

# **EXHIBIT 5C**

**Howard Johnson Estate**

**Petition to Compel Executors to Account**

STATE OF NEW YORK  
SURROGATE'S COURT - COUNTY OF WESTCHESTER

.....X  
Proceeding to Compel DANIEL SMITH and VICTOR  
JONES, as Executors of the Estate of

**HOWARD JOHNSON,**

Deceased.

PETITION TO COMPEL  
EXECUTORS TO  
ACCOUNT  
(SCPA 2205)

File No. \_\_\_\_\_

.....X

TO THE SURROGATE'S COURT OF THE COUNTY OF WESTCHESTER:

The petition of SUSAN JOHNSON, residing at 117 Deer Path, Bedford, New York  
10506, respectfully states:

1. My husband, HOWARD JOHNSON ("my husband"), died a resident of  
Westchester County on April 4, 2008. In that year (i) his Will, dated October 20, 2003, (ii) the  
First Codicil thereto, dated March 21, 2004, (iii) the Second Codicil thereto, dated December 12,  
1995, and (iv) the Third Codicil thereto, dated May 15, 2007 (collectively, "my husband's Will"  
- copy attached as Exhibit "A") were admitted to probate by this Court, and Letters Testamentary  
and Letters of Trusteeship were issued to DANIEL SMITH and VICTOR JONES on that date.

2 I am a beneficiary of a number of specific bequests under my husband's Will, and  
I am also the income beneficiary and a permissible principal beneficiary of residuary trusts under  
Article SEVENTH of my husband's Will. On information and belief, the Executors have  
collected at least approximately \$17,000,000 of principal through January 31, 2015, but have  
made principal distributions of less than \$900,000 through that date. When queried as to the  
inordinate delay in the distribution of the estate assets (more than seven years, with no  
distribution anticipated in the foreseeable future), Executor Victor Jones stated it was not his  
"policy" to make interim distributions, and that distributions would have to await a final

accounting.

3. Uniform Surrogate's Court Rule 207.42 (effective January 6, 1986) provides, in relevant part:

“(a) Whenever the estate of a decedent has not been fully distributed or a final accounting filed with petition for settlement within ... three years [from the date when the first permanent letters testamentary were issued] if a federal estate tax return is required, the executor ... shall, at or before the end of the first complete month following the expiration of such time, file with the clerk of the court a statement in substantially the following form: [form omitted]

“(b) The court shall thereupon take such steps as it deems appropriate to expedite the completion of the administration of the estate and the distribution of all assets.

“(c) Failure to file such statement will be considered by the court on any application for commissions or legal fees and may constitute a ground for disallowance of commissions or fees.”

4. On information and belief, the Executors have not filed such a report. In a letter dated February 25, 2015, to the Executors (copy attached as Exhibit “B” - hereinafter referred to as the “February 25, 2015 letter to the Executors”), my counsel, John Knight, Esq., requested that the Executors provide him with “a copy of the three year report to be provided to the Probate Court as required by NYCRR. 207.42.” He did not receive a response to that request.

5. The Executors prepared schedules of account for the period from April 4, 2008 through October 31, 2013, which they submitted to Petitioner in early 2014. The Schedules are defective in many respects, and do not contain the information necessary to evaluate the Executors' account. For example, Schedule “G” of these Schedules shows partnership interests on hand with identical market values and inventory values of \$9,071,384.48. There is likewise no schedule of proposed distributions, and unpaid administration expenses are listed as \$-0-, even though, for example, the calculation of commissions on Schedule I shows a balance of commissions due the Executors.

6. Petitioner requested detailed information in order to evaluate the accounting (see, e.g., the February 25, 2015 letter to the Executors), and the response of the Executors has been inadequate. For example, the February 25, 2015 letter to the Executors contained the following requests, among others, for information:

“Please furnish invoices and time records (by date, hours, service and provider) for legal and accounting fees paid (including any payments made after the close of the schedules of account), as would be required in an affidavit of legal services.

“Please provide us with an estimate of the balance of legal and accounting fees for the estate until the conclusion of its administration (which ordinarily would be shown on Schedule C-1 of the accounting).”

We have received no response as to these inquiries.

7. The Executors prepared updated schedules of account, through March 31, 2015. They again declined to include the market value of the estate assets until the accounting was approved, and again submitted a Schedule C-1 (Unpaid Principal Expenses) showing \$-0-, even though, on information and belief, unpaid commissions, legal and accounting expenses are in excess of \$500,000.

