IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

DISTRICT COURT
FILED
OCT - 9 2012
SALLY HOWE SMITH, COURT CLERK
STATE OF OKLA. TULSA COUNTY

IN THE MATTER OF THE TRUST OF: CAROLYN S. BURFORD; (PETITION OF JPMORGAN CHASE BANK, N.A., successor in interest to BANK ONE TRUST COMPANY, N.A. FOR INSTRUCTIONS AND CONSTRUCTION OF TRUST)	)))))))	Case No. PT-2006-013 Judge Linda G. Morrissey

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE comes before the Court for decision following a non-jury trial. The Petitioner, J.P. Morgan Chase Bank, N.A. was represented by James Weger, Adam Strange and Robert Peters. Respondent, Ann Fletcher, was represented by Erin Donovan. Respondent, Oklahoma Annual Conference of the United Methodist Church, was represented by John Imel. Interested Party, Rufus Griscom, was represented by R. Casey Cooper. Interested Party, Marianne Borgono, was represented by Joseph Farris and Jeremy Ward. Trustee, the Trust Company of Oklahoma, was represented by James Milton. After considering all of the evidence, briefs and authority presented, the Court, being fully advised in the premises, hereby FINDS and ORDERS as follows:

I. FACTUAL AND PROCEDURAL HISTORY

A. History and Terms of the Carolyn S. Burford Trust

The Carolyn S. Burford Trust (the Trust) was created by Grantors, W.G. Skelly and Gertrude Skelly (Grantors), on October 11, 1955. The Trust was created to benefit the Grantors' daughter, Carolyn Skelly Burford and the Grantors' granddaughter, Ann Burford (now Ann Fletcher). The Trust provides for two co-trustees, one corporate and one individual. The Trust is

an irrevocable trust, and was originally funded with shares of Common Capital Stock of the Skelly Oil Company and Capital Stock of Socony Mobil Oil Company, Inc. William Skelly was the founder of Skelly Oil Company and Gertrude Skelly had ties with Socony Mobil Oil Company, Inc. Because of the Grantors' affiliation with the original common stocks, the Trust instrument included a Retention Provision. The Retention Provision specifically provided:

> Because of the high regard which the Grantors hold for the common stocks placed in this trust as an investment, they specifically recommend that, except for unusual circumstances, the Trustee retain all such stocks throughout the term of the trust and regardless of whether or not such retention may appear to offend against what might ordinarily be considered a sound trust investment practice and the usual principles of investment diversification.

The Grantors unequivocally recommended that the Trustees retain the original stocks, irrespective of the traditional investment practice of asset diversification.

The Trust provided for the payment of the net income of the trust to Carolyn Skelly Burford for her lifetime. Carolyn Burford died on December 10, 1996. The income beneficiary then became Ann Fletcher. At Fletcher's death, fifty percent of the Trust corpus is to be distributed to the Oklahoma Annual Conference of the United Methodist Church (the Church), and the other fifty percent is to be divided equally among Fletcher's surviving children.[1] Fletcher holds a vested interest in the income of the Trust. The Church and the surviving children of Ann Fletcher are the remaindermen of the Trust.

JP Morgan Chase Bank, N.A. (the Bank) became the corporate co-trustee through a series of bank acquisitions and mergers. The Bank resigned as co-trustee on March 3, 2006. The Trust Company of Oklahoma was appointed successor corporate co-trustee and continues to serve in that capacity. At Fletcher's request, Rufus Griscom (Griscom) served as the individual co-trustee from February 1998 until July 1999. Griscom was later re-appointed in March 2005, and

[1] Now, Carolyn Briggs and Marianne Borgono.

resigned in September 2005. Fletcher served as the individual co-trustee from July 1999 until March 2005. Griscom was appointed as individual co-trustee for a third time, beginning in 2008.

B. Relevant Bank Personnel

Beginning in 1988, Jeff Morrow had primary responsibility for administration of the Trust in his role as trust officer of the corporate trustee. Morrow is also a licensed attorney. Morrow acted as the trust officer until March 2005, when he was replaced by Paula Etter. Timothy Gold was employed in the Bank's securities department, and assisted Morrow with investment of Trust assets. Gold is a licensed securities broker. Katherine Graham was employed by the Bank as a marketing specialist in the capital markets division in Chicago.

C. Evolution of Original Stocks

Skelly Oil Company merged into Getty Oil Company on January 31, 1977. As a result, the Trust's shares of Skelly Oil Company were converted or exchanged for shares of Getty Oil Company. In 1984, Texaco was attempting to take over Getty Oil Company, and offered a twenty percent premium for the Getty stock. The co-trustees accepted the offer, determining that such sale was justified as an "unusual circumstance" under the Trust's Retention Provision.

Socony Mobil Oil Company became Mobil Oil Company. In December 1998, Mobil announced a merger with Exxon, forming ExxonMobil Corporation (XOM). The Trust's Mobil shares were converted or exchanged for XOM shares, subject to the Retention Provision.

The Trust's original portfolio of stocks remained unsold from 1955 until the 1984 sale of the Getty stock to Texaco. The Bank repeatedly recommended diversification of the Trust assets, including sale of Mobil/XOM stock, but was met with resistance from Fletcher and Griscom. As the trust advisor, the Bank had the option to resign or seek a court order requiring diversification, which it did not do.

D. Capacity and Income Needs of Ann Fletcher

Fletcher was born August 24, 1937. She attended one year of junior college and was never employed outside the home. Fletcher's husband died in 1997. Since 1997, Fletcher has required live-in help to handle the household affairs, including paying bills and handling communications. Fletcher was diagnosed with acute stress syndrome in December, 1996 and also suffered from depression, according to her doctor, Dr. Albright. The syndrome caused excessively slurred speech between 1998 and 2001. Dr. Albright administered Mini-Mental State Exams to Fletcher beginning in approximately 1999, which revealed cognitive impairment and limited comprehension. Fletcher underwent several surgeries and was hospitalized to address medical problems between 1998 and 2001, including a hip fracture, knee fracture, and cardiac arrest.

Fletcher received $2 million following the death of her mother, Carolyn Skelly Burford. This money was used to pay the substantial debts incurred as a result of Fletcher's husband's long illness and subsequent death from cancer. The Trust has been Fletcher's primary source of income since 1998.

