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Case No. 1803-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MERRILL LYNCH TRUST COMPANY, FSB, Plaintiff, v. MARY F.C. CAMPBELL, individually and as Trustee for the Mary F.C. Campbell Trust and as beneficiary of the Mary F.C. Campbell Charitable Remainder Unitrust, MARY ELEANOR CAMPBELL WEIDLEIN, JAMES RUSSELL CAMPBELL, MARGARET ANN CAMPBELL VAN NOTE, ST. ANDREWS SCHOOL OF DELAWARE, FLINT HILL SCHOOL, LANDON SCHOOL, AMERICAN RED CROSS and WELLESLEY COLLEGE, Defendants.	:	**C.A. No. 1803-VCN**

MEMORANDUM OPINION

Date Submitted: April 13, 2009
Date Decided: September 2, 2009

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NOBLE, Vice Chancellor

I. INTRODUCTION

The financial advisor (or sales representative) of a major brokerage firm improvidently advised an elderly woman to place most of her life savings in a charitable remainder unitrust with a 10 percent annual payout, lifetime gifts to her children as successor-beneficiaries, and the remainder to go to five charities, an event expected to occur almost half a century later—objectives that all now seem to agree and understand were unrealistic and likely unattainable. In the spirit of cross-selling, a trust company sister entity of the brokerage firm was designated trustee. Legal advice was provided by an attorney selected by the brokerage firm; the attorney never even spoke with her client, the trustor.

In order to achieve the desired annual distribution and to maintain any hope of preserving principal for the benefit not only of the intervening life beneficiaries but also of the charities, the trust company invested the assets almost exclusively in equities. When the financial markets experienced a downturn, this investment strategy, which arguably suffered from a lack of diversification, resulted in a drastic drop in the asset value of the trust.

The trustor first asserted claims against the brokerage firm based on the investment mix, but did not prevail in that arbitration proceeding. She then sought to replace the trustee, but the trust company refused unless a release was given. When, as one would expect, no release was forthcoming, the trust company filed

this action for approval of its accounting. The dispute is not about the accuracy of the numbers; it is about the trust company's investment strategy, issues framed primarily by the trustor's counterclaims. The trustor's challenge to the wisdom of the advice that led her to establish the unitrust in the first instance has been dismissed by this Court as time-barred.

In this post-trial memorandum opinion, the Court finds that the trust company generally acted within the broad discretion accorded it under the controlling trust document as well as the laws of Delaware governing the actions of fiduciaries and trustees. Certain payments from the trust related to the arbitration between the trustor and the brokerage firm, however, will be disallowed.

II. BACKGROUND

In 1996, Defendant-Counterclaimant Mary F.C. Campbell ("Campbell"), a then seventy-four year old resident of Delaware, with an infirm husband ten years her senior, was persuaded by Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Pierce") to establish a charitable remainder unitrust (the "Trust") with a predecessor of Plaintiff Counterclaim-Defendant Merrill Lynch Trust Company, FSB ("MLTC") as the Trustee.[1]

[1] The Irrevocable Unitrust Agreement (the "Trust Agreement"), dated August 8, 1996, appears as Trial Exhibit CX 1. It established the only trust at issue in this matter. Compl. ¶ 9. The initial trustee was Merrill Lynch Trust Company of America. MLTC is its successor by a merger that occurred on January 2, 2001. The Court refers to both corporate trustees as "MLTC."

A. *Background*

The story of Campbell and her husband is an inspiring American tale. Campbell was born on the Fourth of July, 1921.[2] She is the daughter of a World War I veteran who was poisoned by mustard gas and injured by shrapnel in the service of his country. Her father lost an oil business to the Great Depression and a farm to the Dust Bowl.[3] Campbell's father was forced to move his family east from their Oklahoma home. They settled in the nation's capital where Campbell's father could receive treatment for his injuries at Walter Reed Memorial Hospital.[4] Campbell stayed behind to finish college.

After her graduation—an event postponed by a bout with pneumonia—Campbell joined her family in Washington, D.C.[5] She too served her country during armed conflict: she worked as an FBI translator during the Second World War. After the war, she left government service for a job with Esso Standard Oil ("Esso").[6] It was there that she met her future husband, James Campbell, himself just back from serving his country in the United States Navy.[7]

Campbell's husband was born in Maryland. He was bright, and graduated high school at sixteen years of age. After college he enrolled in the George

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[2] Transcript ("Tr.") at 252.
[3] *Id.* at 252-53.
[4] *Id.* at 254.
[5] *Id.* at 254-55.
[6] *Id.* at 255.
[7] *Id.*

Washington University Law School in 1932.[8] The Great Depression dealt Campbell's husband a hard hand as well; when money ran short he was forced to drop out of law school. He found a job at Esso selling furnaces door-to-door. His career with the company was interrupted by his service in the Navy, and he returned to Esso after the war where he met his future wife. Campbell and her husband married in 1948.

Over the next two decades the couple repeatedly relocated as Mr. Campbell's career with Esso advanced: first, to Montclair, New Jersey, and eventually to destinations outside the United States. From 1948 through 1970 the couple lived exclusively abroad; Campbell's husband was stationed in Puerto Rico, Panama, the Dominican Republic and Haiti.[9] By their second station in Puerto Rico, Campbell's husband had become President of Esso Puerto Rico.[10] There Campbell gave birth to their first child.[11]

The couple lived in Cuba during the turbulent years of Castro's rise to power, and Campbell later gave birth to two more children in Chile. The family eventually moved to South Africa, where they remained until Campbell's husband retired from Esso as the Manager and CEO of Esso Standard Oil of South Africa.[12]

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[8] *Id.* at 256.
[9] *Id.* at 259.
[10] *Id.*
[11] *Id.*
[12] *Id.*

Retirement was short-lived. Campbell's husband returned to work with the Agency for International Development, assisting in the administration of American schools and hospitals overseas. He eventually was appointed United States Ambassador to El Salvador.[13]

Campbell's husband served only modest time in government service, and he enjoyed an equally modest salary.[14] Although his career with Esso was successful, compensation was not extravagant. Yet, Campbell's husband was good with money, and he participated in an Esso stock benefit program over his years with the company. At retirement, Campbell had accumulated 20,000 shares of Esso (later Exxon) stock through the program.[15] Those shares constituted the bulk of the family's assets and 10,000 of those shares were deposited into a college fund for the couple's three children. The remaining 10,000 shares would ensure the couple's financial well-being through their retirement years.[16]

The couple spent an increasing part of their retirement in Florida, where Mr. Campbell was introduced to a Pierce broker named Baerbel O'Haire ("O'Haire"), who assisted Mr. Campbell in the management of his assets.

