UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JO ANN HOWARD AND ASSOCIATES, P.C., *et al.*,	)	
Plaintiffs,	)	
v.	)	Cause No. 4:09-CV-01252-ERW
J. DOUGLAS CASSITY, *et al.*,	)	
Defendants.	)	ORAL ARGUMENT REQUESTED

MEMORANDUM IN SUPPORT OF DEFENDANTS NATIONAL CITY BANK, U.S. BANK, NATIONAL ASSOCIATION, AND BMO HARRIS BANK'S MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

registering directly with Missouri. SOF ¶ 127. In addition, between 1986 and 2013, David Wulf himself was registered with the Financial Industry Regulatory Authority or its predecessors as a Registered Securities Principal and Registered Financial and Operational Principal, among other things. SOF ¶ 128. Charles Bates was also registered as a Registered Securities Principal. SOF ¶ 129. To maintain WBM's annual registration with the SEC, Wulf took continuing education classes annually. SOF ¶ 130.

NPS was not WBM's only client. WBM's client base was "an eclectic mix of old money, institutions, individuals, [and] retirement plans." SOF ¶ 131. WBM continued representing other clients after NPS went into receivership. SOF ¶ 132.

WBM served continuously as the investment manager for the Missouri Trusts until NPS's collapse in 2008. SOF ¶ 133. During that period, WBM made the decision to invest Missouri Trust assets in Lincoln life insurance policies. *See* SOF ¶¶ 134-135; *see also* SOF ¶ 134 ("The decision to purchase life insurance from Lincoln as a preneed trust investment was made by WBM consistent with Missouri preneed trust statutes, my experience and licensure."); SOF ¶ 134 ("You made the decision to purchase life insurance from Lincoln Memorial Life Insurance Company as a preneed trust investment, correct? . . . . A Yes.").

B. WBM Was "Independent" under Any Meaning of That Term.

At all relevant times, Chapter 436 permitted a pre-need seller to transfer investment management authority from the trustee to an investment advisor once the trust reached $250,000 in principal and income. Mo. Rev. Stat. § 436.031. The statute required that the investment advisor be (a) federally registered or Missouri-registered, (b) qualified, and (c) independent. In the event the pre-need seller designated an investment advisor, "[t]he trustee shall be relieved of all liability regarding investment decisions made by such qualified investment advisor." *Id.* The evident purpose of this provision was to protect the pre-need trustee from liability for decisions

made by a third party it could not control. If the trustee could be held liable for investment decisions made by the investment advisor, the trustee would have reason to second-guess or interfere in the investment manager's decisions. By relieving the trustee of this exposure, the provision formalized the separation of duties between the trustee and the investment advisor.

As allowed by statute, the Missouri trust agreements contained a provision authorizing NPS to appoint an "independent qualified investment advisor, so long as the requirements of Missouri law are met." SOF ¶ 113; Exs. 1-4, ¶ 2.2. NPS invoked this provision in appointing WBM the investment manager for the Missouri Trusts. *See* Exs. 29-31. The trust agreements further reinforced Missouri law by providing that the trustee would have no liability for investment decisions made by the investment advisor. *See* Exs. 1-4, ¶ 2.2. So long as WBM was (a) federally registered or Missouri-registered, (b) qualified, and (c) independent, the Missouri Trustees do not bear any responsibility for his investment decisions. The undisputed evidence establishes that WBM met all three criteria.

First, WBM was registered as an investment advisor with the SEC throughout the Missouri Trustees' trusteeships. *See* SOF ¶ 124. It was therefore "federally registered."

Second, WBM was qualified to render investment advice. To qualify for SEC registration—before it took on the NPS business—WBM was required to have millions of dollars under management. *See* SOF ¶ 125. Throughout the relevant period, Wulf and Bates were credentialed with the Financial Industry Regulatory Authority or its predecessors. SOF ¶ 128. Wulf took continuing education classes annually. SOF ¶ 130.

Third, WBM was "independent" under any plausible interpretation of that term. Chapter 436 does not define the term "independent" or specify the entity or entities from which the investment advisor must be independent. "If a statute is ambiguous, it is to be construed in a

manner consistent with the legislative intent, giving meaning to the words used in the broad context of the legislature's purpose in enacting the law." *Williams-Payton v. Williams (In re Estate of Williams)*, 12 S.W.3d 302, 306 (Mo. 2000) (en banc).

