STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 13456

BROWN BROTHERS HARRIMAN TRUST CO., N.A., as Trustee of the Benson Trust,

Plaintiff,

v.

ANNE P. BENSON, as Grantor of the Benson Trust, JOHN H. BENSON, ANNE H. BENSON, LINLEY C. BENSON, RUTH PRINGLE PIPKIN FRANKLIN, and the UNBORN AND UNASCERTAINED ISSUE AND HEIRS OF ANNE P. BENSON,

Defendants.

MOTION BY CONSENT TO FILE AMICUS CURIAE BRIEF

Defendant ANNE P. BENSON, as Grantor of the Benson Trust, with the consent of all parties, respectfully moves this Court to allow the filing of the brief by the amicus curiae NORTH CAROLINA BANKERS ASSOCIATION, which is attached hereto. All parties, by and through counsel, have consented to the filing of such brief by the NORTH CAROLINA BANKERS ASSOCIATION.

WHEREFORE, Defendant ANNE P. BENSON, with the consent of all parties, respectfully requests that this Court enter an order allowing the filing of the brief by the amicus curiae NORTH CAROLINA BANKERS ASSOCIATION.

This the 5th day of January, 2009.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Motion By Consent to File Amicus Curiae Brief has been duly served by depositing a copy thereof in the United States mail, first class, postage prepaid, addressed to the parties as follows:

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STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 08-CVS-13456

BROWN BROTHERS HARRIMAN TRUST CO., N.A., as Trustee of the Benson Trust,
Plaintiff

v.

ANNE P. BENSON, as Grantor of the Benson Trust, JOHN H. BENSON, as Beneficiary under the Benson Trust, ANNE H. BENSON, as Beneficiary under the Benson Trust, LINLEY C. BENSON, as Beneficiary under the Benson Trust, RUTH PRINGLE PIPKIN FRANKLIN, as Contingent Beneficiary under the Benson Trust, and the UNBORN AND UNASCERTAINED ISSUE AND HEIRS OF ANNE P. BENSON, as Contingent Beneficiaries under the Benson Trust,
Defendants

AMICUS BRIEF OF THE NORTH CAROLINA BANKERS ASSOCIATION IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The North Carolina Bankers Association, by and through special counsel and with the consent of all the parties to this cause, hereby respectfully submits this "Amicus Brief of the North Carolina Bankers Association in Support of Plaintiff's Motion for Summary Judgment."

I. STATEMENT OF INTEREST

Established in 1897, the North Carolina Bankers Association ("NCBA") is a nonpartisan, nonprofit membership trade group which has as members 140 banks and 294 banking-related companies doing business in North Carolina. Banks and companies of all sizes, including the state's largest national banks, are members. The NCBA monitors state and federal legal and

regulatory developments on behalf of its member institutions. It also provides educational and training programs, media relations, insurance benefits programs, the *Carolina Banker* magazine, regulatory and compliance assistance, and other services to its member institutions and to the public. The NCBA also sponsors and operates the Community Investment Corporation of the Carolinas, which provides long-term low-cost financing for low- to moderate-income multi-family developments in North Carolina and South Carolina.

Many NCBA members serve as corporate trustees, and the recent adoption of § 41-23 of the North Carolina General Statutes, abolishing the application of the common-law rule against perpetuities ("RAP") to trusts, is especially important to these members. The NCBA thanks the parties for consenting to the submission of this brief by the NCBA, as a friend of the court, in support of Plaintiff's Motion for Summary Judgment.

II. SECTION 34 OF THE NORTH CAROLINA CONSTITUTION DOES NOT REFER TO THE RAP.

The NCBA concurs fully with the excellent legal analysis in Plaintiff's Brief. The RAP, despite *dicta* in some cases, is a common-law rule quite distinct from the prohibition of "perpetuities" in Section 34 of the North Carolina Constitution. As Professor John Orth notes in his treatise on the North Carolina Constitution, the "perpetuity" deemed in 1776 to be "contrary to the genius of a free state" was an "inalienable" and "indestructible" interest in property that would create a landed aristocracy. John V. Orth, The North Carolina State Constitution: With History and Commentary, at 75 (1995).

> The 1784 legislation regulating entails eliminated the possibility of perpetuities strictly so called. There exists *in addition* a complicated common law rule known as the Rule against Perpetuities that bars other long-lasting arrangements. Although the North Carolina Court of Appeals has mentioned *in passing* that the application of this rule has the "continuing sanction" of this section [34] (North

> Carolina National Bank v. Norris, 1974), it should not be taken to mean that the Rule against Perpetuities in its present formulation is beyond the reach of the legislature.

