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OF COUNSEL:  
BARRON & STADFELD

\*Also admitted in NH and ME

August 22, 2011

Scott Nickerson, Clerk  
Barnstable Superior Court  
Post Office Box 425  
Barnstable, Massachusetts 02630

Re: Torres et al v. Torres et al  
No: BACV2011-00433

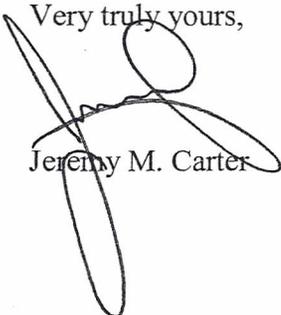
Dear Mr. Nickerson:

Enclosed please find the following documents for filing with your office relative to the above-entitled matter:

1. Defendant's Motion to Dismiss for Failure to State a Claim;
2. Memorandum of Law;
3. Plaintiffs' Response and Opposition to Motion to Dismiss w/exhibits;
4. Affidavit in Support of Response and Opposition to Motion to Dismiss;
5. Index of Documents;
6. Affidavit in Compliance with Rule 9A

If you have any questions, please do not hesitate to contact me.

Very truly yours,

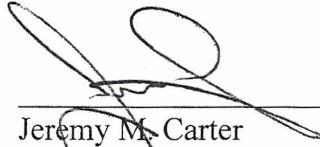
  
Jeremy M. Carter

JMC/jrg  
Enclosures

Cc: Jesse Torres, III  
Jennifer Adams  
Sophie Torres



Respectfully submitted,  
Sophie J. Torres,  
By her attorney



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Jeremy M. Carter  
BBO #542118  
Wilkins and DeYoung  
270 Winter Street  
Hyannis, MA 02601  
(508) 771-4210

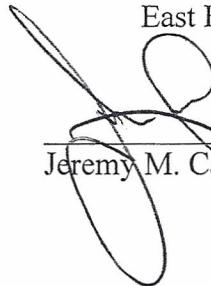
Dated: August 3, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Motion to Dismiss for Failure to State a Claim has been sent via first class mail, postage prepaid this 4 day of August, 2011 to the Plaintiffs:

Jesse E. Torres, III  
562 Waquoit Highway  
East Falmouth, MA 02536

Jennifer J. Adams  
562 Waquoit Highway  
East Falmouth, MA 02536



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Jeremy M. Carter, Esq.



he drafted on behalf of his mother, Sophie Torres, with respect to his claims.

The different counts are under the same cause of action, to wit a breach of contract. Count I deals with the Defendant, Sophie Torres, allegedly signing over certain properties to her son, Plaintiff, Jesse Torres, III. The transfer, according to Count I, consisted of property rights to land known as “Grandma’s house”, “Horse property” and “Uncle Fred’s house”. The allegation is that the Defendant, Sophie Torres, breached this contract by executing a new Will, thus invalidating the Will created by the Plaintiff.

Count II is a breach of contract under the same theory as Count I, except that Count II deals with property known as the “Farmhouse”.

Count III is essentially the same as the first two counts, except that it deals with property known as the “Waquoit” home, which is located at 562 Waquoit Highway, East Falmouth, MA.

Count IV is the same as the previous counts, except that it deals with property which consists of six (6) acres +/- located directly across the street from the “Farmhouse”, which has an address of 345 Carriage Shop Road, East Falmouth, MA.

### **ARGUMENT**

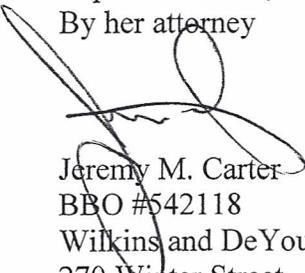
The Plaintiffs’ Complaint concerns a Will that the Plaintiffs drafted and had the Defendant, Sophie Torres, sign on or about April 24, 2009. Disregarding the suspected circumstances under which this Will was executed and the motives of the Defendant at the time of its execution, the Plaintiffs’ claims are simply not a cause of action that can be prosecuted at this time.

Massachusetts case law is clear that, even in the case of an enforceable contract to make a Will, a plaintiff cannot recover from a defendant for breach of contract in such a matter until such time for performance has arrived, which is at the time of death. See Johnson v. Starr, 321

Mass. 566, 569 (1947), citing *Daniels v. Newton*, 114 Mass. 530. It is clear from Johnson v. Starr, that a claim for an anticipated breach of contract is not legally valid until the death of the promissor/declarant; and therefore, the Plaintiffs' claims against Defendant, Sophie Torres, for breach of contract cannot be prosecuted, nor can the Plaintiffs recover on their claims, at this time. Further, as stated in Daniels v. Newton, even if there is an indication of denial of the obligation, and a purpose to refuse compliance with the terms of a written agreement, it is in itself not a breach of the agreement. See Daniels v. Newton, 114 Mass. 530, 542 (1874).

WHEREFORE, the Defendant, Sophie Torres, requests dismissal of Counts I through IV of the Plaintiffs Complaint.

Respectfully submitted,  
Sophie J. Torres,  
By her attorney



Jeremy M. Carter  
BBO #542118  
Wilkins and DeYoung  
270 Winter Street  
Hyannis, MA 02601  
(508) 771-4210

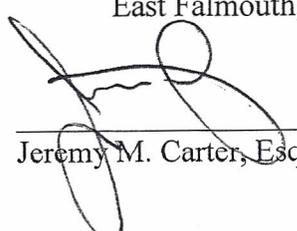
Dated: August 2, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Memorandum of Law has been sent via first class mail, postage prepaid this 4 day of August, 2011 to the Plaintiffs:

Jesse E. Torres, III  
562 Waquoit Highway  
East Falmouth, MA 02536

Jennifer J. Adams  
562 Waquoit Highway  
East Falmouth, MA 02536



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Jeremy M. Carter, Esq.

