No.

IN THE

Supreme Court of the United States

FRIEDA MAE ROGERS, FORMERLY KNOWN AS FRIEDA ROGERS ROEN; PREMIER TRUST INC., A NEVADA CORPORATION, AS TRUSTEE OF THE FRIEDA M. ROEN RESULTING TRUST U/A/D JULY 19, 1934, PETITIONERS

v.

WILMINGTON TRUST COMPANY, A DELAWARE CORPORATION; WILMINGTON TRUST INVESTMENT ADVISORS INC., A MARYLAND CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. May the court of appeals override the parties' factual stipulation crucial to petitioners' right to recover, contrary to this Court's precedents as well as the decisions of inferior federal courts, all holding that factual stipulations are final and binding on the parties and the litigation itself as judicial admissions?

2. Did the court of appeals violate the federalism principle of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) when it created contrary to Delaware statutory law new substantive State law about what constitutes a"report" under 12 Del. Code § 3585 for purposes of triggering the statutes of limitations for bringing suit, a result causing substantial variation in outcomes between State and federal litigation, influencing the choice of a forum for future litigants and depriving petitioners of property rights they would otherwise enjoy in State court?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner Premier Trust, Inc., is a Nevada corporation which is a wholly owned subsidiary of Advisor Group, Inc., a Maryland corporation. No publicly held company owns 10% or more of the stock of Advisor Group, Inc

STATEMENT OF RELATED CASES

None

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OTHER AUTHORITIES

OPINIONS BELOW

The unpublished Opinion of the United States Court of Appeals for the Third Circuit in *Frieda Mae Rogers et al. v. Wilmington Trust Company et al.*, C.A. No. 21-1473, decided and filed March 3, 2022, and reported at 2022 WL 621690 (3rd Cir. 2022), affirming the District Court's orders after a bench trial finding respondent Wilmington Trust not liable for any of the claims brought by petitioners, is set forth in the Appendix hereto (App. 1-17).

The unpublished Memorandum Opinion of the United State District Court for the District of Delaware in *Frieda Mae Rogers et al. v. Wilmington Trust Company*, Civil Action No. 18-116-CFC, decided and filed February 25, 2021, and reported at 2021 WL 739048; 2021 U.S. Dist. LEXIS 35293 (D. Del. Feb. 25, 2021), finding respondent Wilmington Trust not liable for any of the claims brought by petitioners, is set forth in the Appendix hereto (App. 18-54).

The unpublished order of the United States Court of Appeals for the Third Circuit in *Frieda Mae Rogers et al. v. Wilmington Trust Company et al.*, C.A. No. 21-1473, filed on June 29, 2022, denying petitioners' timely filed petition for panel rehearing is set forth in the Appendix hereto (App. 55).

The decision of the United States Court of Appeals for the Third Circuit affirming the District Court's orders finding respondent Wilmington Trust not liable for any of the claims brought by petitioners, was entered on March 3, 2022; and its order denying petitioners' timely filed petition for panel rehearing was decided and filed on June 29, 2022 (App. 1-17;55).

This petition for writ of certiorari is filed within ninety (90) days of the date of the Court of Appeals' denial of petitioners' timely filed petition for panel rehearing. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED.

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

12 *Del. Code* § 3302(a):

Degree of care; authorized investments.
(a) When investing, reinvesting, purchasing, acquiring, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account.
In making investment decisions, a fiduciary may consider the general economic conditions, the anticipated tax consequences of the investment

and the anticipated duration of the account and the needs of the beneficiaries; when considering the needs of the beneficiaries, the fiduciary may take into account the financial needs of the beneficiaries as well as the beneficiaries' personal values, including the beneficiaries' desire to engage in sustainable investing strategies that align with the beneficiaries' social, environmental, governance or other values or beliefs of the beneficiaries.

12 *Del. Code* § 3585 (2015):

Limitation of action against trustee following trustee's report.

(a) A beneficiary may initiate a proceeding against a trustee for breach of trust until the first to occur of:

(1) Two years after the date the beneficiary was sent a report that adequately disclosed the facts constituting a claim; or

(2) The date the proceeding was otherwise precluded by adjudication, release, consent or limitation.

(b) A report adequately discloses the facts constituting a claim if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into its existence.

(c) For the purpose of subsection (a) of this section, a beneficiary is deemed to have been sent a report if:

(1) In the case of a beneficiary having capacity, it is sent to the beneficiary; or

(2) In the case of a beneficiary who under § 3547 of this title may be represented and bound by another person, it is sent to the other person.
(d) If subsection (a) of this section does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within 5 years after the first to occur of:
(1) The removal, resignation, or death of the trustee;
(2) The termination of the beneficiary's interest in the trust; or
(3) The termination of the trust.
(e) This section does not preclude an action to recover for fraud or misrepresentation related to the report.

12 *Del. Code* § 3585(a)(1) & (b) (2018):

Limitation of action against trustee following trustee's report.
(a) A person may initiate a judicial proceeding against a trustee for breach of trust or other claim until the first to occur of:
(1) One year after the date the person was sent a report that adequately disclosed the facts constituting a claim provided, however, that if the governing instrument provides that claims shall survive for a period longer than 1 year after such date, then claims shall survive for the period specified in the governing instrument;
(2) In the case of any trustee who is resigning, has resigned, is being removed, has been removed, is ceasing to serve, or has ceased to serve as trustee for any other reason (including on account of the termination of the trust by

reason of liquidation or by reason of a merger or similar transaction described in § 3341 of this title), 120 days after the date the person was sent a report that:

a. Notifies the person that the trustee is resigning, has resigned, is being removed, has been removed, is ceasing to serve, or has ceased to serve;

b. Adequately discloses the facts constituting a claim; and

c. Adequately discloses the time allowed under this section for initiating proceedings against the former trustee; provided that the trustee transfers the trust property to the appropriate successors in interest within a reasonable period of time following the expiration of the 120-day period; or

(3) The date the proceeding was otherwise precluded by adjudication, release, consent, limitation or pursuant to the terms of the governing instrument.

(b) For the purpose of subsection (a) of this section, a report adequately discloses the facts constituting a claim if it provides sufficient information so that the person knows of the claim or reasonably should have inquired into its existence. Also, for the purpose of commencing the 1-year period in paragraph (a)(1) of this section or the 120-day period in paragraph (a)(2) of this section, either period shall begin when the report is received by the person to whom the report was sent. Absent evidence to the contrary, it shall be presumed that the report was received by the person 7 days after it was sent to such person in accordance with § 3534 of this title.