Fletcher had a social relationship with Bank personnel, Morrow and Gold. Morrow routinely indulged Fletcher's requests for money. She began to view herself, Morrow, and Gold as a "team." Morrow and Gold visited Fletcher's Southampton home for social visits. In 2002, Fletcher appointed Morrow and Gold as her attorneys-in-fact. She named Morrow as the executor of her will, with Gold named as the alternate. Fletcher did not employ independent counsel to advise her regarding the Trust.

E. Management of Trust 1998-1999

In February 1998, Griscom became the individual co-trustee of the Trust at Fletcher's request. He agreed to serve for one (1) year. During this time, discussions were held regarding

diversifying the Trust but Griscom and Fletcher both expressed their wishes that the Trust stock be retained. In 1999, the Trust purchased a condominium in Southampton for Fletcher for her to occupy as her home.

Griscom resigned as individual co-trustee in July 1999 and recommended that Fletcher appoint her daughter, Ms. Briggs, to succeed him as co-trustee. Morrow and Gold suggested to Fletcher that she become the co-trustee. The Bank and Fletcher appointed Fletcher successor co-trustee on July 15, 1999. The Bank did not address the conflict of interest in Fletcher serving as both co-trustee and income beneficiary.

After Fletcher became co-trustee, she requested an income increase to $500,000 annually. Morrow and Gold suggested selling Mobil stock and Fletcher agreed to the sale. The Bank completed the sale of 20,000 shares of Mobil stock on July 21, 1999, generating just over $2 million. $1.9 million was invested in the Bank's municipal bond fund. The sale of this stock was inconsistent with the Retention Provision. None of the remainder beneficiaries were notified of this sale.

F. Variable Prepaid Forward Contracts

In the spring of 2000, the Bank approached Fletcher about using "variable prepaid forward" (VPF) contracts with the Trust assets to increase income. Although the Bank employees characterized the VPFs as uncomplicated and "simple transactions," Griscom described the VPF transactions as "extremely" complex. He testified "I'm a securities lawyer for decades [and] this is the most complicated documentation I have ever seen." The Court finds that the VPFs are complex and were difficult to understand for both the individual Trustee and employees of the Bank. VPFs were not suitable for the Trust because of the risks and costs to the Trust. Morrow had never administered a VPF in a trust and the VPFs in the Burford Trust were the first utilized

by the Bank. Morrow did not do an independent inquiry as to whether the VPFs were reasonable, but instead relied only on statements by Bank investment officers.

In March 2000, the Bank prepared a written presentation about VPFs for Fletcher. The presentation did not adequately disclose the VPF's embedded costs to Ms. Fletcher. The Bank failed to disclose to Fletcher that the Bank would benefit financially from the use of VPFs. The VPF presentation failed to disclose the risks to the Trust associated with using VPFs.

The Bank mailed the presentation to Fletcher on April 4, 2000. Fletcher signed the Risk Disclosure Statement on April 7, 2000. Fletcher relied on Gold and Morrow's recommendation and did not consult with independent financial, legal, or tax advisors before signing the Risk Disclosure Statement.

Sometime after the presentation, Graham had a conference call with Fletcher. Graham did not tell Fletcher that a VPF could result in sale of the XOM stock nor the amount of revenue the Bank would earn from the VPFs. Neither the Bank nor Fletcher ever informed the remaindermen that the Trust was going to invest in VPFs or that the Bank intended to increase "income payments" to Fletcher.

The Retention Provision in the Trust instrument recommended that original stocks be retained unless "unusual circumstances" existed. Morrow concluded that the "unusual circumstances" justifying entering into the VPFs were 1) the need for diversification and, 2) Fletcher's request for more income. The Trust made no provision for disposition of the corpus of the Trust in order to increase income to the beneficiaries, other than its prudent management.

Following the VPFs that were entered into in 2000, 75% of the Trust's 145,892 shares of XOM were pledged under the VPFs. As of May 15, 2003, 100% of the Trust's 291,784 shares of XOM stock were pledged in support of the VPFs. If the Trust had not entered into the VPFs, the Trust would have had 291,784 shares of XOM as of December 2006. If the sale of the 20,000

shares of Mobil had not occurred in 1999 and the VPFs had not been entered into, the Trust would have had 344,504 shares of XOM stock, with a value of more than $23 million as of December 2006. In June 2007, another 19,596 shares of XOM were surrendered to partially settle the remaining VPF. In all, the Bank and its investment affiliate entered the Trust assets into 11 VPF contracts. One (1) out of eleven (11) of the VPFs were done with a counterparty not affiliated with the Bank, Dresdner Bank. The loan proceeds from the VPFs were invested primarily in the Bank's municipal bond fund.

The value of the Trust prior to entering into the May 2000 VPF was $14,392,000. As of June 30, 2003, the sum of the Trust's repayment obligations under the three VPFs had grown to $10,336,050. The value of the Trust at the time the Bank resigned as co-trustee was $12,515,085.57. The Trust's associated decline in principal was $1.88 million.

The Bank produced emails and spreadsheets to show that the Bank earned $1,127,189 from the VPFs. Expert testimony indicates that the Bank earned as much as $2,000,000 in profit. The Bank provided incentives to its employees to generate revenue for the Bank. This created a situation in which the self-interest of employees managing and advising fiduciary accounts was placed in conflict with the interests of those to whom the Bank owed fiduciary duties.

G. Trust's Net Income Provision

Prior to Fletcher becoming co-trustee, the investment objective for the Trust was designated as balanced, balanced growth, or growth. The Skelly's intent for the Trust's income beneficiaries was for them to receive only the dividends earned by the Trust assets. This was complied with for over 40 years. When Fletcher became co-trustee on July 15, 1999, Morrow agreed to raise her annual income distribution from approximately $300,000 to $450,000 or $500,000. The Bank did not verify Fletcher's need for additional income.

In 2000, 2001, and 2002, Morrow distributed to Fletcher more money than the Trust generated in income, resulting in income overdrafts of $377,000, $270,000 and $86,000, respectively. Morrow characterized the use of the corpus of the trust in this manner as an "adjustment from principal to income" and stated that the purpose was to provide more income to Fletcher and to pay her income taxes. A separate $250,000 income overdraft occurred in 2003 and 2004 that was not adjusted. The Bank restored $1.6 million to the Trust for the income overdrafts.

