THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY PROBATE COURT

JULIE SHELTON, Trustee, of the Elizabeth M. Tamposi GST Exempt Trust and the Elizabeth M. Tamposi Trust, both created under the Samuel A. Tamposi Sr. 1992 Trust, and the Elizabeth M. Tamposi Trust created under the Samuel A. Tamposi Sr. 1994 Irrevocable Trust, and ELIZABETH M. TAMPOSI

v

SAMUEL A. TAMPOSI, JR. and STEPHEN A. TAMPOSI, Individually and as Investment Directors of the Elizabeth M. Tamposi GST Exempt Trust and the Elizabeth M. Tamposi Trust, both created under the Samuel A. Tamposi Sr. 1992 Trust, and the Elizabeth M. Tamposi Trust created under the Samuel A. Tamposi Sr. 1994 Irrevocable Trust, and as Directors of the Tamposi Companies

Case Number: 316-2007-EQ-2109

ORDER

This litigation concerns the Samuel A. Tamposi, Sr. 1992 Trust (the SAT, Sr. Trust). It was instituted by Julie Shelton, trustee of the Elizabeth Tamposi Trusts (the EMT Trusts), and Elizabeth Tamposi, individually, against Samuel A Tamposi, Jr. and Stephen Tamposi, individually, and as investment directors for the EMT Trusts and directors of the Tamposi Companies,[1] alleging breach of fiduciary duty. Samuel A. Tamposi, Jr. and Stephen Tamposi deny any breach of duty, move for removal of Julie Shelton as trustee of the EMT Trusts, and ask for enforcement of the *in terrorem* clause of the SAT, Sr. Trust through forfeiture of Elizabeth Tamposi's right, title and interest as beneficiary under the EMT Trusts.

[1] Per order dated 10/15/2009 (Index #354) the court found that it did not have jurisdiction to decide claims against the respondents as Directors of the Tamposi Companies.

The petitioners' complaint is DISMISSED, and the respondents' motions are GRANTED, consistent with the orders within.

I. TRUST PROVISIONS AND APPLICABLE LAW

A discussion of the relevant provisions of the SAT, Sr. Trust will assist, if it is not essential, for contextual understanding of the controversy before the court.

Samuel A. Tamposi, Sr. (Sam, Sr.) was a prominent real estate developer in southern New Hampshire. He had six children: Samuel, Jr. (Sam, Jr.), Michael, Elizabeth (Betty), Nicholas (Nick), Celina (Sally), and Stephen (Steve). As part of his estate plan, he established the SAT, Sr. Trust on or about February 24, 1992. It was designed to confer lifetime benefit to himself during his lifetime, and his children and their issue after his death. He named himself trustee, and Bank of America as successor trustee.

Sam, Sr. amended the trust several times. The First Amendment, in February 1994, eliminated the requirement for a corporate trustee if he was unable to serve. It named David E. Tully successor trustee.[2] The Second Amendment, dated March 1994, granted authorization for the trustee to retain "real estate interests"[3] as a substantial part or all of the trust property, and appointed Sam, Jr. as investment director. The Second Amendment was revoked in its entirety upon execution of and as part of the Third Amendment in April 1994. The Third Amendment reaffirmed that the trustee may retain "real estate interests" as a substantial part or all of the trust property, but this time

[2] Three years after Sam, Sr.'s death, David Tulley resigned as successor trustee and on January 1, 1998, Gerald Prunier accepted the position of trustee pursuant to Article Eleventh. Exhibit 1.4.

[3] Real estate interests are: "Real estate and all legal or equitable interests in real estate, including all interests in closely-held corporations and in general or limited partnerships that own interests in real estate." Samuel A. Tamposi, Sr. 1992 Trust, Article TENTH-A.

named sons Sam, Jr. and Steve, or the survivor of them, investment directors when Sam, Sr. himself was no longer trustee. The Fourth Amendment, effective May 24, 1995, prohibited the trustee from transferring any interest in the Boston Red Sox, a trust asset, without written approval of the American League of Professional Baseball Clubs. It also expressly confirmed all other provisions of the SAT, Sr. Trust, as earlier amended. Much later, after Sam, Sr.'s death, the trust was again amended under a November 13, 2006 agreement signed by the beneficiaries of the SAT, Sr. Trust ("Settlement Agreement") in resolution of longstanding conflict between the investment directors and certain beneficiaries. Some of these changes to the trust were entered as an order of this court on February 22, 2007.[4] Hence, when referenced after November 13, 2006, the SAT, Sr. Trust was collectively comprised of the original instrument, the first, third and fourth amendments, certain provisions of the Settlement Agreement, and a February 22, 2007 court order.

The SAT, Sr. Trust specified that after Sam Sr.'s death, the trust corpus was to be divided into twelve separate trusts for his children and their issue. Each child and his or her issue are beneficiaries of a trust containing assets exempt from the federal generation skipping transfer tax ("GST Exempt Trust"), and each child and his or her issue are beneficiaries of a trust having assets that are not exempt ("Non-exempt Trust").[5] [6] According to Article TENTH of the SAT, Sr. Trust, each of the twelve trusts

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[4] The Settlement Agreement was not submitted *in toto* for court approval. Nonetheless, the parties' actions indicate that they accept the Settlement Agreement as a modification of the trust. *See* RSA 564-B:1-111.

[5] For simplicity purposes going forward the respective trusts for Sam, Sr.'s children and their issue will only reference the name of the child.

[6] As part of his estate plan, Samuel A Tamposi, Sr. also established the Samuel A. Tamposi, Sr. 1994 Irrevocable Trust and named David Tulley as the successor trustee of the trust. However, the remaining assets from this trust were consolidated into each of the corresponding Non-exempt sibling sub-trusts

constitutes a separate and distinct trust, but may be combined and commingled with the other trusts in a common fund for convenience of administration. Thus, while legal title to trust property may be held in the name of the SAT, Sr. Trust, equitable title rests with the individual trusts.[7] For simplicity and clarity, these are referred to as the "sibling sub-trusts" and those created for the benefit of Betty are variously called "the EMT Trusts", "the EMT GST Exempt Trust" or "the EMT Non-exempt Trust."

Under the unamended SAT, Sr. Trust instrument, one trustee was appointed for the twelve sibling sub-trusts. The trustee was conferred discretion to distribute the net income and principal to or for the benefit of the beneficiaries—the six children of Sam Sr. and their issue. The sub-trusts had different "ascertainable standards" for distribution.[8] For the GST Exempt Trusts, the trustee is given discretion to distribute net income and principal as "necessary for their education and maintenance in health and reasonable comfort, taking into consideration the income and cash resources known to the trustee to be available for such purposes from other sources." Article FIFTH. (Emphasis added). For the Non-exempt Trusts, the trustee is given discretion to distribute to or for the beneficiaries such net income and principal as "necessary for their education and maintenance in health and reasonable comfort", but without need to take into account income and cash from other sources. Article SIXTH.

The trust instrument expanded the statutory powers of the trustee to include: investing in or holding property, including real property, even though the character or

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pursuant to an agreement of the parties and order of this court dated January 3, 2008. In re: The Samuel A Tamposi, Sr. 1992 Trust and The Samuel A Tamposi, Sr. 1994 Irrevocable Trust. Case # 2006-2740.

[7] The court is not asked and makes no ruling on the propriety of holding title to the corpus in the name of the SAT, Sr. Trust rather than the sibling sub-trusts.

[8] "Ascertainable standard" references wording in the trust limiting the trustee's discretion to distribute income or principal to a prescriptive capable of measurement derived from Internal Revenue Code sections 2041 (b) (1) (A) or 2514 (c) (1). *See* RSA 564-B:1-103.

size of that investment would not be considered proper; holding securities or other property in such a manner as the trustee deems best; and dividing or distributing trust property "in undivided interests, in cash or in kind or partly in each, in pro-rata or non-pro rata shares." Article TENTH (a), (c) and (e).

Article FOURTEEN contains a "no contest", or *in terrorem*, clause. So far as is now pertinent, it specifies:

> If any person shall at any time commence or join in the prosecution of any proceedings in any court or tribunal...to have ...this trust ...set aside or declared invalid or to contest any part or all of the provisions included in...this trust...or to cause or to induce any other person to do so, then and in that event such person shall thereupon forfeit any and all right, title and interest in or to any portion of this trust, and this trust shall be distributed in the same manner as would have occurred had such person died prior to the date of execution of this trust.

The paragraph concludes with: "Nothing contained in this Article, however, shall preclude any beneficiary from enforcing, by litigation or otherwise...the trustee's duties under this or any other trust."

The Third Amendment confers certain fiduciary responsibilities on the investment directors that are more commonly vested in a trustee. They are given authority and have the responsibility for the investment and management of the trust assets, while the trustee is tasked with determining the needs of the beneficiaries and distributing appropriate funds to them in accordance with the applicable ascertainable standard. The amendment also gives the investment directors authority to control, finance, and structure all real estate assets and operating entities; full authority to direct the retention or sale of all trust assets; and to direct the purchase of property with cash principal. Article TENTH-B (d), (e). They are further conferred license to act as managers or directors of the entities held as trust property that might otherwise raise inherent or

potential conflicts of interest. Article TENTH-C. Sam, Sr. specifically instructed the trustee to follow the directions and decisions of the investment directors regarding investments, purchases, sales, real estate interests and operating entities. Article TENTH-B (a) – (d).

The Third Amendment requires the investment directors to act in a fiduciary capacity for the benefit of the trusts and to exercise "good faith and ordinary diligence." (Article TENTH-B). This is a different and less stringent standard of fiduciary care (business standard) than that required of the trustee pursuant to RSA 564-B:9 (prudent investor standard). The SAT, Sr. Trust and all the sibling sub-trusts are governed by New Hampshire law, specifically, the New Hampshire Uniform Trust Code, RSA 564-B (NH UTC). Though created prior to its enactment, the SAT, Sr. Trust is nonetheless governed by NH UTC. *See* RSA 564-B:11-1104. This court has jurisdiction over the parties and the subject matter pursuant to RSA 564-B:2-202 and 2-203.