In the early 1990's Mr. Campbell was diagnosed with Parkinson's disease. His health declined rapidly, and although the couple had sold their Florida

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[13] *Id.* at 261-62
[14] *Id.* at 262.
[15] *Id.* at 258, 264.
[16] *Id.* at 264.

condominium and moved to Delaware, he instructed his wife to reach out to O'Haire in the event she needed assistance in managing the couple's finances.[17]

B. *The Creation of the Trust*

Campbell had little knowledge of financial matters. During their marriage Campbell managed the household and her husband managed the couple's finances.[18] In fact, Campbell's husband rarely discussed financial matters with her.[19] Only when his health began to fail did Campbell become involved with the management of their finances, and then only in a limited capacity.[20] Her husband's deteriorating health eventually forced Campbell to assume fully the responsibilities of managing their finances. In doing so Campbell was loyal to her husband's instruction, and she relied upon O'Haire's guidance.

In 1996 Campbell traveled to Florida without her husband in order to discuss the couple's financial situation with O'Haire. While the Campbells' Exxon shares had greatly appreciated over the years, they were paying only modest dividends. O'Haire persuaded Campbell to place those shares in a charitable remainder unitrust, with MLTC as trustee, where they could be liquidated and invested to generate a steady, consistent income stream for the couple. Campbell's husband was not fond of the idea, as he had developed a sentimental attachment to his

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[17] *Id.* at 268-69.
[18] *Id.* at 261.
[19] *Id.* at 263-64.
[20] *Id.* at 268.

Exxon shares.[21] Campbell, however, followed O'Haire's advice, and over the course of several trips to Florida executed the Trust Agreement. At its August 1996 formation the Trust had an estimated market value of $840,000.[22]

C. *The Trust and Its Performance*

The Trust Agreement provided for quarterly payments of an annual 10 percent of the net fair market value of the assets in the Trust. The payments were to go to Campbell for life, then to her husband if he survived her, and then, upon the death of the survivor of either Campbell or her husband, payments would be allocated among, and for the benefit of, the couple's three children. Upon the death of the last surviving child, the Trust would terminate and the remainder would be distributed in equal shares to five designated charities.[23] Using accepted actuarial tables, and based on the measuring life of the youngest of the Campbells' three children, the expected life of the Trust was in the range of forty-eight to fifty-one years.[24]

Shortly after the Trust's formation, Campbell's financial needs increased. Her husband's health worsened, and in addition to paying his medical bills, Campbell was burdened by the costs associated with converting a portion of

[21] *Id.* at 270.
[22] PX 1.
[23] They are: Wellesley College, Landon School, Flint Hill School, Saint Andrews School, and the American Red Cross. PX 3.
[24] Tr. at 91, 246. For convenience, the Court will use fifty years as the expected life.

her home into a handicapped accessible area to enable her to care for him at home.[25] Campbell's sister also became ill and needed assistance.[26] Additionally, one of Campbell's children needed financial assistance.[27] Campbell did as she had been instructed and informed O'Haire that her financial needs were changing. The annual Trust distribution was insufficient, and she needed access to additional funds.

Campbell's request was communicated to MLTC. Initially, MLTC had employed a "Growth & Income" investment strategy for the Trust's assets. This internal designation prescribed an investment strategy weighted heavily in equities with a target equity mix of 60-70 percent of the Trust's assets.[28] As a result of Campbell's request, the Trust investment strategy was changed from "Growth & Income" to "Growth."[29] This new designation prescribed a more risky investment strategy and targeted an equity mix of 90 percent of the Trust's assets.[30]

Campbell was entirely unaware that her request for additional income might alter the investment strategy of the Trust and expose its assets to greater risk. MLTC communicated the results of the Trust committee's decision regarding Campbell's request in a short confirmatory letter from Jane Corwin, an MLTC

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[25] *Id.* at 280-84.
[26] *Id.* at 282.
[27] *Id.*
[28] PX 8; CX 41; Tr. at 37.
[29] Tr. at 41.
[30] PX 8; CX 41; Tr. at 42.

Vice President and Trust Officer, dated February 20, 1997. It indicated that a change of investment strategy would be made. It provided:

> It is my understanding that you have decided, in consultation with your Financial Consultant Baerbel O'Haire, and your portfolio manager, Mike Crowley, that your account would be best served with an investment objective of "Growth." In light of the long-term time horizon for your trust, our Trust Committee has concurred with this decision. I would ask that you please sign and return the enclosed copy of this letter to confirm this change of investment objective.[31]

Campbell was uncertain of the import of the letter; she immediately contacted O'Haire who instructed her to sign and return the form. Campbell followed the instructions.

The shift in investment strategy resulted in an aggressive ratcheting-up of an already high equity mix allocation of the Trust's assets, as illustrated below:[32]

	Formation	Sept-99	Sept-00	Sept-01	Sept-02
Equity Mix	60%	79%	99%	98%	83%

From August 2000 to August 2002, the equity mix allocation exceeded 90 percent.[33] The shift proved to be ill-timed despite some initial increases in the Trust's value (and as a result, Campbell's quarterly payout). The periods of the Trust's high equity exposure coincided with a broader decline in the stock market

[31] PX 4; Tr. at 284-86.
[32] Data provided at CX 45.
[33] *Id.*

as a whole.[34] At the end of 1999 the Trust was valued at $943,000. Twelve months later its value had fallen to $740,000. By the end of 2002 the Trust was valued at $356,000.[35]

D. *Campbell Investigates*

The Trust's severe loss of value resulted in proportionally reduced payouts to Campbell. The timing of the reduced payouts was poor for Campbell. Her husband had died in 1999. As a result, his pension payments were cut in half. Campbell was diagnosed with cancer, and she began undergoing treatment.

