EXPERT REPORT OF FRANCIS M. HANNA

Prepared for

U.S. Bank National Association, Successor to
Mark Twain Bank and Mercantile Bank

in

Jo Ann Howard, et al. v. J. Douglas Cassity, et al.

August 15, 2014

wrongdoing. (Ommen Dep., 148-149; Ex. Ommen 3549; Crawford Dep., 38-61.) Following more than a year of litigation, the parties reached a settlement of their dispute, which was described as "a fair and adequate settlement of the issues." (Exs. JC 9003; Ommen 3553.) The parties agreed that it was "in the best interest of...the people of (the) State of Missouri that this matter be amicably resolved..." and that "no Court has ruled that NPS has or has not violated Chapters 407 or 436...." (*Id.*)

Finding the Consent Judgment "will adequately protect the public interest," the Court allowed NPS to continue its operations, expressly permitted the funding of the trusts with life insurance policies, recognized that NPS was purchasing insurance policies from Statesman and Lincoln, and established the parameters for funding the trusts going forward. (Ex. 289.) This allowed NPS to continue its business as a preneed seller in Missouri, and allowed it to continue funding its obligations with insurance policies purchased from its affiliates, Statesman and Lincoln.

This was essentially a "clean bill of health". A reasonably prudent trustee reviewing the terms of the Consent Judgment would have determined that the Court approved of NPS' business practices including the purchase of insurance policies to fund its preneed funeral obligations. Although the parties agreed to increase funding in Trusts II and III, the Consent Judgment expressly stated there had been no finding that NPS violated Chapter 436. (Ex. 289.) Further, the appointment of McBride Lock as a monitor to oversee NPS' compliance with the Consent Judgment would have provided a reasonably prudent trustee additional confidence that NPS would continue to adhere to its obligations under Chapter 436 as well as the Consent Judgment. Plaintiffs' characterization of the Consent Judgment as a "red flag" mischaracterizes its legal effect and misunderstands the nature of the proceeding.

IV. MARK TWAIN ACTED WITHIN THE STANDARD OF CARE WHILE ADMINISTERING THE TRUSTS

A. Income Distributions

Chapter 436 provides, in relevant part, that the trustee shall not distribute income "if, and to the extent that, the distribution would reduce the aggregate market value on the distribution date of all property held in the preneed trust, including principal and undistributed income, below the *sum of all deposits made to such trust* pursuant to subsection of this section of all preneed contracts then administered through such trust." Mo. Rev. Stat. § 436.031. (Emphasis added)

Plaintiffs' experts' opinions that Mark Twain was not meeting its fiduciary responsibility by making loan payments with income distributions are premised entirely on Mr. Lock's 1992 report. (*see* Lock Expert Dep., 285:1-25; Coster Dep., 544:3-547:13.) In that report, Mr. Lock's analysis was flawed in that he failed to apply the proper test. His conclusion that the trusts were underfunded in 1992 was premised entirely on the amounts that he believed NPS was required to deposit into the trust, not what was actually deposited into the trust. Mr. Lock determined that NPS had not deposited 80% of the amounts received from pre-need contract sales into the trust, and from this analysis, he concluded that the trusts were underfunded.[5] (Ex. Lock 7452; Lock

[5]Mr. Lock's stated in his report "Our analysis of the trust balance demonstrate(s) that the trust is funded at a substantially lower amount than required by Chapter 436.... **This deficiency is principally the result of shortages**

Expert Dep., 280-83.) Mr. Lock did not compare the value of the trust assets to the sum of the deposits made into the trust as required by Mo. Rev. Stat. § 436.031.

None of Plaintiffs' expert witnesses have identified an instance in which Mark Twain or Mercantile distributed income that resulted in the aggregate market value of the trust assets falling below the sum of the cash deposits into the Trusts using the proper analysis. Further, Mark Twain understood and tracked the tax cost and market value of the trust assets it received from predecessor trustees. (*See* Section IV(G) below.) Mark Twain and Mercantile tracked the trust deposits and asset values throughout their tenure as trustees. Therefore, Mark Twain and Mercantile kept records necessary to make income distributions under Section 436.031(3.)