In light of the statute's purpose, "independent" is logically construed to require that the investment advisor be independent from the pre-need trustee. As discussed above, the evident purpose of the immunity provision is to protect the trustee from liability for decisions made by third parties that the trustee cannot control. It would make no sense to protect a trustee from decisions made by an investment advisor controlled by the trustee, such as an employee or affiliated company. *Cf.* Restatement (Second) of Trusts § 171 cmt. k (2d. ed. rev. 1992) (trustee has duty to supervise agents to which the trustee himself delegates authority). Therefore, the investment advisor and trustee logically must be independent of each other. It is undisputed that WBM was independent from the Missouri Trustees. No Missouri Trustee had any ownership interest in WBM. *See* SOF ¶ 123.

Plaintiffs' experts have suggested that Chapter 436 should be construed to require the investment advisor to be "independent" of the pre-need seller.[17] *See, e.g.*, Ex. 55, at 51. The Court need not determine whether this interpretation of the statute is correct because, even if it is, the undisputed evidence establishes that WBM and NPS were independent entities. WBM and NPS did not have common ownership. *See* SOF ¶¶ 121-122. WBM existed and did business for several years before it took on the NPS account, and it continued to do business after NPS's collapse. *See* SOF ¶¶ 118, 132. In short, NPS and WBM were independent companies.

[17] Experts are not permitted to opine on what the law means, and these opinions should therefore be stricken. *See* Defendants National City Bank and U.S. Bank's Motion To Strike in Part the Expert Testimony of Edgar M. Coster and Donald J. Fitzgerald and Missouri Trustee Defendants' Motion to Exclude Expert Testimony of Robert Lock.

Plaintiffs' experts have identified several aspects of WBM's operations that they claim rendered WBM non-independent. First, they point out that WBM rented office space in the same office building as NPS. At some time after early 1999—after Mark Twain/Mercantile's trusteeship and after Allegiant had commenced its trusteeship—WBM rented office space from NPS. *See* SOF ¶ 139. The fact of a lessor-lessee relationship does not mean that the two companies were other than independent, and there is no evidence that WBM did not pay an arm's-length rent. Second, they point out that WBM employees were covered by NPS's health insurance. At some point in time, probably in 2001, WBM had to find a larger health insurance plan to join. SOF ¶ 140. It ultimately joined the NPS plan among several others it was considering.[18] SOF ¶ 140. WBM paid for this insurance. SOF ¶ 140. The sharing of a group health insurance plan does not make two companies dependent on each other, particularly when there were other options available to WBM. Third, they cite evidence that 90 percent of Wulf's time was spent on NPS matters. But that fact—which could not be known by the Missouri Trustees—does not affect the factual separateness of the two companies. And, as noted above, WBM, not David Wulf, was the appointed investment advisor, and NPS was just one of WBM's many clients. WBM served other clients both before and after its handling of the NPS account.

Plaintiffs' experts have also argued that WBM was not "independent" of NPS under Chapter 436 because Wulf did not independently reach his investment decisions but instead made decisions at the direction of NPS. *See, e.g.*, Ex. 57, at 13-14; Ex. 56, at 10. These inadmissible "opinions" on what Chapter 436 means fundamentally misconstrue the statute. The statute provides immunity for investment decisions made by an "independent" investment advisor. The term "independent" modifies "investment advisor." Plaintiffs' experts read the

[18] This occurred three years after Mark Twain/Mercantile transferred the trusts to Allegiant.

statute as if it provided immunity for investment decisions made "independently" by the investment advisor. In other words, they re-write the statute such that "independent" modifies "investment decision[]."

Plaintiffs' experts' reading of the statute eviscerates its very purpose. If a trustee's immunity extended only to investment decisions made "independent[ly]" by an investment advisor, the trustee would have to inquire into the decision-making process behind each and every investment to assure itself that it would have immunity. Moreover, when used this way, the term "independent" is impossibly vague. Does an investment advisor act "independently" if he agrees with a suggestion made by the pre-need seller? Does an investment advisor act "independently" if the pre-need seller constitutes a large percentage of his revenue? The ambiguity of the term when used this way would further compel trustees to investigate the decision-making process behind each investment decision, as well as the revenues earned from the particular account.

Even under Plaintiffs' interpretation of section 436.031 to require the investment advisor to be independent of the pre-need seller, WBM was "a federally registered or Missouri-registered independent qualified investment advisor." Mo. Rev. Stat 436.021 (2008) (repealed 2009). Accordingly, the Missouri Trustees' cannot be held liable for WBM's decision to invest trust funds in Lincoln life insurance policies. The Court should grant summary judgment to the Missouri Trustees on Plaintiffs' claim that the Trustees breached their fiduciary duties by using trust assets to purchase Lincoln life insurance policies.

VI. The Missouri Trustees Are Not Liable for Acceptance of the Trusts or a Predecessor Trustee's Acts.

Missouri law is clear that prospective trustees do not owe any duties to a trust beneficiary unless and until they accept the trust accounts. This rule has two consequences for Plaintiffs'