H. Proposal of Conversion to Unitrust

In June 2004, the Bank proposed to convert the Trust from a net income trust to a unitrust because the Trust was not making enough income to maintain its payments to Fletcher. The sole reason for the proposed conversion was Fletcher's income demands without regard to the effects on the remainder beneficiaries or the specific limitations included in the Trust. Fletcher rejected the proposed conversion. Morrow retained Attorney, John Ingraham, to draft a petition and consult with the beneficiaries about converting to a unitrust. In November 2004, Ingraham wrote to the Church about the unitrust proposal. Ingraham also sent the petition to the remaindermen in March 2005. They did not approve the unitrust proposal and the Trust was not converted to a unitrust.

I. Griscom as Co-Trustee, March 2005 - September 2005

When remainderman Briggs received the March 2005 petition to convert the Trust to a unitrust she contacted Griscom who did not know that Fletcher had become co-trustee. Fletcher requested that Griscom replace her as co-trustee. Griscom became co-trustee for the second time on March 29, 2005.

Griscom reviewed Trust and bank records and determined that Fletcher's "income" from the Trust had increased from approximately $25,000 per month to approximately $33,000 per

month, while the value of the Trust had declined from $13 million to $6,750,000. Griscom conducted an investigation and prepared a written report. He concluded that the value of the Trust had declined by 50% between July 1999 and March 2005, that the Bank improperly paid $1.7 million out of the principal of the Trust, and that the Trust pledged $12 million worth of stock to the VPFs and got back only $8 million. These transactions were contrary to the limitations placed on the Trustees by the Grantors.

Griscom again resigned as co-trustee in September 2005. His initial resignation was to be effective upon appointment of a successor co-trustee. However, the Bank requested that his resignation be effective immediately. Griscom complied with the Bank's request. This left the Trust without an individual co-trustee. Acting without co-trustee, the Bank transferred 66,666 shares of the Trust's XOM to itself upon the expiration of the October VPF.

J. Briggs's Interaction with Bank as Beneficiary and Co-Trustee

In December 2005, Briggs wrote to the Bank requesting that the Bank raise the cash necessary to "cash settle" the VPF maturing in December 2005, stabilize Fletcher's income, and resign. The Bank denied her request to cash settle the upcoming VPF, and instead rolled it over.

Briggs was appointed co-trustee of the Trust on March 27, 2006. Briggs repeatedly stated that both she and Fletcher opposed a rollover, requesting that the VPF be cash settled so the Trust could retain some XOM stock. The Bank determined that the VPF be "stock settled," and on May 18, 2006, the Bank transferred 81,140 shares of the XOM stock to itself.

K. Trust Company as Co-Trustee

In March 2007, the Court ordered transfer of all assets of the Trust to Trust Company of Oklahoma. When the Bank resigned, the Trust had 29,571 unpledged shares of XOM stock remaining. The successor trustees preserved 114,407 additional shares by partially cash settling the final VPF.

L. April 2001 Court Order

In 2001, the Bank filed a petition seeking a determination from the Court that any fee charged to the Trust by the Bank in connection with providing VPFs and other derivative products did not violate any self-dealing rules under Oklahoma law. On April 30, 2001, District Judge David Winslow entered an order holding that the fees paid by the Bank for services in connection with the purchase and sale of options and other derivative products to the Bank and the sale of stock to the Bank or its affiliates did not violate any self-dealing rules.

M. The Bank's Accounting

The Bank has produced inaccurate and incomplete records for the Trust and has not produced accounting records prior to 1998. These accounting deficiencies fail to track the changes in value in the Trust over time and do not fully identify the costs associated with the VPFs. The Bank's records do not justify the fees charged and/or refunded.

II. LEGAL ANALYSIS

A. Applicable Law

The Trust contains a choice of law provision that this Court has ruled is not enforceable. The Oklahoma Trust Act (60 O.S. § 175.1 et seq.) governed the Trust since its inception. The version of the Oklahoma Trust Act that governs this action is that which was in effect at the time the particular questioned action was undertaken. The Oklahoma Prudent Investor Act applies to the Trust as to decisions or actions occurring after inception of the Act on November 1, 1995. 60 O.S. § 175.71.

B. Fiduciary Duties

1. The Bank owed a fiduciary duty to the Trust and its beneficiaries to comply with the terms of the Trust. "A trustee is required to proceed diligently with the administration of the trust and

to comply with the terms of the trust and applicable law." *May v. Oklahoma Bank and Trust Co.*, 2011 OK 52, ¶ 15, 261 P.3d 1138, 1142. This duty to comply with the terms of the Trust includes adherence to the intent of the grantors as expressed in the terms of the Trust, particularly when any person having an interest in the Trust insists upon compliance with such expressed intent. *Franklin v. Margay Oil Corp.*, 1944 OK 316, ¶ 36, 153 P.2d 486, 496, (quoting *Hill v. Hill*, 1915 OK 338, 152 P. 1122, 1122) ("Any person having any interest in the trust or the trust property has a right to insist, in proper proceeding, that the trust shall be maintained and executed according to the wishes of the settlor, as expressed by the terms of the trust.").

The Bank did not advise all interested parties (Ms. Briggs, Ms. Borgono, and the Church) that it was directing the sale of the Trust's stock to invest in VPFs, a change from the expressed intent of the Trust grantors. As a result, all interested parties did not have an opportunity to be heard on that issue. The Retention Provision found in Article II, ¶ 2 of the Trust specifically authorizes retention of the original stockholdings, absent "unusual circumstances." While the term "unusual circumstances" is not defined in the Trust terms, the Court finds that the Bank's recommendation to diversify assets does not constitute an unusual circumstance. A request by an income beneficiary to increase payments is also not an unusual circumstance justifying the deviation from the intent of the Retention Provision in the Trust.

Article III, ¶ 2 of the Trust provides for the net income to be paid in monthly installments to the income beneficiary. This provision was intended to preserve the principal or corpus of the Trust for distribution to the remaindermen upon the death of the income beneficiary. The Bank breached its fiduciary duty to comply with the terms of the Trust when it distributed principal of the Trust to the income beneficiary, Fletcher, by engaging in the VPF

transactions. The Bank should have petitioned the court for a modification of the terms of the Trust in order to distribute principal to the income beneficiary. *Reed v. JP Morgan Chase Bank, NA*, 2011 OK 93, 270 P.3d 140. Absent consent of all beneficiaries or authorization of the court, the trustee or the beneficiaries do not have authority to modify the Trust unless granted such power by the terms of the Trust. *Restatement (Third) of Trusts* § 64(1). The Bank breached its fiduciary duty to comply with the terms of the trust by making payments to the income beneficiary out of principal.