B. Use of Lincoln

The Trusts' investment in life insurance policies was directed by WBM, the investment advisory firm designated by NPS to manage the trust investments. Missouri Revised Statutes § 436.031(2) provides, in relevant part:

> A preneed trust agreement may provide that when the principal and interest in a preneed trust exceeds two hundred fifty thousand dollars, investment decisions regarding the principal and undistributed income may be made by a federally registered or Missouri-registered independent qualified investment advisor designated by the seller who established the trust; provided, that title to all investment assets shall remain with the trustee and be kept by the trustee to be liquidated upon request of the advisor of the seller. In no case shall control of said assets be divested from the trust nor shall said assets be placed in any investment which would be beyond the authority of a reasonable prudent trustee to invest in. **The trustee shall be relieved of all liability regarding investment decisions made by such qualified investment advisor.**

The agreements controlling the Trusts contain similar language, with each providing:

> The Trustee shall have the exclusive management and control of the Trust and its funds; provided that when the principal and interest of this pre-need trust exceeds $250,000, the Seller at its discretion may appoint an independent qualified investment advisor so long as the requirements of Missouri law are met, and the Trustee shall have no liability for any investment decision made by such investment advisor. (Trust Agreements, § 2.2.)

Pursuant to Mo. Rev. Stat. § 436.031(2), NPS designated WBM as the investment advisor for the Trusts. (Exs. Wulf 3202, 3231.) The statute is clear that "the trustee shall be relieved of all liability regarding investment decisions made by such qualified investment advisor." As the statute and trust instruments effectively absolve the trustee from liability for investment decisions made by the investment advisor, it follows that the trustee would exercise limited oversight over the trust investments.

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of deposits as described in Finding 1. However, distributions were made for loan payouts by the trustee even though the trust is funded at a level below the sum of deposits required to be held in trust." (Ex. Lock 7452, p. 18.)

Given the applicable law and my experience in the field of trust administration, it is my opinion that a reasonably prudent trustee would not have launched an investigation into the viability of Statesmen or Lincoln in connection with its analysis of insurance as an investment. Contrary to Mr. Coster's assertion, a reasonably prudent trustee would not have investigated details relating to Statesmen's' reinsurers in 1991. Even if Mark Twain had known Statesmen was reinsured by Memorial, a reasonably prudent trustee would not have investigated the details of Memorial's ownership or attempted to uncover whether it had officers, directors or owners in common with NPS. Uncovering these types of details simply would not have been practical because it would not have been readily available to the trustee, nor would it have been expected of a reasonably prudent trustee in 1991when NPS began funding the preneed contracts with insurance policies. If such details were available, it would have been the duty of the investment advisor to consider such things in making his recommendations for the purchase of life insurance policies from Statesman or Lincoln.

Mark Twain was not required to participate in Mr. Wulf's investment strategy and management of trust assets, but more importantly, it was prohibited from doing so. Therefore, a reasonably prudent trustee would not perform any investigation into Lincoln or Statesmen or determine the amount of life insurance to be purchased at a given time, or track the premium payments due under the policies. These duties were assigned to WBM as the investment advisor for these trusts. In my opinion, Mark Twain and Mercantile complied with the standard of care regarding the investment in life insurance policies issued by Statesmen and Lincoln as directed by Mr. Wulf.[6]

C. Alleged Knowledge of Inappropriate Banking Activities

As an attorney in private practice, and in consulting with attorneys regarding trusts while employed as a professor, I have significant exposure to "Chinese Wall" policies and practices in the banking industry, and often provided advice regarding the implementation of them. Although Mr. Coster provides an accurate summary of the history of the "Chinese Wall" concept, he misunderstands the policies and practices employed by trust departments in Missouri during the relevant time period.

U.S. Bank's corporate representative testified that a "Chinese Wall" existed between the trust department of Mark Twain and the banking department, which restricted communications between these departments. (Mullen Dep., 110-12; 187-93.) This is consistent with my understanding of "Chinese Wall" practices at the time, and I have not seen any evidence to contradict Ms. Mullen's testimony. In my experience, banks established policies and procedures to implement a Chinese Wall between the trust department and the banking department, and to avoid the risk of violating the rules, they employed a bright line rule prohibiting communications between the two departments regarding their customers.