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

SUPERIOR COURT

\_\_\_\_\_ )  
 )  
 JESSE E. TORRES III )  
 )  
 JENNIFER J. ADAMS )  
 )  
 Plaintiffs )  
 )  
 vs. )  
 )  
 SOPHIE J. TORRES )  
 )  
 JESSE E. TORRES IV )  
 )  
 DEBTMERICA, LLC. )  
 )  
 DONALD F. TORRES )  
 )  
 Defendants )  
 )  
 \_\_\_\_\_ )

Civil Docket # BACV2011-00433

**PLAINTIFFS' RESPONSE AND OPPOSITION TO DEFENDANT SOPHIE J. TORRES' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM; REQUEST FOR HEARING**

The Plaintiffs, Jesse E. Torres III and Jennifer J. Adams, in the above-entitled matter, hereby oppose the Defendant Sophie J. Torres' Motion to Dismiss for Failure to State a Claim, dated August 3, 2011, and requests a hearing on this matter.

In the Defendant Sophie J. Torres' motion and attached Memorandum, the Defendant's argument is based on assumptions and innuendos rather than facts. The Defendant, through Counsel, then attempts to loosely make fit case law to support these assumptions.

In support of this opposition, the Plaintiffs reallege and reassert paragraphs 1 through 134 of their Complaint, which are incorporated herein by reference and all attachments to said complaint as if specifically attached hereto.

We ask the Court take Judicial Notice: there was a delay in service of the Defendant Sophie J. Torres' above-referenced motion which did severely limit the Plaintiffs' time available to respond. While the motion was dated on August 3, 2011, the certificate of service was dated August 4, 2011, the cover letter was dated August 5, 2011 and the motion was intercepted and withheld by the Defendant Sophie J. Torres until the evening of August 8, 2011, when it was finally delivered,

damaged and solely to the Plaintiff Jesse E. Torres III. We have attached our letter to Counsel for the Defendant concerning this matter and marked it exhibit "HH".

**I. PROCEDURAL GROUNDS OF DISMISSAL: MASS. SUPERIOR COURT RULE 9 (A)(4)**

Of procedural note, and as grounds to dismiss the Defendant Sophie J. Torres' Motion, there is no sworn affidavit attached to the Defendant's Motion as required by Massachusetts Superior Court Rule 9 (a)(4), yet the Defendant Sophie J. Torres through Counsel, starts their argument, in an apparent attempt to prejudice the Court, by stating as fact:

"Disregarding the suspected circumstances under which this Will was executed and the motives of the Defendant at the time of its execution..."

In view of the Defendant Defendant Sophie J. Torres' unsourced statement, we feel obligated to bring forth the true facts; the Defendant Sophie J. Torres' current attorney was not present at the execution of the Will, nor is there any sworn affidavit from the Defendant Sophie J. Torres. Therefore, as such we set forth, the Court need not consider the Defendant's motion.

Of specific mention is that there were numerous other documents executed that day, for which there was no benefit to the Plaintiff Jesse E. Torres III, including but not limited to the execution of the Defendant Sophie J. Torres' Health Care Proxy. The Defendant through Counsel had the opportunity to contact, and should have contacted, the witnesses, who were the long-term neighbors of the Defendant Sophie J. Torres, and whose notarized signatures are attached to said documents, before making such unsubstantiated claims, to wit, that the circumstances under which the documents were executed "were suspect". We assert that if the Defendant Sophie J. Torres through Counsel had found such prejudicial claims to be true, they most assuredly would have attached a sworn affidavit from said witnesses stating these facts.

We ask that the Court take notice that no such affidavit by the witnesses was attached to the above-captioned motion. Further, the Plaintiffs do state that the circumstances under which the execution of these documents took place was quite the opposite to the unfounded claims made by the Defendant Sophie J. Torres through Counsel, to this Honorable Court.

## II. INTRODUCTION

Through the years, the Plaintiff Jesse E. Torres III provided services and loaned monies to his parents, Jesse E. Torres Jr. (hereafter referred to as "Dad") and the Defendant Sophie J. Torres, to cover their numerous and considerable business losses. On or about 1983, Dad had a life altering accident where he spent three and one-half (3 1/2) months in Falmouth Hospital, two and one-half (2 1/2) of which were in intensive care.

This accident came within a few months of a demoralizing and financially devastating partnership in an AMC Dealership in Falmouth, with a Mr. Kevin Mann (hereafter referred to as "Partner"), who subsequently disappeared and left the state with no known forwarding address. The Dealership, Dad, and the Defendant Sophie J. Torres found themselves in financial chaos as their former Partner had left them not only deeply in debt, but had also left the business checking accounts severely overdrawn with uncollected checks to many of their and the Dealership's vendors. These actions also left loans provided by the Plaintiff Jesse E. Torres III to Dad, the Defendant Sophie J. Torres, or the business owned jointly by them, in the amount of one-hundred-twenty-one-thousand-dollars (\$121,000) more or less, unpaid to their son, but also left various of Dad's and the Defendant Sophie J. Torres' personal real estate properties at risk, as they were, to the best of memory, fourteen-months (14) behind on their mortgage payments. See: Jesse E. Torres III Et. Al. v. Falmouth National Bank, Barnstable Superior Court (1988).

Compounding the disastrous situation was the fact that Dad did not have specific health insurance coverage, nor was he able to work for many years after the accident.

