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

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.
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Case No. CACE-16-000592 (04)

MOTION FOR DIRECTED VERDICT

Defendants Wells Fargo Bank, N.A., Debra Charbonnet, Thomas Joyce, Terri Johnson, Melissa Lader Barnhardt, Kim Scott, Marc Spelane, Michael S. Carris, and Mark Lake (collectively, "Wells Fargo") respectfully move for a directed verdict pursuant to Rule 1.480 of the Florida Rules of Civil Procedure.

A trial court should grant a directed verdict where, "'after viewing the evidence in the light most favorable to the non-moving party,'" it "'determines that no reasonable jury could render a verdict for the non-moving party.'" *People's Tr. Ins. Co. v. Kidwell Grp., LLC*, 363 So. 3d 1108, 1110 (Fla. 4th DCA 2023) (citation omitted).

APPLICABLE STANDARD OF CARE

Each Minors' Trust instrument provides that no trustee "shall be liable to any beneficiary except for damages attributable to the Trustee's gross negligence, willful malfeasance or bad faith." *See, e.g.*, Minors' Per Capita Payment Trust Agreement, dated April 20, 2005, art. III, par. B(2).[1] Plaintiffs stipulated that they would "not seek liability under the gross negligence standard" so the Court would not place the Seminole Tribe of Florida on the verdict form as a *Fabre* defendant.[2] Thus, in this case, willful malfeasance and bad faith each require misconduct exceeding gross negligence

"Willful malfeasance" is intentional evil doing, ill conduct, or commission of a completely illegal or wrongful act. *See, e.g.*, *Willful*, MERRIAM-WEBSTER (2025) ("done deliberately[;] intentional"); *Malfeasance*, MERRIAM-WEBSTER (2025) ("wrongdoing or misconduct especially by a public official"); *Malfeasance*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("The commission of a wrongful, unlawful, or dishonest act").[3] Willfulness "connotes blameworthiness. A voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor . . . whether the act is right or wrong. The term *willful* is stronger than *voluntary* or *intentional*; it is traditionally the equivalent of *malicious*, *evil*, or *corrupt*." *Willful*, BLACK'S LAW DICTIONARY (12th ed. 2024).

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[1] *See also* Seminole Tribe of Florida Minors' Per Capita Payment Trust Agreement, dated November 1, 2007, art. III, par. B(2) (same); Seminole Tribe of Florida Minors' Per Capita Payment Trust Agreement, dated March 9, 2010, art. III, par. B(2) (same); Seminole Tribe of Florida Minors' Per Capita Payment Trust Agreement, dated January 13, 2012, art. III, par. B(2) (same).

[2] Amended Order on Defendant's Motion to Exclude the Expert Rebuttal Report and Testimony of J. Marion, entered February 3, 2025, ¶¶ 3–4.

[3] "Dictionaries aid us in establishing the publicly understood plain meaning of a word whose relevant definition is contested, and we look to them when a contractual term is undefined within a contract." *Parrish v. State Farm Fla. Ins. Co.*, 356 So. 3d 771, 776 (Fla. 2023).

Thus, willful malfeasance requires "more than [an] involuntary, inadvertent, negligent, mistaken, careless, or accidental" breach of trust. *Thompson v. Hays*, 11 F.2d 244, 248 (8th Cir. 1926) (willful default). It requires "an intentional designing failure to do or not to do something required—an affirmative wrong." *Id.* "It requires "a corrupt intent." *In re Mann's Will*, 296 N.Y.S. 71, 72 (App. Div. 1937); *cf. New England Tr. Co. v. Paine*, 59 N.E.2d 263, 269 (Mass. 1945) (willful default "frequently . . . interpreted as implying a bad purpose"). It requires a "conscious, deliberate breach of trust." *Van Siclen v. Bartol*, 95 F. 793, 798 (C.C.E.D. Pa. 1899).