Setting aside Mr. Jostrand's statements that he was not aware that NPS had trust accounts at Mark Twain and that his suspicions about check kiting were mere allegations (*see* materials used to educate U. S. Bank's 30(b)(6) witness), the information contained in Mr. Jostrand's series of

[6] Mercantile acquired Mark Twain in 1997. Mercantile had no duties other than those already exercised by the trust department of Mark Twain relating to the investment in life insurance policies issued by Statesmen and Lincoln.

letters from 1993 (ex. 288) would have been strictly confidential. Mr. Coster's suggestion that bankers and trust officers often meet socially has no bearing on the application of "Chinese Wall" provisions at Missouri banks in the early 1990s. And, Mr. Coster admitted that he had no information to suggest that this had actually occurred at Mark Twain or Mercantile. (Coster Dep., 581:18-584:12.) It is my opinion that even if Mr. Jostrand had known that NPS had trust accounts at Mark Twain, he would have been strictly prohibited from sharing the suspicions articulated in his 1993 letters in compliance with the bright line rule followed by Missouri banks in the 1990s.

D. Consent Judgment

Mr. Coster characterizes the Consent Judgment as a "huge red flag that should have resulted in a comprehensive investigation by Mark Twain of that proceeding and its findings regarding the subject trusts." (Coster Report, p. 24.) It is difficult to respond to Mr. Coster's opinion regarding the Consent Judgment because it is unclear which "findings" Mr. Coster finds alarming.[7] Mr. Coster's call for a "comprehensive investigation" fails to recognize that if Mark Twain had launched such an investigation, it is not entirely clear that it would have gained access to the Court file. Further, it is my opinion that Mark Twain had no duty to investigate the Consent Judgment because it was not a party to the Consent Judgment and little, if any, knowledge regarding the proceeding. Mr. Coster's analysis also assumes that Mark Twain would have determined the Consent Judgment was "alarming," when the Consent Judgment expressly provided there had been no finding that NPS violated Chapter 436. (Ex. 289.) It is my opinion that had Mark Twain investigated the Consent Judgment further, it would not have raised any "red flags" about the Trusts or NPS' operations.

E. Policy Loans

Plaintiffs' experts opine that Mark Twain and Mercantile failed to protect and preserve the trust assets by "allowing" NPS to take loans against the insurance policies held by the Trusts. (Coster Report, pp. 25-26; Lock Report, p. 11.) As an initial matter, it is uncontroverted that the Trusts owned the life insurance policies that were held as assets of the Trusts. Because the policy loans were made by Lincoln against policies owned by the Trust without the express authorization of the Trustee, these "loans" should be void *ab initio* and unenforceable as to the trustees. It was telling that Mr. Coster refused to state whether a mortgage taken by a third party against the equity in his own house would be valid, or whether he should be required to call his bank periodically to inquire as to whether any third party had taken a loan against his house. (Coster Dep., 197:20-201:5.) That is because it is analogous to NPS' attempt to encumber policies owned by the Trusts.

Every bank trust department that I have worked with over the last 52 years has owned life insurance in its trusts. Not one of these banks has ever voiced any concern to me about the possibility of fraudulent loans being taken against the policies without the bank's knowledge. Not only should such a loan be invalid, but it is simply not reasonable for the owner of an

[7] At his deposition, Mr. Coster could not identify the terms of the Consent Judgment and had not read any of the pleadings leading up to the Consent Judgment before offering his opinion that it was a "huge red flag." (Coster Dep. 555:17-557:18.)

insurance policy to anticipate or even contemplate the possibility that the insurance company would allow policy loans without the express, written consent of the owner of those policies. Thus, the trustees can hardly have been expected to ask Lincoln if any loans have been taken against property owned by the Trusts.

Plaintiffs' experts opined that Mark Twain knew or should have known about policy loans because they should have taken possession of the policies. But Lincoln did not issue individual policies. (Lock Expert Dep., 99:9-100:11.) Plaintiffs' experts seemed to acknowledge that physical possession of the polices was not required (Coster Dep., 153:13-155:15; Lock Expert Dep., 97-115), but also opined that Mark Twain and Mercantile failed to exercise appropriate "control" over the policies. It is unclear what "control" the trustees could have exercised to prevent the loans and Plaintiffs' experts could not explain what other mechanisms of "control" that Mark Twain should have implemented.