The Plaintiff Jesse E. Torres III did, for the direct benefit of Dad and Defendant Sophie J. Torres, bring all mortgages up to date and/or did purchase and develop said properties, did provide weekly and/or monthly checks to Dad and the Defendant Sophie J. Torres, did make arrangements to pay all of Dad's Hospital bills, and did provide the funding to get Dad and the Defendant re-started in a new business when Dad was able, and did provide other monies to Dad and the Defendant for several years thereafter.

On or about 1996, Dad was falling deep into debt with his new automobile repair business. Once again the Plaintiff Jesse E. Torres III did pay the overdue bills for this failed business, as well as those that were personally owed and/or guaranteed by Dad and the Defendant Sophie J. Torres, in the amount of one-hundred-forty-thousand-dollars (\$140,000) more or less.

Upon closing the above-referenced business, Plaintiff Jesse E. Torres III did provide weekly checks to Dad and the Defendant Sophie J. Torres for an extended period until Dad and the Defendant Sophie J. Torres began receiving their Social Security checks.

It was promised to the Plaintiff Jesse E. Torres III, was common knowledge, and frequently discussed within the family, that the entire estate of Dad and the Defendant Sophie J. Torres was to go to their only natural child, Jesse E. Torres III, in major part to repay the monies owed to their son, the Plaintiff Jesse E. Torres III. This was clearly demonstrated in the original Will of Dad and Defendant Sophie J. Torres. Further, Dad did on many occasions, offer to sell the properties that were inherited from his side of the family to repay his son, the Plaintiff Jesse E. Torres III.

On or about March 22, 2007, the Plaintiff Jesse E. Torres III did have Catastrophic Heart Failure while living in California. This heart failure and its cause are part of the Complaint of this action specific to the Defendant Donald F. Torres. On or about Memorial Day Weekend 2007, the Plaintiffs left California and drove back to the Plaintiff Jesse E. Torres III's childhood home in Falmouth, Massachusetts.

The Plaintiff Jesse E. Torres III, shortly after his return, did ask his mother, the Defendant Sophie J. Torres to accompany him to Rockland Trust to withdraw his monies from the account that Richard Weir, the V.P. of Rockland Trust, had opened for him with a deposit in the amount of one-hundred-fifty-thousand dollars (\$150,000), more or less. These funds were being held for him by his late father, Jesse E. Torres Jr.

The account should have had an amount of one-hundred-thirty-five-thousand-dollars (\$135,000) plus several years interest, since the amount of fifteen-thousand-dollars (\$15,000) had been withdrawn and loaned to Dad by the Plaintiff Jesse E. Torres III in order to repay monies Dad

had borrowed years before from his brother, Defendant Donald F. Torres.

The Defendant Sophie J. Torres at this time, informed her natural son, Plaintiff Jesse E. Torres III, that she had transferred all of her son's money from Rockland Trust to the Sovereign Bank, and that an amount of approximately thirty-thousand-dollars (\$30,000) was all that remained.

This was devastating news to the Plaintiff Jesse E. Torres III as he needed this money for living expenses and to pay the hospital bills he had accumulated from his Heart Failure. Additionally, it was clear that even if he loaned the Defendant Sophie J. Torres the remaining monies, she would soon exhaust the entire amount without a restructuring of her finances.

As there were considerable properties available valued in the approximate amount of two-million-dollars (\$2,000,000), the Plaintiff Jesse E. Torres III and the Defendant Sophie J. Torres did agree to work together, as was in their mutual best interest, and as they had done many times before, to restructure their financing and to have the Plaintiff Jesse E. Torres III manage the family properties and finances as he had always done in the past. In furtherance of this goal, the Defendant Sophie J. Torres did empower her son Jesse E. Torres III with her Power of Attorney hereto attached as Complaint exhibit "R", which was registered with the Barnstable County Registry of Deeds so that he could also manage real estate transactions on her behalf, as well as her general financial requirements. It was agreed that he would make best use of the properties which were to include restoring the properties, and either sell them once restored, or use them to their best economic advantage. This provided the basis of the Contract that is now an action before this Court.

### **III. FACTS**

On or about April 24, 2009, the Plaintiff Jesse E. Torres III and his mother Defendant Sophie J. Torres did enter into a contract to ethically resolve the monies owed to the Plaintiff Jesse E. Torres III by the estate of Jesse E. Torres Jr. and the Defendant Sophie J. Torres, and further, to refinance and develop the properties referenced in said contract to their full financial potential.

The defined PROPERTIES (herein also referenced to as "PROPERTIES") named in the Contract were "Grandma's House" located at 345 Carriage Shop Road, "Horse Property" located across the street from Grandma's House, consisting of 5+ acres of land, Town of Falmouth Map 29, Sec 01, Parcel 009, Lot 000, Book 01121, Page 0060, and "Uncle Fred's House" located at 562 Waquoit Highway. All properties are located in East Falmouth, Barnstable County, Massachusetts.

The appraised values of these properties were assessed by licensed appraisers and were valued, more or less, in the following amounts: Grandma's House four-hundred-forty-thousand-dollars (\$440,000), Horse Property nine-hundred-sixty-thousand-dollars (\$960,000) and Uncle Fred's House two-hundred-forty-thousand-dollars (\$240,000) for an amount totaling one-million-six-hundred-forty-thousand dollars. (\$1,640,000).

To facilitate the objectives and intent of the above-stated goals of the Defendant Sophie J. Torres and Plaintiff Jesse E. Torres III and for the purpose of enabling Plaintiff Jesse E. Torres III to finance and develop the PROPERTIES, said Plaintiff was appointed by the Defendant Sophie J. Torres as her Attorney in Fact on April 24, 2009. The Power of Attorney was registered with the Barnstable Registry of Deeds on June 1, 2009 @ 12:05 pm; Bk. 23757 Pg. 88 #30498.

