

**IN THE DISTRICT COURT OF APPEAL  
FOR THE THIRD DISTRICT OF FLORIDA**

**CASE No. 3D-15-1453  
L.T. No. 2002-595 CP 02**

|                                    |   |                       |
|------------------------------------|---|-----------------------|
| IN RE:                             | : | ON APPEAL FROM        |
| THE ESTATE OF VICTOR POSNER.       | : | THE CIRCUIT COURT OF  |
|                                    | : | THE ELEVENTH JUDICIAL |
|                                    | : | CIRCUIT IN AND FOR    |
| _____                              | : | MIAMI-DADE COUNTY,    |
|                                    | : | FLORIDA,              |
| BRENDA NESTOR, individually and as | : | PROBATE DIVISION      |
| former personal representative,    | : |                       |
|                                    | : |                       |
| Appellant,                         | : |                       |
|                                    | : |                       |
| v.                                 | : |                       |
|                                    | : |                       |
| THE ESTATE OF VICTOR POSNER,       | : |                       |
|                                    | : |                       |
| Appellee.                          | : |                       |
| _____                              | / |                       |

**PENSION BENEFIT GUARANTY CORPORATION'S  
ANSWER BRIEF TO APPELLANT'S INITIAL BRIEF**

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## TABLE OF CONTENTS

|   |    |
|---|----|
| STATEMENT OF THE CASE .....   | 1  |
| The Parties.....  | 2  |
| Appellant .....   | 2  |
| PBGC and ERISA .....  | 3  |
| STATEMENT OF FACTS.....   | 4  |
| The Pension Plan.....   | 4  |
| The Estate failed to make required contributions to the Pension Plan .....                                      | 5  |
| PBGC perfected the Pension Plan’s lien against the Estate and all<br>known members of its controlled group..... | 6  |
| PBGC and the Estate attempted to resolve the pension obligations .....  | 7  |
| PBGC commenced litigation against Estate-owned entities.....  | 8  |
| Probate Court Proceedings .....   | 9  |
| The Show Case Hearing.....  | 12 |
| A. Testimony Concerning Appellant’s Failure to Obtain<br>an Accounting .....                                    | 13 |
| B. Testimony Concerning Asset Sales After Filing of the<br>Notice of the Pension Plan’s Lien.....               | 14 |
| C. Testimony Concerning the Estate’s Financial Condition.....   | 15 |
| D. The Probate Court Removed Appellant as Personal<br>Representative .....                                      | 17 |
| SUMMARY OF ARGUMENT.....  | 18 |
| ISSUE I.....  | 18 |
| ISSUE II .....  | 19 |
| ISSUE III.....  | 19 |
| ISSUE IV .....  | 20 |
| ISSUE V .....   | 20 |
| ISSUE VI.....   | 21 |
| ISSUE VII .....   | 21 |

|  |    |
|--|----|
| ARGUMENT .....   | 21 |
| I. The Probate Court did not abuse its discretion when it removed Appellant for her failure to comply with an order of the Court.....  | 22 |
| II. The Probate Court correctly rejected Appellant’s “impossibility” defense. Appellant had the means to provide the accounting and chose not to do so .....   | 26 |
| III. The Probate Court did not abuse its discretion in finding that the evidence established that the Estate was endangered.....   | 31 |
| IV. Appellant waived her argument, made here on appeal for the first time, that the Probate Court lacked authority to order the personal representative to account for the assets of the Estate-owned entities ..... | 35 |
| V. The Probate Court properly required Appellant to produce financial documents to interested parties .....  | 36 |
| VI. Appellant does not have standing to raise claims of Marianne Nestor and Nannette Nestor .....  | 36 |
| VII. PBGC does not request reimbursement of its attorney’s fees.....   | 38 |
| CONCLUSION .....   | 38 |

## TABLE OF CITATIONS

### Cases

|  |            |
|--|------------|
| <i>Alterra Healthcare Corp. v. Estate of Shelley</i> ,<br>827 So. 2d 936 (Fla. 2002).....                        | 37         |
| <i>Blechman v. Dely</i> ,<br>138 So. 3d 1110 (Fla. 4th DCA 2014) .....   | 25, 31     |
| <i>Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.</i> ,<br>174 So. 2d 614 (Fla. 2d DCA 1965) .....      | 19, 27     |
| <i>Ellingham v. Florida Dep't of Children &amp; Family Services</i> ,<br>896 So. 2d 926 (Fla. 1st DCA 2005)..... | 27         |
| <i>Henderson v. Ewell</i> ,<br>149 So. 372 (Fla. 1933).....  | 21         |
| <i>In re Anders' Estate</i> ,<br>209 So. 2d 269 (Fla. 1st DCA 1968).....   | 21, 31     |
| <i>In re Murphy's Estate</i> ,<br>336 So. 2d 697 (Fla. 4th DCA 1976) .....                                       | 19, 21, 31 |
| <i>Keech v. Yousef</i> ,<br>815 So. 2d 718 (Fla. 5th DCA 2002) .....   | 20, 35     |
| <i>Lezcano v. Estate of Hidalgo</i> ,<br>88 So. 3d 306 (Fla. 3d DCA 2012) .....                                  | 25         |
| <i>LoCascio v. Estate of LoCascio</i> ,<br>78 So. 3d 573 (Fla. 3d DCA 2011) .....                                | 19, 22, 25 |
| <i>Major League Baseball v. Morsani</i> ,<br>790 So. 2d 1071 (Fla. 2001).....                                    | 31         |
| <i>McIntyre v. Norman</i> ,<br>429 So. 2d 1296 (Fla. 3d DCA 983) .....   | 27         |
| <i>PBGC v. Evans Tempcon, Inc.</i> , No. 15-1388,<br>2015 WL 6685319 (6th Cir. Nov. 2, 2015).....                | 8, 9, 34   |

|  |        |
|--|--------|
| <i>PBGC v. LTV Corp.</i> ,<br>496 U.S. 633 (1990) .....                    | 3      |
| <i>Powers v. Ohio</i> ,<br>499 U.S. 400 (1991) .....                       | 37     |
| <i>Vorbeck v. Betancourt</i> ,<br>107 So. 3d 1142 (Fla. 3d DCA 2012) ..... | 20, 35 |
| <i>Winans v. Weber</i> ,<br>979 So. 2d 269 (Fla. 2d DCA 2007) .....        | 31     |
| <i>Zulon v. Peckins</i> ,<br>81 So. 3d 647 (Fla. 3d DCA 2012) .....        | 19     |

## United States Code

### Title 26

|                            |          |
|----------------------------|----------|
| Section 412 .....          | 3, 4, 32 |
| Section 430 .....          | 3, 4, 32 |
| Section 430(j) .....       | 3        |
| Section 430(k)(4)(C) ..... | 4        |
| Section 430(k)(5).....     | 4        |

### Title 29

|                              |          |
|------------------------------|----------|
| Section 1002(16)(A)-(B)..... | 5        |
| Section 1082 .....           | 3        |
| Section 1083 .....           | 3, 4, 32 |
| Section 1083(f)(4)(B).....   | 4        |
| Section 1083(j) .....        | 3        |
| Section 1083(k)(5).....      | 4        |
| Sections 1301-1461 .....     | 3        |
| Section 1301(a)(1).....      | 5        |
| Section 1321 .....           | 5        |
| Section 1362(b)(2).....      | 9, 33    |
| Section 1368 .....           | 6        |
| Section 1368(b) .....        | 4        |
| Section 1368(c)(3)-(4).....  | 4        |

Other Authorities

29 C.F.R. pt. 4044 .....9, 33

Black’s Law Dictionary 873 (10 ed. 2014).....27

BROWARD COUNTY OFFICIAL RECORDS,  
INSTRUMENT #112209830, Book 40681, Page 1081, *available at*  
<https://officialrecords.broward.org/oncoreV2/showdetails.aspx?id=54862936&rn=6&pi=0&ref=search>..... 15

BROWARD COUNTY PROPERTY APPRAISER, 2885 LAKE RIDGE LANE,  
*available at*  
[http://www.bcpa.net/RecInfo.asp?URL\\_Folio=503924090210](http://www.bcpa.net/RecInfo.asp?URL_Folio=503924090210) ..... 15

§ 197.333, Fla. Stat..... 16

§ 197.432, Fla. Stat..... 16

§ 197.502, Fla. Stat..... 16

§ 197.562, Fla. Stat..... 16

§ 733.504, Fla. Stat.....22, 25, 31

§ 733.504(3), Fla. Stat. .... 10, 18, 22, 23

Fla. Prob. R. 5.440(a) ..... 10, 23

Senate Finance Comm., Reconciliation Submissions of the Instructed  
Committees Pursuant to the Concurrent Resolution on the Budget  
for the Fiscal Year 1988,  
H.R. Con. Res. 93, 100th Cong. At 222 (1987-1988)..... 4

## STATEMENT OF THE CASE

The Probate Division of the Circuit Court of the 11<sup>th</sup> Judicial Circuit, in and for Miami-Dade County, Florida (the “Probate Court”) did not abuse its discretion by removing Brenda Nestor (“Appellant”) as personal representative of the Estate of Victor Posner (the “Estate”)<sup>1</sup> and appointing Philip J. von Kahle (the “Curator”) as curator of the Estate.