The procedure for processing policy loans during the time Mark Twain and Mercantile served as trustee involved Randy Sutton of NPS contacting Tony Lumpkin of Lincoln to request that Lincoln make loans against the policies. Mr. Lumpkin used a computer program to determine which policies could be borrowed against and to process the loan transactions. (Lumpkin Dep., 104-111.) Plaintiffs' experts have not identified any method of "controlling" the policies that could have prevented this activity because the loans were processed by the issuer of the policies, Lincoln, which always had the ability to manipulate its own policies without the knowledge of the trustee. Possession of the policies would not have prevented this manipulation.

As trustee, Mark Twain and Mercantile owned the life insurance policies that were assets of the Trusts. Mark Twain (and presumably Mercantile, given that it acquired Mark Twain) kept a copy of the "master policy" issued by Lincoln in its vault. (Mullen Dep., 90-93.) In addition, the trustees received "Evidence of Insurance" materials each month, which provided a list of the contract holders for whom policies had been issued. (*E.g.*, Exs. 293, 321.) Mark Twain and Mercantile's control of the trust assets was well within the standard of care.

Plaintiffs' experts opine that Mark Twain and Mercantile "could and should have obtained the cash value of the policies." (Coster Report, p. 25; Fitzgerald Report, p. 7), but it was well within the standard of care for Mark Twain and Mercantile to rely upon information provided by the insurance carrier (Lincoln), especially because the values were reviewed and approved by Mr. Wulf. (Wulf Dep., 327:7-333:17.)

Moreover, the issue regarding whether the policies should have been valued at cash surrender value was litigated in the action between the State of Missouri and NPS in 1992. In that litigation, the State of Missouri expressly abandoned its position that policies should be valued at cash surrender value, which effectively permitted the reporting of policies at face value. (Ommen Dep., 147-159; Exs. Ommen 3552, 3553.)[8] This further supports my opinion that Mark Twain

[8] Mr. Lock understood that the policies were valued at face value in 1992 and throughout the monitoring period, and did not express any concerns regarding this practice until after Mercantile stopped serving as trustee when he was advised that NPS had taken policy loans against the policies. In 1998, Mr. Lock advised the Court that the asset valuation had been in compliance with the terms of the Consent Judgment. (Lock Dep., 215-232; Ex. 7468.)

and Mercantile acted reasonably when they reported the value of the insurance policies as assets of the Trusts.

Plaintiffs' experts claim Mark Twain and Mercantile should have detected the policy loans by monitoring the Trusts more closely, but, based upon the record, it appears that NPS and Lincoln took deliberate steps to conceal the policy loan transactions from the trustee. From 1995-1996, Lincoln wired proceeds from policy loans directly to NPS, circumventing the trustee entirely. (Plaintiffs' Amended Responses to U.S. Bank's Interrogatory No. 4.) This was done at the direction of Mr. Wulf, who directed the policy loan transactions. (Exs. TL 8010, Wulf 3242; Wulf Dep., 231:1-234:8.) Beginning in 1997, Lincoln began depositing policy loan proceeds directly into the trusts, but there is no indication that Mark Twain or Mercantile were notified that these deposits constituted policy loan proceeds.

As part of their efforts to conceal the policy loans from the trustee, Lincoln requested repayment of the policy loans from NPS upon the death of the consumer before paying death benefits due under a given policy, so the trustee would not see a reduced death benefit payment. (Exs. TL 8011, 8012; Lumpkin Dep., 144:11-152:24.) Further, Mr. Lock believes NPS concealed the loans from the trustees. Mr. Lumpkin also testified that the trustees were never notified of the loans. (Lock Dep., 248-253; Lumpkin Dep., 139:7-12.)