On May 8, 2009, in order to preserve the standing of the Will, Power of Attorney, Health Care Proxy and the above-referenced contract, all executed on April 24, 2009, two separate packages were sealed and mailed to the then CPA of the Defendant Sophie J. Torres and Plaintiff Jesse E. Torres III, Mr. Jeffery S. Cooper. The first package contained all but the Contract between said parties entitled PERMANENT TRANSFER OF PROPERTY RIGHTS (hereafter referred to as "Contract"), the second package contained only the Contract itself with specific written instructions on the envelope, demanded by the Defendant Sophie J. Torres that the separate Contract was "only to be opened if her Will was contested". Hereto attached and marked as Exhibits "FF" and "GG". (see: Ohio Bldg. Restoration, Inc. Id.)

On August 6, 2009, in order to advance the mutual goals and obtain the mutual benefits thereof, the Defendant Sophie J. Torres and the Plaintiff Jesse E. Torres did execute a Letter of Intent to place the Properties into a corporate trust, ("Torres Farm Trust, Inc."), hereto attached and marked as Exhibit "EE", (see: Ohio Bldg. Restoration, Inc. Id.) whereby the parties agreed that the Plaintiff Jesse E. Torres III would receive fifty-one percent of the outstanding stock and the Defendant Sophie J. Torres would receive forty-nine percent of the outstanding stock. Therefore, each of the parties were to receive this percentage of monies from the PROPERTIES by their sale, or any other incomes as became available.

The Torres Farm Trust, Inc. was to have been created upon the completion of the construction and restoration of the property known as Grandma's House.

On or about May 28, 2011 the Plaintiff Jesse E. Torres III after many years of abuse, did by email disavow his son, the Defendant Jesse E. Torres IV. Within 24 hours after this act, the Defendant Sophie J. Torres did notify the Plaintiff Jesse E. Torres III that she was going to breach her contract with the Plaintiff Jesse E. Torres III by changing her will and would also evict the Plaintiffs from the properties of which they had received at minimum a Tenancy interest.

On or about July 11, 2011 the Plaintiffs did send by certified mail, return receipt requested, a "Notice of Breach of Contract" to the Defendant Sophie J. Torres and her then attorney Kathryn Wilson of Mackey and Foster, P.A.

On or about July 12, 2011 the Plaintiffs did send by certified mail, return receipt requested, a "Notice to Cease and Desist, Intent to Bring Actions" to Defendants Jesse E. Torres IV and Debtmerica, LLC.

None of the above-named Defendants cured, or attempted to cure, the defaults as stated in their above-captioned notices, and as such the Plaintiffs did, on July 21, 2011, file the above-named action with this Court to protect their interests.

The Complaint contains four counts against the Defendant Sophie J. Torres. In summary, Count I is brought for specific breach of contract for violating specific conditions as set forth in the Contract. While the remaining Counts all contain breach of contract claims, Count II is for not completing the construction, nor maintaining the property known as "Grandma's House". Counts III and IV are primarily for failure to maintain the properties. Counts II through IV are brought in part for Breach of Fiduciary Responsibility and as in these counts, the Defendant Sophie J. Torres is causing severe devaluation of the PROPERTIES where the Plaintiffs have a financial interest directly or as the sole asset available to the Defendant that can facilitate the payment of those monies owed by the Defendant Sophie J. Torres to the Plaintiff Jesse E. Torres III.

The Plaintiffs through their prayers specific to the Defendant Sophie J. Torres have asked the Court, among other things, to adjudicate that the Defendant Sophie J. Torres has breached her contract with the Plaintiff Jesse E. Torres III and as such, to award damages in the amounts set forth in the Contract from the Defendant Sophie J. Torres to her son, Plaintiff Jesse E. Torres III, as well as interest, costs and fees, and any other relief the Court deems just and proper.

#### **IV. STANDARDS FOR CONSIDERING A RULE 12(B)(6) MOTION TO DISMISS**

The Defendant Sophie J. Torres' Motion to Dismiss fails to meet the rigorous standards required by Rule 12(b)(6): "A court may grant the radical relief of dismissal only if the plaintiff can set forth no set of facts which would entitle [them] to relief." *Coraccio*, 415 Mass. at 147. It is well established that "[t]he rules of pleading in Massachusetts are generous. A cause may not be dismissed for failure to state a claim upon which relief could be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Spence v. Boston Edison Company*, 390 Mass. 604, 615 (1983) (citations omitted).

These "generous and indulgent criteria" reduce "a plaintiff's obstacle in surmounting a rule 12(b)(6) motion to dismiss for failure to state a claim to a minimal hurdle," and mean that a "plaintiff is to be given the benefit of any doubt . . . and must prevail over the motion unless it appears with

certainty that he is entitled to no relief under any combination of facts that could be proved in support of his claims.” Brum v. Town of Dartmouth, 44 Mass. App. Ct. 318, 321-22 (1998) (citations omitted, emphasis in original).

The sufficiency of the claims raised in the plaintiff’s complaint is examined by accepting the allegations, and such reasonable inferences as may be drawn therefrom, as true. See Eyal v. Helen Broadcasting Corp., 411 Mass. 426 , 429 (1991)

Further, the Court may also look to materials outside of the pleadings to satisfy itself that it has subject matter jurisdiction without converting the motion for summary judgment. See Flynn v. Ohio Bldg. Restoration, Inc., 260 F. Supp. 2<sup>nd</sup> 156, 161 (D.D.C. 2003). (This paragraph hereafter referenced as Ohio Bldg. Restoration, Inc.)

The Defendant Sophie J. Torres has not come close to meeting this high burden.