Campbell inquired as to why her distributions were shrinking. Her obvious first action was to contact O'Haire. However, she did not receive a satisfactory answer. One of Campbell's friends had a son, Terry Smith ("Smith"), who worked for Pierce as a broker in Rehoboth Beach, Delaware.[36] Campbell's friend suggested she contact Smith. Smith opined that the Trust was too heavily invested in equities: that it was unbalanced.[37] Campbell asked Smith to take over the management of her account, and address this problem. This transfer occurred in November 2001 and the Trust's equity mix was reduced to 60 percent upon its return in 2002 to the original investment strategy of "Growth and Income."

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[34] *See* Tr. at 55 (explaining the reasons behind the equity market's decline).
[35] Amounts are approximate. See PX 45 for precise amounts.
[36] Tr. at 290-91.
[37] *Id.* at 291.

E. *Procedural History*

With the aid of her children, Campbell sought redress. In March 2005, Campbell commenced an NASD (now FINRA) arbitration proceeding against Pierce alleging: (i) violation of the Florida Investor Protection Act[38] by Pierce (and its brokers) through its placement of "unsuitable investments in Campbell's accounts that were contrary to her investment objective and inconsistent with her financial needs and circumstances" and through its "participat[ion] or aid in making unsuitable sales and purchases in [Campbell's] accounts"; (ii) breaches by Pierce and its brokers of their fiduciary duties of loyalty and care; (iii) negligent supervision of Campbell's accounts by Pierce; and (iv) liability by ratification of misconduct.

MLTC, although not a party to the NASD arbitration proceeding, joined with Pierce in this Court in an effort to enjoin the arbitration (the "Injunctive Action"). MLTC funded its efforts from the Trust. MLTC was dismissed from the Injunctive Action for a lack of standing; no injunction issued.[39]

Campbell, however, did not prevail in the NASD arbitration.[40] She followed that action with an attempt to replace MLTC as trustee. MLTC refused to allow

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[38] Fla. Stat. §§ 517.211, 517.301.

[39] *Merrill Lynch Pierce Fenner & Smith v. Campbell*, C.A. No. 1640-VCN. (Order Implementing Bench Ruling on Plaintiffs' Motion for a Preliminary Injunction) (Del. Ch. Jan. 27, 2006).

[40] CX 52.

the substitution and transfer of Trust assets unless Campbell released MLTC and its affiliates, including Pierce. Campbell refused to do so.

MLTC brought this action against Campbell, the individual successor beneficiaries (her children), and the various charitable beneficiaries. It sought both approval of an accounting of its efforts since 1996 and a declaratory judgment, pursuant to 12 *Del. C.* § 3521 and 10 *Del. C.* § 6504, respectively,[41] that its administration of the Trust and its investment of the Trust's assets were lawful and appropriate.[42]

Campbell counterclaimed. She asked the Court to order a refund of all Trustee's fees, brokerage and investment fees, and advisory fees; a refund of all legal fees taken by MLTC from the Trust; an injunction requiring MLTC to deliver the Trust corpus to a successor-Trustee; rescissory damages; and an award of the costs and expenses incurred in defending this action, defending the Injunctive Action, and in presenting her counterclaim here.

As amended, Campbell's counterclaims are as follows. In Count I, Campbell challenged the way in which representatives of MLTC and Pierce persuaded her to enter into the Trust Agreement. She alleged that she was induced to enter into the Trust Agreement by misleading misrepresentations and omissions on the part of MLTC and Pierce. However, all of the alleged misrepresentations

[41] Compl. ¶ 1.
[42] *Id.* ¶¶ 19-22.

occurred, and thus her causes of action arose, in 1996. The three year statute of limitations under 10 *Del. C.* § 8106, which equity would borrow for purposes of laches, imposes a time-bar that Campbell was unable to avoid. This Court dismissed Count I.[43]

In Count II Campbell challenges MLTC's portfolio investment strategies.[44] Campbell does not challenge any particular investment. Instead, she argues that investing for an individual of advanced age requires a significant component of fixed income investments instead of the 90-100 percent equity investment strategy implemented by MLTC. Count II of the counterclaim alleges that this portfolio investment strategy violated MLTC's common law and statutory fiduciary duties.

Count III alleges that MLTC breached its fiduciary duties when it initiated the Injunctive Action, and funded its unsuccessful effort by unilaterally withdrawing funds from the Trust. In addition, Campbell alleges that MLTC's initiation of the instant action, and its concomitant withdrawal of Trust funds, constitutes an additional breach of its fiduciary duties.[45]

III. ANALYSIS

Before addressing the various claims, a brief contextual assessment may prove helpful. Campbell lacked an understanding of the risks associated with

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[43] *Merrill Lynch Trust Co., FSB v. Campbell*, 2007 WL 2069867 (Del. Ch. July 11, 2007).

[44] Def.s' Am. Countercl. ¶¶ 23-29.

[45] *Id.* ¶¶ 30-35. None of the successor beneficiaries—either Campbell's children or the charities—has actively participated as a party to these proceedings.

investing, and the risks associated with the Trust's investments specifically.[46] Communications with both MLTC and O'Haire failed to inform her of the risks involved with investing the Trust's assets.[47] Moreover, Campbell did not fully appreciate the nature of the Trust or how it would be managed; she did, however, recognize that management decisions would not be hers to make. She believed, simply, that "the Exxon stock would be used to set up a trust, and there would be an income from it."[48]

Perhaps Campbell believed that the couple's primary asset would be converted to something akin to an annuity—producing a steady income stream for her, and possibly her children. Campbell's simplistic request for greater payouts reflects this belief. The Court doubts that a charitable remainder unitrust with a 10 percent payout and a long expected life was the best investment choice for Campbell. Campbell needed access to cash as necessary to cover living expenses and unexpected costs over a relatively short period of time. It was clear her husband's health was poor, and worsening. The investment provided Campbell a mere $6,237 charitable deduction; under current IRS rules the Trust's charitable remainder interests would be too small too qualify for a deduction.[49]

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[46] There, however, is no evidence suggesting she lacked the capacity to enter into the Trust Agreement.
[47] Campbell testified that "risk" was never discussed in her conversations with O'Haire. Tr. at 273.
[48] *Id.*
[49] *Id.* at 189, 235, 244.

To be certain, the Trust's provision of a 10 percent payout amount was unusual. To demand an annual 10 percent payout from a trust expected to last fifty years was truly an extraordinary decision. Both parties' experts, testifying at trial, agreed on this issue.[50] However, this was never conveyed to Campbell before the Trust's formation. In fact, quite the opposite occurred. O'Haire projected investment returns as high as 12 percent annually and counseled Campbell that similar trusts with 10 percent payouts were more common than they likely were, and were perfectly acceptable.[51] Campbell trusted O'Haire implicitly.