Willful malfeasance "does not include a breach of trust which is not known to be such but which merely results from the intentional act or refraining to act of the trustee." *Cf. New England Tr. Co.*, 59 N.E.2d at 549. Indeed, since "[a]lmost every act or refraining to act of most trustees is intentional and not accidental or inadvertent," any definition of willful malfeasance that encompassed "every intentional act or refraining to act that in fact ultimately [brought] about a default would render the expression" willful malfeasance "in the exculpatory clause so impotent" as to be meaningless—and contrary to the grantor's purpose of including an exculpatory clause in the first place.[4] *Cf. id.* (collecting cases and holding willful default clause exculpated trustee from liability for "the consequences of any breach of trust that [trustee] did not intend to commit, knowing it to be a breach of trust, and from responsibility for any loss that [trustee] did not intend to bring about"). Thus, a clause exculpating a trustee for conduct short of willful malfeasance relieves the trustee of "liability for negligence or failure to exercise sound judgment amounting to

[4] The narrower definition of willful malfeasance tracks the Florida distinction between negligence and intentional torts. "[K]nowingly creating an unreasonable risk of harm" is "negligence, not an intentional tort." *Faircloth v. Main St. Ent., Inc.*, 392 So. 3d 1042, 1048 (Fla. 2024) (citation omitted). The "'intent required in order to show that the defendant's conduct is an intentional tort is the intent to bring about harm (more precisely, to bring about the type of harm to an interest that the particular tort seeks to protect).'" *Id.* at 1047 (citation omitted).

a breach of trust and even for an intentional breach of trust unless there was also an intent to cause loss." *Id.*

Like willful malfeasance, "bad faith" means fraud, a conscious design to mislead or deceive another, or a sinister motive. *See, e.g.*, *DeToro v. Dervan Invs. Ltd.*, 483 So. 2d 717, 722–23 (Fla. 4th DCA 1985) (cleaned up) (bad faith is "opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another or sinister motive" and contemplates "a state of mind affirmatively operating with a furtive design or some motive of interest or ill will"); *Bad Faith*, MERRIAM-WEBSTER (2025) ("lack of honesty in dealing with other people"); *Bad Faith*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("Dishonesty of belief, purpose, or motive"); *Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Tr. Co.*, 73 F. 653, 654, 655 (6th Cir. 1896) (bad faith "means 'with actual intent to mislead or deceive another'" on par with "the same actual intent to mislead that must be found in convicting one of the crime of false pretenses"). Mistakes, bad judgment, negligence, or even gross negligence—i.e., acts or omissions that a reasonable, prudent person would know are likely to result in injury to another[5]—are not bad faith. Bad faith, unlike gross negligence, "contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will. It contains the element of intent to do wrong in some degree, actual or necessarily inferable." *Browning v. Fid. Tr. Co.*, 250 F. 321, 325 (3d Cir. 1918); *see also Peterson v. Pollack*, 290 So. 3d 102, 109 (4th DCA 2020) (the "phrase 'bad faith' . . . has been 'equated with the actual malice standard'" and "the definitions of 'in bad faith' and 'with malicious purpose' appear to be synonymous with each other under Florida law"). Therefore, if "a man makes a statement in the honest belief that it is true, he does not make that

[5] *See, e.g.*, *Eller v. Shova*, 630 So. 2d 537, 541 n.3 (Fla. 1994) (defining gross negligence).

statement in bad faith, even if his honest ignorance of the truth is the result of the grossest carelessness." *Penn Mut. Life Ins. Co.*, 73 F. at 654.

I. THE LAW OF THE CASE REQUIRES THE COURT TO GRANT DEFENDANTS A DIRECTED VERDICT ON COUNTS I, II, III, IV, VI, AND VIII.

The Court must implement the Fourth District Court of Appeal's holding that Plaintiffs failed to make an evidentiary showing of intentional misconduct—that Plaintiffs did not proffer any evidence of "fraud, malice, or other misconduct that would justify punitive damages"—as law of the case. "The doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001). Moreover, "a trial court is bound to follow prior rulings of the appellate court," where, as in this case, "the facts on which such decision are based continue to be the facts of the case." *Id.* at 106.