## **VI. ARGUMENT**

The Defendant and Plaintiffs agree that there was a persistent and irrevocable transfer of property rights from the Defendant Sophie J. Torres to her natural son, Plaintiff Jesse E. Torres III through a contract entitled “PERMANENT TRANSFER OF PROPERTY RIGHTS” (hereafter referenced as “Contract”) that was attached to the Will of the Defendant Sophie J. Torres.

The Defendant through Counsel appears to be arguing without basis in fact or law that the Contract attached to the Will was dependent on the Will, which is simply not factual, nor was it ever the intent of the Contract or the Parties thereof. It is the original Will that was in fact dependent on the terms and conditions of the Contract, as the Contract transferred permanently and persistently the property rights to properties that were the main assets of the Will.

The Will of the Defendant Sophie J. Torres is simply the trigger whereby the final transfer of the properties would be completed, and full title and deed transferred to the Plaintiff Jesse E. Torres III, upon which conveyance, and only with this conveyance, the amounts owed by the Defendant Sophie J. Torres to her natural son, Plaintiff Jesse Torres III would be considered “paid in full”, or if

the Will was materially altered, the amounts owed to the Plaintiff Jesse E. Torres III in the agreed to amount of one-million-six-hundred-forty-thousand dollars. (\$1,640,000) would become, and is now, fully due and payable.

The terms and penalties for the Plaintiffs' claimed breach of contract were clearly set forth in the Contract. Further, the Court has historically held that "notice that a party will not perform his contract has the same effect as a breach" See Johnson v. Starr 321 Mass. 570 (1947) in its ruling on Count II. It is without argument by the Defendant Sophie J. Torres through Counsel, that the Defendant Sophie J. Torres did in fact breach her contract with the Plaintiff Jesse E. Torres III, by changing in material part, her Will.

The Plaintiffs set forth that only the trier of fact can determine the specific meaning of "*The Permanent and Persistent Transfer of Property Rights*" which the Plaintiffs aver set up a joint use and tenanship of the properties by both the Plaintiffs and the Defendant Sophie J. Torres. Therefore, if certain actions by the Defendant Sophie J. Torres, whereby the Defendant did threaten the Plaintiffs that if they brought this action, she was going to to evict the Plaintiffs from these properties and change the locks on buildings being used exclusively by the Plaintiffs, this would clearly constitute a violation of said joint use and tenanship of the properties by the Defendant Sophie J. Torres. In fact, the Defendant Sophie J. Torres has made good on her threats to the Plaintiffs including but not limited to, serving on the Plaintiffs a Notice to Quit to evict them from properties in which the Plaintiffs have a tenanship interest. In addition, the Defendant Sophie J. Torres has changed the locks on buildings where the Plaintiffs have their personal property stored. The Plaintiffs assert that these acts by the Defendant Sophie J. Torres, constitute specific breaches of contract which can ultimately only be determined by the trier of fact. Therefore the Plaintiffs aver that the Defendant Sophie J. Torres' above-named motion cannot be allowed as there are numerous issues that are not a matter of law but rather a matter of fact at issue and in dispute, and therefore the Defendant's motion is not yet ripe to be determined by this Court. The Plaintiffs have met the burden to allege facts sufficient "to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint

are true (even if doubtful in fact).” Bell Atlantic Corp.v, Twombly, 127 S. Ct. 1955, 1964-65(2007).

Even if we were to assume that the Plaintiffs' Complaint, in its prayers to the Court specific to the Defendant Sophie J. Torres, “a) adjudicate that the existing Will of the Defendant, dated April 24, 2009, be declared as the only true Will of the Defendant Sophie J. Torres...” could somehow be loosely applied to Johnson v. Starr 321 Mass. 566, 569 (Count I) as the Defendant Sophie J. Torres through Counsel claims, it is of no consequence since the contractual obligation of the Defendant Sophie J. Torres, is in the repayment of the amount agreed, of one-million-six-hundred-forty-thousand dollars (\$1,640,000) now due the Plaintiff Jesse E. Torres III, as is demanded under the Plaintiff's prayers 'b)' through 'e)' for relief from the Defendant Sophie J. Torres.

The amount now due the Plaintiff Jesse E. Torres III is well in excess of the current value of the properties as set forth in the Contract. The Plaintiffs argue that these properties provide the only means whereby the Defendant Sophie J. Torres can pay her contractual obligations to the Plaintiff Jesse E. Torres III. The evidence is weighted so heavily in favor of the Plaintiffs, that the Court, we assert, will most assuredly rule in favor of the Plaintiffs, and will therefore allow the Plaintiffs to file liens against these properties eventually leading to their sale; and said sale will most likely occur before the time of the Defendant Sophie J. Torres' death, and if not, the Defendant's argument would be moot, as the time for performance would have arrived. Therefore the Defendant's through Counsel's argument is of no consequence as there is no additional benefit or loss to the Defendant Sophie J. Torres. See: Walker v. Cronin, Supra at 565 (1871).

The Defendant Sophie J. Torres through Counsel attempts to make, and appears to base as the foundation of their motion, claims and arguments that the permanent transfer of property rights was not registered at the Barnstable County Registry of Deeds. The Defendant's argument is flawed and without judicial merit as, while it is necessary to register and record evidence of ownership of property within Massachusetts, the Plaintiff has not claimed that the property rights as defined in the Contract were a form of specific ownership, nor does the Plaintiffs' Complaint make claims against the properties other than that they were the primary asset securing the monies owed to the Plaintiff

and as such were to be maintained. The Plaintiffs' claims against the Defendant Sophie J. Torres are for breach of contract, whereby all monies in the agreed to amount of one-million-six-hundred-forty-thousand dollars. (\$1,640,000) are now due and payable to the Plaintiff Jesse E. Torres III.