The Probate Court ordered Appellant to provide an accounting. Despite sufficient resources and time, Appellant failed to comply. After notice and an evidentiary hearing, the Probate Court rightly rejected Appellant’s excuses and attempts to blame others for her failures, and removed Appellant as personal representative of the Estate. Also, the Probate Court determined that cause existed to remove Appellant because the totality of the evidence established that the Estate was endangered. Accordingly, this Court should affirm the Probate Court’s decision to remove Appellant as personal representative of the Estate.

Victor Posner died on February 11, 2002. On that same day, Appellant filed her petition for administration, and the Probate Court appointed her the personal representative of the Estate. The Pension Benefit Guaranty Corporation (“PBGC”) entered its appearance on February 5, 2014. Since that date, PBGC has continuously appeared before the Probate Court to protect PBGC’s interests and

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<sup>1</sup> Citations are to the Record on Appeal for Lower Case No. 02-000595/3D15-1453 (“R1”). *In re Estate of Victor Posner*, Case No. 02-0595 CP 02.

the interests of the APL/NVF Consolidated Pension Plan (the “Pension Plan”). PBGC has filed this answer brief to address in detail those issues raised by the Appellant in which PBGC was involved -- Issues I, II, III, IV and VI.<sup>2</sup> PBGC generally supports the legal arguments of the Curator with respect to Issues V and VII. With respect to Issue VII, however, PBGC does not seek reimbursement of its attorney’s fees.

## **The Parties**

### **Appellant.**

Appellant is the former personal representative of the Estate. On April 30, 2015, the Probate Court entered an Order Removing Personal Representative and Providing for Appointment of Successor (the “Removal Order”), removing Appellant as the personal representative of the Estate.<sup>3</sup>

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<sup>2</sup> Initial Brief for Appellant, *In re: Estate of Victor Posner*, Case No. 3D15-1455 (Fla. 3d DCA Oct. 9, 2015) (hereafter, “Appellant’s Brief”).

<sup>3</sup> R1 at 2040-2047, Order Removing Personal Representative and Providing for Appointment of Successor, *In re: Estate of Victor Posner*, Case No. 02-0595 CP 02 (Fla. Dade Cty. Ct. Apr. 30, 2015). In her Notice of Appeal, Appellant states that she is appealing the Probate Court’s “Order Removing Personal Representative and Providing for Appointment of Successor rendered on May 28, 2015.” R1 at 2027-2039, Notice of Appeal, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. June 2, 2015), at 1-2. However, the order with that title was entered on April 30, 2015. On May 28, 2015, the Probate Court entered a different order, denying Appellant’s motion for rehearing on her removal. *See* R1 at 2048-2050, Order Denying Motion for Rehearing, *In re: Estate of Victor Posner*, Case No. 02-0595 CP 02 (Fla. Dade Cty. Ct. May 28, 2015).

## **PBGC and ERISA.**

PBGC is the United States government agency established to administer the defined-benefit pension insurance program under Title IV of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”),<sup>4</sup> the federal statute that protects participants in private sector defined benefit pension plans.<sup>5</sup> When an underfunded pension plan terminates, PBGC generally becomes the trustee of the plan and assumes an obligation to pay participants and beneficiaries the benefits owed under the plan subject to statutory limits.<sup>6</sup>

ERISA and the Internal Revenue Code of 1986, as amended (“IRC”), require that the sponsor of a defined benefit pension plan make minimum funding contributions to the plan.<sup>7</sup> If a plan sponsor defaults in making its statutorily required minimum funding contributions and the aggregate of the missed contributions exceeds \$1 million, a statutory lien arises under ERISA and the IRC in favor of the pension plan.<sup>8</sup> The statutory lien provision was enacted to protect

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<sup>4</sup> 29 U.S.C. §§ 1301-1461 (2012 & Supp. II 2014).

<sup>5</sup> *See generally PBGC v. LTV Corp.*, 496 U.S. 633, 636-39 (1990).

<sup>6</sup> *Id.*

<sup>7</sup> *See* 26 U.S.C. § 412; 29 U.S.C. § 1082. The annual requirements are paid in quarterly payments followed by a “catch up” payment for any shortfall in the annual requirements. *See* 26 U.S.C. § 430(j); 29 U.S.C. § 1083(j).

<sup>8</sup> *See* 26 U.S.C. §§ 412, 430; 29 U.S.C. § 1083.

underfunded pension plans “by ensuring that contributions are paid.”<sup>9</sup> The lien arises automatically in the amount of all unpaid contributions, plus interest, and reaches all real and personal property of the plan’s sponsor and members of its controlled group.<sup>10</sup>

ERISA and the IRC expressly authorize only PBGC to enforce the required minimum funding contribution lien.<sup>11</sup> Although a pension plan’s lien under IRC § 430(k) arises as of a specific date, the lien is not perfected until a notice of the lien has been filed in the appropriate recording office.<sup>12</sup> Notice is required to be filed in the appropriate recording offices similar to the way the Internal Revenue Service files federal tax liens under IRC § 6323.<sup>13</sup>

## STATEMENT OF FACTS

### **The Pension Plan.**

The Estate is the sponsor of the APL/NVF Consolidated Pension Plan (the “Pension Plan”)<sup>14</sup>, a single-employer defined benefit pension plan covered by Title

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<sup>9</sup> Senate Finance Comm., Reconciliation Submissions of the Instructed Committees Pursuant to the Concurrent Resolution on the Budget for the Fiscal Year 1988, H.R. Con. Res. 93, 100th Cong. at 222 (1987-1988).

<sup>10</sup> See 26 U.S.C. §§ 412, 430; 29 U.S.C. § 1083.

<sup>11</sup> 26 U.S.C. § 430(k)(5); 29 U.S.C. §1083(k)(5).

<sup>12</sup> See 29 U.S.C. § 1368(b), (c)(3)-(4).

<sup>13</sup> See 26 U.S.C. § 430(k)(4)(C); 29 U.S.C. §§ 1083(f)(4)(B), 1368(c).

<sup>14</sup> R1 at 447-487, PBGC’s Report on the Current Status of Pension Obligations and Statement in Support of the Removal of Brenda Nestor as Personal Representative in Response to the March 10, 2015 *Sua Sponte* Order of the Court, *In re: Estate of*

IV of ERISA.<sup>15</sup> The Pension Plan has 2,091 participants and is underfunded on a termination basis by approximately \$39 million.<sup>16</sup> Asset Manager, Inc. (“Asset Manager”), an entity 100% owned by the Estate, is the plan administrator for the Pension Plan.<sup>17</sup>

**The Estate failed to make required contributions to the Pension Plan.**

On April 5, 2013, PBGC received from Asset Manager a Form 200, Notice of Failure to Make Required Contributions, stating that the Estate had failed to make the first quarterly required contribution for the 2011 plan year in the amount of \$559,348.<sup>18</sup> The form also stated that the Estate had failed to make required contributions for the 2010 plan year, which caused the amount of unpaid contributions to exceed \$1 million.<sup>19</sup> Also on April 5, 2013, PBGC received a copy of the Pension Plan’s January 1, 2012 actuarial valuation report stating that, as of January 1, 2012, accumulated unpaid contributions for the Plan totaled approximately \$8 million, without accrued interest.<sup>20</sup>

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*Victor Posner*, Case No. 02-595 CP 02 (Fla. Prob. Ct. Mar. 30, 2015) (hereafter, “PBGC’s Status Report”), at 2.

<sup>15</sup> See 29 U.S.C. § 1321.

<sup>16</sup> R1 at 447-487, PBGC’s Status Report, at 6.

<sup>17</sup> 29 U.S.C. §§ 1002(16)(A)-(B), 1301(a)(1).

<sup>18</sup> R1 at 447-487, PBGC’s Status Report at 6.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

**PBGC perfected the Pension Plan's lien against the Estate and all known members of its controlled group.**

On or about July 25, 2013, PBGC filed Notices of Federal Tax Lien under IRC § 430(k) with the appropriate filing offices in the amount of \$10,128,398 against the Estate and every entity that the Estate had named as a member of its controlled group.<sup>21</sup> By doing so, PBGC perfected the Pension Plan's statutory lien (the "Lien") for \$10,138,398 against all real and personal property of the Estate and all then-known controlled group members.<sup>22</sup>

Since July 25, 2013, the Estate has generally missed all additional contributions owed to the Pension Plan.<sup>23</sup> As a result, PBGC updated notices of the Lien against the Estate and all now-known controlled group members,<sup>24</sup>

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<sup>21</sup> *Id.* On July 25, 2013, PBGC filed notices against the real and personal property of the following entities:

APL Corporation; APL Shelter Products; Arbor Chase Luxury Estate Homes, Inc.; Asset Manager; Boardwalk & Baseball, Inc.; Boardwalk Land Development, Inc.; Cary Marine Sales and Service; Coleridge Corporation; Equity Asset Management; Evans Tempcon, Inc.; Eagle Affiliates, Inc.; Florida Lake Homes, Inc.; Ocean Marine Yacht Club, Inc.; Regents Glen Building & Development, LLC; Regents Glen Country Club, LLC; Regents Glen Dinner Club, LLC; Regents Glen Dining Services, Inc.; Regents Glen Golf Course Services, Inc.; Regents Realty, LLC; Security Financial & Investment Corp. DBA Riviera Cabinets; Security Management Corp.; Universal Housing Corp.; Windmill Reserve Corp.; and Windmill Reserve Realty Corp.