As distasteful as the facts are, none of the decisions surrounding the formation of the Trust can now be fairly charged to MLTC. MLTC and Pierce—which persuaded Campbell to establish the Trust—are separate legal entities. This remains true despite their mutual relationship with Merrill Lynch & Co. and despite Campbell's understanding to the contrary. While the specter of incentivized cross-selling can be gleaned from the record,[52] no evidence has been developed showing that the relationship between Pierce and MLTC was improper,

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[50] *Id.* at 401 (MLTC expert); *id.* at 190 (Campbell expert). MLTC's expert witness acknowledged that he had never seen a charitable remainder unitrust set up with a 10 percent payout during his thirty-four year career. *Id.* at 406. Campbell's expert witness had encountered only one in his equally lengthy career. *Id.* at 188, 191. That trust, however, was highly distinguishable, as it had a very short expected life—each of its two measuring lives was almost eighty years old at its formation. *Id.*

[51] *Id.* at 275.

[52] In addition to Pierce's selection of MLTC as Trustee, a third Merrill Lynch & Co. entity managed the Trust's transactions.

or misrepresented. Most importantly, any claims Campbell may have had concerning the formation of the Trust are time-barred.

A. *Initial Investment Strategy*

MLTC, as Trustee, must be held to the same prudent investor standard as any other professional trustee charged with the management of a trust.[53] This standard requires a trustee act with skill, care, diligence and prudence in light of the circumstances.[54] The Restatement (Third) of Trusts articulates the prudent investor standard as follows:

> The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.
>
> (a) This standard requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust.
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> (b) In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.[55]

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[53] The Trust Agreement at Article FOURTH (A) provides for the prudent investor standard:

> With respect to the property under its care and management, the Trustee shall not be liable for any loss or depreciation in the value thereof by reason of its making any sale, investment or reinvestment, or continuing to hold any such property, unless it shall have failed to act in good faith or with the judgment and care, under the circumstances then prevailing, which a person of prudence, discretion and intelligence exercises in the management of his or her own affairs.

[54] *Wilmington Trust Co. v. Coulter*, 200 A.2d 441, 447-48 (Del. 1964).

[55] RESTATEMENT (THIRD) OF TRUSTS § 90 (2007).

The very terms of the trust agreement, and its obligations, shape the contours of the prudent investor's responsibilities. A trustee will not be liable to a beneficiary for following a specific investment strategy to the extent that the trustee acted in reasonable reliance on the terms of the trust.[56] The conduct of a trustee in administering the trust is not to be determined a violation of any fiduciary duty based on hindsight knowledge of subsequently developed facts and circumstances.[57]

The Trust anticipated no less than ten beneficiaries. Under Delaware law, when a trust has more than one beneficiary, a trustee is under a duty to administer the trust in a manner which preserves a fair balance between the beneficiaries, and to ensure the integrity of the trust's assets.[58] This duty of impartiality required MLTC to invest in a manner designed to deliver reasonable payments to the Trust's income beneficiary and to preserve the Trust's corpus for the benefit of others. The Restatement (Third) of Trusts articulates that balance as follows:

> (1) A trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust, requiring that:
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> (a) in investing, protecting, and distributing the trust estate, and in other administrative functions, the trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust; and

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[56] *Law v. Law*, 753 A.2d 443, 448 (Del. 2000).
[57] *Coulter*, 200 A.2d at 448.
[58] *DuPont v. Delaware Trust Co.*, 320 A.2d 694, 699 (Del. 1974).

> (b) in consulting and otherwise communicating with beneficiaries, the trustee must proceed in a manner that fairly reflects the diversity of their concerns and beneficial interests.
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> (2) If a trust is created for two or more beneficiaries or purposes in succession and if the rights of any beneficiary or the expenditures for a charitable purpose are defined with reference to trust income, the trustee's duty of impartiality includes a duty to so invest and administer the trust, or to so account for principal and income, that the trust estate will produce income that is reasonably appropriate to the purposes of the trust and to the diverse present and future interests of its beneficiaries.[59]

Both Campbell and MLTC sponsored expert witnesses at trial, and the Court finds the testimony of both to have been reliable and based on principles and methods generally acceptable in the relevant communities. Both parties' experts agreed that preserving the Trust's corpus for the fifty-year expected life of the Trust presented an onerous challenge for its Trustee. Each relied in part on a research paper by The Bernstein Wealth Management Group (the "Bernstein Report"),[60] which projected the probability of successfully preserving a unitrust's corpus for the life of the unitrust given certain equity investment mixes.

The Bernstein Report does not project the probability of success for such a trust with a fifty-year life; it provides only data up to a thirty-year trust life. That data, however, is instructive. It demonstrates that, as the length of the projected

[59] RESTATEMENT (THIRD) OF TRUSTS § 79 (2007).

[60] PX 14. MLTC's expert witness relied most heavily on a report by Ibbotson Associates (PX 17 Sched. A), which reaches roughly the same conclusions as the Bernstein Report. Tr. at 298-99.

trust life is increased, the probability of its survival decreases, and higher percentages of equity investment are required to afford any chance of survival. It is clear from the Bernstein Report, and from the testimony of both experts, that the longer the expected life of a given trust, the less likely its corpus will be preserved. The probability of maintaining the original value of a trust which pays out 10 percent of its value annually is as follows:[61]

	Equity Mix					
	100%	**80%**	**65%**	**50%**	**35%**	**20%**
Probability of Maintaining Original Value for 30 years with a 10% Annual Payout	18%	12%	6%	<2%	<2%	<2%

It is clear that as the equity investment mix of a trust's assets increases, the probability that its original value will be preserved for the life of the trust increases. Of course, there is no guarantee that a trust following a similar investment strategy will succeed—such is the nature of statistics and projections based on historical market data. The Bernstein Report additionally demonstrates that at some point—in a thirty year trust this occurs somewhere near a 50 percent mix—the chances of preserving a trust's original value become virtually nil. Finally, it is clear that the equity mix percentage at which this point occurs increases—that is, a higher equity percentage mix is required to avoid an asset value approaching nil—as the life of the trust increases. It is a fair inference from

[61] This data is gathered from several charts found in the Bernstein Report. PX 14 p. 26.

this data and from the expert testimony that such a trust, with a projected fifty-year life, would require an equity mix well above 50 percent to have any chance for lasting until its projected termination date.

