UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JO ANN HOWARD AND ASSOCIATES, P.C., *et al.*,	)	
Plaintiffs,	)	
v.	)	Cause No. 4:09-CV-01252-ERW
J. DOUGLAS CASSITY, *et al.*,	)	
Defendants.	)	

THE MISSOURI TRUSTEES'[1] OPPOSITION TO
PLAINTIFFS' MOTION FOR RULINGS AS A MATTER OF LAW

[1] The Missouri Trustees are National City Bank (including PNC Bank, N.A.) and U.S. Bank, National Association.

TABLE OF CONTENTS

INTRODUCTION

The Missouri Trustees agree with Plaintiffs on two fronts. First, the Court should decide as a matter of law who is the beneficiary of the Missouri NPS Trusts. Second, the Court should determine before trial what it means for an investment advisor to be "independent" under Chapter 436.

On both fronts, however, Plaintiffs' arguments are incorrect as a matter of law. First, NPS—the pre-need seller—is the sole beneficiary of the NPS pre-need trusts. Unlike some other states, Missouri elected *not* to require that pre-need consumers or funeral homes have rights in trust principal or income. Instead, under Chapter 436 and the trust agreements, the pre-need seller is the only party that puts money into the trust and the only party entitled to receive money from the trust. As a result, only the pre-need seller has an enforceable beneficial interest in trust assets. There is nothing "logically unsupportable" about such an arrangement, Pls.' Mem. in Supp. of Mot. for Rulings ("Mot."), at 3 (D.E. #1760): other states similarly have enacted laws under which the pre-need seller is the only trust beneficiary.

Second, although Chapter 436 relieves the trustee of all liability regarding investment decisions made by a duly appointed, "independent" investment advisor, the parties disagree about what it means to be "independent." Plaintiffs argue that the investment advisor must be independent of the pre-need seller rather than the trustee. That interpretation is wrong and unworkable because the availability of this statutory protection would depend on facts about other companies that cannot be known by a trustee. No rational trustee could ever agree to relinquish investment authority under that statutory construction, and the statute would not function as intended. Accordingly, the most logical reading of the statute would require the investment advisor to be independent of the trustee, not the pre-need seller, because the fact of that independence is within a trustee's knowledge.

But that distinction is a moot point here because the investment advisor appointed by NPS, Wulf Bates & Murphy ("WBM"), was indisputably independent of NPS, the pre-need seller. Moreover, no matter what relationship is being examined, the term "independent" must be defined by objective, ascertainable criteria about the two companies' legal relationship so that the trustee can decide in advance whether it makes sense to turn over investment authority. This case proves the point: Plaintiffs argue that the jury should decide whether WBM was independent of NPS based on subjective factors that could not have been evaluated by the trustee in a meaningful way. *Id.* at 4-6. Plaintiffs' test for assessing independence—even if the trustee could determine such "facts"—has no meaningful contours and would render the statutory scheme ineffective. The Court should hold that WBM was "independent" whether that term requires independence of the trustee or the pre-need seller.

BACKGROUND

The facts relevant to Plaintiffs' motion are set forth in the Missouri Trustees' Statement of Uncontroverted Material Facts ("SOF") (D.E. # 1763).[2]

LEGAL STANDARD

Although Plaintiffs fancy their motion as one for "rulings as a matter of law," in reality it is a motion for partial summary judgment. *See* Mot. at 6 (referring to "summary judgment" and citing Fed. R. Civ. P. 56(c)). Plaintiffs improperly did not file with their motion a statement of uncontroverted material facts, as required by Local Rule 7-4.01(E). Ordinarily, Plaintiffs' failure to comply with Local Rule 7-4.01(E) would be grounds for denying their motion. *See Broad. Music, Inc. v. MWS, LLC*, No. 4:11CV1481 TIA, 2013 U.S. Dist. LEXIS 111560, at *6 (E.D.

[2] All numbered exhibit references in this memorandum are to the exhibits attached to the Missouri Trustees' Statement of Uncontroverted Material Facts (D.E. ## 1763-1770, 1773). The Missouri Trustees have attached hereto additional exhibits A to C.

Mo. Aug. 8, 2013). The two issues presented, however, were also raised in the Missouri Trustees' properly filed Motion for Partial Summary Judgment. Therefore, the Court should decide the issues on the merits.

Summary judgment shall be granted "when the evidence viewed in the light most favorable to the nonmoving party presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *EEOC v. Audrain Health Care, Inc.*, 756 F.3d 1083, 1086 (8th Cir. 2014) (quotation marks omitted); *see also* Fed. R. Civ. P. 56(a).

ARGUMENT

I. NPS Is the Sole Beneficiary of the Missouri NPS Trusts.

The parties agree on two key points. First, the Court should determine who the trust beneficiary is as a matter of law. Second, NPS, the pre-need seller, is a beneficiary of the Missouri NPS Trusts.[3] Mot. at 6.