II. FACTS

Sam, Sr. died on May 25, 1995. His estate and trust property consisted of various tenancies, business entities, limited partnerships, corporations and numerous parcels of real estate in New Hampshire and Florida, valued at approximately $20.5 million. Sam, Sr.'s business interests and real estate, some held individually, by the trusts, or by the various business entities, are referred to under the consolidated term "Tamposi Company" (or "Tamposi Companies"). Initially, Sam, Jr. and Steve assumed their given roles as investment directors for all twelve sibling sub-trusts. They continue to currently act as investment directors of the trusts for the benefit of Sam, Jr., Michael, Sally, and

Steve. However, since November 13, 2006, they have served as investment directors for only certain assets held by the trusts for the benefit of Betty and Nick consistent with the Settlement Agreement. Gerald Prunier serves as trustee of the trusts for the benefit of Sam, Jr., Michael, Sally, and Steve. Eugene Van Loan is trustee of the trusts for the benefit of Nick. Julie Shelton, co-petitioner in the case at bar, is trustee of the trusts for the benefit of Betty.

A. *Prior Trust Controversies*

The SAT, Sr. Trust was the subject of prior litigation in this court. A dispute had arisen over whether the trustee was required to consent to the transfer of certain assets from the non-exempt trusts to the generation skipping tax-exempt trusts. Betty and Nick objected to the proposed transfer. In January 2000, Sam, Jr. and Steve, as investment directors, and Gerald Prunier, trustee of the twelve sub-trusts, filed a petition for declaratory judgment. They sought a ruling from the court that the trustee is required to act in accordance with the written directions of the investment directors, and neither has nor incurs liability for so doing. In their petition, the investment directors and trustee alleged that Betty and Nick had expressed interest in a possible "buy-out" or separation of their beneficial interests in the trust property.[9]

In April 2000, Betty, Nick and their children submitted their own petition for declaratory judgment asking the court to make an interpretive determination that they could participate in the January 2000 action without triggering the *in terrorem* clause.[10] On October 2, 2000, the court (Cloutier, J.) ruled that so long as they did not attempt to challenge the validity of the trust or the authenticity of documents, but sought only to

[9] In re Samuel A Tamposi, Sr. 1992 Trust. Case number: 2000-178.
[10] Tamposi v Prunier, Trustee Case number: 2000-786.

uphold fiduciary standards under the trust and New Hampshire law, there would be no violation. Both of the declaratory judgment actions were dismissed without prejudice by an agreed order of November 13, 2000.

The following September, Betty and Nick instituted another action against Sam, Jr. and Steve, individually and as investment directors; Gerald Prunier, individually and as trustee; and David Tulley, individually and as trustee for the Samuel A. Tamposi, Sr. 1994 Irrevocable Trust; this time for breach of fiduciary duties.[11] Betty and Nick alleged that the respondents had failed to account properly, had misused or improperly conveyed trust assets, and had committed several other breaches of duty. They requested the court to order an accounting, surcharge, removal of the trustees and investment directors, and an award of attorneys' fees and costs. Betty and Nick withdrew the complaint by voluntary non-suit, without prejudice, slightly less than two months later.

There legal matters stood until December 2006, when Trustee Prunier of the SAT, Sr. Trust and Trustee Tully of the Samuel A. Tamposi, Sr. 1994 Irrevocable Trust filed a joint petition asking the court to modify each trust.[12] Between 2001 and 2006, the underlying disagreements between Betty and Nick on the one side, and their siblings on the other, continued. The parties privately engaged in mediation, and eventually, the Settlement Agreement was reached. It called for merging the SAT, Sr. 1994 Trust for the benefit of each child into his or her respective non-exempt sibling sub-trust; provided that Betty and Nick could appoint his and her own trustee; and Sam, Jr. and Steve

[11] Elizabeth Tamposi and Nicholas Tamposi v Samuel A. Tamposi, Jr., Stephen A. Tamposi, individually and as Investments Directors, Gerald Prunier, individually and as Trustee, and David Tulley, individually and as Trustee. Case number: 2001-1687.

[12] In re: The Samuel A. Tamposi, Sr. 1992 Trust and the Samuel A. Tamposi Sr. 1994 Trust. Case number 2001-1687.

agreed to resign as investment directors over all but ten assets in Betty and Nick's sub-trusts pending their sale or liquidation. The Settlement Agreement had no effect on the organizational or legal structure and ownership of the assets, which remained primarily undivided minority interests in business entities and real estate. The merger of the trusts was approved by the court on January 3, 2008. Changes made to the SAT, Sr. Trust in accord with the Settlement Agreement were approved by the court on February 22, 2007.

B. Current Litigation

This action, alleging breach of fiduciary duties by the investment directors, was filed in October 2007, a mere eight months after the court ordered amendments to the trust occasioned by the Settlement Agreement.

On December 31, 2008, the approximate value of the Tamposi Company (including trust assets) was $146 million. Exhibit 13.5.[13] Averaged over the years 2007, 2008 and 2009, Betty has received distributions from EMT Trusts and her non-trust Tamposi Company assets of slightly less than $1.5 million per year. See Exhibits 9.32; 9.32A.

When the Settlement Agreement was signed, Betty was married to Theodore Goodlander ("Ted") and resided in Nashua, New Hampshire. Betty and Ted have three children, Christina Goodlander, Margaret Goodlander and John Goodlander, who are beneficiaries of the trusts but not petitioners in this litigation.

In April 2005, Betty purchased a house and land on Governor's Island in Gilford for $1,795,000. By January 2007, she had commenced significant renovations and

[13] Throughout the trial and throughout this order the exhibits are referred to in this short-hand form. Exhibit 13.5 refers to Book 13, Document 5.

improvements to this property, eventually spending more than $2.5 million over the original purchase price. See Exhibits 2.11; 9.4; 11.13. Much of the expense was incurred while this litigation was in progress.

On May 16, 2007, Ted filed for divorce seeking a share of Betty's property, including assets of the EMT Trusts. The divorce court found that both Betty and Ted had taken liberties with assets of their children. Betty was ordered to reimburse $320,000 to the children's qualified personal residence trust as well as accept responsibility for additional unsecured debts of approximately $765,342. Exhibits 11.93; 8.5. The divorce was highly acrimonious and expensive. The final decree divided the parties' assets. Betty was required to provide Ted with spousal support of up to $50,000 yearly (from the EMT Trust distributions) until such time as he accumulates liquid assets of at least $1.5 million. Exhibit 11.93.

Betty has had a prominent career in government and education. She is currently a graduate student at Harvard Divinity School, has a Masters degree from Harvard's Kennedy School of Government, and has been on the board of trustees for Rivier College, NH University System, and New England College. She was a state legislator from 1979 – 1986, then ran for U.S. Congress, was appointed as U.S. Assistant Secretary of State for Consular Affairs (1989-1992) and has been a political commentator on WMUR TV Channel 9. However, throughout this current litigation, Betty has had no employment income. She has incurred enormous debt and expense from the divorce, home improvements, living expenses and this litigation. Beyond that, she spent approximately $925,000 on the prior trust litigation and mediated negotiations (2000 – 2006) which she wants reimbursed by her trustee. Exhibit 2.32.

Sam, Jr. is the President of the Tamposi Companies. He is the oldest of the Tamposi siblings and worked with his father at the family business prior to the latter's death. He is involved in the day-to-day operation of the Tamposi Company—negotiating real estate purchases, sales, and leases, and managing the myriad business entities of which it is comprised. Steve is a resident and manages the ongoing development and maintenance of Citrus Hills, Florida, while also working with Sam, Jr. in the overall management of the Tamposi Companies. Neither Sam, Jr. nor Steve receives any compensation from the SAT, Sr. Trust or sibling sub-trusts for services as investment directors. Their compensation comes from their employment as managers and directors of the various Tamposi Companies. See e.g. Exhibits 4.1; 4.2.

In the Settlement Agreement, Betty named her then attorney, Richard Couser, her new trustee. While the stated effective date for the Settlement Agreement was November 13, 2006, the parties understood that implementation of all its terms would take time. They submitted petitions to the court for approval of some of the agreed modifications in February 2007 and in December 2007. Regrettably, Attorney Couser became very ill, and was rendered unable to continue as trustee of the EMT Trusts.[14] He had not requested nor taken possession of any of the trust assets. The Settlement Agreement contained no provisions for the transition from Trustee Prunier to a new trustee chosen by Betty.

Attorney Couser resigned as trustee of the EMT Trusts by letter dated May 18, 2007. Exhibit 2.28. Betty then began a search for a new trustee. She contacted her long-time friend, Julie Shelton, for assistance in identifying an appropriate trustee. Shelton suggested that Betty contact Attorney Stephanie Denby of Chicago, whose law

[14] Attorney Couser passed away in September 2008 after a long battle with cancer.

practice specializes in very high-end trusts and estate planning, primarily servicing clients with assets of $1 billion or more. Betty met with Attorney Denby in May 2007, engaged Denby as attorney for her trust, and interviewed four potential institutional trustees in the Chicago area. Exhibit 2.30. None of those institutions was willing to act as trustee for the EMT Trusts because there was not sufficient cash flow assured to compensate for their services.

In June 2007, Attorney Denby met with Attorney David Barradale (attorney for Trustee Gerald Prunier), Attorney Pam Newkirk (attorney for Trustee Gerald Prunier), and Attorney Eugene Van Loan (Trustee for the trusts for the benefit of Nick) to discuss the transition process for transferring assets from Trustee Prunier to Betty's new (and, as of yet, unnamed) trustee. Exhibits 2.35; 2.36; 2.38. Denby further informed Barradale that Betty had significant cash needs. Exhibits 2.32; 2.35.

Eventually, on August 10, 2007, Julie Shelton was chosen by Betty to serve as trustee of the EMT Trusts. Shelton accepted her appointment reluctantly. She is a litigation attorney from Chicago, Illinois. She acknowledges having no prior experience in and limited knowledge of trust administration. She has known Betty for more than 30 years and the Goodlander children for more than 10 years. Until some point during the course of this litigation, she was unaware that the trust beneficiaries include issue now living and later born during Betty's lifetime. Shelton relied on advice from Attorney Denby for information about her role as trustee. She testimonially admitted that there was no evidence that Sam, Jr. and Steve had mismanaged the EMT Trusts' assets.