The Bank breached the terms of the Trust when it borrowed, pledged, or otherwise encumbered trust assets as security for entering into VPF transactions. The Bank also breached its fiduciary duty to comply with the terms of the Trust by borrowing money on behalf of the Trust. Trustees cannot borrow against the Trust unless specifically authorized to do so by terms of the Trust. *Restatement (Second) of Trusts* § 191.

The Bank breached its fiduciary duty to comply with the terms of the Trust by selling the Trust's Mobil stock in 1999 and by engaging in VPFs with respect to the Trust's XOM stock. The terms of the Trust "specifically recommend that, except for unusual circumstance," the trustees retain the stocks originally placed in the Trust, "regardless of whether or not such retention may appear to offend against what might ordinarily be considered a sound trust investment practice and the usual principles of investment diversification." Neither Fletcher's requests for additional income, nor the Bank's desire to diversify the Trust investments, constituted an unusual circumstance, as intended by the Skellys as grantors of the Trust. There was no "unusual circumstance" justifying the sale of the Mobil stock or the XOM stock, nor did the Bank make an adequate inquiry or determination that an "unusual circumstance" existed.

2. The Bank did not have an absolute duty to diversify the assets in the Trust. The Retention Provision articulated by the grantors specifically recommended retention of the original stocks "regardless of whether or not such retention may appear to offend against what might ordinarily be considered a sound trust investment practice and the usual principles of investment diversification." Thus the terms of the Trust effectively waived any ordinary duty to diversify the trust assets. Further, 60 O.S. § 163 relieves the trustee from liability for retention of the Trust's original stock, or the stock it became through mergers.

The Oklahoma Prudent Investor Rule was adopted in 1995 as part of the Uniform Prudent Investor Act. This rule mandates diversification of trust assets unless there are special circumstances showing that the trust purpose is better served by not diversifying. 60 O.S. § 175.63. Oklahoma case law supports discretion to not diversify assets as directed by the provisions of the trust.

> [T]he Prudent Investor Rule, adopted in 1995, is a "default" rule and "may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust." . . . The intent of the Settlors, as expressed by the Trust instrument, represents a factor that may be considered when deciding whether and to what extent to diversify. Thus, the Prudent Investor Rule does not make an absolute requirement that the trustee diversify.

Atwood v. Atwood, 2001 OK CIV APP 48, ¶ 29, 25 P.3d 936, 944 (internal citations omitted); see also, *Restatement (Third) of Trusts* § 92 cmt. d(2) ("The duty to diversify. . . is not absolute.").

The Trust's grantors, the Skellys, had personal and business connections with the original stocks placed in the Trust. These relationships and high regard for the original stocks led to creation of the Retention Provision in order to waive the duty to diversify. This intent of the grantors and express desire for retention of the original holdings was clear and unequivocal and excused the default rule to diversify.

3. The Bank owed a fiduciary duty of prudence to the Trust and its beneficiaries. The standard of care applicable to the Bank is the Prudent Investor Rule found in 60 O.S. § 175.62. This is

a standard of "reasonable care, skill, and caution" evaluated in the context of an overall investment plan. The duty of prudence is often summarized as a requirement that a trustee act "as prudently for the *cestui que trust* as he would have done for himself." *Phelps v. Harris*, 101 U.S. 370, 383 (1879). Under the prudent investor standard, a trustee is required to act with the same prudence in investing trust funds as a prudent person would in investing his own funds. Morrow admitted that if he were managing his own money, he would have shopped around to determine if he could get a better price on the VPFs from a counterparty other than the Bank, but he did not do so on behalf of the Trust. Rather than investing the proceeds in a range of investments, the Bank invested them almost exclusively in municipal bond funds from which the Bank earned fees. A trustee with special skills or expertise has a duty to act in accordance with those skills or expertise. The Bank is a professional manager of trusts, has extraordinary facilities and skills, and therefore is held to a higher standard of prudence. The duty of reasonable care includes that "[a] trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets." 60 O.S. § 175.62(D). Failure to adequately investigate investments and their risks is a breach of the duty of prudence. *Allison v. Bank One-Denver*, 289 F.3d 1223, 1238-39 (10th Cir. 2002).

The Bank's failure to adequately investigate and inform the beneficiaries of the risks and costs associated with VPF contracts was a breach of the duty of prudence. Included in the Bank's responsibilities was a duty to analyze the costs associated with VPFs and conduct a cost comparison among products being considered for the Trust portfolio.

> In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.

60 O.S. § 175.67

Further, the power to incur expenses is limited by the Uniform Prudent Investor Act of 1994. As stated in comments to the Act,

> It is important for trustees to make careful cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio.

Uniform Prudent Investor Act, § 7, cmt, quoting *Restatement (Third) of Trusts*, § 227, cmt m.

Here, the Bank failed to establish that the VPFs were suitable for the Trust in general or that the Bank's pricing on the VPFs was fair to the Trust. It also failed to justify converting Trust principal to pay "income" to the income beneficiary.

The VPF proposal was purportedly based in large part on Fletcher's request for additional income, yet the Bank failed to verify the facts regarding Fletcher's need for additional income. The Bank also allegedly relied on its mistaken belief that the co-trustees were required to diversify the Trust's concentrated XOM stock, yet the Bank never sought independent counsel or court instructions regarding the Retention Provision or its impact on any duty to diversify. By entering into the VPF contracts without verifying the underlying bases for doing so, the Bank breached its duty of prudence.

The investment of the VPF proceeds did not satisfy the Bank's duty of prudence. Prudent use of a VPF also requires a plan to invest the proceeds to compensate for the high cost of the VPF. No Bank employee evaluating the VPF strategy ever made any inquiry regarding how proceeds would be invested. The Bank's failure to determine how the proceeds would be effectively invested prior to entering into VPF contracts was a breach of its duty of prudence.

The Bank breached its fiduciary duty of prudence by failing to adequately supervise personnel involved in administration of the Trust and investment of Trust assets. The Bank's trust officer and the Trust's primary investment advisor did not understand or fulfill their obligations to evaluate risk and suitability of the VPF investments to the Trust.