Plaintiffs contend, however, that pre-need funeral consumers and funeral homes are additional trust beneficiaries. That contention fails as a matter of law. NPS is the *sole* beneficiary of the Missouri NPS Trusts. Under both Chapter 436 and the trust agreements, NPS—the pre-need seller—is the only entity that has a direct, enforceable interest in trust assets. The fact that funeral homes receive money from NPS or that consumers will benefit from services provided by those funeral homes does not make those parties trust beneficiaries.[4]

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[3] This memorandum uses the term "Missouri NPS Trusts" to refer to NPS Pre-Need Trusts I through V. Plaintiffs have not moved for rulings on their claims related to the Mount Washington and CSA Trusts. As discussed in the Missouri Trustees' Motion for Partial Summary Judgment, NPS was neither grantor nor beneficiary of those trusts, and the Special Deputy Receiver lacks standing to assert claims related to those trusts. *See* D.E. # 1762 at 52-53.

[4] The Missouri Trustees do not "concede that they did not exercise any fiduciary care towards the preneed consumers and funeral homes." Mot. at 3. Nor do they concede that they owed "no fiduciary duties to the Plaintiffs." Mot. at 8 n. 4. The Missouri Trustees agree that they owed certain fiduciary duties to NPS, on whose behalf the Special Deputy Receiver brings this lawsuit.

A. A Trust Beneficiary Is a Person Entitled to a *Direct* Benefit from the Trust.

Plaintiffs barely discuss the legal definition of a trust beneficiary. "A person is a beneficiary of a trust if the settlor manifests an intention to give him a beneficial interest . . . ." Restatement (Second) of Trusts § 127 (1959); *see also* Mo. Rev. Stat. § 456.1-103(3) (2014) ("'Beneficiary' means a person that . . . has a present or future beneficial interest in a trust, vested or contingent . . . .").[5] "[T]o qualify as a beneficiary, a person must be *entitled to a direct benefit* from the trust." George Gleason Bogert et al., *Bogert's Trusts and Trustees* § 182 (2014) (emphasis added). As Missouri courts have explained, a beneficiary holds "equitable title" to trust property. *Heartland Presbytery v. Gashland Presbyterian Church*, 364 S.W.3d 575, 584 (Mo. Ct. App. 2012) (quotation marks omitted). In other words, for a person to be a beneficiary, the grantor must manifest an intention to give him an enforceable interest in trust property.[6]

A person who benefits only indirectly or incidentally from the performance of the trust is not a trust beneficiary. *See* Bogert et al., *supra*, § 182 ("It is not sufficient that the execution of the trust will result in indirect or incidental benefit to her."); Restatement (Second) of Trusts § 126 ("A person is not a beneficiary of a trust if the settlor does not manifest an intention to give him a beneficial interest, although he may incidentally benefit from the performance of the trust."); 90 C.J.S. *Trusts* § 234 (2014) (same). For example, the fact that a trust is established to pay for a beneficiary's education does not make the beneficiary's school a trust beneficiary, even

[5] The Missouri Uniform Trust Code took effect in 2005, after the tenure of the Missouri Trustees, but its definition of "beneficiary" is consistent with preexisting common law.

[6] A beneficiary's interest may be either vested or contingent. *See* Mo. Rev. Stat. § 456.1-103(3); *see also Siefert v. Leonhardt*, 975 S.W.2d 489, 492 (Mo. Ct. App. 1998) (plaintiffs' interest in trust property was "contingent upon their survival of . . . the lifetime beneficiary of the trust").

though the school will be the ultimate recipient of trust funds. *See* Restatement (Second) of Trusts § 126 cmt. a, illus. 5.

Determining the identity of a trust beneficiary and the nature of the beneficiary's interest are matters of the grantor's intent. Restatement (Second) of Trusts § 127; Bogert et al., *supra*, § 161. And the grantor's intent is to be ascertained from the trust instrument. *See Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 444 (Mo. Ct. App. 2004) (en banc).

B. Chapter 436 Does Not Make Consumers or Funeral Homes Trust Beneficiaries.

Before reviewing the applicable trust agreements, it is helpful to understand the applicable statutory scheme. States have enacted a wide variety of statutes governing the sale of pre-need funeral contracts. Although many states require or permit the receipts from pre-need contracts to be placed in trust, states differ in how they define and regulate such trusts. Some states expressly provide that the pre-need seller must be the only trust beneficiary. *See* Ala. Code § 27-17A-31(g)-(h) (2014); Fla. Stat. § 497.458(g), (j) (2014).[7] In other states, by contrast, the funeral services recipient must be a trust beneficiary. *See* 239 Mass. Code Regs. 4.09(2)(b) (2014); Tex. Fin. Code Ann. § 154.256 (2014). In a number of states, the trustee must make principal payments directly to funeral homes upon a consumer's death. *See, e.g.*, Cal. Bus. & Prof. Code § 7737 (2014); Tenn. Code Ann. § 62-5-410(a) (2014); W. Va. Code § 47-14-6(a) (2014). Some states provide that pre-need consumers (or their estates) are entitled to receive trust income or the balance remaining in the trust after payment for funeral services. *See, e.g.*, Del. Code Ann. tit. 5, § 3402(c) (2014); Ky. Rev. Stat. Ann. § 367.934(3) (2014); Tenn. Code Ann. § 62-5-410(b); W. Va. Code § 47-14-7(b)(2). And, in some states, if a consumer cancels

[7] Florida law permits an "alternative" pre-need contract under which the purchaser makes payments directly to the trustee and is deemed the trust beneficiary. Fla. Stat. § 497.464 (2014).