The question on appeal was whether Plaintiffs had made a "reasonable showing by evidence . . . which would provide a reasonable basis for recovery of [punitive] damages." Fla. Stat. § 768.72(1). To meet this standard, "the movant must demonstrate [that it] will be able to produce competent, substantial evidence at trial upon which a rational trier of fact could find that the defendant specifically intended to engage in intentional or grossly negligent misconduct that was outrageous and reprehensible enough to merit punishment." *Creech v. Santomassino*, 395 So. 3d 549, 552 (Fla. 4th DCA 2024) (citation and emphasis omitted). The Fourth District Court of Appeal therefore necessarily concluded Plaintiffs could not "produce competent, substantial evidence at trial upon which" the jury could find that Wells Fargo had "intended to engage in intentional or grossly negligent misconduct." *See id.* Indeed, the court expressly held Plaintiffs had not proffered "*any*" evidence whatsoever of "fraud, malice, or other misconduct," *Wells Fargo Bank, N.A. v. Gopher*, 397 So. 3d 1033, 1034 (Fla. 4th DCA 2024), *reh'g denied* (Dec. 19, 2024),

even though it was "viewing the totality of proffered evidence in the light most favorable" to Plaintiffs, *Creech*, 395 So. 3d at 553.

The issue here is whether a reasonable jury could render a verdict for Plaintiffs, i.e., find that Wells Fargo invested trust assets and received trust management fees with willful malfeasance or in bad faith. *See People's Tr. Ins. Co.*, 363 So. 3d at 1110. The Fourth District Court of Appeal concluded that there was no evidence of fraud, malice, or misconduct that would justify punitive damages—that there was no evidence Wells Fargo "specifically intended to engage in intentional or grossly negligent misconduct." *See Gopher*, 397 So. 3d at 1034; *Creech*, 395 So. 3d at 552. Plaintiffs have not presented any evidence to the jury that they did not also present to the Fourth District Court of Appeal. Thus, no reasonable jury could find Wells Fargo acted with willful malfeasance or in bad faith—that any of Wells Fargo's acts constituted evil doing, ill conduct, completely illegal or wrongful acts, fraud, or the product of a conscious design to mislead or deceive or a sinister motive. Nor could a reasonable jury find Wells Fargo committed fraud—the Fourth District Court of Appeal has already held there is not "any" evidence of fraud. *Gopher*, 397 So. 3d at 1034.

The Court should enter a directed verdict for Wells Fargo on Counts I through IV, VI, and VIII accordingly.

II. NO REASONABLE JURY COULD RENDER A VERDICT FOR PLAINTIFFS ON THEIR INVESTMENT CLAIMS (COUNTS II, III, AND VII) BECAUSE THERE IS NO EVIDENCE WELLS FARGO INVESTED TRUST ASSETS IN VIOLATION OF THE TERMS OF A TRUST INSTRUMENT AND APPLICABLE LAW WITH WILLFUL MALFEASANCE OR IN BAD FAITH.

A. Wells Fargo's Investments Did Not Breach The Terms Of The 2012 Minors' Trust Instrument.

The 2012 Minors' Trust instrument provides that the "paramount objective of the Grantor is preservation of principal" and that "return on investments is a secondary consideration."

Seminole Tribe of Florida Minors' Per Capita Payment Trust Agreement, dated January 13, 2012, art. VI, par. A(1). The instrument expressly directs Wells Fargo to "limit investments to fixed-income securities with strong credit quality" and prohibits investment in "common stocks and other 'equity-like' investments." *Id.* It also provides Wells Fargo "shall have no duty to diversify under the Prudent Investor Rule as set forth in Section 518.11, Fla. Stat." The instrument also provides that Wells Fargo shall not be "liable to any beneficiary except for damages attributable to the Trustee's gross negligence, willful malfeasance or bad faith" and, in particular, "shall not be responsible for losses resulting from a lack of diversification of the assets into other asset classes[.]" *Id.* art. III, par. B(2) & *id.* art. VI, par. A(1).[6]

Wells Fargo invested the assets of the 2012 Minors' Trust in fixed-income securities with strong credit quality to preserve principal. It had no duty to diversify these investments. *Id.* art. VI, par. A(1). Thus, any claim founded upon Wells Fargo's investment of the 2012 Minors' Trust's assets must fail.

