IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: CACE 16-000592 (04)

LEWIS GOPHER JR.; NANCY JIMMIE, PARENT TO MINORS M.J., M.J., and M.J.; QUENTIN TOMMIE; and PROVIDENCE FIRST TRUST COMPANY, AS GENERAL TRUSTEE OF THE FOURTH SUCCESSOR SEMINOLE TRIBE OF FLORIDA MINORS' PER CAPITA PAYMENT TRUST AGREEMENT DATED JULY 24, 2018,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.; DEBRA CHARBONNET; THOMAS JOYCE; TERRI JOHNSON; MELISSA LADER BARNHARDT; KIM SCOTT; MARC SPELANE; MICHAEL S. CARRIS; and MARK LAKE,

Defendants.
_____/

PLAINTIFFS' MOTION FOR DIRECTED VERDICT AGAINST DEFENDANT WELLS FARGO BANK, N.A.

Plaintiffs move for a directed verdict on all claims against Defendant, Wells Fargo Bank, N.A. ("Wells Fargo"), for the following reasons.

I. The Evidence Establishes Indifference to the Beneficiaries' Interests and Intentional Acts That Wells Fargo Knew to be a Breach of its Duties.

Under Florida law, "[a] term of a trust relieving a trustee of liability for breach of trust is **unenforceable** to the extent that the term (a) Relieves the trustee of liability for breach of trust committed in bad faith or with **reckless indifference to** the purposes of the trust **or the interests of the beneficiaries**." Fla. Stat. § 736.1011(1)(a) (emphasis added).; *id.*, § 736.0105(2)(u)

(providing that Section 736.1011 is non-waivable). Similarly, fiduciary "bad faith" occurs when a trustee acts disloyally—in other words, when it acts based on any motive other than what it objectively believes to be the best interests of the beneficiaries:

- *Taubenfeld v. Lasko*, 324 So. 3d 529, 538 (Fla. 4th DCA 2021) ("Within the law on fiduciary duties, the application of 'good faith' . . . is best viewed as being subsumed within the duty of loyalty.").
- *Fox v. McCaw Cellular Commc'ns of Fla., Inc.*, 745 So. 2d 330, 334-35 (Fla. 4th DCA 1998) (Farmer, J., concurring) (distinguishing "good faith" in the fiduciary and non-fiduciary contexts, and noting that in the "fiduciary category," good faith requires "more than merely act[ing] honestly" and imposes "obligations . . . to act in the best interests of someone").[1]
- *Harvey v. GEICO Gen. Ins. Co.,* 259 So. 3d 1, 10 (Fla. 2018) (in bad faith action against insurer, duty of good faith requires "due regard for the interests" of insured).
- Fla. Stat. § 736.0801 ("Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with . . . the interests of the beneficiaries . . .").
- *Mest v. Dugan*, 790 P.2d 38, 40 (Or. 1990) ("A trustee's act that completely ignores the interests of beneficiaries, intentional or not, constitutes bad faith.").
- *Mennen v. Wilmington Tr. Co.*, No. CV 8432-ML, 2015 WL 1914599, at *26 (Del. Ch. Apr. 24, 2015), *adopted*, (Del. Ch. 2015), *aff'd*, 166 A.3d 102 (Del. 2017) (explaining that investments are not made in good faith if the motivation is not "to further the interests of the Beneficiaries of the Trust").

The evidence establishes Defendants' indifference to the beneficiaries' interests.

As for malfeasance, the evidence also establishes that Wells Fargo's acts were intentional. The Florida Supreme Court long ago characterized "faithless performance of its trust in the particulars enumerated and specified in the trust instrument" as "**acts of malfeasance**." *Smith v. Boyd*, 119 Fla. 481, 484-85 (Fla. 1935) (emphasis added). Therefore, under the common law of trusts, a breach of the trust instrument or trust law is malfeasance. The Florida Trust Code provides

[1] Defendants have confused this point by relying on a non-fiduciary definition of bad faith, requiring "a design to mislead or deceive another . . . or sinister motive . . . with a furtive design or some motive of interest or ill will." *Fox*, 745 So. 2d at 334-35 (Farmer, J., concurring) (explaining that this definition of bad faith applies only to non-fiduciaries, who are merely required to act honestly rather than acting in someone else's interests).

that "[t]he common law of trusts and principles of equity supplement this code, except to the extent modified by this code or another law of this state." Fla. Stat. 736.0106.

