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IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In Re: Estate of James Joseph Pellien, Deceased | Commissioner's Report
Fiduciary Number FI-2006-0001904 | of Debts and Demands

To the Honorable Judges of the Circuit Court of Fairfax County, Virginia:

At the request of Peter T. Straub, counsel of the above estate, the undersigned gave the notice required under Virginia Code § 64.1-171, setting the 30th day of December, 2008, at 10:00 a.m. at the office of your commissioner in Fairfax, Virginia, as the time and place for receiving proof of debts and demands against the estate of James Joseph Pellien. At the said time and place, the said Peter T. Straub along with Linda Miller Pellien, executor, appeared on behalf of the estate. No person appeared to offer proof of any debts or demands against said estate.

Five creditors filed claims against the estate with the commissioner of accounts in the following amounts:

American Express	\$ 4,742.95
FIA Card Services	\$ 3,072.51
Navy Federal Credit Union	\$ 36,025.00
Omnium Worldwide	\$ 5,544.07
Richard R. Martin	\$ 2,011.05

The undersigned provided notice of the hearing to each of the claimants, a copy of which is attached hereto as Exhibit 1. The estate does not dispute any claim filed with the commissioner; therefore, each such claim is allowed in the amount shown. No other creditor filed a claim with your commissioner.

The estate provided an additional list of creditors with claims against the estate at the hearing in this matter:

Art Salatin	\$ 1,271.00
Bank of America	\$ 3,072.51



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WILL BK 00851 PG 0299
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Estate PELLIE, JAMES JOSEPH
Recorded in
FAIRFAX COUNTY CIRCUIT COURT
TESTE: JOHN T. FREY

Fortress Construction, LLC	\$ 362.00
Internal Revenue Service	\$ 1,585.00
Linda Pellien (funeral expenses)	\$ 2,015.00
Shenandoah Avionics, LLC	\$ 703.91
Showalter Aviation	\$ 872.00
Suburban Credit Corp.	\$ 117.00
Virginia Department of Taxation	\$ 291.26

The estate did not provide notice of the hearing to these claimants. The Virginia Code requires such notice to the holder of any disputed claim. The estate does not dispute any of the claims against the estate; therefore, such notice is not statutorily required, and each claim is allowed in the amount shown.

Linda Miller Pellien filed claims for statutory allowances pursuant to Virginia Code §§ 64.1-151.1, 151.2 and 151.3¹ as follows:

Family Allowance	\$18,000.00
Exempt Property	\$15,000.00
Homestead Allowance	\$15,000.00

A copy of the elections for the family allowance, the exempt property allowance and the homestead allowance were filed with the Clerk's office and your commissioner's office on November 9, 2007, within one year of the decedent's death. These elections appear to be in order and the statutory allowances are allowed in the amounts shown.

The estate's inventory indicates initial assets of \$305,271.41 within the estate. This value consisted principally of a rental residence in Basye, Virginia, appraised at \$260,000.00 on January 11, 2007. The executor also managed the decedent's quarter timeshare interest at the Royal Surf Club in Dewey Beach, Delaware. The executor generated income for the estate by renting out both properties throughout its administration. In an effort to preserve the Virginia real estate from foreclosure, to produce rental income

¹ It should be noted that the election of a homestead allowance by the decedent's wife makes her ineligible to receive any inheritance from the estate; however, because the estate is insolvent it appears unlikely that any such inheritance would be forthcoming.

for the estate, and to sell both properties on the market, the executor continued mortgage payments, paid for maintenance expenses, paid utility bills, and prepared both properties for sale. Once it became apparent that the estate had no equity in the Virginia property, the executor ceased mortgage payments and all other expenditures as to that property. “One of the foremost duties of an executor is to preserve the value of estate property during administration.” *Friedberg v. Hague Park Apartments Ltd. Partnership*, 61 Va. Cir. 589, 2001 WL 34157592 at *6 (Norfolk, 2001); *See generally*, 31 AM. JUR. 2d *Executors and Administrators* § 497. Your commissioner is satisfied that these payments were all proper administrative expenses of the estate, expended pursuant to an effort by the executor to preserve the estate’s main assets and maximize the beneficiaries’ interest and any potential creditor’s interest in the residue of said estate. Therefore, your commissioner finds that said expenditures are properly considered priority 1 administrative expenses.

