revised cover page April 27, 2015

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KATHRYN MENNEN, SARAH MENNEN, ALEXANDRA MENNEN, SHAWN MENNEN, and JOHN MENNEN,	)	
Plaintiffs,	)	C.A. No. 8432–ML
v.	)	
WILMINGTON TRUST COMPANY, a Delaware corporation, GEORGE JEFF MENNEN, and OWEN J. ROBERTS, not individually but solely as the individual trustee of the TRUST ESTABLISHED BY GEORGE S. MENNEN FOR THE BENEFIT OF GEORGE JEFF MENNEN u/a/d/ 11/25/1970, a Delaware trust,	)	
Defendants.		

MASTER'S REPORT
(Post-Trial)

Draft Report: December 8, 2014
Exceptions Submitted: February 13, 2015
Final Report: April 24, 2015

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LEGROW, Master

The beneficiaries of a once substantial trust filed this action challenging twenty years of investment decisions by the individual and corporate trustees of the trust. It is undisputed that the trust, once valued at over $100 million, was reduced to a value closer to $25 million through a series of debt and equity investments largely focused on two insolvent, unproven, and ultimately unsuccessful private companies with no established record of profitability. There can be no doubt that the investments were astonishing failures. The question is whether, divorced of hind-sight bias regarding the outcome of the challenged transactions, the trustees' investment decisions expose them to liability to the beneficiaries. Because the trust agreement modified the trustees' default duties and exculpated the trustees from liability unless they acted in bad faith or with willful misconduct, a showing that the trustees committed a lesser breach of trust will not result in the judgment the beneficiaries seek.

What remains before the Court after a settlement between the beneficiaries and the corporate trustee is whether the individual trustee, who is the beneficiaries' brother and uncle, respectively, and who personally directed and oversaw the challenged investments, engaged in non-exculpated breaches of trust. I conclude that he did as to the vast majority of the transactions at issue. Interestingly, the bulk of the transactions tainted by the trustee's bad faith were not – as one might expect – directly intended to confer an immediate pecuniary benefit on the trustee. Although a handful of investments directly relieved the trustee from personal guarantees or loans he made to these companies, or – on one notable occasion – were used as leverage to ensure a company paid the trustee's consulting fees, most of the transactions were motivated by something far more

amorphous, but much more pervasive: pride. That is, because most of the trustee's personal fortune was out-of-reach in his own trust, the trustee turned to his brother's trust as a piggy bank he readily opened to fund a few private companies in which the trustee had invested his time and on which he had staked a claim that he was uniquely skilled at selecting and advising small fledgling companies that he could turn into the "next big thing." Certain that fortune and acclaim were around the bend, the trustee eschewed the interests of the beneficiaries in favor of subsidizing his self-aggrandized standing as a financier.

It is perhaps unsurprising that, with his financial security assured by his own independently-managed trust, the trustee set out to achieve recognition within the business community and display the financial acumen that his ancestors exhibited when they built a substantial fortune with the admirable success of their own private company. The trustee breached the trust reposed in him, however, when he used the trust assets to achieve those goals. Although these motivations differ from the typical pecuniary incentives that traditionally underlie disloyal behavior, they are no less real and no less emblematic of bad faith. In fact, they bear all the hallmarks of more traditional disloyal behavior, except that, instead of investing his own money, the trustee invested his time and his name in the companies at issue, and then used the trust's money to protect and advance those investments. Because this disloyalty is not exculpated by the trust agreement, the trustee is liable to the beneficiaries for the losses the trust suffered.

BACKGROUND

These are the facts as I find them after trial.

A. The Mennen Family and the Mennen Company

The plaintiffs, Kathryn Mennen ("Katie"),[1] Sarah Mennen ("Sarah"), Alexandra Mennen ("Alexandra"), Shawn Mennen ("Shawn") and John H. Mennen ("John") (collectively, the "Plaintiffs" or the "Beneficiaries"), are the current beneficiaries of a trust established by George S. Mennen for the benefit of John H. Mennen and his issue by agreement dated November 25, 1970 (the "Trust"). Katie, Sarah, Alexandra, and Shawn are John's four children and range in age from 24 (Shawn) to 19 (Alexandra).[2] Katie, Sarah, and Alexandra are college students. Shawn has special needs and lives at home with John. John serves as Shawn's legal guardian.[3]

John is one of four children of George S. Mennen (the "Settlor"). The Settlor, who died on May 5, 2005, had three other children: William G. Mennen ("Bill"), Elma Christina Mennen ("Christina"), and defendant George Jeff Mennen ("Jeff"). Bill and Jeff are the children of the Settlor's first marriage and John and Christina are the children of the Settlor's second marriage.

As set forth below, the Trust – and several others established by the Settlor at various times – initially was funded with stock of The Mennen Company, a privately held

[1] I use the Mennen family members' first names for the sake of clarity. No disrespect is intended.
[2] At the time this action was filed, Alexandra was a minor and initially was represented in the litigation by her mother. *See* Verified Compl. ¶ 7. Alexandra turned 18 on August 21, 2013. Joint Pre-Trial Stipulation and Order (hereinafter "Pre-Trial Order") ¶ 6.
[3] Pre-Trial Order ¶¶ 6-7.

company founded in 1878 and located in New Jersey. The Mennen Company was perhaps best known for its "Speed Stick" and other personal hygiene products. The Settlor controlled approximately 30 percent of The Mennen Company at the time the Trust was created.[4]

B. The Trust

On November 25, 1970, the Settlor established four irrevocable trusts, one for the benefit of each of his four children. Each trust was funded with approximately 18,700 shares of non-voting Class A common stock of The Mennen Company, and each trust later received 500 shares of The Mennen Company preferred stock.[5] The trust agreements named Lowell Wallace, a friend of the Settlor and an officer of The Mennen Company, as individual trustee of each trust and named defendant Wilmington Trust Company ("Wilmington Trust") as corporate trustee.[6] Wilmington Trust served as corporate trustee of the Trust until it resigned on May 28, 2013.[7]

After Wallace left his employ at The Mennen Company, the Settlor appointed Jeff as the successor individual trustee of the Trust.[8] Jeff also served in the same capacity for Christina's trust. Jeff, a graduate of Washington & Lee University and the American Institute of Foreign Trade, was employed by The Mennen Company from 1968 until

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[4] *Mennen v. Wilmington Trust Co.*, C.A. No. 8432-ML (Feb. 12, 2014 & Feb. 14, 2014) (TRIAL TRANSCRIPT) (hereinafter "Tr.") at 115 (Jeff).
[5] Pre-Trial Order ¶ 12.
[6] *Id.* ¶¶ 14-15.
[7] *Id.* ¶ 15. Wilmington Trust also served as corporate trustee of Jeff's Trust until it resigned on the same date. Wilmington Trust continues to serve as corporate trustee for the trusts established for Bill and Christina. *Id*.
[8] *Id.* ¶ 14.

1990, rising in the ranks from salesman to Vice-Chairman.[9] After he left The Mennen Company, Jeff ran a consulting business through which he offered consulting services to family-owned businesses.[10] When the Settlor appointed Jeff as individual trustee of the Trust, he was aware that Jeff had no background in finance.[11]

At the time the Trust was created, the family did not expect to sell The Mennen Company.[12] In March 1992, however, The Mennen Company was sold to Colgate-Palmolive Company for a combination of common stock and cash.[13] As a result of that sale, the Trust received 830,097.456 shares of Colgate common stock, along with $8,318,576.02 in cash.[14]

The agreement governing the Trust (the "Trust Agreement") identifies both John and his issue as current beneficiaries of the Trust and envisions that the Trust would last for several generations and serve the needs of John, his children, and his grandchildren.[15] Article Second of the Trust Agreement enumerates the trustees' powers. In addition to the standard powers to retain, sell, dispose of, purchase, and invest and reinvest Trust assets, the trustees are permitted to invest and reinvest funds held in the Trust without any duty to diversify those investments.[16] The Trust Agreement also gives the trustees the power to invest Trust assets in businesses "regardless of whether the Trustees acting in an individual capacity[] are or may be an officer, director, shareholder, partner or otherwise

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[9] Tr. at 101-04 (Jeff).
[10] *Id.* at 104-05 (Jeff).
[11] *Id.* at 102 (Jeff).
[12] JX 2397 at 28-29.
[13] Pre-Trial Order ¶ 13.
[14] *Id.*
[15] JX 1489, Art. FIRST, § 1.
[16] *Id.*, Art. SECOND, § (d).

financially interested in any such business."[17] Article Third requires the trustees to act by majority consensus, except that the individual trustee has the power to direct the corporate trustee as to certain of the powers granted in Article Second.[18]

In their complaint in this action, the Beneficiaries alleged that the trustees breached their fiduciary duties by causing the Trust to engage in a series of conflicted and imprudent transactions that substantially reduced – to the tune of tens of millions of dollars, if not more – the value of the Trust. The Beneficiaries' claims potentially implicate a number of exculpatory provisions contained in the Trust Agreement. First, Article SIXTH shields the trustees from liability for losses resulting from decisions the trustees made in good faith, even if those decisions involved businesses or property in which the trustees had a personal interest. Specifically, Article SIXTH provides:

> The Trustees shall be and hereby are absolved and exonerated from any individual responsibility for any loss which may result to the Trust Estate or to others in connection with the exercise or nonexercise of the powers and authority hereby granted to the Trustees under this Agreement so long as they shall have been acting in good faith, notwithstanding that they may be an officer, director, shareholder, partner or otherwise financially interested in his [sic] individual capacity in any business, company or real property in which the Trust Estate has an interest.[19]

Article SEVENTH confirms the Settlor's intent to exculpate the trustees from liability, so long as they acted in good faith, and extends the waiver to "any loss or depreciation in the value of the Trust Estate occurring by mistake in, or error of, judgment in the purchase or sale of any investment or the retention of any investment … so long as the same be made

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[17] *Id.*, Art. SECOND, § (p).
[18] *Id.*, Art. THIRD.
[19] *Id.*, at Art. SIXTH.

or done in good faith."[20] The Trust Agreement also permits the trustees to consult with counsel and excuses the trustees from liability for actions taken on the advice of counsel, provided such actions are taken in good faith:

> The Trustees may consult with legal counsel (who may or may not be of counsel to the Grantor) concerning any question which may arise with reference to the Trustees' duties or obligations under this Agreement, and the opinion of such counsel shall be full and complete authorization and protection in respect of any action taken or suffered by the Trustees in good faith and in accordance with the opinion of such counsel.[21]

It is against this background that the Plaintiffs' claims must be weighed.

C. John's History

John's personal history, and his dependence on the Trust and on Jeff, form an important part of both parties' positions in this action and therefore are recounted in more detail than might otherwise seem warranted. After graduating from high school, John attended college for one year, but he – in his own words – "couldn't hack it anymore" and did not complete any additional work toward a degree.[22] Instead, John worked a number of "blue collar" jobs, first at a chemical company and later at The Mennen Company.[23] John left The Mennen Company in 1992, when it was sold to Colgate-Palmolive, and has not been employed since that time. John manages a nine-acre farm adjacent to his home in New Jersey, the costs of which substantially outpace the $800 in gross revenue the farm generates each year.[24]

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[20] *Id.*, Art. SEVENTH.
[21] *Id.*, Art. TENTH.
[22] Tr. at 208-209 (John).
[23] *Id.* at 209-12 (John).
[24] *Id.* at 213-15 (John).

John was married to Nancy Mennen ("Nancy"), who is the mother of his four children, but John and Nancy divorced in the mid-to-late 1980s.[25] During and after the divorce, John struggled with alcoholism and had a difficult time managing his finances.[26] John's father took him to a facility for the first of John's three rehab attempts, but John's addiction continued. In the years that followed, Jeff was the only member of John's family who provided consistent support to him. Jeff took John to two more rehabilitation facilities, until John finally became sober in 1992.[27] During this time, Jeff also made sure that John's bills were paid, found a lawyer to represent John in the divorce and custody disputes with his ex-wife, and generally proved to be John's only source of emotional support.[28]

In comparison, John's relationship with the other members of his family was strained. John plainly loved and admired his father, but their relationship was "not the greatest," and John perceives that his father lacked confidence in him.[29] In contrast, when he appointed Jeff as trustee of John's trust, the Settlor told John that Jeff "would do the best for [John] and … he was the right guy."[30] John's relationship with Bill and Christina was "distant" and they did not communicate frequently during the 1990s.[31] The family divide became evident when Bill and Christina sued Jeff regarding his administration of other family trusts for which he served as trustee. Although Bill and

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[25] *Id.* at 217 (John).
[26] *Id.* at 216-19 (John).
[27] *Id.* at 217-19 (John).
[28] *Id.* at 218-20 (John).
[29] *Id.* at 220-21 (John).
[30] *Id.* at 223 (John).
[31] *Id.* at 220-21 (John).

Christina asked John to join their side during the litigation, John refused to do so because he "wanted to support" Jeff.[32]

John's dependence on Jeff did not end with the emotional support Jeff provided. After he left his employment with The Mennen Company in 1992, John came to depend on the Trust as his sole source of income. Between 1992 and 2012, John requested and received regular monthly distributions from the Trust, amounting to $15,000 a month in 1992 and 1993; $35,000 a month from 1994 through November 1997; $50,000 a month from December 1997 through May 2004; $65,000 a month from June 2004 through April 2009; and $72,500 a month from May 2009 through April 2010 and from June 2011 through February 2012.[33] During a period from October 2010 through May 2011, and again from May 2012 through March 2013, when the Trust did not have sufficient liquidity to make distributions to John, Jeff loaned John $863,000 with assurances that things would get better quickly because the Trust's major investment was going to "hit big" and the Trust soon would resume making distributions so that John could repay the loans from Jeff.[34] In addition to the monthly distributions, John also requested several extraordinary one-time distributions. In all, John received approximately $13.9 million from the Trust after 1992.[35]

Given his dependence on both the monthly distributions and Jeff, it is perhaps unsurprising that John adopted the myopic view that all was well with the Trust as long

[32] *Id.* at 221 (John).
[33] Pre-Trial Order ¶ 17.
[34] *Id.*¶¶ 20-21; Tr. at 71, 147-48 (Jeff); Tr. at 228, 230 (John).
[35] Pre-Trial Order ¶ 19.

as the monthly distributions arrived on time.[36] On the few occasions that John did inquire with Jeff regarding the Trust's investments, Jeff vaguely reassured John that everything was fine, that the investments were going to "hit big," and that there was no cause for concern.[37] Those assurances, however, proved unfounded, if not untruthful.

D. The Management of the Trust

When The Mennen Company was sold to Colgate-Palmolive in 1992, the trustees suddenly held a very different portfolio of Trust assets. Where the Trust previously solely held illiquid stock in a privately held company, the trustees now had at their disposal a portfolio of cash and publicly traded stock valued at approximately $46 million.[38] Although the Trust Agreement permitted the Trustees to hold an undiversified portfolio, and although the Trustees had been unable to diversify while The Mennen Company was privately held, Jeff recognized the value of diversification and hired money managers whom he charged with diversifying the Trust's Colgate-Palmolive holdings into a portfolio of positions in publicly traded companies.[39] Jeff monitored the money managers' performance and made changes as needed.[40] By May 2000, the stated value of the Trust was $115,385,927.00.[41] By late 2007, the Trust held stock and convertibles in publicly traded companies, mutual funds, bonds, and cash with a

[36] Tr. at 222, 224, 262-63 (John). *See also* JX 2373 (Snyder dep.) at 97.
[37] Tr. at 227-30 (John).
[38] *Id.* at 117 (Jeff).
[39] *Id.* at 117-20 (Jeff).
[40] *Id.* at 120-21 (Jeff).
[41] JX 10, 12-19.

combined stated value near $70 million.[42] The value of the Trust's assets, however, and its apparent diversification, was misleading; by 2007 a large portion of the Trust's public portfolio had been pledged as collateral to support a handful of fledgling, privately held companies Jeff identified as likely to provide the type of out-sized returns he was certain he could deliver. Unfortunately, Jeff's skill at identifying successful investments proved inversely related to his own certainty in his abilities. By the time of trial, the Trust consisted of (i) an investment in a private fund called "Acorn Partners," which was valued at $2.8 million and was redeemed in February 2014 to create some liquidity for the Trust, (ii) debt and equity in On-Site Analysis, Inc., with a stipulated value of $9.6 million, and (iii) a 9.42% interest in Signal Point with a stipulated value of $15 million.