District Court Local Rule 16.3(c)(3):

Pretrial Conference and Procedure.
(c) Proposed pretrial order. Prior to the pretrial conference, counsel for all parties shall meet and confer in order to premark and exchange all trial exhibits and otherwise discuss the contents of the proposed pretrial order, which shall include the following:
....
(3) A statement of the facts which are admitted and require no proof....

STATEMENT

Petitioner Frieda Mae Rogers, f/k/a Frieda Rogers Roen ("petitioner" or "Rogers"), is an heir to the Carnation Milk enterprise. Her family's relationship with respondent Wilmington Trust Company ("respondent" or "WTC") as a trustee goes back at least until 1934 when the Rogers family created the so-called "original trust." In 2004, the Rogers family partitioned the original trust; one of the resulting trusts was the Rogers Family Trust. In November of 2008, the Delaware Court of Chancery further partitioned the Rogers Family Trust into five newly created resulting trusts, one of which is the Frieda M. Roen Resulting Trust under agreement dated July 19, 1934 ("Roen Trust"). Each partition was a voluntary act undertaken by the interested parties.

In 2008, the Roen Trust contained approximately \$33.5 million in assets distributed from the Rogers Family Trust. Under the Roen Trust Agreement, petitioner is the sole primary beneficiary of the Trust and distributions of its net income and principal could be made "to or for the benefit of the Primary Beneficiary" (App. 19-20). Its provisions forbid distributions to anyone other than petitioner beginning in 2013 (upon the death of another family member who was the measuring life) until petitioner passes. Upon petitioner's passing, the Roen Trust will terminate and its assets are distributed to her remaindermen in accordance with a waterfall distribution scheme.

WTC was trustee of the Roen Trust when it was formed in 2008. One month later, Rogers appointed WTC to also act as Trust advisor. Until January of 2015, WTC served as both trustee and advisor to the Roen Trust. Under Delaware law, a trust advisor is a fiduciary who has control of certain actions of the trustee when the trust agreement requires the advisor's approval (App. 19-20). The Roen Trust Agreement contains an exculpation clause limiting the liability of WTC and its advisor WTIA to "fraud, willful misconduct or gross negligence" (App. 21;41).

As of 2013, Rogers was empowered by the Roen Trust to replace and appoint the trustee of the Trust. The Trust Agreement also granted WTC, with the express consent and approval of itself as the advisor, the discretion to invest and sell trust assets as the trustee deemed advisable and to spend so much of the Roen Trust's income and principal as WTC saw fit. Of the \$33.5 million in Trust assets in 2008, \$25.4 million was invested in six private limited partnership funds, the affiliated Wilmington Private Funds ("WPFs").

WPFs were offered only to WTC clients and its affiliates. Non-party Wilmington Trust Investment Management ("WTIM"), a wholly owned subsidiary of WTC, was the manager of these six WPFs. Investments in WPFs required the disclosure of Private Placement Memoranda ("PPMs") which disclosed to a potential investor like the Roen Trust that assignment was only permitted with WTIM's prior written consent. However, WTIM's *unwritten* internal policy—which petitioner was not told—was that it *never* consented to the transfer of WPF assets outside of WTC. Thus if an investor wished to move the WPF assets to another institution, it had to liquidate its holdings and likely incur substantial capital gains tax liabilities.

From January 2009 through December of 2014, the Roen Trust's invested in six WPFs which had a combined net gain of $23.9 million. The Trust's last purchase of these WPFs took place on January 3, 2011. Notwithstanding this last purchase, WTC—as trustee and Advisor—made the intentional decision to maintain a majority of the Roen Trust's assets in the affiliated WPFs. Besides the $33.5 million in assets distributed to the Roen Trust in 2008 following the Rogers Family Trust partition and the $23.9 million net gain realized from its investments in the WPFs from 2009 through 2014, the Roen Trust also received a significant distribution upon the dissolution of a separate Rogers Family Limited Partnership investment with WTC in 2013. Thus by 2014, the corpus of the Roen Trust was comprised of $61.5 million of which $36 million was invested in the WPFs.

Petitioner was 61 years old when the Roen Trust was created in 2008. At the time of trial, she was 74 years of age, wheelchair-bound and hard of hearing. She never finished high school and has "little knowledge of or interest in financial matters" (App. 20). Although she had received more than $12 million from the Trust between 2009 and 2014, including a monthly distribution of $150,000, she was always communicating with WTC to obtain larger distributions. Eventually her repeated requests for money caused the conversion of the Trust to a so-called "unitrust" that annually paid petitioner a minimum fixed percentage of the market value of Trust assets.

Chris Sullivan was WTC's investment expert for the Roen Trust and Tonia Kennedy was WTC's relationship manager—the point person for contact with petitioner. After creation of the Roen Trust in 2008, Sullivan met with petitioner, but he failed to apprehend that she was unsophisticated in financial matters and that she had failed to graduate high school. All he knew was that petitioner lived on a ranch in California and had six children, an insufficient basis to determine her investment goals or the suitability of investments WTC might pursue on her behalf (App. 23-24). As the trial judge later found, WTC's annual review of the Trust's performance on petitioner's behalf "could charitably be described as pro forma" (App. 24).

Nor did Sullivan or Kennedy ever discuss with petitioner the tax implications arising from WTC's management of Trust assets. Remarkably, WTC admitted that it never engaged in tax or financial planning for the Trust. Its personnel never explained to petitioner that the majority of Trust assets were in the WPFs; that the WPFs were restricted funds; and that if she appointed a new trustee, these funds would need to be liquidated and the Trust would face substantial capital gains tax liabilities. Without exercising any fiduciary oversight as trustee or Advisor to the Roen Trust, Sullivan "locked up" the $36 million of WPF investments until their forced liquidation in 2015.

By 2013, petitioner's ranch manager (Shawna Baker) became increasingly involved with petitioner's ongoing requests for disbursements of Trust funds beyond her monthly allowance. Baker kept track of petitioner's financial documents and as Baker's involvement in petitioner's finances increased, so too did petitioner's requests for discretionary disbursements. In July of 2013, petitioner requested a $1.4 million disbursement to buy land; and in early 2014, she asked Kennedy to approve a $9 million disbursement to expand her cattle business. Her business plan showed that Baker and her husband owned 50% of petitioner's cattle business. This fueled concern by WTC that the Bakers were taking advantage of petitioner, a concern that never stopped WTC from continuing to manage its relationship with petitioner through Baker.

WTC eventually approved the $1.4 million disbursement in June 2014. With petitioner's $9 million request still pending, WTC in 2014 approved other distributions significantly beyond what she had requested in prior years, e.g., $300,000 for medical expenses; $193,000 for "unanticipated hay expenses;"and $150,000 for Christmas gifts. On December 5, 2014, Kennedy wrote petitioner that WTC's loan committee had more questions about the $9 million disbursement. Baker became irate with Kennedy over WTC's delay in approving this disbursement and, apparently speaking for petitioner, threatened to "move her Trust" to another trustee (App. 30).