<sup>22</sup> *See* 29 U.S.C. § 1368.

<sup>23</sup> R1 at 447-487, PBGC's Status Report at 7.

<sup>24</sup> R1 at 447-487, PBGC's Status Report at 7. PBGC stopped updating lien notices against three Estate-owned entities who filed for bankruptcy relief. On January 13, 2014, Boardwalk & Baseball, Inc., Boardwalk Land Development, Inc., and

including twenty controlled group members not initially listed by the Estate.<sup>25</sup> The Pension Plan now holds a perfected lien against the Estate and all known controlled group members that exceeds \$17 million.<sup>26</sup>

The Estate has been aware of the Lien since as early as August 5, 2013.<sup>27</sup>

**PBGC and the Estate attempted to resolve the pension obligations.**

In August 2013, shortly after perfecting the Lien, PBGC began settlement discussions with the Estate. PBGC sought to structure an agreement that would permit the Estate to liquidate its assets in an orderly manner and provide compensation for the ongoing costs of liquidating the Estate, while paying the

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Coleridge Corporation filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code. These cases are being jointly administered in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, *In re Boardwalk & Baseball, Inc.*, Case No. 8:14-bk-317.

<sup>25</sup> The updated notices of liens were filed against the Estate and all known controlled group members, including the following entities that were not originally identified in the Estate's April 5, 2013 Form 200 Notice of Failure to Make Required Contributions:

1919 Clearwood Road, LLC; Dallastown Acquisitions, LP; Dallastown Acquisitions, LLC; Eau Gallie Melbourne Bowling, Inc.; Knollcrest Construction, LLC; Knollcrest Construction Two, LLC; Knollcrest Construction Three, LLC; Knollcrest Construction Four, LLC; Knollcrest Construction Five, LLC; Knollcrest Construction Five, LLC; Knollcrest Construction Six, LLC; Monmouth Construction Ph V Sec I, LLC; Monmouth Construction Ph V Sec II, LLC; Monmouth Construction West, LLC; Monmouth Construction West I, LLC; Monmouth Construction West II, LLC; Monmouth Construction West III, LLC; Monmouth Construction West IV, LLC; New Inner Cities Communities, Inc.; NVF Company; Tollgate Construction, LLC; Tollgate Construction I, LLC; and Victor Posner Enterprises Construction, LLC.

<sup>26</sup> R1 at 447-487, PBGC's Status Report at 9.

<sup>27</sup> *Id.* See also Appellant's Brief at 16-17.

Estate's missed pension obligations.<sup>28</sup> The settlement discussions continued on and off for nearly twelve months.<sup>29</sup> Ultimately, PBGC and the Estate were unable to resolve the Estate's pension obligations.<sup>30</sup>

**PBGC commenced litigation against Estate-owned entities.**

Because PBGC and the Estate could not resolve the Estate's pension obligations, PBGC proceeded to litigate certain claims to protect the nation's pension insurance program.

On July 22, 2014, PBGC filed suit in the United States District Court for the Western District of Michigan (the "Michigan District Court") to foreclose the Lien against the assets of Evans Tempcon, Inc. (the "Evans Foreclosure Action").<sup>31</sup> Evans Tempcon, Inc. ("Evans") is located in Grand Rapids, Michigan, and is wholly owned directly or indirectly by the Estate.<sup>32</sup> Appellant served as the president of Evans until March 18, 2015, when the Michigan District Court appointed a receiver over Evans, based in part upon Evans's failure to comply with

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<sup>28</sup> R1 at 447-487, PBGC's Status Report at 11.

<sup>29</sup> *Id.*

<sup>30</sup> R1 at 759-1198, Transcript of Apr. 17, 2015 Show Cause Hearing (hereafter "Show Cause Hr'g Tr.") at 132, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. 2015).

<sup>31</sup> *PBGC v. Evans Tempcon, Inc.*, Case No. 1:14-cv000782-RHB (W.D. Mich.)

<sup>32</sup> *PBGC v. Evans Tempcon, Inc.*, No. 15-1388, 2015 WL 6685319, at \*1 (6th Cir. Nov. 2, 2015).

an order of the Michigan District Court.<sup>33</sup> The United States Court of Appeals for the Sixth Circuit recently affirmed the Michigan District Court's appointment of a receiver for Evans.<sup>34</sup> The Receiver continues to manage and operate Evans's property.<sup>35</sup>

On October 6, 2014, PBGC also filed suit in the United States District Court for the Southern District of Florida against Asset Manager, the Pension Plan Administrator, requesting, among other relief, a decree adjudicating that the Pension Plan must be terminated and appointing PBGC statutory trustee (the "Termination Action").<sup>36</sup> If the Pension Plan is terminated, PBGC will have a claim for unfunded benefit liabilities in the amount of approximately \$39.2 million.<sup>37</sup> The Termination Action remains pending.

### **Probate Court Proceedings.**

On September 26, 2014, the Probate Court entered a *Sua Sponte* Order for Interim Accounting and Amended Inventory that ordered Appellant to file an

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<sup>33</sup> R1 at 447-487, PBGC's Status Report at 13. *See also PBGC v. Evans Tempcon, Inc.*, Case No. 1:14-cv000782-RHB, Dkt. Nos. 41-42 (W.D. Mich. Mar. 18, 2015), *aff'd*, No. 15-1388, 2015 WL 6685319 (6th Cir. Nov. 2, 2015).

<sup>34</sup> *PBGC v. Evans Tempcon, Inc.*, No. 15-1388, 2015 WL 6685319, at \*5 (6th Cir. Nov. 2, 2015).

<sup>35</sup> *See* Third Joint Status Report, *PBGC v. Evans Tempcon, Inc.*, Case No. 1:14-cv000782-RHB, Dkt. No. 99 (W.D. Mich. Oct. 21, 2015), at 3-4, 7.

<sup>36</sup> *PBGC v. Asset Manager, Inc.*, Case No. 14-62302 (S.D. Fla. 2014). *See also* R1 at 447-487, PBGC's Status Report at 10.

<sup>37</sup> R1 at 447-487, PBGC's Status Report at 10. The unfunded benefit liabilities of the Pension Plan become immediately due to PBGC upon plan termination. *See* 29 U.S.C. §§ 1362(b)(2); 29 C.F.R. pt. 4044.

interim or final accounting pursuant to Florida Probate Rules 5.345 or 5.346 by December 17, 2014.<sup>38</sup> In the September 26, 2014 order, the Probate Court warned Appellant that “[f]ailure to timely file an accounting as ordered shall result, on the court’s own motion, in an order to show cause why the personal representative shall not be removed for failure to comply with this order of the court.”<sup>39</sup>

On October 23, 2014, the Probate Court entered another *Sua Sponte* Order for Interim Accounting and Amended Inventory that ordered Appellant to file an interim or final accounting pursuant to Florida Probate Rules 5.345 or 5.346 by December 17, 2014.<sup>40</sup> In the October 23, 2014 order, the Probate Court again warned Appellant that “[f]ailure to file a timely accounting as ordered shall result, on the court’s own motion, in an order to show cause why the personal representative shall not be removed for failure to comply with this order of the court.”<sup>41</sup>

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<sup>38</sup> R1 at 140-147, *Sua Sponte* Order for Interim Accounting and Amended Inventory, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Sept. 26, 2014).

<sup>39</sup> R1 at 140-147, *Sua Sponte* Order for Interim Accounting and Amended Inventory, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Sept. 26, 2014).

<sup>40</sup> R1 at 242-249, *Sua Sponte* Order for Interim Accounting and Amended Inventory, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Oct. 23, 2014), at ¶ 17. This order is virtually identical to the Probate Court’s September 26, 2014 order.

<sup>41</sup> R1 at 242-249, *Id.* at ¶ 18 (citing § 733.504(3), Fla. Stat.; Fla. Prob. R. 5.440(a)).