the pre-need contract, he receives a refund directly from the trust. *See, e.g.*, Cal. Bus. & Prof. Code § 7737; Ky. Rev. Stat. Ann. § 367.936; W. Va. Code § 47-14-6(b).[8]

Unlike other states' laws, Chapter 436 does not give pre-need consumers direct rights in the trust principal or income. Nor does Chapter 436 give funeral homes any right to distribution of trust assets. Under Chapter 436, Missouri pre-need sellers collect funds from pre-need purchasers and deposit a required percentage of those funds into a trust. Mo. Rev. Stat. § 436.027 (2008, repealed 2009). *All* payments from the trust—whether of trust principal or income and whether occurring at the time of death or upon contract cancellation—are made to the pre-need seller (or, in limited cases of the pre-need seller's default, its creditors). *See id.* §§ 436.031(3), 436.035, 436.041, 436.045, 436.048. In other words, the trustee receives funds from the pre-need seller and pays funds to the pre-need seller.

Nevertheless, Plaintiffs contend that funeral services recipients are trust beneficiaries under Chapter 436. They assert that Chapter 436 "set[s] out definitions of the parties to preneed funeral trusts." Mot. at 9. But Chapter 436 does no such thing. The definitions section of the statute provides, in relevant part:

> As used in sections 436.005 to 436.071, unless the context otherwise requires, the following terms shall mean:
>
> (1) **"Beneficiary"**, the individual who is to be the subject of the disposition and who will receive funeral services, facilities or merchandise described in a preneed contract[.]

Mo. Rev. Stat. § 436.005(1). Chapter 436 nowhere uses the term "beneficiary" to describe the beneficiary of a pre-need trust. Instead, in each case, the statute refers to the "beneficiary" *of the pre-need contract—i.e.*, the deceased person who receives funeral services under the contract:

[8] When Missouri replaced Chapter 436 in 2009, it required that trustees pay the pre-need purchaser directly upon contract cancellation. *See* Mo. Rev. Stat. § 436.456(3) (2014).

- § 436.007(1)(3): pre-need contract is void unless "[i]t identifies the contract beneficiary"
- § 436.011(2): funeral home designated in pre-need contract must provide "funeral merchandise and services described in the preneed contract for the beneficiary"
- § 436.038: describing the pre-need seller's obligations if "the death of the beneficiary occurs outside the general area served by the provider designated in a preneed contract"
- § 436.045: after a funeral home provides the services "described in the contract" to the beneficiary, the seller must pay the funeral home the amount specified in the contract
- § 436.053: requirements of a pre-need contract providing for payments to be held in a joint account instead of a trust

In fact, one of the provisions that uses the term "beneficiary" sets forth the option for a pre-need seller to establish a "joint account *in lieu of trust*." *Id.* § 436.053 (emphasis added). Clearly, then, the term "beneficiary" does not mean trust beneficiary.[9]

Plaintiffs cite three provisions that they claim "reflect the preneed funeral consumers' position" as trust beneficiary. Mot. at 10. None of those provisions uses the defined term "beneficiary" or recognizes pre-need consumers as trust beneficiaries. One provision simply recognizes that the pre-need seller may retain 20 percent of the total amount agreed to be paid by the pre-need "purchaser." *See* Mo. Rev. Stat. § 436.027. It does not state—contrary to Plaintiffs' suggestion—that the remainder must be deposited into trust "for the benefit of the preneed consumer." Mot. at 11.

The second provision entitles the pre-need "purchaser" to cancel the pre-need contract at any time. Mo. Rev. Stat. § 436.035. If the purchaser cancels the contract, he is entitled to a

[9] By contrast, applicable Iowa law used the defined term "beneficiary" to describe the trust beneficiary. *See* Iowa Code §§ 523A.202(2)(d) (2001) ("the trustee may invest, reinvest, exchange, retain, sell, and otherwise manage the trust fund for the benefit and protection of the named beneficiary"), 523A.203(3) (the trustee must maintain "a detailed listing of the amount deposited in trust for each beneficiary"). For this reason, the positions taken by the Iowa Trustee Defendants in this case are irrelevant to the claims against the Missouri Trustees.

refund from *the pre-need seller* in the amount of funds deposited into trust in connection with his contract. *Id.* The pre-need consumer has no right to obtain trust funds directly from the trustee upon cancellation. This provision thus confirms that the purchaser is *not* a trust beneficiary.

The final provision entitles pre-need "purchaser[s]" or funeral homes to obtain trust funds in their capacities as *creditors* of a pre-need seller "as damages for [the seller's] breach." Mo. Rev. Stat. § 436.048; *cf.* Ala. Code § 27-17A-31(h); Fla. Stat. § 497.458(j); Restatement (Second) of Trusts § 147. Having rights as a creditor does not make purchasers or funeral homes trust beneficiaries. If Chapter 436 recognized purchasers and funeral homes as trust beneficiaries, there would be no need to give them a creditor's right to payment from the trust in the event of the pre-need seller's default.

C. NPS Is the Sole Beneficiary under the Trust Agreements.

The governing trust agreements appropriately apply the scheme established by Chapter 436. The agreements unambiguously make NPS the only beneficiary of the Missouri Trusts.

1. NPS Is the Only Entity with an Interest in Trust Property.

Each trust agreement grants NPS—and only NPS—a direct interest in the trust income and principal. By virtue of its rights to distributions of trust assets, NPS is a trust beneficiary.