Furthermore, even if Wells Fargo had owed a duty to diversify the investments among fixed-income securities, it did so. And even if Plaintiffs, with the benefit of hindsight, disagree with Wells Fargo's exercise of its judgment, there is no evidence Wells Fargo's authorized investments in fixed-income securities amounted to intentional evil doing, ill conduct, completely illegal or wrongful acts, fraud, or the product of a conscious design to mislead or deceive or a sinister motive. Thus, no reasonable person could find that Wells Fargo had breached a duty to

[6] The 2012 Minors' Trust's exculpatory terms are enforceable. Wells Fargo did not draft or cause these terms to be drafted. Even if it had, independent counsel represented the grantor—the Seminole Tribe of Florida—in connection with the drafting of the 2012 Minors' Trust instrument, the tribe eliminated Wells Fargo's duty to invest in accordance with the Prudent Investor Rule, and three prior iterations of the trust exculpated Wells Fargo from liability for conduct short of gross negligence, willful malfeasance, or bad faith.

diversify the 2012 Minors' Trust's investments with willful malfeasance or in bad faith. *See New England Tr. Co.*, 59 N.E.2d at 272 (disproportionately large investments "were no more than failures to exercise the degree of judgment required in the circumstances" and thus "did not amount to bad faith or to intentional breaches of trust or to reckless indifference to the interest of the beneficiaries"). Wells Fargo is entitled to a directed verdict accordingly.

B. Wells Fargo's Investments Did Not Breach The Terms Of The 2005, 2007, Or 2010 Minors' Trust Instruments.

1. The 2005, 2007, and 2010 Minors' Trust instruments are unambiguous—and directed Wells Fargo to preserve trust principal.

The Seminole Tribe's purpose, as reflected in the 2005, 2007, and 2010 Minors' Trust instruments, was unambiguous: Wells Fargo was to invest trust assets so as to preserve principal. Each instrument provides that the tribe, as grantor, intended for the trust to "comply with the requirements of IGRA for the purpose of receiving *and investing* a portion of the per capita payments to which each current and future Minor Qualified Enrolled Tribal Member is entitled . . . ." Minors' Per Capita Payment Trust Agreement, dated April 20, 2005, art. II (emphasis added).[7] IGRA provides that "[n]et revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if," among other things:

> the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are ***protected and preserved*** and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe[.]

[7] *See also* Seminole Tribe of Florida Minors' Per Capita Payment Trust Agreement, dated November 1, 2007, art. II (same); Seminole Tribe of Florida Minors' Per Capita Payment Trust Agreement, dated March 9, 2010, art. II (same).

25 U.S.C. § 2710(b)(3)(C) (emphasis added).

Taken together, the trust instruments' requirement that investments comply with IGRA and IGRA's requirement that the interests of minors be protected and preserved permit a single construction of the grantor-tribe's intent: that Wells Fargo invest trust assets with the goal of protecting and preserving principal.

2. In the alternative, the 2005, 2007, and 2010 Minors' Trust instruments are ambiguous and reasonably construed to direct Wells Fargo to preserve trust principal.

In the alternative, the agreements are ambiguous because statements that the tribe, as grantor, "intends" that the trust "comply with the requirements of IGRA for the purpose of receiving and investing a portion of the per capita payments" are subject to multiple, reasonable interpretations.

