

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE
GENERAL COURT
OF JUSTICE
SUPERIOR COURT
DIVISION
12-CVS-8740

THE KIMBERLEY RICE
KAESTNER 1992 FAMILY
TRUST,

Plaintiff,

v.

NORTH CAROLINA
DEPARTMENT OF REVENUE,

Defendant.

AFFIDAVIT
OF DAVID H.
BERNSTEIN

(Filed Jun. 8, 2014)

I, David H. Bernstein, being duly sworn, depose
and say:

1. I am over eighteen (18) years of age, am competent to testify, and have personal knowledge of the matters contained herein.

2. I was, and remain, the trustee of The Kimberley Rice Kaestner 1992 Family Trust (the “Plaintiff Trust”) from 2005 and through all times relevant to this action.

3. The Joseph Lee Rice, III Family 1992 Trust (the “Family Trust”) was created under an agreement dated December 30, 1992 (the “Trust Agreement”) between Joseph Lee Rice III as settlor (the “Settlor”) and

William B. Matteson as trustee (the “Initial Trustee”). Attached as Exhibit A is a true and correct copy of the Trust Agreement.

4. The Family Trust was created in New York, and the Trust was and is governed by New York law.

5. At the Family Trust’s creation:

- a. The Settlor was a resident and domiciliary of New York;
- b. The Initial Trustee was a resident and domiciliary of New York;
- c. The primary beneficiaries of the Family Trust were the Settlor’s descendants, none of whom were residents or domiciliaries of North Carolina;
- d. The contingent beneficiaries of the Family Trust were the Settlor’s spouse and sister, neither of whom were residents or domiciliaries of North Carolina;
- e. All of the assets contributed to the Family Trust were located outside of North Carolina; and
- f. The Family Trust was a separate tax paying entity subject to New York income tax.

6. In 1995, the Initial Trustee moved to Florida.

7. On December 30, 2002, pursuant to Section 1.2 of the Trust Agreement, the Family Trust was divided into separate share trusts, one for each of the

Settlor's three children, one of whom is Kimberley Rice Kaestner (formerly Kimberley E. Rice). This is the Kimberley Rice Kaestner 1992 Family Trust ("Plaintiff Trust").

8. At the time the Family Trust was divided into separate share trusts, Kimberley Rice Kaestner was a resident and domiciliary of North Carolina, having moved to North Carolina in 1997, almost five years after the Family Trust's creation.

9. The separate share trusts are administered by the trustee under the terms of the Trust Agreement (Exhibit A, Art. 1, § 1.2.)

10. The current beneficiaries of the separate share trust for the benefit of Kimberley Rice Kaestner are Kimberley Rice Kaestner and her three children, all of whom were residents and domiciliaries of North Carolina in the tax years at issue.

11. The contingent remainder beneficiaries of the Plaintiff Trust, none of whom are North Carolina residents, are the Settlor's other two children (both of whom are residents and domiciliaries of New York), the Settlor's spouse (who also is a resident and domiciliary of New York), and the Settlor's sister (who is a resident and domiciliary of Connecticut).

12. The Family Trust, consisting of the three separate share trusts, is an irrevocable *inter vivos* trust (Exhibit A, Art. 10.)

13. In 2005, the Initial Trustee resigned, at which time the Settlor appointed me to serve as

trustee (the “Trustee”). When appointed I was a Connecticut resident and domiciliary and remain so today.

14. Between 2005 and 2008, the assets held in the Plaintiff Trust consisted of equities, mutual funds, and investments in partnerships. The custodian for these assets was State Street Bank (formerly Investors Bank & Trust), located in Boston, Massachusetts. Later, I changed the custodian to Cambridge Appleton Trust, also located in Boston, Massachusetts. Other ownership documents related to assets held in the Plaintiff Trust were located at my offices at Debevoise & Plimpton LLP, in New York, New York. The financial books and records of the Plaintiff Trust were kept at the offices of Eisner Amper LLP, in New York, New York, and the legal records of the Plaintiff Trust were maintained at my offices in New York, New York. Eisner Amper LLP has prepared all the tax returns for the Plaintiff Trust in New York, New York. Eisner Amper LLP and Debevoise & Plimpton LLP prepared the trust accountings in New York, New York.