Plaintiffs do not identify a single provision in the trust agreements that gives any right to any consumer to receive any distribution from the trusts. Plaintiffs concede that NPS is the only party entitled to "income generated by the investment of preneed trust funds." Mot. at 17; *see also* SOF ¶ 36; Exs. 1-2, ¶ 3.3 (any net income is the property of NPS); SOF ¶ 37; Exs. 1-2, ¶ 3.3 (trustee required to distribute any net income to NPS "from time to time").

Likewise, NPS is the only party entitled to distributions of trust principal. Article III requires the trustee to distribute principal to NPS in three circumstances: (1) when NPS has paid for the funeral services for the beneficiary of a pre-need contract; (2) when NPS has refunded

money following cancellation by the purchaser; or (3) when NPS has refunded money after a cancellation by NPS. SOF ¶ 33, Exs. 1-2, Art. III. The agreements prohibit the trustee from making any distribution of principal directly to any other person unless authorized by NPS. *See* SOF ¶¶ 34-35; Exs. 1-2, ¶ 3.2(d).

When the trusts terminate, all remaining principal and income is due to NPS. *See* SOF ¶ 47; Exs. 1-2, Art. V.

2. Contract Beneficiaries, Contract Owners, and Funeral Homes Do Not Have Any Interest in Trust Property.

Plaintiffs conflate two weak arguments in an attempt to bolster their doomed position that the trust agreements recognize "recipients of funeral services" as trust beneficiaries. Mot. at 8.

First, Plaintiffs point out that the trust agreements define "beneficiary" as "the person designated in writing by the Owner of a Funeral Agreement as the person who is to be the subject of the disposition and is to receive the funeral and/or burial services therein described, or if no such person is designated then the Owner thereof." SOF ¶ 29; Exs. 1-2, ¶ 1.5. That provision, which mirrors Chapter 436, simply provides that, where the term "beneficiary" is used, it means the beneficiary *of the pre-need contract*. As in Chapter 436, each time the trust agreements use the term "beneficiary," they are describing the pre-need contract beneficiary:

- Exs. 1-2, ¶ 1.6: defining "Funeral Agreement" as "the written agreement between an Owner and Seller entered into for the purpose of providing the Beneficiary thereof with funeral or burial services" and pursuant to which Seller "has agreed to deposit into this Trust a portion of amounts paid to it" under the agreement

- Exs. 1-2, ¶ 1.9: defining "Maturity Date" as the date of death of the person designated in the Funeral Agreement "as the Beneficiary entitled to the benefits thereof"

- Exs. 1-2, ¶ 3.2(a): trustee shall pay deposits to the pre-need seller upon presentation of an affidavit "that a Funeral Agreement has matured as the result of the death of the Beneficiary thereof"

- Exs. 1-2, ¶ 4.2(a): trustee or investment advisor may purchase "life insurance on the life of any beneficiary as the term beneficiary is defined in paragraph 1.5"
- Exs. 1-2, Art. VI: referring to "beneficiaries of outstanding Funeral Agreements"

Accordingly, the definition of "beneficiary," standing alone, does not make the person receiving the funeral a trust beneficiary. *Cf.* 2 Austin Wakeman Scott et al., *Scott and Ascher on Trusts* § 12.13, at 771 (4th ed. 2006) ("[E]ven if the governing instrument expressly or by class refers to a particular individual, the individual is not necessarily a beneficiary."). The question remains, "Beneficiary *of what*?" The trust agreements provide a clear answer: as to the trusts, NPS is the only beneficiary because the agreements specifically give all rights in trust property to NPS, and only NPS. The defined term "beneficiary" cannot possibly refer to the trust beneficiary because, as that term is used throughout the trust agreements, no rights whatsoever in trust property are provided to the "beneficiary." "Beneficiary" simply refers to the pre-need contract beneficiary.

Second, Plaintiffs cite provisions that refer to pre-need contract "owners." Mot. at 8. But pre-need contract owners are not necessarily "[t]he recipients of funeral services sold by NPS." *Id.* For example, an elderly person's child may purchase a pre-need contract for his or her parent, making the child the contract "owner" and the parent the "beneficiary." The "Owner" and "beneficiary" of a pre-need contract are separately defined in the trust agreements. The "owner" is "each person who shall execute a Funeral Agreement with the Seller for the purchase of the funeral services, articles and facilities agreed to be furnished thereunder." SOF ¶ 27; Exs. 1-2, ¶ 1.1. Plaintiffs' reliance on provisions referencing contract "owners" exposes the fallacy of their argument that the agreements' "beneficiary" definition is dispositive.

In any event, none of the provisions on which Plaintiffs rely gives pre-need contract "owners" a beneficial interest in trust property. Although the trust agreements provide that the contract owners "shall be deemed to have only the right to the distributions herein provided in

Article III," SOF ¶ 32; Exs. 1-2, ¶ 2.3, Article III does not give owners any right to distributions. NPS is the only party entitled to distributions under Article III. In the unlikely event that NPS has dissolved and the trustee cannot identify its successor, the trustee may, in its discretion, make payments directly to owners or funeral homes. SOF ¶ 45, Exs. 1-2, ¶ 4.6. The decision to make such payments, however, rests in the discretion of the trustee; neither contract owners nor funeral homes have any enforceable right against the trustee in that situation.

