IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JO ANN HOWARD AND ASSOCIATES, P.C., SPECIAL DEPUTY RECEIVER OF LINCOLN MEMORIAL LIFE INSURANCE COMPANY, MEMORIAL SERVICE LIFE INSURANCE COMPANY, AND NATIONAL PREARRANGED SERVICES, INC., ET AL.,	)	
Plaintiffs,	)	Case No. 09-CV-1252-ERW
v.	)	
J. DOUGLAS CASSITY; RANDALL K. SUTTON; BRENT D. CASSITY; J. TYLER CASSITY; RHONDA L. CASSITY; ET AL.,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR RULE 52(c) JUDGMENT
AGAINST PNC BANK ON PNC'S AFFIRMATIVE DEFENSES

Under Rule 52(c), Plaintiffs respectfully move for an entry of judgment against Defendants PNC Bank, N.A. and National City Bank (collectively "PNC") on PNC's (i) investment advisor defense; (ii) authorization defense; and (iii) *in pari delicto* defense. In support of their motion, Plaintiffs state as follows:

1. Rule 52(c) provides in relevant part:

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Fed. R. Civ. P. 52(c). Thus, by its plain terms, Rule 52(c) judgment may be entered as to affirmative defenses. Fed. R. Civ. P. 52(c) ("the court may enter judgment against the party on a claim or defense").

2. "A district court must make credibility determinations and findings of fact under both Rule 52(a) and Rule 52(c) …." *Bowen v. Celotex Corp.*, 292 F.3d 565, 566 (8th Cir. 2002). Thus, "[w]hen considering a Rule 52(c) motion, 'a district court may not draw any special inferences in favor of the non-movant'; rather, 'the court must weigh the evidence, resolve any conflicts in it, and decide where the preponderance lies.'" *DL v. D.C.*, 109 F. Supp. 3d 12, 25 (D.D.C. 2015) (quoting *United States ex rel. Ervin & Assocs. v. Hamilton Secs. Grp., Inc.*, 298 F. Supp. 2d 91, 92-93 (D.D.C. 2004)). In addition, the court has "the authority, if not the obligation, to draw reasonable inferences from the facts found." *Id.* (quoting *Hamilton Secs. Grp.*, 298 F. Supp. 2d at 93 n.3).

I. The Court Should Enter Judgment against PNC on its Investment Advisor Defense

3. The Eighth Circuit explained that "Allegiant, as trustee, was required to control trust assets, protect trust assets, and keep adequate records of trust funds" and that "PNC is liable" to beneficiaries for trust law damages "[i]f Allegiant breached any of these duties." *Jo Ann Howard and Assocs., P.C. v. Cassity*, 868 F.3d 637, 645–46 (8th Cir. 2017) (citing Restatement (Third) of Trusts § 94 (2012); Restatement (Second) of Trusts § 205 (1959)). With respect to the investment advisor defense, the Eighth Circuit held:

> A trustee always has a duty to ensure that trust assets are invested prudently, whether the trustee is investing the assets himself or monitoring the investment decisions of an investment advisor. Restatement (Third) of Trusts §§ 90, 91 (2007). The statute recognized this ongoing duty by providing that "in no case" where assets are invested imprudently—investment advisor or no—may the trustee be relieved of liability. PNC is not relieved of liability unless Allegiant ensured that Wulf was investing trust assets within the authority of a reasonably prudent trustee.

Jo Ann Howard and Assocs., 868 F.3d at 647–48.

4. The Court has already held that "[s]imply ensuring the types of investment are within the authority granted by the trust agreement is not enough to relieve the trustee of liability."

ECF No. 2789 at 12. Thus, under both the Eighth Circuit's mandate and this Court's subsequent interpretation of that order, PNC must show that Allegiant did more to monitor the investment directions than merely checking that the assets booked were of a type of investment permitted by Section 4.2 of the Trust Agreement.

5. This Court previously ruled that under Chapter 436, the investment advisor defense could apply only if Wulf was independent of NPS. ECF Nos. 2505 at 14–17 & 2303 at 13 & 2084 at 11–14. PNC did not appeal that ruling.

6. Finally, Chapter 436 unambiguously requires that "investment decisions" may only be made by an "independent qualified investment advisor" "when the principal and interest in a preneed trust exceeds two hundred fifty thousand dollars[.]" Mo. Rev. Stat. § 436.031.2.