Regarding the deposits from Lincoln into the trusts in 1997 and 1998 along with the corresponding wires out of the trust to NPS, a reasonably prudent trustee would likely have noticed these transactions and pursued an explanation. Although she does not recall the precise details due to the passage of time, Ms. Moellenhoff was confident she would have investigated and received a satisfactory explanation. (Moellenhoff Dep., 249:1-266:2.) Ms. Moellenhoff, however, was clear Mr. Wulf never disclosed the fact that NPS was taking loans against the policies owned by the Trusts. (Moellenhoff Dep., 266:7-20.) It is important to note that Mr. Lock, a Certified Public Accountant appointed by the Court who reviewed monthly trust statements and had full access to NPS' books and records, did not discover the nature of these transactions until late 1998, after Mercantile stopped serving as trustee. (Lock Dep., 183-200; 219-256; Lock Exs. 7466-68.) Although Mr. Lock now claims he detected the loans by reviewing the trust statements, the record reveals that regulators notified Mr. Lock of the existence of the policy loans. At that time, Mr. Lock indicated he was not aware of the loans even though he analyzed the trust statements on a monthly basis beginning in February of 1994. (Ex. Lock 7465.)[9]

F. Debentures

The debentures deposited into Trust I in 1997 (exs. Hall 3426-28) were trust investments for which WBM had sole responsibility, and the trustee is expressly relieved of any liability for these investment decisions. Mr. Wulf was appointed as investment advisor for Trust I. Angela Hall of NPS testified that Mr. Wulf would have received a copy or been notified of all wire transfers, including those corresponding to the debentures. (Hall Dep., 126:23-131:12.)

[9] When Mr. Lock was advised of the existence of the policy loans, he began investigating the loans by contacting NPS, which offered justification for the loans. Lock reported the loans to the Court and Attorney General, but no action was taken against NPS. (Ommen Dep., 179:14-190:6; Lock Dep., 259:19-200:3.)

If Mark Twain had been responsible for evaluating the prudence of these debentures, it would have assessed NPS' financial condition by reviewing financial statements prepared by a certified public accountant, including an income statement and balance sheet. It is my understanding that this would have shown assets and cash flow sufficient to service the debt represented by these debentures.

Regarding the $14,285,193.00 million debenture held by Trust III, the Debenture Bond and Security Agreement relating to this Debenture makes clear that it represents a contingent obligation. NPS promised to pay $14,285,193.00 to the trustee *"when and if"* it was required to do so by the Court in the ligation giving rise to the Consent Judgment. (Ex. 295.) In February of 1994, the Court entered the Consent Judgment, which did not require that NPS pay this debenture. (Ex. 289; Lock Dep., 334-336; Crawford Dep., 83.) Although Mark Twain and Mercantile reported the debenture on the monthly statements for Trust III, Mr. Lock recognized that it was a contingent asset, and thus he did not take the debenture into account when determining whether Trust III was adequately funded for purposes of complying with the Consent Judgment. (Lock Dep., 336.)[10]

It therefore is my opinion that Mark Twain and Mercantile acted within the appropriate standard of care, and properly discharged its statutory duties regarding these debentures.

G. Mark Twain and Mercantile kept Adequate Records

Throughout their expert reports and depositions, Plaintiffs' experts claim Mark Twain and Mercantile never received a "baseline record" when it accepted the Trusts, suggesting that they were never able to determine how much money had been deposited into the Trusts. During my conference with Ms. Botkin, she explained that when accepting a new trust, the committee would obtain statements from the prior trustee and evaluate the assets being transferred. Importantly, Mark Twain would obtain both the market value and the tax cost of the assets. The tax cost identifies how much was paid for the asset, such that Mark Twain was able to identify and track the amounts that had been deposited into the Trusts. The initial account statement for Trust II confirms that Mark Twain obtained both market value and tax cost of the assets transferred from UMB. (SDR0109909-14.) The same is true for Trust III (SDR0244185-87) and Trust I (SDR0107726-27.) Trust IV, which was by far the largest and most active of the Trusts, originated at Mark Twain following the entry of the Consent Judgment in 1994, and Mark Twain and Mercantile tracked the amounts deposited and tax cost of Trust IV assets from its inception.

Plaintiffs' experts claim that Mark Twain and Mercantile failed to keep adequate records because the trustees did not track the amount deposited into the trust for each pre-need contract sold by NPS. They also contend that the trustees were responsible for ensuring that NPS deposited 80% of the money received from pre-need sales into the Trusts. As discussed above, a reasonably

[10] Plaintiffs' experts' opinions regarding the $14,285,193.00 debenture being lost by Mark Twain is a red herring. No adverse consequences were suffered by the loss of the debenture, which was ultimately replaced by NPS and returned to Mark Twain's vault. Moreover, Mark Twain took the appropriate steps to replace the lost debenture. (Exs. 600B, 600C.)

prudent trustee would not read Chapter 436 or the Trust Agreements to impose such requirements.

