [other] circumstance beyond the plaintiffs or [his or] her counsel's control of the kind we usually understand to provide good reason for the dormancy of a claim." Cass, 131 N.H. at 553-54; Bennett, 149 N.H. at 498-99 (reliance upon administrator's representations of insolvent estate was mistake of fact, not fault rising to the level of culpable neglect, and thus mortgagee, who timely made its demand, was entitled to an extension under RSA 556:28 to bring claim); Smith, 90 N.H. at 38-39; W.A. Emerson's, 88 N.H. at 62.
2. For example, the Smith court held that the executor plaintiff was entitled to an extension to bring the decedent's claim for repayment of a mortgage nine (9) years after the limitation period because the decedent and/or plaintiff relied upon a mistake of fact, there existed a relationship of trust or confidence, and the decedent and/or plaintiff relied upon the decedent's son's representations that, although he was not financially able to fully satisfy the debt, he would do so when he could. 90 N.H. at 37, 39-41. There, the plaintiffs testator, a physician, issued a mortgage to one of his patients for, unbeknownst to him, insufficient security, and the borrower in turn lent the funds to his son to purchase a home. Id. at 37, 39-40. The borrower's son made interest payments to the creditor prior to and after his father's death, representing upon the creditor's request that he could not do any more than that and eventually stopping payment

altogether, alleging an inability to pay. Id. at 37. The plaintiff brought suit to collect the amount owed under the mortgage after the limitations period against the borrower's estate had run. Id. The Smith court held that this delay was justified and not a product of culpable neglect because it was based upon a mistake of fact that the mortgage was secured and further justified by the borrower's long-standing arrangement of the son paying interest and inducement by the son that he was unable to pay the debt. Id. 38-40 ("If the son had made an honest statement..., immediate action by the creditor might have been demanded.").

1. Similarly, the courts found no culpable neglect by the plaintiffs in Coffey and Stewart where, due to no fault of their own (like the Petitioners here), they were unaware that the limitations periods had run but timely commenced suit upon discovery. Stewart, 131 N.H. at 460-61; Coffey, 127 N.H. at 689, 693-94. The Stewart court held that plaintiffs who timely filed their claims against the estate arising from an assault by the decedent but did not make a demand pursuant to RSA 556:1-3 were not guilty of culpable neglect. 131 N.H. at 460-61. In Stewart, the plaintiffs did not know of the decedent's death until they hired an attorney to bring their claims; lived outside the distribution area of the newspaper that was used to notice the death; did not have contacts in the distribution area; the tort limitations period had not yet run; and they brought suit in the same month they retained counsel. Id. at 460.
2. Similarly, the Coffey court instructed the trial court on remand that factual circumstances surrounding the filing of the plaintiffs' medical malpractice claim based in contract on behalf of their daughter suggested that the plaintiffs were not chargeable with culpable neglect, where they failed to exhibit a demand under RSA 556:1-3 and failed to bring suit timely under RSA 556:5 but brought suit three months after learning that the medical

treatment rendered by the decedent was actionable and could not have reasonably discovered the treatment was actionable sooner. 127 N.H. at 689, 693-94.

1. In this case, like the plaintiffs in Bennett, Smith, Stewart, and Coffey, the Petitioners are not chargeable with culpable neglect because they have diligently, attentively, and carefully pursued their claims since notification of Smith's death. See, e.g., Stewart 131 N.H. at 460-61; Coffey, 127 N.H. at 689, 693-94; Smith, 90 N.H. at 38-39. Given the magnitude and complexity of the Litigation, reasonable and ordinary care dictated that all parties in the Litigation comply with the 2014 Order to promptly provide notice of a party's death. Like the Coffey and Stewart plaintiffs, therefore, the Petitioners were unaware that Smith died and could not have reasonably known that their rights under RSA 556:6 existed during the applicable limitations period because, here (unlike in Coffey and Stewart), the Administratrix and counsel for Smith concealed the fact that Smith died for over 19 months, well beyond the deadlines established under RSA 556:3 and 556:5. See Stewart 131 N.H. at 460; Coffey, 127 N.H. at 689, 693-94. Upon notification, the Petitioners, through counsel, began actively pursuing probate proceedings and gathering what information they could concerning Smith's death. Their reasonable reliance on the Administratrix and counsel for Smith's compliance with the 2014 Order resulted in mistakes of fact that led to delayed action—that Smith had died around May 25, 2018 and that probate proceedings had not yet commenced because no probate proceeding correlated with Smith's last known address. They had no reason to know that Smith died in 2016 or that probate proceedings would commence in New Hampshire.
2. Nonetheless, like the Coffey plaintiffs who brought their claims within three months of learning of the existence of probate and the Stewart plaintiffs who brought their claims within one month of learning of the existence of probate, the Petitioners brought the