8. Executors’ commissions and professional fees paid to companies with which the Executors are affiliated are, in Petitioner’s opinion, exorbitant - approximately 10% of the estate.

a. Schedule I computes Executors’ commissions for the accounting period (through March 31, 2015) at \$879,145.25 (\$439,572.60 per executor). A large part of these commissions (in excess of \$100,000) are attributable to the unjustified delay in making distributions from the estate. According to the revised draft accounting through March 31, 2015, commissions on ordinary income alone of \$3,556,355, even at the lowest marginal rate of 2%, would be approximately \$142,000 for two Executors.

b. On information and belief, Executor Daniel Smith was a principal in the

accounting firm of Smith CPAs, Inc.. He has advised Petitioner (by letter dated August 16, 2015) that “total fees, including expenses, incurred by the Estate for bookkeeping, accounting, taxes and financial consulting expenses from inception, April 4, 2008, through July 31, 2015 amounted to approximately \$480,000. . . .” On information and belief, Executor Daniel Smith has charged the estate for all or most of billable time of his companies, even though he is also claiming a full Executor’s commission. Further on information and belief, Executor Daniel Smith, and/or companies with which he is affiliated, have billed, and received fees from, business entities in which the estate has an interest, and inter vivos trusts of which my husband was the Settlor.

c. On information and belief, Executor Victor Jones is a principal in the law firm of Jones & Grab, Esqs.. As set forth in the revised draft Schedules, total payments to that firm through March 31, 2015 were \$143,572.51. In addition to these legal fees, the Executors have attempted to intimidate Petitioner into accepting the incomplete defective draft schedules of account, by emphasizing that they will hire a very expensive Wall Street lawyer to handle the accounting, at an exorbitant expense to the estate (even though Executor Victor Jones is a member of a prominent law firm which is capable of bringing a judicial accounting).

9. Petitioner also has questions concerning the disclosure given my husband by the executors in having him sign SCPA 2307-a letters, and, due to his poor health, his ability to fully understand disclosure which may have been given.

10. Petitioner respectfully submits that it is in the best interests of my husband’s estate, and of myself and the other beneficiaries, that the Executors be compelled to account. Based on a review of the limited disclosure which the Executors have provided to date, Petitioner anticipates that in a judicial accounting the Executors will be subject to a surcharge of



at least \$500,000, and that they will be subject to removal as Trustees under my husband's Will.

WHEREFORE, Petitioner prays for an order pursuant to SCPA 2205 requiring that Daniel Smith and Victor Jones, as Executors of the Estate of Howard Johnson, file a first and final account within such time and in such manner as this court may deem just and proper.

Dated: August 31, 2015

---

SUSAN JOHNSON

STATE OF NEW YORK            )  
  )ss.:  
COUNTY OF WESTCHESTER    )

I, the undersigned, being duly sworn, say: I have read the foregoing petition subscribed by me and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

---

SUSAN JOHNSON

Sworn to before me this 31st day  
of August, 2015

---

Notary Public

Name of Attorney: White & Knight  
Attn: John Knight  
Address of Attorney: 12 Main Street  
Wassaic, New York 12592

Tel. No: (845) 222-2222

---

John Knight

SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

-----X  
Accounting by MARY McCARTHY as Executor of the Estate of

**AFFIRMATION OF  
LEGAL SERVICES**

**DOROTHY DECEDENT,**

File No. 2013/2345

Deceased.  
-----X

I, JAMES LITTLE ABNER, an attorney duly admitted to practice in the Courts of the State of New York, under penalty of perjury, affirm as follows:

1. I am Counsel to the firm of Capp & Abner. I make this Affirmation of Legal Services in support of the application for a legal fee for my firm made in connection with the administration of the Estate of Dorothy Decedent. My firm's services are detailed below.

**I. Probate Proceeding**

2. My firm prepared all papers necessary for the probate proceeding for Decedent's Will, including petition for probate and for Preliminary Letters Testamentary, citation, Notice of Probate and Affidavit required by Uniform Surrogate Court Rule 207.17(e) [required for attorney/executors].

3. The probate proceeding was made more difficult because Decedent did not have any surviving close relatives (no spouse, no issue, no parents, no brother or sisters, no issue of predeceased brothers or sisters [nieces or nephews], no grandparents [maternal or paternal], no maternal or paternal aunts or uncles, and no children of deceased maternal or paternal aunts or uncles [first cousins].

4. In addition, family records were incomplete, and in some instances were located in foreign countries. Ultimately it was determined that Decedent was survived by four first cousins,

once removed, all of whom live in hollers in the Ozarks.

5. By reason of the time needed to resolve these issues, my firm applied for and obtained Preliminary Letters Testamentary.

6 Ultimately, all distributees were identified and located. A family tree was prepared for the probate proceeding, the distributees were served with process, and the Court determined that jurisdiction was complete.

7 There were difficulties with identifying and locating legatees, and service of Notice of Probate on them.

a. There were eleven legatees (taking into account pre-deceased legatees, and excluding distributees who were also legatees).

b. Adjustments had to be for fractional “gifts-over” for legacies to pre-deceased legatees.

c. Locating and service of four of the legatees was made more difficult by the fact that four of them live outside the United States (two in Germany, one in England and one in the Netherlands).

## **II. Administration of Estate**

8 My firm rendered services in the administration of Decedent’s estate, including:

a. Assisting the Executor in marshaling Decedent’s assets, liquidating estate assets, and payment of all creditors. This included obtaining a Court Order for opening Decedent’s Safe Deposit Box, and assisting the Executor with the opening of the box.

b. Preparation and filing in Court an inventory for the estate.

c. Registration of Estate with New York Attorney General’s Office.



d. Assisting the accountant for the estate with preparation of fiduciary income tax returns for the estate, including obtaining an Employer Identification Number for the Estate.