During a conference call on August 7, 2007, Betty informed the investment directors and other family members that she had appointed her new trustee and asked

that the investment directors meet with the new trustee. Betty did not identify the new trustee at that time. See Exhibit 2.52. On or about August 29, 2007, Shelton sent a letter to the investment directors informing them that she had accepted the position as trustee of the EMT Trusts as of August 10, 2007. She asked that they meet with her to discuss Betty's need for increased cash flow and financial resources. Exhibit 2.61. Betty earlier had emailed the investment directors requesting that she, Shelton, and they meet in person. She suggested several possible meeting dates. Exhibit 2.52; see also 2.72. Sam, Jr. agreed to meet and confirmed his availability for September 7, 19 or 20th. Exhibit 2.53. Steve agreed to meet on those same dates, but expressed his preference to remain in Florida and meet via conference call. Exhibits 2.54; 2.55. Later in September, Steve suffered a back injury that impeded his ability to travel. See Exhibit 2.87. On August 22, 2007, Betty sent an email to Shelton indicating their "agenda" for this meeting was "to talk about the implications of (Betty's) divorce and a buy out... that the red sox (sic) are an issue..." and inquiring whether Sam, Jr. and Steve should be so informed. Exhibit 2.55. They were not apprised.

In August and early September 2007, Betty and Shelton interviewed at least three litigation attorneys in Boston, Massachusetts. They testified that they initially contacted attorneys to discuss a malpractice action against Attorney Couser. This related to Betty's claim that the attorney may not have appropriately represented her in negotiating the Settlement Agreement, as well as other advice he provided unrelated to this litigation. However, given that Betty and Shelton were discussing a buy-out and issues regarding the Red Sox on or prior to August 22, 2007, it is reasonable to infer from their actions and the exhibits that their search for legal counsel included discussion

of further litigation over the EMT Trusts. Exhibits 2.55; 2.56; 2.57. It is notable that contact, and at least one of these meetings with potential attorneys, occurred even before Trustee Shelton introduced herself to the investment directors or the former trustee. The petitioners obtained the same law firm to represent them both. Each signed a fee agreement that required payment of a reduced hourly fee and a percentage of any "gross amount recovered." Exhibit 2.89. Shelton testified that she did not conduct any cost/benefit analysis to determine whether proposed litigation would benefit the beneficiaries.

On September 7, 2007, Shelton sent a letter to the investment directors asking them to provide her with $2 million within 7 days for the immediate cash needs of the trust beneficiaries. Exhibit 2.73. The letter was not addressed or sent to the former trustee, Gerald Prunier. At the time it was sent, Shelton had not taken possession of, nor had she reviewed and determined the estimated worth of the trust assets. She also had not taken into account the other income and resources of the beneficiaries at that time.[15] Further, the record does not show that Betty or her children had any emergency that required a cash payment, let alone $2 million within 7 days; in fact, Betty was then current on most of her financial obligations. What is of note, however, is that on that same day, at 7:02 in the morning, Steve emailed Shelton from Florida a message stating that Sam, Jr. would be out of the country until September 18 starting the next day; that he and Sam, Jr. would make themselves available for a meeting on September 19 or September 20, after Sam, Jr.'s return; and suggesting, based on concerns of economy, that the meeting be by telephone to "explore any issues that

[15] The ascertainable standard of the EMT GST Exempt Trust requires that the trustee take into account other income and cash resources of the beneficiaries. The EMT Non-exempt Trust does not have this requirement.

require our attention", with any unresolved matters reserved for a later face to face meeting. Exhibit 2.72. Shelton responded later that day from Chicago at 4:40 p.m., informing that she had "never found telephone conferences to be as productive as face to face meetings"; that she felt it "far more productive, as well as more economical, efficient and prudent for [them] to meet in person"; that a face to face meeting with her was "part of [his] responsibility as an investment advisor"; and that she would not agree to a telephone conference. Exhibit 2.72. Given the one hour time difference between Steve's location in Florida and Shelton's in Illinois, it is reasonable to deduce that Steve's email was available for receipt at the start of Shelton's workday, while Steve's receipt of Shelton's email would have been near or after the end of that workday, a Friday. The "$2 million within 7 days letter" was sent by Federal Express from Shelton to Steve and Sam, Jr. at an unspecified time on September 7. From the sequence of events, it is reasonable to infer that Shelton knew Sam, Jr. would not receive the letter until after the 7 days had expired; that Shelton's letter was triggered by Steve's morning email; and that it was designed to bolster her insistence that the meeting be held "face to face".

When Trustee Shelton's "request" was not satisfied and she had received no other response, she followed-up with another letter September 14, 2008 demanding that the Red Sox be sold with the resulting cash distributed immediately. Exhibit 2.77. Her endeavors to at once interview and retain litigation attorneys while seeking to personally meet with and receive an enormous financial distribution from the investment directors, ensuing as it were on parallel tracks within the same or overlapping timeframes,

persuades the court that her press for cash was unreasonable and not grounded in good faith.

Sam, Jr. was in Scotland on vacation and unaware of the September 7 letter until his return on September 17, 2007. He testified that Shelton's request for funds was unprecedented and that there had never been a request for a distribution of this magnitude or with such urgency from any family member. Sam, Jr. further testified that all family members were aware of the cash assets of the trusts and knew that the investment directors could not raise $2 million for one beneficiary in 7 days without doing substantial damage to other sibling sub-trusts. Steve testified that he forwarded the letter to their attorney, Robert Stein. Stein responded on behalf of the investment directors that until settlement documents were finalized and releases were signed by Betty and her children, the investment directors would not meet with Shelton, nor distribute requested funds. Exhibit 2.76.

After the letter from Shelton requesting $2 million in 7 days and the response from Stein that she had "the cart before the horse" in requesting a meeting prior to other conditions being accomplished, there was a significant change in the tone of communication between the parties. The meeting between Shelton and the investment directors did not occur at that time. Exhibits 2.76; 2.80. When Betty learned this, she e-mailed Shelton that "now we need to whack really really hard to get their [i.e. Sam, Jr. and Steve's] attention." Exhibit 2.81.

Barbara Tamposi, mother of the six siblings, attempted to defuse the developing discord. She requested that Sam, Jr., Betty, and Steve schedule a meeting with her attorney, Daniel Sklar, to discuss their disagreements. Exhibits 2.85; 2.86; 2.90.

Attorney Sklar confirmed a meeting date of Friday, September 28th, but Betty then insisted that she be represented by counsel at the meeting, which in turn prompted the brothers to posit that their attorney also be present. Exhibit 2.92. The meeting never occurred. Instead, on September 26, 2007, Betty's current attorney, Michael Weisman, forwarded a proposal to Attorney Sklar for the investment directors to buy out all of Betty's interests in the trust and all her individual assets in the Tamposi Companies for more than $24 million. Exhibit 2.96.

On September 28, 2007, Trustee Shelton and Betty filed a complaint against Tamposi LLC, Ballinger Properties LLC., Sam, Jr. and Steve, individually and as investment directors, with the Suffolk Superior Court in Boston alleging breach of fiduciary duty and seeking an order compelling the respondents to exercise an option for sale of the EMT Trust's share of Tamposi LLC ("the put"). Exhibit 6.2.

Tamposi LLC was a business entity owned primarily by the six sibling sub-trusts and managed by Ballinger Properties LLC, another Tamposi company. Tamposi LLC's only asset was 50 shares of New England Sports Ventures, LLC, (formerly known as FMBC LLC), the primary owner of the Boston Red Sox. Tamposi LLC had the right and option to sell its ownership shares of the Red Sox through the put, which required New England Sports Ventures, LLC to purchase those shares at a price determined after appraisal and further negotiation. Exhibit 9.12. As relevant to this litigation, the put allowed for Tamposi LLC to exercise its option to sell during the first three months of 2007 or 2008. Exhibits 9.12; 2.9. The put was not the only method for selling Tamposi LLC shares, but was an option.

The potential sale of Tamposi LLC had been a topic of discussion between Betty and the investment directors even prior to the Settlement Agreement. It was placed squarely at issue in both the Massachusetts and this litigation. In the Settlement Agreement, Tamposi LLC was one of the ten EMT Trusts' assets that specifically remained under the management of the investment directors.

The court accepts that sale of the Red Sox shares was important to the petitioners because it would raise substantial cash that would, in turn, be transferred to the EMT Trusts as a consequence of the provisions of Settlement Agreement, and removed from management by the investment directors.

Though unexpressed, the record supports a finding that sale of the Red Sox shares was contemplated when the Settlement Agreement was reached. On November 9, 2006 Attorney Couser corresponded with Sam, Jr. stating that he understood Tamposi LLC would be sold in early 2007. Exhibit 2.1. Attorney Stein replied that the investment directors' concern was maximizing return and the put would be exercised in either 2007 or 2008. Exhibit 2.2. On January 22, 2007, Sam, Jr. notified family members that it was felt more advantageous to not exercise the put that year. Exhibits 2.9; 2.16.

The petitioners testified that they filed the litigation in Massachusetts to assure that the EMT Trusts' interests in Tamposi LLC would be sold during the subsequent put period of January through March 2008.