Although he retained advisors to manage the Trust's portfolio of public companies, bonds, and similar investments, Jeff personally oversaw the Trust's investment in small, privately held companies. Jeff believed that most professional advisors would not offer advice regarding such companies, but concluded he was well suited to select those investments himself because he believed his experience as an executive of The Mennen Company and a consultant for private companies had given him "unique capabilities" regarding such investments.[43] Jeff testified that he performed extensive due diligence on these private company investments, including interviewing executives, reviewing financial information, and consulting with Thomas O'Mara, a former Arthur Anderson partner whom Jeff claims he hired to "check the financial

[42] Post-Tr. Opening Br. of George Jeff Mennen (hereinafter "Jeff Post-Tr. Opening") at 7.
[43] Tr. at 123-24 (Jeff).

records and the business plan[s] and the histor[ies] of the compan[ies]."[44] According to Jeff, Mr. O'Mara would provide reports of his review of these records and Jeff and Mr. O'Mara frequently would reject a potential investment on the basis of their review of the company.[45] Tellingly, there are no records of Mr. O'Mara's reports or of this extensive due diligence Jeff purportedly conducted, even for those companies in which he caused the Trust to invest.[46]

Although the Trust Agreement prohibited Jeff, as a family member trustee, from receiving compensation for his services, Jeff was permitted to seek reimbursement for his expenses.[47] In 1994, Jeff and Wilmington Trust agreed that John's expenses would be based on the "office space costs" (*i.e.*, rent and utility expenses) of TMF Investments ("TMF"), a company owned by Jeff and other members of the Mennen Family and through which Jeff conducted certain business for John's trust and other family trusts.[48] In 1994, Jeff obtained an opinion from Carol Nickel, Esquire, of the firm of Ivins, Phillips & Barker, regarding the types of expenses and the manner in which he could obtain reimbursement from the Trust. Ms. Nickel opined:

> If the expenses at issue can be clearly identified as connected with [the Trust], you should be entitled to reimbursement. If the expenses are a portion of larger expenses, such as office rent and overhead or secretarial costs, you should develop a consistently applied system to make a fair allocation among the various uses of the space or the employees at issue. This could include daily timesheets, periodic accountings or some other

[44] *Id.* at 124 (Jeff).
[45] *Id.* at 123-26 (Jeff).
[46] *Mennen v. Wilmington Trust Co.*, C.A. No. 8432-ML (July 1, 2014) (TRANSCRIPT) at 93-94.
[47] JX 1489 (Trust Agreement) Art. TWELFTH.
[48] *See* JX 1580.

method that reasonably identifies the percentage of office or secretarial time devoted to each person or entity sharing its costs.[49]

Purportedly relying on that advice, Jeff and Wilmington Trust arrived at a procedure whereby Jeff would provide Wilmington Trust an estimate of the number of days he spent working on business for the trusts each year, and the trusts would reimburse Jeff for that percentage of the "office space costs" for TMF. For example, in 1994 Jeff estimated that he spent 56 out of 132 business days working on trust business, and the trusts therefore reimbursed Jeff for 40% of TMF's "office space costs" that year. Jeff suggested this method because he contended it would be "unnecessarily cumbersome" to allocate his time and his assistant's time on an hourly basis.[50] It is not clear how, if at all, TMF's office expenses were a reliable measure of Jeff's "expenses" as trustee since Jeff conceded that the office expenses were not increased due to his work for the Trusts.[51] To say Jeff was generous in his estimates would be an understatement; Jeff conceded that he would allocate an hour's worth of work for the Trust as an entire day for purposes of expense reimbursement.[52] This practice resulted in substantial payments by the Trust to TMF Investments. For example, in a six month period in 2007, the Trust reimbursed Jeff for $17,871.78 in "expenses."[53] While he was still serving as trustee for Christina's Trust, Jeff repeatedly double charged expenses by charging each

[49] *Id.* (Mar. 18, 1994 letter from Nickel to Jeff, attached to Jun. 21, 1994 letter from Jeff to Andrew Smith of Wilmington Trust).
[50] *Id.* (Jun. 21, 1994 letter from Jeff to Wilmington Trust).
[51] JX 2392 (Jeff Dep.) at 112-13.
[52] *See* JX 1580 ("I am not going to say that I spent the full day each one of those days on the trusts …"); JX 1991 (allocating an entire business day to Trust activity when calendar shows one hour meetings relating to Trust activity).
[53] JX 1991.

trust for the full amount of TMF's expenses for a day spent working on either trust. For example, in 1998, Jeff represented to Wilmington Trust that he spent 70 days, or 58.3% of his working days, working on John and Christina's trusts between July 1st and December 31st. Based on TMF's office expenses of $4,000 a month, John indicated he was entitled to reimbursement of $2,333.33 a month, or $14,000 for the six month period. Rather than divide that reimbursement between the two trusts, however, John sought and received $14,000 from each trust.[54] In other words, although TMF's total expenses for that six month period were $24,000, Jeff received $28,000 from the two trusts. Similar overbilling occurred in 1995, 1996, and 1997.[55] After Jeff resigned as trustee of Christina's trust in 1998, the number of days he spent working on trust business strangely increased.[56] Between 1994 and 2009, Jeff charged the Trust $536,000 in "expenses."

Most of John's knowledge of the Trust and its various investments came from Jeff. To reiterate, the Trust Agreement required the trustees to act with consensus except as to certain powers over which the individual trustee could direct the corporate trustee. At some point, Wilmington Trust concluded that the Trust's investment in privately held companies was one of those directed powers and Wilmington Trust thereafter ceded control over the Trust's investments in privately held companies.[57] Although

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[54] JX 1639.
[55] See JX 1618 (July – Dec. 1995); JX 2696 (Jan-Jun 1996); JX 1631 (Jan-Jun 1997); JX 1638 (July-Dec 1997).
[56] *See* Pls.' Opening Post-Tr. Br. Ex. A.
[57] Whether Wilmington Trust's interpretation of the Trust Agreement was proper, and whether Wilmington Trust breached its fiduciary duties by abdicating its oversight of the Trust to Jeff is not addressed in this report because the Plaintiffs settled their claims against Wilmington Trust on the eve of trial. For that reason, this report largely focuses on Jeff's actions as trustee, and

Wilmington Trust prepared and sent regular statements to John,[58] those statements were relatively unhelpful to even a sophisticated beneficiary because the Trust was maintained in multiple sub-accounts and the statements for each account were issued separately: some on a monthly basis and some on a quarterly basis. It was not until September 2009 that Wilmington Trust provided consolidated statements to John.[59] More significantly, these statements provided values for the Trust's private company investments that were unsubstantiated because Jeff failed to provide Wilmington Trust with current market value information, despite Wilmington Trust's repeated requests for that information.[60] Jeff made no attempt at trial or in post-trial briefing to reconcile his inability to provide reliable values for these investments with his unflinching testimony that he continually reviewed the financial well-being of the companies in which the Trust invested. I also have difficulty swallowing that Jeff was unable to provide valuation information about the companies on whose board he served. The most reasonable conclusion, and the one I

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mentions Wilmington Trust only when necessary to understand background or resolve the Plaintiffs' claims against Jeff.

[58] Pre-Trial Order ¶ 43.

[59] *Id.*

[60] JX 1809 (2002 letter from Wilmington Trust to Jeff requesting valuation information); JX 1880 (Wilmington Trust notes from meeting with Jeff in 2004 stating "[Oller of Wilmington Trust] showed Jeff a few exhibits on the trust value and how these investments are appearing on the trust records. Because we don't have updated values and know about the investments, we don't know if we are properly accounting for them."); JX 1935 (Wilmington Trust agenda for meeting with Jeff in 2006 noting "we have nothing to substantiate the market value" of several investments in privately held companies); JX 2051 (e-mail from Oller of Wilmington Trust to Jeff in July 2009 stating that Oller had been requesting market value information for the last 7-8 years); JX 2114 (Wilmington Trust notes for meeting with Jeff in 2010 stating "lack of info … probably overstated but by how much? … Jeff will get [Oller] numbers before year end"); JX 2187 (April 2012 e-mail to Wilmington Trust from counsel noting need for Jeff to provide requested information promptly "so that we can get out an accurate statement for May if not for April").

reach after weighing the evidence, is that Jeff deliberately obscured the true value of these investments in a bid to continue his unfettered access to the Trust to further his personal interests, as explained later in this report.

Other than the statements sent by Wilmington Trust, which John did not regularly review, John relied upon Jeff to provide updates regarding the Trust.[61] Jeff testified that he regularly met with John, both at his own initiative and at John's request, to update John regarding the Trust.[62] None of these updates or reports were made in writing or memorialized, and therefore it is difficult to assess what John knew about the Trust and when. Even when John e-mailed Jeff requesting information, Jeff would respond with a telephone call.[63] Jeff and Wilmington Trust occasionally held annual reviews with John, but these reviews were not conducted regularly, purportedly because John "didn't have a good feeling about Wilmington Trust and Mark Oller," the Wilmington Trust relationship manager assigned to the Trust.[64] Although other members of the Mennen family warned John that he should not trust Jeff, that Jeff's investment strategy was risky, and that John should replace Jeff as trustee,[65] John did not heed those warnings and continued blindly to believe that, as long as the monthly distributions continued, the Trust was fine.[66] Although Wilmington Trust began internally to express grave concerns regarding Jeff's management of the Trust, it did nothing to alert John or John's children to those concerns

[61] Tr. at 231 (John).
[62] *Id.* at 129-31 (Jeff).
[63] *Id.* at 133 (Jeff).
[64] *Id.* at 132 (Jeff).
[65] JX 2389 (Christina dep.) at 16-19, 23-25; Tr. at 239-40 (John).
[66] Tr. at 227-30 (John). Even after the distributions stopped, John continued to believe Jeff's assurances that the problems were temporary. *Id.*

until 2012. Remarkably, at a meeting in December 2011 to introduce Shawn and Katie to the Trust, Wilmington Trust assured Katie that it was monitoring Jeff's investments and acting as a "cross-check" against Jeff.[67] The December 2011 meeting was the only meeting either Jeff or Wilmington Trust had with John's children until December 2012.

As some of the foregoing makes clear, Jeff maintained almost no records as trustee and therefore it is difficult at times to piece together Jeff's decisions as trustee or what information was shared with the Beneficiaries. John contends he received very little substantive information regarding the Trust and that Jeff evaded probing questions with repeated platitudes that all of the Trust's investments were performing well. Jeff, meanwhile, contends that he performed extensive due diligence before and after making investments for the Trust and provided John with a constant stream of information regarding the Trust. I found John's recollection more credible.

E. The Challenged Investments

The Plaintiffs challenge a series of transactions through which the Trust became "invested"[68] in various privately held companies. Jeff does not dispute that the trust lost substantial sums of money through these investments. The dispute between the parties is whether those losses are attributable to market shifts or other factors outside the trustees' control, as Jeff contends, or whether the losses are the result of the Jeff's bad faith or willful misconduct.

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[67] *Id.* at 227 (John), 278-79 (Katie).

[68] Many of the challenged transactions were loans, loan guarantees, and other debt instruments, rather than traditional equity investments. I use the word "investment" in this report to refer to all such transactions.

Having reviewed the evidence and observed the witnesses at trial, I found most of Jeff's testimony, which largely was self-interested, unreliable for a number of reasons. For example, if Jeff and Mr. O'Mara performed the searching diligence to which Jeff testified, one reasonably would expect records of such diligence and confirmatory testimony from Mr. O'Mara or executives at the various companies, but no such evidence was provided at trial or produced to the Plaintiffs. If, as he claims, Jeff was serving as a director of many of these companies in order to protect the Trust's interests, one reasonably would expect he could provide Wilmington Trust with information regarding the current market value of the Trust's investments, but no such information was provided for many years. Jeff's method of extracting unauthorized compensation from the Trust in the form of unsubstantiated "expenses," as well as his repeated overcharging of the Trust for those expenses, also raises questions regarding his integrity. In addition, as described in more detail below, on more than one occasion Jeff denied having a personal interest in various companies in which the Trust invested, even when the record evidence showed otherwise, and provided inconsistent testimony regarding his personal interests in those companies. Accordingly, this report assigns little weight to Jeff's testimony, particularly those aspects that are plainly aimed toward limiting or eliminating his exposure in this case. In contrast, I found the Plaintiffs who testified to be credible witnesses.

1. LOCATE/Mobile Media

Almost immediately after The Mennen Company was sold and the Trust's assets became liquid, Jeff began to invest the trust in Local Area Telecommunications

("LOCATE"), a company involved in "beepers." Before the Trust became invested in LOCATE, Jeff controlled 10-15% of LOCATE's equity through "096 Associates," a family partnership in which Jeff had an interest and for which Jeff served as the General Partner.[69] Jeff's father and several other family members personally invested in LOCATE, and Jeff was friendly with LOCATE's CEO, Craig Roos, although he attempted to downplay the relationship at trial.[70] By the time the Trust made its first loan to LOCATE, Jeff was serving on the board to represent his family's interests in the company and some contemporaneous documents indicate he was Chairman.[71]

Jeff testified, truthfully, I believe, that he personally invested in LOCATE because he believed it had substantial potential for growth.[72] LOCATE, however, also had liquidity problems and proved unable to achieve that growth despite several capital infusions.[73] After the company continued to struggle despite investments by Jeff and other family members, Jeff caused the Trust to make four loans to LOCATE between September 1992 and May 1993 totaling $875,000.[74] When LOCATE continued to need additional capital to stave off bankruptcy, Jeff personally loaned LOCATE approximately $8 million he obtained through a loan from a venture capital firm.[75]

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[69] Tr. at 153-54; JX 2464 at MNAT00006507 (handwritten notes indicating Jeff owned 10-15% of the equity of LOCATE).
[70] Tr. at 154-56 (Jeff).
[71] JX 1567 at MNAT00006584; Tr. at 10-11 (Jeff).
[72] Tr. at 13-14 (Jeff).
[73] *Id.* at 158-59 (Jeff).
[74] Pre-Trial Order, Ex. 1, Master List of Transactions No. 641-44.
[75] JX 1748 at ¶¶ 24-25. Although Jeff could not recall this loan at trial, he did not deny making it. Tr. at 17-18 (Jeff).

Jeff apparently was uncomfortable with his position as LOCATE's creditor, notwithstanding his belief in LOCATE's potential. He therefore caused the Trust to loan $3.75 million to LOCATE. Those funds, along with a similar loan Jeff caused Christina's trust to make, were used to repay LOCATE's loan from Jeff.[76] The Trust loaned these funds to LOCATE at 10% interest. To fund the loan, the Trust borrowed money from Wilmington Trust at 8.5% interest. In other words, even if LOCATE repaid the loan in full, the Trust would net a 1.5% profit.[77] When asked to explain how this loan benefited the Trust, Jeff continued to insist that the "upside" for the Trust was in LOCATE's growth opportunities.[78] Jeff failed to explain how the Trust could profit from LOCATE's growth through a loan with a 150 basis point spread. Rather, it was Jeff's personal investment and his ability to claim skill as a financier that would be protected if LOCATE was able to capitalize on its growth opportunities. The record also casts substantial doubt on Jeff's vague testimony that he conducted extensive due diligence before proceeding with this transaction. In contrast to Jeff's explanations at trial about the certainty of LOCATE's growth potential, Wilmington Trust reviewed LOCATE's financials at the time the loan was made and described LOCATE's financial condition as

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[76] JX 1748 at ¶¶ 25-26.

[77] Although the record reflects that the Trust also received warrants to purchase MobileMedia stock, *see* JX 1591, the Trust never exercised those warrants. Jeff cites no evidence that the warrants ever had value. Plaintiffs suggest the Trust was unable to exercise those warrants in the brief period they had value because Jeff was a company insider. *See* Pls.' Pre-Trial Br. at 11.

[78] Tr. at 13-14 (Jeff).

"hopeless."[79] Wilmington Trust nevertheless permitted the loan to proceed and profited from its own loan to the Trust.

Notably, although he retained virtually no records for the Trust, including records of his due diligence, Jeff had the foresight to retain an authorization – signed by John and most likely requested by Wilmington Trust – in which John acknowledged the $3.75 million loan to LOCATE.[80] The authorization, which takes the form of a letter to Wilmington Trust, states in pertinent part:

> This is to inform you that Jeff Mennen has reviewed with me the Locate loan transaction, and I am in agreement with this transaction.
>
> To be clear, I understand that Locate is borrowing $3,750,000 from the trust for a period of one year at a rate of 10%, with interest to be paid quarterly. Further, Locate will award the trust 150,000 warrants for Locate stock which will actually come in the form of Mobilemedia Communications, Inc. stock (approximately 30,000 shares).
>
> Further, I understand that the trust will borrow the funds to make this loan from Wilmington Trust Company at 8.5% interest. I am in agreement with this arrangement.[81]

Neither the authorization nor any document Jeff produced indicates that Jeff advised John about (1) LOCATE's tenuous financial condition, (2) Jeff's personal investment in LOCATE through 096 Associates or (3) LOCATE's intent to use the loan proceeds to

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[79] JX 1572 at MNAT 00006556 (MNAT memo stating "[a]fter having reviewed Locate's balance sheet and income and expense statement, WCT, DHH and I called Neal this morning and advised him that the financial condition of Locate appeared hopeless and that it did not seem prudent to us to make a loan to Locate apart from the fiduciary liability concerns.").

[80] JX 1591. Jeff testified that Wilmington Trust requested the authorization and that conclusion is reasonable, as the letter is addressed to Wilmington Trust. Tr. at 20 (Jeff).

[81] JX 1591.

repay Jeff's loan.[82] I credit John's testimony that he was unaware of these conflicts at the time he signed the authorization.[83]

Although the Trust's loan to LOCATE was intended to be short term with interest paid quarterly, LOCATE never paid any interest on the loan and did not repay the principal within the one year period. The Trust therefore was required to use other sources to repay the interest and principal on the loan from Wilmington Trust. In 1996, after LOCATE was acquired by MobileMedia, Inc. ("MobileMedia"), MobileMedia assumed LOCATE's obligations under the promissory note. Mobile Media declared bankruptcy on January 30, 1997 and was purchased in bankruptcy by Arch Communications, Inc. ("Arch").[84] Although the Trust received warrants to purchase Arch stock, the warrants expired on September 1, 2001 without being exercised.[85] In 2009, Wilmington Trust realized that the failure to exercise the warrants left the Trust unable to claim a substantial tax loss.[86]

The Trust lost a total of $2,514,969.92 in principal as a result of the LOCATE transactions.[87] That figure does not account for the attorneys' fees the Trust incurred to retain counsel regarding the MobileMedia bankruptcy, the lost opportunity for growth, or the missed opportunity to claim a tax loss associated with the transaction.

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[82] Tr. at 21-23 (Jeff).
[83] *See* Tr. at 242-44 (John)
[84] JX 2047.
[85] *Id.*
[86] JX 2046.
[87] *See* Pre-Trial Order, Ex. 1, Master List of Transactions Summary Page.