The only right granted to a contract owner is the right to *information* about trust assets. *See* SOF ¶¶ 52-53; Exs. 1-2, ¶ 4.3; *see also* Exs. 1-2, ¶ 4.1 (making the trustee accountable to provide such information). For example, under the trust agreement that governed most of the Missouri NPS Trusts, the owner is entitled to information regarding the amount of funds deposited into trust in connection with his pre-need contract. SOF ¶ 52; Ex. 1, ¶ 4.3. A right to information, however, is not equitable title to trust property. Plaintiffs have not identified any provision of the trust agreements that conveys an enforceable beneficial interest in the trust assets to pre-need contract owners or beneficiaries. In every instance, NPS is the only party entitled to receive trust principal and income.

Finally, Plaintiffs do not even attempt to argue that the trust agreements make funeral homes trust beneficiaries. Their complete failure to identify any support in the trust agreements for their position that funeral homes are trust beneficiaries necessarily defeats that position.

D. The Out-of-Jurisdiction Cases Cited by Plaintiffs Are Largely Irrelevant.

Lacking any support in Missouri law or the trust agreements, Plaintiffs fall back on case law from other jurisdictions. Because the grantor's intent determines who is a trust beneficiary, cases from other jurisdictions—involving different trust instruments and statutory schemes—have little relevance, if any, here. As discussed above, states have enacted a wide variety of statutory schemes governing pre-need trusts. It is therefore impossible to draw general

conclusions from out-of-jurisdiction cases. In any event, Plaintiffs grossly mischaracterize their cited cases. Notably, some of Plaintiffs' cases have *nothing to do with trusts at all*.

First, Plaintiffs falsely describe cases as having "found funeral services recipients to be beneficiaries of preneed trusts." Mot. at 13. None of the cases cited by Plaintiffs makes that finding. Two cases do not mention trusts at all. *See N.C. Bd. of Mortuary Sci. v. Crown Mem'l Park, L.L.C.*, 590 S.E.2d 467 (N.C. Ct. App. 2004); *Guar. Nat'l Ins. Co. v. Denver Roller, Inc.*, 854 S.W.2d 312 (Ark. 1993).[10] Another opinion—an antitrust consent decree—mentions trusts only in passing. *See Commonwealth v. Doane Beal & Ames, Inc.*, No. 94-1002 8 REK, 1994 WL 117068, at *2 (D. Mass. Feb. 15, 1994) (settling defendants must assign "all trust accounts relating" to pre-need contracts to the acquiring entity). To the extent the cited cases use the term "beneficiary" in connection with pre-need consumers, they are describing the "beneficiary" of the pre-need contract or simply quoting statutory provisions. *See, e.g.*, *Doane Beal & Ames*, 1994 WL 117068, at *2 ("the beneficiaries of all such contracts"); *N.C. Bd. of Mortuary Sci.*, 590 S.E.2d at 470 ("the beneficiary of the products and services to be rendered" (footnote omitted)); *Stevens v. Stevens*, 505 S.E.2d 674, 677 (W. Va. 1998) (per curiam) (citing statutory provisions that use the term "contract beneficiary"); *Utah Funeral Dirs. & Embalmers Ass'n v. Mem'l Gardens of Valley, Inc.*, 408 P.2d 190, 193 (Utah 1965) (quoting statutory provisions).

Second, Plaintiffs mischaracterize rulings of the U.S. Tax Court. In *Perry Funeral Home, Inc. v. Commissioner*, 86 T.C.M. (CCH) 713 (T.C. 2003), *available at* 2003 WL 22953114, the Tax Court was simply quoting a Massachusetts regulation, under which the recipient of funeral services must be the trust beneficiary. *See id.* at *6; *see also* p. 5, *supra*.

[10] Similarly, Plaintiffs cite *D.O. McComb & Sons, Inc. v. Feller Funeral Home, Inc.*, 720 N.E.2d 454 (Ind. Ct. App. 1999) for the proposition that funeral homes are pre-need trust beneficiaries, but that case has nothing to do with trusts.

Worse yet, Plaintiffs used a "citation omitted" parenthetical to obscure the fact that the court was quoting a regulation. Likewise, in *McCormac v. Commissioner*, 67 T.C. 955 (1977), the Tax Court was simply describing the terms of a particular trust agreement. *See id.* at 958.[11]

Third, Plaintiffs misstate the holdings of other cases. For example, they incorrectly suggest that an Illinois federal court found that pre-need consumers were trust beneficiaries. Mot. at 13 (citing *Tipsword v. I.F.D.A. Servs., Inc.*, Nos. 09-390-GPM et al., 2011 WL 2470705, at *1 (S.D. Ill. June 21, 2011)). In fact, the opinion did not address claims by consumers. The bank trustees moved to dismiss claims by the *funeral homes* that sold the preneed contracts, deposited the funds into the trust, and were entitled to payments from the trust upon the consumers' death. *See* 2011 WL 2470705, at *3; Ex. A, ¶ 5 (Third Am. Compl. in Case No. 3:09-cv-00390 (S.D. Ill.)). In other words, the funeral home plaintiffs were similarly situated to NPS. Unsurprisingly, the court held that the funeral homes were trust beneficiaries in those circumstances. 2011 WL 2470705, at *3. Similarly, in *IFS Industries, Inc. v. Stephens*, 205 Cal. Rptr. 915 (Ct. App. 1984), a California court concluded that a funeral director was a trust beneficiary where, by statute, the trustee was required to "deliver the corpus of the trust to the funeral director." *Id.* at 921-22 (emphasis and quotation marks omitted).[12] To the extent Plaintiffs' cases are at all relevant, they confirm that NPS—the party entitled to distributions from the trust—is the only trust beneficiary.