MLTC, from the outset, chose an investment strategy targeting an equity mix greater than 50 percent. The Trust's initial equity investment mix targeted 60 percent. MLTC chose this equity mix based upon its understanding of the probability of preserving the original value of the Trust for its long anticipated life, given an annual 10 percent payout obligation.[62] Thus, MLTC chose to employ a long-term investment strategy[63] that some consider to be aggressive. Only equities offered any opportunity to grow at a rate anywhere near 10 percent annually, thereby preventing the complete depletion of the Trust's corpus before the end of the Trust's expected life. The equity investment mix of the Trust has remained above 50 percent since its inception.

As is to be expected, the experts did not agree whether this investment strategy was a reasonable decision and thus in satisfaction of the prudent investor standard. Campbell and her expert take the position that because the likelihood of preserving the Trust's corpus was so low, MLTC's investment strategy attempting preservation was a breach of its fiduciary duties. Campbell's expert characterized

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[62] MLTC is authorized by statute to consider "the anticipated duration" of the Trust in its investment decisions. 12 *Del. C.* § 3302(a).

[63] Tr. at 38-39 (testimony of Merrill Lynch representative Jeffrey Langenderfer).

the prospects of preserving the Trust's corpus for the life of the Trust as an "impossible dream."[64] The proper course, they suggest, would have been to acknowledge from the outset that the remainder interests were impaired; that the corpus was a wasting asset; that "the respective interests of the beneficiaries were decidedly and deliberately tipped towards the life beneficiaries."[65] They posit that the reasonable choice would have been a low equity mix more in line with the needs of atypical elderly investor with declining health.

Yet the choice to abandon the Trust's remaindermen and focus exclusively on the needs of its life beneficiary would carry with it the potential for breach of other fiduciary obligations binding MLTC; Delaware law is clear that the interests of all beneficiaries must be considered in investment and management decisions.[66] MLTC faced something of a fiduciary "Morton's Fork" when charged with the Trust's management: either take large risks in an attempt to satisfy its duties to all beneficiaries and fulfill the terms of the Trust Agreement, or concede from the very beginning that the Trust would fail; choosing instead to manage its assets by seeking goals other than those found in the Trust Agreement.

Although one is tempted to wonder whether the obstacles to meeting the Trust's objectives could have formed the basis of some modification to its

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[64] *Id.* at 214.
[65] Campbell Post-Trial Opening Br. 28.
[66] *DuPont*, 320 A.2d at 699.

objectives without offending the other beneficiaries or the tax authorities, MLTC's actions must be judged in light of the circumstances as they then existed, not with the benefit of hindsight.[67] From that perspective, and considering the duties owed to each anticipated beneficiary and the unique coalescence of competing mandates, the Court finds MLTC's decision to invest the Trust's assets heavily in equities to have been reasonable.

B. *Campbell's Request for Higher Payouts and MLTC's Increased Equity Mix*

Campbell called O'Haire requesting higher payouts from the Trust in 1997. That request was, in substance, honored and MLTC increased the equity mix of the Trust's assets in an attempt to grow the corpus faster, and thereby increase the amount of Campbell's payout. Campbell alleges that MLTC's decision to increase the equity investment mix, to at times as high as 99 percent, was a breach of the Trustee's fiduciary duties owed to her.[68] Not only, according to Campbell, were

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[67] *Lockwood v. OFB Corp.*, 305 A.2d 636, 641 (Del. Ch. 1973).

[68] Campbell argues that carrying such a high equity mix violates MLTC's duty to diversify found in Restatement (Third) of Trusts § 90(b). However, merely carrying a high equity mix (even approaching 100 percent) instead of investing in bonds or cash is not, on its own, an actionable breach of the duty to diversify, even if it might ordinarily prove difficult to justify; a trustee's duties are contextual, and there may be situations, perhaps rare, where diversification is neither practicable nor desirable. There is no set formula for diversification. *See Law*, 753 A.2d at 447.

Additionally, a trustee may achieve market diversity in its equity investments. The Trust held a range of equity investments and no challenge is made to the lack of diversification within this set of equity investments. *See* CX 21-22. Instead, Campbell complains that a significant portion of the Trust's assets should have been invested in debt or cash equivalents, and not in equities. It is this component of diversification that Campbell claims was not achieved by MLTC. It is possible that a particular investment may carry an equity label but function more like, for example, a debt instrument. The record here does not support this type of analysis to satisfy any diversification obligation on the part of the Trustee.

the risks associated with such a decision never explained to her, but MLTC also employed no deliberative process in making this decision and merely followed the requests of the life beneficiary.

The Trust Agreement grants the Trustee sole discretion over investment decisions.[69] "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion."[70] Had MLTC abdicated its duties and acted solely upon Campbell's request, MLTC's failure to exercise any judgment concerning the shift in investment strategy would have been an abuse of its discretion.[71]

The record concerning what process MLTC employed following Campbell's request for a larger payout is thin.[72] What is demonstrated is MLTC's practice of considering the wishes of a beneficiary as but one of many factors used in charting

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[69] Trust Agreement at Article Second.
[70] RESTATEMENT (SECOND) OF TRUSTS § 187 (1959). *See* 12 *Del. C.* § 3315 (effective August 1, 2008).
[71] *Id.* at cmt. h; *see also McNeil v. Bennett*, 792 A.2d 190, 213 n.49 (Del. Ch. 2001), *aff'd in part sub. nom. McNeil v. McNeil*, 798 A.2d 503 (Del. 2002) (leaving trust to operate on "autopilot" not a reasonable exercise of discretionary power).
[72] The record does not demonstrate precisely what process was employed in making the decision to push the Trust's equity mix to higher levels. However, the record amply documents MLTC's standard practices, and there is no reason to suspect those standard practices were not followed here. Additionally, the written documentation of the process, such as it is, supports a finding that MLTC employed a deliberative process. In its confirmatory letter to Campbell, MLTC indicated that its Trust Committee had reviewed Campbell's request and agreed that increasing equity levels to satisfy Campbell's request was permissible given the Trust's investment horizon. PX 4. Combined, sufficient evidence of a deliberative process exists. To require more (absent evidence to the contrary) would be to require as a matter of law written justification for every investment decision a trustee makes in the management of a trust.

an investment course.[73] According to MLTC representative Jeffrey Langenderfer, because Campbell's request fit within the Trust's overall investment strategy, it was considered, but, it was not dispositive.[74] As a matter of practice, an MLTC senior trust officer and investment officer, along with the MLTC trust committee, reviewed and approved of the change in investment strategy before its implementation.[75]

By increasing the Trust's equity mix, MLTC was able to both increase the payout Campbell would likely receive by virtue of her status as current beneficiary as well as increase the probability that the Trust's original value would be preserved for its estimated fifty-year life. There is sufficient, but admittedly not overwhelming, evidence in the record to find that MLTC employed a sufficient process, and did in fact exercise independent discretion in deciding whether to increase the equity mix of the Trust following Campbell's request.