2. Top Source/GTI/On-Site

The Trust's most substantial investment after the sale of The Mennen Company was in a company originally called Top Source Technologies, Inc. ("Top Source"), which was managed by one of Jeff's friends, Will Willis. The two became acquainted when Jeff interviewed Willis for a position with The Mennen Company. After The Mennen Company hired Willis as president of its Paper Art subsidiary, Willis reported to Jeff and they frequently interacted.[88] Willis refused to report to anyone other than Jeff and when that no longer was possible he left his position with The Mennen Company.[89] Although Jeff described their relationship as "business associates," both Jeff's secretary and John described them as personal friends.[90]

In May 1997, Willis became CEO of Top Source and Jeff promptly was invited to join the board of directors.[91] At the time, Top Source was struggling financially and was dependent on a single customer for 97% of its revenue.[92] Top Source's previous chairman had been removed by the board for making inaccurate public statements regarding the company's prospects.[93] When Jeff joined the board, he received 35,000 non-qualified stock options.[94] Although Jeff denied at his deposition receiving any compensation for his service on the Top Source board, he was forced to acknowledge the

[88] Tr. at 23-24, 169-70 (Jeff).
[89] *Id.* at 23-24 (Jeff).
[90] *Compare* Tr. at 23 (Jeff) *with* JX 2374 (Winchester dep.) at 78, 150; Tr. at 245 (John).
[91] Tr. at 24 (Jeff).
[92] *Id.* at 25 (Jeff); JX 1639, Note 16 to Consolidated Financial Statements ("In fiscal 1997, the majority of the Company's overall revenue was derived in the automotive technology segment from one customer, an OEM, which accounted for 97% of the total business activity. That same customer accounted for 99% to 91% of the net sales in both 1996 and 1995.").
[93] Tr. at 175-76 (Jeff).
[94] *Id.* at 24 (Jeff); JX 2678.

options at trial and then weakly testified that the options were returned when the Trust made its first loan to Top Source, while conceding he had no documentation that the options were returned.[95] Jeff testified that he joined the Top Source board to try to help the company grow and to learn more about the company as a potential investment for the Trust.[96] Unfortunately, Jeff's presence on the board did not prevent the company's slide, and despite his insider knowledge of the company's problems, Jeff decided to invest the Trust in Top Source.

Before the Trust invested in Top Source, however, Jeff first exposed his own personal assets through a guarantee of Top Source's financial condition. A 1995 financing agreement between the company and Mellon Private Asset Management ("Mellon") required Top Source to maintain a 1.5 debt-to-equity ratio (the "Mellon ratio").[97] In 1997, because the Company was in danger of exceeding the ratio, Jeff personally guaranteed Mellon that Top Source would maintain the Mellon ratio or Jeff would refinance the notes to Mellon's satisfaction.[98] In return for this guarantee, Jeff received 50,000 Top Source warrants.[99]

By September 30, 1998, Top Source was not in compliance with the Mellon Ratio.[100] On November 17, 1998, Top Source sold $3.5 million of its Series B

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[95] *Compare* JX 2392 (Jeff dep) at 64 *with* Tr. at 24, 106, 176 (Jeff).
[96] Tr. at 173 (Jeff).
[97] JX 1639 , Note 10 to Consolidated Financial Statements.
[98] Tr. at 25-26 (Jeff); JX 1639, Note 10 to Consolidated Financial Statements.
[99] JX 1639, Note 10 to Consolidated Financial Statements.
[100] JX 1658, Note 10 to Consolidated Financial Statements.

Convertible Preferred Stock to two Mennen trusts.[101] $2 million of that cash infusion came from the Trust.[102] Top Source described the transaction as "superior to competing offers available in strict arms-length transactions."[103] Top Source used those funds to restructure its debt to Mellon, relieving Jeff of his personal guarantee.[104] Jeff concedes that Top Source was having cash flow issues at the time the Trust purchased the preferred stock. In fact, Jeff claims that he was well aware of the company's financial condition at the time, as he continuously was performing due diligence in order to evaluate the potential investment.[105] Again, Jeff maintained no records of his research or analysis and offered no testimony regarding how these investments compared to other investment opportunities available to the Trust.

In late 1999, Top Source changed its name to GTI after selling its subsidiary, Onkyo America, Inc ("OAI") to a third party. Jeff remained on the board of directors. Less than a year after selling OAI, however, GTI decided to repurchase the business. To finance that transaction, the Trust loaned $12 million to GTI. To obtain the funds for the loan to GTI, the Trust borrowed $12 million from Summit, pledging other Trust assets as collateral.[106] Jeff concedes that GTI was insolvent at the time this loan was made.[107] The Summit loan later was transferred to Fleet National Bank, which was purchased by Bank

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[101] *Id.*, Note 20 to Consolidated Financial Statements.
[102] Pre-Trial Order., Ex. 1, Master List of Transactions No. 66.
[103] JX 1658, Note 20 to Consolidated Financial Statements.
[104] *Id.* ("During December 1998, the Company restructured substantially all of its outstanding $3,020,000 of Senior Subordinated Convertible Notes … [w]ith a portion of the proceeds from the Series B Preferred … .") *See also id.* at note 10 (describing these convertible notes as the Mellon debt).
[105] Tr. at 174-75 (Jeff).
[106] *Id.* at 32-33, 177-78 (Jeff).
[107] *Id.* at 33, 178 (Jeff).

of America. By February 2003, the Trust's loan to GTI, funded by the loan from Bank of America and secured by the Trust's assets, had increased to $19,550,000.[108]

GTI continued to burn through cash, and between January and October 2001 the Trust continued to prop up GTI by purchasing $11 million in GTI preferred stock.[109] By this time, the Trust's investment in GTI represented 38% of the stated value of the Trust.[110] Jeff testified that, based on the continuous and thorough due diligence he was able to perform by virtue of his position on GTI's board, he believed that the company's problems were caused by a series of outside factors, that the company's prospects were still strong, and that the Trust stood to gain from these growth opportunities Jeff foresaw. Notably, however, and much like the LOCATE transactions, a substantial portion of the Trust's support for GTI took the form of debt instruments, financed by loans the Trust took and secured by Trust assets, and even those transactions that included an equity component were (1) made at a time the company was insolvent or (2) involved warrants with a strike price the company had little hope of achieving in the near term. Even GTI characterized the preferred stock transactions as "loans."[111] Jeff offered no documentation for the due diligence he now recalls conducting and maintained no records memorializing the factors underlying his decision to expose the Trust to this substantial risk. Once again, however, Jeff had the foresight to obtain and keep a letter dated

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[108] Pre-Trial Order, Ex. 1, Master List of Transactions No. 429, 442, 445, 447, 449, 450.
[109] *Id.* No. 84, 89, 91, 98, 100; Tr. at 34 (Jeff).
[110] Tr. at 38-39 (Jeff).
[111] JX 1896 (document prepared by On-Site and listing preferred stock purchases and warrants as "loans" to On-Site or its predecessors); JX 2404 (Willis dep.) at 26 (identifying JX 1896 as a document prepared by On-Site).

September 13, 2001 and signed by John, in which John stated he had "reviewed the proposed [GTI] transaction and I am in agreement with this transaction."[112] Jeff does not recall who drafted or typed this letter or whether he explained to John the precarious nature of GTI's finances.[113] John signed the letter not because he understood the purpose of the transaction, but simply because Jeff asked him to do so and he trusted Jeff.[114]

In December 2001, GTI declared bankruptcy. Undeterred, Jeff continued his pattern of using the Trust to rescue GTI, providing $11.4 million in Debtor in Possession financing without obtaining the superiority typically given to such loans.[115] The Trust bought out GTI's other creditors and emerged from the bankruptcy as 100% owner of GTI, which was renamed On-Site Analysis, Inc. ("On-Site"). Jeff became the Chairman of On-Site's board.

After On-Site emerged from bankruptcy, it continued to struggle financially and was unable to pay from revenues the interest on the Trust's loans.[116] The Trust therefore began making additional loans to On-Site, which in turn were used to service the company's existing debt to the Trust.[117] Again, the Trust borrowed money in order to finance these loans to On-Site.[118] This shell game continued through 2007, with the

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[112] JX 1768.
[113] Tr. at 34-35 (Jeff).
[114] *Id.* at 253-54 (John).
[115] *Id.* at 39 (Jeff).
[116] JX 1957.
[117] *Id.*; Tr. 47-48.
[118] John signed a consent to these loans, apparently at the request of Fleet. *See* JX 1829. Nothing in the consent or the record indicates that John was informed, at the time he signed the consent, of On-Site's financial problems, or that the new loans were being used to service previous loans from the Trust. *See* Tr. at 45-48 (Jeff). Given John's level of sophistication and

knowledge and authorization of Jeff and Wilmington Trust.[119] That this pattern continued for so long is all the more remarkable because, despite Jeff's repeated representations to Wilmington Trust that On-Site was on the verge of profitability, Wilmington Trust recognized that it was "highly unlikely" On-Site ever would repay the loans from the Trust.[120]

After emerging from bankruptcy, On-Site initiated litigation against the former owners of OAI. The Trust funded that litigation. In July 2010 On-Site was awarded a $6.1 million judgment, plus interest. A payment of $6.6 million was received in late 2012 or early 2013, the net balance of which was owed to the Trust. The Trust, however, received none of these funds. Instead, Willis and Jeff "discussed" the matter and agreed that the money should remain in On-Site's accounts in a vaguely-explained effort to make On-Site appear more desirable to potential purchasers.[121] Notably, Jeff apparently approved On-Site's request to keep the money on its books, rather than repaying its debts

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education, as well as his blind trust in Jeff, I find it highly unlikely that he either drafted this letter or understood its import.

[119] JX 1957 (2/19/07 e-mail from Oller to Jeff stating "[w]e continue to go through the monthly pattern of providing On-Site money to cover their continuing operations plus our loan payments. This has been going on ever since they reorganized."); Tr. at 47-48 (Jeff)

[120] JX 1952 (12/27/2006 e-mail from Oller to Jeff stating "[i]t is highly unlikely that On-Site will ever be able to repay this debt …"). *See also* JX 2117 (Oller e-mail memorializing 12/15/10 call with Jeff and stating Jeff represented On-Site "will turn profitable in 1st Q and should return trust monies in 2011. (Jeff has been telling me this for the last 2-4 years.)"); JX 1940 (6/30/06 e-mail from Oller to Jeff stating "[u]nfortunately, from my vantage point, the On-Site situation doesn't seem to be improving.").

[121] Tr. at 40-43, 144-45 (Jeff); JX 2404 (Willis dep.) at 30-32. Significantly, Jeff did not explain whether he took any steps to ensure these funds would be shielded from On-Site's creditors. Candidly, it alludes me how funds purportedly segregated in a separate account and acknowledged as owing to the Trust would make On-Site any more appealing to a potential purchaser who conducted even basic due diligence.

to the Trust, at a time when the Trust was illiquid and could not make monthly distributions to John, requiring John to turn to Jeff for loans.

On-Site made its last payment to the Trust in 2008, but the Trust continued to make loans to the company through most of 2009. In 2010, with On-Site's cash flow problems continuing, Jeff personally loaned the company $400,000 at 5% interest. In connection with that loan, Jeff required the company to provide weekly cash-flow updates. Jeff also obtained "super priority" on his personal loan, so that "in the event of any [b]ankruptcy or change of ownership event," the principal and accrued interest would take "priority over all outstanding debt," including the substantial sums owed to the Trust.[122] Jeff testified that he later subordinated his debt to On-Site's obligations to the Trust, but he offered no documentation for this change in the terms of the loan.[123]

In all, the Trust infused On-Site with $55,004,554.15 in principal.[124] The parties stipulated that the value of the Trust's holdings in On-Site for purposes of calculating damages is $9.6 million.[125]

3. Wave2Wave

The Trust's other substantial investment was in Wave2Wave Communications, Inc. ("Wave2Wave"), which was founded in November 1999 by Andrew Bressman and Steven Ashman.[126] Ashman and Jeff were involved in a number of different business ventures, including a company called Innovention, which was founded by Ashman's

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[122] JX 2115.
[123] Tr. at 50-51 (Jeff).
[124] Pre-Trial Order, Ex. 1, Master List of Transactions Summary Page.
[125] Order Regarding Valuation Issues, Dkt. No. 459, ¶ 1.
[126] Pre-Trial Order ¶ 31.

father and for which Jeff provided consulting services at Ashman's request.[127] Before the Trust's first investment in Wave2Wave, Jeff contends he reviewed a package of due diligence materials and concluded Wave2Wave would be a promising investment if it obtained necessary working capital.[128] Jeff did nothing to document his investigation of the company or its prospects. Nevertheless, in April 2002, Jeff caused the Trust to purchase $500,000 of Wave2Wave common stock.[129] Jeff caused the Trust to make this investment despite his knowledge that one of Wave2Wave's founders, Andrew Bressman, had pled guilty in 1997 to federal charges of enterprise corruption and grand larceny.[130]

Although he testified that he caused the Trust to invest in Wave2Wave because of its promising business plan, Jeff also apparently used the Trust's investment as leverage to ensure that Ashman continued to pay Jeff's consulting fees related to Innovention. Despite Jeff's dissembling recollection of his motivations at trial, an e-mail he wrote in June 2003, shortly after the Trust purchased $1 million in common stock and $2.2 million in preferred stock, leaves little room for doubt.[131] In a clipped e-mail to Ashman, Jeff demanded that Innovention become and remain current on the consulting fees owed to Jeff, threatening that "[u]ntil we get this straightened out to my satisfaction, there will not be any further investment or guarantees in Wave2Wave."[132] The issue must have been

[127] JX 2392 (Jeff dep.) at 51-52; Tr. at 52 (Jeff).
[128] JX 2392 (Jeff dep.) at 75-77.
[129] Pre-Trial Order, Ex. 1, Master List of Transactions No. 1.
[130] Pre-Trial Order ¶ 37; Tr. at 70 (Jeff).
[131] JX 1805; Pre-Trial Order, Ex. 1, Master List of Transactions No. 1-6.
[132] JX 1805. Innovention also was called "Gustbuster." Tr. at 55 (Jeff).

resolved to Jeff's satisfaction, as the Trust guaranteed a $4 million loan from Wachovia to Wave2Wave in December 2003.[133] That guarantee later was increased to $5 million in June 2005.[134]

The Trust received shares of Wave2Wave in connection with these guarantees, but it appears Jeff also personally received Wave2Wave equity in connection with the same transactions. Although Jeff denied ever having an equity interest in Wave2Wave, a capitalization table prepared by the company in 2009 reflects that Jeff personally received shares of common stock on August 1, 2003, November 1, 2004, and June 30, 2005, the same days that the Trust received larger allotments of shares in connection with its guarantees.[135] At trial, Jeff claimed that the titling of shares in his name was an error by Wave2Wave's CFO, whom he instructed to correct the error.[136] Although he apparently recognized that the shares belonged to the Trust, rather than him, Jeff did nothing to ensure or document that the shares were transferred to the Trust and offered no proof that the instructions were given, much less followed.[137] As with much of his testimony, Jeff's explanation that these shares were issued to him in error lacked credibility and his argument that the Beneficiaries cannot prove the shares were not later transferred to the Trust borders on incredible.[138]

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[133] JX 1871.
[134] JX 1893.
[135] JX 2060 at WTC00011959-61.
[136] Tr. at 56 (Jeff).
[137] *Id.* at 56-57.
[138] *See* Jeff's Post-Trial Answering Br. at 20-21.

The Trust's financial propping up of Wave2Wave continued when Jeff and Wilmington Trust caused the Trust to guarantee a $13.5 million loan from Wachovia to Wave2Wave.[139] North Fork Bank ("North Fork") later purchased the loan from Wachovia and increased the principal amount to $14 million.[140] In 2007, Jeff permitted Wave2Wave to increase the loan to $15 million, thereby increasing the Trust's exposure to Wave2Wave's uncertain financial position.[141] Without the guarantees of the Trust, Wave2Wave could not have obtained arms-length financing.[142] If Jeff considered the issue at all, he did nothing to memorialize his analysis of why this investment and its associated risk was preferable to alternate investments available to the Trust.

In October 2007, Jeff caused the Trust to co-borrow on a $34 million loan from Greystone Business Credit II, L.L.C. ("Greystone").[143] The proceeds from the loan were used to satisfy Wave2Wave's obligations under the North Fork loan and to purchase a company called RNK, Inc. In November 2007, that loan was increased to $35.7 million.[144] After Wave2Wave defaulted on its obligations under the Greystone loan, Greystone agreed to waive the default if the Trust pledged additional collateral to support the loan.[145] In March 2009, however, Wave2Wave again defaulted and Greystone foreclosed on the loan.[146] As a result of the foreclosure, the Trust liquidated

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[139] JX 1924; JX 1925.
[140] JX 1930.
[141] JX 1958. Jeff also personally guaranteed this loan, "hypothetically" exposing himself in the event Wave2Wave defaulted on its obligations. JX 1959; Tr. at 60 (Jeff).
[142] Tr. at 185 (Jeff).
[143] JX 1972, 1975. Jeff also personally guaranteed this loan. JX 1973.
[144] JX 1978.
[145] JX 2012.
[146] Pre-Trial Order ¶ 33.

$39,364,275.00 of collateral and assumed Greystone's position as lender to Wave2Wave.[147] The liquidation of this collateral exhausted the Trust's liquid assets and caused the Trust to incur substantial capital gains tax associated with the sale of its low basis Colgate stock.[148] By that time, distributions to John were funded solely by Wave2Wave's interest payments to the Trust.[149]

Six months after the Trust assumed Greystone's position under the loan, the co-trustees permitted Wave2Wave to enter into a $9.3 million bridge loan facility with Victory Park.[150] As a condition to that loan, the Trust agreed to subordinate its position as Wave2Wave's creditor.[151] Although the Trust's counsel advised that the terms of the Victory Park loan were "well outside standard commercial terms," and although Wave2Wave was insolvent at the time the Trust agreed to the subordination, Jeff consented to the transaction on behalf of the Trust because Wave2Wave "had nowhere else to go."[152] There is no indication in the record that the Trust received any compensation for its agreement to subordinate its liens and nothing to memorialize any analysis Jeff conducted before agreeing to the subordination.