The Bank breached its fiduciary duty of prudence by exercising the power to adjust. Even though the Uniform Principal and Income Act is applicable to the Trust, the power to adjust would not have been available because the Church is a charitable remainder beneficiary of the Trust. The purpose of the Act's power to adjust is to allow a trustee with an otherwise sound investment strategy that violates the duty of impartiality to adjust receipts therefrom to treat different classes of beneficiaries more equally. 60 O.S. § 175.104. The Bank's investment strategy favored the income beneficiary over the remaindermen, but it used its "power to adjust" to transfer even more money from the remaindermen's principal to the income beneficiary. The Act prohibits a co-trustee who is also a beneficiary from participating in any decision to exercise the power to adjust under the Act. The only time the power to adjust was exercised was when Fletcher was co-trustee, the power was exercised in her response to her requests for more income, and the Bank never required her to execute the release of the power required by its own policies.

The failure of the Bank to properly consider the expected tax consequences of its investment decisions or strategies constitutes a breach of the duty of prudence. The sale of XOM stock in 1999 and the settlement of VPF contracts in 2005 and 2006 caused the Trust to incur substantial capital gains tax liability.

4. The Bank owed a duty of loyalty to the trust and to all of its beneficiaries. Oklahoma law prohibits trustees from "directly or indirectly buy[ing] or sell[ing] any property for the trust from or to itself or an affiliate . . ." 60 O.S. § 175.11. The Bank administered the trust in part for its own benefit by its actions of entering into VPFs, wherein the Bank retained and subsequently sold the Trust's XOM stock to settle the VPFs. Individual bank employees also benefitted from the VPF transactions through an employee sales incentive program. The Bank's actions were in conflict with its duties as Trustee to administer the Trust in the interest

of the beneficiaries and to communicate all material facts to the beneficiaries. The *Restatement (Third) of Trusts* addresses the duty of loyalty in Section 78 as follows:

> (1) Except as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose.
>
> (2) Except in discrete circumstances, the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests.
>
> (3) Whether acting in a fiduciary or personal capacity, a trustee has a duty in dealing with a beneficiary to deal fairly and to communicate to the beneficiary all material facts the trustee knows or should know in connection with the matter.

Oklahoma case law has also found that a trustee "is not permitted to manage the affairs of the trust or to deal with the trust property, so as to gain any advantage directly or indirectly for himself." *Sanders v. Hall*, 74 F.2d 399, 406 (10th Cir. 1934). The Bank breached its duty of loyalty through its use of VPFs, which operated to gain advantage both to the Bank itself, as well as individual Bank employees.

The Bank breached its fiduciary duty of loyalty by self-dealing with respect to the VPF transactions. The Bank profited from each VPF, in part due to the interest charged in connection with the loan embedded within each VPF. In addition, the VPFs resulted in the sale of 147,806 shares of the XOM stock to the Bank's securities department while the Bank was acting as trustee.

The Bank's incentive structure created a situation in which the self-interest of employees managing and advising fiduciary accounts was impermissibly placed in conflict with those to whom the Bank owed fiduciary duties. Employees of the Bank were encouraged and financially incentivized to engage in cross-selling and even to target the Trust for the purchase of VPFs, which earned fees for the Bank that were larger than most types of investments.

Further evidence that the VPFs constituted impermissible self-dealing is the fact that the Bank failed to inform Fletcher and the other beneficiaries of all material facts in connection with the VPFs. Further, the Bank Trustee failed to encourage the Individual Trustee to seek independent advice.

Although the April 30, 2001, Order by Judge David Winslow, determined that the sale of stock by the Trust to Bank One N.A. and affiliates, up until April 30, 2001, was not self-dealing and that fees paid in connection with the purchase and sale of options and other derivative products was not self-dealing, it addressed only two specific types of transactions: (i) fees paid by the Bank's trust department to its securities department for the purchase and sale of options and other derivative products and (ii) the sale of Trust stock to the Bank or its affiliates. Whether the VPF transactions constituted self-dealing was not addressed in the 2001 Order. Further, the 2001 Order speaks in the past tense. No stock was delivered under the VPFs by the Trust to the Bank until October 2005, well after the 2001 Order was entered. Eight of the eleven VPFs entered into on behalf of the Trust took place after the 2001 Order was entered. The 2001 Order did not determine whether any of the VPFs were prudent nor did the Bank request such a determination.

Entering into self-dealing transactions without obtaining informed conflict waivers from the Trust beneficiaries constituted a breach of the fiduciary duty of loyalty. The Bank provided no notice of the VPFs to the remaindermen and did not send the Risk Disclosure Statement to them.

The Bank breached its fiduciary duty of loyalty by investing the proceeds of the VPF loans in its own investment products. The investment fees were charged in addition to corporate trustee fees, which amounted to double dipping that was inherently unreasonable.

The Bank breached its fiduciary duty of loyalty by allowing considerations other than the best interest of the Trust and/or beneficiaries to influence its actions concerning the purported diversification of the Trust. The Bank admitted that its primary motivation in seeking diversification was a fear that the remaindermen beneficiaries would sue the Bank for failure to diversify. This was a concern of the Bank, not the Trust, and the fiduciary duty of loyalty required the Bank to put the Trust's interests before its own.

5. The Bank owed a fiduciary duty of impartiality to the Trust and its beneficiaries. With regard to this duty, Section 79 of *Restatement (Third) of Trusts* states as follows:

> (1) A trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust, requiring that:
>
> a) In investing, protecting, and distributing the trust estate, and in other administrative functions, the trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust; and
>
> b) In consulting and otherwise communicating with beneficiaries, the trustee must proceed in a manner that fairly reflects the diversity of their concerns and beneficial interests.

Because the interests of two or more of the beneficiaries of the Trust were in conflict, the co-trustees of the Trust owed a duty of impartiality to each of the beneficiaries.

The duty of impartiality does not require an equal balancing of diverse interests; rather it requires "a balancing of those interests in a manner that shows due regard for … the beneficial interests and the terms and purposes of the trust." *Restatement (Third) of Trusts* § 79 cmt. c. The Skellys balanced the beneficiaries' interests by their specific recommendation that the Trustees retain the original stock. The Skellys also directed that the net income of the Trust be paid to the income beneficiaries. The Bank had a duty to balance the beneficiaries' interests in a manner consistent with that intent. Despite the net income provision of the Trust, the Bank made significant payments from the Trust corpus to the income beneficiary or on

her behalf, to the detriment of the remaindermen. The magnitude of the payments from the corpus of the Trust to Fletcher or on her behalf indicates that the Bank failed to balance the divergent interests of the various beneficiaries of the Trust in a manner consistent with the intent of the grantors and the terms of the Trust. The Bank breached its fiduciary duty of impartiality.