Appellant failed to comply with these orders. On March 10, 2015, the Probate Court issued a *sua sponte* order that Appellant was required to show cause why she should not be removed as personal representative for the Estate for her failure to perform and file the accounting mandated by the Probate Court's orders (the "Show Cause Order").<sup>42</sup> In the Show Cause Order, the Probate Court also asked PBGC to "report on the current status of the pension obligations sought and the responsible entities for those obligations."<sup>43</sup>

On March 30, 2015, PBGC filed its report.<sup>44</sup> In the report, PBGC provided the Probate Court with an update on the status of the pension obligations, and informed the Probate Court of several other relevant events that negatively affected the Probate Estate, including:

1. the Evans Foreclosure Action;<sup>45</sup>
2. a foreclosure action initiated by the Pennsylvania tax authority against 16 properties owned by Regents Glen, an Estate-owned entity;<sup>46</sup> and
3. a foreclosure action initiated by Stonebridge Bank against certain properties owned by Monmouth Condominiums, an Estate-owned entity located in Maryland.<sup>47</sup>

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<sup>42</sup> R1 at 419-428, *Sua Sponte* Order Requiring Formal Notice, Expanding Time for Hearing, and Order to Show Cause and Request for Status of Estate Obligation, at ¶ 16, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Cir. Mar. 10, 2015).

<sup>43</sup> *Id.*

<sup>44</sup> See generally R1 at 447-487, PBGC's Status Report.

<sup>45</sup> R1 at 447-487, PBGC's Status Report at 11, 13-16.

<sup>46</sup> R1 at 447-487, PBGC's Status Report at 12.

<sup>47</sup> R1 at 447-487, PBGC's Status Report at 12-13.

On April 13, 2015, Appellant filed her Written Defenses to the Court's *Sua Sponte* Order Dated March 10, 2015 and Response to PBGC Report ("Appellant's Written Defenses").<sup>48</sup> In Appellant's written defenses, she blamed the PBGC for her failure to file an accounting.<sup>49</sup> Appellant also requested that the Probate Court enter an Order authorizing the use of Estate assets subject to the Pension Plan's lien to pay for an accounting.<sup>50</sup>

### **The Show Cause Hearing**

On April 17, 2015, the Probate Court held a show cause evidentiary hearing on Appellant's removal (the "Show Cause Hearing"). The Show Cause Hearing spanned the entire day. Appellant called to testify the following four witnesses:

1. Melissa Harclerode, counsel for PBGC;<sup>51</sup>
2. Andrew Clubok, counsel for the Estate;<sup>52</sup>
3. John Schulte, counsel for the Estate;<sup>53</sup> and
4. Appellant, Brenda Nestor.<sup>54</sup>

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<sup>48</sup> R1 at 579-588, Defendants' Written Defenses to the Court's *Sua Sponte* Order Dated March 10, 2015 and Response to PBGC Report, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. April 13, 2015).

<sup>49</sup> *Id.* at 2-3.

<sup>50</sup> *Id.* at 3.

<sup>51</sup> R1 at 759-1198, Show Cause Hr'g Tr. 95-132.

<sup>52</sup> R1 at 759-1198, Show Cause Hr'g Tr. 132-254.

<sup>53</sup> R1 at 759-1198, Show Cause Hr'g Tr. 255-261.

<sup>54</sup> R1 at 759-1198, Show Cause Hr'g Tr. 262-332.

**A. Testimony Concerning Appellant's Failure to Obtain an Accounting.**

At the Show Cause Hearing, Appellant and Clubok conceded that she had failed to provide the accounting although Appellant was aware that the Probate Court ordered her to do so in the fall of 2014.<sup>55</sup>

Appellant argued that her failure to provide an accounting was primarily the PBGC's fault.<sup>56</sup> However, Clubok acknowledged that Appellant had failed to advise the Probate Court of her alleged inability to file the accounting until after the Probate Court issued the Show Cause Order in March 2015.<sup>57</sup> Clubok also testified that throughout 2014 (including after the September 26, 2014 and October 23, 2014 Probate Court orders that mandated the accounting), the Estate and PBGC had attempted to negotiate an agreement that might have led to the release of funds for the accounting.<sup>58</sup>

Harclerode testified that Appellant had never advised PBGC why she had not provided the Probate Court with an accounting for the past 13 years.<sup>59</sup> Appellant had never presented any specific plan to PBGC detailing how the Estate intended to comply with the Probate Court's orders to provide an accounting.<sup>60</sup>

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<sup>55</sup> R1 at 759-1198, Show Cause Hr'g Tr. 173:4-6, 205:9-14, 327:18-23.

<sup>56</sup> R1 at 759-1198, Show Cause Hr'g Tr. 266, 328-29.

<sup>57</sup> R1 at 759-1198, Show Cause Hr'g Tr. 179:20 – 180:12.

<sup>58</sup> R1 at 759-1198, Show Cause Hr'g Tr. 132:25 – 133:9.

<sup>59</sup> R1 at 759-1198, Show Cause Hr'g Tr. 123.

<sup>60</sup> R1 at 759-1198, Show Cause Hr'g Tr. 124.

And Appellant had never provided any formal proposal from an accountant outlining a plan to provide an accounting and the cost of such accounting.<sup>61</sup>

**B. Testimony Concerning Asset Sales after Filing of the Notice of the Pension Plan's Lien.**

At the hearing, Appellant introduced a spreadsheet (identified in the record as "Appellant Exhibit 2") that listed \$6,770,650 in real estate sales made by Estate-owned entities from July 31, 2013, through March 30, 2015.<sup>62</sup> The spreadsheet indicated that of the sales listed, those that closed after the Probate Court's September 26, 2014 order that mandated the accounting, resulted in \$2,164,750 in sales proceeds.<sup>63</sup> The spreadsheet further indicated that the Estate had contributed only \$155,867.33 to the Pension Plan from sales made after the Probate Court issued its September 26, 2014 order.<sup>64</sup>

In fact, for the post-September 26, 2014 sales, the the Pension Plan received only 7.2% of the post-September 26, 2014 sale proceeds, \$155,867.63.<sup>65</sup> Notably, the spreadsheet did not include a \$3 million sale of property in Broward County, Florida by Estate-owned entity Windmill Reserve Corporation ("Windmill

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<sup>61</sup> R1 at 759-1198, Show Cause Hr'g Tr. 124.

<sup>62</sup> See R1 at 690-94, Appellant Ex. 2 at PR POSNER 00004.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

Reserve”) in March 2014.<sup>66</sup> The Pension Plan also did not receive any proceeds from this sale.<sup>67</sup>

Harclerode testified that PBGC provided a partial withdrawal of the Lien with respect to each real estate sale so that the sale could occur.<sup>68</sup>

### **C. Testimony Concerning the Estate’s Financial Condition.**

During the hearing, Appellant’s witnesses testified about the financial condition of the Estate. In particular, Clubok testified that Regents Glen Building & Development LLC (“Regents Glen”), an Estate-owned entity located in Pennsylvania, had failed to pay real estate taxes.<sup>69</sup> As a result of Regents Glen’s failure, the taxing authority had commenced proceedings to foreclose on Regents Glen’s property.<sup>70</sup>

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<sup>66</sup> R1 at 700-04, Response To Court Exhibit #2 from April 17, 2015 Hearing, at ¶ 5, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. April 22, 2015); *see also* BROWARD COUNTY OFFICIAL RECORDS, INSTRUMENT # 112209830, BOOK 50681, PAGE 1081, *available at* <https://officialrecords.broward.org/oncoreV2/showdetails.aspx?id=54862936&rn=6&pi=0&ref=search>; BROWARD COUNTY PROPERTY APPRAISER, 2885 LAKE RIDGE LANE, *available at* [http://www.bcpa.net/RecInfo.asp?URL\\_Folio=503924090210](http://www.bcpa.net/RecInfo.asp?URL_Folio=503924090210).

<sup>67</sup> R1 at 700-04, Response To Court Exhibit #2 from April 17, 2015 Hearing, at ¶ 5, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. April 22, 2015).

<sup>68</sup> R1 at 759-1198, Show Cause Hr’g Tr. 109-11.

<sup>69</sup> R1 at 759-1198, Show Cause Hr’g Tr. 144-45, 218.

<sup>70</sup> R1 at 759-1198, Show Cause Hr’g Tr. 218.

Clubok further testified that Windmill Reserve, an Estate-owned entity located in Florida, had also failed to pay real estate taxes since 2012.<sup>71</sup> According to PBGC Exhibits A and D, admitted into evidence, Appellant used \$327,486.23 of proceeds from the sale of four Windmill Reserve lots in March 2015 to pay off the delinquent 2012 property taxes.<sup>72</sup> As of the date of the Show Cause Hearing, Windmill Reserve still owed 2013 and 2014 real estate taxes in the amount of \$621,786.96.<sup>73</sup>

Clubok and Appellant both testified that Regents Glen and Asset Manager each owed delinquent payroll taxes to the Internal Revenue Service.<sup>74</sup>

Appellant testified that three entities owned by the Estate had filed bankruptcy in the United States Bankruptcy Court for the Central District of Florida.<sup>75</sup>

Clubok testified that attorneys for the Estate were owed roughly \$1 million, and the administrator ad litem was owed an additional \$117,000.<sup>76</sup> Clubok also

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<sup>71</sup> R1 at 759-1198, Show Cause Hr'g Tr. 149-151; R1 at 665-668, PBGC Exhibits A and B of the Apr. 17, 2015 Show Cause Hearing. *See also* §§ 197.333, 197.432, Fla. Stat. (2015).