In 2010, Wave2Wave defaulted on the Victory Park loan. In exchange for Victory Park's agreement to forbear on exercising its rights under the loan, Wave2Wave agreed to stop making any payments to satisfy its obligations to the Trust until the Victory Park

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[147] *Id.* ¶ 33; JX 2034.
[148] Tr. at 64-65, 67-68 (Jeff).
[149] *Id.* at 67-68 (Jeff).
[150] *Id.* at 65 (Jeff).
[151] *Id.*
[152] *Id.* at 65-66 (Jeff); JX 2058.

loan was paid in full.[153] Because the trustees relied on those payments in order to make distributions to John, the distributions to John also stopped.[154] When John became concerned, Jeff reassured John that the problems were temporary and that Wave2Wave was going to "hit big."[155] Those assurances notwithstanding, Wave2Wave continued to default on its obligations to Victory Park, and in a later forbearance agreement the Trust was forced to convert half its $40 million debt to equity.[156] Wave2Wave was insolvent at the time of that conversion.[157]

In February 2012, Wave2Wave filed for bankruptcy in New Jersey.[158] During the bankruptcy proceedings, the trustees discovered that the Trust's security interest in Wave2Wave associated with the loan had been terminated in September 2009 by filings mistakenly made by the Boston law firm then representing the Trust.[159] As a result of those terminations, the Unsecured Creditors' Committee argued that the Trust did not have a security interest in Wave2Wave's assets.[160] The trustees did not pursue any action against the law firm that made the termination filings, although Jeff asserts those filings were "unauthorized."[161]

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[153] Tr. at 67-68 (Jeff).
[154] *Id.* at 68 (Jeff).
[155] *Id.* at 71, 139-40, 147 (Jeff); Tr. at 228 (John).
[156] *Id.* at 68-69 (Jeff).
[157] *Id.* at 70 (Jeff).
[158] Pre-Trial Order ¶ 34.
[159] *Id.* ¶ 35.
[160] *Id.*
[161] Jeff Pre-Trial Br. at 18.

The Trust lost $38,922,775.86 in principal in connection with its support of Wave2Wave.[162] On September 27, 2012, the bankruptcy court approved the sale of Wave2Wave's assets to Signal Point Corp. ("Signal Point"). Through the sale, the Trust received 10% of Signal Point's equity.[163] The parties stipulated that the value of the Trust's position in Signal Point is $15 million for the purpose of calculating damages.[164]

4. Other Transactions

The Beneficiaries challenge a series of other, much smaller, transactions through which Jeff caused the Trust to invest in start-up companies. Mercifully, the history behind these transactions is decidedly less complex. The remaining investments challenged by the Beneficiaries are:[165]

a. **Innovention.** In addition to using the Trust's investment in Wave2Wave to guarantee payment of his consulting fees from Innovention, Jeff also caused the Trust to loan $1.25 million to Innovention between 2000 and 2005.[166] A 2012 Wilmington Trust statement values the Trust's investment in Innovention at $794,559, consisting of a $250,000 promissory note and another unknown investment,[167] but there is nothing in the record to substantiate the actual value of this investment. Jeff concedes that Innovention never paid any principal or interest on the loans

[162] *See* Pre-Trial Order, Ex. 1, Master List of Transactions Summary.
[163] Pre-Trial Order ¶ 36. At the time of trial, the Trust held a 9.42% interest in Signal Point. *Id.*
[164] *See* Order Regarding Valuation Issues, Dkt. No. 459, ¶ 2.
[165] Although the Master List of Transactions attached to the Pre-Trial Order lists "Personal Communication Network Services" as a challenged transaction, the parties do not discuss that transaction in their post-trial briefs. The Trust lost less than $70,000 on that investment. Because the Beneficiaries did not develop a sufficient record regarding this investment, I assume they have abandoned their claim for damages regarding Personal Communication Network Services.
[166] Pre-Trial Order, Ex. 1, Master List of Transactions No. 737, 738.
[167] *See* JX 1265 at MLP_0001557.

made by the Trust.[168] The Beneficiaries contend that the Trust lost $1.25 million in principal relating to Innovention.

b. **Pet-Products.** The Trust invested in Pet Products when it was little more than a start-up entity.[169] In October 2001, the Trust purchased $2.15 million of Pet-Products' preferred stock.[170] The company never "got off the ground" and the Trust lost its entire $2.15 million.[171]

c. **Premium Brands.** Although Wilmington Trust's records show that Jeff caused the Trust to purchase $2 million in Premium Brands' preferred stock in May 2002, Jeff has no recollection of the investment and he did not maintain any records regarding the Trust's investment.[172] The Trust lost $2 million in principal associated with this investment.[173]

d. **Inntraport.** In March 2000, the Trust purchased $4 million of Series A convertible secured stock in Inntraport International Corporation ("Inntraport").[174] Inntraport was a start-up company that was shut down when its owner was found to have engaged in fraud.[175] Inntraport made some dividend payments, but the Trust lost $3,791,116.67 in principal relating to Inntraport.[176]

e. **World Broadcasting Group.** Jeff caused the Trust to purchase $300,000 in common stock in World Broadcasting Group in May 2002.[177] World Broadcasting Group was not profitable at the time of the investment.[178]

5. Wilmington Trust's Fees

The Beneficiaries also argue that Wilmington Trust overbilled the Trust for trustee fees by failing to adjust the net value of the Trust to account for the Trust's loan from

[168] JX 2403 (Jeff dep.) at 314.
[169] Tr. at 74 (Jeff).
[170] Pre-Trial Order, Ex. 1, Master List of Transactions No. 739.
[171] Tr. at 74 (Jeff).
[172] Pre-Trial Order, Ex. 1, Master List of Transactions No. 740-41.
[173] Tr. at 75-76 (Jeff).
[174] Pre-Trial Order, Ex. 1, Master List of Transactions No. 750-51.
[175] Tr. at 74-75 (Jeff).
[176] Pre-Trial Order, Ex. 1, Master List of Transactions Summary.
[177] *Id.*, Master List of Transactions No. 742.
[178] Tr. at 75 (Jeff).

Bank of America. In 2002, Wilmington Trust notified Jeff by letter that the principal amount on which Wilmington Trust based its fees was not reduced by the amount of the Bank of America loan.[179] The Beneficiaries argue Jeff should be held liable for the amount of this fee "overcharge," which they estimate totaled $158,403.63.[180] In its letter to Jeff, Wilmington Trust explained that it charged this fee due to the "extraordinary work involved with executing and maintaining this loan (or any future loans)."[181]

F. Procedural Background

As the value of the Trust declined precipitously, and as the Trust's remaining assets became almost exclusively tied to two companies with no proven ability to become or remain profitable ventures, Wilmington Trust became increasingly concerned that John – or more likely, his children – would bring claims against the corporate trustee for what Wilmington Trust viewed as John's misfeasance or nonfeasance.[182] For that reason, in early 2012, Wilmington Trust retained counsel to advise Wilmington Trust as to its "options and alternatives for positioning itself" in the event the Beneficiaries brought claims against it.[183]

On May 25, 2012, Wilmington Trust filed a petition in this Court to remove Jeff as the individual co-trustee of the Trust (the "Petition Action").[184] In the Petition Action,

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[179] JX 1806.
[180] JX 2685 at Ex. 1B.
[181] JX 1806.
[182] Aff. of Thomas R. Pulsifer, Esq. in Supp. of Wilmington Trust Co.'s Opp. to Pls.' Mot. to Compel the Production of Privileged Documents ¶ 3.
[183] Aff. of Beth A. Ungerman in Supp. of Wilmington Trust Co.'s Opp. to Pls.' Mot. to Compel the Production of Privileged Documents ¶ 5.
[184] *In re Trust for the Benefit of John H. Mennen created by George S. Mennen Under Agreement Dated Nov. 25, 1970*, C.A. No. 7570-ML (hereinafter cited as "Petition Action").

Wilmington Trust alleged that the Trust was a directed trust that required Wilmington Trust to follow the direction of the individual trustee with respect to certain trustee powers and responsibilities, and that investment decisions directed by Jeff had caused the Trust to lose a substantial portion of its value. Wilmington Trust sought (1) removal of Jeff as individual trustee, (2) an order authorizing the adult beneficiaries of the Trust to appoint a successor individual co-trustee, and (3) access to certain investment information Jeff allegedly was withholding. Although the Beneficiaries were identified as interested parties and received notice of the Petition Action, they did not immediately appear in this Court. Instead, after Wilmington Trust indicated that its attempts to contact the Beneficiaries had gone unanswered for a number of years,[185] and because I was concerned that the minor and unborn beneficiaries were not adequately being represented by the adult beneficiaries, I appointed a guardian *ad litem* to represent the interests of Alexandra, who was then a minor, and the unborn beneficiaries.

The parties initially agreed to the appointment of Peter S. Gordon, Esquire to serve as guardian *ad litem* in the Petition Action. Shortly after Mr. Gordon's appointment, Wilmington Trust filed an emergency motion for instructions regarding the Wave2Wave bankruptcy proceedings. With only a few days to understand the complicated dynamics

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[185] *See* Petition Action, C.A. No. 7570-ML (Sept. 28, 2012) (TRANSCRIPT) at 3-4 (counsel for Wilmington Trust explaining that Wilmington Trust has "made attempts to contact [the beneficiaries] … and they've been completely nonresponsive, the last couple of years, really.") That representation appears to have been in error, as e-mails in the trial record indicate John Mennen contacted Wilmington Trust after he received a copy of the Petition and expressed confusion regarding the action. *See* JX 2199 (e-mail from Mark Oller dated Jun. 4, 2012 stating "John has received the petition and is very confused by it. The support person recommended to him that he call me but John told her he wants to talk to Jeff."). The representation also is puzzling given the December 2011 meeting between Jeff, Wilmington Trust, John, Shawn, and Katie.

involving the Trust and the Mennen family, Mr. Gordon interviewed counsel to Jeff and Wilmington Trust, as well as Nancy, and reviewed the pleadings in the Petition Action and the Wave2Wave bankruptcy case. On October 24, 2012, Mr. Gordon filed a letter (the "Gordon Response") explaining the background of the Wave2Wave bankruptcy and providing his recommendation regarding Wilmington Trust's emergency motion.[186] That letter also stated:

> The Trust investments in Wave2Wave and On-Site comprise substantially all of the Trust assets. The Trust is a "directed trust" with respect to certain trust powers identified in the Petition. However, the Trust does not appear to be a directed trust with respect to the powers granted in ARTICLE SECOND subsections (h) or (p). … [W]hile it is clear that the Grantor intended to create a directed trust and to vest certain powers exclusively in the individual trustee, it is not clear from the plain language of the Trust that the investments at issue in the Petition were the sole responsibility of Jeff. It is likely that discovery will need to be taken to determine the intent of the Grantor with respect to this particular issue.[187]

The Gordon Response further highlighted the concentration of Trust assets in Wave2Wave and On-Site and the uncertainty regarding the actual value of those investments, explaining:

> The [Trust account] statement values the Trust assets at $50,815,441. However, only $2,233,590.34 in assets constitutes traditional investments. The nontraditional investments, comprised mostly of the Trust interest in Wave2Wave and On-Site either through direct ownership or debt instruments, is stated at $48,597,631.84. Correspondence shows that Petitioner requested access to valuation information for these investments from Jeff which Jeff did not supply.[188]

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[186] *See* Petition Action, C.A. No. 7570-ML, Ltr. to the Court from Peter Gordon, Esq. dated Oct. 24, 2012 (Dkt. No. 44) (hereinafter, "Gordon Response").
[187] Gordon Response at 3.
[188] *Id.*

At the hearing on the emergency motion, Mr. Gordon also requested to step down as guardian *ad litem* because Mr. Gordon represented Wilmington Trust in another matter pending before the Court and Mr. Gordon recognized the possibility that the minor and unborn beneficiaries might be adverse to Wilmington Trust at some point in the future.[189] I granted that request and a substitute guardian *ad litem* was appointed to represent the minor and unborn beneficiaries.[190]

Before stepping down, Mr. Gordon sent a copy of the Gordon Response to Nancy, who showed the letter to Katie in November 2012. Alarmed by the contents of the letter, Katie demanded a meeting with Jeff.[191] When Katie informed John about the letter, John attempted to reassure Katie that "everything [was] going to be fine" and that John trusted Jeff and Katie should do the same.[192] Katie, however, continued to insist on meeting with Jeff and that meeting ultimately was held in December 2012 at TMF with Jeff, John, Shawn, Katie, Sarah, and Alexandra in attendance.[193] When Katie showed Jeff the Gordon response, he claimed never to have seen the letter and assured Katie that the letter was "fake," the numbers were "incorrect," and Mr. Gordon no longer was involved in the case because of a conflict.[194]

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[189] *See* Petition Action, C.A. No. 7570-ML (Oct. 26, 2012) (TRANSCRIPT) at 6; *see also* JX 2243 (letter from P. Gordon to N. Mennen explaining reasons for withdrawal).
[190] Order dated Nov. 30, 2012 appointing Michael A. Weidinger, Esq. to serve as substitute guardian *ad litem* (Dkt. No. 56).
[191] Tr. at 285-87 (Katie).
[192] *Id.* at 234 (John), 287 (Katie).
[193] *Id.* at 232-33 (John), 288 (Katie).
[194] *Id.* at 234-35 (John), 291-92 (Katie).

Although John felt satisfied with Jeff's answers, Katie was not and she promptly consulted an attorney.[195] Katie and her sisters decided to retain counsel to pursue legal action regarding the Trust. John initially was unwilling to join the lawsuit, but ultimately agreed to become a plaintiff shortly before the complaint was filed.[196]

It was not until this action was filed on March 22, 2013 that the beneficiaries of the Trust appeared in this Court. At that point, the Petition Action was stayed by agreement of the parties and the guardian *ad litem* was dismissed from service because Alexandra's interests were being represented by her mother. The Plaintiffs brought claims for breach of trust against both Wilmington Trust and Jeff, and brought a claim against the trust the Settlor established for Jeff ("Jeff's Trust"), seeking a transfer of assets from Jeff's Trust to John's Trust on equitable grounds.[197] Wilmington Trust also filed a cross-claim against Jeff for indemnification and contribution, after which Jeff filed an identical counterclaim against Wilmington Trust.

At the time the complaint was filed, Wilmington Trust was the corporate trustee of Jeff's Trust and Owen J. Roberts was the individual trustee of Jeff's Trust. Mr. Roberts moved to intervene in this action under Court of Chancery Rule 24. I recommended that the Court grant that motion, concluding that Mr. Roberts was the real party in interest under Rule 17(a).[198]

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[195] *Id.* at 236 (John), 292-93 (Katie).
[196] *Id.* at 237-38, 296 (Katie).
[197] *See* Verified Compl. Count XXVII.
[198] 2013 WL 4083852 (Del. Ch. July 25, 2013).

I granted the Plaintiffs' motion to expedite these proceedings and a four day trial was scheduled to begin on February 11, 2014. During discovery, I issued two final reports addressing discovery disputes between the parties.[199] On January 17, 2014, I issued a draft report recommending that the Court grant Mr. Roberts' motion for summary judgment as to the single claim against Jeff's Trust, reasoning that the spendthrift clause in the agreement governing Jeff's Trust precluded the Plaintiffs from reaching the assets in that trust even if the Plaintiffs prevailed in their claims against Jeff. Because trial was scheduled to begin in less than a month, I stayed the period for taking exceptions until I issued this post-trial draft report. Contemporaneous with this report, I have issued a final summary judgment report regarding the claim against Jeff's Trust.

On the eve of trial, the Plaintiffs and Wilmington Trust settled for an undisclosed sum and the Plaintiffs' claims against Wilmington Trust were dismissed with prejudice. Wilmington Trust and Jeff agreed to sever their claims against one another from the Plaintiffs' claims against Jeff. Trial on the defendants' claims against one another may be resumed after a final decision on the Plaintiffs' claims against Jeff.[200] Trial on the Plaintiffs' claims against Jeff took place over two days in February 2014. Shortly after trial, the Plaintiffs filed a motion to remove Jeff as individual trustee of the Trust. Jeff agreed to resign as trustee. On December 8, 2014, I issued my draft post-trial report on the question of Jeff's liability for the challenged transactions. The parties took exceptions to that draft report. This is my final report on Jeff's liability.

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[199] *Id.*; 2013 WL 5288900 (Del. Ch. Sept. 18, 2013).
[200] *See* Stipulation and Order to Sever Cross-Claims (Dkt. No. 65).

G. The Parties' Experts

The parties relied on opinions issued by several experts to support their theories as to both liability and damages. With the exception of Messrs. Scherf and Smith, I have not relied on the report of any of the experts, either because – in the case of the liability experts – the factual record did not require reliance on expert testimony or – in the case of the damages experts – the parties stipulated to the majority of the facts related to the damages calculation. For the sake of the record, I briefly will summarize each expert's opinion and will describe in more detail the portions of the expert reports I considered in my analysis.