In late March 2008, Sam, Jr. and Steve, as managers of Ballinger Properties LLC, notified the Red Sox of their intention to exercise the put. Exhibit 2.183. However, instead of following the procedural mechanics of the put, the investment directors had

an independent appraisal done and proceeded to negotiate terms for sale of the Tamposi LLC shares.[16]

Incredibly, and for reasons serving no purpose other than to render more difficult, if not sabotage, the investment directors' efforts to negotiate a sale of the Red Sox shares, on February 1, 2008, on behalf of the petitioners, their attorney wrote the attorney for the Red Sox of Betty's objection to certain actions she expected Sam, Jr. to take or that he had taken on behalf of Tamposi LLC. Exhibit 11.141. The objection cited several concerns. First, Attorney Weisman maintained that Major League Baseball and the Red Sox had not approved the transfer of management of Tamposi LLC to Ballinger Properties LLC. He asserted that Betty had never been consulted about or pleased with the Red Sox investment; but that it had been unilaterally "forced" on the family by Sam, Jr. Weisman protested that Tamposi LLC signed a restatement of the Red Sox limited liability agreement representing that it had made no transfers in violation of its terms—a false representation according to the attorney because the transfer of management to Ballinger had not been approved by Major League Baseball and personal bankruptcy filings made by family members, as individuals, had not been disclosed. He referenced a forged signature of Betty on the Ballinger operating agreement—an issue that had been raised prior to, and was preempted by the Settlement Agreement, even were it true. Lastly, Weisman asserted that Sam, Jr.'s execution of the proposed restated limited liability agreement "would be in derogation of his fiduciary responsibilities to his clients [the petitioners] by making representations and warranties that are not truthful and by further restricting [their] ability to sell their

[16] The shares were eventually sold on May 13, 2008 at a price significantly greater than any prior sale. The Tamposi LLC sale price is subject to a confidentiality agreement. The specific price has been sealed by this court upon mutual request of the parties.

interests in the Red Sox." The letter came on the heels of a deposition of the Red Sox CFO who Weisman questioned about the consequence to an owner found scalping tickets, seemingly calculated to suggest that Sam, Jr., or the investment directors collectively, may have done so. Sam, Jr. was aware that people he knew had been contacted by what he believed to be private investigators seeking "dirt". It does not appear that the Red Sox placed any credence on Weisman's assertions. The Red Sox were, however, bothered by the expense incurred for representation in the Massachusetts litigation initiated by the petitioners. In the negotiations for sale, they postured for a discount of the $250,000 to $300,000 it had incurred, or would incur, and indemnification for costs that might exceed the discount. The Red Sox also sought to negotiate a sale for the acquisition of Betty's undivided interest alone—a proposition Sam, Jr. declined, asserting that it would disserve the other family members' undivided interests and place him in a conflict position as a fiduciary. He felt that whatever price was negotiated for Betty, even assuming one might be reached that was acceptable or palatable to her, would establish a value precedent for any later sale of Tamposi interests. Further, the Red Sox ultimately changed the ownership rules of the limited partnership in February 2008, removing highly valued ownership privileges from those having less than 50 shares, the number of total shares owned by Tamposi LLC. Those perks greatly enhanced the attraction of, and hence value to, people having the kind of money required to own part of a sport franchise. All of this, played out in front of the Red Sox as it were, certainly did nothing to make the Tamposi sale negotiations easier or more successful. Wholly apart from that, it constituted precisely the type of decentralized and fragmented approach to management that Sam, Sr. sought to avoid

under the Third Amendment. It lends great compliment to Sam, Jr. and Steve's skills, and the confidence entrusted in them by their father, that they were yet able to negotiate a sale for the price they did.

In June 2008, the petitioners learned that the sale of the Red Sox shares had been completed. In the Massachusetts case, the parties disputed whether the litigation precipitated the sale or the sale would have occurred, in any event, without litigation. Sam, Jr. and Steve testified that selling the Red Sox shares outside of the put conferred greater financial benefit to the trust beneficiaries—contention the court finds credible.

Given active litigation in the Massachusetts court, the New Hampshire Superior Court and this court, the investment directors did not immediately transfer the sale proceeds to the trustee of the EMT Trusts. See Index # 114. After there were no conflicting court orders and upon court instruction, the investments directors transferred the funds in December 2008.

Shelton and Betty initiated this equity action under an original complaint dated October 12, 2007. It is limited to causes of action that arose after the parties' Settlement Agreement, as the agreement included a waiver and release of claims for all causes of action through its effective date. Exhibit 1.3.

At the time of Sam, Sr.'s death, the assets of the EMT Trusts continued to be predominantly undivided and minority interests in business entities, real estate companies and tenancies in real estate. Sale of some of these assets by the trustee is restricted by their governing agreements. The investment directors are managers or directors of many of these holdings. At the time of Sam, Sr.'s death, his estate and trust assets included approximately 400 parcels of real estate as well as multiple business

entities. Exhibit 13.5. Sam, Jr. and Steve have used their considerable knowledge and experience in the real estate business to sell or lease many of these parcels to generate substantial cash and significantly increase the long-term portfolio value for the 12 sibling sub-trusts. In distributing funds as managers or directors, Sam, Jr. and Steve provide disbursements equally to the six siblings.

Given the largely undivided and minority interests of the corpus, the petitioners allege that the trusts are unreasonably illiquid, limiting access to funds for distribution by the trustee. By illustration, the petitioners complain that this illiquidity makes it difficult, if not impossible, for the trustee to fund education of the beneficiaries as purposed by the trusts. In September 2007, the petitioners (through Betty's accountant, Sue Edwards) asked Sam, Jr.'s assistant to arrange for payment of $42,040 for John Goodlander's Groton School, and $40,000 for Margaret Goodlander's ("Maggie") Yale University, tuitions. Exhibit 2.74. Sam, Jr. replied that their mother, Barbara Tamposi, would not pay school tuitions for Betty or her children. Exhibit 2.84. Barbara Tamposi had historically often paid tuition for her grandchildren. Exhibit 2.201. She had ceased to do so for Betty and Nick's children in 2003 due to their ongoing disagreements with the investment directors. Maggie's tuition was due on October 5, 2007, under threat that she would be involuntarily withdrawn by the school at the end of that fall's semester. Exhibit 2.78. As a beneficiary of the EMT Trusts, at the discretion of the trustee, trust funds may be used for her education. Trustee Shelton testified that she was then without any trust funds to pay the tuition.

Betty then took a different route for the Yale tuition payment. Hopeful that her mother would relent and recommence her tradition of paying tuition, Betty transported

Maggie from Yale to her grandmother's house one day in late September 2007, so that the latter could personally ask her grandmother for the tuition money.[17] Barbara, aware that Betty was at odds with the investment directors again, declined. Exhibits 2.84; 2.109.

Betty claims that she herself was unable to pay Maggie's tuition at that time. Yet, the evidence shows that while the Yale tuition was due Betty paid her own $6,750 tuition to Harvard, made a $7,150 down payment for a family weekend retreat and gave a donation to Georgetown University in the amount of $20,000 as an installment on a five year pledge. See Exhibit 2.64. Additionally, she paid Cobb Hill Construction, the contractor then working on her house in Gilford, $258,239.04 in September and another $75,000 in October 2007. Exhibit 2.83.

Maggie was told by Sam, Jr. near the end of September that she would be shortly receiving a distribution from her own Tamposi assets that she could apply to the tuition. Exhibit 2.109. She received those funds approximately October 9, 2007. Nonetheless, Maggie proceeded to submit a loan application to cover the tuition expense. Exhibit 2.94. Betty co-signed the loan fully understanding that it could be repaid within thirty (30) days without interest or penalty. Exhibit 2.95. The loan was approved on October 8, 2007, one day before Maggie's account was fattened with the money from her own trust. Neither she nor Betty repaid the loan within the thirty (30) day grace period.

Soon thereafter, on November 16, 2007, Betty submitted a loan application to Sovereign Bank to secure funds for her continuing house renovations. On the loan application, she neglected to disclose that a few weeks earlier she had co-signed

[17] Betty did not enter the home or participate in the meeting.

Maggie's tuition loan. Betty falsely reported that she had been self-employed at Citrus Hills Construction for 21 years and had a monthly income from employment of $93,876.66. She further misstated the value and her ownership of the property where she then resided in Nashua. To a question asking, "Are you a party to any lawsuit?" she answered "no"—disregarding that she had already initiated the litigation in Massachusetts and New Hampshire. Exhibit 11.52. Betty's effort to attribute these falsehoods and the omission to the assistance rendered by others is not found credible, especially given her level of education, experience with legal matters and general sophistication.

Prunier testified that he would have paid Maggie's Yale tuition had it been requested of him, but he was not contacted. At the time Maggie's $40,000 tuition was due the EMT Trusts' assets included cash accounts of approximately $275,000. See Exhibits 2.133; 2.146. Trustee Shelton had not yet taken possession of these assets.

On September 28, 2007, Trustee Shelton sent a request in writing to Sam, Jr. to transfer the liquid assets of the EMT Trusts to an account under her control in Chicago. Exhibit 2.98. She directed this request to him as an investment director, not to the former trustee, Gerald Prunier. It is the former trustee who maintains control of the assets until transfer to the new trustee. RSA 564-B: 7-707. Sam, Jr. told Shelton to contact Prunier. Exhibit 2.99. Shelton then sent a letter to Prunier and his attorney, David Barradale, on October 1, 2007 requesting the transfer of funds. Exhibits 2.102; 2.105. Barradale informed Shelton of his opinion that all trust assets must be transferred at the same time, a position the court finds advisable but not essential under

the law. The letter did not state that the petitioners and trust beneficiaries would be required to sign a release prior to the transfer of trust funds. Exhibit 2.106.

The transfer of assets from Prunier to Shelton was further complicated and delayed because Trustee Shelton requested that all EMT Trusts' funds be deposited into one account at a Chicago branch of Bank of America. Exhibit 2.102. The former trustee, through counsel, informed Shelton that commingling EMT GST Exempt Trust funds with EMT Non-exempt Trust funds could trigger transfer tax consequences. Exhibit 2.111. On October 24, 2007, Shelton provided the former trustee with separate bank account numbers for transfer of the EMT GST Exempt Trust and EMT Non-exempt Trust. Exhibit 2.123. On October 30, 2007, Shelton received $239,259.62 cash from the EMT GST Exempt Trust account. Exhibit 2.133. On November 6, and 8, 2007, Attorney Shelton received $18,232.39 cash from the GST Non-exempt Trust. Exhibit 2.146. The non-cash assets, including equitable title to real estate and business entities, were transferred shortly thereafter. The trustee transition was accomplished within approximately two months of the date that new trustee Shelton informed former trustee Prunier of her assuming office.

Throughout their testimony, as well as that of Attorney Denby, the petitioners complained that the investment directors could not or would not provide a sufficiently accurate projection of the annual distributions. Attorney Denby testified that in June 2007, she was informed that Betty and her family could expect $22,000 per month from the EMT Trusts and non-trust assets—an amount Betty considered insufficient to support her living, litigation and other expenses. Exhibit 2.36. The distribution actually

received over the years has been substantially greater than $22,000 per month, a fact that had to be well known by Betty, if not by her trust attorney and trustee.

The petitioners are seeking surcharge, removal of investment directors and "decoupling" Betty's trusts' assets from those of the sub-trusts of other family members. By decoupling, the petitioners mean that all of the EMT Trusts assets should be purchased by Sam, Jr. and Steve, individually or as investment directors on behalf of the remaining sibling sub-trusts, for separate investment and management by Betty's chosen trustee for the EMT Trusts.