An agreement is ambiguous when it uses words that are "subject to reasonable differences of opinion." *Powers v. Aberdeen Golf & Country Club, Inc.*, 886 So. 2d 312, 315 (Fla. 4th DCA 2004). *Miller v. Kase*, 789 So. 2d 1095 (Fla. 4th DCA 2001), is instructive. In that case, the grantor amended his then-revocable trust to give his girlfriend a life estate in a trust-owned condominium. *Id.* at 1096. The grantor and his girlfriend also executed an agreement which required the grantor to establish an escrow account, "the amount of the account being a sum sufficient to pay off any mortgage on the [condominium] and to provide the funds necessary to pay the annual property taxes during the [girlfriend's] lifetime." *Id.* at 1097. After the grantor died, the girlfriend sued the successor trustees for a declaration that the quoted language required them, as trustees, to deposit the full amount needed to cover these condominium costs for the rest of her lifetime. *Id.* The successor trustees, by contrast, contended the provision at issue required them to deposit funds sufficient to satisfy the mortgage and property taxes as they came due, not

in one lump sum. *Id.* The Fourth District Court of Appeal held that each interpretation of the agreement was "reasonably inferred" from its terms, and that the agreement was therefore ambiguous. *Id.* at 1097–98. The district court held that the trial court had erred by applying a rule of grammatical construction instead of placing "itself in the situation of the parties, including the surrounding circumstances, to determine the meaning and intent of the language used." *Id.* at 1098. In short, the trial court had erred by failing "to consider the extrinsic evidence which would shed light on the intent of the parties." *Id.* at 1099.

Powers stands for the same proposition. 886 So. 2d at 315. In that case, the buyer and seller of a property disputed the meaning of a clause by which the buyer "expressly assum[ed] the risk of existing or future circumstances." *Id.* at 313. The Fourth District Court of Appeal held that the "choice" of the word "circumstances" was "subject to reasonable differences of opinion," that the clause was therefore ambiguous, and that "the trial court should have heard parol evidence on the matter before issuing a ruling as a matter of law." *Id.* at 315 (citing *Miller*, 789 So. 2d at 1098). The district court reversed accordingly. *Id.*

Here, to the extent the trust instruments do not unambiguously direct Wells Fargo to select investments with the goal of preserving trust principal, they are ambiguous and reasonably construed to require preservation of principal. Again, each instrument provides that the tribe, as grantor, intended for the trust to "comply with the requirements of IGRA for the purpose of receiving *and investing* a portion of the per capita payments to which each current and future Minor Qualified Enrolled Tribal Member is entitled . . . ." *See, e.g.*, Minors' Per Capita Payment Trust Agreement, dated April 20, 2005, art. II (emphasis added). None of the three trust instruments explains what the grantor meant by "comply with the requirements of IGRA for the purpose of . . . investing a portion of the per capita payments." In fact, the trust instruments elsewhere instruct—

contrary to these statements of purpose—that the trustee may "invest or reinvest" without "being restricted in any way by any statute or court decision (now or hereafter existing) regulating or limiting investments by fiduciaries." *See id.* art. VI, par. A(2).

The trust instruments define IGRA as "the Indian Gaming Regulatory Act of 1988 (Public Law 100-497) 102 Stat. 2467 dated October 17, 1988, (Codified at 25 U.S.C. 2701-2721 (1988)) and any amendments thereto." *See id.* art. I, art. X, par. D. IGRA does not specifically address investment of per capita payments. *See generally* 25 U.S.C. §§ 2701–2721. However, Section 2710 provides that "net revenues from any tribal gaming" may only be used "to fund tribal government operations or programs," "to provide for the general welfare of the Indian tribe and its members," "to promote tribal economic development," "to donate to charitable organizations," or "to help fund operations of local government agencies." 25 U.S.C. § 2710(b)(2)((B). It also provides that "[n]et revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if," among other things:

> the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are ***protected and preserved*** and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe[.]