7. Thus to succeed on its investment advisor defense, PNC must show:

a. Allegiant ensured that Wulf was investing trust assets within the authority of a reasonably prudent trustee by doing more than "[s]imply ensuring the types of investments are within the authority granted by the trust agreement[;]"

b. Wulf was independent of NPS; and

c. The value of the trusts exceeded $250,000.00.

8. Each of these is a separate, independent requirement and PNC cannot avail itself of the investment advisor defense if any of these requirements is not met.

9. Plaintiffs are entitled to judgment on PNC's investment advisor defense because the facts presented at trial establish:

a. Allegiant did nothing to ensure the prudence of investments. Allegiant did not evaluate a single wire transfer request received to determine the purpose of the wire and thus was unable to monitor if the wire transfers were actually investments. Allegiant

never tracked any wire of money out of the trust to determine if an asset was received in exchange. At best, Allegiant only reviewed the assets that were received by the trust to determine if they were of the "type" of investment permitted by Section 4.2.

b. Wulf, Bates & Murphy was not independent of NPS. Instead, the evidence establishes that, with the assistance of Allegiant, Mr. Wulf delegated his investment authority to Randy Sutton and Angie Hall and that the vast majority of investment decisions were made by Mr. Sutton, not Mr. Wulf.

c. PNC's expert opined that the **assets** held in Trust IV were worth **negative** $2 million.

II. The Court Should Enter Judgment against PNC on its Authorization and *in Pari Delicto* Defenses

10. The Eighth Circuit held that this Court was correct in its previous order striking PNC's authorization and *in pari delicto* defenses. *Jo Ann Howard and Assocs.*, 868 F.3d at 642; *see also* ECF No. 2092, at 19-23 (not allowing PNC's defenses to stand against the SDR in the shoes of NPS); ECF No. 2505, at 3-14 (same). Thus under the Eighth Circuit's mandate, these defenses are not available to PNC.

11. In addition, this Court's prior rulings are law of the case and PNC has not introduced substantially different evidence and the decisions are neither clearly erroneous nor do they work manifest injustice. *See Little Earth of the United Tribes, Inc. v. U.S. Dep't. of Housing and Urban Dev.*, 807 F.2d 1433, 1441 (8th Cir. 1986).

12. PNC failed to introduce evidence sufficient to warrant application of its authorization defense. PNC introduced no evidence that NPS consented to any breach by Allegiant with "full information" or that Allegiant "inform[ed] NPS these actions would be

considered a breach of duty and it needed confirmation from NPS to go forward." *Walker v. James*, 85 S.W.2d 876, 885 (Mo. 1935); ECF No. 2505 at 5.

13. The evidence introduced at trial also establishes that the "adverse interest" exception to these defenses applies, preventing this defense from being applied to the SDR in the shoes of NPS.

14. Plaintiffs incorporate by reference the Memorandum in Support of this Motion, filed contemporaneously with this Motion.

WHEREFORE Plaintiffs request that this Honorable Court enter an Order granting judgment in favor of Plaintiffs and against Defendants:

(a) eliminating PNC's investment advisor, authorization, and *in pari delicto* affirmative defenses from the case; and

(b) granting such other, further and different relief as the Court determines to be just and proper to address the issues discussed herein.

Dated this 18th day of January, 2019.

Respectfully submitted,

s/ John M. McHugh

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Attorneys for Plaintiffs Jo Ann Howard and Associates, P.C., in its capacity as Special Deputy Receiver of Lincoln Memorial Life Insurance Company, Memorial Service Life Insurance Company, and National Prearranged Services, Inc.; the National Organization of Life and Health Insurance Guaranty Associations; the Missouri Life & Health Insurance Guaranty Association; the Texas Life & Health Insurance Guaranty Association; the Illinois Life & Health Insurance Guaranty Association; the Kansas Life & Health Insurance Guaranty Association; Oklahoma Life & Health Insurance Guaranty Association; the Kentucky Life & Health Insurance Guaranty Association; and the Arkansas Life & Health Insurance Guaranty Association

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2019, the foregoing was filed electronically with the Clerk of Court and served by operation of the Court's electronic filing system upon all counsel of record in this case participating in Electronic Case Filing.

s/ John M. McHugh
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