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[11] State law—not federal tax law—"controls in determining the nature of [a taxpayer's] legal interest" in property. *Aquilino v. United States*, 363 U.S. 509, 512-13 (1960) (quotation marks omitted). For this reason, Plaintiffs' reliance on an IRS notice describing pre-need trusts is unfounded. *See* Mot. at 14. The notice sets forth eligibility requirements for "qualified funeral trusts." Plaintiffs cite no evidence that the Missouri NPS Trusts were qualified funeral trusts.

[12] Similarly, in *Bean v. Department of State*, 855 A.2d 148 (Pa. Commw. Ct. 2004), the plaintiff was a funeral director who sold the pre-need contract. Although the court suggested that both the funeral director and pre-need consumer were trust beneficiaries, that issue was not before the court and the court did not even decide whether a trust existed. *Id.* at 155-56.

II. Under Any Definition of "Independent," Wulf Bates & Murphy Was an Independent Investment Advisor.

A. The Statutory Scheme.

Chapter 436 and the trust agreements authorized NPS to appoint "a federally registered or Missouri-registered independent qualified investment advisor" to make investment decisions about trust assets. Mo. Rev. Stat. § 436.031(2) (2008, repealed 2009); *see also* SOF ¶¶ 112-113; Exs. 1-2, ¶ 2.2. In the event of such appointment, the trustee has no "discretion [or] authority" over investment decisions. Exs. 1-2, ¶ 4.2. That authority rests solely with the investment advisor. As Plaintiffs admit, "[t]he legislature . . . designated one of two entities to have power over preneed trust investments—the trustee or independent investment advisor." Mot. at 17.

When the trustee has investment authority, it must "exercise such judgment and care under circumstances then prevailing which men of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs." Mo. Rev. Stat. § 436.031(2). Chapter 436 makes clear that the investment advisor is held to the same standard: although the seller may designate an investment advisor to manage trust funds, "[i]n no case . . . shall said assets be placed in any investment which would be beyond the authority of a reasonably prudent trustee to invest in." *Id.*

When the seller appoints an independent investment advisor, the trustee "shall be relieved of all liability regarding investment decisions made by such qualified investment advisor." *Id.*; *see also* SOF ¶ 113; Exs. 1-2, ¶ 2.2. That provision is a crucial component of the statutory scheme. If a trustee could be held liable for investment decisions by the investment advisor, the trustee would have reason to second-guess or interfere in each of those decisions. By removing the trustee's authority and relieving the trustee of this exposure, the statute formalizes the separation of duties between the trustee and the investment advisor. Put another way, no rational

trustee would agree to relinquish authority over investment decisions to a third party (selected by the pre-need seller) if the trustee could be held liable for that third party's decisions. The "no liability" provision thus protects the pre-need seller's ability to appoint an investment advisor.

Plaintiffs incorrectly suggest that a trustee is relieved from liability only when the investment advisor's investment is "reasonably prudent." Mot. at 18-19. That nonsensical interpretation would improperly eviscerate the statute's "no liability" provision—*i.e.*, the exception would swallow the rule. *Cf. 20th & Main Redevelopment P'ship v. Kelley*, 774 S.W.2d 139, 141 (Mo. 1989) (en banc) (courts must "strive to . . . harmonize all provisions of the statute"); *State ex rel. Stern Bros. & Co. v. Stilley*, 337 S.W.2d 934, 939 (Mo. 1960) (statutes should be construed to avoid "absurd" results). When read together with the entire statute, including the provision relieving trustees from liability, the "reasonably prudent" language plainly describes the standard for the investment advisor's investment decisions—the standard under which *the investment advisor* might be held liable. The statute cannot reasonably mean that trustees are liable for imprudent investment decisions over which they have no authority.

B. NPS's Appointment of Wulf Bates & Murphy.

In 1988, NPS retained WBM as investment advisor for the assets in the Missouri NPS Trusts. SOF ¶ 114; Ex. 29; *see also* SOF ¶ 115. WBM served continuously as the investment advisor for the Missouri NPS Trusts until NPS's collapse in 2008. SOF ¶ 133.

WBM was an investment firm founded by David Wulf, Charles Bates, and John Murphy in 1985 or 1986. SOF ¶ 118. WBM hired its own employees, paid its own taxes, and leased its own office space. SOF ¶ 119. Wulf and Bates each owned roughly half of the company. SOF ¶ 120. Neither NPS nor any NPS officer, Cassity family member, or NPS affiliate had an ownership stake in WBM. SOF ¶¶ 121-122. NPS was not WBM's only client. WBM's client

base was "an eclectic mix of old money, institutions, individuals, [and] retirement plans." SOF ¶ 131. WBM continued representing other clients after NPS went into receivership. SOF ¶ 132.