C. *The Trust Agreement Bound MLTC's Hands*

When viewed in the abstract, the Trust's equity investment mix was at times disturbingly high. Had Campbell been the Trust's only income beneficiary, MLTC's choices would have been inappropriate, perhaps even a breach of its duties as Trustee. It is unlikely that a prudent investor would place the principal

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[73] Tr. at 47-48.
[74] *Id.* at 48.
[75] PX 12.

holdings of an elderly woman of declining health almost entirely in equities where risks were high, instead of in more stable, lower risk, assets.

Perhaps if the Trust Agreement mandated a lower annual payout, or if the Trust had a shorter expected life, MLTC's investment decisions would have constituted a breach of its fiduciary duties. Of course, had the Trust Agreement been different MLTC's decisions might have been different as well.

In the short term, MLTC's investment strategy was successful: Campbell enjoyed payouts of increasing size and the Trust's corpus grew. However, the timing of the Trust's creation, its onerous annual distribution obligations, and MLTC's resulting investment strategy combined to form a seemingly perfect storm. A sharp and sustained downturn in the economy pummeled the Trust's equity investments. Because this downturn occurred so early in the life of the Trust, insufficient gains had been accumulated to enable the Trust to better weather the decline in equities. The result was a loss of nearly $500,000—58 percent of the Trust's original value—in only six years.

MLTC, however, cannot be held liable for failing to anticipate the precipitous drop in the market, and it cannot be held liable merely because market forces have proven that its investment decisions were poor ones. The record is clear that a 10 percent charitable remainder unitrust with an expected life of fifty years is rarely formed; however, that does not here indict MLTC in an actionable

manner, as claims surrounding the decisions embodied in the Trust Agreement are time-barred.[76]

The Trust Agreement set a nearly unreachable standard. MLTC had few, if any, good options when setting an investment course for the Trust. It chose a course that, based on the data presented at trial, was most likely to result in the satisfaction of the Trust Agreement's obligations: the delivery of a large payout to income beneficiaries for fifty years, and the preservation of the Trust corpus for the benefit of the remaindermen. MLTC cannot be held liable for its good faith reliance on the express provisions of the Trust Agreement.[77] That reasonable people might disagree—indeed, that this Court might disagree—with the proper investment strategy does not render MLTC's choices unreasonable. MLTC made reasonable decisions in light of the circumstances it faced.

The fatal flaw of this unhappy tale is found in the Trust Agreement itself. Fiduciary duties, always contextual, might not allow for an investment strategy so heavily weighted in equities but for the unusual constraints embodied in the Trust

[76] There is something unsettling about allowing MLTC to evade liability by relying on the questionable acts of its sister entity Pierce (some of which may have been reviewed in the NASD arbitration) and the passage of time. It no doubt seems unfair to Campbell. However, there are no facts that justify reviving Campbell's time-barred claims against MLTC based on the Trust's formation. Had an entirely unrelated trustee been charged with the management of the Trust the result here might be more palatable. Yet the standards are the same. Charged with such burdensome obligations, the Trustee took risks that might normally be unjustified, yet are justified here by the nature of the Trust Agreement. The Court cannot hold MLTC liable for making a reasonable choice when faced with unappealing alternatives despite the fact that, in hindsight, its choice may not have been the better.

[77] 12 *Del. C.* § 3302(e).

Agreement.[78] Because of these unique facts, the Court need not reach the question of whether, and under what circumstances, such a heavy equity mix would be, if ever, permissible. The Court need only find, and does so find, that, given the Trust Agreement and in light of the Court's having concluded that any claim challenging its formation is time-barred, no breach of the prudent investor standard may be found in MLTC's administration of the Trust.

D. *Attorneys' Fees*

Campbell next challenges MLTC's decision to fund its litigation costs and attorney's fees from the Trust's assets. She seeks to restore to the Trust the $75,786 withdrawn to fund the Injunctive Action. Campbell also seeks the restoration of all fees and expenses withdrawn from the Trust for the funding of this action.

Under traditional Delaware law the payment of attorneys' fees out of the trust corpus has generally been proper in two circumstances: (i) where the attorney's services are necessary for the proper administration of the trust, or (ii) where the services otherwise result in a benefit to the trust.[79] In either circumstance the trustee may charge the trust estate with the expenses of litigation, even if the litigation is unsuccessful.

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[78] *See supra* note 50 and accompanying text.

[79] *Bankers Trust Co. v. Duffy*, 295 A.2d 725, 726 (Del. 1972); *In re Trust u/a McKinley*, 2002 WL 31934411, at *3 (Del. Ch. Dec. 31, 2002). Questions regarding the continuing viability of *Bankers Trust*, in light of the enactment in 2007 of 12 *Del. C.* § 3333, may form an implicit subtext to much that follows. *See infra* note 86.