original Petition as soon as reasonably possible, less than two months after learning that probate existed in New Hampshire and that the limitations periods had passed. See Stewart 131 N.H. at 460; Coffey, 127 N.H. at 689, 693-94. The Petitioners thus brought their initial request for extensions in a third of the time claimants are provided for bringing claims in the normal course under RSA 556:3 and RSA 556:5.

1. Moreover, like the plaintiff in Smith, there existed a relationship between the Petitioners and Smith by consequence of being parties to the Litigation that carried with it an expectation that parties would comply with the orders in the Litigation. 90 N.H. at 38-40. The Petitioners should have been able to trust that the Administratrix and counsel for Smith would have filed the Suggestion of Death "promptly" in compliance with the 2014 Order, and not over a year and a half after the decedent's death. If the Administratrix and counsel for Smith had complied, the Petitioners would have promptly complied with statutory limitations periods. Because the Administratrix and counsel for Smith did not, the Petitioners cannot be charged with culpable neglect. Id. at 39.
2. Furthermore, the Administratrix's conduct in administrating the Estate suggests she may have done so to conceal Smith's death from the Petitioners, a "circumstance beyond the [Petitioners'] or [their]...counsers control[,] provid[ing] good reason for the dormancy of the Petitioners' claims. Cass 131 N.H. at 553-54. Specifically, the effect of the failure by the Administratrix and counsel for Smith to comply with the 2014 Order is compounded by the fact that the Administratrix moved for summary administration prior to filing the required Suggestion of Death. She stated under oath in the Motion for Summary Administration that all beneficially interested parties assented, despite her knowledge that the Petitioners were not even aware that Smith had died. She also stated under oath in the Motion for Summary

Administration that she had no knowledge of any unresolved claims against the Estate, despite her knowledge of Smith's participation in the Litigation. These actions convincingly show that the Petitioners' have "good reason for the dormancy" of their claims. Id.

1. Accordingly, the Petitioners' delay in complying with RSA 556:1-3 and RSA 556:5-6 stems from the Administratrix's and counsel for Smith's failure to comply with 2014 Court Order, rather than any faulty or blame-worthy conduct by the Petitioners that might suggest that they slept on their rights. See, e.g., Bourassa, 159.N.H. at 348; Bennett, 149 N.H. at 498-99; Cass, 131 N.H. at 553. Accordingly, the Petitioners respectfully submit that they cannot be charged with "culpable neglect."

B. Justice and Equity Also Require that the Court Grant the Petitioners Extensions Pursuant to RSA 556:28 Because the Petitioners Have Important Substantive Rights to Tort Recovery for Fraudulent Transfers and Because the Estate Will Not Be Affected By the Late Filing As It Has Set Aside Adequate Funds to Defend the Petitioners' Claims.