There was and is no statutory requirement that the Plaintiff Jesse E. Torres III register these permanent transfer of property rights, to maintain the status of his contract, nor to receive the benefit thereof.

The Defendant's through Counsel's argument is flawed as they rely on Count I in Johnson v. Starr for which the Plaintiffs have made no similar claims. In Johnson v. Starr Count I, the plaintiff made claim against the properties that were not due the plaintiff until the time of the death of the defendant. In the Contract by and between Defendant Sophie J. Torres and her natural son, Plaintiff Jesse E. Torres III, it included, but was not limited to, the permanent transfer of property rights, which included the right to live on, farm, store equipment on, use certain buildings and use for recreation, the properties. These benefits have been enjoyed by the Plaintiffs since the signing of the Contract and were not, and are not, contingent on the death of the Defendant Sophie J. Torres.

In Johnson v. Starr Count II, the Court clearly stated that the defendant's actions of changing the deed to properties promised the plaintiff was a breach of contract and as such all monies owed for services quantum meruit to the plaintiff upon said breach of contract, were owed to the plaintiff.

The Plaintiffs' claim is for breach of contract triggered, among other things, by the specific act of materially changing the Will, specific penalties that all monies owed the Plaintiff Jesse E. Torres III by the Defendant Sophie J. Torres, monies that predate the Will, would and did become fully due and payable. This was defined in the clear and concise language within the Contract :

"If any of these provisions are violated, any monies and interest (at a rate not to exceed that of a normal bank loan during the same time frames and considerations) will become fully due and payable."

Further in Johnson v. Starr 570 (Count II) the Court specifically held that the defendant, by her actions of changing the deed to the properties of that matter, had in fact breached their contract and

that the defendant was ordered to pay for all of the services provided by the Plaintiff.

The Plaintiffs are owed monies for their services quantum meruit and the Plaintiff Jesse E. Torres III is owed the agreed amounts that were owed to him at the time the Contract was signed and prior to the execution of the Will of the Defendant Sophie J. Torres.

The Plaintiffs intend to amend, with leave of Court, their complaint specific to the Defendant Sophie J. Torres to include demand for payment for their services quantum meruit, which total several thousand hours of their labors, more or less, and as such the Defendant Sophie J. Torres' above-named motion cannot be considered at this time for dismissal. See Sherman v. Hallauer (1972, CAS Fla) 455 F2d 1236.

The Defendant Sophie J. Torres through Counsel, failed to consider certain language in the Contract and appears therefore unable or unwilling to recognize that had the Plaintiff Jesse E. Torres III, for the sake of argument, legally registered said property rights, this would have considerably affected or, more likely than not, eliminated the ability to finance the properties by the Defendant Sophie J. Torres, which was one of the limited rights allowed her by the Contract.

“This is a binding and durable provision except as follows: a) Sophie J. Torres is free to sell or finance the PROPERTIES while she is living if said sale or financing is required to benefit her happiness, well being or health. b) any proceeds received either directly or indirectly from the sales or financing of these properties not used by SJT will become the property of JET upon upon her death.”

The Defendant Sophie J. Torres did in fact, with the assistance of the Plaintiffs, obtain much needed financing and did obtain a Reverse Mortgage on the property known as “Uncle Fred's House” on or about May 13, 2009, and did obtain a construction mortgage on the property known as “Grandma's House” on or about December 13, 2010. The Plaintiffs assert that without this financing the PROPERTIES were in jeopardy of being lost due to the financial obligations of the Defendant Sophie J. Torres, and in the case of “Grandma's House”, of literally falling down through disrepair, had said financing not been obtained.

The agreed to goal of the Defendant Sophie J. Torres and her natural son, Jesse E. Torres III

(hereafter referred to as "Parties") as to the properties of the Contract, was to restore them, and then to; a) sell them at the highest market value available, or b) use the property in the most expeditious way to generate the greatest financial return for the Parties. If the financing was not obtained, this would have been an unprocurable goal, a goal that both the Plaintiff and the Defendant Sophie J. Torres had wanted. In fact, the Parties had agreed to a division of profits based based on ownership of stock in a new corporation that would in fact have title to the Properties, and did contractually agree in writing, through a letter of intent, to set up the "Torres Farm Trust, Inc." upon completion of the restoration. Said agreement outlined the terms and conditions of ownership as well as specific stock obligations and was signed by the Defendant Sophie J. Torres and her natural son, Plaintiff Jesse E. Torres III on August 06, 2009. See Exhibit "EE" hereto attached. (see: Ohio Bldg. Restoration, Inc. Id.)

The above-referenced action clearly and contractually demonstrates the intentions of the Parties in respect to the Contract, to transfer title prior to the death of the Defendant Sophie J. Torres, and therefore would have made the Will inconsequential. As such, the Defendant Sophie J. Torres' argument based on Johnson v. Starr, Mass. 566, 569 (1947), (hereafter referenced as "Johnson v. Starr Count I") where in that contract the performance under said contract was based on the death of the defendant, has no application to this matter, as the Death of the Defendant Sophie J. Torres was not a consideration of the transfer of the properties to a corporation of which the Plaintiff Jesse E. Torres III would have been the majority shareholder.