The parties, however, may stipulate additional grounds for payment of expenses in a trust agreement.[80] The Trust Agreement authorizes MLTC generally to retain attorneys:

> In addition to every power and discretion conferred upon the Trustee by any other provision of this [Trust] Agreement . . . , the Trustee shall have all the usual powers conferred by law on a trustee in every jurisdiction in which the Trustee may act; and, in addition thereto, the Trustee shall have the following express powers, *exercisable exclusively in a fiduciary capacity*, but in the Trustee's sole discretion without court order or approval, with respect to all property, whether principal or income, at any time coming into the Trustee's hands, whether by purchase or in any other manner:
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> . . .
>
> (D) To employ . . . attorneys . . . as the Trustee deems necessary and proper and to pay for such services from the property of the [Trust] . . . .[81]

In addition, MLTC is empowered "[t]o adjust, settle or compromise any claim or claims in favor of or against the [Trust] or the Trustee acting as such, and to institute, prosecute and defend any and all legal proceedings, on such terms, in such manner and to such extent as the Trustee shall deem advisable."[82]

More specifically, the Trust Agreement provides for the bringing of an accounting action and payment of attorneys' fees as follows:

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[80] *See* 12 *Del. C.* § 3333 (affording parties to a trust agreement great flexibility as long as the document does not "permit the exculpation or indemnification of a fiduciary for the fiduciary's own willful misconduct").
[81] Trust Agreement at Article SECOND (D) (emphasis added).
[82] *Id.* at Article SECOND (J).

> The Trustee may, but shall not be required to, prepare and file accountings with any court. . . . Further, prior to delivering all the property of the [Trust] to a successor-trustee or to making any partial or complete distribution of the [Trust] estate, a Trustee may require an approval of the [Trust's] accounting either by a release and discharge by the beneficiary or beneficiaries of the [Trust] or by a court of competent jurisdiction. All of the Trustee's fees and expenses (including reasonable attorneys' fees) attributable to any accounting and/or approval shall be paid by the [Trust].[83]

Delaware adheres to the "objective" theory of contracts: i.e., a contract's construction should be that which would be understood by an objective, reasonable third party.[84] Thus, "[c]ontract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language."[85] In construing the Trust Agreement, the Court will give effect to the parties' apparent intent.

1. MLTC's Fees in the Injunctive Action

MLTC, in the Injunctive Action, sought to enjoin a portion of an NASD arbitration proceeding brought, not against it (or the Trust), but against Pierce. MLTC used its control over the Trust's assets in an effort to assist its related entity Pierce in the arbitration process. That effort conferred no benefit on the Trust and

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[83] *Id.* at Article FIFTH

[84] *Cantera v. Marriott Senior Living Servs., Inc.*, 1999 WL 118823, at *4 (Del. Ch. Feb. 18, 1999).

[85] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

served no useful purpose in the Trust's administration.[86] In addition, although the Trust Agreement confers general powers upon the Trustee to retain attorneys and to pay for their services with assets of the Trust, the power to retain counsel was "exercisable exclusively in a fiduciary capacity," and nothing in the Trust Agreement even hints at the possibility that the Trust's assets could be used to fund an effort to defend, directly or indirectly, claims brought against Pierce, but not the Trustee. For MLTC to have used the funds of the Trust in an effort to preclude an arbitration proceeding against neither it nor the Trust was inconsistent with its fiduciary duties to the Trust and its beneficiaries and an abuse of its discretion.

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[86] *Bankers Trust Co.*, 295 A.2d at 726. Moreover, nothing in the Trust Agreement can fairly be read as expressly allowing it to charge the Trust for such expenses. Certainly, neither the arbitration proceeding nor the Injunctive Action could be viewed as involving an accounting with the scope of Article FIFTH of the Trust Agreement.

In a sense, management of the Trust was a tangential issue in the NASD arbitration because Campbell was challenging the investment of assets in the Trust. That arbitration was limited to Pierce's conduct. MLTC, however, was at most seeking to insulate itself from potentially adverse factual findings in the NASD arbitration. It has not shown how any factual findings there, however adverse, would have been binding upon it. Moreover, MLTC has not shown how, if Pierce had been found liable in the arbitration process, such liability would have attached to it as a non-party. MLTC, as Trustee, chose to use the services of Pierce, as it was entitled to do under the terms of the Trust Agreement. That it could use Pierce's services does not mean that it could also use the Trust's funds to pay for a strategic response to arbitration claims brought only against Pierce.

MLTC invokes 12 *Del. C.* § 3333 to justify its use of trust funds to seek to enjoin a portion of the NASD arbitration proceedings. By 12 *Del. C.* § 3333, "except as provided in the governing instrument, a fiduciary may retain counsel in connection with any claim that has or might be asserted against the fiduciary, ..." Although this provision applies to Delaware trusts regardless of the date of creation, its effective date is August 1, 2007, 76 Del. Laws c. 90 § 21. Because MLTC's use of the trust assets to fund the injunctive proceeding was before adoption of this provision, it affords no relief to MLTC. MLTC argues that 12 *Del. C.* § 3333 is a legislative repudiation of *Bankers Trust*. The effective date of this section obviates any need to address this contention in the context of MLTC's expenditure of trust funds with respect to the Injunctive Action.

Because the Injunctive Action benefited only the Trustee (or its related entity) individually, and not the Trust or its beneficiaries or even the Trustee, as trustee, the sum of $75,786 withdrawn from the Trust to fund the Injunctive Action shall be restored to the Trust with interest.[87]

2. <u>MLTC's Fees in this Litigation</u>

Bankers Trust teaches that attorneys' fees incurred by a trustee in pursuing judicial approval of an accounting should be disallowed to the extent that such fees are attributable to the trustee's "efforts to insulate itself from possible surcharges . . . [and to its] desire to receive absolution."[88]

MLTC's decision to pursue this accounting action was implemented primarily, if not exclusively, to protect itself from Campbell's challenges to its investment policies and investment actions. It perceived a potential risk—evidenced both by Campbell's letters of complaint and the NASD arbitration proceeding—and filed this action as a means of protecting its interests. If the general principles of *Bankers Trust* are controlling in this instance, MLTC would not be entitled to an award of its fees in pursuing this action.[89]

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[87] Campbell requests 90 percent of that amount added to the Trust and 10 percent to Campbell representing the additional payments she would have received in her quarterly payouts. That request is a fair approximation of the flow of funds that should have occurred.

[88] *Bankers Trust*, 295 A.2d at 726.

[89] Any benefit to the Trust in these circumstances would be, at most, incidental. There may, however, be other instances in which the pursuit of judicial review of an accounting by the Trustee would benefit the Trust and its beneficiaries. Although any judicial approval of an accounting, in some sense, always benefits the Trustee, it does not necessarily follow that any

Bankers Trust, however, involved a different trust document, one that only permitted the filing of an accounting action.[90] By contrast, the Trust Agreement goes much further. It expressly enables MLTC, as the Trustee, to condition release of the Trust assets upon receipt either of a release or a judicial approval of its accounting. It expressly authorizes the Trustee to obtain judicial approval of its accounting. Finally, it expressly entitles the Trustee to the payment of its attorneys' fees in obtaining that judicial review.