25 U.S.C. § 2710(b)(3)(C) (emphasis added).

IGRA does not explain what it means to protect and preserve a minor's interest, and the trust instruments do not say what the grantor understood the terms protect and preserve to require (with respect to an investment or otherwise). These terms are "subject to reasonable differences of opinion." *See Powers*, 886 So. 2d at 315. As if to illustrate this point, the trustee plaintiff's

representative himself testified that he and Wells Fargo's counsel were "using 'preservation' a little differently":

> Q. Preservation means not to lose it, right?
>
> A. For example, losing it to inflation and stuff like that, yes. But the real value of that trust maintains its value.
>
> Q. You don't want to lose it in any way, right?
>
> A. No, I don't necessarily agree with that. . . .
>
> Q. You don't want to lose it in market losses, correct?
>
> A. Over the short term, that is okay.
>
> Q. But not in the long term?
>
> A. Not -- over the long term, no.

Tr. 1363:16–1364:9; *see also* Tr. 1398:15–18 ("Q: And [investing in cash and short-term fixed income] is one way for a minor to preserve and protect their share of the Minors' Trust? A. I don't agree with how you're using 'preserve and protect.'").

Thus, if the trust instruments do not unambiguously reflect the tribe's intent that Wells Fargo should select investments with the goal of preserving trust principal, then the instruments—and their references to compliance "with the requirements of IGRA for the purpose of . . . investing" without explaining what those requirements are or what compliance entails—are ambiguous. *See, e.g.*, Minors' Per Capita Payment Trust Agreement, dated April 20, 2005, art. II.

3. The 2005, 2007, and 2010 Minors' Trust instruments eliminated Wells Fargo's duty to follow the Prudent Investor Rule.

Wells Fargo owed no duty under the 2005, 2007, and 2010 Minors' Trust instruments to invest in accordance with the terms of the Prudent Investor Rule. Under Florida law, a fiduciary's "duty to invest and manage investment assets . . . may be expanded, restricted, eliminated, or otherwise altered by express provisions of the governing instrument." Fla. Stat. § 518.11(1), (2).

The "express provision need not refer specifically" to Section 518.11, Florida Statutes. Fla. Stat. § 518.11(2).

Each of the 2005, 2007, and 2010 instruments authorized Wells Fargo to "invest and reinvest in" any "interest or investment medium, . . . even if such investment would not be of a character authorized by applicable law, but for this provision, all without diversification as to kind or amount, without being restricted in any way by any statute or court decision (now or hereafter existing) regulating or limiting investments by fiduciaries." *See, e.g.*, Minors' Per Capita Payment Trust Agreement, dated April 20, 2005, art. VI, par. A(2). Each of these provisions—permitting any investment, without the need to diversify, and without limitation by any fiduciary investment statute or case law—eliminated the prudent investor rule. *See, e.g.*, *Hoffman v. First Va. Bank of Tidewater*, 263 S.E.2d 402, 407 (Va. 1980) (ellipses in original omitted) (prudent investor rule did not provide where trust "authorized investment 'in any type of real or personal property regardless of diversification or State laws, and in common stocks, unimproved real estate, non-productive items, common trust funds, investment company shares'"); *Van Gundy v. Van Gundy*, 292 P.3d 1201, 1205–06 (Colo. Ct. App. 2012) (prudent investor rule did not apply where trust authorized trustee "to invest and reinvest in common stocks, preferred stocks, investment trusts, bonds, securities and other property, real or personal, foreign or domestic . . . *whether or not such investments be of the character permissible for investments by fiduciaries under any applicable law, and without regard to the effect any such investment or reinvestment may have upon the diversity of the investments*"); *In re Jervis C. Webb Tr.*, 2006 WL 173172, at *6 (Mich. Ct. App. Jan. 24, 2006) (prudent investor rule did not apply where trust authorized investment "without diversification as to kind or amount and without being restricted in any way by any statute or court decision (now or hereafter existing) regulating or limiting investments by fiduciaries").

Since Wells Fargo owed no duty to comply with the Prudent Investor Rule or to diversify trust investments, any claim founded upon Wells Fargo's non-compliance with the Prudent Investor Rule or failure to diversify trust investments fails.