If a trustee intentionally chooses investments that are inconsistent with the trustee's duties to the beneficiaries, it is an intentional breach of trust even if the trustee does not have evil intent. *Dunkley v. Peoples Bank & Tr. Co.*, 728 F. Supp. 547, 560 (W.D. Ark. 1989) ("It is a breach of trust for the trustee to speculate with trust funds for his own gain, but it is no less a breach of trust to . . . take speculative risks though for the benefit of the fund and not the trustee. To do so knowingly is a willful and intentional breach of trust.") (applying Florida law). The *Boyd* court also held that an exculpatory clause does not relieve a trustee of liability for failure to perform the "positive duties imposed upon the trustee by the trust instrument." *Boyd*, 119 Fla. at 485.

II. Affirmative Defenses Based on "Agency" and "Representation" Fail.

All of Wells Fargo's affirmative defenses are based on their interactions with the grantor, the Seminole Tribe—not the beneficiaries or their parents. In other words, Defendants rely exclusively on parol evidence of grantor intent to prove their defense. For that reason, these defenses fail as a matter of law. *See E. A. Turner Const. Co. v. Demetree Builders, Inc.*, 141 So. 2d 312, 314 (Fla. 1st DCA 1962) (holding that trial court "correctly struck [affirmative] defenses . . . because they could not be proved without violating the parol evidence rule"). After creating an irrevocable trust, "the settlor is not, except as expressly provided otherwise by the trust instrument . . . , in any legal relationship with the beneficiaries or the trustee, and has no rights, liabilities or powers with regard to the trust administration." *Bogert's the Law of Trusts and Trustees* § 42; *see Sanders v. Citizens Nat. Bank of Leesburg*, 585 So. 2d 1064, 1066 (Fla. 5th DCA 1991) (approvingly citing Bogert's, § 42, to explain grantor's lack of standing to sue).

There is no evidence that the minor beneficiaries' parents entered any agreement with the Tribal government, giving up their rights to act as the beneficiaries' legal guardians. There is no

evidence that the beneficiaries "controlled" the Tribal government officials, nor that the beneficiaries or their guardians told the Defendants that the Tribal government was their agent. These facts preclude Defendants' "agency" defenses. "The essential elements of an actual agency relationship are: 1) acknowledgment by the principal that the agent will act for him or her, 2) the agent's acceptance of the undertaking, and 3) control by the principal over the actions of the agent." *Font v. Stanley Steemer International, Inc.*, 849 So. 2d 1214, 1216 (Fla. 5th DCA 2003).

None of the Plaintiffs, the Defendants, or other witnesses testified about any such agreement existing between the minors and the Tribe in 2005-2016. On the contrary, Jim Raker testified that no such agreement existed.

As for apparent agency, "[a]n agent cannot establish her own agency. Apparent agency is conferred based upon the principal's actions or statements." *UATP Mgmt., LLC v. Barnes*, 320 So.3d 851, 857-58 (Fla. 2d DCA Apr. 16, 2021) (no apparent agency where the defendant "does not rely upon any representation by Ms. Barnes, the purported principal," but relied instead on representations by the alleged agent). As in *Barnes*, Defendants have presented no evidence that the minor beneficiaries or their parents ever represented that they had entered a principal/agent relationship with the Tribal government.

Defendants have made purely legal arguments that the Tribe's acts are automatically "representative" of the beneficiaries because it is a sovereign. But the Trust is governed by Florida law, which provides that a "a state may not sue **to assert the rights of private individuals**," so the state's decisions cannot be binging on "**purely private interests, which the State cannot raise**." *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1261 (Fla. 2006) (emphasis added). The *Engle* court held that the State of Florida's settlement with tobacco companies could not bind the "purely private" rights of its citizens against a tortfeasor. *Id.*

Florida law also provides that "parents jointly are the natural guardians of their own children." Fla. Stat. § 744.301. Defendants have shown no evidence that the parents ever surrendered these personal rights to Tribal officials. Plus, the Florida Trust Code provides that a "designated representative" may represent a beneficiary "[i]f specifically nominated in the trust instrument." Fla. Stat. 736.0306(1). Here, the Trust does designate representatives for the beneficiaries—their "parents or Guardian(s)." PTX-0122, 2005 Trust, Art. V.B. The Trust also provides that the Guardian cannot be the Tribe itself. 2005 Trust, Art. V.B (providing that if the Trust is terminated, "distribution of a beneficiary's share may . . . be made to . . . the beneficiary's Guardian," but "not to the Tribe"). This language matches the Florida law providing that a minor's personal representative is the minor's parent—not the government.

In sum, all of Defendants' affirmative defenses are based on their attempt to transform Tribal government officials like Jim Raker into "representatives" of the minor beneficiaries. A directed verdict is appropriate because there is no evidence of any agency relationship and Defendants' legal arguments for representation fail as a matter of law.