The executor was unable to sell the rental residence in Basye, Virginia for a price exceeding its mortgage and Navy Federal Credit Union consented to a sale for less than the outstanding mortgage balance. Navy Federal Credit Union has made no claim for the deficiency arising from such sale and the fiduciary advised your commissioner that Navy Federal Credit Union waived its right to pursue any deficiency claim.

The executor is unable to sell the decedent’s quarter timeshare interest at the Royal Surf Club in Dewey Beach, Delaware. The executor reported to your commissioner that similar properties at the same location have also been unable to sell, even at prices well below their appraised value.

An executor is allowed a 5% commission on the inventory value of a property when a power of sale is executed. While the executor in the case at hand never executed her power of sale over the Basye, Virginia property, the executor did possess said power of sale and attempted to preserve and sell the real estate on the market. Accordingly, your commissioner will allow the executor a 2.5% commission on the inventory value of said real estate² in addition to a 5% commission on the balance of the estate’s inventory value. Therefore, your commissioner will allow \$8,763.57 as a priority 1 executor commission. On the estate’s first account, approved by this office on

² No commission is allowed upon the value of the Dewey Beach, Delaware time-share as this asset is not part of the decedent’s Virginia probate estate.

August 7, 2008, the executor indicated she had closed the decedent's Bank of America account #6217 and accepted its balance in the amount of \$4.27 as part of her fiduciary compensation. After deducting this amount, a further \$8,759.30 may be provided to the executor in total satisfaction of her fiduciary compensation.

The estate is insolvent and unable to pay all claims in full. Therefore, all claims are to be satisfied pursuant to Virginia Code § 64.1-157 according to the priorities set forth in the statute. Pursuant to Virginia Code § 64.1-157, all administrative expenses incurred by the fiduciary should be reimbursed first as a priority 1 claim. The claim by Linda Pellien for statutory allowances should be treated as a priority 2 claim. Linda Pellien's claim for funeral expenses exceeds the statutory maximum accorded priority under Virginia Code § 64.1-157 as a priority 3 claim. Therefore, the first \$2,000.00 of said claim should be satisfied as a priority 3 claim; the balance should be treated as a priority 9 claim. The claim by the Internal Revenue Service is a priority 4 claim; the claim by the Virginia Department of Taxation is afforded priority 8 treatment. All other claims are priority 9 claims and should be satisfied at their pro rata share of the balance of the estate.

Based upon representations by the executor at the hearing, your commissioner finds that there are likely only enough assets in the estate to satisfy the administrative expenses of the estate and to satisfy partially the claim for statutory allowances by Linda Pellien. Pursuant to § 64.1-157 of the Virginia Code, the General Assembly has established certain priorities for the payment of claims in insolvent estates. That section provides that any allowances provided in Article 5.1 of Chapter 6 of Title 64.1, including the family allowance, exempt property allowance, and homestead allowance, shall be paid before claims for debts and taxes with preference under federal law.

There is no question that the relative priority of federal tax liens is exclusively a matter of federal law.³ There are a number of decisions which accord priority to the federal tax lien over various statutory allowances. Where state homestead laws do not create a present property interest, but merely confer privileges and exemptions, a federal tax lien is good against

³ United States v. Cameron, 248 Va. 290, 448 S.E.2d 410 (1994).

homestead property.⁴ Similarly, the right to set-off allowances for the family under state law has been held to be ineffective against a federal tax lien.⁵

The Internal Revenue Service has advised personal representatives in the past that a claim of the United States Government shall be paid first when the estate of a deceased debtor, in the custody of an executor or an administrator, is not enough to pay all the debts of a debtor. The Internal Revenue Service has further advised personal representatives that they may be personally liable if any debt of a decedent or an estate is paid prior to the unpaid claims of the Government. Notwithstanding the stated position of the Internal Revenue Service, the more favored rule is that statutory allowances entitled to priority in the disbursement of an estate are expenses of administration rather than debts of the decedent, and therefore, the allowances are entitled to priority over a federal tax lien. In the leading case of *Estate of Igoe v. U.S.*,⁶ the Missouri Supreme Court held that

homestead and family allowances are debts of the estate and not debts of the decedent. Homestead and family allowances are similar to funeral expenses and costs of estate administration.⁷