On January 8, 2015, Kennedy and WTC personnel flew to California to meet with petitioner. Instead, Baker met with them; she stated that petitioner "intended to fire [WTC] as trustee" (App. 31). Notably, no one from WTC thought it necessary to contact the authorities in California to investigate whether the Bakers were taking advantage of petitioner (*Id.*).

On January 15, 2015, petitioner's attorney wrote WTC that petitioner had terminated WTC as trustee and that petitioner Premier Trust, Inc. (a "petitioner" or "Premier") was now the successor trustee. On behalf of Premier, the attorney asked for the expeditious transfer to Premier of both public and private trust assets . On January 23, 2015, Kennedy responded that there "are significant gains on assets within Frieda's Trust that are not transferrable to Premier" (App. 33). In an e-mail four days later, Kennedy "estimate[d] capital gains in excess of $9 million if the [WPFs] are liquidated since they are not transferable outside of [WTC, and]...this will result in a tax liability to the Trust in excess of $2.2 million...." (App. 34-35). Kennedy never mentioned that the WPFs could be transferred in kind with WTIM's consent.

By February 2015, Rogers had also appointed Premier as Advisor to her Trust. Premier's President, Mark Dreschler, was compelled to direct WTC to sell the proprietary WPFs and transfer the other Trust assets to Premier. WTC liquidated the Trust's holdings in the WPFs and transferred to Premier the sale proceeds and remaining Trust assets. Premier believed it could mitigate the anticipated capital gains tax by use of a capital loss carry-forward of $4.4 million from 2013. However, and unbeknownst to Premier, WTC used the 2013 capital loss carry-forward in 2014. This was unknown to Premier because, among other things, WTC's routine quarterly account statements for 2014 showed *no* long-term capital gains for that year.

Because the $36 million in WPFs were held in six limited partnerships, Premier could not address the taxable income petitioner derived therefrom as a beneficiary for 2014 until it received the Form K-1s for 2014 from WTC, the last full year WTC served as Trustee. In July 2015, Premier's Dreschler and its Trust Officer Kindra Blaylock both understood from Kennedy that she (Kennedy) would send the K-1s to Premier when they became available in September of 2015, the time when Premier would file the Trust's 2014 tax return. But Kennedy *never* delivered the six K-1s to Premier in 2015. *Prior to trial, the parties stipulated to the fact that "WTC cannot confirm when the WPF K-1s were actually sent or delivered to Premier."*

In March of 2015, Kennedy filed with the California Health and Human Services Agency (CHHSA) a report of suspected Dependent Adult/Elder Abuse. It identified Rogers as the victim and Baker as the perpetrator of financial abuse concerning the Roen Trust. CHHSA told Kennedy it would investigate but WTC never followed up to determine whether an investigation took place.

On March 16, 2017, petitioner and Premier ("petitioners") began this civil action against WTC and its affiliate Wilmington Trust Advisors, Inc. ("WTIA") in the federal district court for the Eastern District of California (Fresno Division). Asserting primary jurisdiction under 28 U.S.C. § 1332(a)(1) (diversity), Premier on behalf of the Roen Trust alleged breaches by WTC of its fiduciary duties as Trustee of the Roen Trust; a claim of equitable fraud; and a claim under the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1-21 (App. 12;19). Rogers also alleged a state law statutory claim for financial abuse of an elder (*Id.*). WTC successfully sought a transfer of venue to the District of Delaware pursuant to 28 U.S.C. §1404(a).

Prior to trial, the parties agreed upon a Stipulation of Facts, one of which provided that "*WTC cannot confirm when the WPF K-1s were actually sent or delivered to Premier*" (App. 7). (emphasis added). Prior to trial, WTIA was dismissed from the suit when WTC agreed that it was legally responsible for any actions WTIA took with regard to the Trust (App. 19). After a four-day bench trial, the district court, Connolly, J., issued his Memorandum Opinion on February 25, 2021 (App. 18-54).

Addressing WTC's breach of fiduciary duties, the trial judge was "disturbed" by WTC's failure to disclose to Rogers WTIM's unwritten practice of never consenting to a transfer of WPFs to another institution thereby subjecting her Trust to significant tax liabilities if she did so. In addition, the trial judge was "disturbed" by WTC's "perfunctory" performance in assessing the suitability of the Trust's portfolio for Rogers and her remaindermen (App. 41-42;43-44). Yet the trial judge ruled the first claim was "abandoned" when petitioners' counsel stated that the *purchase* of the WPFs was not part of the case, ignoring the gravamen of Premier's claim that WTC's lockup or *retention* of these private funds until their liquidation in 2015 was a breach of fiduciary duty/trust (App. 42). As for the suitability claim, he found no evidence that WTC's "balanced growth investment choices" were inconsistent with Trust purposes (App. 44). This is despite the fact that the WPF returns, while impressive, paled in comparison to the *additional* $38 million the Trust would have earned by just being invested in the S&P index fund. The trial judge also saw no inherent conflict of interest caused by WTC's dual role of being both Trustee and Advisor to the Trust (App. 45;46-47).

As for WTC's collecting excess fees not permitted under the Trust Agreement, the trial court found that WTC disclosed its fee schedule in July 2011and explained the fee calculations in a statement provided Rogers in December of 2012 (App. 42-43). It cannot be disputed that these fees were in excess of the settlor's intent as expressly set forth in the Trust Agreement. Because this suit was filed in March of 2017, the trial court concluded that any claim based on WTC's excessive fees was barred by the then applicable limitations period of 12 *Del. C.* § 3585 which precludes claims brought more than two years after a "beneficiary was sent a report that adequately disclose[d] the facts constituting a claim" (App. 43). The trial court found that the 2011 fee schedule together with the 2012 account statement qualified as "reports" for purposes of triggering § 3585's limitations period (*Id.*).

Finally, the trial judge ruled that WTC did not breach its assumed duty to the Trust by not delivering to Premier the 2014 WPF K-1s by September 2015 so that Premier could file the Trust's 2014 tax return. Contrary to the parties' Stipulation of Facts that "WTC cannot confirm when the WPF K-1s were actually sent or delivered to Premier," the trial court found that Premier failed to establish by a preponderance of evidence that WTC did not timely deliver to Premier the 2014 K-1s (App. 47). As the trial judge saw it, the testimony of WTIM's Richard Capuano overrode the parties' Stipulation and established that WTC "sent Premier all required K-1s before September 2015" (*Id.*). The trial judge ruled against petitioners on all their remaining claims (App. 47-53).