III. Fees: The Court Should Grant a Directed Verdict Because it is Undisputed That the Trustee Charged Fees Not Disclosed to the Beneficiaries.

It is undisputed that the Trustee charged fees not listed on the original fee schedule, PTX-034. Defendants have sought to justify this based on disputed evidence about what they did or did not disclose to Jim Raker. However, Raker is not the beneficiary of the Minors' Trust, and there is no evidence that Defendants disclosed their fees to the beneficiaries.

Under Florida law, the trustee must provide each beneficiary with accountings, and "[t]he accounting must show all cash and property transactions and all significant transactions . . . , including compensation paid to the trustee and the trustee's agents." Fla. Stat. 736.08135(2)(b); *see* PTX-122, 2005 Trust, Art. VI.B (requiring trustee to provide beneficiaries with accountings).

Florida courts have required trustees to return any compensation not disclosed on beneficiary statements, holding: "[A] trustee's unilateral payment to [it]self of a seven-figure fee from trust monies[,] . . . **without prior disclosures of alleged entitlement and amount to the beneficiaries** or the court[,] . . . constitute[s] a **flagrant** breach of duty." *McCormick v. Cox*, 118 So. 3d 980, 987 (Fla. 3d DCA 2013) (emphasis added) (affirming disgorgement of fees); *see* Fla. Stat. §§ 736.1001(2)(c) & (2)(h) (court may "[c]ompel the trustee to redress a breach of trust by paying money or restoring property . . . [or] [r]educe or deny compensation to the trustee").

Here, the account statements Wells Fargo provided to the beneficiaries failed to disclose any fees. The Wachovia statements even contained a column of "Other" that "includes forfeitures, fees and similar transactions." PTX-1132, at 1 (Lewis Gopher statements). But under the "Other" category, the sum is listed as "$0.00." This was a misrepresentation of the fees collected. Under *McCormick*, the trustee may not retain any fees that were not disclosed on the 2005 fee schedule or the beneficiaries' account statements.

For the undisclosed fees, the Court need not reach the Trustee's state of mind because disclosure to the beneficiaries is a "positive dut[y] imposed upon the trustee[.]" *Boyd*, 119 Fla. at 485. In any case, failure to disclose trustee compensation to the beneficiaries on their account statements is a "**flagrant** breach of duty." *McCormick v. Cox*, 118 So. 3d at 987 (emphasis added). According to Merriam-Webster, "flagrant" means "conspicuously offensive" or "so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality."[2] Thus, a flagrant breach of duty is a breach committed in bad faith.

IV. Investments

A. The Court should declare the 2012 Trust void because the Trustee did not disclose this change to the beneficiaries.

[2] https://www.merriam-webster.com/dictionary/flagrant (last visited March 19, 2025).

Florida law also provides that "[a]n exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless: (a) The trustee proves that the exculpatory term is fair under the circumstances." Fla. Stat. § 736.1011(2)(a). Here, the 2012 change to the Trust was not fair because unrebutted testimony proves it was not disclosed to the beneficiaries and it was intended to relieve the trustee from liability. Defendant Charbonnet admitted Wells Fargo did not inform the beneficiaries of this change:

> "**Q. Were the beneficiaries given any notice in advance of the changes of the Trust in 2012? A. I don't know the answer to that either. We didn't provide any information**."

3/13/2025 Trial Transcript, 4734:1-4 (emphasis added). She also testified that the bank threatened to resign if this change was not made, and when asked why, stated: "**I think I thought the bank might be afraid something like this lawsuit would come up, unless there was specific language in the Trust**." 3/13/2025 Trial Transcript, 4859:6-8 (emphasis added).

As a matter of law, "fairness" to the beneficiaries required Wells Fargo to disclose that it was seeking a change to relieve itself of liability: "[T]he beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust." *First Union Nat. Bank v. Turney*, 824 So. 2d 172, 190 (Fla. 1st DCA 2001); *accord Sanders*, 585 So. 2d at 1066 n.5 ("the beneficiaries were entitled to be notified by the trustee that the trust corpus was threatened so that they could have the opportunity to preserve it"). In 2007, the Florida Trust Code merely codified this settled duty. Fla. Stat. § 736.0813 ("[t]he trustee shall keep the qualified beneficiaries of the trust reasonably informed of the trust and its administration"). Further, the Court stated in this case: "Wells Fargo has a clear and obvious responsibility to communicate with the beneficiaries of the Trust that it's the Trustee with." 4/23/2019 hearing transcript, 324:16-19.

For these reasons, the Court should hold that the 2012 exculpatory clause is not fair under the circumstances and declare it void.