<sup>72</sup> R1 at 665, 671-673; PBGC Ex. A and D. R1 at 759-1198, Show Cause Hr'g Tr. 166-69. *See also* §§ 197.432, 197.502, 197.562, Fla. Stat. (2015).

<sup>73</sup> *See* R1 at 665, PBGC Ex. A.

<sup>74</sup> R1 at 759-1198, Show Cause Hr'g Tr. 146, 152 and 274.

<sup>75</sup> R1 at 759-1198, Show Cause Hr'g Tr. 218, 321. *See also In re Boardwalk & Baseball, Inc., et al.*, Case No. 8:14-bk-317 (Bankr. M.D. Fla.); *see also* R1 at 447-487, PBGC Status Report at 7, n. 18.

<sup>76</sup> R1 at 759-1198, Show Cause Hr'g Tr. 159-160.

testified that some Estate professionals were unwilling to continue to work for the Estate because they had not been paid.<sup>77</sup>

**D. The Probate Court Removed Appellant as Personal Representative.**

On April 30, 2015, the Probate Court entered an order that removed Appellant as the personal representative for the Estate (the “Removal Order”). The Probate Court “reject[ed] the defenses of [Appellant] to the order to show cause” and found that “[w]hile professing through counsel that she has been prepared to act, [Appellant] has denied responsibility for failure to comply with the October 23, 2014 order without plausible explanations.”<sup>78</sup> The Probate Court specifically found that by virtue of approximately \$10 million in recent sales of Estate assets, Appellant had the present ability to comply with the orders mandating the accounting:

Because of testimony and documentation showing recent real estate sales with gross amounts of almost ten million, from which relatively modest amounts were paid for overdue pension payments, the court rejects as lacking credibility the respondent’s defense that she is unable to pay for an accounting due to the PBGC’s liens.<sup>79</sup>

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<sup>77</sup> R1 at 759-1198, Show Cause Hr’g Tr. 137-38.

<sup>78</sup> R1 at 2040-47, Order Removing Personal Representative and Providing for Appointment of Successor, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Apr. 30, 2015), at ¶¶ 4, 11.

<sup>79</sup> *Id.* at ¶ 12.

The Probate Court also rejected attempts by Appellant and her counsel to shift blame for her failures to comply with the Probate Court's orders, including last-gasp requests for relief that were "at best untimely."<sup>80</sup>

On June 3, 2015, the Probate Court appointed Philip von Kahle (the "Curator") as curator of the Estate.<sup>81</sup>

This appeal followed.

### **SUMMARY OF ARGUMENT**

The Probate Court did not abuse its discretion in entering orders that removed Appellant as personal representative of the Estate and appointed the Curator. Appellant's brief raises seven issues in arguing for reversal of the orders. None of issues raised justify reversal of the Probate Court's orders.

### **ISSUE I**

A Florida probate court may remove a personal representative when the personal representative fails to comply with a court order.<sup>82</sup> Prior to being removed, a personal representative is entitled to notice and an opportunity to be

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<sup>80</sup> *Id.* at ¶ 5 ("multiple counsel for respondent have sought to shift the responsibility for failures to others while continuing to withhold information from the court, creditors, beneficiaries, and interested persons as to the financial status of the estate.")

<sup>81</sup> R1 at 1722-28, Order Appointing Curator Pursuant to Removal of Personal Representative, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Jun. 3, 2015).

<sup>82</sup> § 733.504(3), Fla. Stat. (2015).

heard.<sup>83</sup> Appellant was afforded these rights. She did not file the court-ordered accounting and she did not show cause as to why she should not be removed. The Probate Court did not abuse its discretion when it removed Appellant as personal representative of the Estate.

## ISSUE II

Under Florida law, to sustain an “impossibility” defense, a party must show that something cannot or is not able to occur, exist or be done.<sup>84</sup> The Estate realized approximately \$10 million from real estate sales after the Estate received notice of the Lien (including approximately \$2 million after the Probate Court ordered an accounting). The Estate had sufficient resources to fund the accounting, but Appellant failed to perform one. The Probate Court did not abuse its discretion when it determined that Appellant’s failure to perform an accounting cannot be excused.

## ISSUE III

Under Florida case law, removal of a personal representative should only be ordered when “the Estate is endangered.”<sup>85</sup> The Probate Court’s record established that: (a) the Estate failed to pay numerous obligations of the Estate and underlying

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<sup>83</sup> *Zulon v. Peckins*, 81 So. 3d 647, 647 (Fla. 3d DCA 2012); *see also LoCascio v. Estate of LoCascio*, 78 So. 3d 573, 574 (Fla. 3d DCA 2011).

<sup>84</sup> *See Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc.*, 174 So. 2d 614, 617 (Fla. 2d DCA 1965).

<sup>85</sup> *In re Murphy's Estate*, 336 So. 2d 697, 699 (Fla. 4th DCA 1976).

entities, including taxes and pension obligations; (b) multiple foreclosure proceedings were pending against Estate-owned entities; and (c) some Estate professionals were unwilling to perform work due to the Estate's failure to pay past due bills. Accordingly, the Probate Court did not abuse its discretion when it determined that the Estate was endangered.

#### ISSUE IV

Under Florida law, an appellate court will not consider an issue that has been raised for the first time on appeal.<sup>86</sup> Though Appellant argues that the Probate Court acted beyond its authority by requiring her to account for the assets and liabilities of Estate-owned trusts and entities, Appellant never raised this argument before the Probate Court. Therefore, she failed to preserve this issue for appellate review, and thereby waived her right to raise this issue on appeal.

#### ISSUE V

PBGC generally supports the legal arguments of the Curator with respect to Issue V.

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<sup>86</sup> *Vorbeck v. Betancourt*, 107 So. 3d 1142, 1147 (Fla. 3d DCA 2012) (“The rule of preservation, which is a keystone in our appellate process, dictates that ‘[in] the absence of fundamental error, an appellate court will not consider an issue that has been raised for the first time on appeal.’”) (quoting *Keech v. Yousef*, 815 So. 2d 718, 719 (Fla. 5th DCA 2002)).

## ISSUE VI

Under Florida law, a party cannot generally assert legal rights on behalf of third parties. Appellant seeks to raise due process claims on behalf of Marianne and Nannette Nestor (Appellant's adult sisters).<sup>87</sup> But Appellant has provided no factual or legal basis to allow her to assert the legal rights of these individuals. Therefore, this Court should deny Appellant's claims asserted on behalf of Marianne Nestor and Nannette Nestor.

## ISSUE VII

PBGC generally supports the legal arguments of the Curator with respect to Issue VII. However, PBGC does not seek reimbursement of its attorney's fees.

## ARGUMENT

The Probate Court's removal of Appellant as the personal representative under Florida Probate Code section 733.504 for her failure to comply with its order to provide an accounting is reviewed by this Court under an "abuse of discretion" standard.<sup>88</sup>

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<sup>87</sup> Appellant's Brief at 44-46.

<sup>88</sup> *In re Murphy's Estate*, 336 So. 2d 697, 698-99 (Fla. 4th DCA 1976) ("Removal of a personal representative pursuant to Section 733.504 Florida Statutes (1975) (formerly Section 734.11) involves the exercise of the trial court's discretion . . . . [W]e find the issues on this appeal involved an exercise of the trial court's discretion and no abuse thereof has been shown. The order appealed from is affirmed."). See also *In re Anders' Estate*, 209 So. 2d 269, 271 (Fla. 1st DCA 1968); *Henderson v. Ewell*, 149 So. 372, 372 (Fla. 1933) ("Nor will an appellate

**I. The Probate Court did not abuse its discretion when it removed Appellant for her failure to comply with an order of the Court.**

Florida Probate Code section 733.504 provides several enumerated causes for the removal of a personal representative and revocation of letters of administration.<sup>89</sup> One of those causes, set forth in Section 733.504(3), is a personal representative's "[f]ailure to comply with any order of the court, unless the order has been superseded on appeal."<sup>90</sup> To meet the requirements of due process, prior to being removed, a personal representative is entitled to notice and an opportunity to be heard.<sup>91</sup>

In its September 26, 2014 and October 23, 2014 orders, the Probate Court ordered Appellant to file an accounting in compliance with the Florida Probate Code.<sup>92</sup> The Probate Court explicitly warned Appellant in both orders that failure to file a timely "accounting as ordered shall result, on the court's own motion, in an order to show cause why the personal representative shall not be removed for

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court reverse such a decree of removal, in the absence of a showing of clear error or abuse of discretion in the making of the order complained of.").

<sup>89</sup> § 733.504, Fla. Stat. (2015).

<sup>90</sup> § 733.504(3), Fla. Stat. (2015).

<sup>91</sup> See generally *LoCascio v. Estate of LoCascio*, 78 So. 3d 573, 574 (Fla. 3d DCA 2011) (holding that, to meet the requirements of due process, removal must be preceded by notice and an evidentiary hearing).