The Beneficiaries relied on three experts: John H. Langbein, Turney P. Berry, and Stephen J. Scherf. Professor John H. Langbein ("Professor Langbein") is the Sterling Professor of Law and Legal History at Yale Law School and has served as a Uniform Law Commissioner since 1984 under gubernatorial appointments from Illinois and Connecticut and on the advisory panels for the Restatement (Third) of Trusts: Prudent Investor Rule (1992) and the Restatement (Third) of Trusts (2003-2012). Professor Langbein offered an opinion regarding "(1) how a prudent professional fiduciary acting as a co-trustee would have understood and administered the co-trusteeship provisions of the John Mennen Trust; (2) the practices that a prudent institutional co-trustee should follow in monitoring and challenging a conflicted co-trustee; and (3) the effect of the language of exculpation contained in the John Mennen Trust [Agreement]."[201] Professor

[201] JX 2411 at 3. All the parties filed various motions in limine to strike the other sides' expert reports as offering impermissible legal opinions. During the pre-trial conference, I

Langbein later issued a rebuttal report responding to the expert reports of Jeff's expert and Wilmington Trust's expert.[202]

The Beneficiaries also introduced the opinion of Turney P. Berry, Esquire ("Mr. Berry"), who is an attorney in private practice in Louisville, Kentucky. In his practice, Mr. Berry drafts trust agreements and advises fiduciaries about the administration of trusts. Mr. Berry is an elected member of the American College of Trusts and Estate Counsel and a Uniform Law Commissioner appointed by the governor of Kentucky.[203] Mr. Berry offered opinions regarding how, under prevailing customs of trust practice, a prudent trustee in the position of the co-trustees would have behaved. Mr. Berry also opined how a prudent trustee would have allocated the Trust's assets between debt and equity. Regarding asset allocation, Mr. Berry opined that a large trust designed to support several generations would have been invested in not less than 70% equities at all times.[204] Mr. Berry supported that opinion by noting that (1) "since the general acceptance of the modern prudent investor rule, the national trend has been for personal trusts to consist of approximately 70% equities," (2) the size of the trust would have provided adequate income to support the beneficiaries even with the allocation of 30% to income-generating securities, (3) the Trust Agreement allowed the trustees to invade the

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recommended that the Court grant in part and deny in part the various motions, reasoning that the experts could not offer testimony regarding whether the trustees complied with their fiduciary duties or the meaning of the Trust Agreement, but could offer testimony regarding how a trustee, granted certain powers and charged with the various duties under the Trust Agreement, would discharge his obligations. Ultimately, because I do not rely on any of the experts' opinions on those topics, that ruling largely is moot.

[202] *See* JX 2424.

[203] JX 2417 at 3.

[204] *Id.* at 16.

principal to support the Beneficiaries, (4) the long-term horizon of the trust would allow the trustees to "ride out fluctuations in the equity markets," and (5) Delaware trusts typically hold more equity than do trusts in other states.[205] Mr. Berry also offered a rebuttal of the expert opinions offered by Jeff and Wilmington Trust.[206]

The Beneficiaries' third expert, Stephen J. Scherf ("Mr. Scherf"), is a certified public accountant, certified fraud examiner, certified forensic accountant, certified insolvency and restructuring advisor, and has a Master of Science with a concentration in Finance.[207] Mr. Scherf served as the Beneficiaries' damages expert, and in that role he offered opinions regarding the value of On-Site and Signal Point and the method for calculating damages assuming the Beneficiaries prevailed in this action. Mr. Scherf's valuation opinions were rendered moot by the parties' post-trial stipulation regarding the value of On-Site and Signal Point. Mr. Scherf also opined regarding the rate of return the Trust would have achieved had the Trustees not engaged in the transactions challenged by the Beneficiaries. In this regard, Mr. Scherf opined that 8.12% was the proper "prudent investor rate" to apply to the principal lost in the challenged transactions.[208] Mr. Scherf selected this rate by considering the Vanguard Balanced Index Fund ("VBINX"), which is a balanced mutual fund established in November 1992, very near in time to the first challenged transaction. The VBINX is comprised of approximately 60% stock and 40% fixed income securities, similar to the allocation Mr. Scherf assumed would be used

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[205] *Id.*
[206] *See* JX 2430.
[207] JX 2418 at 3.
[208] *Id.* at 4-6.

in a traditional, balanced trust portfolio.[209] Since November 1992, the VBINX's average annual rate of return has been 8.12%. To test the reasonableness of this rate, Mr. Scherf compared it to the annual total returns published in the 2012 Ibbotson yearbook. Between 1992 and 2012, the average blended annual return on large cap stocks, small cap stocks, long term corporate bonds, long term government bonds, intermediate government bonds, and U.S. Treasury Bills was 8.41 percent, assuming an equal allocation between stock and fixed income securities. If those investments were allocated 60/40 between stocks and fixed income securities, the average annual rate of return rises to 8.55%, and an allocation of 70/30 yields an average annual return of 10.23 percent.[210] Mr. Scherf therefore concluded that the VBINX fund was a "slightly conservative proxy" for identifying a prudent investor rate of return over the relevant period.

Jeff introduced reports and testimony from two experts: Paul Marcus and Michael J.A. Smith. Paul Marcus ("Mr. Marcus"), a principal with StoneTurn Group, LLP, advises clients in connection with commercial disputes or litigation, corporate finance, mergers and acquisitions, due diligence, strategic planning, financial analysis, and other financial transactions.[211] Mr. Marcus offered expert testimony regarding the value of the Trust's interests in On-Site and Signal Point. In a rebuttal report, Mr. Marcus also criticized Mr. Scherf's calculation of 8.12% as the prudent investor rate of return that should be applied to any damages awarded by the Court.[212] According to Mr. Marcus,

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[209] *Id.* at 5.
[210] *Id.* at 5.
[211] JX 2414.
[212] JX 2427 at 6-7.

Mr. Scherf's calculation is unreliable because it assumes that the Trust would remain allocated at a 60/40 equity to debt ratio over twenty years, without taking into account that the allocation might change over time to account for market shifts.[213] Mr. Marcus also critized Mr. Scherf's opinion because it assumed that the Trust's assets would be invested in the same manner as the VBINX.[214] Mr. Marcus recalculated damages using the legal rate and began the calculation at various times in the history of the Trust.[215] Under the legal rate, beginning the damages calculation with the first challenged investment in 1992, and assuming the Beneficiaries prevailed on all of their claims against Jeff, Mr. Marcus's calculation yields damages of $177,970,113.[216]

Jeff's other expert, Michael J.A. Smith ("Mr. Smith") is a "fiduciary consultant" who worked for 40 years in the field of trust and estate administration.[217] While working for several large trust companies, Mr. Smith advised personnel responsible for the management and administration of estate and trust accounts. Mr. Smith offered an opinion regarding Jeff's duties as trustee under the Trust Agreement and whether those duties rose to the level of bad faith.[218] Mr. Smith also provided a rebuttal report in which he criticized the expert reports of Professor Langbein and Messrs. Berry and Scherf. Regarding Mr. Scherf's selection of 8.12% as the prudent investor rate of return over the relevant time period, Mr. Smith opined that "it is impossible to make the determination

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[213] *Id.* at 6.
[214] *Id.* at 7.
[215] *Id.* at Ex. 2, Ex. 3.
[216] *Id.* at Ex 3, p. 10.
[217] JX 2413 at 1.
[218] *Id.* at 4-9.

that a 60/40 allocation is the static prototype for computing damages."[219] Mr. Smith also criticized the selection of the VBINX as a proxy for determining the prudent investor rate of return because mutual funds tend to have lower operating expenses than the fees charged by trustees and mutual funds tend to have a "robust portfolio turnover rate when compared to the average trust" and therefore are better able to adjust their portfolios than the average trust.[220] Mr. Smith did not offer an alternate figure for the prudent investor rate of return, although he suggests 6% to 7% may be more typical in the trust industry.[221]

ANALYSIS

I. The Trust Agreement alters the default fiduciary duties applicable to Trustees and exculpates liability for certain breaches, but requires the Trustees to act in good faith and prohibits willful misconduct.

The "seminal" rule applied by Delaware courts charged with interpreting a trust agreement is easily stated: "the settlor's intent controls the interpretation of the instrument," and "[s]uch intent must be determined by considering the language of the trust instrument, read as an entirety, in light of the circumstances surrounding its creation."[222] As with any contract, the terms used in the agreement are accorded their "ordinary meaning and the Court will not consider extrinsic evidence to vary or contradict express provisions of a trust instrument that are clear, unambiguous and

[219] JX 2426 at 9 (emphasis in original).
[220] *Id.*
[221] *Id.* at 10.
[222] *In re Peierls Family Inter Vivos Trusts*, 77 A.3d 249, 263 (Del. 2013).

susceptible to only one interpretation."[223] Only if an analysis of the language of the trust agreement reveals ambiguity in its terms will the court resort to rules of construction.[224]

With one possible exception, the parties do not argue that the terms of the Trust Agreement are ambiguous, although they offer different interpretations of the Trust Agreement and conflicting arguments regarding the effect of Delaware law on various provisions in the Agreement. Having reviewed the Trust Agreement, I conclude it is not ambiguous, the Settlor's intent was clear, and the Trust Agreement gives the trustees broad powers, alters several default fiduciary duties, and exculpates the trustees from liability for certain conduct.

That settlors are accorded wide latitude to structure their trusts in a manner that varies from the default statutory scheme or the common law is a hallmark of Delaware's Trust Act, which specifically confirms that

> a) Notwithstanding any other provision of this Code or other law, the terms of a governing instrument may expand, restrict, eliminate, or otherwise vary any laws of general application to fiduciaries, trusts and trust administration, including, but not limited to, any such laws pertaining to:
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> * * *
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> (3) The circumstances, if any, in which the fiduciary must diversify investments; and
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> (4) A fiduciary's powers, duties, standard of care, rights of indemnification and liability to persons whose interests arise from that instrument.
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> * * *

[223] *DiSabatino v. Diferdinando*, 2002 WL 2005743, at *2 (Del. Ch. Aug. 13, 2002) (quoting *Wilmington Trust Co. v. Annan*, 531 A.2d 1209, 1211 (Del. Ch. 1987)).
[224] *In re Peierls Family Inter Vivos Trusts*, 77 A.3d at 263.

> provided, however, that nothing contained in this section shall be construed to permit the exculpation or indemnification of a fiduciary for the fiduciary's own wilful [sic] misconduct or preclude a court of competent jurisdiction from removing a fiduciary on account of the fiduciary's wilful [sic] misconduct. The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this section. It is the policy of this section to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments.[225]

The Trust Agreement at issue here deviates from the common law in several important respects. First, Article Second gives the trustees the power to manage the Trust's investments "without being under any duty to diversify investments" and "regardless of whether the Trustees acting in an individual capacity[] are or may be an officer, director, shareholder, partner or otherwise financially interested" in the business that is the subject of the investment. Second, Articles Sixth and Seventh exculpate the Trustees for losses to the Trust estate associated with the exercise of powers, or the purchase or retention of any investment, even if the trustee has an individual interest in the subject of the investment, so long as the Trustees act in good faith.[226] In other words, the trustees are accorded broad discretion in selecting investments for the Trust, including investments (1) that result in a lack of diversification of assets, (2) in companies in which the trustees have a personal interest, or (3) that might not otherwise fit the common law definition of a "prudent" investment. To the extent the trustees' decisions to make or retain an investment result in a loss to the Trust, the trustees are insulated from liability provided they acted in good faith and did not engage in willful misconduct.

[225] 12 *Del. C.* § 3303(a).
[226] JX 1489, Articles SIXTH and SEVENTH.

This combination of expanded "powers," altered duties, and exculpation for certain losses is important. Both parties recognize that a trustee's actions are "twice-tested" under Delaware law.[227] First, a court will consider whether the trustee was empowered – under the law or the governing instrument – to act in a certain manner. Second, a court will consider whether those actions – even if permitted by law – were a breach of the trustee's fiduciary obligations.[228] Under this twice-tested rule, the mere fact that a trustee has the power under the trust agreement to engage in the challenged conduct does not preclude a reviewing court from holding the trustee liable if he acted in breach of his duties. When, however, a grant of powers is combined with an exculpatory provision, a trustee is effectively insulated from liability, even under the "twice tested" analysis, provided the exculpatory provision in question is enforceable and the trustee's conduct fell within it.[229]

This Court must abide by a settlor's decision to insulate a trustee from judicial oversight, regardless of the Court's view regarding the wisdom of that decision, but even the broadest grants of authority do not confer unfettered discretion on a trustee.[230] Under

[227] *Paradee v. Paradee*, 2010 WL 3959604, at *11 (Del. Ch. Oct. 5, 2010) (quoting *Sample v. Morgan*, 914 A.2d 647, 672 (Del. Ch. 2007)).
[228] *Paradee*, 2010 WL 395604, at *11 (Trustee's power to make a loan to the beneficiaries using trust assets as collateral "does not answer the separate question of whether he breached his fiduciary duties by doing so.").
[229] *See* George Gleason Bogert, *The Law of Trusts and Trustees* § 542, p. 216 (1993) ("The grant of absolute or uncontrolled discretion to the trustee in the administration of the trust, without an exculpatory clause, may not relieve the trustee of liability for imprudent exercises of his powers."); *McNeil v. McNeil*, 798 A.2d 503, 509 (Del. 2002).
[230] *McNeil*, 798 A.2d at 211; Restatement (Third) of Trusts § 91, cmt. g(1) ("Trust investment provisions sometimes purport to grant the trustee "absolute" or "sole and uncontrolled" discretion. Such language broadens the trustee's latitude in investment matters but is not unlimited, and the trustee is subject to liability for abusing it.").

Delaware law and the terms of the Trust Agreement, the Trustees' discretion was constrained in two important respects. First, the Trust Act precludes a settlor from exculpating a trustee for willful misconduct.[231] Second, the Trust Agreement required the Trustees to exercise their authority in good faith.

The parties largely agree with this interpretation of the Trust Agreement, subject to a few peripheral disputes. Although those disputes primarily are academic, because I conclude that Jeff acted in bad faith with respect to most of the challenged transactions, I address the disputes briefly for the sake of completeness. First, the Beneficiaries take the position that the Trust Agreement does not exculpate the Trustees for decisions that were grossly negligent. In making this argument, the Beneficiaries rely on decisions of this Court and the Delaware Supreme Court that were decided before 2003. It appears, based on my review of that precedent, that before 2003 settlors were precluded from exculpating a trustee from grossly negligent conduct. For example, in *Riggs National Bank v. Zimmer*, this Court explained that an exculpatory clause was not against public policy if it relieved a trustee from liability for ordinary negligence, but concluded that an exculpatory clause could not be read as excusing liability for gross negligence.[232] The Supreme Court's decision in *McNeil v. McNeil* similarly suggests that Delaware courts would not enforce an exculpatory clause that excused gross negligence by a trustee.[233] Both cases, however, were decided before the General Assembly revised 12 *Del. C.* §

[231] 12 *Del. C.* § 3303(a).
[232] 1977 WL 5316 at *12-13 (Del. Ch. Nov. 30, 1977).
[233] 798 A.2d 503, 509 (Del. 2002) ("[c]ourts often permit the settlor of a trust to exculpate a trustee for failure to exercise due care, however, so long as such conduct does not rise to the level of gross negligence.").

3303. Those revisions, adopted in 2003, permit a settlor to exculpate a trustee from liability for anything except willful misconduct, and expressly apply to "wills and trusts whenever created."[234] Although the Beneficiaries acknowledge this shift in the law, they argue that the Court should apply the law existing at the time the Trust Agreement was drafted, without squarely addressing the General Assembly's instruction that the statutory revision be applied retroactively. This Court is bound by the General Assembly's instructions and the Trust Agreement's exculpatory clauses therefore must be read as excusing grossly negligent conduct.

Second, the Beneficiaries appear to argue that there is ambiguity in Article Second of the Trust empowering the Trustees to invest without regard to any duty to diversify and in businesses in which a trustee has a personal interest. The Beneficiaries argue that the language should be read narrowly because "the Settlor provided the authorizations not to diversify the Trust and to engage in conflicted transactions to enable the Trust to retain its original assets – Mennen Company stock."[235] The Beneficiaries did not specifically argue, however, that the Trust Agreement was ambiguous, nor does my own reading of the agreement reveal ambiguity in the relevant language. The Court therefore cannot consider extrinsic evidence to alter or narrow the terms of the Trust. Even if extrinsic evidence could be considered, there is no such evidence in the record other than the Beneficiaries' musings. Although it is not unreasonable to assume that the language in question was included in the Trust Agreement because of the Trust's initial concentration

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[234] 74 Del. Laws c. 82, §§ 1, 8 (approved June 30, 2003).
[235] Pls.' Post-Tr. Answering Br. at 16.

in The Mennen Company stock, there is nothing in the record from which the Court can conclude that the Settlor intended a different standard to apply to other Trust assets later acquired. Therefore, to prevail in this case, the Beneficiaries must prove that Jeff's decision to cause the Trust to make the challenged transactions was the result of willful misconduct or bad faith. Whether Jeff's conduct reached that level must be determined based on the circumstances existing at the time the investments were made, without regard to "hindsight bias" based on facts or circumstances that developed later.[236]

Third, the parties differ in their understanding of how bad faith is measured. Willful misconduct and bad faith are distinct concepts. Jeff's post-trial briefs at times appear to conflate the two,[237] but both the Trust Act and Delaware precedent are clear that the terms mean different things.[238] Having said that, however, it is not easy to delineate a precise distinction between the two, and one might credibly argue that willful misconduct is one subset of bad faith conduct; it is arguable that all willful misconduct is bad faith conduct, but not all bad faith conduct may be characterized as willful misconduct. Willful misconduct is defined in the Trust Act as "intentional wrongdoing, not mere negligence, gross negligence or recklessness and 'wrongdoing' means malicious conduct or conduct designed to defraud or seek an unconscionable advantage."[239] Willful misconduct appears to be a subjective standard that depends on the alleged wrongdoer's

[236] *Law v. Law*, 753 A.2d 443, 448 (Del. 2000).
[237] *See* Jeff Post-Tr. Opening at 24-27.
[238] *Compare* 12 *Del. C.* § 3301(g) *with* 12 *Del. C.* § 101(2); *Policemen's Annuity and Benefit Fund of Chicago v. DV Realty Advisors LLC*, 2012 WL 3548206, at *13 (Aug. 16, 2012) ("good faith can sometimes include objective, as well as subjective, elements.").
[239] 12 *Del. C.* § 3301(g).

state of mind.[240] In contrast, "good faith" is defined as "honesty in fact and the observance of reasonable standards of fair dealing."[241] As the Delaware Supreme Court has explained, "[g]ood faith and bad faith are illustrative examples of opposite characteristics – as described by Aristotle – in that each is used in more than one sense and thereby informs our understanding of each other."[242] Throughout this report, I use bad faith as synonymous with the absence of good faith.