B. Reliance on conversations with the grantor and other extrinsic evidence of "intent" cannot be relied on by the grantor to establish good faith.

Under Florida law, "[t]he fiduciary has a duty to diversify the investments **unless, under the circumstances, the fiduciary believes reasonably it is in the interests of the beneficiaries** and furthers the purposes of the trust, guardianship, or estate not to diversify." Fla. Stat. § 518.11(1)(c) (emphasis added). If the Trustee is relying on the grantor's extrinsic statements and not an assessment of the beneficiaries' interests to justify the failure to diversify, that is not "good faith." It is instead reckless indifference to the beneficiaries' interests:

- The Florida Trust Code states: "[T]he trustee may follow a direction of the settlor that is contrary to the terms of the trust **while a trust is revocable**." Fla. Stat. § 736.0603(3) (emphasis added). So if a trust is irrevocable, the Florida Trust Code does not permit the trustee to rely on the settlor's opinion to vary the duties owed.
- Similarly, the Prudent Investor Rule only allows deviations "by **express provisions of the governing instrument**." Fla. Stat. 518.11(2) (emphasis added). Thus, it is not "good faith" to follow the grantor's verbal opinions over the text of the Trust
- In deciding if the portfolio is in the beneficiaries' interests, a trustee is "**obligated** to use [its] **own** judgment, **not** to defer to the judgment of another." *In re Whittaker*, 564 B.R. 115, 144–45 (Bankr. D. Mass. 2017) (placing "**no weight** on [grantor's] instruction" about investments, as it "[did] not appear in the Trusts") (emphasis added) (applying Florida law).

Courts apply the same rule—a trustee may not be influenced by extrinsic evidence of grantor intent—when the grantor is an Indian tribe or the federal government itself:

- *Culbertson v. Peoples Bank*, 375 F. Supp. 2d 824, 830 (S.D. Iowa 2005) ("The United States' role in the trust is that of Grantor, which is also often referred to in trust law as the 'settlor.' Since the Trust at issue is an irrevocable trust, . . . [i]t is the duty of the Trustee, here Peoples Bank, to uphold the integrity of the Trust **and the trustee cannot be influenced by later given instructions by the settlor**.") (emphasis added).

- *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 299 (2013) ("[T]he [trustee] **cannot escape the ramifications of its past failures by conveniently claiming now that it was nothing more than a glorified 'order-taker**.' Per contra. The [trustee] was obliged to use its 'independent judgment that the tribe's request was in its own best interest.' . .

. Under basic principles of trust law, **it could not shift that fundamental responsibility** to the [grantor-tribe] . . . .") (emphasis added).

And courts around the country agree that a trustee's mismanagement may not be excused by its alleged reliance on extrinsic evidence of grantor intent:

- *Steiner v. Hawaiian Tr. Co.*, 393 P.2d 96, 107 (Haw. 1964) (holding trustee liable despite defense that it followed settlor's investment requests, holding: "Nor does the fact that the settlors retained the power to remove the trustee alter the duty of diversification which the trustee owed to the beneficiaries under the 'prudent investment rule'").

- *Chase Nat. Bank of New York City v. Reinicke*, 10 N.Y.S.2d 420, 431–32 (N.Y. Sup. Ct. 1938) ("If . . . the [trustee] complied with the settlor's request, . . . the [trustee] might well have been exposed and subjected to a claim for a surcharge of such loss.").

To justify Wells Fargo's acts, Defendant Charbonnet suggested the duty of loyalty was owed to the grantor rather than the beneficiaries alone. 3/13/2025 Transcript, 4729:7-8 ("A. I think they had a loyalty to the grantor of the Trust as well."). But this assertion is actually a confession of bad faith. Professor Sitkoff testified that the duty of loyalty required that the Trustee's investments be based *solely* on the beneficiaries' interests—not the perceived political interests of Tribal officials. And this understanding appears in Wells Fargo's own training materials: "A fiduciary owes its beneficiaries undivided loyalty and must act **solely** in the beneficiaries' interests." PTX-0273 (emphasis added). Under Florida law, consideration of the grantor's alleged separate interests is disloyalty to the beneficiaries and thus amounts to bad faith. *See Taubenfeld*, 324 So. 3d at 538 ("Within the law on fiduciary duties, the application of 'good faith' . . . is best viewed as being subsumed within the duty of loyalty."); Fla. Stat. § 736.1011(1)(a) (providing that trustee is always liable for "reckless indifference to . . . the interests of the beneficiaries").