4. Wells Fargo did not act with willful malfeasance or in bad faith.

There is no evidence Wells Fargo invested trust assets with willful malfeasance or in bad faith—which is to say, there is no evidence that Wells Fargo's conservative investment of 2005, 2007, and 2010 Minors' Trust assets constituted evil doing, ill conduct, completely illegal or wrongful acts, fraud, or the product of a conscious design to mislead or deceive or a sinister motive or that Wells Fargo intended to cause a loss to the beneficiaries.

Barnett v. Barnett, 424 So. 2d 896 (Fla. 1st DCA 1982), is instructive. In that case, a trust was to be distributed in equal shares to the grantor's four children or, for each child who had died, to the deceased child's surviving blood issue. *Id.* at 897. When the trust terminated, after all four of the grantor's children had died, there was litigation pending about whether one child's son was his blood issue. *Id.* The trustee distributed the three undisputed shares and held the fourth in trust pending resolution of the blood issue dispute. *Id.* After the Florida Supreme Court held the son was his father's blood issue, the son sued the trustee for holding his share of the trust in (1) cash in a non-interest bearing checking account and (2) bank shares, despite a "falling market," during the pendency of the blood issue dispute. *Id.* at 897–98. The trustee invoked the trust instrument's exculpatory provision, under which he "could be held liable only for willful negligence, default, malfeasance or misfeasance, and not for honest errors of judgment made in good faith." *Id.* at 898. The First District Court of Appeal held that the trustee's continued investment of the son's trust share in bank stock "would not be in bad faith considering the tradition of holding [the bank's] stock in the trust since its inception." *Id.*

Here, likewise, Wells Fargo invested trust assets in a conservative bond portfolio at the tribe's direction from the creation of the 2005 Minors' Trust in 2005, the creation of the 2007 Minors' Trust in 2007, and the creation of the 2010 Minors' Trust in 2010. As in *Barnett*, Wells Fargo's continued investment of Minors' Trust assets in conservative bond portfolios could not have been in bad faith or willfully malfeasant considering the "tradition"—affirmed through the tribe's retention of Wells Fargo as trustee for the 2007 and 2010 Minors' Trusts—of investing trust assets conservatively in such bond portfolios. *See Barnett*, 424 So. 2d at 898; *see also Figel v. Wells Fargo Bank, N.A.*, 2011 WL 860470, at *4 (S.D. Fla. Mar. 9, 2011) ("Plaintiffs offer not one case where a trustee was found to have breached a trust or a fiduciary duty, or was otherwise found negligent, because it invested the corpus of the trust in a manner that did not earn as much as it could have."); *New England Tr. Co.*, 59 N.E.2d at 272 (undiversified investments do not rise to level of "bad faith" or "intentional breaches of trust"). Thus, Wells Fargo is entitled to a directed verdict. *See People's Tr. Ins. Co.*, 363 So. 3d at 1110.

C. The Individual Defendants Did Not Breach The Terms Of Any Trust Instrument.

The individual defendants are entitled to a directed verdict on Plaintiffs' investment claims for the additional reason that there is no evidence any of them invested trust assets with willful malfeasance or in bad faith.

It is undisputed that Debra Charbonnet, Thomas Joyce, Terri Johnson, Melissa Lader Barnhardt, Kim Scott, Marc Spelane, and Michael S. Carris did not invest trust assets at all. Each of them is therefore entitled to a directed verdict on Plaintiffs' investment claims.

There is no evidence that the lone remaining individual defendant, Mark Lake, invested trust assets with willful malfeasance or in bad faith. Mr. Lake repeatedly testified that he invested trust assets in accordance with what he understood the purposes of the trusts to be and in the

interests of the trusts' beneficiaries. Even if he erred, no reasonable jury could determine that his good-faith efforts rise to the level of intentional evil doing, ill conduct, completely illegal or wrongful acts, fraud, or the product of a conscious design to mislead or deceive or a sinister motive. *See, e.g.*, *Browning*, 250 F. at 326–27 (no willfulness or bad faith where "officers acted solely in what they thought was a correct performance of the trust . . . without ulterior motive, furtive purpose or design to injure anyone"). He, too, is therefore entitled to a directed verdict on Plaintiffs' investment claims.