Jeff argues, without reliable precedent, that "good faith" as it is used in the Trust Agreement is a purely subjective standard, and that this Court should conclude that Jeff acted in good faith because he never intended for the Trust to lose money in any of the challenged transactions, always wanted the Trust to make money, and never subjectively intended to harm the Trust.[243] The argument that good faith is a purely subjective standard, defined entirely by a fiduciary's intent to cause harm, cannot withstand scrutiny. Recent decisions of this Court have clarified that good faith in the context of a fiduciary's conduct contains both subjective and objective elements. The "honesty in fact" portion of the definition refers to whether a fiduciary subjectively believed that his actions were appropriate.[244] In contrast, the "observance of reasonable standards of fair dealing" portion of the definition is objective and requires the Court to consider whether

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[240] *See e.g., Venhill Ltd. P'ship v. Hillman*, 2008 WL 2270488, at *30 (Del. Ch. Jun. 3, 2008).
[241] 12 *Del. C.* § 101(2).
[242] *DV Realty Advisors LLC v. Policemen's Annuity and Benefit Fund of Chicago*, 75 A.3d 101, 110 (Del. 2013).
[243] *See e.g.,* Jeff Post-Tr. Opening at 33; Post-Tr. Reply Br. of George Jeff Mennen (hereinafter "Jeff Post-Tr. Reply") at 8.
[244] *Paradee v. Paradee*, 2010 WL 3959604, at *11 (Del. Ch. Oct 5, 2010).

the trustee acted beyond the bounds of a reasonable judgment.[245] There is some conduct that is "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[246]

In support of his argument that "good faith" must be an entirely subjective standard, Jeff cites this Court's decision in *DV Realty Advisors LLC v. Policemen's Annuity and Benefit Fund of Chicago*, in which the Court explained that "[t]he common law definition of good faith, at least in the fiduciary context, was *historically* subjective."[247] That selective quotation ignores several important aspects of that case. First, the Court in *DV Realty* went on to explain that "there has been some suggestion that [the characterization of good faith as a solely subjective standard] may no longer be the case," and "good faith can sometimes include objective, as well as subjective, elements."[248] In fact, the *DV Realty* court itself stated that "it may be that, regardless of the evidence presented as to subjective intent, the Court will necessarily (almost always) find that certain conduct could not possibly have been undertaken in good faith."[249] Third, the Court in *DV Realty* was not confronted with the question of whether a fiduciary acted in good faith, and therefore was "not opining on what is required of fiduciaries."[250] Finally, and most importantly, whatever the common law definition of good faith, the General Assembly adopted a statutory definition of good faith that

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[245] Restatement (Second) of Trusts § 187, cmt. (e), cmt. (i).
[246] *In re Novell, Inc. S'holder Litig.*, 2013 WL 322560 at *10 (Del. Ch. Jan. 3, 2013) (quoting *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *12 (Del. Ch. Oct. 13, 2011)).
[247] 2012 WL 3548206, at *13 (Del. Ch. Aug. 15, 2012) (emphasis added).
[248] *Id.*
[249] *Id.*
[250] *Id.*

contains both objective and subjective elements and expressly applies to trusts "whenever created."[251]

Jeff, however, strangely contends that the statutory definition of good faith does not apply to trust agreements, and only applies to the use of that term in the Trust Code. That argument is illogical and inconsistent with both the Trust Code and this Court's precedent.[252] Jeff's position, if accepted, would create an odd construct where the Court potentially could be required to apply two different standards of good faith to a trustee's actions.[253] Jeff does not bother to explain how this inconsistency might be resolved.

Jeff also argues that defining good faith by objective standards would eviscerate the Trust Agreement's provisions that permit the Trustees to invest the Trust in matters in which the Trustees had a personal interest and exculpate the Trustees for liability associated with those investments. In this regard, Jeff over-reaches in his understanding

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[251] 12 *Del. C.* § 101(2); 79 Del. Laws c. 352 §§ 1, 6 (approved July 22, 2014). Jeff's argument that the Court should apply the definition of good faith that was accepted at the time the Trust was created, without regard to the General Assembly's instruction that the statutory definition apply retroactively, is directly at odds with Jeff's argument regarding the retroactive effect of the 2003 amendments to Section 3303. Jeff cannot have it both ways.

[252] *See* 79 Del. Laws ch. 352 § 6 (amending Section 101 and stating the act applies to "trusts … whenever created); *Vincent v. Baize*, 2011 WL 4695622, at *1, n.4 (Del. Ch. Sept. 30, 2011) (applying statutory definition of good faith to interpret trust agreement and determine trustee's liability).

[253] An example serves to illustrate the point. Assume that a trust agreement, much like the one here, exculpated a trustee for liability for actions taken in good faith. A trustee causes the trust to engage in a transaction the trustee believes is authorized by the terms of the trust agreement. Under Jeff's interpretation of that term, the Court would apply an entirely subjective standard to determine if the trustee acted in good faith. Under Section 3586, however, the trustee is exculpated for good faith reliance on the trust agreement, but the statutory standard of good faith has both objective and subjective elements. Confronted with this scenario, which definition of good faith governs the Court's analysis and determines the trustee's liability? In other words, Jeff's self-serving interpretation of the Trust Code results in an absurd reading and I therefore cannot adopt it.

of the Trust's exculpatory clauses. Although the Trust Agreement permits such "conflicted" transactions, altering the "no further inquiry" rule that typically inheres to conflicted transactions in the trust context,[254] nothing in the language of the Trust Agreement allows the Trustees to engage in conflicted transactions that prefer *their own interest* over the interests of the Trust Beneficiaries. As the Restatement succinctly explains:

> A trustee may be authorized by the terms of the trust, expressly or by implication, to engage in transactions that would otherwise be prohibited by the rules of undivided loyalty … . For example, the terms of a trust may permit the trustee personally to purchase trust property or borrow trust funds, or to sell or lend the trustee's own property or funds to the trust.
>
> Even an express authorization of this type, however, would not completely dispense with the trustee's underlying fiduciary obligations to act in the interest of the beneficiaries and to exercise prudence in administering the trust. Accordingly, no matter how broad the provisions of a trust may be in conferring power to engage in self-dealing or other transactions involving a conflict of fiduciary and personal interests, a trustee violates the duty of loyalty to the beneficiaries by acting in bad faith or unfairly.[255]

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[254] Restatement (Third) of Trusts § 78, cmt. b (2007) ("In transactions that violate the trustee's duty of undivided loyalty, under the so-called 'no further inquiry' principle it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee. A trustee, therefore, commits a breach of trust by purchasing trust property, even as the highest bidder at a public auction; otherwise the possibility of purchase by the trustee would create a temptation for the exercise of less than the trustee's best efforts and business judgment on behalf of the trust to determine whether sale is appropriate and to obtain the most favorable price and terms from others for the trust property. … The principle applies as well to conflict-of-interest situations that do not involve self-dealing. … For example, normal assurances concerning proper fiduciary behavior would be undermined (especially regarding the trustee's future conduct) if a bank were allowed to purchase its own shares for a trust it is administering, even though the shares were purchased from third persons at a market price and would be a prudent investment for the trust.").

[255] *Id.*

To the extent the record shows – as it does – that some of Jeff's investment decisions were motivated by Jeff's preference for his personal interests, those decisions are, by definition, bad faith, if not willful misconduct, and are not exculpated by the Trust Agreement.

Finally, much of Jeff's argument that he acted in good faith rests on his repeated insistence that he conducted extensive and continuous due diligence before committing the Trust to these investments. Jeff, however, maintained no records of this diligence. A trustee has an independent duty to maintain records for the trust.[256] "As fiduciaries, trustees have a duty to account to beneficiaries for their disposition of trust assets and bear the burden of proving that a disposition was proper. 'Included within the duty to account is a duty to maintain records that will discharge the fiduciaries' burden, and that if that duty is not observed, every presumption will be made against the fiduciaries.'"[257] Where Jeff has failed to offer any records of his due diligence, it is fair to presume that the records do not exist because the due diligence never occurred. That conclusion also is warranted by Jeff's unreliable testimony and by his inability to provide Wilmington Trust with accurate values for these investments. In other words, there is no evidence to support Jeff's argument that he subjectively believed, based on extensive due diligence, that the investments would be profitable to the Trust.

[256] *Hardy v. Hardy*, 2014 WL 3736331, at *12 (Del. Ch. July 29, 2014).
[257] *Id*. (quoting *Technicorp Int'l II, Inc. v. Johnston*, 2000 WL 713750, at *3 (Del. Ch. May 31, 2000)).

II. Jeff breached his fiduciary duties to the Beneficiaries by failing to act in good faith and by engaging in willful misconduct with respect to the Trust's investments in LOCATE, Top Source, and Wave2Wave.

The Trust's initial investments in LOCATE, Top Source, and Wave2Wave were made at a time when Jeff had a personal financial interest in the companies. Under the Trust Agreement, those conflicted transactions were not *per se* violations of Jeff's duties, but if Jeff made the investments in order to advance his own interests, at the expense of the Beneficiaries' interests, Jeff would be liable for breach of trust. Apart from those plainly conflicted transactions, however, Jeff caused the Trust to make many more investments that did not meet the classic definition of "self-dealing," in the sense that Jeff received no immediate personal financial benefit from the transactions. As this Court has recognized, however, "it is not only greed that can inspire disloyal behavior by a business fiduciary."[258] As explained in more detail below, it is impossible to conclude that Jeff directed these transactions to further the interests of the Beneficiaries of the Trust. To the contrary, the at-times incomprehensible and haphazard nature of the investments, the outsized risk associated with those investments, and the repeated instances of increasing the Trust's exposure to unproven, closely held, and insolvent companies, considered against the needs of the Beneficiaries and the Settlor's objective of providing for at least three generations through the Trust, cannot be explained by any other logic.

This is not merely an instance of a trustee making investments for a trust that appear, in hindsight, unconsidered, imprudent, or financially unsound. Having reviewed the record evidence, as well as the testimony of the witnesses, the Plaintiffs established

[258] *Venhill Ltd. P'ship v. Hillman*, 2008 WL 2270488, at *1 (Del. Ch. Jun. 3, 2008).

that Jeff's investment strategy was driven not by the interests of the Beneficiaries, but by his interests in protecting his own personal imprudent investments and in advancing the interests of companies to which Jeff had devoted his time. Perhaps most importantly, Jeff pursued the transactions with Trust assets to prove to his family and associates that he actually possessed some specialized knowledge and ability to identify and advise privately held companies, allowing them to achieve their "promise" by relying on his "unique capabilities." In other words, because the bulk of Jeff's personal wealth was tied up in his own trust, which was administered by an independent trustee, Jeff used the Trust to fund his effort to live up to the family name. In that way, Jeff acted in bad faith by ignoring the interests of the Beneficiaries and pursued a pattern of investing that was patently unreasonable, bore no relation to the long-term security of the Trust, and is inexplicable apart from Jeff's need to prove himself. Ultimately, Jeff showed he is capable of little except pouring good money after bad in a stubborn effort to right sinking ships. This pattern appears in the Trust's investments in LOCATE, Top Source, and Wave2Wave.

1. LOCATE

The Trust's investment in LOCATE, although small in comparison to the transactions involving Top Source and Wave2Wave, is the earliest example of Jeff's use of the Trust's assets to prop up failing companies in which Jeff had taken a particular interest. The record reflects that Jeff personally had invested in LOCATE through 096 Associates, that several other members of the family also had invested in the company, and that Jeff served on LOCATE's board, at least in part, to "represent" the Mennen

family's interests in LOCATE. These investments were made at the same time that Jeff was marketing his services as a consultant to private companies, apparently believing that his position as an executive of The Mennen Company and a member of the Mennen family gave him particular skills to assist other private companies.[259] When LOCATE began to fail, however, despite Jeff's service and notwithstanding his belief in the company's potential, Jeff began to behave irrationally, first by leveraging his own finances to loan money to the company, and then by causing the Trust to loan money to LOCATE to replace Jeff's personal loan.

Jeff caused the Trust to make this "investment" at a time when LOCATE's financial condition was precarious. If, as he contends, Jeff was conducting "extensive" due diligence before making investments on behalf of the Trust, he surely knew that LOCATE was almost entirely dependent on one client and faced significant barriers to profitability. Even Wilmington Trust recognized that LOCATE's financial condition was "hopeless." The more logical conclusion, however, and the one supported by the complete lack of any credible evidence of Jeff's due diligence, is that Jeff caused the Trust to make this loan to LOCATE without investigating its soundness as an investment and not to advance the interests of the Trust but to advance his own need and desire to see LOCATE become the profitable venture he believed it could be.

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[259] Tr. at 123-24 (Jeff).

This decision amounted to bad faith, if not willful misconduct.[260] Even if, as Jeff contends, the Beneficiaries had not offered sufficient evidence that Jeff caused the Trust to loan money to LOCATE so the company could repay Jeff's loan, the Beneficiaries have succeeded in showing that Jeff caused the Trust to loan money to LOCATE to further Jeff's agenda, rather than the interests of the Beneficiaries. Although, unlike the Trust's involvement with Top Source and Wave2Wave, Jeff did not cause the Trust to make repeated and increasing loans to LOCATE, the Beneficiaries have shown by a preponderance of the evidence that Jeff caused the Trust to make the loan in a bid to bail out a failing company in which several family members had invested, on whose board Jeff served to protect those family investments, and on which he had staked his ability to identify profitable companies and deliver out-sized returns. Jeff is liable to the Trust for his bad faith conduct. This breach of Jeff's obligations cost the Beneficiaries $2,514,969.92, plus interest.

2. Top Source/GTI/On-Site

The Trust's involvement with Top Source brings this pattern into sharper focus. Jeff's conduct at the initial stages of the Trust's involvement with Top Source, as well his investment directions after GTI's bankruptcy, rose to the level of willful misconduct, while his decisions with respect to the remaining investments amounted to bad faith, if nothing else.

[260] *See Venhill Ltd. P'ship*, 2008 WL 2270488, at *30 (fiduciary acted in bad faith and engaged in willful misconduct by "impoverishing [the trust] in order to keep [a private company] afloat for personal reasons unrelated to [the trust's] own best interests" and by investing the trust's funds "in an imprudent and irrational manner.").

The Beneficiaries demonstrated at trial that Jeff caused the Trust to make its initial investment in Top Source after he personally guaranteed the company's ability to maintain the Mellon ratio and the company later exceeded that ratio. The Trust's purchase of Top Source's preferred stock relieved Jeff of this guarantee. At the time of the investment, Top Source was struggling financially and was dependent on one customer for 97% of its business, and Jeff had spent more than a year trying to assist the company in capitalizing on its vision and "potential." Although he appeared to have great faith in the company, when his personal finances were exposed Jeff turned to the Trust to bail out himself and Top Source. The decision, which favored Jeff's interests over those of the Beneficiaries, amounted to bad faith and willful misconduct.

Jeff, unfortunately, did not stop there. Rather than cutting the Trust's losses when Top Source continued to struggle, Jeff further entrenched the Trust by causing it to loan increasing amounts to the company until, by 2001, Top Source represented 38% of the Trust's total value. The unconsidered and self-interested decision to expose such a substantial portion of the Trust to a financially strapped company is so far beyond the bounds of reason that it cannot be explained by anything short of bad faith. There are a number of factors that drive this conclusion. First, although Jeff testified that Top Source had "strong prospects," the vast majority of the Trust's interest in Top Source took the form of loans to an insolvent company, which carried substantial risk and minimal upside. Jeff produced no evidence of these "strong prospects" and created no record – other than his self-interested testimony – regarding the investigation he purportedly undertook to reach a conclusion that the interests of the Beneficiaries were best served by

investing nearly 40% of the Trust in one insolvent company. Jeff also made no record of any comparison he undertook to study the potential returns the Trust would receive from investing in Top Source or GTI in comparison to other, more typical investments. As previously noted, given a trustee's independent duty to maintain records of trust activity, it is fair to presume that records of Jeff's due diligence do not exist because he never conducted any investigation before committing the Trust to these transactions.[261]

Second, the decision to repeatedly and increasingly expose the Trust to the very real possibility that GTI would default was driven not by mere carelessness or amateurish strategy, but by Jeff's stubborn hubris regarding his own ability to identify the potential of particular private companies, and his determination to prove that ability to himself and the world. Any doubt about Jeff's motivation to prove himself and – relatedly – to hide the evidence of his poor decisions, is erased by Jeff's decision to cause the Trust to obtain additional loans, and in turn loan those funds to an insolvent On-Site, so that On-Site could service its existing debts to the Trust.

Jeff weakly argues that he permitted these loans because he concluded outside factors, rather than organic weakness, were driving On-Site's problems, and he needed to protect the Trust's existing investment until those outside pressures eased. That

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[261] *Hardy v. Hardy*, 2014 WL 3736331, at *12. In his exceptions brief, Jeff provided a two-page string cite to communications he had with Mr. Willis, On-Site's CEO. From that, Jeff argues my conclusion that he did not engage in any due diligence is against the weight of the evidence. These records indicate Jeff received updates in his capacity as On-Site's Chairman. The exhibits do not indicate Jeff ever investigated (or considered) whether the investments would be in the Beneficiaries' interests, or considered the associated risk and potential return in comparison to other investment opportunities. All these records show is that Jeff was well aware of On-Site's precarious financial position and its continuing inability to capitalize on its potential, but nevertheless chose to further expose the Trust to those risks. It is unclear to me how Jeff believes this helps his contention that he acted in the best interests of the Beneficiaries.

argument, which is unsupported by any record evidence or by any testimony other than Jeff's self-interested recollections, is both unreliable and unpersuasive. Having maintained no records, Jeff cannot be credited with investigating the factors driving On-Site's struggles or the likelihood things would turn around to the point the Trust could recoup its investment. In addition, Jeff cannot justify later investments based on preserving earlier investments he authorized in bad faith. More than anything, this argument confirms Jeff's obstinate refusal to believe that he did not possess the unique capabilities on which he premised his career after leaving The Mennen Company.