Petitioners appealed. On March 3, 2022, the court of appeals affirmed all the trial judge's order and judgment (App. 1-17). While it ruled that Premier never waived its claim that WTC had had engaged in a breach of trust by collecting excessive fees, the Panel determined—as a matter of first impression under Delaware law—that even routine, quarterly account statements qualify as a "report" for purposes of triggering the then applicable two-year limitations period of 12 *Del. C.* § 3585, thereby cutting off the right of a beneficiary like Rogers to seek redress on this issue (App. 3-4;14).

As to WTC's failure to deliver all the 2014 K-1s prior to Premier's tax filing in September of 2015, the

Panel, like the trial court, overrode the parties' Stipulation of Facts that "WTC cannot confirm when the WPF K-1s were actually sent or delivered to Premier" (App. 6-7). It ruled that the exact date of delivery was established when WTIM's Capuano testified that WTC "sent Premier all required K-1s before September 2015" (*Id.*). In a finding that contradicted the parties' stipulated facts, the Panel determined that the trial court's finding that the required K-1s were delivered prior to September 2015 was "well-supported by the record" (App. 7).

On June 29, 2022, the Panel denied petitioners' timely filed petition for panel rehearing (App. 55).

REASONS FOR GRANTING THE PETITION

1. The Panel Overrode The Parties' Factual Stipulation Crucial To Petitioners' Right To Recover For Respondent's Breach Of Trust, Contrary To This Court's Precedents As Well As Decisions Of Inferior Federal Courts, All Holding That Factual Stipulations Are Final And Binding On The Parties And The Litigation Itself As Judicial Admissions.

Pursuant to District Court Local Rule 16.3(c)(3), the parties prior to trial stipulated to facts which were admitted and that required no proof. One of those stipulated facts supported petitioners' claim that WTC committed a breach of trust/fiduciary duty when it failed to timely deliver to Premier all the 2014 K-1s for the WPFs prior to Premier's tax filing in September of 2015. That stipulation provides:

> Wilmington Trust cannot confirm when federal K-1 statements related to the Wilmington Private Funds were actually sent or delivered to Premier.

This stipulation represented the state of the pleadings and eventual proof at trial. WTC's answer admitted only that it anticipated that the Form K-1s "would be completed *and delivered* to Premier in September of 2015," *not* that it had done so. Kennedy testified at trial that she *never* delivered them to Premier in 2015; and WTIM's Capuano testified that only four of the six 2014 K-1s were available by September 2105, *not* that all of them had been timely delivered to Premier by then.

Thus, the state of the evidence was that WTC was unable to establish when, if ever, it had delivered any of the six 2014 K-1s to Premier by September of 2015. This provided a persuasive foundation for a finding that it had breached its fiduciary duty to the Trust of prudent administration when it failed to deliver the 2014 K-1s to Premier in a timely manner. Yet the district court and then the court of appeals overrode this binding and conclusive stipulation of the parties and found that all the 2014 K-1s were delivered to Premier prior to September 2015.

The Panel's refusal to enforce or even acknowledge WTC's factual stipulation that it could not confirm if it had ever delivered the K-1s to Premier in a timely manner is at odds with this Court's precedents as well as decisions of inferior federal courts, all holding that such stipulations are final, binding and will be enforced. Moreover, the Panel never meaningfully addressed why it ignored the parties' stipulation; and it never analyzed why it did not bind WTC in this case. Nor did it give any reason why WTC should be permitted to now renege on appeal the stipulation in order to escape liability for breaching its trust by failing to deliver the K-1s to Premier in a timely manner.

This failure by the Panel to honor the parties' binding and conclusive stipulation or to meaningfully address why it would not do so is legal error under this Court's precedents which, at a minimum, warrants a remand to the court of appeals with instructions to address the stipulation and explain its reasoning for disregarding the established fact in this litigation—a binding judicial admission— that WTC was unable to establish when, if ever, it had delivered any of the six 2014 K-1s to Premier by September of 2015. In the alternative, the Court should summarily reverse the court of appeals and remand the matter to the District Court for the District of Delaware for a retrial of the issue of WTC's breach of trust consonant with the parties' Stipulation of Facts.

This is a vitally important issue of federal practice and procedure which warrants the Court's intervention because ignoring the parties' stipulated facts has the potential for widespread negative consequences if allowed to stand. Courts will be unable to efficiently dispose of cases if litigants have no assurance that they can rely on stipulations of fact, a reliance encouraged by both the Local Rules and the Fed. R. Civ. P. 16. Instead, parties will be motivated to prove every fact, even if uncontested, resulting in wasted judicial resources. The issue comes within Supreme Court Rule 10(c)'s guidance about the considerations which point toward the Court's granting a petition for certiorari, i.e., when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court."

In *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 677-678 (2010), the Court held that "the factual stipulations [of the parties] are 'formal concessions...that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of that fact[,] [and] [t]hus, a judicial admission...is conclusive in the case." *Id.*, quoting 2 K. Broun, *McCormick on Evidence* § 254, p. 181 (6th ed. 2006) (footnote omitted). A judicial admission is a stipulation by the parties to a certain fact or application of law to fact which removes a factual dispute from contention. *Starbuck v. R.J. Reynolds Tobacco Co.*, 349 F. Supp.3d 1223, 1234 (M.D. Fla. 2018). The concept of a judicial admission seeks to encourage judicial efficiency and fairness and is supported by the truth-seeking mission of the trial court. *Id.*

Because stipulations of fact are binding and conclusive, the facts agreed to

> are not subject to subsequent variation. So, the parties will not be permitted to deny the truth of the facts stated,...or to maintain a contention contrary to the agreed statement,...or to suggest, on appeal, that the facts were other than as stipulated or that any material fact was omitted.

Martinez, 561 U.S. at 677, quoting 83 C.J.S., Stipulations, § 93 (2000). This is a long-standing rule of Supreme Court jurisprudence. See, e.g., *H. Hackfield & Co. v. United States*, 197 U.S. 442, 447 (1905) ("[P]arties [a]re entitled to have [their] case tried upon the assumption that...facts, stipulated into the record, were established."); *Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1881) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced."). For these reasons, the *Martinez* Court refused to consider a party's argument that contradicted a joint stipulation of the parties which, like here, was entered into at the outset of the litigation. 561 U.S. at 677.