<sup>92</sup> R1 at 242-249, *Sua Sponte* Order for Interim Accounting and Amended Inventory, at ¶ 17, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Oct. 23, 2014); R1 at 140-147, *Sua Sponte* Order for Interim Accounting and Amended Inventory, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Sept. 26, 2014), at ¶ 17.

failure to comply with this order of the court.”<sup>93</sup> Thus, Appellant received notice of her potential removal. Despite this, Appellant did not comply with the Probate Court’s specific order and did not heed the Probate Court’s warning.

Consequently, on March 10, 2015, the Probate Court ordered Appellant to show cause “why she should not be removed as personal representative, pursuant to Florida Statute 733.504(3) for failure to comply with the . . . order of the court rendered October 24, 2014, which has not been superseded on appeal.”<sup>94</sup> The Probate Court acted within its statutory mandate in doing so, as the Florida Probate Code allows a court or interested person to initiate removal proceedings.<sup>95</sup>

On April 17, 2015, Appellant had an opportunity to be heard at an evidentiary hearing on her proposed removal, the Show Cause Hearing.

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<sup>93</sup> R1 at 242-249, Oct. 23, 2014 *Sua Sponte* Order for Interim Accounting and Amended Inventory, at ¶ 18, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Oct. 23, 2014); R1 at 140-147, *Sua Sponte* Order for Interim Accounting and Amended Inventory, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Sept. 26, 2014), at ¶ 18 (both citing § 733.504(3), Fla. Stat.; Fla. Prob. R. 5.440(a))

<sup>94</sup> R1 at 419-428, *Sua Sponte* Order Requiring Formal Notice, Expanding Time for Hearing, and Order to Show Cause and Request for Status of Estate Obligation at ¶ 7, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Mar. 10, 2015).

<sup>95</sup> Fla. Prob. R. 5.440(a). Florida Probate Rule 5.440(a) provides, in pertinent part: (a) Commencement of Proceeding. The court on its own motion may remove, or any interested person by petition may commence a proceeding to remove, a personal representative. A petition for removal shall state the facts constituting the grounds upon which removal is sought, and shall be filed in the court having jurisdiction over the administration of the estate.

The Show Cause Hearing spanned the entire day. Appellant was represented by multiple attorneys who called four witnesses, including Appellant.<sup>96</sup> Appellant testified that she was aware that the Probate Court had ordered an accounting in the fall of 2014, and that she had not provided one.<sup>97</sup> And, as explained in Section II below, Appellant failed to sufficiently explain her failure to provide one.

Accordingly, on April 30, 2015, the Probate Court removed Appellant as the personal representative of the Estate.

Appellant incorrectly asserts that her removal was based on civil contempt proceedings that allegedly violated her due process rights.<sup>98</sup> In fact, she was removed in accordance with Florida Probate Code section 733.504 for her failure to comply with the Probate Court's orders to provide an accounting. Thus, Appellant's arguments about due process rights with respect to civil contempt proceedings are not relevant.

In the Removal Order, the Probate Court specifically cited Florida Probate Code section 733.504(3) as its basis for removing Appellant, stating that "a failure

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<sup>96</sup> R1 at 759-1198, Show Cause Hr'g Tr. 12, 95-332. Appellant also had the opportunity to file written defenses to the March 10, 2015 *Sua Sponte* Order and to file a response to the PBGC's report, which she did on April 13, 2015. See R1 at 579-588, Defendants' Written Defenses to Court's *Sua Sponte* Order Dated March 10, 2015 and Response to PBGC Report, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Apr. 13, 2015).

<sup>97</sup> R1 at 759-1198, Show Cause Hr'g Tr. 327:18-23.

<sup>98</sup> Appellant's Brief at 29-31.

to obey court order is all that is required to remove a personal representative.”<sup>99</sup> Notably, contempt is not one of the enumerated causes for removal under Section 733.504,<sup>100</sup> and the Probate Court’s April 30, 2015 Order does not identify contempt as a basis for Appellant’s removal.<sup>101</sup> Moreover, section 733.504 provides, in pertinent part, that “[r]emoval under this section is in addition to any penalties prescribed by law,” which manifests the legislature’s intent that removal under section 733.504 be a stand-alone remedy for a personal representative’s actions.<sup>102</sup>

Appellant has been afforded all of the rights to which she is entitled under the law. She received the required notice of her proposed removal and an evidentiary hearing on the issue.<sup>103</sup> Appellant neither filed the court-ordered accounting nor showed adequate cause why she should not have been removed. Her due process arguments concerning civil contempt proceedings conveniently

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<sup>99</sup> R1 at 2040-47, Order Removing Personal Representative and Providing for Appointment of Successor, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02, at ¶¶ 15-16 (Fla. Dade Cty. Ct. Apr. 30, 2015).

<sup>100</sup> § 733.504, Fla. Stat. (2015).

<sup>101</sup> R1 at 2040-47, Order Removing Personal Representative and Providing for Appointment of Successor, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02, at ¶¶ 1; 15-16 (Fla. Dade Cty. Ct. Apr. 30, 2015).

<sup>102</sup> § 733.504, Fla. Stat. (2015).

<sup>103</sup> See, e.g., *LoCascio v. Estate of LoCascio*, 78 So. 3d 573, 574 (Fla. 3d DCA 2011) (holding that removal must be ordered with notice and an evidentiary hearing to meet the requirements of due process); *Lezcano v. Estate of Hidalgo*, 88 So. 3d 306, 307 (Fla. 3d DCA 2012) (same); *Blechman v. Dely*, 138 So. 3d 1110, 1115 (Fla. 4th DCA 2014) (same).

and tellingly ignore the Probate Court's authority to remove her under Florida Probate Code section 733.504(3). The Probate Court did not abuse its discretion in removing Appellant as personal representative of the Estate under Florida law.

This Court should affirm the Probate Court.

**II. The Probate Court correctly rejected Appellant's "impossibility" defense. Appellant had the means to provide the accounting and chose not to do so.**

In the Removal Order, the Probate Court found that Appellant had the resources to pay for the ordered accounting and thus rejected Appellant's "impossibility and inability" to comply defense.

For thirteen years, Appellant failed to provide an accounting that meets the requirements of the Florida Probate Code.<sup>104</sup>

Appellant argued before the Probate Court that it was "impossible" for her to comply with the Probate Court's orders mandating an accounting and, thus, that the Probate Court should not have removed her.<sup>105</sup> Appellant unpersuasively

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<sup>104</sup> R1 at 759-1198, Show Cause Hr'g Tr. 327:18-23 (testimony of Appellant), 173:4-6, 205:9-14 (testimony of Appellant's attorney Andrew Clubok). In September 2014, the Probate Court noted that "the time standards for probate cases for contested cases is 24 months from filing to final discharge. This estate is more than ten years overdue." R1 at 140-147, *Sua Sponte* Order for Interim Accounting and Amended Inventory, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Sept. 26, 2014). at ¶ 21.

<sup>105</sup> Appellant's Brief at 20.

blames her failure to perform an accounting on the PBGC and the Pension Plan's Lien.<sup>106</sup>

“Impossibility” is an affirmative defense<sup>107</sup> and requires that something cannot or is not able to occur, exist, or be done.<sup>108</sup> As it is an affirmative defense, Appellant has the burden of proof.<sup>109</sup> Appellant cannot meet her burden. At the Show Cause Hearing, Appellant presented evidence (including Appellant's Exhibit 2) that from August 5, 2013 (the date that Appellant learned of the Lien) through April 17, 2015 (the date of the Evidentiary Hearing), the Estate sold real estate of Estate-owned entities for approximately \$10 million. The Probate Court specifically cited the approximately \$10 million in real estate sales as proof of Appellant's present ability to comply with the order and as evidence that Appellant's “impossibility” defense was “lacking credibility.”<sup>110</sup>

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<sup>106</sup> R1 at 759-1198, Show Cause Hr'g Tr. 266, 328-29.

<sup>107</sup> *McIntyre v. Norman*, 429 So. 2d 1296, 1297 (Fla. 3d DCA 1983). Appellant's “impossibility” defense is analogous to the “impossibility of performance” affirmative defense in contract actions. *See, e.g., Ellingham v. Florida Dep't of Children & Family Servs.*, 896 So. 2d 926, 927 (Fla. 1st DCA 2005) (“we conclude that lack of funding is an affirmative defense to a claim for developmental disabilities services, analogous to the defense of impossibility of performance in a contract action.”).

<sup>108</sup> *Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc.*, 174 So. 2d 614, 617 (Fla. 2d DCA 1965); *see also* Black's Law Dictionary 873 (10th ed. 2014).

<sup>109</sup> *Ellingham*, 896 So. 2d at 927 (“The party seeking to assert the affirmative defense has the burden of proof as to that defense.”).

<sup>110</sup> R1 at 2040-47, Order Removing Personal Representative and Providing for Appointment of Successor, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Apr. 30, 2015), at ¶ 12.