The respondents argue that decoupling is contrary to Sam, Sr.'s intent as settlor. They complain that Betty has been trying to force a buy-out or severance of her interests from the rest of the family trusts for many years. They presented testimony by Attorney Alan Reische, Sam, Sr.'s trust and estate planning attorney, who stated that he had personally met with Betty and spoken with her on the phone in 1994 concerning her father's determination that family members be treated equally and that the family businesses continue after his death. Exhibit 11.97. Sally testified that there were two meetings—one in 1994 and one in 1995—at which Sam, Sr. specifically informed all his children about his trusts and his intention that Sam, Jr. and Steve be in charge of the Tamposi Companies. Sally expressly recalled that Sam, Sr. told the six siblings that this was a gift and they could take it or walk away. He informed the family that he had provisions in the trust to enforce this. Sally further testified that Betty was adamant in her objection to Sam, Jr. and Steve having charge of the family business. Sally stated Betty later misrepresented to Sam, Sr. that Sally also objected, and that this nearly caused a rift between Sally and her father. Betty testified that she had no recollection of

the family meetings regarding the trust or her subsequent meeting with Attorney Reische. The court disbelieves that Betty would have no recollection of such significant and momentous occurrences touching her financial self-interests–interests that have been at the fore ever since.

The respondents request that Shelton be removed as trustee based on her inexperience, wasting of assets by bringing this litigation, and acting as an agent for but one of multiple beneficiaries.

The case was presented over the course of a protracted trial conducted between November 30, 2009 and January 22, 2010. The parties and numerous expert and lay witnesses testified. Some 556 exhibits (many multi-page to voluminous)[18] were submitted and/or admitted into evidence, as well as findings of fact, rulings of law, and memoranda. All have been carefully reviewed and considered by the court.

III. RULINGS

A. Breaches of Fiduciary Duty

(1) Failure to Acknowledge Respective Roles of Trustee and Investment Directors

The petitioners allege that the investment directors have breached their fiduciary duty by failing to acknowledge the appropriate role of the trustee. Amended Complaint Count 1a. Here lies the fundamental dispute before the court. The petitioners argue that Trustee Shelton has sole responsibility and authority to determine appropriate

[18] By way of example only, Exhibit 2.121 contains 183 pages, and Volume 3 contains six exhibits each well over 100 pages.

distributions from the EMT Trusts; and that the investment directors' responsibility is to provide funds when and in the amount requested by the trustee.

Under RSA 564-B:1-105, the powers and duties of the trustee and investment directors are determined by the trust instrument. The Third Amendment sets up a bifurcated system of fiduciaries, a trustee and two investment directors, for the 12 sibling sub-trusts. The named investment directors,[19] Sam, Jr. and Steve, are given authority to make decisions about investing, selling or retaining trust assets. Article TENTH-B (c), (e). The trustee is expressly prohibited from making any decisions about the investment or sale of trust assets, and in the parlance of RSA 564-B:7-711, the trustee is an "excluded fiduciary" with respect to investment and management of trust assets.[20] Conversely, according to Article TENTH, the trustee retains the authority and discretion to determine the amount and timing of distributions to the beneficiaries, and the investment directors are "excluded fiduciaries" regarding distributions to beneficiaries.

The petitioners maintain that it was entirely appropriate for Trustee Shelton to request $2 million to be paid within 7 days, and the investment directors should have complied without further questioning. They offered testimony of John Langbein in support of this argument. Langbein is a professor at Yale Law School, served on the committee that drafted the Uniform Trust Code (enacted in NH as RSA 564-B) and was primary draftsman of the Prudent Investor's Act (enacted in New Hampshire as RSA

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[19] The Samuel A Tamposi, Sr. 1992 Trust pre-dated the enactment of the New Hampshire Uniform Trust Code, RSA 564-B. The role of Investment Directors described in the trust instrument is analogous to what is described in the NH UTC as a Trust Advisor. *See* RSA 564-B: 12-1201(a)(10),(13), and (b).

[20] "Excluded fiduciary" means any trustee, trust advisor, or trust protector to the extent that, under the terms of the trust, an agreement of the qualified beneficiaries, or court order, (i) the trustee, trust advisor, or trust protector is excluded from exercising a power, or is relieved of a duty, and (ii) the power or duty is granted or reserved to another person. RSA 564-B:1-103(24).

564-B:9). After review of the SAT, Sr. Trust, it is his view that the trustee has the authority to instruct the investment directors to make funds available for her distribution. Langbein bases this conclusion on the trustee's discretionary power to distribute principal and income from the trust. He stated that the investment function of a trust is always subordinate to distribution and that the investment directors are "service providers" to the trustee. Langbein admitted that his analysis was premised on, and delimited by, documents provided by the petitioners' counsel. He concluded that the investment directors breached their duties by refusing to consult with Shelton and insisting on releases and personal financial information from the beneficiaries. He further stated his opinion that the investment directors breached a duty to maintain trust investments in a sufficiently liquid and diverse form that the trustee might access funds as needed.

The respondents and intervenors presented rebuttal expert testimony about the relationship of the trustee to the investment directors. Jeffrey Cooper, law professor at Quinnipiac University School of Law, referenced the SAT, Sr. Trust's having named two specific individuals as investment directors, indicating that the settlor had singular confidence in their specialized knowledge and expertise. He proffered that the trust telegraphs Sam, Sr.'s emphasis on real estate and the continuation of his business. Cooper opined that the trustee may make requests of the investment directors for distribution of funds, but the investment directors have the reciprocal right to refuse. Charles Rounds, law school professor at Suffolk University School of Law, likewise commented that the trustee has no authority to give directions to the investment directors. Further he stated that the investment directors have the right and duty to

monitor the trustee's actions if they know or should know that the trustee is breaching fiduciary duties.

Although informative, the expert testimony is not crucial to a decision on this issue. The SAT, Sr. Trust expresses Sam, Sr.'s unambiguous intent in distinguishing the roles of trustee and investment directors. The NH UTC is clear that the terms of the trust control the relationship between fiduciaries. *See* RSA 564-B:12-1201 – 12-1205. In New Hampshire, the intent of the settlor is the sovereign guide in interpreting or construing a trust. *See* Peaslee v Rounds 77 N.H. 544, 545 (1915). The settlor's intent governs unless "that intent is contrary to statute or public policy." Bartlett v Dumaine 128 N.H. 497, 504 (1986). Sam, Sr. conferred on Sam, Jr. and Steve unequivocal authority to make investment decisions and rendered their decisions neither reviewable nor reversible by the trustee. Sam, Jr. and Steve elected to retain and further invest trust assets in closely-held business entities and real estate enterprises. Their father specifically authorized such retention and investment in Article TENTH-A knowing that some or many of these holdings are or would be encumbered by sale-related restrictions or covenants under ownership agreements. They are appropriate investments according to the trust provisions and are not contrary to statute or public policy.

The petitioners attempt to buttress their position by placing focus on the EMT Trusts' provisions empowering the trustee to distribute principal regardless of the existence or amount of income available. That the trust instrument grants the trustee authority to distribute principal and income is not a compelling argument for enabling the trustee to issue mandates to or superintend the investment directors. The investment

directors make distributions to the trustees that include income from investment assets as well as proceeds from their sale. When cash is distributed to the sub-trusts, it may be retained or distributed to the beneficiaries, in the discretion of the trustee. The court has taken note that, as of June 2009, the trusts of Betty's five siblings all had significant cash assets. See Exhibit 3.6 pp. 89-94.

The Second Amendment and Third Amendment introduced the concept of investment directors and limited the powers and duties of the trustee. The trustee is relegated to a ministerial role as to investments and is required to follow the directions of the investment directors. Read in its entirety, the trust makes clear that Sam, Sr. reposed special confidence in Sam, Jr. and Steve's ability to run the Tamposi Companies and make relevant financial decisions. To whatever extent there is perceived ambiguity between the powers of the trustee, as stated in Article FIFTH (a) and SIXTH (a), and the investment directors under Article TENTH-B, the court rules that the later drafted Article TENTH-B, inclusive of both trustees and investment directors, controls.

The terms of the trust grant the investment directors authority to retain, sell and purchase investments. They have no duty to make assets available at the request or demand of the trustee above and beyond what would be necessary to provide for the beneficiaries' education and maintenance in health and reasonable comfort.

The petitioners argue that the respondents' actions impaired the dominant purpose of the EMT Trusts to benefit the beneficiaries, by denying the trustee unfettered access to all of the trust assets. The court recognizes that a trust may have multiple purposes, including, for example, to: provide income to the beneficiaries, minimize

taxes, provide protection from creditors, maintain a family business, and provide long-term asset growth for multiple generations of beneficiaries. The SAT, Sr. Trust was created to further all these purposes. The investment directors have been loyal to the trust purposes and their actions have greatly enhanced the benefits received by the beneficiaries. The inability of the trustee to access all of the trust assets is a direct consequence of Sam, Sr.'s trust scheme.

Trustee Shelton has no authority to direct retention or sale of assets and no duty to review the actions of the investment directors in making investment decisions. *See* RSA 564-B:12-1204. The investment directors have invested trust property in assets that provide substantial income to the beneficiaries as well as significant long-term growth; and have not breached their fiduciary duties in so doing.

(2) Failure to Appropriately Invest Assets to Assure Sufficient Liquidity

Illiquidity and Non-diversity

The petitioners argue that the respondents have breached their fiduciary duty by failing to appropriately invest trust assets to assure sufficient liquidity. Amended Complaint Count 1b. They argue that the respondents have overly invested in undivided minority interests in real estate and business entities. They rely on the testimony of Professor Langbein, who stated that the investment directors have a continuing duty to diversify trust assets to afford sufficient liquidity to meet the reasonable and foreseeable distribution requests of the trustee. Langbein indicated that it would not benefit the beneficiaries to hold assets that were illiquid or undiversified. He offered that the EMT Trusts contained more real estate interests than is appropriate.

The respondents counter that Betty is estopped from asserting this argument by the Settlement Agreement. When it was signed, the assets of the twelve sibling sub-trusts were held primarily as undivided, and often minority interests in real estate and business entities. The agreement did not change the composition of the EMT Trusts' assets, nor include any requirement that the assets be made more diverse or more liquid.