At least six courts of appeals have recognized the importance of enforcing factual stipulations to prevent a party from reneging on an agreement into which it freely entered and upon which the other party relied. See, e.g., *United States v. Bill Harbert Int'l Construction, Inc.*, 608 F.3d 871, 889 (D.C. Cir. 2010) ("Stipulations bind the court and parties....[O]ne party need offer no evidence to prove it and the other party is not allowed to disprove it."); *Provident Fin. Inc. v. Strategic Energy L.L.C.*,404 Fed. App'x 835, 838 (5th Cir. 2010) (pretrial order containing stipulations "supersedes all pleadings and governs the issues and evidence to be presented at trial."); *Hernandez v. Philip Morris USA, Inc.*, 486 F.3d 1, 6 (1st Cir. 2007) (once a party has entered into a stipulation, that party is not at liberty to renege unilaterally on a stipulated fact without leave of court); *Gander v. Gander*, 250 F.3d 606, 609 (8th Cir. 2001) (courts cannot make findings contrary to stipulated facts); *Waldorf v. Shuta*, 142 F.3d 601, 616 (3d Cir. 1998) (allowing parties to modify or set aside stipulations would waste judicial resources and undermine future confidence in such agreements) and *Kearns v. Chrysler Corp.*, 32 F.3d 1541, 1546 (Fed. Cir. 1994) (public policy favors enforcing stipulations of fact).

Contrary to these principles, WTC reneged on its stipulation that it could not confirm when, if ever, it delivered the 2014 K-1s to Premier. It adduced at trial various testimony which while stopping well short of proving its actual delivery to Premier of all the K-1s prior to September of 2015, insinuated that it actually had done so. The Panel should have rejected out of hand this bald attempt by WTC to allegedly "set the record straight," *Acosta v. Special Police Force Corp.*, 371 F. Supp.3d 60, 73 (D.P.R. 2019), and disprove the very facts established by its own pretrial stipulation; and it should have enforced the parties' agreement that WTC could not disprove the established fact that it had breached its duty of prudent administration when it failed to deliver all the 2014 K-1s to Premier in a timely manner.

As *Martinez* holds, a court will not consider a party's argument or evidence that contradicts a stipulation entered at the outset of litigation. 501 U.S. at 676-678. See *Sturdivant v. Blue Valley Unified Sch. Dist.*, 469 F. Supp.3d 1121, 1126 n.2 (D. Kan. 2020) (explication of the *Martinez's* principle). Nor can courts make findings contrary to stipulated facts. *Gander*, *supra*. Yet the Panel violated both tenets first by considering WTC's arguments on the issue of delivery and second by finding based upon Capuano's trial testimony that WTC "sent Premier all required K-1s before September 2015," a finding undercut by

Capuano himself who testified that only four of the six K-1s were presented *to WTC's tax department* by September 1, 2015, *but not* that these K-1s were actually sent to Premier by this time (App. 6-7).

The Panel's overreach in each instance fails to comport with *Martinez*. The parties' stipulation serves as a surrogate for a finding of fact made during the trial about whether WTC delivered the six 2014 K-1s to Premier by September of 2015: as far as WTC is concerned, it could not establish whether or not it did so. Given this stipulation, Premier's proof on this score, i.e., that it had *not* received all the K-1s by then, provided a solid foundation for finding that WTC had breached its duty of prudent administration when it failed to deliver all the 2014 K-1s to Premier in a timely manner. A finding to this effect therefore should have entered in Premier's favor on its claim of WTC's breach of trust/fiduciary duty.

While this was a bench trial, even juries in civil cases are instructed that they *must* accept stipulated facts as proven for purposes of the case. *Third Cir. Comm. On Model Civil Jury Instructions*, *Modern Civil Jury Instructions* § 2.4 (2017) ("The [parties] have agreed that [set forth stipulated fact or facts] [is/are] true....You must therefore treat [this fact] [these facts] as having been proved for the purposes of this case."). See Hogg, Linsey K., *How To Instruct the Jury on Stipulations of Fact in Federal Criminal Cases*, 106 Kentucky Law J. 511, 517 n. 39 (2018), and cases cited. The court of appeals should be subject to the same requirement.

Finally, the Panel's refusal to hew to the parties' stipulation in its decision denies petitioners due process of law. Their right to have their claims heard and decided by the federal courts----to have their day in court----is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972). *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933). See *Boddie v. Connecticut*, 401 U.S. 371, 374-375 (1971). The Panel's refusal to honor the parties' stipulation of facts denies petitioners a fair hearing on their claim that WTC breached its duty to the Trust of prudent administration when it failed to deliver all the K-1s to Premier in a timely manner. *Armstrong v. Manzo*, 380 U.S. 545, 551-552 (1965).

2. By Creating New Substantive State Law At Odds With Delaware Statutory Law About What Constitutes A "Report" For Purposes of Triggering Delaware's Statute of Limitations For Bringing Suit, The Panel Caused A Substantial Variation In Outcomes Between State And Federal Litigation, Encouraging Forum-Shopping And Depriving Petitioners Of Rights They Would Otherwise Enjoy In State Court.

WTC first claimed that a one-page fee schedule delivered to Rogers in 2011 and a single quarterly account statement from December 2012 which allegedly explained its fee calculations constituted a "report" for purposes of triggering the then applicable two-year limitations period of 12 *Del. C.* § 3585, thereby cutting off the right of Premier on behalf of the Trust to seek redress for WTC's charging of excessive fees in this 2017 lawsuit. WTC next claimed that its routine, generic quarterly account statements and PPMs furnished Premier in 2015 spanning five previous years constitute "reports" under § 3585. The Panel, after noting that the word "report" is not a defined term under Delaware law, agreed that these documents were sufficient to qualify as "a report" for purposes of triggering the statute of limitations period (App. 3-4).

The Delaware General Assembly, however, has identified what a "report" is and should contain. Under the 2015 version of § 3585 (a) & (b), a beneficiary has two years to pursue a claim for excessive fees if she was "sent a report that adequately disclosed the facts constituting a claim" and such a "report" would adequately do so"if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into its existence." Under the 2018 version of § 3585(a)(2) and (b) (which would not be apply to this proceeding begun in 2017), a person receives a "report" which adequately discloses the facts constituting a claim when that report "[n]otifies the person that the trustee is resigning, has resigned, is being removed, has been removed, is ceasing to serve, or has ceased to serve; adequately discloses the facts constituting a claim; and adequately discloses the time allowed under this section for initiating proceedings against the former trustee."

Neither WTC's one-page 2011 fee schedule nor its routine, generic quarterly annual account statements or PPMs spanning five previous years—*none* of which refer to the Trust's permissible fees structure—constitutes a "report" under § 3585. *None* of these documents adequately discloses the facts constituting a claim for fees and *none* of them provides sufficient information so that the beneficiary or any other person receiving same "knows of the claim or reasonably should have inquired into its existence." The 2011 fee schedule fails to adequately disclose the basis for the fees, whether it was based on the total principal or just the income; and the disclosed fees are *below* the 1.75% permitted under the Trust Agreement, bespeaking an incomplete and inadequate disclosure of the fees actually charged *above* the permissible level of 1.75%. Likewise, neither the PPMs spanning five years nor the generic quarterly account statements adequately disclose the lockup or WTC's excessive fees.