Moreover, Appellant's Exhibit 2 established that \$2,164,750 of the approximately \$10 million of real estate sales closed after the Probate Court's September 26, 2014 order that mandated the accounting.<sup>111</sup> For the majority of the post-September 26, 2014 sales, the Estate did not contribute any of the proceeds to the Pension Plan.<sup>112</sup> In fact, the Pension Plan received only 7.2% of the post-September 26, 2014 sale proceeds, \$155,867.63.<sup>113</sup>

The remaining 92.8% of post-September 26, 2014 sale proceeds, approximately \$2 million, either presumably went into the Estate's coffers or went to other Estate creditors such as banks and local taxing authorities. Many of these obligations accrued long before Appellant learned about the Lien.<sup>114</sup> Appellant could have used some of the remaining \$2 million in post-September 26, 2014

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<sup>111</sup> R1 at 690-94, Appellant Ex. 2 at PR POSNER 00004. The Removal Order reflects that the Probate Court specifically considered Appellant's Exhibit 2 and found that its four pages "do not justify [Nestor's] continued delay in the preparation and filing of an interim accounting." R1 at 2040-47, Order Removing Personal Representative and Providing for Appointment of Successor, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Apr. 30, 2015), at ¶ 13.

<sup>112</sup> *Id.*

<sup>113</sup> R1 at 690-94, Appellant Ex. 2 at PR POSNER 00004. Of the \$2,164,750 in sales by Estate entities that closed after the Court's September 26, 2014 order, only \$155,867.63 – or 7.2% – went to the Pension Plan PBGC to service the \$17 million in missed contributions. *Id.*

<sup>114</sup> R1 at 759-1198, Show Cause Hr'g Tr. 242.

sales proceeds to pay for the Probate Court-ordered accounting. She did not.

These facts belie Appellant's arguments of "impossibility."<sup>115</sup>

Appellant's transparent attempts to blame PBGC, far from the only creditor of the Estate, miss the mark. PBGC tried throughout 2014 to negotiate an agreement with the Estate that could have released funds to be used to provide the accounting, but to no avail.<sup>116</sup> And PBGC provided a partial withdrawal of the Pension Plan's Lien against more than \$2 million in post-September 26, 2014 sale proceeds to be used by the Estate.<sup>117</sup>

From September 26, 2014, the date that the Probate Court initially ordered an accounting, through March 10, 2015, the date that the Probate Court issued the Show Cause Order, Appellant never advised PBGC or the Probate Court why she was not providing the Probate Court with an accounting.<sup>118</sup> Appellant never presented any formal plan to PBGC detailing how the Estate intended to comply with the Probate Court's orders to provide an accounting.<sup>119</sup> And Appellant never provided PBGC any documentation from the Estate's accountants outlining a

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<sup>115</sup> Appellant was, by her own admission, not without other options. Though seemingly under no obligation to do so, she found funds to pay other VP Entity creditors (Regents Glen obligations paid with proceeds of a "loan" from her husband) and testified that she made several loans to Estate entities totaling at least \$2.5 million. R1 at 759-1198, Show Cause Hr'g Tr. 265:9-11, 281:25 – 285:19.

<sup>116</sup> R1 at 759-1198, Show Cause Hr'g Tr. 132:25 – 133:9.

<sup>117</sup> R1 at 759-1198, Show Cause Hr'g Tr. 109:8 – 113:16.

<sup>118</sup> R1 at 759-1198, Show Cause Hr'g Tr. 123.

<sup>119</sup> R1 at 759-1198, Show Cause Hr'g Tr. 124.

formal plan for an accounting and the cost of such accounting.<sup>120</sup> PBGC is not to blame for Appellant's failure to provide the accounting.

Compounding the frailty of Appellant's "impossibility" defense is what the Probate Court called her "at best untimely" request that the Court direct PBGC to release the Lien against Estate assets to pay for an accounting.<sup>121</sup> Appellant was so dilatory that she did not advise the Probate Court of her alleged inability to file the accounting until after the Probate Court had issued the Show Cause Order.<sup>122</sup> In fact, the accounting was due by December 17, 2014, two and a half months earlier.<sup>123</sup>

No "impossibility" prevented Appellant from providing the court-ordered accounting. Appellant simply chose not to file an accounting. Moreover, a party is

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<sup>120</sup> R1 at 759-1198, Show Cause Hr'g Tr. 173-80.

<sup>121</sup> R1 at 2040-47, Order Removing Personal Representative and Providing for Appointment of Successor, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Apr. 30, 2015), at ¶ 5.

<sup>122</sup> R1 at 759-1198, Show Cause Hr'g Tr. 179:20 – 180:12. Testimony further evidences that Appellant failed to take any meaningful actions to ensure the filing of the accounting – such as applying to any court for an order authorizing the use of money to pay for an accounting – until the last minute. R1 at 759-1198, Show Cause Hr'g Tr. 170: 11 – 171:21, 213.

<sup>123</sup> R1 at 242-49, *Sua Sponte* Order for Interim Accounting and Amended Inventory, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Oct. 23, 2014), at ¶ 17; R1 at 140-147, *Sua Sponte* Order for Interim Accounting and Amended Inventory, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Sept. 26, 2014), at ¶ 17.

equitably estopped from benefitting from her own wrongdoing.<sup>124</sup> So Appellant cannot manufacture an “impossibility” defense based upon her own inappropriate actions.

The Probate Court properly rejected Appellant’s “impossibility” defense.

**III. The Probate Court did not abuse its discretion in finding that the evidence established that the Estate was endangered.**

A Florida court may remove a personal representative of a probate estate when, among other causes, the personal representative has exhibited “wasting or maladministration of the estate.”<sup>125</sup> The trial court must exercise its discretion to determine that “there is some tangible and substantial reason to believe that damage will otherwise accrue to the estate.”<sup>126</sup> Moreover, removal “is a drastic action and should only be resorted to when administration of the estate is endangered.”<sup>127</sup>

Appellant argues that the Probate Court erred in finding that the Estate was endangered and that “no parties introduced any evidence regarding Brenda’s

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<sup>124</sup> See, e.g., *Winans v. Weber*, 979 So. 2d 269, 275 (Fla. 2d DCA 2007) (“The primary purpose of the doctrine of equitable estoppel is to ‘prevent a party from profiting from his or her wrongdoing.’”) (citing *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1078 (Fla. 2001)).

<sup>125</sup> 733.504, Fla. Stat. (2015).

<sup>126</sup> *In re Murphy’s Estate*, 336 So. 2d 697, 698 (Fla. 4th DCA 1976) (quoting *In re Anders’ Estate*, 209 So. 2d 269 (Fla. 1st DCA 1968)).

<sup>127</sup> *Blechman v. Dely*, 138 So. 3d 1110, 1114 (Fla. 4th DCA 2014) (quoting *In re Murphy’s Estate*, 336 So. 2d 697, 699 (Fla. 4th DCA 1976)).

[Appellant] alleged maladministration of the Estate.”<sup>128</sup> To the contrary, the Probate Court record established that the Estate was endangered and a vast amount of evidence was presented of Appellant’s maladministration.

First, the Probate Court’s record set forth that under Appellant’s stewardship, the Estate and its affiliated entities had failed to pay millions of dollars of debts, including taxes and pension obligations. As of the date of the Show Cause Hearing, Regents Glen and Windmill Reserve each owed delinquent real estate taxes.<sup>129</sup> Regents Glen and Asset Manager each owed delinquent payroll taxes to the Internal Revenue Service.<sup>130</sup> And the Estate and each Estate-owned entity owed the Pension Plan in excess of \$17 million for missed funding contributions.<sup>131</sup> As a result of the Estate’s failure to pay this obligation, the Pension Plan held the Lien, a statutory lien akin to a federal tax lien, in excess of \$17 million against all real and personal property of the Estate and its affiliated entities.<sup>132</sup>

Second, the Probate Court’s record established that the Estate’s dire financial condition had resulted in numerous court proceedings against the Estate-owned entities. The Pennsylvania tax authority had initiated a foreclosure

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<sup>128</sup> Appellant’s Brief at 37.

<sup>129</sup> R1 at 759-1198, Show Cause Hr’g Tr. 147-49.

<sup>130</sup> R1 at 759-1198, Show Cause Hr’g Tr. 146, 152.

<sup>131</sup> R1 at 759-1198, Show Cause Hr’g Tr. 104. See also R1 at 447-487, PBGC’s Status Report at 9.

<sup>132</sup> See 26 U.S.C. §§ 412, 430; 29 U.S.C. § 1083.

proceeding against certain properties owned by an Estate-owned entity in Pennsylvania.<sup>133</sup> Stonebridge Bank initiated a foreclosure action against certain properties owned by an Estate-owned entity located in Maryland.<sup>134</sup> Three Estate-owned entities had filed for bankruptcy protection in the United States Bankruptcy Court for the Central District of Florida.<sup>135</sup> PBGC had initiated a foreclosure action against Evans in Grand Rapids, Michigan.<sup>136</sup> And PBGC had filed an action against Asset Manager in the United States District Court for the Southern District of Florida for termination of the Pension Plan.<sup>137</sup> Upon termination of the Pension Plan, the Estate and its controlled group members will become immediately liable for the unfunded benefit liabilities owed to the Pension Plan's participants and beneficiaries.<sup>138</sup>

Third, attorneys for the Estate were owed roughly \$1 million, and the administrator ad litem was owed an additional \$117,000.<sup>139</sup> Moreover, some

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<sup>133</sup> R1 at 759-1198, Show Cause Hr'g Tr. 218. *See also* R1 at 447-487, PBGC's Status Report at 12.