The parties to the Trust Agreement are bound by these terms. The terms are not against public policy, and there simply is no reason why the Court should not enforce the private ordering of the Trustee and beneficiary relationship in such a clear and unambiguous fashion.[91]

Therefore, the Court concludes that MLTC's funding of the expenses of this action from the Trust is proper.[92]

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accounting is brought for the primary benefit of the Trustee. In this instance, however, the Court finds that MLTC's primary motivation was self-interest, especially in light of its refusal to allow the substitution of a trustee and the context in which it took that action.

[90] Whether *Bankers Trust* sets the standard to be applied to a trustee's fees incurred after the enactment of 12 *Del. C.* § 3333 in the summer of 2007—as have many (but not all since this action was filed in 2005) of the fees in this action—is subject to some doubt. *See supra* note 86.

[91] By exercising the right conferred in the Trust Agreement to seek judicial approval of its accounting, MLTC cannot be said to have violated any fiduciary duty that it may have owed to Campbell (or to any other beneficiary).

[92] There is one exception. A small portion of this litigation concerns the parties' debate surrounding the propriety of charging MLTC's fees in the Injunctive Action to the Trust; Count III of Campbell's counterclaim challenged that payment. The Court finds that the portion of MLTC's legal fees incurred in defending that aspect of Campbell's counterclaim should be restored to the Trust, or not paid for MLTC's benefit.

3. Campbell's Request for Fee Shifting

Finally, Campbell has requested that MLTC be ordered to pay her attorney's fees incurred in defending against the Injunctive Action and in defending (and counterclaiming) in this litigation. Fee shifting is rarely ordered by Delaware courts.

> Generally, Delaware follows the American Rule and litigants must pay their own attorneys' fees and costs. As an equitable exception to the American Rule, however, this Court may grant attorneys' fees if it finds that a party brought litigation in bad faith or acted in bad faith during the course of the litigation. Still, this Court does not lightly award attorneys' fees under this exception, and has limited its application to situations in which a party acted vexatiously, wantonly, or for oppressive reasons.[93]

Campbell argues that MLTC has proceeded in bad faith and for the purpose of exerting pressure on its client, both financial and emotional. There is no evidence of bad faith on the part of MLTC. As to this proceeding, the Trust Agreement authorizes MLTC to bring an accounting action in this Court. The questions of fiduciary duty addressed in this action were difficult and important. In short, a legitimate disagreement existed, MLTC was authorized to present that

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Campbell has questioned the reasonableness of MLTC's attorneys' fees and expenses. Documentation of attorneys' fees incurred by MLTC in this proceeding ended as of the spring of 2008, well before trial (CX 50). Piecemeal assessment of litigation expenses is problematic, and the better practice, in a case of this nature, would be for a more comprehensive consideration of the fees and expenses sought by MLTC for substantially all of the effort. Thus, approval of any particular fee amount must be deferred pending supplementation of the attorneys' fees and expenses which MLTC seeks from the Trust.

[93] *Sloan v. Segal*, 2009 WL 1204494, at *18 (Del. Ch. Apr. 24, 2009) (quoting *Postorivo v. AG Paintball Holdings, Inc.*, 2008 WL 3876199, at *24 (Del. Ch. Aug. 20, 2008)).

disagreement to this Court, and in doing so an inference of bad faith cannot be drawn. Absence such a showing, there is no basis to deviate from the presumption that Campbell must bear her own expenses.

The Injunctive Action presents a closer call. MLTC was not a party to the NASD arbitration action it sought to enjoin, and this Court found it had no standing to seek its requested injunction. Yet beyond those facts Campbell can point to no evidence of bad faith. MLTC sought to enjoin only those claims in the NASD arbitration related to the Trust. Campbell's claims in the NASD arbitration alleged against Pierce arguably implicated the Trust's management. Although this Court concluded that the NASD arbitration would not impact the proceedings here, the question was close enough to warrant MLTC's concern. The Court cannot infer bad faith from the filing of the Injunctive Action,[94] and will apply the American Rule, which presumes that a party should bear her own costs.[95]

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[94] The problem was not the filing of the Injunctive Action, which Pierce could have done by itself or for which MLTC could have paid with its own funds. Instead, the problem was MLTC's use of the Trust's funds for that purpose. Campbell's need to incur legal fees stemmed, not from who was paying for the Injunctive Action, but from the fact that the Injunctive Action had been filed.

[95] Campbell also relies on 12 *Del. C.* § 3584, which provides:

> In a judicial proceeding involving a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorneys' fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

This provision allows the Court "as equity and justice may require" to shift attorneys' fees from, for example, Campbell to MLTC. It sets a standard that is more relaxed than that of the American Rule, but its application, nonetheless, should be informed by the precepts underlying the American Rule. The Court, thus, has the discretion to shift fees in circumstances where the exacting requirements of the American Rule might not otherwise allow. Other than sympathy

IV. CONCLUSION

For the foregoing reasons, MLTC's accounting will be approved, except for attorneys' fees and expenses. Those costs incurred in MLTC's effort to enjoin a portion of the NASD arbitration proceeding shall be reimbursed to the Trust, as well as those fees that can fairly be allocated in this proceeding to defending Campbell's successful challenge to those payments. Otherwise, MLTC is entitled to its attorneys' fees and expenses in pursuing this accounting action, but determination of the amount to be approved must be deferred until more complete information is provided. Finally, Campbell's request for an award of fees from MLTC is denied.[96]

Counsel are requested to confer and to submit an implementing order.

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for Campbell, there is no apparent reason for burdening MLTC with her fees. She has tendered substantial issues for resolution, but she has not prevailed generally, and there is nothing about MLTC's conduct as currently assessed by the Court that triggers those notions of equity and justice that would justify shifting Campbell's attorneys' fees to MLTC.

[96] At Campbell's election, however, her fees incurred in this proceeding may be paid from the Trust. Her counterclaim raised substantial questions regarding administration of the Trust and the conduct of the Trustee, and equity should allow the cost of those efforts to be met through funds of the Trust. *See* 12 *Del. C.* § 3584.