C. The failure to diversify was not based on an assessment of the beneficiaries' interests.

Here, the evidence proves the Trustee's lack of diversification was not based on any assessment of the beneficiaries' interests. The main investment officer, Defendant Mark Lake, admitted he never considered the minors' time horizons or individual circumstances:

> "Q. . . . . You did not invest in stocks and you did not invest in corporate bonds from 2005 to 2012, right?
> A. Yes.
> Q. **Okay. And you didn't consider the time horizons of the beneficiaries, did you**?
> A. **No**.
> Q. **And you disregarded the unique nature of each individual minor child, right**?
> A. **Yes**."

3/11/2025 Transcript, 4298:15-24 (emphasis added). Indeed, the first two investment policy statements ("IPSs") identified no time horizon at all. PTX-185 (2007), PTX-1170 (2009). And in 2011, Wells Fargo sought to justify its willful mismanagement by falsely listing the beneficiaries' time horizons as "1 to less than 3 years."" PTX-87 (2011 IPS).

In 2007, when deciding how to invest, Lake possessed extensive historical evidence proving that portfolios with 10-40% stock outperformed all-fixed-income portfolios, both in terms of return and protecting from the risk of loss over many time horizons up to 18 years. 3/12/2025 Transcript, 4618:24 – 4626:25 (reviewing DTX-139, email and chart). For the 18-year time horizon, there were no loss periods for any portfolio. *Id.*, 4626:2-8. Thus, Lake knew he was investing against the beneficiaries' interests for their longer time horizon.

At the same time, Wells Fargo's other internal training modules proved that a 50/50 stock/bond portfolio was the best at protecting from the risk of loss:

> "Q. Looking at below the chart, it says, "Here's how your time horizon might relate to your asset mix. If we look at history going back to 1926, we can examine how

different blends of stocks and bonds did in terms of protecting investors from loss." Did I read that correctly?
A. Yes.
Q. **So the sentence that follows after "protecting investors from loss," says, "The best blend was a 50/50 blend of stocks and bonds. For a holding period six to seven years, there is no stretch of time when an investor would have lost money." Did I read that correct?**
A. Yes."

3/10/2025 Trial Transcript, 3956:8-21 (emphasis added).

By failing to apply its own informed judgment, and failing to consider the beneficiaries' time horizons and circumstances, the bank showed reckless indifference to their interests. The Trustee's fiduciary officer, Debra Charbonnet, also admitted that it was violating the Prudent Investor Rule by not including any equities in the portfolio:

"**We must have the document DIRECT us to invest in fixed income with NO equities. Otherwise, we need to diversify within the context of the Prudent Investor Rule using equities**."

PTX-402 (emphasis added). From day one, Charbonnet always found it "odd" there were no stocks in a trust for minors. 3/13/2025 Transcript, 4855:21-25 ("A. Well, again, it wasn't one set of circumstances that came -- it was sort of a gradual thing. **When I first got involved in the relationship, I said, "This is odd. It doesn't have any equities and these are minors**," and I was told . . . .") (hearsay objection follows, sustained).

There is no question that Wells Fargo knew it was acting contrary to the standard of care, and instead, put the interests of the bank and its relationship with the grantor before that of the Beneficiaries. Debra Charbonnet, admitted that before this change, Wells Fargo's internal systems flagged the Minors' Trust with "exceptions," alerting the bank that the portfolio deviated from the bank's diversification policies. 3/13/20205 Transcript, 4901:16-22 (Charbonnet testifying about Reg 9 review with question, "Account equity diversifications are within policy," and she marked the answer as "false"). Wells Fargo's investment risk officer, Ed Apelian, confirmed that these

alerts continued *every day* for years. 3/14/2025 Transcript, 5007:8–5009:25; *id.*, 5010:1-4 ("Q. And so for anywhere from 150 days to 550 days, Wells Fargo was being reminded that these exceptions exist? A. That's correct."). Thus, Defendants knew for a fact that their investments were not appropriate for young beneficiaries with long time horizons.

Defendants' own expert, Robert Reilly, admitted Defendants' portfolio chosen is not appropriate for beneficiaries with time horizons of 18 years or longer and that his analysis was based on a 1-3 year horizon. Both Reilly and the Defendants sought to justify this inappropriate 1-3 year time horizon—including the failure to add any corporate bonds until 2014—solely by reference to extrinsic evidence of grantor intent. In fact, the Court had to repeatedly admonish Defendant Mark Lake and the defense experts for gratuitously inserting parol evidence—which the Trustee was not entitled to rely on—into their answers.

Conclusion

For these reasons, the bank and the Defendants are liable for investment mismanagement.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was electronically filed on March 20, 2025 via the Florida Courts E-filing Portal, which will send notification of such filing to all attorneys of record.

By: */s/ William R. Scherer*
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