III. NO REASONABLE JURY COULD RENDER A VERDICT FOR PLAINTIFFS ON THEIR FEE CLAIMS (COUNTS I, III, IV, VI, AND VIII) BECAUSE THERE IS NO EVIDENCE WELLS FARGO RECEIVED FEES WITH WILLFUL MALFEASANCE OR IN BAD FAITH.

A. There Is No Evidence Wells Fargo Received Fees With Willful Malfeasance Or In Bad Faith.

Even if Wells Fargo had received a subset of its fees in error—and it did not—there is no evidence it did so with willful malfeasance or in bad faith and not just negligence or gross negligence. *See Gopher*, 397 So. 3d at 1034 (no evidence of "fraud, malice, or other misconduct").

Again, willful malfeasance and bad faith each require intentional misconduct—not just that Wells Fargo acted intentionally, but that it intended to cause a loss to the beneficiaries of the Minors' Trust or harbored a malicious purpose. *See New England Tr. Co.*, 59 N.E.2d at 549 (willful default); *Peterson*, 290 So. 3d at 109 (the "phrase 'bad faith' . . . has been 'equated with the actual malice standard'" and "the definitions of 'in bad faith' and 'with malicious purpose' appear to be synonymous with each other under Florida law").

Plaintiffs have presented no evidence Wells Fargo intended to cause a loss to the beneficiaries or harbored a malicious purpose in disclosing its fees as it did. To the contrary, the evidence shows Wells Fargo rendered services for the fees it received, disclosed the fees to Jim Raker, the tribe's chief financial officer, and repaid those fees it concluded it had received in error.

Since Wells Fargo was, at most, negligent or grossly negligent, no reasonable jury could find Wells Fargo acted with willful malfeasance or in bad faith or render a verdict for Plaintiffs. Wells Fargo is entitled to a directed verdict on Counts I, III, IV, VI, and VIII accordingly. *See People's Tr. Ins. Co.*, 363 So. 3d at 1110.

B. There Is No Evidence Any Individual Defendant Participated In Wells Fargo's Receipt Of Fees With Willful Malfeasance Or In Bad Faith.

The individual defendants are likewise entitled to a directed verdict on Plaintiffs' fee claims for the additional reason that there is no evidence any of them acted with willful malfeasance or in bad faith.

Mark Lake had no role regarding Wells Fargo's receipt of fees. Neither did Thomas Joyce or Terri Johnson. There is no evidence Debra Charbonnet, Melissa Barnhardt, or Michael Carris did anything wrong at all. Marc Spelane disclosed the fees to Jim Raker and the tribe; he did not conceal Wells Fargo's receipt of the fees. A number of the individual defendants—including Johnson and Barnhardt—had no involvement with the Minors' Trust and Wells Fargo's receipt of fees until after Raker's successor asked Wells Fargo to provide additional information regarding the fees. And, to the extent any individual defendant erred, there is no evidence that the defendant intended to cause a loss to the beneficiaries of the Minors' Trust or harbored a malicious purpose—that their acts rose to the level of evil doing, ill conduct, completely illegal or wrongful acts, fraud, or the product of a conscious design to mislead or deceive or a sinister motive. *See New England Tr. Co.*, 59 N.E.2d at 549; *Peterson*, 290 So. 3d at 109.

The Court should enter a directed verdict for the individual defendants on Counts I, III, IV, VI, and VIII accordingly.

CONCLUSION

The Court should enter a directed verdict for Wells Fargo, including each of the individual defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 17, 2025, I electronically filed the foregoing document with the Clerk of the Court using the E-Filing Portal. I further certify that the foregoing document is being served via transmission of Notices of Electronic Filing generated by the E-Filing Portal on all parties listed on the Service List below.

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