The SAT, Sr. Trust alters or eliminates provisions of the prudent investor rule that would otherwise disallow the investment in under-diversified assets, and holds the investment directors to a lesser standard of care than the trustee. Sam, Sr. explicitly deemed real estate a proper investment, even if it cumulatively constituted a predominant portion or all of the trust property. SAT, Sr. Trust Article TENTH-A. The investment directors are held to the business standard of "good faith and ordinary diligence" (SAT, Sr. Trust Article TENTH-B) rather than the default standard of "reasonable care, skill, and caution" in the NH UTC. RSA 564-B:9-902(a) (Prudent Investor Rule).[21] These provisions lead the court to conclude that Sam, Sr.'s intent was to allow the investment directors to retain undivided real estate interests as long as they determined, in their good business judgment, that it was appropriate.

RSA 564-B:9-903 states that: "A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." The Comments to the

[21] RSA 564-B:9:901(b) states that the terms of the trust may expand, restrict, eliminate or alter the Prudent Investor Rule, i.e. RSA 564-B:9.

Prudent Investor Act[22] specify that a desire of the settlor to retain a family business may be a special circumstance that would justify not diversifying a trust. *See also* In re Pulitzer's Estate 139 Misc. 575 (NY 1931).

The court notes that in a recent article Professor Langbein himself suggests that in certain circumstances maintaining a family business may be an appropriate reason for nondiversification of trust assets and may not violate the "benefit-the-beneficiaries" rule. Langbein, Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments, 90 BU Law Review 375, 394 (2010).

Sam, Sr. built a sizeable family business that was well-known in the community. It had provided employment for all six of his children at some time, and provided regular as well as significant income for them. The investment directors are given authority to act as managers and directors of the various companies and business entities. Sam, Sr. specifically chose his oldest and youngest sons to service the business empire after he himself would have no ability to do so. Sam, Sr. wanted the family business continued for the equal benefit of his children and their issue. The investment directors have been extraordinarily faithful in fulfilling that desire by their trust management and investment. They have consistently made contemporaneous and equal transfers to the six siblings' trusts.

Maintaining the family business constitutes a special circumstance exonerating the investment directors from a duty to further diversify under RSA 564-B:9. The investment directors have managed the trust assets to provide, at once, both substantial annual income and long-term growth for the current and future beneficiaries.

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[22] *See* National Conference of Commissioners on Uniform State Laws 2002, Comment to Uniform Prudent Investor Act ("UPIA"), Section 3, Diversification. http://www.nccusl.org. RSA 564-B:9-903 has the exact language of UPIA, Section 3.

The respondents and intervenors presented the expert testimony of Robert Wexler to posit that the assets of the sibling sub-trusts are sufficiently diverse because they incorporate a mix of commercial, retail, and residential real estate holdings. This bolsters the court's determination that the investment directors had no duty to further diversify the trusts' assets.

Ascertainable Standard

The petitioners complain that, because of the lack of diversity and liquidity of assets or other cause, the investment directors have failed to provide sufficient funds to the trustee that she can adequately provide for the beneficiaries' education and maintenance in health and reasonable comfort. Amended Complaint Count 1c. In support, Trustee Shelton testified that Betty's needs are significant due to her house construction and cumulative litigation costs. They have not demonstrated that the beneficiaries of the EMT Trusts have a greater financial need than has been provided. There was no evidence introduced showing that the beneficiaries have not and are not receiving funding for their education, health and reasonable comfort. Betty owns a beautiful home on Governor's Island in Lake Winnipesaukee—also the legal residences of her three adult children. Betty attends Harvard Divinity School, Christina is a graduate of Georgetown University, Maggie is a graduate of Yale University and John attends St. Andrew's University in Scotland. The petitioners have chosen to consume enormous trust resources in funding this litigation, outlay neither related to education nor maintenance in health and reasonable comfort.

The SAT, Sr. Trust permits the trustee to determine and distribute to the beneficiaries resources "necessary for their education and maintenance in health and

reasonable comfort." Article FIFTH and SIXTH. By creating this trust, Sam, Sr. assured that his children would not have immediate or unrestricted access to an inheritance. The trust does not accommodate the trustee's showering the beneficiaries with extravagances, but instead limits distributions to funding that is necessary and related to education, health and reasonable comfort.

The EMT Trusts have consistently received sufficient cash on an annual basis to reasonably meet their ascertainable distribution standards.

(3) Refusal to Meet with Trustee

The petitioners allege that the respondents breached their fiduciary duties by: refusing to meet with the trustee unless a release was signed and financial information about the beneficiaries was provided; refusing to cooperate with Trustee Shelton; and seeking her removal as trustee in violation of the Settlement Agreement. Amended Complaint Counts 1f and 1g.

In late August and early September 2007, the parties were corresponding by email and fax in an attempt to schedule a meeting requested by the petitioners. The respondents agreed to meet on three possible dates suggested by the petitioners, September 7, 19 or 20, and a meeting was scheduled for the 20th. It was not until after the September 7 "$2 million in 7 days letter" that the respondents, through their counsel, indicated that there would be no meeting unless a release and waiver were provided. The respondents' requests for a release, and later, financial information, were precipitated by Shelton's demand for trust assets without so much as waiting for the meeting the petitioners had sought.

As "excluded fiduciaries" the investment directors have no right to determine the amount or timing of distributions to the beneficiaries and no duty to review the trustee's distribution decisions. *See* RSA 564-B: 12-1202, 12-1204. Although the investment directors may request financial information from the beneficiaries, they have no right to demand beneficiaries' financial statements prior to making distributions. In so far as they continued to transfer cash in the customary course without receiving the requested information, there was no breach of duty.

The trustee and the investment directors have an obligation to cooperate and keep the other informed about the administration of the trust. *See* RSA 564-B:7-703(i), 12-1202(a). The petitioners have not met their burden in proving that the respondents refused to cooperate with the trustee. In August and early September 2007, the petitioners were meeting with litigation attorneys in Boston. By September 16th, prior to the scheduled September 20th meeting with the respondents, the petitioners were drafting a complaint. Exhibit 2.224. Betty, through her attorney, proceeded to cancel a September 28th meeting with the respondents at Attorney Sklar's office. The court is mindful that throughout the August and September 2007 timeframe the petitioners' agenda was undisclosed—a buy-out of the EMT Trust assets and the Tamposi Company assets owned individually by Betty. Exhibits 2.55 and 2.96. In this regard, the trustee herself acted toward the investment directors in a noncooperative fashion. The respondents' request that Trustee Shelton be removed is a remedy sought by them in this litigation; it does not serve as its cause.

(4) Sale of Tamposi LLC (Boston Red Sox)

It is asserted by the petitioners that the respondents breached their fiduciary duties by: refusing to commit to the sale of Tamposi LLC; forcing the trustee to institute and prosecute the Massachusetts litigation; and failing to distribute proceeds from the sale of the EMT Trusts' interests in Tamposi LLC. Amended Complaint Counts 1d, 1e, 1h, 1i, 1j.

The Settlement Agreement continued the investment directors' responsibility for the investment and management of Tamposi LLC. The decision how, when, or if to sell the EMT Trusts' interests in the Boston Red Sox lay in the sole discretion of the investment directors, consistent with their duty to act in good faith, in accordance with the terms of the trust, and in the interests of the beneficiaries. *See* RSA 564-B:12-1202(a). The respondents acted in good faith in selling the trusts' interests in 2008. They sold the shares, in avoidance of the put and at a price per share higher than any previous seller, not because of the litigation but because of their determination of how and when to sell, and their negotiating acumen. In so doing, the court apprehends no violation of duty.

The trustee, an "excluded fiduciary" as to investments, did not have the authority to force the investment directors to sell a specific asset, i.e. the Boston Red Sox.

The petitioners charge that the respondents' failure to immediately distribute the proceeds from the sale of the shares constitutes another breach of fiduciary duty. The facts giving rise to this allegation occurred more than six months after the petitioners filed the complaints in Massachusetts and New Hampshire. The parties were engaged in contentious litigation at the time of the sale of the Boston Red Sox shares. Initially,

the petitioners complained of the respondents' apprehended reluctance to distribute the proceeds in May 2008, prior to the actual sale. Petitioners' Motion for Order Directing Respondents to Make Disbursements, Index # 44. This motion was discussed at a hearing held on May 29, 2008, at which the petitioners requested an additional fourteen days to consider whether to present the motion for a ruling. The court granted the petitioners' request from the bench and in its order stated that upon failure of the petitioners to respond by June 12, 2008, the motion would be denied. Orders on Motions, Index # 82, 8/11/2008. The petitioners did not request the hearing until after June 17, 2008. Orders, Index # 99, 10/22/2008. The motion was entertained along with several others at a two-day hearing on November 6 and 14, 2008. Furthermore, in early June 2008, Betty's husband, Ted, submitted a motion to this court requesting that it bar distribution of the Red Sox sale proceeds to Betty. Motion to Intervene and Freeze Funds, Index # 60. The court denied leave to intervene and, in ruling on a later Motion for Reconsideration, noted that it had been informed that the superior court had issued an order restraining the trustee from distributing the proceeds in the course of the divorce proceedings. Order, Index # 97, 10/14/2008, and Order on Motion to Reconsider, Index # 107, 11/4/2008. After the November 6 and 14 hearing, this court issued an order directing the respondents to distribute proceeds from the sale of the Boston Red Sox, conditioned on the petitioners' securing relief from the temporary restraining order issued by the superior court. Orders, Index # 114, 12/3/2008. The respondents distributed the sale proceeds to the EMT Trusts in December 2008.

Given that pleadings regarding the distribution of the Red Sox sale proceeds were being considered simultaneously in three courts involving petitioners, respondents,

and petitioner's husband, the court finds that the respondents acted reasonably in awaiting orders prior to distributing funds to the EMT Trusts. The court finds that some delay in resolving this issue was caused by the petitioners' initial decision not to seek a ruling on its Motion for Order Directing Respondents to Make Disbursements and their tardiness in requesting that the matter be heard. The court finds that the respondents did not breach their fiduciary duty in distributing the proceeds from the sale of the Boston Red Sox interest.