<sup>134</sup> R1 at 759-1198, Show Cause Hr'g Tr. 218. *See also* R1 at 447-487, PBGC's Status Report at 12.

<sup>135</sup> *See In re Boardwalk & Baseball, Inc., et al.*, Case No. 8:14-bk-317 (Bankr. M.D. Fla.). *See also* R1 at 759-1198, Show Cause Hr'g Tr. 218, 321.

<sup>136</sup> R1 at 447-487, PBGC's Status Report at 11, 14-15.

<sup>137</sup> R1 at 447-487, PBGC Status Report at 10, *In re: APL/NVF Consolidated Pension Plan*, Case No. 0:14-cv-62302 2-0595 CP 02.

<sup>138</sup> *See* 29 U.S.C. §§ 1362(b)(2); 29 C.F.R. pt. 4044. PBGC asserts that the unfunded benefit liabilities on a termination basis is approximately \$39.2 million. *See* R1 at 447-487, PBGC's Status Report at 10.

<sup>139</sup> R1 at 759-1198, Show Cause Hr'g Tr. 159-160.

Estate professionals were unwilling to continue to work for the Estate because they had not been paid.<sup>140</sup>

Lastly, the United States District Court for the Western District of Michigan had taken the extraordinary action of appointing a receiver over Evans.<sup>141</sup>

Appellant did not contest or contradict any of the facts highlighted above. Notwithstanding the totality of the evidence establishing that the Estate was endangered, Appellant argues in her brief that the 2013 report of Michael Axman, the administrator ad litem, supports her claim that the Estate was not endangered.<sup>142</sup> First, this report was not presented at the hearing. Moreover, this report is out of date. Any findings in that report fail to outweigh the overwhelming evidence in the record that the Estate was endangered. Accordingly, the Probate Court did not abuse its discretion when it determined that the totality of the evidence established that the Estate was endangered and removed Appellant as personal representative.

**IV. Appellant waived her argument, made here on appeal for the first time, that the Probate Court lacked authority to order the personal representative to account for the assets of the Estate-owned entities.**

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<sup>140</sup> R1 at 759-1198, Show Cause Hr'g Tr. 137.

<sup>141</sup> R1 at 447-487, PBGC Status Report at 13, *PBGC v. Evans Tempcon, Inc.*, Case No. 1:14-cv000782-RHB, Dkt. Nos. 41-42 (W.D. Mich. Mar. 18, 2015), *aff'd*, No. 15-1388, 2015 WL 6685319 (6th Cir. Nov. 2, 2015). *See* R1 at 759-1198, Show Cause Hr'g Tr. 39-43, 69, 120, 172.

<sup>142</sup> Appellant's Brief at 37-38.

Under Florida law, the rule of preservation dictates that “[i]n the absence of fundamental error, an appellate court will not consider an issue that has been raised for the first time on appeal.”<sup>143</sup> On appeal, Appellant argues that the Probate Court acted beyond its authority because the Show Cause Order required Appellant to account for the “assets and liabilities of the estates and trusts and corporate interests of Victor Posner. . . .”<sup>144</sup> Appellant never raised this argument in her written defenses, or at the Show Cause Hearing. Therefore, Appellant failed to preserve this issue for appellate review, and thereby waived her right to raise this issue on appeal.

In addition, the September 26, 2014 and October 23, 2014 orders required Appellant to file an interim or final accounting by December 17, 2014, pursuant to Florida Probate Rules 5.345 or 5.346.<sup>145</sup> Appellant failed to comply. The Show Cause Order about which Appellant complains was entered by the Probate Court on March 10, 2015, two and a half months after the accounting was due. Any

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<sup>143</sup> *Vorbeck v. Betancourt*, 107 So. 3d 1142, 1147-48 (Fla. 3d DCA 2012) (“The rule of preservation, which is a keystone in our appellate process, dictates ‘[in] the absence of fundamental error, an appellate court will not consider an issue that has been raised for the first time on appeal.’”) (quoting *Keech v. Yousef*, 815 So. 2d 718, 719 (Fla. 5th DCA 2002)).

<sup>144</sup> Appellant’s Brief at 39.

<sup>145</sup> R1 at 242-49, *Sua Sponte* Order for Interim Accounting and Amended Inventory, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Oct. 23, 2014), at ¶ 17. R1 at 140-147, *Sua Sponte* Order for Interim Accounting and Amended Inventory, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. Sept. 26, 2014), at ¶ 17.

additional language in the Show Cause Order that purports to expand the scope of the accounting did not excuse Appellant's failure to abide by the Probate Court's orders and provide an accounting in accordance with the Florida Probate Rules.

The Probate Court also found cause to remove Appellant because the totality of the evidence established that the Estate was endangered. Notwithstanding Appellant's dilatory argument concerning the language in the Show Cause Order, the Probate Court did not abuse its discretion in removing the Appellant as personal representative.

**V. The Probate Court properly required Appellant to produce financial documents to interested parties.**

PBGC generally supports the legal arguments of the Curator with respect to Issue V.

**VI. Appellant does not have standing to raise claims of Marianne Nestor and Nannette Nestor.**

Appellant asserts that the Probate Court violated Marianne Nestor's and Nannette Nestor's (Appellant's adult sisters) due process rights by failing to give them notice of Appellant's removal and the ability to petition for appointment as successor personal representative.<sup>146</sup> Appellant further states that Marianne Nestor

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<sup>146</sup> Appellant's Brief at 44-46.

and Nannette Nestor “stand ready to promptly address the pending matters to complete the probate administration of this estate.”<sup>147</sup>

Appellant has no standing to raise this issue. As stated by the Supreme Court of Florida, in *Alterra Healthcare Corporation v. Estate of Shelley*, “[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.”<sup>148</sup>

Appellant has provided no factual or legal basis for this Court to grant an exception to that rule. And, to date, neither Marianne Nestor nor Nannette Nestor has appeared before the Probate Court to raise such claim. Accordingly, this Court should deny Appellant’s argument concerning any due process rights of Marianne Nestor and Nannette Nestor.

Moreover, Appellant complains about the Probate Court’s appointment of the Curator in the June 3, 2015 Order.<sup>149</sup> However, in her Notice of Appeal to the Probate Court and to interested parties, Appellant gave notice only that she was appealing the Removal Order.<sup>150</sup> Indeed, the Notice of Appeal predates the

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<sup>147</sup> Appellant’s Brief at 46.

<sup>148</sup> *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

<sup>149</sup> Appellant’s Brief at 6, 25, 48. See R1 at 1738-1744, Order Appointing Curator Pursuant to Removal of Personal Representative, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. June 3, 2015).

<sup>150</sup> R1 at 2027-2039, Notice of Appeal, *In re: Estate of Victor Posner*, Case No. 02-595 CP 02 (Fla. Dade Cty. Ct. June 2, 2015).

Probate Court's June 3, 2015 Order appointing the Curator by a day. Therefore, Appellant never filed a notice of appeal of the June 3, 2015 Order.

**VII. PBGC does not request reimbursement of its attorney's fees.**

The Removal Order states that "[t]he court finds grounds to assess attorney's fees for failure to provide estate information and reserves ruling as to amounts."

PBGC generally supports the legal arguments of the Curator with respect to Issue VII. However, PBGC does not seek reimbursement of its attorney's fees.

**CONCLUSION**

The Probate Court ordered Appellant to provide an accounting. Despite sufficient resources and time, Appellant failed to comply. After notice and an evidentiary hearing, the Probate Court rightly rejected Appellant's excuses and attempts to blame others for her failures, and removed Appellant as personal representative of the Estate for cause under section 733.504 of the Florida Probate Code for failure to comply with an order of the court. Also, the Probate Court rightly determined that cause existed to remove Appellant because the totality of the evidence established that the Estate was endangered. Under no circumstances can the Probate Court be said to have abused its discretion in these findings and conclusions. Accordingly, this Court should affirm the Probate Court's decision to remove Appellant as personal representative of the Estate.

Date: December 21, 2015

Respectfully submitted,

PENSION BENEFIT GUARANTY  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by e-mail via an automatic e-mail by eDCA to all parties this 21st day of December, 2015.

/s/ Robin J. King  
Robin J. King, Esq.

## CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fla. R. App. P. 9.210(a)(2) and (c) that the word count of the Answer Brief of Pension Benefit Guaranty Corporation to Appellant's Initial Brief is 9,604, excluding the parts of the brief exempted by Fla. R. App. P. 9.210(a)(5)(E). The brief was prepared using Microsoft Word 2013, and PBGC's counsel has relied on the word count function of Microsoft Word 2013 to calculate the word count. The brief complies with the typeface requirements and the type style requirements of Fla. R. App. P. 9.210(a). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED: December 21, 2015

/s/ Joel W. Ruderman  
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