1. There is no exhaustive list used by courts to determine what constitutes the "justice and equity" required to grant an extension under RSA 556:28. Coffey, 127 N.H. at 693. Where a plaintiff's underlying claim arises in tort, however, the New Hampshire Supreme Court has made it clear that "both the plaintiffs important substantive right to pursue recovery in tort and the interest in speedy settlement of estates underlying RSA chapter 556" must be considered. Stewart, 131 N.H. at 463; Coffey, 127 N.H. at 693 ("the substantive right of tort plaintiffs to recover for their injuries is also significant"). In making this determination, the policy of tort law "that a person who unreasonably interferes with the interests of another should be liable for the resulting injury" is thus relevant to the analysis. Coffey, 127 N.H. at 693. Where the tortious conduct at issue is fraudulent in nature — as is alleged here in the Litigation — the question of whether the estate has been settled is often of no consequence. Follett, 101 N.H. at 350-51.
2. Moreover, an extension under RSA 556:28 is appropriate when delay "has not unduly affected the estate's defence against the claim." Smith, 90 N.H. at 40. In making this determination, the court will consider factors relevant to the effect, if any, the late filing may have on the settlement of the estate, including, without limitation, whether the estate is closed and whether insurance may cover the claims. Stewart 131 N.H. at 463. No such factor, however, is determinative or necessary. Id.
3. Thus, the Smith court held under those circumstances, justice and equity required an extension of the limitations period because the borrower's estate was unsettled as to the son's unpaid debt, concluding that the borrower's estate had a duty to foreclose and use the proceeds to pay the plaintiff's claim. 90 N.H. at 41. The Follett court, however, held that "the fact that funds of a decedent have been distributed is not necessarily a defense under RSA 556:28 where fraud exists" because "{t]he remedy which equity gives to the defrauded person is most extensive," requiring a court of equity to strip the fraudulently-acquired property from not only the perpetrator of the fraud but also from his descendants and others who received such property. Follett, 101 N.H. at 350-51 (citations omitted).
4. Respectfully, in this case, justice and equity warrant and require that the extensions be granted pursuant to RSA 556:28 because the Petitioners' claims advance their important substantive rights under tort law and because, as in Smith, "late" action by the Petitioners under RSA 556:1-3 and RSA 556:5-6 will not affect settlement of the Estate. See Stewart, 131 N.H. at 463; Coffey, 127 N.H. at 693; Smith, 90 N.H. at 40. The Petitioners' claims sound in tort and arise from Smith's receipt of fraudulent transfers in excess of $1,000,000 from the LBO. Justice and equity require that the Petitioners recover for the injuries

suffered by his conduct and that his Estate not be enriched by funds he obtained thereby. Coffey, 127 N.H. at 693; Follett, 101 N.H. at 350-51.

1. Moreover, the Petitioners' "delay" in interposing their claims and requesting that adequate Estate assets be set aside to satisfy their contingent claims "has not unduly affected the estate's defence against" these claims. See Smith, 90 N.H. at 40. Upon information and belief, the Administratrix has acknowledged the Petitioners' claims and has informed counsel for Smith in the Litigation that sufficient funds have been set aside to satisfy any judgment against the Estate therein. Accordingly, reopening the Estate at this time to allow the late filing will have a minimal, if any, effect on settlement of the Estate because the funds set aside by the Administratrix, like the debt owed by the son in Smith, render the Estate unsettled as to the Petitioners' contingent claims. See Stewart, 131 N.H. at 463; Smith, 90 N.H. at 41. In fact, the Estate remains a defendant in the Litigation so it will not be fully settled until its liability with respect to the Litigation is resolved.
2. Moreover, granting the extensions under RSA 556:28 is also just and equitable where, as detailed above, the Court's grant of summary administration *was* based upon the Administratrix's misrepresentations, under oath, in her Motion for Summary Administration, contrary to RSA 553:33.
3. Finally, due process requires that the extension be granted because the Petitioners' identities were "known or 'reasonably ascertainable'" to the Administratrix, given the Litigation was commenced more than five years before Smith's death in which he was represented by counsel. See Tulsa Prof. Collection Servs., Inc. v. Pope, 485 U.S. 478, 491 (1988) (holding statutes like RSA 556:3 may violate due process where known or reasonably ascertainable creditors are not notified of the probate proceedings); Stewart, 131 N.H. at 464-66 (holding RSA

556:3 susceptible to Tulsa Prof. Collection Servs. Inc. due process claims). Accordingly, the Administratrix was required to provide the Petitioners with proper and timely notice that the estate was opened. Because she did not do so, justice and equity require that the Petitioners be granted extensions pursuant to RSA 556:28. See Tulsa Prof. Collection Servs., Inc., 485 U.S. at 491; Stewart, 131 N.H. at 464-66; cf. RSA 556:10 (1951) (an administrator for estate where decedent was defendant in a tort action for physical injury pending at the time of the decedent's death "shall forthwith notify in writing the adverse party or his attorney of record of such death and grant of administration, and such action shall not be barred until the end of the second term after the giving of such notice"); RSA 553:33, III(b) (party moving for summary administration shall attach assents of all parties beneficially interested to motion for summary administration).

1. Accordingly, justice and equity require that the Petitioners be granted extensions under RSA 556:28 to interpose their claims pursuant to RSA 556:1-3 and request adequate estate assets be set aside to satisfy the Petitioners' contingent claims.