The Bank breached its fiduciary duty of impartiality by entering into the VPF transactions, which involved the invasion of principal in favor of the income beneficiary. The VPFs resulted in a 1.88 million dollar decline in principal of the Trust, during the same period of time when the amount distributed to the co-trustee/income beneficiary increased by $3 million.

The Bank also breached its fiduciary duty of impartiality by using the power to adjust. In using the power to adjust, "a fiduciary shall administer a trust impartially, based on what is fair and reasonable to all the beneficiaries, except to the extent that the terms of the trust . . . clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries." Uniform Principal and Income Act; 60 O.S. § 175.103(B). There was no clear manifestation in the Trust that one beneficiary was to be favored over another.

By pursuing investment strategies designed to increase income for the income beneficiary without regard to the negative tax consequences to a vested remainder beneficiary, the Bank breached its fiduciary duty of impartiality. The Bank failed to appreciate the tax consequences that its investment decisions had on the different classes of beneficiaries. If the XOM stock had been retained as intended by the Skellys, the Church could have avoided the tax liability attributable to its share of the Trust corpus.

6. The Bank owed a fiduciary duty to its co-trustee. The Trust agreement established and appointed two co-trustees to administer the Trust. With respect to co-trustees, *Restatement (Third) of Trusts* § 81 provides:

> (1) If a trust has more than one trustee, except as otherwise provided by the terms of the trust, each trustee has a duty and the right to participate in the administration of the trust.
> (2) Each trustee also has a duty to use reasonable care to prevent a co-trustee from committing a breach of trust and, if a breach of trust occurs, to obtain redress.

The Bank had a duty to cooperate with its co-trustees and to ensure that co-trustees were afforded the right to participate in the administration of the trust. The Bank also had a duty to properly inform the co-trustees of all relevant material facts. *Id.* at cmt. b. Further, where there are co-trustees, "joint action or the concurrence of both trustees is required to exercise powers of the trusteeship." *Id.* at cmt. c. Failure to obtain informed consent of a co-trustee to an exercise of investment powers of the co-trustees would be a breach of this duty.

Failure of the Bank to cooperate with its co-trustee and to ensure that he or she is afforded the right to participate in the administration of the Trust constitutes a breach of fiduciary duty with respect to co-trustees. The Bank failed to consult with Griscom on several important issues while he served as co-trustee. Similarly, the Bank disregarded Briggs' status as co-trustee by failing to timely provide her with information concerning financial analysis of the May 2006 VPF maturity and by stock settling that VPF over Briggs' repeated objections. The Bank's failure to notify its co-trustees of significant decisions to be made in the Trust deprived the individual co-trustees of their right to participate in the Trust's administration and was a breach of the Bank's fiduciary duty.

The Bank breached its fiduciary duty by failing to adequately disclose the VPF transactions to Co-Trustee, Fletcher. The disclosures made by the Bank to Fletcher concerning the VPFs were inadequate and incomplete in light of the complexity of the VPFs,

Fletcher's limited capacity, the Bank's manipulation of Fletcher, and Fletcher's reliance on Morrow and Gold. The Bank's failure to make adequate disclosures sufficient to obtain Fletcher's informed consent to the VPFs is a breach of its duty with respect to its co-trustee.

The Bank breached its fiduciary duty with respect to its co-trustees by engaging in the VPF transactions without first requiring a full disclosure regarding the conflict of interest of its trustee/income beneficiary, Fletcher. Fletcher's interest was conflicted with the interests of the remaindermen in any proposed transaction, which would have the effect or possible effect of diminishing the corpus of the Trust for the purpose of creating the possibility of income. Though the Bank, as a professional manager of trusts, was equipped to and should have recognized Fletcher's conflict of interest, it failed to take any action to address the conflict and did not pursue any court approval of the VPFs.

By failing to obtain Fletcher's informed consent to the 1999 stock sale and/or VPF transactions, the Bank breached its fiduciary duty with respect to the co-trustees. Fletcher's lack of understanding and diminished capacity is reflected in many ways, including her written statement, received by the Bank on July 19, 1999. She wrote, "I'm [skard] to do puts & calls," then changed her statement to "I'm scared to do puts & calls." Fletcher's consent was uninformed and ineffective because the Bank omitted material facts about the transactions in its communication with co-trustee Fletcher.

Finally, "some persons are not properly capable of serving as trustees." *Restatement (Third) of Trusts*, § 77 cmt. b. Since the Bank had authority with regard to the nomination and appointment of individual co-trustees, they owed a duty to nominate and appoint only persons properly capable of serving as trustees. By recommending or agreeing to a co-trustee who was obviously unable to discharge her duties as co-trustee, the Bank breached its fiduciary duty to prevent breach by its co-trustee and to nominate a person properly capable of serving as

trustee. Bank representatives encouraged and facilitated Fletcher becoming the co-trustee despite her lack of qualifications to do so. The Bank also failed to consider the obvious conflict of interest that arose as the result of Fletcher's dual status as the net income beneficiary of the Trust and co-trustee. The Trust instrument provided that the corporate co-trustee agree to and appoint the individual co-trustee. Under this provision, the Bank's consent was plainly required in order for Fletcher to fill the vacancy. Had the Bank withheld its consent, Fletcher could never have been appointed. Its failure to do so constitutes a breach of fiduciary duty.

7. The Bank had a fiduciary duty to inform beneficiaries of material information and events concerning the Trust and its administration. Openness and disclosure are favored in situations where the trust is irrevocable – "beneficiaries are entitled not only to accounting information but also to relevant information concerning the bases upon which the trustee's discretionary judgments have been or will be made." *Smith v. Baptist Foundation of Oklahoma*, 2002 OK 57, ¶ 29, 50 P.3d 1132, 1145.

Restatement (Third) of Trusts § 82 states as follows:

> (1) Except as provided in § 74 (revocable trusts) or as permissibly modified by the terms of the trust, a trustee has a duty [to]:
>
> a) Promptly inform fairly representative beneficiaries of the existence of the trust, of their status as beneficiaries and their right to obtain further information, and of basic information concerning the trusteeship;
>
> b) To inform beneficiaries of significant changes in their beneficiary status; and
>
> c) To keep fairly representative beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests.