From 1986 until 2010 or 2011, WBM was registered as an investment advisor with the U.S. Securities and Exchange Commission ("SEC"). SOF ¶ 124. In addition, between 1986 and 2013, Wulf and Bates were each registered with the Financial Industry Regulatory Authority or its predecessors. SOF ¶¶ 128-129.

C. WBM Was "Independent" under Any Meaning of That Term.

Chapter 436 does not specify the entity or entities from which the investment advisor must be independent. "If a statute is ambiguous, it is to be construed in a manner consistent with the legislative intent, giving meaning to the words used in the broad context of the legislature's purpose in enacting the law." *Estate of Williams v. Williams*, 12 S.W.3d 302, 306 (Mo. 2000) (en banc). In ascertaining legislative intent, the court must construe the "provisions of the entire act . . . together and, if reasonably possible, all provisions should be harmonized." *Martinez v. State*, 24 S.W.3d 10, 18 (Mo. Ct. App. 2000).

In light of the statute's overall structure, "independent" is logically construed to require that the investment advisor be independent from the trustee. As discussed above, the trustee must have confidence that it will be protected by the "no liability" provision. If a trustee cannot know in advance whether the "no liability" provision will apply, one of two things will occur: either the trustee will resign as trustee when the pre-need seller appoints an investment advisor or the trustee will exceed its statutory authority by scrutinizing or second-guessing each of the investment advisor's investment decisions. In either case, the pre-need seller's statutory right to transfer investment authority *from* the trustee *to* an investment advisor would be meaningless. For the statute to be effective, then, the trustee must be able to determine in advance that the investment advisor is "independent." The trustee can confidently make that determination if and

only if the statute requires independence *from the trustee*.[13] It is undisputed that WBM was independent from the Missouri Trustees. *See* SOF ¶ 123.

Plaintiffs argue that Chapter 436 should be construed to require the investment advisor also to be "independent" of the pre-need seller. The Court need not determine whether Plaintiffs' interpretation of the statute is correct because, even if it is, the undisputed evidence establishes that WBM and NPS were independent.

As plaintiffs themselves recognize, *see* Mot. at 20, the word "independent" has myriad meanings. *See, e.g.*, *Webster's New World Dictionary of the American Language* 714 (1982):

> 1. free from the influence, control, or determination of another or others; specif., *a)* free from the rule of another; controlling or governing oneself; self-governing *b)* free from influence, persuasion, or bias; objective . . . *c)* relying only on oneself or one's own abilities, judgment, etc.; self-confident; self-reliant . . . 2. *a)* not dependent on another or others, esp. for financial support . . . .

To determine which of these meanings governs, the court must read the word in the context of the statute as whole, harmonizing the statute's provisions to effectuate its purpose. *See Williams*, 12 S.W.3d at 306; *Martinez*, 24 S.W.3d at 18. For Chapter 436 to work under Plaintiffs' interpretation—which calls for the investment advisor to be independent of the pre-need seller—the term "independent" must be defined by objective, clear criteria that are ascertainable in advance by a trustee. If the investment advisor's independence were not defined by objective, ascertainable criteria, the trustee could not know in advance that it would be protected from liability for the investment advisor's investment decisions. As discussed above, in that situation, the trustee rationally could not agree to relinquish investment management authority. Alternatively, the trustee would have to scrutinize the investment advisor's decisions, which

[13] It makes sense that the legislature would protect the trustee from liability only if the trustee and investment advisor are independent of each other, not where the trustee controls the investment advisor. *Cf.* Restatement (Second) of Trusts § 171 cmt. k (1992) (trustee has duty to supervise agents to which the trustee himself delegates authority).

contravenes the trust agreements' recognition that "full discretion and authority with respect to the investment of the funds" rests with the trustee "*or*" the investment advisor. Exs. 1-2, ¶ 4.2 (emphasis added). In either scenario, the pre-need seller's statutory authority to appoint an investment advisor would be worthless.

The need for clear, objective criteria favors reading "independent" consistent with definition 1(a) above—*i.e.*, to ask whether the investment advisor is "free from the rule of [the pre-need seller]; controlling or governing oneself; self-governing." *Webster's New World Dictionary of the American Language*, *supra*, at 714. That inquiry necessarily looks to the legal status of the two companies. It is undisputed that WBM was self-governing. WBM and NPS did not have common ownership. SOF ¶¶ 121-122. WBM existed and did business for several years before it took on the NPS account. SOF ¶ 118. And WBM continued to do business after NPS's collapse. SOF ¶ 132. The two companies were separate, independent companies.

Plaintiffs have not offered any alternative standard by which to judge WBM's independence from NPS. The best they can muster is to state that the investment advisor must be "free from the influence, control, or authority" of the pre-need seller. Mot. at 20. That mushy standard provides no criteria by which a trustee could assess in advance whether the investment advisor is independent. A trustee would not even know what questions to ask to arrive at a clear understanding of the investment advisor's independence. How much influence is too much under this test? Under Plaintiffs' view, a trustee would be strictly liable for an investment advisor's imprudent decisions whenever a jury concluded, with the benefit of hindsight, that the investment advisor was unduly "influence[d]" by the pre-need seller. That standard inappropriately would "introduce[] an element of uncertainty into an area that demands certainty

and predictability" and would offer no "predictive value" to a trustee. *Pinter v. Dahl*, 486 U.S. 622, 652 (1988) (rejecting a similarly amorphous test in the securities context).