The Court noted that the Internal Revenue Service had not objected to the payment of funeral expenses and administrator's fees prior to its claim. The Court therefore concluded that the exceptions to the priority of the federal lien set forth in the Internal Revenue Code were not as inclusive a list as the Government represented. The Court granted priority to claims for homestead and family allowances.⁸

⁴ *Shaw v. United States*, 331 F.2d 493 (9th Cir. 1964); *United States v. Heasley*, 170 F. Supp. 738 (D.C.N.D. 1959).

⁵ *In re Rosenfield's Will*, 36 Misc. 2d 284, 232 N.Y.S. 2d 610 (1962).

⁶ 717 S.W.2d 524 (Mo. 1986).

⁷ 717 S.W.2d at 527.

⁸ *See also*, *Schwartz v. C.I.R.*, 560 F.2d 311 (8th Cir. 1977)(Widow's and family allowances are not debts within contemplation of 31 U.S.C. §191, 192); *In re Estate of Funk*, 221 Ill.2d 30, 849 N.E.2d 366 (2006)(Statutory allowances are not debts and claims of U.S. do not take priority over allowances); *In re Estate of Brooks*, 134 Ill. App.3d 993, 481 N.E.2d 89 (1985)(Spousal and children's awards took priority over federal claims for unpaid taxes); *In re Carl's Estate*, 94 N.E.2d 239 (Ohio Probate Court 1950)(Allowances arise out of marriage relation and take precedence over federal debt claims). *See, generally*, 31 AM. JUR. 2d, *Executors and Administrators* § 663 (federal priority over debts of deceased does not include debts incurred by the estate, such as administrative expenses) and § 679 (statutory allowances not asset of the estate nor available for payment of debts); 35 AM. JUR. 2d, *Federal Tax Enforcement* §253, n. 15 (estate property was not owned by decedent, but by heirs, and was subject to expenses of administration and statutory allowances before federal priority over other debts applied).

The Internal Revenue Service has now recognized in its administrative manual that the priority accorded the government is subject to administrative expenses and homestead/family allowances when seeking to collect from a decedent's estate, stating:

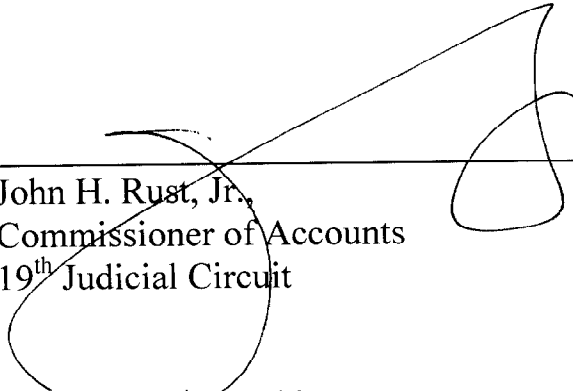
The IRS should concede reasonable administrative expenses, homestead and family allowances in insolvency proceedings even where the IRS is asserting priority based on the tax lien rather than the Federal Priority Statute. While the argument can be made that the tax lien should prevail over homestead and family allowances, the decision has been made not to litigate this issue unless the allowances are excessive or unreasonable.⁹

Thus, although there are no Virginia cases on point, your commissioner is of the opinion that Virginia's statutory allowances should be accorded priority over a federal tax lien asserted against the decedent. The personal representative should note, however, to the extent that there are taxes due to the Internal Revenue Service from the estate rather than from the decedent, the rationale articulated in *Igoe* may not be applicable in the case at hand.