Simply put, it is a fundamental misreading of Delaware statutory law to find, as the Panel did, that these documents constitute a "report" for purposes of triggering the limitations period of § 3585. Delaware law does not require a beneficiary to cobble together these kinds of disparate disclosures—some over the course of several years—to guard against a fiduciary's faithless conduct. See *Weiss v. Swanson*, 948 A.2d 433, 452 & n.83 (Del. Ch. 2008), citing *In re Dean Witter P'ship Litigation*, 1998 WL 442456, at **6-8 (Del. Ch.) and recognizing that a contrary result is warranted where "all the information necessary to put the [*Dean Witter*] plaintiff on notice of his claim was found in one annual report." Accord, *In re Thomas Lawrence Reeves Irrevocable Trust*, 2015 WL 1947360 at *9 (Del. Ch.) (trustee furnished beneficiaries with "a complete accounting from the inception of the Trust" including all trust receipts, gains, losses, disbursements, and distributions).

There was no such complete or coherent documentary presentation here by WTC containing enough information so that a beneficiary like Rogers would reasonably be put on notice of a claim regarding its excessive fees. The Panel's decision otherwise dramatically expands § 3585's definitive language about what a triggering "report" can contain. It makes a triggering "report" encompass *any* document sent by the trustee to the beneficiary no matter how routine or generic, a result contrary to the plain language of the statute and one unsupported by any Delaware decisional law. Its failure to apply faithfully this substantive statutory law of Delaware which defines a "report" in specific terms in order to give putative claimants fair and reasonable notice essentially abrogates this statutory language determining when the statute of limitations begins to run.

The effect of the Panel's reading of § 3585 deprived Premier, suing on behalf of the Trust, of its right to pursue its timely claim against WTC for charging the Trust excessive fees. The 2015 version of § 3585's limitations period applies only to a "beneficiary" of a trust, *not* to a successor trustee like Premier. The Delaware General Assembly later revised § 3585 in 2018 to expand the scope of the statute from a "beneficiary" to a "person," presumptively including persons like Premier as a successor trustee. However, at the time when the Panel determined that Premier itself had received a "report" of WTC's excessive fees (January of 2015), § 3585 applied only to a "beneficiary" like Rogers, *not* a successor trustee like Premier. Thus, Premier's suit, begun on March 16, 2017, was timely brought and should have been adjudicated on the merits.

Moreover, the Panel's reading of § 3585 to bar Premier's claim based upon WTC's excessive fees has the effect of subverting the settlor's intent as expressed in the Trust Agreement. It is Hornbook law that the settlor's intent prevails. *Chavin v. PNC Bank*, 816 A.2d 781, 783 (Del. 2003). If the Panel's ruling is allowed to remain, it would create new State law that would permit a fiduciary to effectively change unilaterally the language of the Trust Agreement and alter the settlor's intent simply through the passage of time. This is not the intended consequence of § 3585.

This refusal by the Panel to follow the substantive statutory law of Delaware in this diversity case violates *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). In *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-111 (1945), the Court recognized that statutes of limitations are outcome-determinative and constitute a part of State substantive law which federal courts must apply when exercising their diversity jurisdiction. *Id.* So too their triggering language. The Panel's expansive reading of § 3585 contorts its meaning and, in the process, relieves trustees of their obligation to provide beneficiaries with facts which adequately puts them on notice of a claim, creating a duty on their part to inquire into its existence. In this way, "the accident of a suit by a non-resident litigant in a federal court instead of a State court a block away, [has led] to a substantially different result" than would obtain in State court. *Id.* at 109.

Avoiding judge-made rules in federal court which undercut a litigant's rights he otherwise would enjoy under State law promotes comity and federalism, discourages forum-shopping and acknowledges that the pronouncements of State courts or Legislatures on the substantive rights of its citizens are expressions of their sovereignty. *Bush v. Gore*, 542 U.S. 692, 740-742 (2000) (Rehnquist, C.J., concurring). Subsequent decisions have reinforced *Erie's* notion of federalism. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). *Salve Regina College v. Russell*, 499 U.S. 225, 234 (1991).

Where the State's highest court has not yet spoken on § 3585's language, as the Panel confirmed here, the proper function of a federal court "is to ascertain what the state law is, not what it ought to be." *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 497 (1941). The Panel's broad reading of § 3585 is unsustainable given its clear language giving putative claimants the right to fair and reasonable notice of a claim before being dutybound to inquire into its existence; and it creates unprincipled federal common law in Delaware, dramatically limiting the rights of trust beneficiaries in the federal forum, rights they would otherwise enjoy in State court, thereby violating *Erie's* core federalism principle. In addition, the Panel impermissibly applied the 2015 version of § 3585 to Premier when the 2015 version of § 3585 applies only to a "beneficiary."

Finally, the Panel could have certified the question to the Delaware Supreme Court *sua sponte* if it had doubts about the application of § 3585 to the facts here. See, e.g., *Lehman Brothers v. Schein*, 416 U.S. 386, 390-391 (1974); *Clay v. Sun Insurance Office*, 363 U.S. 207, 210-212 (1960). Instead, it created federal common law denying petitioners their day in court on the issue of whether WTC breached its trust in collecting the excessive fees that it did.

CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Third Circuit and remand the case to that tribunal with instructions to address the parties' stipulation of facts and explain its reasoning for disregarding these judicial admissions; or, in the alternative, the Court should summarily reverse the court of appeals and remand the matter to the District Court for the District of Delaware for a retrial of the issues of WTC's breach of trust/fiduciary duty consonant with the parties' Stipulation of Facts and its breach of trust by charging the Trust with excessive fees; or provide petitioners with such further relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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2022 WL 621690
Only the Westlaw citation is currently available.
United States Court of Appeals, Third Circuit.

Frieda Mae ROGERS, formerly known as Frieda Rogers Roen; Premier Trust Inc., a Nevada corporation, as Trustee of the Frieda M. Roen Resulting Trust u/a/d July 19, 1934, Appellants
v.
WILMINGTON TRUST COMPANY, a Delaware corporation; Wilmington Trust Investment Advisors Inc., a Maryland corporation

No. **21-1473**

Submitted Pursuant to Third Circuit L.A.R. 34.1(a) October 4, 2021(Filed: March 3, 2022)

On Appeal from the United States District Court for the District of Delaware (District Court No. 1:18-cv-116-CFC), District Judge: Honorable Colm F. Connolly

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Benjamin P. Chapple, Esq., Reed Smith, Wilmington, DE, for Wilmington Trust Investment Advisors Inc., a Maryland Corporation.