Finally, Jeff's decision to allow On-Site to maintain the balance of the judgment from the OAI litigation, despite the undisputed evidence that those funds are owed to the Trust, only confirms his pattern of elevating his own interests, and those of On-Site, above the interests of the Beneficiaries. Again, although Jeff argues that he made this decision to further the Trust's interest in seeing On-Site be acquired, so that the Trust might receive some return on its substantial investment, Jeff cannot rationalize this decision by reference to earlier, bad faith decisions to cause the Trust to become so heavily tied to On-Site's fortune. This decision, and Jeff's illogical explanation of it, is indicative of Jeff's odd and at-times slippery efforts to salvage ill-conceived investments. Jeff's conduct damaged the Trust in the amount of $55,004,554.15, plus interest, less the stipulated value of On-Site.

3. Wave2Wave/Signal Point

Jeff's decision to tie the Trust's fortunes to Wave2Wave followed a similar course. Jeff used the Trust's initial investments in Wave2Wave as leverage to ensure

Ashman would continue to pay the consulting fees owed to Jeff for his work for Innovention. Jeff extended the personal benefit he received from the Trust's initial investment by receiving shares in his own name as compensation for the Trust's guarantees of Wave2Wave's loans. I am skeptical of Jeff's explanation that these shares were put in his name by mistake, but, in any event, Jeff offered no credible evidence that he took steps to correct the mistake once he learned of it. These actions, which baldly favored Jeff's interests over those of the Beneficiaries, amounted to willful misconduct.

The bulk of the Trust's investments in Wave2Wave, however, were driven not by Jeff's personal financial interests, but by – as previously described – his interest in establishing or maintaining his self-created persona as a skilled financier. In the name of that effort, Jeff caused the Trust to guarantee or co-borrow on increasingly large loans to a struggling company. As Jeff himself recognized, such guarantees had little to no upside, [262] even considering the Trust's comparatively small equity position in Wave2Wave. In other words, it defies reason that the Trust would commit itself to loan tens of millions of dollars to protect an equity investment of no more than one or two million dollars. The irrationality of exposing the Trust in this manner, as with the Top Source transactions, cannot be explained by anything other than bad faith. Similarly, Jeff's decision to subordinate the Trust's position in favor of other creditors, rather than simply cutting the Trust's losses and maintaining its position as senior creditor in bankruptcy, is inexplicable except by reference to Jeff's fervent desire to prove his

[262] *See* Jeff's Post-Tr. Opening at 30 n.10 (arguing that Jeff's personal guarantees on these loans represented "pure downside" for Jeff).

"unique capabilities" and his personal interest in preventing the Mennen family from realizing the extent of Jeff's failures.

Jeff also argues that the downturn in the stock market in 2008, rather than any misconduct on his part, is what caused the Trust to become so heavily invested in Wave2Wave and On-Site, because the Trust had pledged its public securities as collateral for (i) the money the Trust borrowed from Bank of America to loan to GTI and (ii) the Greystone loan to Wave2Wave. According to Jeff, the 2008 market crash, and the associated decline in the value of the Trust's public portfolio, is what caused the Trust to liquidate its public holdings and become so heavily invested in these two unprofitable companies.

Jeff may be correct that the 2008 crash was the tipping point that forced the Trust to liquidate its public holdings and assume its ultimate position as creditor to two insolvent companies, but Jeff cannot, with that sleight of hand, shift the blame for causing the Trust to pledge its public securities to support two failing companies, or excuse his failure to recognize that – in the event of a market downturn – the Trust might lose its collateral. Jeff's argument crudely glosses over his role in causing the Trust to guarantee substantial loans for two unprofitable companies. It was Jeff's decisions, which were contrary to the Beneficiaries' interests and made solely for his own personal interests, that harmed the Trust. Jeff cannot so easily lay his sins upon the head of a goat.[263] Just as the Court cannot allow the benefit of 20/20 hindsight to judge Jeff's

[263] Leviticus 16 (King James).

liability for his decisions as trustee, Jeff cannot shift to later-occurring events the blame for investment decisions that were made in bad faith.

Accordingly, Jeff should be ordered to pay damages to the Trust in the amount of $38,922,775.86, plus interest, less the stipulated value of the Trust's Signal Point holdings.

III. Jeff breached the Trust Agreement and acted in bad faith by extracting fees from the Trust in the form of unsupported and inflated expenses.

Jeff also breached the Trust Agreement by extracting fees from the Trust under the guise of expense reimbursement. The Trust Agreement prohibited family member trustees from receiving compensation for their services, but permitted the reimbursement of expenses. Rather than provide a fair and accurate estimate of expenses, however, Jeff grossly overcharged the Trust by (1) using TMF's total office expenses as a measure for the expenses incurred by Jeff as trustee, even though Jeff conceded TMF's expenses bore no relation to his expenses as trustee, (2) charging the Trust for an entire day of expenses when only a small portion of the day could be attributed to Trust-related work, and (3) double-charging John's Trust and Christina's Trust for the same expenses for several years. This practice was unreasonable and bore the hallmark of a trustee obtaining unauthorized compensation.

Jeff does not directly defend his method of calculating "expenses," and does not in any satisfying manner address the "double-charging" that occurred for several years, but instead simply relies on the advice of Ms. Nickel and Article Tenth of the Trust Agreement, which exculpates a trustee for good faith conduct undertaken in accordance

with the advice of counsel. Even a generous reading of Ms. Nickel's advice, however, cannot justify Jeff's conduct. In particular, Ms. Nickel carefully opined that Jeff should "develop a consistently applied system to make a fair allocation among the various uses of the space or the employees," whether by timesheets, accountings, or another method that "*reasonably identifies* the percentage of office or secretarial time devoted to each person or entity sharing its costs." Jeff's practice, however, was to submit a semi-annual letter to Wilmington Trust stating the number of days in which he performed work relating to the Trust, without any documentation, accounting, timesheet, or similar method to achieve the allocation suggested by Ms. Nickel. In fact, Jeff candidly admitted to Wilmington Trust that such record keeping would be "unnecessarily cumbersome." Because Jeff did not act in accordance with counsel's advice, Article Tenth does not apply. Jeff's practice of enriching himself in the name of expense reimbursement and to the detriment of the Beneficiaries violated the terms of the Trust Agreement and constituted a breach of trust. Jeff therefore should reimburse the Trust the entire $536,000 he received as expenses, plus interest.

IV. The Beneficiaries have not established that Jeff acted in bad faith as to the remaining challenged transactions.

In contrast to Jeff's investments in LOCATE, Top Source, and Wave2Wave, the remaining investments challenged by the Beneficiaries, although likely imprudent, do not exhibit the same pattern of increasing the Trust's exposure in an unproven company that consistently was unable to turn a profit, and do not appear to be driven by Jeff's determination in establishing – at the expense of the Beneficiaries' interests – his abilities

as a financier. These challenged transactions do not follow Jeff's modus operandi of (i) markedly increasing the Trust's exposure at the same time the subject company's insolvency deepened, (ii) using the Trust's money to rescue himself from personal guarantees, (iii) risking substantial portions of the Trust's diversified portfolio to bail out a small number of companies unable to turn a profit or repay debts in the ordinary course, and (iv) allowing the companies to use new infusions of capital from the Trust to service the Trust's existing debt. If Jeff could be held liable for ordinary or gross negligence, the Beneficiaries might well succeed in these claims, but the Trust Agreement exculpates Jeff from liability for such imprudent decisions, and therefore the Beneficiaries' claims regarding Innovention, Pet-Products, Premium Brands, Inntraport, and World Broadcasting Group should be dismissed.

Similarly, the Beneficiaries have not established that Jeff should be liable for the Wilmington Trust fees that the Beneficiaries contend were "overcharged." As an initial matter, the Beneficiaries did not establish that Wilmington Trust charged excessive fees when it failed to adjust the value of the Trust for the loan from Bank of America. Wilmington Trust explained to Jeff that the adjustment was not made because of the time required to execute and maintain the loan. Whether Wilmington Trust's method was reasonable was not the subject of testimony at trial, and I cannot conclude on the current record that the decision was improper. In addition, the Beneficiaries have not established that Jeff's failure to require Wilmington Trust to adjust its fees to account for the loan – assuming those fees were excessive – was anything more than negligence on Jeff's part. That is, the Beneficiaries have not established that Jeff's failure in this regard was the

result of bad faith or willful misconduct. One might speculate that Jeff may not have pressed the issue in view of his own questionable "expense reimbursement" practice, but it is impossible to so conclude on the record presented at trial.

V. Jeff's equitable defenses are unavailing.

Jeff also argues that, even if the Beneficiaries' claims have merit, they are barred in whole or in part by laches and acquiescence. Both defenses depend on what John knew or should have known regarding the challenged transactions and whether any delay or acquiescence by John may be imputed to his children under principles of virtual representation.

A. Even if John was on inquiry notice of the Beneficiaries' claims, his material conflict with his children bars him from virtually representing the minor beneficiaries.

Jeff first argues that the Beneficiaries' claims are barred by the doctrine of laches, which bars a claim if a plaintiff unreasonably delayed in pursuing it after he knew or should have known about the facts giving rise to the claim, and if such delay materially prejudiced the defendant.[264] This Court frequently uses the analogous statute of limitations as a presumptive limitations period for purposes of laches.[265] When a complaint is filed after the presumptive limitations period, the Court need not engage in a traditional laches analysis, and instead may bar the claim except in "rare" and "unusual" circumstances.[266]

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[264] *U.S. Cellular Inv. Co. of Allentown v. Bell Atlantic Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996).
[265] *Id.*
[266] *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at *12 (Del. Ch. Jun. 29, 2005); *In re Sirius XM S'holder Litig.*, 2013 WL 5411268, at *4 (Del. Ch. Sept. 27, 2013).

The Beneficiaries filed this action on March 22, 2013. Jeff argues that under 12 *Del. C.* § 3585, the Beneficiaries' claims were barred upon the first to occur of (1) two years after the date John received a report that "adequately disclosed the facts constituting the claim," or (2) the date the claims otherwise were precluded by limitation, which Jeff argues was three years after the date of the challenged transaction.[267] With respect to the two year limitations period, Jeff argues that John received monthly or quarterly statements as early as 1980,[268] and that those statements disclosed by March 22, 2011, all but one of the transactions challenged by the Beneficiaries.[269] Even if the Court concludes that those statements did not provide "sufficient information" such that John reasonably should have inquired into the existence of the claims,[270] Jeff argues that all but one challenged transaction occurred before March 22, 2010, and therefore the claims are barred by the three year statute of limitations applicable to claims for breach of fiduciary duty.

The Beneficiaries concede that virtually all of the challenged transactions occurred more than three years before they filed this action. The Beneficiaries argue, however, that the claims are not barred by laches because the limitations period was tolled by Jeff's fraudulent concealment of the problems with the Trust. To establish fraudulent concealment, "a plaintiff must allege an affirmative act of 'actual artifice' by the

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[267] *See* 12 *Del. C.* § 3585(a); 10 *Del. C.* § 8106 (establishing three year limitations period for a claim for breach of fiduciary duty).
[268] Pre-Trial Order ¶ 43.
[269] The only transaction not disclosed in the statements by March 22, 2011 was a $2,337 payment for legal fees. Pre-Trial Order, Ex. 1, Master List of Transactions No. 65.
[270] 12 *Del. C.* § 3585(b).

defendant that either prevented the plaintiff from gaining knowledge of material facts or led the plaintiff away from the truth."[271] The Beneficiaries also appear to argue that equitable tolling applies in this case.[272] Under the doctrine of equitable tolling, the statute of limitations is tolled when the plaintiff "reasonably relie[s] on the competence and good faith of a fiduciary."[273] In the context of claims against a trustee, the doctrine of equitable tolling is based on the fact that "[t]he trust relationship has utility only if beneficiaries feel at ease confiding in and relying upon a trustee."[274]

Under both of these tolling doctrines, however, the limitations period is tolled only until a beneficiary is on inquiry notice of the facts supporting a claim. A plaintiff is on inquiry notice when a person "of ordinary intelligence and prudence would have facts sufficient to put them on inquiry which, *if pursued*, would lead to the discovery of the injury."[275] Jeff argues that John was on inquiry notice more than three years before the complaint was filed, relying on the warnings John received from Christina and Bill, John's participation in the 1998 lawsuit against Jeff, John's knowledge about certain of the companies in which the Trust was invested, and John's understanding that Jeff was removed as trustee of other family trusts because the family members were unhappy with Jeff's performance as trustee.

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[271] *In re Tyson Foods Inc. Consol. S'holder Litig.*, 919 A.2d 563, 585 (Del. Ch. 2007).
[272] Pls.' Answering Post-Tr. Br. at 35-39.
[273] *de Adler v. Upper New York Inv. Co. LLC*, 2013 WL 5874645, at *15 (Del. Ch. Oct. 31, 2013).
[274] *Reed v. Del. Trust Co.*, 1995 WL 317013, at *3 (Del. Ch. May 19, 1995).
[275] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *7 (emphasis in original).

The Beneficiaries raise a number of compelling arguments to counter Jeff's contentions regarding when John was on inquiry notice of the facts supporting the claims pending in this action. Ultimately, however, I need not resolve those issues, because the limitations period was tolled for John's children until they reached the age of majority.[276] Because any beneficiary may bring a claim for breach of trust,[277] the claims against Jeff are not barred by laches unless the Court concludes that John was virtually representing his children under 12 *Del. C.* § 3547.[278] Put another way, because some of the Beneficiaries turned 18 less than three years before this action was filed, the claims

[276] *Conaway v. Griffin*, 970 A.2d 256 (Del. 2009) (TABLE) (noting the general rule that the statute of limitations begins to run at the time of the alleged wrongdoing, but stating there is an exception to that rule for infancy and incapacity); *Mastellone v. Argo Oil Corp.*, 82 A.2d 379, 383 (Del. 1951) ("Ignorance of the facts is in the ordinary case no obstacle to the operation of a [s]tatute of [l]imitations. There are, of course, certain well defined exceptions, such as infancy, incapacity, certain types of fraud, or concealment of the facts… .").

[277] Restatement (Third) of Trusts § 94, cmt. b ("[a] suit to enforce a private trust ordinarily … may be maintained by any beneficiary whose rights are or may be adversely affected by the matter(s) at issue."); Restatement (Second) of Trusts § 214(1) ("[i]f there are several beneficiaries of a trust, any beneficiary can maintain a suit against the trustee to enforce the duties of the trustee to him or to enjoin or obtain redress for a breach of the trustee's duties to him.").

[278] *See* 12 *Del. C.* § 3547(a) (providing that minors or incapacitated persons may be virtually represented by another beneficiary with a "substantially identical interest"); 12 *Del. C.* § 3547(d) (providing that principles of virtual representation apply, among other things, to "the measurement of the limitation period described in § 3585 of this title."); 12 *Del. C.* § 3585(c)(2) (for purposes of 12 *Del. C.* § 3585(a), a beneficiary is deemed to have been sent a report if it is sent to an individual virtually representing the beneficiary). Jeff argues that, even if I conclude the other beneficiaries' claims are not barred by laches, "John's claims" should be dismissed. This argument is odd, as it is unclear what it would accomplish. All the beneficiaries have a current interest in the entire corpus of the trust, so dismissing John as a plaintiff would not reduce the damages award.

against Jeff are not time-barred unless those beneficiaries were virtually represented by another person (John)[279] who was on inquiry notice of the claims by March 22, 2010.

Delaware's virtual representation statute unambiguously limits virtual representation to circumstances where the putative representative has "no material conflict of interest" with the represented parties "with respect to the particular question or dispute."[280] Recent amendments to the statute further explain that

> there is a presumption that a material conflict of interest exists … in any judicial proceeding … (3) [i]n which the representative has any other actual or potential conflict of interest with the represented beneficiaries with respect to the particular question or dispute, including but not limited to a conflict resulting from a differing investment horizon or an interest in present income over capital growth.[281]

The evidence at trial removed any doubt that, with respect to the transactions challenged in this action, John had a material conflict with his children because (1) he placed nearly complete emphasis on the present income of the Trust, without any apparent regard for

[279] Although Shawn turned 18 more than three years before this action was filed, he could not virtually represent his minor siblings because he is disabled and John is his legal guardian. John's next oldest child, Katie, did not turn 18 until September 3, 2010. Pre-Trial Order ¶ 6.
[280] 12 *Del. C.* § 3547(a).
[281] 12 *Del. C.* § 3547(e)(3); 79 Del. Laws c. 172, § 3 (2013). The parties dispute whether this amendment was intended to apply retroactively since it was not adopted until after this action was filed and the act states it applies to "the estate of decedents dying on or after the Act's effective date, to transfers whenever made, to trusts whenever created, and to actions brought on or after the Act's effective date with respect to conduct whenever occurring." 79 Del. Laws c. 172 § 6. Even if the amendment is not binding, it is at least persuasive authority regarding the meaning of "material conflict" in Section 3547(e). The legislative history of this amendment indicates it does not change existing law, but merely "clarifies the circumstances under which virtual representation may be used." *See* Synopsis to Senate Bill No. 138, 147th General Assembly, available at: http://legis.delaware.gov/LIS/lis147.nsf/vwlegislation/F271027D8F32D05F85257B89004FA910 (last visited Apr. 17, 2015). That these amendments to Section 3547 only codified the existing definition of "material conflict" also is evidenced by this Court's rules, particularly Rule 103, which was amended in May 2012 and defines a material conflict as including "conflicts relating to differing investment horizons or an interest in present income over capital growth."

the capital growth or long-term stability of the Trust, and (2) he was beholden to Jeff to the point that John could not himself take action to remedy Jeff's bad faith conduct.