15. None of the Plaintiff Trust’s assets was located in North Carolina, and none of the Plaintiff Trust’s income was derived directly from a North Carolina source. The Plaintiff Trust owned no real or personal property located in North Carolina. In 2005, one of the investments of the Family Trust was a partnership interest in the DE Shaw Composite Fund, LLC. The Family Trust held a 0.0827% non-managing member interest in this fund. This fund, in turn, invested in other investments, through which the Family Trust incurred a \$0.11 indirect loss attributable to an

unknown North Carolina source. One-third of this loss was attributed to Plaintiff Trust in the amount of approximately \$0.04. In 2007, one of the investments of the Rice Family Investors (KER) (“KER Investors”), an entity wholly owned by Plaintiff Trust, was a partnership interest in Magnitude U.S. Partners Fund. KER Investors held a 0.6846% non-managing member interest in that fund. That fund, in turn, invested in other investments, through which KER Investors incurred an indirect \$2.10 net loss attributable to an unknown North Carolina source.

16. The beneficiaries have no right to the assets or income of the Plaintiff Trust, as distributions are made at the sole discretion of the Trustee. (Exhibit A, Art. 1, § 1.2(a).) The beneficiaries have no right to control the investment of the Plaintiff Trust assets, and I did not take any direction or accept any recommendation from the beneficiaries concerning my investment decisions. To the contrary, to assist me with investment decisions and allocations, I consulted solely with Rocaton Investment Advisors, LLC, a company located in Norwalk, Connecticut. I had complete discretion to make all investment decisions on my own, taking into account Rocaton’s recommendations, and I exercised that discretion without any input from the beneficiaries.

17. From the Trust’s creation through and including the 2008 tax period, no distribution was made to a North Carolina beneficiary.

18. In 2009, the Plaintiff Trust was decanted with a significant portion of its assets transferred into the KER Family Trust.

19. The Plaintiff Trust paid taxes to North Carolina on all of its income from 2005 to 2008.

20. Over these four tax years, the Plaintiff Trust paid to North Carolina taxes in an amount exceeding \$1.3 million.

21. None of the Plaintiff Trust's income taxed by North Carolina was distributed to anyone anywhere, let alone to any beneficiary in North Carolina.

22. The Plaintiff Trust sought refunds on the taxes paid in the following amounts:

- a. \$79,634.00 for the 2005 tax year;
- b. \$106,637.00 for the 2006 tax year;
- c. \$1,099,660.00 for the 2007 tax year,
- d. \$17,241.00 for the 2008 tax year.

23. The Department denied the Plaintiff Trust's request for a refund on February 11, 2011.

24. During discovery in this matter the Plaintiff Trust produced records of the Family Trust and of the Plaintiff Trust. The records included: accountings, documents evidencing investment decisions, and communications with the Family Trust's and Plaintiff Trust's accountants and investment advisors. The records also included records of my limited contacts with the beneficiaries, none of which occurred in North Carolina.

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Dated: July 2, 2014

/s/ David H. Bernstein
David H. Bernstein

SWORN to and subscribed before me.

This 2nd day of July, 2014

/s/ Susan Bange Avram
Notary Public for the State
of New York

My Commission Expires: 7/31/2019

[NOTARY STAMP]

[Certificate Of Service Omitted]

EXHIBIT A

THIS AGREEMENT is made and delivered as of the 30th day of December, 1992, between JOSEPH LEE RICE, III, of New York, New York (hereinafter referred to as the "Settlor"), and WILLIAM B. MATTESON of New York, New York (hereinafter and his successor referred to as the "Trustee"), creating the "Joseph Lee Rice, III Family 1992 Trust".