Before: SHWARTZ, RESTREPO, and SCIRICA, Circuit Judges.

OPINION[*]

RESTREPO, Circuit Judge.

Frieda Rogers and Premier Trust appeal the District Court's judgment in its favor for breach of trust, equitable fraud, and financial elder abuse claims and grant of leave to amend Wilmington Trust's answer.[1] We will affirm for the reasons that follow.

I. DISCUSSION[2]

A. Breach of Trust

Appellants argue the District Court erroneously rejected each of Wilmington Trust's eight alleged breaches of fiduciary duty to the Trust. We address each in turn, and ultimately, affirm the judgment in favor of Wilmington Trust.[3]

i. Lock-Up Theory[4]

The District Court properly found that Premier's counsel expressly waived any fiduciary claim "premised on Wilmington Trust's investment in a Wilmington Private Fund."[5] Premier argues it never waived its claims because its claims were premised on the retention—not the purchase—of the Private Funds and on Wilmington Trust's alleged failure to disclose the transfer restrictions. As the record demonstrates, the District Court clearly understood Premier's explicit waiver to include any alleged wrongdoing stemming from the purchase of the Private Funds. Despite this clear indication, Premier's counsel made no effort to clarify that it never intended to waive such claims. Even if it had not been waived, the lock-up theory fails because multiple witnesses testified that the liquidation and its associated tax consequences were avoidable[6], and thus Wilmington Trust did not force Rogers to choose between replacing it and avoiding tax consequences.

Even if Premier indicated before and during trial that their lock-up claim was focused on retention rather than purchase, this would not make the District Court's decision to rely on Premier's clear disavowal unreasonable.[7] Counsel for Premier stated that the purchase of the private funds is not "part of [their] case."[8] Accordingly, the District Court did not abuse its discretion in finding Premier waived all claims relating to the purchase of the Wilmington Private Funds.[9]

ii. Excessive Fees Theory

The District Court concluded Premier never alleged[10], and therefore waived, any claim that Wilmington Trust collected excessive fees. The District Court also found that even if not waived, the excessive fees claim would be rejected for failure of proof and on statute of limitations grounds.[11] Appellants correctly note that allegations in the Pretrial Order and Amended Complaint served to preserve the excessive fees theory of liability.[12] Despite this, we affirm the District Court's alternative finding that the statute of limitations in *12 Del. C. § 3585* barred the excessive fees claim.

Appellants argue the District Court erroneously relied on documents that provided inadequate notice or were defective, as a matter of law, and thus, could not trigger the statute of limitations period. But "report" is not a defined term, and Appellants point to no evidence that Delaware's legislature intended disclosures putting beneficiaries on notice to take a certain form. Likewise, we have found no Delaware case law suggesting a "report" must take a certain form to trigger the statute of limitations, nor do Appellants cite any decision to that effect.[13]

Moreover, even if Rogers did not receive adequate notice, Premier itself received notice in January of 2015,[14] and that fact alone would bar the claim entirely. We will therefore affirm the District Court.

iii. Tax Plan Theory

Premier also argued that Wilmington Trust breached its fiduciary duty through its failure to engage in tax planning for the Trust. The District Court found that Premier failed to establish how Wilmington Trust's failure to engage in tax planning proximately caused any damage to the Trust. We review for clear error.[15]

We see no reason to disturb the District Court's finding. Crucially, Premier fails to explain how any efforts by Wilmington Trust to tax plan would have prevented the alleged losses in the form of capital gains taxes. They make the conclusory statement "[t]hese damages was [sic] caused by WTC's failure to tax plan." D. Ct. ECF No. 359 at 39. But such unsupported allegations are not enough to plead causation, let alone establish it at trial.[16] Because we find the District Court correctly concluded Premier failed to establish proximate cause, we need not address whether

Wilmington Trust was obligated to conduct tax planning in the first instance.[17]

iv. Suitability of Trust's Investments

Premier also challenges the District Court's conclusion that Premier failed to prove Wilmington Trust's selection of investments were inconsistent with the purposes of the Trust.[18] Under Delaware law, a trustee is required to select investments to "attain the purposes" of the trust.[19] When a trust lacks an express purpose, the settlor's intent, as indicated by the language of the trust instrument, controls the trust.[20] Here, the trust lacks an express purpose, but Premier has not shown how Wilmington Trust was grossly negligent in selecting investments; multiple employees repeatedly asked Rogers to provide information about her needs and expenses,[21] as well as the needs of Rogers' children, who were the Trust's remainderman.[22] Thus, the District Court properly rejected Premier's theory.

v. Conflict of Interest

Premier argued that Wilmington Trust breached its fiduciary duties due to a conflict of interest when it acted as both Trustee and Advisor, but Premier cites no authority establishing a conflict. Under Delaware law, an advisor may be "given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions,"[23] and the Trust Agreement so provided.[24] The Trust Agreement does not, however, prohibit the Trustee from being an Advisor.[25] Moreover, even if there were a conflict of interest by serving both roles, Rogers appointed Wilmington Trust as Advisor and cannot complain now of the conflict.[26]

vi. Misrepresentations Regarding a "Never Consent to Transfer" Policy

Premier argued that Wilmington Trust misrepresented restrictions on the Wilmington Private Funds in two ways: (1) its affirmative statements in January 2015 that the Funds were not transferrable, and (2) its failure to disclose Wilmington Trust's historical practice of never consenting. The affirmative statements, however, were true and thus cannot serve as the basis for a misrepresentation claim. In addition, any omission is likely not material[27] because neither Rogers nor Premier ever requested consent and were thus unaffected by a policy that made such consent difficult or impossible to obtain. We thus conclude that Premier has failed to prove a misrepresentation theory of breach.

vii. Delivery of the K-1s

Premier claimed Wilmington Trust is liable for breach of trust because of its failure to deliver the K-1s for the 2014 tax year before Premier filed the taxes in September 2015. The District Court rejected this theory based on two findings: 1) as a matter of law, any failure of communication surrounding the delivery of the 2014 K-1s lies with Premier because "[it] was obligated as the trustee as that point to file those returns, and it had an obligation to follow up to obtain the documents from Wilmington Trust," J.A. 802 (Tr. 1251:3–6); and 2) as a matter of fact, "[t]he unrebutted testimony of Richard Capuano established ... that

Wilmington Trust sent Premier all required K-ls before September 2015." Premier challenges both conclusions.