The Defendant Sophie J. Torres through Counsel wrongfully makes claims on Johnson v. Starr, Count I, which clearly and additionally do not apply as the Contract between Sophie J. Torres and Jesse E. Torres III was:

1. a written agreement, where in Johnson v. Starr Count I, the Court's decision was based on an oral contract wherein the Court was forced to interpret the meaning of the contract. The Contract between Plaintiff Jesse E. Torres III and Defendant Sophie J. Torres contains clear and concise language which includes the conditions and penalties for breaching said

Contract, and

2. in Johnson v. Starr Count I, breach of contract was claimed by the plaintiff, as the defendant had transferred a deed to property promised to the plaintiff upon the death of the defendant and the Court ruled that in this limited context, as the defendant was still alive, the performance under the contract had not yet arrived. There was no written provision in the Will of the defendant in Johnson v. Starr Count I specific to:

- a) permanently transferring property rights not conditional on the Will, but on which the Will was materially bound, and
- b) that the named properties' rights were permanently and persistently transferred from the Defendant Sophie J. Torres to the Plaintiff Jesse E. Torres III on April 24, 2009, and
- c) that the property was to be placed into a corporation, "The Torres Farm Trust, Inc", upon completion of certain of the properties' restoration and that this would more likely than not, have transpired before the death of the Defendant Sophie J. Torres, or if not, her death would trigger the time for performance of the Will, making the Defendant's arguments moot, and
- d) there was no "Conditional Release of Obligations" clause whereby the Plaintiff Jesse E. Torres III agreed to set aside his right to file claim against the estate of his late father, Jesse E. Torres Jr., before it was probated, for claims of amounts agreed to by the parties of the Contract that exceeded the values of the named properties. These properties were appraised by licensed appraisers to have a total worth in the amount of one-million-six-hundred-forty-thousand dollars (\$1,640,000) more or less. and
- e) there was no specific language in Johnson v. Starr Count I stating specific conditions of breach of contract as is contained in the Contract; specifically and in clear and concise language, of which materially changing the Will was a

specific breach of contract:

“that this provision is both permanent and persistent and cannot be modified, including *but not limited to*, any future Wills or Codicils. This is a binding and durable provision...”

- f) and that the Contract contained specific penalties for the above stated breach of contract which clearly states:

“Solely in consideration of receiving the PROPERTIES, JET does herein relinquish any and all claims against the Estate of SJT and/or SJT and DAD for the services rendered and monies loaned to SJT and/ or DAD as long as the terms and conditions of this Agreement are fully complied with. If any of these provisions are violated, any monies and interest (at a rate not to exceed that of a normal bank loan during the same time frames and considerations) will become fully due and payable. Further, JET does herein acknowledge that he fully understands that the monies he receives from the PROPERTIES will most likely not fully repay him for the services he provided, the monies he advanced and the interest to which he is entitled”

3. the Defendant Sophie J. Torres through Counsel claims in their Argument that

“Massachusetts case law is clear that, even in the case of an enforceable contract to make a Will, a plaintiff cannot recover from a defendant for breach of contract in such a matter until such time for performance has arrived, which is at the time of death” with reliance on Johnson v. Starr Count I, which does not apply to this case as the Plaintiff Jesse E. Torres III's breach of contract claim against the Defendant Sophie J. Torres is for monies owed to the Plaintiff Jesse. E. Torres III prior to the existence of the Will or the Contract, which are now contractually fully due and payable; and is clearly set forth in Johnson v. Starr, Mass. 566, 570 (hereafter referenced to as “Johnson v. Starr Count II”):

"It is clear that, apart from technical considerations, so far as the right to rescind goes, notice that a party will not perform his contract has the same effect as a breach. . . .“

4. It is clear that the Defendant Sophie J. Torres has breached her Contract with the Plaintiff Jesse E. Torres III and that the Plaintiff Jesse E. Torres III is entitled to the amounts owed him

as specifically set forth in said Contract.

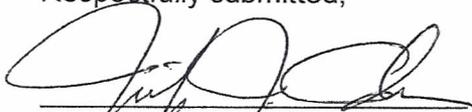
5. The Defendant through Counsel then relies on Daniels v. Newton, 114 Mass, 530, 542 (1874) insofar as they claim that “to refuse compliance with the terms of a written agreement, it is in itself not a breach of the agreement”. However, in *that* case “there was no implied relationship between the parties that created a present right...”. What Counsel fails to state is that in Daniels v. Newton there were no services provided, no settlement of monies owed, no permanent and irrevocable transfer of property rights, nor did that contract contain specific provisions that clearly and specifically addressed these issues, as did the clear and concise language of the Contract between the Defendant Sophie J. Torres and her son, Plaintiff Jesse E. Torres III. Even if this clear and concise language did not exist in the Contract between the Parties, Johnson v. Starr, Mass. 566, 570, Count II, is clearly on point in that the actions of the Defendant Sophie J. Torres constituted a clear breach of contract and as such, all monies owed the Plaintiff Jesse E. Torres III are now due and payable.
6. The Plaintiffs have now two (2) motions before this Court that are material in determining if the Defendant Sophie J. Torres was coerced or at minimum, unduly influenced by the Defendants Jesse E. Torres IV and Donald F. Torres, to breach her Contract with her natural son, Plaintiff Jesse E. Torres III. See the Plaintiffs “*Verified Motion for Mental Examination*” and “*Plaintiffs' Verified Motion to Restrain Certain Parties from Discussing the Case or the Plaintiffs with the Defendant Sophie J. Torres*”. The Plaintiffs aver that the Defendant Sophie J. Torres' Motion to Dismiss cannot be considered until these matters are adjudicated by the Court. See, Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 464 (1997) (stating the elements of fraud based on undue influence).

## **V. CONCLUSION**

For all of the reasons stated above, this Court should deny the Plaintiff Sophie J. Torres' Motion to Dismiss for Failure to State a Claim. Alternatively, if the Court is inclined to grant Defendant

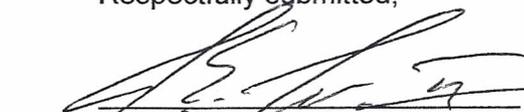
Sophie J. Torres' motion on the basis of failure to state a claim, the Plaintiffs then respectfully request leave to amend their claim to plead additional facts and more detailed allegations in support thereof.