9. My firm also rendered services with the payment of legacies, including preparation of Receipts and Releases, correspondence with the legatees, and seeing to the execution of the Receipts and Releases.

10. There were also special considerations by reason of the Executor also being affiliated with my law firm.

a. My firm determined that there was insufficient compliance with SCPA 2307-a and advised the Executor that the commissions payable to her would be one-half of the statutory commissions to which she would otherwise be entitled pursuant to SCPA 2307.

b. My firm also advised that, pursuant to Uniform Surrogate's Court Rule 207.62, no payments on account for Executor's commissions and legal fees should be made unless and until approved by the Court in the Executor's accounting.

### **III. Judicial Accounting Proceeding**

11. My firm has prepared and will prepare all of the papers necessary for this judicial accounting proceeding (including Petition, Schedules of Account and Citations), and saw to the service of the citation on all necessary parties.

### **IV. Fixing Compensation for My Firm**

12. The seminal case establishing criteria for fixing attorneys fees in matters relating to estates is Matter of Potts.

“In general, the court, in determining the justice and reasonableness of an attorney's claims for services, should consider the time spent, the difficulties involved in the matters in which services were

rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained [citations omitted].”<sup>1</sup>

These factors will be discussed below.

**A. Difficulties Involved**

13. As set forth above, this administration was made difficult by, among other things, the facts that:

- a. Decedent did not have any surviving close relatives.
- b. There were numerous legatees, some of whom live in foreign countries
- c. Charitable legatees and the New York Attorney General were involved.
- d. The Executor is also an attorney who drafted Decedent’s Will, and is

affiliated with my law firm.

**B. Results Achieved**

14. Good results were achieved. All necessary parties were identified and served in the probate proceeding, Decedent’s Will was admitted to probate, estate assets were marshaled, creditors paid, all pecuniary legacies paid, and all legal requirements particular to (i) charitable interests in the estate and (ii) the Executor being the attorney/draftsperson and affiliated with my firm have been attended to.

**C. Amount Involved; Time Spent**

15. Total assets of Decedent’s estate had a value of \$837,355 (\$579,354 probate assets and \$257,981 non-probate assets)

---

<sup>1</sup> 213 A.D. 59, 251 N.Y.S. 655 (4<sup>th</sup> Dept. 1925, aff’d, 241 N.Y. 593, 150 N.E. 568 (1925); see also Matter of Freeman, 40 A.D.2d 397, 341 N.Y.S.2d 511 (4<sup>th</sup> Dept. 1973), aff’d, 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480 (1974).

16. A computer printout of time entries recorded by attorneys and employees of Capp & Abner through November 30, 2013 is attached. It shows that the following persons expended 103.26 hours for which time charges were recorded in connection with the administration of Decedent's estate, with a billing rate of \$375/hour for attorney time and \$110/hour for paralegal time, for a total of \$15,079.79<sup>2</sup> of time charges:

<u>Name</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Value</u>
James Little Abner, Esq.	7.90	\$375.00	\$2,962.50
Sheila Jones, Paralegal	110.16	\$110.00	<u>\$12,117.29</u>
			\$15,079.79

**D. PROFESSIONAL STANDING**

17. I received a B.A. cum laude from Dogpatch College in 1977, and a J.D. cum laude from Dogpatch Law School in 1980. I was admitted to the New York bar in 1971, and have concentrated in the area of trusts and estates since graduation. I (a) am a member of the New York State Bar Association, (b) have lectured in its Practical Skills Courses in Accounting and in Probate and Administration of Estates and Estate Planning and Will Drafting, (c) have also lectured on accountings at the Dutchess County CLE Program for Guardians ad Litem, (d) have presented CLE Courses for the Dutchess County Bar Association on the 2009 and 2010 Amendments to the New York Power of Attorney Law, and (e) have published articles in the field.

18. The paralegal, Sheila Jones, received her Associate in Applied Science in Business-Paralegal from Ulster County Community College in 2009. She studied Accounting at the State

---

<sup>2</sup> This time does not include any time spent in the preparation of this Affirmation. In addition, it does not include 5.80 hours of James Little Abner and 7.50 hours of Sheila Jones expended by them, but for which time was not billed).

University of New York - Oneonta.

**E. Value of Services**

18. . Taking into account the relevant factors, including time spent, I respectfully submit that the fair and reasonable value of my firm's services is \$15,000.00.

**F. Disbursements**

19. My firm applies for allowance of the following disbursements:

Dutchess County Surrogate's Court Fees

Probate filing fee (additional fees)	\$625.00	
Accounting Petition filing fee	\$1,250.00	<u>\$1,875.00</u>
		\$1,875.00

**G. Aggregate Fees and Disbursements**

25. My firm applies that its fees through November 30, 2013 be fixed in the amount of \$15,000.00 (of which no part has been paid), and that disbursements be fixed in the amount of \$1,875.00 (of which no part has been paid), for an aggregate payment of \$16,875.00 .

Dated: December 6, 2013  
Stanfordville, New York

---

JAMES LITTLE ABNER

**[Attach billing sheet printout]**