The primary function of the trustee as contemplated in section 436.031 is to "accept all deposits made to it by the seller of a pre-need contract," and to "hold, administer and distribute such deposits in trust, as trust principal, pursuant to the provisions of sections 436.005 - 436.071." The trustee is required to "maintain adequate books of account of all transactions administered through the trust and pertaining to the trust generally." *See* Mo. Rev. Stat. section 436.031.5. A reasonably prudent trustee would maintain records of aggregate amounts deposited into trust, which Mark Twain and Mercantile did. Contrary to Plaintiffs' experts' assertions, a reasonably prudent trustee would not have attempted to track whether certain amounts were deposited for each of the thousands of pre-need consumers, or seek to monitor or ensure that NPS was depositing 80% into trust, especially given that Section 4.1 of the Trust Agreements provides that the Trustee is not obligated to ensure that deposits are made according to the provisions of a funeral agreement. Further, a trustee cannot be expected to supervise the preneed seller's business and ensure that it is not engaging in fraud or violating the law.

Although Mo. Rev. Stat. § 436.025 requires the trustee to "distribute to the seller from the trust an amount equal to all deposits made into the trust for the contract," nothing requires the trustee to keep records relating to specific deposits for each pre-need funeral contract. The statute contemplates the trustee relying on NPS for this information and distributing funds accordingly. In fact, the very section that requires the trustee to keep adequate records of transactions "administered through the trust" provides that the *seller* shall furnish records relating to the amounts deposited into trust for each purchaser upon request. *See* Mo. Rev. Stat. § 436.031(5.) Given that the *seller* must provide this information to the consumers, a reasonably prudent trustee would conclude that the seller – and not the trustee – was required to track this information.

Plaintiffs' experts also contend that the trustees could not properly distribute income without keeping track of the amounts deposited into trust for each consumer. Again, Plaintiffs misunderstand the statutory test for distributing income. Chapter 436 provides that the trustee shall not distribute income "if, and to the extent that, the distribution would reduce the aggregate market value on the distribution date of all property held in the preneed trust, including principal and undistributed income, below the *sum of all deposits made to such trust* pursuant to subsection 1 of this section of all preneed contracts then administered through such trust." Section 436.031(3.) This requires the trustee to track "the sum of all deposits made to such trust." This section imposes no requirement on the trustee to track the amounts deposited on behalf of each consumer when determining whether an income distribution is appropriate.[11]

Mr. Coster contends that Mark Twain and Mercantile were required to keep records of the names, addresses and social security numbers of each of NPS' pre-need contract purchasers in the event these individuals must be notified of a change in trustee. (Coster Dep., 263:23-267:9.) Mr. Coster does not explain how any failure to keep this information caused harm to the trusts or

[11]Again, Plaintiffs' experts have not cited any examples of Mark Twain or Mercantile making an inappropriate income distribution. Mr. Coster admitted at his deposition that he had no idea if the hypothetical scenario presented on pg. 49 of his expert report ever occurred. (Coster Dep., 268:7-273:3.)

the preneed consumers. In any event, nothing in Chapter 436 or the common law imposes a duty upon the trustee to track this information with respect to NPS' customers. Based upon the custom and practice at the time, a reasonably prudent trustee would not have taken on this responsibility when it was not required by the statute or trust instrument.

In addition, Mr. Coster contends that Mark Twain and Mercantile failed to keep adequate records by not seeking the cash surrender values of the insurance policies that were trust assets. As discussed in Section II(F) above, the trustees acted reasonably in accepting the information provided regarding asset values, especially given that Mr. Wulf monitored and approved of how the assets were reported. Even if the trustees had requested cash surrender value, the record reveals a pattern and practice of NPS withholding or concealing information. Importantly, NPS and Lincoln did not provide the trustee with reduced face values for the policies subject to loans, making it implausible that either one of them would have provided the accurate cash surrender value if asked by the trustee.