Moreover, Plaintiffs' standard seemingly asks whether the investment advisor acts independently of the pre-need seller when it makes each investment decision. The statute, by contrast, asks whether the investment advisor is "independent" as a categorical matter, not whether it acts "independently" in any given situation. Plaintiffs' standard would require a trustee to scrutinize, continuously, each investment decision to determine whether it was influenced by the seller. Not only is that standard impractical, it would be counterproductive. Collaborative relationships between investment advisors and clients are commonplace. Indeed, the State of Missouri previously recognized that it was appropriate for NPS to make investment recommendations to WBM. *See* Ex. B (NPS "shall not . . . recommend any investment decisions inconsistent" with the reasonably-prudent-trustee standard of § 436.031(2)).

None of Plaintiffs' factual assertions—many of which are incorrect—undermines WBM's independence from NPS.

1. That David Wulf spent most of his time advising Cassity-owned entities does not mean that WBM is not independent of NPS—just as the fact that an outside lawyer spends most of her time advising a certain client does not compromise the "independence" of the lawyer's law firm. Moreover, NPS was just one of WBM's many clients. *See* SOF ¶ 131.

2. That WBM authorized NPS employees to perform "ministerial acts" for WBM, or that WBM instructed the trustees to transfer trust funds upon direction from NPS employees, does not mean that WBM and NPS were not independent companies. At most, it shows that the companies collaborated, as one would expect a client and advisor to do.

3. WBM received internet access and use of a computer server space from NPS when it leased office space from NPS. *See* Pls.' Ex. G, at 102:21-103:12. This service does not compromise the two companies' legal independence. And, although WBM employees may have received NPS or Forever Network e-mail addresses in connection with this server sharing, Wulf's undisputed testimony was that WBM employees did not use those e-mail addresses and always communicated using a wbmnet.com address. *See* Ex. C at 319:8-321:5 (Dep. Tr. of David Wulf). Finally, although Plaintiffs cite a handwritten note indicating that David Wulf received his signature stamp and stationery back from NPS, his undisputed testimony was that NPS used his stamp without his consent and he took it back. *See* Ex. C at 378:3-5. Wulf's testimony reinforces the two companies' independence. Moreover, none of these facts are the kind of objective criteria that could be evaluated in any meaningful way by a trustee.

4. At some point in time, probably in 2001, WBM had to find a larger health insurance plan to join. SOF ¶ 140. It joined the NPS plan among others it was considering. SOF ¶ 140. WBM paid for this insurance. SOF ¶ 140. The sharing of a group health insurance plan does not make two companies dependent on each other. Plaintiffs have provided no evidence that WBM employees actually participated in NPS's retirement plan; Exhibit I does not show any contributions by or disbursements to WBM employees. In any event, these are not the kinds of factors that can be evaluated by a trustee with any sort of precision.

5. That WBM's compensation by Lincoln was tied to the amount of assets being reserved by Lincoln does not mean that WBM and NPS were not independent companies. Plaintiffs provide no evidence to suggest that a trustee could have known or evaluated the significance of this fact.

6. The lessor-lessee relationship between NPS and WBM—which did not arise until after early 1999, after Allegiant had commenced its trusteeship, *see* SOF ¶ 139—did not render the two companies not independent. WBM's office space was separate from NPS's office space; NPS did not have any offices on the floor on which WBM was located. *See* Pls.' Ex. G, at 102:3-14. There is no evidence that WBM did not pay arm's length rent.

7. WBM's disclosure of potential conflicts of interest in a Form ADV filed with the SEC in 2002—long after Allegiant had assumed its trusteeship—is not objective criteria of a lack of independence. A potential conflict of interest is not the same thing as a lack of independence. WBM and NPS remained separate companies.

In sum, the facts that Plaintiffs intend to present to the jury illustrate precisely why Plaintiffs' open-ended, amorphous "independence" standard cannot be the law. If a trustee had to scrutinize, continuously, every aspect of an investment advisor's financial dealings with a pre-need seller to assure itself that the investment advisor was, and continued to be, sufficiently free of the pre-need seller's influence, the division of duties between the trustee and the investment advisor would collapse. Even assuming Plaintiffs are correct that the investment advisor must be independent of the pre-need seller, the required "independence" must be defined by objective, easily ascertainable criteria tied to the two companies' legal relationship. Under that objective test, WBM was independent of NPS.

CONCLUSION

For the foregoing reasons, the Missouri Trustees respectfully request that this Court deny Plaintiffs' motion for rulings as a matter of law and hold that (a) NPS is the sole beneficiary of the Missouri NPS Trusts and (b) Wulf Bates & Murphy was "independent" as that term is used in Mo. Rev. Stat. § 436.031 (2008, repealed 2009).

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2014, the foregoing OPPOSITION TO PLAINTIFFS' MOTION FOR RULINGS AS A MATTER OF LAW was filed electronically with the Clerk of Court and served by operation of the Court's electronic filing system upon all counsel of record in this case participating in Electronic Case Filing.

I hereby further certify that the foregoing was mailed by United States Postal Service to the following non-participants in Electronic Case Filing:

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