Id. at 75-76 (emphasis added). In his exhaustive treatment of North Carolina RAP law, Professor Ronald Link notes "the early cases regarded perpetuities as estates tail, *e.g.*, Griffin v. Graham, 8 N.C. (1 Hawks) 96 (1820), and a similarity between perpetuities and monopolies was found in that each resulted in a tying up of property so that no one had the power to alienate it." Ronald C. Link, The Rule Against Perpetuities in North Carolina, 57 N.C. L. Rev. 727, 751 n.121 (1979). "The North Carolina constitutional ban on 'perpetuities and monopolies' does not appear to have given any different meanings to the Rule [against Perpetuities] in this state, as compared with traditional formulations; nor do similar constitutional provisions in other states appear to have affected the development of the Rule. The constitution is cited in an occasional perpetuities case, but generally it has not been an influencing factor." Id. at 751-52 (citations omitted).

Section 34 also prohibits monopolies, which originally were understood to mean an exclusive right granted by a monarch to a political favorite, Orth, supra, at 75, such as the cloth and wine monopolies Elizabeth I granted to Walter Raleigh. Conflating the constitutional meaning of "perpetuity" with the common-law "rule against perpetuities" would be as serious an error, and as serious an anachronism, as confusing the constitutional prohibition of monopolies with the provisions of N.C. Gen. Stat. § 75-1. Just as the General Assembly is free to amend or repeal any provision of Chapter 75, it is free to "otherwise provide for," or to "abrogate" or "repeal," common-law provisions such as the RAP. N.C. Gen. Stat. § 4-1. If a "perpetuity" under Section 34 includes any trust with an unlimited existence, then the provisions of the

Business Corporation Act[1] and the Limited Liability Company Act[2] allowing perpetual existence of statutory business entities also would violate Section 34.

The modified RAP explicitly voids a trust that restrains alienation for a period longer than permitted under the RAP. N.C. Gen. Stat. § 41-23(a). "[I]n considering the constitutionality of a statute, *every presumption* is to be indulged in favor of its validity." State v. Arnold, 147 N.C. App. 670, 673, 557 S.E.2d 119, 121 (quoting State v. Lueders, 214 N.C. 558, 561, 200 S.E.2d 22, 24 (1938)) (emphasis added). As the General Assembly expressly addressed the alienation restrictions at the heart of the Section 34 "perpetuities" prohibition, the constitutionality of N.C. Gen. Stat. § 41-23 is assured.

III. THE NORTH CAROLINA GENERAL ASSEMBLY CHOSE TO ABROGATE APPLICATION OF THE RAP BASED ON IMPORTANT PUBLIC POLICY CONSIDERATIONS.

Although the General Assembly makes policy for North Carolina, as noted in Plaintiff's excellent Brief, this Court may find discussion of the policy reasons for RAP repeal helpful in applying "every presumption" to the question whether the 1776 reference to "perpetuities" refers to the common-law RAP.

Two sets of considerations for repeal of the RAP, as it applies to trusts, are commonly considered: (1) the general benefits of repeal to a state's citizens; and (2) particular economic benefits that repeal may bring. The North Carolina Bar Association discussed both kinds of benefits when it helped the sponsors of the Bill present it to the General Assembly for

[1] N.C. Gen Stat. § 55-2-02(b)(2)(vi); Robinson, Robinson on North Carolina Corporation Law, § 2.05[2], at 2-14 (7th ed., 2008).
[2] N.C. Gen Stat. § 57C-2-21(a)(2).

consideration. The Bill passed in the Senate with no "nay" votes and in the house with only one "nay" vote.

A. General Benefits to North Carolinians

There are many other good arguments for repeal of the RAP, a complicated rule considered a trap for the unwary, as it applies to trusts. As Professor Link noted in his exhaustive 1979 article:

> Perpetuities reform statutes are nearly as numerous as the several states. Most reforms tinker with the period of the Rule [Against Perpetuities] ..., attempt to cure some of the nonsense applications (for example the fertile octogenarian rule), or promulgate a statutory cy pres or wait-and-see doctrine. In view of the constant problems caused by the Rule, it may be time to ask whether these statutes merely treat the symptoms and not the disease.... [C]ould it not be that the Rule itself ought to be abolished?
>
> Some beneficial aspects of abolition are readily apparent. Commercial interests would be free from jeopardy, and the courts would be forced to concentrate on relevant commercial policies, such as restraints on alienation, instead of trying to apply the ill-fitting Rule Against Perpetuities. Trust duration, which supposedly is not a matter of perpetuities, would be free at last.... And all those delightful doctrines of infectious invalidity, administration contingencies and "if at all" would be reduced to a footnote (albeit a long one) in the legal history books.
>
> A large benefit of abolition would be removal of a substantial malpractice risk.... The [Professor] Leach recommendation that a saving clause be inserted in most wills and trusts is testimony that perpetuities mistakes are inevitable.
>
> The benefits of repeal in eliminating the nonsense applications of the Rule are obvious. But what are the detriments? Here, one must look at the underlying purposes of the Rule, and [Professor] Simes has stated them admirably. Briefly, they are: (1) promoting alienability of property; (2) preventing undue concentration of wealth; (3) furthering the competitive struggle; and (4) limiting dead-hand control. In view of a number of North Carolina statutes and one federal statute, and weighing the nuisance aspects of the Rule, it may be that these purposes are no longer so strongly served that retention of the Rule is justified.

Link, supra, at 819-22 (citations omitted).

In today's trust environment, absent repeal, North Carolinians who otherwise would prefer to deal with North Carolina trust institutions would be forced to deal with trust institutions headquartered in other states to achieve normal federal tax planning objectives.

B. Benefits to North Carolina's Economy

It is a truism that banking is big business in North Carolina. Banking was big business in North Carolina when N.C. Gen. Stat. § 41-23 was enacted, and it remains so despite the upheavals of the past year. The corporate trustee business is a big part of our banking business. North Carolina has a number of state-chartered banks and independent trust companies which act as corporate trustees in North Carolina and do so with the permission and under the supervision of the North Carolina Commissioner of Banks ("NCCOB") and, except for independent trust companies without deposit insurance, the Federal Deposit Insurance Corporation ("FDIC"). North Carolina also is home to a number of federally-chartered entities that provide trust services with the permission and under the supervision of the Office of the Comptroller of the Currency ("OCC"), for national banks, and the Office of Thrift Supervision ("OTS"), for federal savings associations.

Professors Robert H. Sitkoff[3] of Harvard Law School and Max M. Schanzenbach[4] of Northwestern University School of Law have researched extensively, and published detailed studies on, the RAP and its role in the "jurisdictional competition for trust funds."[5] They recently presented an update on their research at the 2008 Heckerling Institute on Estate

[3] http://www.law.harvard.edu/faculty/directory/facdir.php?id-649
[4] http://www.law.northwestern.edu/faculty/profiles/MaxSchanzenbach/
[5] Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes, 115 Yale L.J. 356 (2005); Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust, 27 Cardozo L. Rev. 2465 (2006); see also Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?, 50 J.L. & Econ. 681 (2007).

Planning, sponsored by the University of Miami School of Law. Beginning in the mid-1990s, many states began to repeal or modify the RAP as it applied to trusts. Repeal became important because of the substantial advantages a state without a RAP applicable to trusts offered a grantor seeking to best deploy his or her exemption from the generation skipping trust tax imposed in the 1986 tax overhaul. Perpetuities, Taxes, and Asset Protection: An Empirical Assessment of the Jurisdictional Competition for Trust Funds, 42d Annual Heckerling Institute on Estate Planning, 12-12 to 12-14, and 12-39 (T. Portando, ed., 2008) (Harvard Law and Economics Discussion Paper No. 609).

Based solely on data available to federal banking regulators, Professors Sitkoff and Schanzenbach demonstrated that the "interstate competition for trust funds is both real and intense." Id. at 12-2. They found "strong evidence of a national market for trust funds that is responsive to the interplay between state trust law and federal tax law." Id. at 12-5. Sitkoff and Schanzenbach concluded that "on average, through 2003 a state's abolition of the Rule Against Perpetuities increased its reported trust assets by about $6 billion and its average trust account size by roughly $200,000." These increases were very substantial in any context, but they are particularly so considering estimates that the average state had roughly $19 billion in reported trust assets and an average account size of about $1 million. Id. at 12-2. Through 2003, approximately $100 billion in trust funds, or 10% of the total trust assets reported to federal banking regulators, "poured into states" that abolished the RAP as applied to trusts. Id. at 12-2 and 12-37. Professors Sitkoff and Schanzenbach also note that because their data was limited to federally reporting trustees, their estimates probably *understate* the amount of trust assets that

moved as a result of RAP repeal. Id. at 12-37. North Carolina currently has at least seven "native" trust companies that do not report trust data to federal regulators.[6]