H. Investment Advisor

Both Chapter 436 and the Trust Agreements relieve the trustees of all liability regarding investment decisions made by WBM. If the trustees were required to regularly and routinely monitor the performance of investments, as suggested by Plaintiffs' experts, the exculpatory clauses set forth in Chapter 436 and reiterated in the Trust Agreements would be rendered superfluous. Mr. Harlan's testimony that Mark Twain's portfolio review group would annually review the portfolio of the trusts (Harlan Dep., 35-36) does not indicate that the trustee had a duty under Chapter 436 to investigate or participate in the investment advisor's decisions.[12]

Chapter 436 permits NPS to designate an investment advisor of its own choosing. It follows that any duty to investigate the credentials of the investment advisor is imposed on NPS, not the trustee. Without opining on the statutory interpretation of whether the investment advisor must be independent of NPS (who has the right to select the investment advisor) or the trustee (since the trustee would have been responsible for investment decisions without the appointment of an investment advisor), but assuming for purposes of this report the advisor had to be independent of NPS, it is my opinion that under the circumstances, a reasonably prudent trustee would have made a basic determination that WBM was appropriately registered and licensed and owned independently of NPS.[13]

I. Trust Distributions

Mr. Lock opines that the trustees failed to monitor distributions of trust principal and specifically questions the "wire transfer protocols," without referencing specific transactions he believes to be improper. Moreover, Mr. Lock monitored all activity in and out of the trusts from 1994

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[12] If Mark Twain or Mercantile had participated in or monitored the investment function of WBM, it would have potentially exposed itself to discipline from the Missouri Division of Finance. (Ketchum Dep., 175:19-176:18; Rialti Dep., 71:15-72:13; 73:14-18; Avella Dep., 57:9-18,176:9-177:16.)

[13] WBM was registered with the SEC and had a significant number of clients and assets prior to developing its advisory relationship with NPS. (Wulf Dep., 307:24-313:15.)

through the end of Mark Twain and Mercantile's tenure as trustee, and made no report of any inappropriate wire transfers to the Court during that time frame. In any event, Angela Hall testified that Wulf was copied (and would receive a copy) of all trust wires during Mark Twain and Mercantile's tenure as trustee. Each of Mark Twain and Mercantile's former trust administrators testified that they took instructions from Mr. Wulf.[13] Mr. Wulf received and reviewed monthly trust statements from Mark Twain and Mercantile. (Hall Dep., 139:23-140:10; Wulf Dep., 326:21-330:23.) Under these circumstances, it was reasonable and appropriate for the trustee to comply with the wire transfer instructions based upon the belief that Mr. Wulf was directing the distributions out of the trusts, particularly where he never complained that any of the transactions listed on the monthly statements were unauthorized. (Wulf Dep., 326:21-330:23.)

V. DISCLOSURE TO SUCCESSOR TRUSTEE

Given that the representatives of Mark Twain and Mercantile testified that they were not aware of the Consent Judgment, no duty can be imposed on Mercantile to have disclosed the Consent Judgment to the successor trustee, Allegiant Bank. Further, the Consent Judgment imposed no duties or obligations whatsoever on the trustee. (Ex. 289.) The trustees' duties are limited to those set forth under Missouri law and the applicable trust instruments.

Even if Mercantile had known about the Consent Judgment, however, a reasonably prudent trustee would not have determined it to be material to the trustee's duties and obligations since the trustee was not a party to the judgment, and was not advised of any duties imposed upon the trustee as a result of the Consent Judgment. In contrast, by its terms, NPS was required to notify the investment advisor, David Wulf, of the terms of the Consent Judgment, and he was required to acknowledge his understanding of those terms. (Ex. Wulf 3209.) David Wulf continued as the investment advisor when the trusts were transferred to Allegiant Bank. For these reasons, Mercantile had no duty to "warn" Allegiant Bank about the Consent Judgment prior to transferring the trusts to the successor trustee.

Dated this 15th of August, 2014.

Francis M. Hanna

[13] Harlan Dep., 58:23-59:2; Moellenhoff Dep., 147:10-19; Barton Dep., 137:20-138:11; Zieser Dep., 202:22-203:3.