The term "fairly representative beneficiaries" as used above includes "those who would be entitled or eligible to receive distributions of income or principal if either the trust or current interests . . . were then to terminate." *Restatement (Third) of Trusts* § 82 cmt. a(1). The phrase

"significant developments" includes changes in the identities of the trustee, adjustments being considered in investment strategies, actions under consideration involving special sensitivity to beneficiaries or hard-to-value assets, and other transactions to which beneficiaries should be made aware. *Id.* at cmt. d.

The Bank breached its fiduciary duty by failing to inform the contingent beneficiaries of any investments entered into by the co-trustees. During all relevant times, the Church, Briggs, and Borgono held vested beneficial interests in the corpus of the Trust. The Trust is irrevocable and provides that the corpus is to be preserved for the vested remaindermen. Thus, the Church, Briggs, and Borgono were entitled to be notified of the existence of the Trust, their status as beneficiaries, and "significant developments" concerning the Trust and its administration. The Bank breached its duty to inform beneficiaries by failing to inform the Church of the existence of the Trust and its status as a beneficiary until 2004. The Bank made a number of decisions establishing or altering investment policy of the Trust without consulting or informing the remainder beneficiaries. By failing to inform the vested remainder beneficiaries, the Bank breached fiduciary duties owed to the beneficiaries and deprived them of their opportunity to offer objections, suggestions, comments, or information or otherwise to protect their interests.

Failure to provide accurate and complete account statements to Fletcher further constitutes the Bank's breach of its fiduciary duty to inform beneficiaries. The Trust account statement provided by the Bank to Fletcher contained significant omissions and misleading information. Some statements overstated the value of the Trust by millions of dollars because they failed to show the liability created by the VPFs. Even after the Bank began booking the liability of the VPFs and reporting the same on Trust account statements, the values reported on the

statements failed to provide any meaningful disclosure of the impact of the VPFs on the Trust. Further, the Bank failed to issue corrected statements.

The Bank, as part of its duty to inform beneficiaries, and also in its capacity as a securities broker/dealer, had an obligation to assure that Fletcher had been adequately informed regarding the VPF transactions, which they did not do. In light of Fletcher's limited capacity, the Bank's manipulation of Fletcher, and Fletcher's reliance on Morrow and Gold, it was not reasonable for the Bank to rely on Fletcher to educate herself or obtain independent counsel regarding the VPFs, which it should have insisted she do.

The Bank breached its fiduciary duty to inform beneficiaries by failing to obtain the informed consent of the remainder beneficiaries to the 1999 stock sale and/or the VPF transactions.

8. The Bank owed a fiduciary duty to maintain proper Trust records. A trustee is bound to keep clear, distinct, and accurate accounts. *Burford v. Stuart*, 1967 OK 3, ¶ 15, 422 P.2d 428, 431. If it does not, all presumptions are against it. *Finley v. Exchange Trust Co.*, 1938 OK 178, ¶¶ 12-13, 80 P.2d 296, 300; *see also Restatement (Third) of Trusts* § 83 ("A trustee has a duty to maintain clear, complete, and accurate books and records regarding the trust property and the administration of the trust, and, at reasonable intervals upon request, to provide beneficiaries with reports or accountings."). Furthermore, the Trust also requires that the trustee "keep books of account showing all transactions relating to the trust funds held hereunder . . .."

The Bank breached its fiduciary duty to maintain proper trust records as demonstrated by its inability to produce accounting information for the period of October 11, 1955 to January 1, 1998. While the Bank produced some records for that period, there is little evidence of the funds received by the Bank during that time and no evidence of amounts paid to beneficiaries or for other items. The Bank's accounting is incomplete and inadequate. By failing to amend

the accounting it filed when it was clear that the accounting was incomplete and inaccurate, the Bank has caused the beneficiaries to incur the substantial expense of discovery and trial in an attempt to understand the transactions that have occurred during the Bank's administration of the Trust.

9. Fletcher had a duty to the Trust while acting as co-trustee. However, due to Fletcher's lack of investment knowledge and skills as compared with the Bank, her standard of care is lower than that of the Bank. *See* 60 O.S. § 175.62(F) ("A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise."). The Bank is solely responsible for any breach attributable to Fletcher's decisions with respect to any proposed transaction, which had the effect of diminishing the corpus of the Trust for the purpose of creating more income and from decisions regarding the use of the power to adjust.

Fletcher did not breach her fiduciary duties by failing to adequately investigate and inform herself regarding the VPF transactions. Fletcher relied on Bank personnel for information regarding the VPFs. Additionally, while it was imprudent of Fletcher to consent to the VPFs, Fletcher should not have been allowed to participate in the decision to pursue the VPF investment plan due to her conflict of interest and complete lack of understanding.

The Bank had a duty to prevent its co-trustee from committing a breach of trust. As part of such duty, the Bank had an obligation to adequately investigate the Trust investments as co-trustee. Because the Bank knew or should have known that Fletcher did not and could not understand VPFs and that Fletcher was relying solely on Bank personnel, the Bank breached its duty.

Fletcher did not breach her fiduciary duties by failing to notify the remainder beneficiaries that the Trust was entering into VPFs. Fletcher, due to her inability to understand the VPFs, could not have adequately informed the remainder beneficiaries regarding the transactions.

10. The Bank's accounting does not meet the standards for a corporate trustee's accounting of its administration of a trust. The Bank is unable to produce records of the trust administration and blames the absence of such records from October 1, 1955 through January 1, 1998 on its inability to retrieve documents from a broken imaging system formerly used by the Bank.

C. Damages

The Trust suffered substantial financial decline directly caused by the numerous breaches of fiduciary duty, in particular, but not limited to the ill-advised investments in the VPFs and the fees and costs associated with them, and the further breaches set out above. The Bank breached numerous fiduciary duties it owed as trustee because, among other things, (a) it negligently and recklessly subjected the XOM shares to the VPFs, effectively selling 167,402 shares, and (b) it negligently sold 20,000 XOM shares on July 21, 1999 to purchase other assets for the Trust.

The proper measure of damages is the loss to the Trust caused by the inappropriate investments in VPFs. 60 O.S. § 175.57(C) specifically authorizes the Court to order that the Bank pay "the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or if greater, the profit that the trustee made by reason of the breach." Here, the greater of the two amounts is that required to restore the value of the Trust property; accordingly, the Bank is ordered to restore to the Trust corpus the shares of XOM stock lost under the VPF investment strategy. Therefore, 220,122 shares of XOM should be restored to the Trust. The value of these shares on May 19, 2011 was $18,122,644.26 and judgment is entered for the Respondent Trust in that amount.