As to the first point, John repeatedly testified that his sole measure for the Trust's performance was whether he received his monthly distributions. John concedes that he lived off of the Trust and his monthly expenses were such that he could not support himself or his family by any other means. John's testimony that he judged Jeff's performance and monitored the health of the Trust solely by reference to whether he continued to receive his monthly distributions was echoed by other observers, some of whom attempted without avail to warn John that he should pay closer attention to Jeff's investment strategy.[282] This alone is sufficient evidence of a material conflict under Section 3547. Jeff attempts to introduce ambiguity in the record by pointing to John's testimony that he "want[s] to see the [T]rust be around for [his] kids."[283] This testimony, however, was made in a colloquy that only confirms John's failure to represent the interests of his children:

> Q. [Mr. Webb] Were you satisfied with the investments that Jeff was making for the 1970 trust up until 2010?
>
> A. [John] I mean as far as everything was working, I was, yeah.
>
> Q. What do you mean 'everything was working?'
>
> A. Well, the monthly distributions were coming in.

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[282] Tr. at 222 (John); JX 2374 (Winchester dep.) at 128-29 (Jeff's assistant testifying that she advised John to pay more attention to the Trust, but that he did not follow her advice and had "no interest at all … [a]s long as his distribution came in every month."); JX 2373 (Snyder dep.) at 97-98 (John's assistant testifying that John never expressed any concern about the Trust other than about his monthly distribution).

[283] JX 2380 (John dep.) at 180-81.

> Q. So as long as you got your monthly distribution, you didn't care what happened to the trust?
>
> A. No.
>
> Q. You did care?
>
> A. Well, yeah. I want to see it, I want to see the things still go.
>
> Q. What do you mean by "things still go?" The monthly distributions still come in?
>
> A. No. The trust, I want to see the trust to be around for my kids.
>
> Q. What did you do to be sure that the trust would still be around for your kids?
>
> A. Whatever I could do to try to – you know, I believed what Jeff told me.
>
> Q. So you listened to Jeff?
>
> A. Yes.
>
> Q. Even though your sister, your brother and your parents had said don't listen to Jeff?
>
> A. Yes.[284]

The fact that John indicated that he wants (present tense) the Trust to be around for his kids is not enough to overcome the substantial evidence of a conflict, which was confirmed by several witnesses who testified that John placed almost exclusive significance on the continuation of the monthly distributions without giving more than a passing thought to the long-term viability of the Trust.

Apart from his interest in maximizing the present income of the Trust at the expense of its capital growth, the evidence also is overwhelming that John was dependent

[284] *Id.*

on Jeff emotionally and financially and therefore was unable or unwilling objectively to consider the interests of the minor beneficiaries. When John was suffering from alcoholism, Jeff helped him achieve sobriety, and Jeff thereafter was the predominant – if not only – family member with whom John had reliable ties. John's relationship with his parents and his other siblings was strained, he was divorced from his wife, and Jeff provided John financial and emotional support through his divorce and custody battle. In return, John showed unwavering loyalty to Jeff, even when Jeff was sued by other family members for breach of trust, and even after John's parents suggested John should be wary about Jeff's investment decisions. John's willingness to accept Jeff's loyalty and prudence at face value also is demonstrated by John's limited questions about the Trust and his regular decision to not even open most of the Trust statements, even after Jeff's assistant warned him to pay closer attention.[285] When he did ask questions, John was easily pacified by Jeff's reassurances that everything was fine and that the Trust's investments would "hit big," even after the monthly distributions stopped.

John's financial dependence on Jeff was particularly acute at the time he should have been most primed to ask questions: when the monthly distributions stopped. Because the monthly distributions were the litmus test by which John judged the strength of the Trust, John was highly concerned when those distributions stopped. Given his lack of income, however, John was perhaps even less likely to "rock the boat" at that point, as he then turned to loans from Jeff as his sole means of support. Whether by design or

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[285] JX 2374 (Winchester dep.) at 128-29.

happenstance, this created a new reason for John to defer to Jeff at the very moment he might otherwise have been disposed to begin to question Jeff's conduct as trustee.

John's complete dependence on the monthly distributions from the Trust, coupled with his dependence on Jeff emotionally and financially, left him unable to represent the interests of his minor children. Although the virtual representation statute is an important component of the State's trust code and a necessary element to protecting trustees from confronting challenges to their decisions decades after they are made, the statute cannot be applied mechanically and without a studied view of the various relationships at issue in a particular case. Perhaps the best evidence of the fact that John was unable to represent the interests of his children appears in his remarkable reluctance to press Jeff and pursue claims against him, even after John's children received the Gordon letter and were preparing to bring this lawsuit. John did not agree to become a plaintiff until shortly before this action was filed. That reluctance is indicative of John's refusal or inability to recognize that Jeff was less than completely reliable and highlights why it would be disingenuous for the Court to conclude John was representing his children's interests.

Finally, Jeff raises for the first time in his exceptions two ill-supported arguments regarding John's ability for virtually represent his minor children. First, Jeff argues – without any persuasive citation or logical underpinnings – that the Court should apply an objective, rather than subjective, test to determine whether a material conflict exists between a putative representative and the other beneficiaries. In other words, if a person of ordinary intelligence could have virtually represented his minor children under similar

circumstances, Jeff contends the Court should not consider the specific relationship between the parties before it. If that were the intent of Section 3547, however, the legislature simply could define what constitutes a material conflict and what does not. An objective standard, however, would be ill-suited to address the many varied relationships between parties who appear before the Court in trust cases, and likely would unduly eliminate virtual representation in some cases even though no actual conflict exists, while permitting virtual representation even when – as here – the factors in a particular case demonstrate a conflict plainly existed. The recent statutory amendments defining what constitutes a "presumption" of a material conflict also indicate an intent that the Court examine subjective factors, as that would be the only way to determine whether the presumption of a conflict is overcome in a case.

Jeff also argues that the reference in Section 3547 to a "material conflict … with respect to the particular question or dispute" means that John did not have a conflict with his minor children because his interests are aligned with his children's interests *in this action*. This reading of the statute ignores its substance. The issue of virtual representation as it applies to a laches analysis is not whether the parties' interests are aligned in the action in which a laches defense is raised, but whether they were aligned at the time the representation allegedly occurred, *i.e.*, when the limitations period was running. The "question or dispute" refers not to the litigation presently before me, but the period when Jeff's wrongdoing occurred, because that is the period during which Jeff contends John was virtually representing his children. For the reasons explained above, John's interests were in conflict with his children's interests at that time.

B. Jeff did not establish the elements of acquiescence and, in any event, any purported acquiescence would not extend to John's children.

Jeff also argues that the Beneficiaries' claims as to three specific transactions are barred by John's acquiescence to those transactions. Specifically, Jeff argues that John acquiesced to the December 1994 loan to LOCATE,[286] the September 2001 investment in GTI,[287] and the $22 million loan taken out by the Trust in January 2003 to facilitate an additional investment by the Trust in GTI.[288] For each such investment, John signed a letter indicating, in substance, that he was aware of and consented to the transaction.

To rely on this defense, Jeff must prove the elements of acquiescence. Chief among those elements is the acquiescing party's full knowledge of all material facts.[289] Other than his own self-interested testimony, Jeff failed to provide any evidence that John had knowledge of the material facts of these transactions, such as that (1) the money the Trust lent to LOCATE was used to pay off Jeff's loan to the company, (2) by 2001, the Trust's investment in GTI represented 38% of the stated value of the Trust, (3) the Trust's loans to GTI were used to service GTI's existing debt to the Trust, or (4) the financial condition of the companies at issue was very insecure. For that reason alone, this defense must fail.

Furthermore, even if I concluded that Jeff had satisfied the elements of acquiescence with respect to John, that defense would not extend to the other

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[286] JX 1591. Jeff's brief cites JX 1589, but appears to be referring to the letter at JX 1591. *See* Jeff Post-Tr. Opening at 37 n.14.

[287] JX 1768. Based on the timing, this appears to relate to the Trust's purchase of $2 million of preferred Class E stock in GTI. *See* Pre-Trial Order, Ex. 1, Master List of Transactions No. 98.

[288] JX 1829.

[289] *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471, at *9 (Del. Ch. Mar. 23, 2012), *rev'd in part on other grounds*, 59 A.3d 418 (Del. 2012).

Beneficiaries because I already have concluded that John could not virtually represent his children for purposes of the claims at issue in this action. Jeff's defense of acquiescence therefore does not bar the Beneficiaries from recovering damages for these claims.

VI. The Beneficiaries are entitled to damages in the amount of $96,978,299.93, plus pre-judgment interest, less set-offs, plus post-judgment interest.

Jeff's bad faith and willful misconduct with respect to the Trust's investments in LOCATE, Top Source, and Wave2Wave constituted a breach of trust for which the Court may order an equitable remedy.[290] The remedies available to address a breach of trust are wide ranging, but specifically may include an order "[c]ompelling the trustee to redress a breach of trust by paying money, restoring property, or other means."[291] The appropriate remedy in this case is a monetary judgment that includes the value of the lost principal associated with Jeff's breaches and an additional amount to restore the value of the trust to what it would have been had the breach not occurred, reduced by certain set-offs to which Jeff is entitled.[292] The parties disagree about the prudent investor rate of return that the Court should adopt in measuring damages, as well as about how the set-offs should be taken.[293]

Mr. Scherf testified that 8.12% is a conservative rate of return that the Trust could have achieved if not for Jeff's breaches of trust. Jeff's experts criticized this figure on several grounds, namely that (1) the rate assumes that the Trust's assets would be allocated at all times in a 60/40 equity to debt ratio, (2), the rate assumes the assets would

[290] 12 *Del. C.* § 3581(a)-(b).
[291] 12 *Del. C.* § 3581(b)(3).
[292] 12 *Del. C.* § 3582.
[293] *Cf. Venhill Ltd. P'ship v. Hillman*, 2008 WL 2270488, at *30-33 (Del. Ch. Jun. 3, 2008).

be invested consistent with the VBINX, and (3) the VBINX's annual operating expenses were 50 to 75 basis points below the administrative fees typically charged by a professional trustee.

In my view, only the third criticism merits an adjustment to Mr. Scherf's calculations. First, Mr. Scherf's assumption that the Trust would be allocated 60/40 equity to debt at all times is not a certainty, but some uncertainty is expected and accepted in calculating damages. Jeff's experts offered no more reliable method that would improve certainty. Arbitrarily varying the ratio over time seems no more preferable and certain than Mr. Scherf's method of holding the ratio steady, at an allocation directly between the 50/50 allocation that even Jeff's experts seem to acknowledge would be typical, and the 70/30 allocation that Mr. Berry credibly testified would be more typical of a trust of this nature. Although Jeff's experts are correct that assuming a 60/40 allocation could have the effect of overstating the appropriate rate of return, the assumption also could understate the rate of return if 70/30 would be an expected allocation for this type of trust. Jeff, not the Beneficiaries, should bear the risk of uncertainty surrounding this element of the damages calculation, as it was Jeff's repeated breaches of trust, and his efforts to conceal those breaches from Wilmington Trust and the Beneficiaries, that resulted in the extended timeline at issue in this case.[294]

Likewise, Jeff's experts' criticism of Mr. Scherf's use of the VBINX as an appropriate proxy is unpersuasive. First, Mr. Scherf tested the reasonableness of his use of the VBINX by comparing its returns to the total returns published by Ibbotson, and

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[294] *See McNeil v. McNeil*, 798 A.2d 503, 511 (Del. 2002).

found that the VBINX return was slightly lower than the total returns achieved by the market, even at a 50/50 equity to debt ratio. Second, the Restatement specifically recognizes that return rates for index mutual funds or market indexes (with adjustments as appropriate) may serve as a basis for calculating the rate of return a trust would have achieved had it been properly administered.[295] Although the Restatement identifies other data that may provide an even more accurate rate of return, none of that data was available in this case. Mr. Scherf persuasively testified that he selected the VBINX because it started in 1992, the same year that Jeff began to breach his obligations to the Beneficiaries, and it provided a slightly lower return than the total market return in the same period.

I do, however, credit Jeff's experts' remaining criticism that the use of the VBINX overstates the appropriate rate of return by failing to account for the higher fees commonly charged by trustees. Mr. Smith opined that trustees typically would charge 50 to 75 basis points more than the expenses charged by the VBINX. I therefore recommend that the Court reduce Mr. Scherf's proposed prudent investor rate by almost 40 basis points, to 7.75%, to account for those higher fees. I chose to reduce the rate by a figure slightly less than the fee range supplied by Mr. Smith both because Mr. Scherf's

[295] Restatement (Third) Trusts § 100, cmt. (b)(1) ("Depending on the type of trustee and the nature of the breach involved, the availability of relevant data, and other facts and circumstances of the case, the projected returns on indefinite hypothetical investments during the surcharge period may appropriately be based, inter alia, on: the return experience (positive or negative) for other investments, or suitable portions of other investments, of the trust in question; average return rates of portfolios, or suitable parts of portfolios, of a representative selection of other trusts having comparable objectives and circumstances; or return rates of one or more suitable common trust funds, or suitable index mutual funds or market indexes (with such adjustments as may be appropriate).").

calculated rate already was more conservative than other measures available and because any uncertainty should be resolved against the faithless fiduciary, rather than the injured Beneficiaries.[296]

The parties also dispute whether the interest rate should be simple or compound. It is undisputed that this Court has broad discretion to award either simple or compound interest depending on the circumstances of each case.[297] The more recent trend in this Court has been to award compound interest, which "better comports with 'fundamental economic reality.'"[298] In this case, an award of simple interest "has nothing to commend it."[299] Jeff engaged in fiduciary misconduct that caused the value in the Trust to decline by tens of millions of dollars. Jeff succeeded in masking his wrongdoing for two decades by taking advantage of his dependent brother and his brother's four minor children. Jeff's conduct in hiding and obfuscating his misconduct, along with his refusal to recognize his own limitations as an investor, deprived the Beneficiaries of the growth that such a sizeable trust could have achieved. To award simple interest to the Beneficiaries would be inconsistent with the economics of the Trust and with my rationale in selecting the appropriate interest rate.[300] I therefore recommend that the Court award interest at 7.75%, compounded quarterly.

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[296] *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *25 & n. 229 (Del. Ch. Feb. 18, 2010).
[297] *Recor Medical, Inc. v. Warnking*, 2015 WL 53526, at *1 (Del. Ch. Jan. 30, 2015).
[298] *Henke v. Trilithic, Inc.*, 2005 WL 2899677, at *13 (Del. Ch. Oct. 28, 2005) (quoting *Finkelstein v. Liberty Digital, Inc.*, 2005 WL 1074364, at *26 (Del. Ch. Apr. 25, 2005)).
[299] *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 173 (Del. 2002).
[300] *Accord* Bogert, *supra* note 229, § 543(V), p. 540 ("[w]here the breach of trust is found to be willful, … compound interest may be awarded.")

In their exceptions briefing, the parties dispute the issue of how various set-offs should be taken. The Beneficiaries do not dispute that Jeff is entitled to offset the damages he owes with an amount – unspecified by the parties – that accounts for the Beneficiaries' settlement with Wilmington Trust.[301] The parties also stipulated to the value of On-Site and Wave2Wave for purposes of calculating damages, but they disagree as to whether the set-offs should be taken before or after pre-judgment interest is calculated.

The Restatement indicates that set-offs should be taken after pre-judgment interest is calculated, explaining that recovery from a trustee for improper investments

> "ordinarily would be the difference between (1) the value of [the improper] investments and their income and other product *at the time of surcharge* and (2) the amount of funds expended in making the improper investments, increased (or decreased) by a projected amount of total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested."[302]

This formula indicates that the Court must calculate the amount improperly expended, increased or decreased by the appropriate interest rate, and then determine the difference

[301] The amount of the Beneficiaries' settlement with Wilmington Trust is confidential. Whether the amount may come to light at some time when the Court enters a final order is unclear. There also may be a dispute between the parties regarding whether Jeff is entitled to a set-off equal to the amount of the settlement, as envisioned by 10 *Del. C.* § 6304(a), or whether Jeff may be entitled to a higher set-off equal to Wilmington Trust's pro rata share of liability, as provided under 10 *Del. C.* § 6304(b). Jeff contends he cannot take a position on this issue until the Court determines when the set-off should be taken (*i.e.,* before or after interest is calculated). At this point, given the myriad disputes that will have to be resolved when the parties inevitably take exception to my final reports, I believe it would be more efficient for those exceptions to be resolved by the reviewing judicial officer, after which the parties can address the need for additional proceedings regarding the amount of the set-off. If, however, the judicial officer assigned to hear the exceptions would prefer that I hold proceedings regarding the amount of the set-off before the other exceptions are resolved, I will do so.
[302] Restatement (Third) of Trusts § 100, cmt. (b)(1).

between that figure and the value of the improper investments at the time of surcharge. Jeff does not address or refute this authority, but instead argues it would be inequitable to calculate interest on the gross amount of the improper investment, because the challenged investments had value throughout the time they were held in the Trust.[303] Because Jeff has not explained why the Court should not follow the Restatement, or offered any expert testimony that would allow the Court to make the calculation Jeff urges is appropriate, I recommend that the Court follow the Restatement and enter judgment against Jeff for $96,978,299.93, plus pre-judgment interest at 7.75% compounded quarterly, accruing from the date of each wrongful investment until the date of judgment, less set-offs to account for the Wilmington Trust settlement and the stipulated values of On-Site and Wave2Wave, plus post-judgment interest on the net amount at 7.75%, compounded quarterly.

CONCLUSION

For the foregoing reasons, I recommend that the Court enter judgment against Jeff in the amount specified above. This is my final report and exceptions may be taken in accordance with Rule 144.

/s/ *Abigail M. LeGrow*
Master in Chancery

[303] Jeff also vaguely argues that the set-off for On-Site should be increased from the stipulated value "to account for any further mitigation of damages that the Beneficiaries achieved by selling OSA" after trial. Jeff neither offers a proposed alternate figure nor explains why he should be relieved from the stipulated order entered by the Court. I do not believe the Court should deviate from the terms of the parties' agreement.

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