(5) Failure to Resign as Investment Directors

Breach of their fiduciary duty is claimed owing to the respondents' failure to resign as investment directors over Tamposi LLC. Amended Complaint Count 1 k. The Settlement Agreement (Exhibit 1.3 p. 3-5) called for Sam, Jr. and Steve to resign as investment directors over the EMT Trusts' interests in Tamposi LLC "upon and to the extent of the sale, liquidation, or conversion of each trust asset to cash." The only asset of Tamposi LLC, the family's ownership interest in the Boston Red Sox, was sold in May 2008. The proceeds were distributed to Trustee Shelton in December 2008. See Exhibit 11.196 (p.4). Whether Sam, Jr. and Steve provided the petitioners with any notice of their resignation as investment directors is immaterial. After distribution of the asset, the investment directors had no authority to control the asset for investment, nor any responsibility for its distribution to the beneficiaries. The investment directors effectively resigned their authority as to the EMT Trusts interests in Tamposi LLC as of the date of distribution of the proceeds to the trustee.

(6) Misappropriating Ownership Benefits in Red Sox

The petitioners maintain that the respondents breached their duty of fair dealing by misrepresenting the nature of the ownership benefits in the Boston Red Sox and misappropriating the ownership benefits for their own personal use. Amended Complaint Counts 1l and 1m. The petitioners did not present any evidence to support these allegations. Accordingly, the court does not so find or rule.

(7) Payment of Attorneys' Fees and Making Distributions

Another proffered breach of fiduciary duty is attributed to the claimed respondents' withholding of distributions to coerce the petitioners into waiving claims against them and by ensuring payment of their own attorney's fees, while refusing to provide distributions from which their own attorneys' fees and litigation expenses might be paid. Amended Complaint Counts 1n and 1o.

During this litigation the respondents have distributed substantial money to the EMT Trusts, and the other sibling sub-trusts, for the benefit of their respective beneficiaries. They have not made any fewer distributions to the EMT Trusts than any other sibling sub-trust; and they have not withheld distributions they were legally obligated to make.

"The general rule in this State is that each party to a lawsuit is responsible for payment of his or her own lawyer's bill." Adams v. Bradshaw, 135 N.H. 7, 16, (1991), cert. denied, 503 U.S. 960, 112 S.Ct. 1560, 118 L.Ed.2d 208 (1992). The court has statutory authority to award attorneys' fees in a judicial proceeding involving the administration of a trust pursuant to RSA 564-B:10-1004. That said, there is no

statutory or other requirement that has been asserted by the petitioners obligating the respondents to fund payment of the petitioners' attorneys' fees and litigation expenses.

(8) Acting in Their Own Self-Interests

Breach of another fiduciary duty is alleged in the petitioners' amended complaint by reason of the respondent's purported actions in serving their own self-interests, as well as those of their immediate families, rather than the interests of the EMT Trusts' beneficiaries. Amended Complaint Count 1p. *See* RSA 564-B:8-802; 8-803. More specifically, they insist that the investment directors allowed family members to utilize various business benefits, real estate and office clerical services at a reduced rate while charging the petitioners excessive fees for these same services. The petitioners provided evidence that Sally obtained services from Tamposi Company personnel, in that Jeff Knight contacted Trustee Gerald Prunier on her behalf (Exhibit 11.190), and a staff person typed a letter for her on Tamposi stationery (Exhibit 11.194). But there was no evidence that these actions were specifically authorized by the investment directors or conferred benefit on them or their immediate families. The investment directors have not violated their duty of loyalty or their duty of impartiality to the beneficiaries of the EMT Trusts as averred.

(9) Engaging in a Course of Conduct Marked by Hostility

It is alleged that the respondents have breached their fiduciary duty in "engaging in a course of conduct marked by hostility over a period of years against the petitioners and the beneficiaries of the EMT Trusts, conduct which demonstrates their inability, unwillingness and unfitness to discharge their fiduciary duties..." Amended Complaint Count 1q. This litigation is limited to claims that arose subsequent to the November

2006 Settlement Agreement. Petitioners instituted this litigation in October 2007. Accordingly, their claim that there has been hostility *over a period of years* is both exaggerated and meritless. Although the parties have engaged in contentious litigation, that alone does not constitute a breach of fiduciary duty; meanwhile the investment directors have continued to appropriately manage and invest the EMT Trust assets.

(10) Wasting Trust Assets

The petitioners ask the court to rule that the respondents breached a duty by wasting resources of the EMT Trusts and other Tamposi Company assets owned by Betty for needless attorneys' fees, accountants' fees and other expenses. Amended Complaint Count 1r. The court ruled in an Order on Motion for Partial Summary Judgment that it does not have jurisdiction to hear claims pertaining to other Tamposi Company assets owned individually by Betty. Index #354. The case before this court has been exceedingly litigious. The parties have submitted a plethora of repetitive motions, responses and supportive exhibits. This will certainly be taken into account in addressing any award of attorneys' fees and costs. It was the petitioners, not the respondents, who filed this litigation in Massachusetts and New Hampshire, causing the very expenditure on attorney's fees and other litigation costs of which the petitioners complain. They have not, on their proof, established that the respondents breached their duty by asserting their defense.

B. *In terrorem* Clause

The respondents have requested that the court find that this litigation was brought in violation of Article FOURTEENTH of the Trust, the "*in terrorem*" clause. Article FOURTEENTH specifies that:

> If any person shall at any time commence or join in the prosecution of any proceedings in any court or tribunal...to have ... this trust ... set aside or declared invalid or to contest any or all of the provisions included in ...this trust...or to cause or to induce any other person to do so, then and in that event such person shall thereupon forfeit any and all right, title and interest in or to any portion of this trust, and this trust shall be distributed in the same manner as would have occurred had such person died prior to the date of execution of this trust.

Article FOURTEENTH further says that:

> Nothing contained in this Article, however, shall preclude any beneficiary from enforcing, by litigation or otherwise,...the trustee's duties under this or any other trust.

Both the petitioners and the respondents earlier raised application of Article FOURTEENTH as an issue in pre-trial motions. The court deferred requested ruling until all evidence had been submitted.

New Hampshire has long held that "[t]he general rule is well established that a beneficiary who contests the will will forfeit [her] share in accordance with a provision in the will therefor (sic)." C.f. Burtman v Butman 97 N.H. 254, 257 (1952) "Where the intention of the testator is clear and no question of public policy is involved either in the nature of the provision attached or the way the will came in to being, effect will be given to such a no-contest clause...." Id. at 259. Furthermore, "probably no jurisdiction has stood more steadfastly for giving effect to the intention of the testator rather than to arbitrary rules of law than New Hampshire." Id. at 258. In a previous order, this court found that an *in terrorem* clause is a valid provision for inclusion in a trust instrument. Order on Petitioners' Motion for Partial Summary Judgment on Applicability of *In Terrorem* Clause, Index # 160.

The provisions of the SAT, Sr. Trust, as amended, specified that Sam, Jr. and Steve would, throughout their lives, be responsible for managing investment of the trust

assets. Given that Sam, Sr. did not name successor investment directors to his sons, his clear intent was that only they would fill that role. This intention was also voiced to his children at a family meeting in 1994. Betty knew, or should have known, of her father's intent by her presence at this meeting and subsequent meeting with Attorney Alan Reische. Her testimony of having no recollection of being told about and discussing her father's trust and estate plan at that time provokes sentiment going beyond mere disbelief. Sam, Sr. intended for Sam, Jr. and Steve to continue the family business of investment in real estate, even if it might otherwise be considered imprudent. He wanted his children treated equally and for trust assets to be available for multiple generations of his issue.

Betty brought this action in October 2007, only eight months after her concurrence with entry of an order approving trust modification in accordance with the Settlement Agreement that the family had negotiated after several years of dissension. Betty herself testified that she understood the Settlement Agreement and believed it to be fair when it was reached; yet she began searching for litigation attorneys within six months after court approval. In the prior litigation, Betty sought removal of her brothers as investment directors, request for relief she presently repeats.

This action contests several provisions of the trust including, among others: the role of the investment directors (Article TENTH-B); authority of investment directors to retain assets in common with other sibling trusts (Article TENTH); and their right to retain substantial trust assets as or in real estate (Article TENTH-A). The court finds that in bringing and prosecuting this litigation the petitioners have acted in bad faith.

The petitioners strive to undermine and eliminate the role of the investment directors as described in the SAT, Sr. Trust. The court has found that the investment directors did not breach their fiduciary duties to the petitioners, have served appropriately and have very successfully managed and invested the trust assets. The actions of the petitioners in bringing this matter to court were motivated by a desire to force a buy-out of Betty's share of the trust and non-trust assets. Many of petitioners' actions strike the court as contrived in a calculated endeavor to manufacture evidence for purposes of litigation. Had Trustee Shelton concentrated on taking possession of the assets, she would have had sufficient funds to pay Maggie's tuition. Had Trustee Shelton actually been driven to take over as trustee, she would have agreed to an initial meeting in person with one investment director and telephonically with the other, who had suffered a back injury and lived in Florida. Had Trustee Shelton truly sought to cooperate with the investment directors, she would not have sent the "$2 million in 7 days letter" without first evaluating what assets the trusts held or how feasible fulfillment of her request would be. Nor would she have sent such a letter only nine days after introducing herself to the investment directors and prior to evaluating the other assets of the beneficiaries.

Article TENTH-A of the trust instrument specifically allows the investment directors to hold trust assets in real estate interests, creating the illiquidity of which the petitioners complain. Article TENTH of the trust instrument specifically allows the sibling sub-trusts to be combined or commingled in undivided proportionate interests. These provisions are entirely consistent with Sam, Sr.'s wish to benefit each of his children and their issue as integrated parts of the larger whole. The court has found

that these provisions do not violate any statute or public policy. The petitioners have contested them.

The remedies sought by the petitioners, including the removal of the investment directors and the "decoupling" (or buy-out) of the EMT Trusts from the other trust assets, are yet other manifestation of their wish to challenge provisions of the SAT, Sr. Trust. The petitioners' Complaint prior to amendment, sought liquidation of the Tamposi Companies. It was clearly the intent of Sam, Sr. in devising his trust strategy, that the Tamposi family business would continue; that the trust assets would be managed and invested together; that his children would be treated equally; and that family bonds would be cemented as a result. In this litigation, the petitioners aspire to defeat these purposes by disengaging the interests of Betty and her issue from the train, taking it down an independent track where they will be free to choose their own destination and route for getting there.