This Court has authority to impose a variety of remedies, including "any other appropriate remedy." 60 O.S. § 175.57(B)(9). Title 60 O.S. § 175.57(D) provides that this Court, in its discretion, may award costs and expenses, including reasonable attorney's fees, to be paid by another party. The Bank shall be surcharged with the reasonable attorney's fees incurred by the Trust and the beneficiaries because of its egregious conduct.

Neither Briggs nor Griscom has been paid for their service as co-trustee. Griscom has not been paid for work he has done as a consultant or advisor (or trustee). Griscom provided extraordinary services that resulted in the discovery of significant mistakes made by the Bank in the administration of the Trust. Likewise, Briggs made extraordinary but unsuccessful efforts to hold the Bank accountable as a responsible corporate trustee. Griscom and Briggs are entitled to reimbursement as a surcharge against the Bank in an amount that this Court deems appropriate for their extraordinary services to the Trust, and which shall be determined at a future hearing to be set upon application.

The evidence in this case satisfies the elements which the Legislature has prescribed for the imposition of punitive damages because of the Bank's reckless and/or intentional disregard for the rights of the beneficiaries. As noted above, this Court has authority to impose a variety of remedies, including "any other appropriate remedy." 60 O.S. § 175.57(B)(9). Punitive damages would be such an appropriate remedy, and the Court is guided by 23 O.S. § 9.1, which governs punitive damage awards in "all civil actions." 23 O.S. § 9.1(G). *See also Robinson v. Kirbie*, 1990 OK CIV APP 45, ¶9, 793 P.2d 315, 318-19 (citing 23 O.S. § 9.1 as support for punitive damages award against trustee found to have charged unreasonable trustee fees, embezzled and/or converted trust assets to his own use, and provided deliberate misinformation to beneficiaries). Reviewing the conduct of the Bank in light of the factors set forth in 23 O.S. § 9.1, it is clear that an award of punitive damages is appropriate:

- The misconduct by the Bank is serious and shows a disregard for customers of the Bank.

- The Bank profited by the misconduct described herein in an amount of up to $2 million dollars, plus management fees.

- The misconduct continued for years and was concealed from both the income and remainder beneficiaries until Griscom investigated.

- The Bank was fully aware—or recklessly failed to be aware—that the conduct alleged was prejudicial to the Trust and the beneficiaries while beneficial to it and its employees.

- Upon discovery of the misconduct, the Bank did restore some excessive fees and improperly distributed income, but has failed to restore the loss to the Trust for the VPFs.

- A number of employees of the Bank were involved in the sale of the VPFs to the Trust due to the Bank's incentive structure.

The Court finds that the Bank was fully cognizant of its fiduciary obligation and the requirements attendant thereto under Oklahoma law. The Bank disregarded important elements of that obligation by promoting risky financial transactions to Fletcher, the individual co-trustee, without insuring that she was either capable of meaningful analysis or had independent financial counsel prior to agreeing to the transactions skewed substantially in favor of the Bank. Following decades of abiding by the Retention Provision in the Trust instrument, and previous individual trustees' refusal to place the stock assets at risk in order to diversify the Trust, the Bank recruited Fletcher to serve as the individual trustee by enticing her with substantially increased monthly income from approximately $25,000 per month to $33,000 per month. By involving Fletcher, who was not only self-interested but of obvious diminished capacity, in the conversion of Trust assets into payments that were described as income, the Court can only conclude the Bank employees, both in the trust department and the investment divisions, acted in concert to utilize the Trust assets to benefit the Bank and in willful disregard of the best interest of the Trust. Individuals, acting under the auspices of the Bank and within the scope of their duties, disregarded the clear and

unequivocal expression by Mr. & Mrs. Skelly who placed their confidence in a corporate trustee. In the pursuit of monetary gain, both Bank employees individually and the Bank as a corporation, engaged in a pattern of conduct calculated and designed to primarily enrich the Bank and its employees without regard to the deleterious effects of its conduct on the Trust and the remaindermen of the Trust. Imprudent decisions were made and irresponsible actions were taken by the Bank that demonstrated a reckless use of Trust assets to generate substantial revenue to the Bank of well over $1 million and unprecedented bonuses to the Bank employees connected to managing the assets of the Trust amounting to tens of thousands of dollars.

The Court finds that beyond simply restoring the trust to the position in which it should have been maintained, it is appropriate to assess punitive damages for the sake of example and by way of punishing the Bank for its conduct. The breaches of fiduciary duty by the Bank set forth herein qualify for punitive damages because the Bank has engaged in conduct that was in "reckless disregard of the rights of others," to wit, the beneficiaries, and in particular, the remaindermen who suffered substantially because of the diminution in Trust assets. 23 O. S. § 9.1(B). The Court finds, by clear and convincing evidence, that the Bank has been guilty of reckless disregard for the rights of others. Punitive damages to be awarded pursuant to 23 O. S. § 9.1(B) to the Respondent Trust shall be determined following a hearing limited to "the financial condition" of the Bank. 23 O. S. § 9.1(A)(7). The Court has heard evidence relating to factors 1 through 6 of § 9.1(A) and will hear evidence relating to the 7th factor which is the Bank's financial condition at a hearing on December 11, 2012 at 9:30 a.m.

CONCLUSION

The evidence in this case overwhelmingly demonstrates the Bank's grossly negligent and reckless administration of the Trust to the detriment of the beneficiaries. The Bank breached a series of fiduciary duties, including investing in VPFs, overpaying the income beneficiary,

engaging in self-dealing and failing to properly account for its actions. These actions have caused damage to the Trust and to the interests of the beneficiaries. Accordingly, judgment is entered for the Respondents on their counterclaims and damages are awarded as set forth above.

IT IS SO ORDERED this 9th day of October, 2012.

Linda G. Morrissey
Judge of the District Court

AFFIDAVIT OF MAILING

I, Sally Howe Smith, Court Clerk of Tulsa County, hereby certify that on the 10 day of October, 2012, a true and correct copy of the foregoing Order was mailed to each of the attorneys listed below and a true and correct copy of the foregoing Order was filed in the foregoing case:

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