Respectfully submitted,



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(617) 840-7880  
[jadams@jetiii.com](mailto:jadams@jetiii.com)

Respectfully submitted,

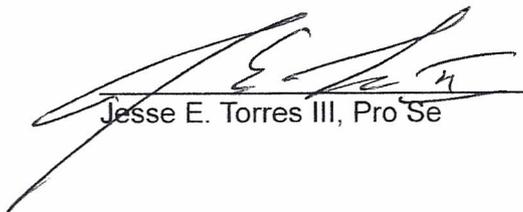


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562 Waquoit Highway  
East Falmouth, MA 02536  
(617) 291-0862  
[itorres@jetiii.com](mailto:itorres@jetiii.com)

Dated August 16, 2011

#### CERTIFICATE OF SERVICE

I, Jesse E. Torres III, hereby certify that on August 16, 2011, I have served the Defendants Sophie J. Torres through her attorney of record, and Jesse E. Torres IV and Debtmerica, LLC, at their address on record with this Court, a true copy of this document by postage prepaid U.S. Mail.



Jesse E. Torres III, Pro Se

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Will of Sophie J. Torres – Envelope Front. Signature over seal.

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Addendum to Will of Sophie J. Torres – Envelope Back. Instructions for when to open envelope clearly visible.

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

SUPERIOR COURT

\_\_\_\_\_  
 )  
 JESSE E. TORRES III )  
 JENNIFER J. ADAMS )  
 Plaintiffs )  
 vs. )  
 SOPHIE J. TORRES )  
 JESSE E. TORRES IV )  
 DEBTMERICA, LLC. )  
 DONALD F. TORRES )  
 Defendants )  
 \_\_\_\_\_

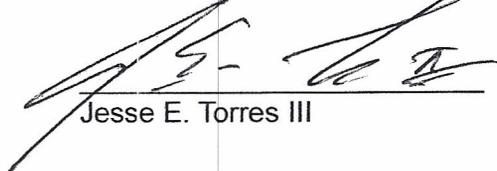
Civil Docket # BACV2011-00433

**AFFIDAVIT IN SUPPORT OF PLAINTIFFS' RESPONSE AND OPPOSITION TO  
 DEFENDANT SOPHIE J. TORRES' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM;  
 REQUEST FOR HEARING**

**VERIFICATION ATTESTATIONS**

**Plaintiff** Jesse E. Torres III:

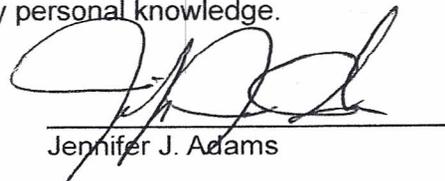
I Jesse E. Torres III of Barnstable County, Massachusetts did personally prepare the "Plaintiffs' Response and Opposition to Defendant Sophie J. Torres' Motion to Dismiss for Failure to State a Claim; Request for Hearing" and I do herein swear, under the pains and penalties of perjury, that the facts contained therein, are true to the best of my personal knowledge.

  
 \_\_\_\_\_  
 Jesse E. Torres III

Aug. 16, 2011  
 Date

**Plaintiff** Jennifer J. Adams:

I Jennifer J. Adams of Barnstable County, Massachusetts did review "Plaintiffs' Response and Opposition to Defendant Sophie J. Torres' Motion to Dismiss for Failure to State a Claim; Request for Hearing" and I do herein swear, under the pains and penalties of perjury, that the facts contained therein, are true to the best of my personal knowledge.

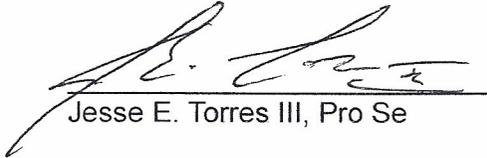
  
 \_\_\_\_\_  
 Jennifer J. Adams

AUGUST 16, 2011  
 Date

Dated: August 16, 2011

**CERTIFICATE OF SERVICE**

I, Jesse E. Torres III, hereby certify that on August 16, 2011, I have served the Defendants Sophie J. Torres through her attorney of record, and Jesse E. Torres IV and Debtmerica, LLC, at their address on record with this Court, a true copy of this document by postage prepaid U.S. Mail.

  
\_\_\_\_\_  
Jesse E. Torres III, Pro Se



COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

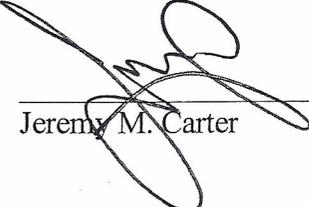
SUPERIOR COURT  
NO. BACV2011-00433

JESSE E. TORRES, III and )  
JENNIFER J. ADAMS, )  
Plaintiffs, )  
 )  
vs )  
 )  
SOPHIE J. TORRES, )  
JESSE E. TORRES, IV, )  
DEBTMERICA, LLC, and )  
DONALD F. TORRES, )  
Defendants. )  
\_\_\_\_\_ )

**AFFIDAVIT OF COMPLIANCE WITH RULE 9A**

I, Jeremy M. Carter, being duly sworn to hereby state that on or about August 5, 2011 I served a copy of Defendant's, Sophie Torres, Motion to Dismiss along with a Memorandum in Support of Motion to Dismiss on Plaintiffs, Jesse E. Torres, III and Jennifer Adams, in compliance with Rule 9A. On August 18, 2011 I received Plaintiff's Response and Opposition to Motion to Dismiss as required under rule 9(A)(b)(2).

Signed under the pains and penalties of perjury this 22 day of August, 2011.

  
\_\_\_\_\_  
Jeremy M. Carter