The petitioners contend that this litigation concerns breaches of fiduciary duty by the investment directors, affording a free pass from the *in terrorem* clause's bite under Article FOURTEENTH. The court finds this argument unpersuasive. As early as August 2007, petitioners planned to bring litigation concerning the trust, prior to most or all of the breaches alleged in the petition and even prior to introducing the new trustee to the investment directors or the former trustee.

The *in terrorem* clause has been violated. The court finds and rules that Elizabeth M. Tamposi has forfeited her right, title and interest in the trust. *See* Tumminello v Bolten 873 N.Y.S. 2d 731, 732, 59 A.D.3d 727, 728 (NY 2009) (forfeiture of interest in trust by challenging its validity in guardianship proceeding); Ackerman v

Genevieve Ackerman Family Trust 908 A.2d 1200, 1204 (DC 2006) ("no contest" provision in trust ruled valid and enforceable, and lawsuit to "reform" deemed clear trust violation).

Had the petitioners sincerely believed that the trustee had power to require liquidation of trust assets and demand distributions, they would have petitioned the court for instructions pursuant to RSA 564-B:2-201(c), with enhanced, if not avoidant, prospect of not implicating the *in terrorem* clause. The petitioners, one of whom is herself an attorney, would have been better advised to vet any genuine concern they had through the less contentious proceeding for an instruction. *See e.g.* In re Pack Monadnock 147 N.H. 419 (2002).

The respondents' "Motion to Forfeit Elizabeth M. Tamposi GST Trust and the Elizabeth M. Tamposi Trust, Both Created under the Samuel A. Tamposi, Sr. 1992 Trust, and the Elizabeth M. Tamposi Trust Created Under the Samuel A. Tamposi, Sr. 1994 Irrevocable Trust, and to Distribute All Assets Remaining in the Trusts in the Same Manner as if Elizabeth M. Tamposi Had Died Prior to Execution of the Trusts" is **granted** consistent with other orders herein.

Having so ruled, the court proceeds to a consideration of the timing of the forfeiture of Betty's interest in the EMT Trusts. The wording of Article FOURTEENTH suggests that forfeiture would occur at the time that a person commenced or joined in proceedings to oppose the trust or any provision of the trust. Article FOURTEENTH states that "if any person shall ...commence ...proceedings in any court...then and in that event such person ...shall thereupon forfeit...." (Emphasis added). The parties have provided substantial evidence that Betty and Trustee Shelton have used

considerable assets from the EMT Trusts to fund this litigation against the investment directors. The court finds it is contrary to the intent of SAT, Sr. to allow a beneficiary to use the assets of the trust in order to violate the *in terrorem* clause. It finds further that Betty forfeits all her right, title and interest in the EMT Trusts as of the date of filing the original Complaint.

After review, the court will order the petitioners to pay reasonable attorneys' fees and reasonable costs incurred by the respondents and intervenors in defending this action. It takes no position on the litigation between the parties in Massachusetts and will not order payment of attorneys' fees and costs incurred by either party in that action.

The court has carefully considered all claims prior to coming to the conclusion that the *in terrorem* clause has been violated. It is compelled by the stated intent of the settlor to order the forfeiture of Betty's interest. Although not uncommon in wills, an *in terrorem* clause is not frequently seen in a trust document and Sam, Sr. included it knowingly. As of 1994, the six siblings were aware of the *in terrorem* clause. Betty specifically knew her risk of forfeiture in filing this litigation, given the prior litigation and the earlier order on "Petitioner's Motion for Partial Summary Judgment on Applicability of *In Terrorem* Clause." Index # 160. Furthermore, if history is any indication of the future, Betty will not cease litigating as long as her interests are tethered to that of her brothers and other siblings, and her assets remain in the Tamposi Companies.

C. Motion to Remove Trustee Julie Shelton

The respondents seek to disqualify Julie Shelton as trustee of the EMT Trusts, alleging that she is incompetent and has wasted trust assets by bringing this litigation. The petitioners, Betty and Shelton, object. Maggie Goodlander and Christina

Goodlander, beneficiaries of the EMT Trusts, testified at the final hearing and informed the court that they did not wish for Julie Shelton to be removed as trustee.

RSA 564-B:7-706 (a) states that, "The settlor, a co-trustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative." The respondents are not settlors or beneficiaries of the EMT Trusts. They are co-fiduciaries, but their role in the EMT Trusts is limited to investment and management of the trust assets. They have not been aggrieved by the distribution decisions of Trustee Shelton. The court finds that they are not in a position to request removal of the trustee over the objection of the beneficiaries.

RSA 564-B:7-706 provides that the court itself may remove a trustee on its own initiative. Trustee Shelton testified at the final hearing, and the court finds as credible, that she reluctantly agreed to serve as trustee because Betty was unable to procure an institutional trustee. Shelton does not wish to continue serving as trustee for the long-term. She had no prior experience in trust administration, and accepted her appointment as trustee without thoroughly evaluating the trust terms or understanding her role or duties.

Trustee Shelton is a party to this litigation. She colluded with Betty in creating controversy with the investment directors. She participated with Betty in interviewing and hiring litigation counsel to bring this lawsuit. This litigation has cost millions of dollars in fees for the attorneys, trustees, experts and other litigation costs and expenses. Shelton did not conduct an appropriate cost/benefit analysis prior to bringing this litigation, as suggested by her own expert, John Langbein. She did not request transfer of assets to her until six weeks after she was named as trustee. She testified

that litigation costs were so massive that there were insufficient funds in the EMT Trusts to provide for Christina, Maggie and John. Shelton violated her duty as trustee to control and protect trust assets, and her duty to invest and manage trust assets with reasonable care, skill, and caution. RSA 564-B: 8-809, 9-902. The court finds that bringing this litigation was to benefit one trust beneficiary, i.e. Betty, and afforded little or no value to the other beneficiaries including, and most especially, the unborn. Trustee Shelton violated her duty of impartiality to the beneficiaries. RSA 564-B:8-803.

The court finds that Trustee Shelton has persistently failed to administer the trust appropriately and removal of Trustee Shelton will best serve the interest of the beneficiaries. RSA 564-B:7-706. The court further finds that Trustee Shelton is entitled to reasonable compensation as trustee, commensurate with her duties of trust administration. RSA 564-B:7-708.

D. Other Rulings

The court appointed a guardian ad litem to represent the interest of the beneficiaries and/or remainderpersons of the EMT Trusts who are under disability or presently not ascertainable. Orders, Index #114. The guardian ad litem commented that she had no specific evidence that the investment directors in any way breached their fiduciary duty between November 2006 and August 2007. Report of the Guardian ad Litem, p.12, Index 377. She further commented that there was a significant level of distrust between the parties and that "the largest single drain on the assets of each of the individual sub-Trusts...has been, and foreseeably could be, the expenses of the litigation that now span nearly a decade...." Report, p. 35. Additionally, the guardian ad litem stated that:

> it is more likely than not that litigation in one form or another will continue unless or until it is possible to sever the EMT interests, both Trust bound and not, from the interests of the other family members. In sum, one living beneficiary of the Samuel A Tamposi, Sr. Revocable Trust of 1992 is not content to have her financial future tied to those of her siblings and, in particular, to the Investment Directorship of her two brothers. Report, p. 36.

In her report and testimony, the guardian ad litem suggests that a court order decoupling Elizabeth's interests from that of the rest of the Tamposi family as Tamposi real estate assets are liquidated would minimize further litigation costs and preserve assets for the unborn issue who are EMT Trust beneficiaries. The court has found that the respondents did not breach their fiduciary duties. That being the case, there is no premise for legal or equitable relief consistent with her recommendation.

The parties have submitted one thousand thirty five (1035) requests for findings of fact and rulings of law which the court determines is an unreasonable number. *See* Clinical Lab Products, Inc. v. Martina, 121 N.H. 989, 991 (1981); (when number of requests is unreasonable, the court may rely upon its narrative findings of essential facts and ignore the requests).

IV. ORDERS

1. By bringing this action, Elizabeth M. Tamposi has violated the "in terrorem" clause of the Samuel A. Tamposi, Sr. 1992 Trust and thereby forfeits all of her right, title and interest in or under the Samuel A. Tamposi, Sr. 1992 Trust, as amended by the settlor and as modified by the parties' Settlement Agreement.
2. Elizabeth Tamposi shall not receive distributions from the Elizabeth M. Tamposi Non-exempt Trust or the Elizabeth M. Tamposi GST Exempt Trust. Elizabeth

Tamposi shall reimburse the trusts for any distributions received by her, retroactive to the date of filing the original Complaint.

3. Julie Shelton is removed as trustee of the Elizabeth M. Tamposi Trusts.
4. Julie Shelton shall provide the court with an accounting of the compensation she has received as trustee within 30 days after the date of the notice of this order for the court to determine the reasonableness of this compensation.
5. The children of Elizabeth M. Tamposi may choose, by majority vote, a successor trustee by the date of the removal of Trustee Julie Shelton.
6. If the children of Elizabeth M. Tamposi have not chosen a successor trustee by the date of the removal of Trustee Julie Shelton, subject to his acceptance, the court will appoint Attorney Eugene Van Loan as trustee of the trusts for the benefit of Elizabeth M. Tamposi until such time as a successor trustee is named by a majority of the beneficiaries.
7. Petitioners' request for attorneys' fees and costs is **denied**.
8. After receipt of further filings, the court will make a determination of attorneys' fees and costs of the respondents and intervenors chargeable to and payable by the petitioners.
9. Respondents and intervenors shall provide summaries of their reasonable costs and attorney's fees within thirty (30) days of the notice of this order. Petitioners shall have ten (10) days thereafter to submit their objections.
10. Motions for reconsideration or notices of appeal shall not stay the application of this order. Probate Court Rule 59-A.

11. The parties' requested findings of fact and rulings of law are **granted** so far as consistent with the above order. Any of the parties' requests for findings and rulings inconsistent with the order, either expressly or by necessary implication, are hereby **denied** or determined otherwise to be unnecessary in light of the court's decision.

8·18·10
Date

Gary R. Cassavechia, Judge