Your commissioner directs that the estate first satisfy the reasonable and necessary expenses of the estate's administration as well as such executor's commission as the fiduciary may elect to receive, not to exceed the amount allowed. Subsequently, the estate should satisfy the claim for statutory allowances by Linda Pellien to the greatest extent possible. Linda Pellien indicated at the hearing that she is willing to accept the decedent's quarter time share interest at the Royal Surf Club in Dewey Beach, Delaware in partial satisfaction of her claim for statutory allowances. Your commissioner finds this reasonable and will approve a disbursement as such. If any assets remain after the satisfaction of Linda Pellien's claim, the balance of the estate should be distributed to the creditors of the estate pursuant to the priorities set forth by Virginia Code § 64.1-157.

⁹ IRM 5.17.13.3(6).

Respectfully submitted this 31st day of December, 2008.



John H. Rust, Jr.,
Commissioner of Accounts
19th Judicial Circuit

Commissioner's Fee for this Report	\$ 250.00	
<u>Publication costs</u>	<u>\$ 10.00</u>	
Total Amount Due	\$ 260.00	- UNPAID

cc: Linda Miller Pellien, Executor
Peter T. Straub, Esquire
American Express
Art Salatin
Bank of America
FIA Card Services
Fortress Construction, LLC
Internal Revenue Service
Navy Federal Credit Union
Omnium Worldwide
Richard R. Martin
Shenandoah Avionics, LLC
Showalter Aviation
Suburban Credit Corp.
Virginia Department of Taxation

I, JOHN T. FREY, Clerk of the Circuit Court of Fairfax County, Virginia, do hereby certify that the foregoing Account or Report has been filed in my office for more than fifteen days, and that no exceptions have been filed thereto, and the same is now recorded pursuant to the provisions of §§26-33 and 26-35 of the Code of Virginia, as amended.

Teste: JOHN T. FREY, Clerk

1/2/09

Date

By: 

Deputy Clerk



John H. Rust, Jr.
Commissioner of Accounts

COMMONWEALTH OF VIRGINIA
CIRCUIT COURT OF FAIRFAX COUNTY
OFFICE OF THE COMMISSIONER OF ACCOUNTS
THE FAIRFAX BUILDING
10555 Main Street, Suite 500
Fairfax, Virginia 22030
703-667-4900



Joseph A. Barsanti
Deputy Commissioner

July 28, 2008

Bank of America c/o FIA Card Services NA 4161 Piedmont Parkway NC4-105-03-56 Greensboro, NC 27410	Navy Federal Credit Union Patricia Wilson P.O. Box 3002 Merrifield, VA 22116-9887
Omnium Worldwide Inc. 7171 Mercy Road, Suite 400 PO Box 6618 Omaha, NE 68106	Estate Recoveries, Inc. c/o American Express P.O. Box 24566 Baltimore, MD 21214
Richard R. Martin 505 Lewis Street Vienna, VA 22180	

RE: Estate of James Joseph Pellien
Fiduciary No. FI-2006-0001904

Dear Sir or Madam:

Enclosed is a notice of a debts and demands hearing in the captioned estate at which your claim will be considered. Contested claims must be proven by satisfactory evidence. Contested claims not proven by satisfactory evidence are subject to being disallowed. A purpose of the hearing is to receive such evidence as you may choose to offer in support of your claim.

Very truly yours,

John H. Rust, Jr.
John H. Rust, Jr.
Commissioner of Accounts
By SW

JHRJ/tlw
Enclosure

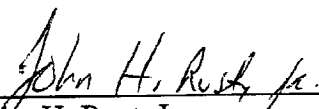
Exhibit 1

IN THE OFFICE OF THE COMMISSIONER OF ACCOUNTS
CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

IN RE: Estate of James Joseph Pellien)
Deceased) **NOTICE**
Fiduciary No. FI-2006-0001904)

Pursuant to the provisions of §64.1-171 of the Code of Virginia, 1950, as amended, notice is hereby given that the undersigned Commissioner of Accounts has appointed the 30th day of December, 2008, at 10:00 A.M., at his office at 10555 Main Street, Suite #500, Fairfax, Virginia, as the time and place for receiving proof of debts and demands against the estate of James Joseph Pellien, at the request of Peter T. Straub, Attorney, of said estate.

Given under my hand as Commissioner of Accounts this 3rd day of December, 2008.



John H. Rust, Jr.
Commissioner of Accounts for
Fairfax County, Virginia
By Au

JHRJ:tlw