Professors Sitkoff and Schanzenbach characterize the RAP repeal development as a "race to abolish" the RAP, and note that the movement appears to have originated in Delaware. The Delaware General Assembly, in abolishing the RAP, explicitly noted that it did so to attract trust assets and also to maintain Delaware, in the face of competition from other states that had abolished the RAP, as a leading jurisdiction for capital formation and trust business. By the end of 2000, Alaska, Arizona, Illinois, Maine, Maryland, New Jersey, Ohio, and Rhode Island had authorized perpetual trusts. Seven years later, Colorado, Florida, Missouri, Nebraska, Nevada, New Hampshire, Pennsylvania, Utah, Virginia, and Wyoming had followed suit, and seven more states, including North Carolina, were considering legislation to do so. Id. at 12-9 to 12-11. Sitkoff and Schanzenbach also found that a state would be more likely to attract trust funds if it also abolished the state fiduciary income tax, id. at 12-38, but, of course, our General Assembly could rationally decide to repeal the RAP but retain the fiduciary income tax.[7]

Like the Legislatures of Delaware and the other states that modified the RAP, our General Assembly made its decision based in large part on the desire to keep North Carolina competitive in the trust business. Repeal of the RAP followed closely on the heels of North Carolina's 2005 adoption of the Uniform Trust Code and its 2001 adoption of Article 14 of

[6] A list of all entities licensed by the NCCOB to serve court-supervised trusts without posting bond is shown at https://www.nccob.org/Online/BRTS/TrustLicensees.aspx. Most of these entities are banks, but the current list includes seven North Carolina-based trust companies that are not federally regulated: Boys, Arnold Trust Company – Asheville; Franklin Street Trust Company – Chapel Hill; Investors Trust Company – Chapel Hill; Old North State Trust – Siler City; Piedmont Financial Trust Company – Greensboro; The Trust Company of the South – Burlington; and Wakefield Trust Company – Charlotte.

[7] N.C. Gen. Stat. Chapter 150, Article 4, Part 3, §§ 105-160, et seq. (North Carolina fiduciary income tax).

Chapter 53, the banking statute, overhauling trust regulation. The General Assembly also was cognizant of preserving North Carolina's relatively new status as a major banking center.

The economic benefits that could be expected from repeal include, but by no means are limited to:

- Enhanced ability for North Carolinians to achieve their federal tax planning objectives with trust institutions in their home state;
- Enhanced ability of North Carolina trust institutions to compete with those that administer trusts in the many jurisdictions that have repealed the RAP;
- Attraction of trust assets to North Carolina institutions;
- Attraction of existing trust entities and start-up trust entities to North Carolina;
- Retention of trust institution jobs, and creation of more of those jobs;
- Retention of service provider opportunities connected to administration of trusts (for estate planning lawyers, tax accountants, financial advisors, appraisers, and similar professionals and employees of or contractors with such providers), and creation of more of those opportunities;
- General maintenance and enhancement of North Carolina's prominence as a banking center; and,
- Augmentation of North Carolina revenues from various taxes.

IV. CONCLUSION

N.C. Gen. Stat. § 41-23 does not promote, and, in fact, explicitly voids, restraints on alienation that North Carolina courts long have understood to be the kinds of "perpetuities" banned by what is now Section 34 of the North Carolina Constitution. The common-law RAP

may be a matter of some veneration, but it is not a matter of our fundamental law. The policy arguments for RAP repeal may be debated endlessly, but ultimately the question was decided by our General Assembly. In its 2007 session, the General Assembly chose to exercise its constitutional policy-making powers to modify a rule deemed by many to be an overcomplicated trap and, in doing so, to make North Carolina financial institutions that render trust services more competitive with institutions operating in the many states that have repealed or modified the RAP to allow for federal tax planning.

The constitutional issue before this Court results from a mistaken connection of a common-law rule with a constitutional restraint prohibiting actual oligarchy. This Court should grant Plaintiff's Motion for Summary Judgment.

This the 5th day of January, 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 15.8 of the Amended General Rules of Practice and Procedure for the North Carolina Business Court, counsel for the North Carolina Bankers Association certifies that the foregoing Brief, which is prepared using a proportional font, is double-spaced and is less than 7500 words, excluding the case caption, signatures, and certificates of counsel, as reported by the word-processing software.

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