COUNT III   
AN AWARD OF ATTORNEYS' FEES AND COSTS IS APPROPRIATE BECAUSE THE   
ADMINISTRATRIX'S PLAIN DISREGARD OF THE 2014 ORDER HAS   
UNNECESSARILY FORCED PETITIONERS TO FILE THIS PETITION

1. The preceding allegations are incorporated into this Count by reference.
2. An award of attorneys' fees "is an appropriate tool in the court's arsenal to do justice and vindicate rights[,]" including where one party has acted in bad faith. Harkeem v. Adams, 117 N.H. 687, 690-91 (1977). Bad faith justifies an attorneys' fees award "where one party has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons,' ...where the litigant's conduct can be characterized as unreasonably obdurate or obstinate,... where it should have been unnecessary for the successful party to have brought the action[,]" and "[w]here an

individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention...." Id. at 690-91.

1. Here, an award of attorneys' fees and costs is appropriate because "it is should have been unnecessary for" the Petitioners to have petitioned for the Administratrix to reopen the Estate and for extensions. See id. The 2014 Order required the Administratrix and counsel for Smith to promptly file the Suggestion of Death — and to do so for the very purposes shown by this Petition. In violation of the 2014 Order, however, they only did so after the deadlines under RSA 556 had passed and over a year and half after Smith's death. By no fault of their own, but rather as a result of the Administratrix's plain disregard of the 2014 Order, the Petitioners were unable to timely interpose their claims and request that the Court order the Administratrix to set aside sufficient Estate assets to satisfy the Petitioners' contingent claims.
2. Moreover, an award of attorneys' fees and costs is also appropriate because the Administratrix's conduct suggests the Estate was administered in "bad faith, vexatiously, wantonly, or for oppressive reasons." Id. Despite knowledge of the Petitioners' claims and the 2014 Order, the Administratrix concealed Smith's death from the Petitioners, and the Petitioners' claims from this Court, presumably to prevent the Petitioners from interposing their claims in the probate proceedings. After the limitation period in RSA 556:5 ran, she moved for summary administration of the Estate. In that motion, she represented under oath that there were no unresolved claims against the Estate, which she knew to be untrue given the pendency of the Litigation. In that motion, she also represented that all interested parties assented, which she knew was untrue given her knowledge that the Petitioners' claims are unresolved; and only after the limitations periods ran was the Suggestion of Death filed—more than 19 months after

Smith's death, despite the 2014 Order's clear requirement that parties promptly file the Suggestion of Death.

1. Accordingly, the Petitioners request an award of attorneys' fees and costs.   
   CONCLUSION
2. The Petitioners have contingent claims against the Estate, and the Administratrix's concealment of same in moving for summary administration requires that the Court order the Administratrix to reopen the Estate.
3. Upon the reopening of the Estate, the Petitioners request that the Court grant them extensions of time pursuant RSA 556:28 to interpose their contingent claims pursuant to RSA 556:1-3, request Estate assets be set aside to satisfy its contingent claim pursuant to RSA 556:5­6, and bring suit to enforce the claim if necessary pursuant to RSA 556:5.
4. The Petitioners further request an award of attorney's fees and costs.

WHEREFORE, the Petitioners respectfully request that the Court:

1. Issue Orders of Notice to be served on the interested parties listed herein;
2. Order the Administratrix Jane Roe to Reopen the Estate of John E. Smith, III;
3. Grant the Petitioners extensions of time to comply with RSA 556:1-3 pursuant to RSA 556:28;
4. Grant the Petitioners extensions of time to comply with RSA 556:5-6 pursuant to RSA 556:28;
5. Issue an Order directing that Estate assets be set aside in an amount adequate to satisfy the Petitioners' contingent claims pursuant to RSA 556:6;
6. Alternatively, schedule a hearing in this matter;
7. Award the Petitioners the legal fees and costs they have incurred and will incur in litigating the above-captioned matter; and
8. Grant the Petitioners such other and further relief as justice requires.

Respectfully submitted,

JOHN S. DOE, LITIGATION TRUSTEE, YYYYY BANK TRUST COMPANY AMERICAS, WWWW TRUST COMPANY, AND

THE ZZZZ TRUST COMPANY,

By Their Attorneys,

SHEEHAN PHINNEY BASS & GREEN PA

Dated: September \_\_\_, 2019 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Christopher Cole, N.H. Bar No. 8725

Nicole A. Faille, N.H. Bar No. 267547

1000 Elm Street, P.O. Box 3701

Manchester, NH 03105-3701

[ccole@sheehan.com](mailto:ccole@sheehan.com): (603) 627-8223

[nfail@sheehan.com](mailto:nfail@sheehan.com); (603) 627-82334