First, Premier contends it did not have a duty to follow up about the 2014 K-1s. We disagree. Premier mistakenly assumes that Delaware law does not require a successor trustee to "inquire into or confirm the validity of the predecessor trustees' actions." Premier omitted the opening clause of § 3544, "[u]nless provided otherwise by the terms of the governing instrument." In this case, the Trust Agreement requires the Trustee to "prepare and file all tax returns required by law to be filed on behalf of the trust." It follows then, as the District Court concluded, that Premier was obligated to obtain the necessary K-1s, and thus required to follow-up regarding their delivery.

Second, Premier contends the District Court erroneously found that Wilmington Trust delivered the required K-1s prior to Premier's filing in September 2015. Premier argues that Wilmington Trust conceded that it could not confirm "when federal K-1[s] ... were actually sent or delivered to Premier" in pretrial stipulations. But so long as the K-1s were delivered prior to Premier's tax filing in September of 2015, as the District Court correctly concluded, the exact date of delivery is irrelevant. We see no reason to disturb this factual finding, which is well-supported by the record.
Accordingly, the District Court correctly concluded that Premier was obligated to follow up about the 2014 K-1s and did not err in finding the required K-1s delivered prior to September 2015.

viii. RFLP Funds

Before the District Court, Premier argued Wilmington Trust breached its duties because it failed to fully convey the Trust's interest in the Rogers Family Limited Partnership ("RFLP"), based on calculations by their expert witness.[28] The District Court rejected this contention by weighing the testimony of both trial witnesses, and ultimately found, Wilmington Trust's witness credible.[29]

We conclude the District Court did not err in so finding, because special deference is paid its credibility findings.[30] Therefore, we affirm the judgment finding that Wilmington Trust is not liable for any alleged breaches of trust.

B. Equitable Fraud

Appellants appeal the District Court's finding that Wilmington Trust was not liable for misrepresenting the availability of K-1s for the Wilmington Private Funds. The District Court found that Premier had not put forth any evidence that Kennedy's statements were false, and thus Wilmington Trust cannot be liable for equitable fraud. For the following reasons, we affirm the District Court's findings and judgment.

As we already held the enforceability of the exculpatory provision, we only address Premier's other arguments that, (a) if enforceable, the clause does not exculpate liability for innocent or negligent misrepresentation or does not apply to actions in January and July 2015, and (b), either way, Kennedy was grossly negligent. Neither is convincing, so we affirm.

We first consider the scope of the exculpatory provision. Appellants argue the provision should be interpreted to include common law fraud because any ambiguity should be construed against Wilmington

Trust as the drafter of the provision. Nevertheless, the District Court properly concluded there was no ambiguity in this term.[31]

"A contract is not ambiguous simply because the parties do not agree upon its proper construction, but only if it is susceptible to two or more reasonable interpretations."[32] Moreover, construing a contract against a drafter is a rule of "last resort" and applies only when other methods of interpretation fail.[33] Finally, "the settlor's intent controls the interpretation of the [trust] instrument" as "determined by considering the language of the trust instrument."[34]

Here, the language of the Trust Agreement unambiguously indicates a settlor's intent to limit the trustee's liability for equitable fraud. The term "fraud" is listed together with "willful misconduct" and "gross negligence." Construing the term "fraud" to include "equitable fraud" would defy the settlor's intent to limit a trustee's liability for negligent, or innocent misrepresentation.[35] For this reason, the only reasonable interpretation of the exculpatory clause is it retains liability only for common law fraud.

Premier next argues that the exculpatory clause does not apply to Kennedy's communications, because at that point, Wilmington Trust was no longer a fiduciary having been removed as trustee. As the District Court correctly noted at the pretrial hearing, Wilmington Trust's duty, and thus Premier's basis for an equitable fraud claim, could only arise from its role as trustee.[36]

Finally, Appellants contend the District Court erroneously found that Premier did not establish Kennedy's conduct "was an 'extreme departure' from industry norms that is required for a finding of gross negligence."[37] Premier argues that "Kennedy was grossly negligent in making her July 2015 statement because she had previously been informed that some of the WPF were already available." But, as the District Court correctly pointed out, Premier failed to prove Kennedy "had not so been informed."[38] In any case, the trial judge found her statement would still be true even if Kennedy knew some of the K-1s were available, because a reasonable interpretation is she was saying that not all K-1s would be ready until early September. Indeed, it is undisputed that K-1s relating to certain hedge funds were only available in the first week of September 2015. Accordingly, Kennedy's statements were true and not grossly negligent, and the District Court properly found Wilmington not liable for equitable fraud.

C. Financial Elder Abuse

Rogers challenges the District Court's finding that Wilmington Trust did not commit financial elder abuse in violation of **section 15610.30 of the California Welfare & Institutions Code**.

To prevail on this claim, Rogers must prove that Wilmington Trust deprived her—while she was 65 or older—of a property right when it knew or should have known that the deprivation would likely cause her harm.[39] The District Court found she had not established that Wilmington Trust's actions constituted a "taking" as defined by the statute. The record shows no evidence of appropriation of Roger's funds for a wrongful use and the District Court found that dispositive of the claim.[40] The District Court specifically determined that, even if causing adverse tax consequences could constitute a taking of property, it was Premier that ordered the liquidation of the

Wilmington Private Funds and caused the adverse tax consequences.[41]

Accordingly, we affirm the District Court's Order.

D. Leave to Amend

Appellants argue the District Court abused its discretion in granting leave to Wilmington Trust to amend its answer to include a statutory counterclaim for attorney's fees.

Generally, leave to amend a pleading "should [be] freely give[n] ... when justice so requires."[42] A district court may deny leave upon finding undue delay, bad faith, prejudice to the opposing party, or futility.[43] A party seeking to amend a scheduling order must additionally show "good cause."[44] A party thus must show that "good cause" to modify the scheduling order exists "before a district court considers whether the party also meets Rule 15(a)'s more liberal standard."[45] The touchstone for assessing whether there was good cause to amend a complaint is whether the moving party showed due diligence in bringing their claims.[46]

Appellants argue the amendment was untimely because Wilmington Trust threatened to bring a claim for sanctions against Appellants' counsel several years prior. In response, Wilmington Trust asserted it had good cause to amend shortly before trial, after discovering key information relevant to its attorney's fees claim. Wilmington Trust supported its motion with extensive reference to the record, explaining how it had only recently learned certain facts Plaintiffs alleged in the Amended Complaint and the Interrogatories were not supported by evidence. Based on this record, the

District Court did not abuse its discretion in finding Wilmington Trust had good cause to amend.[47]

Finally, we have interpreted **Rule 15** liberally to allow amendment even where the moving party has delayed in proposing the amendment, "so long as the opposing party is not prejudiced by the delay."[48] There was no undue delay here, as Wilmington Trust filed its motion within three months of the close of depositions and learning of inaccurate Interrogatories. Moreover, Appellants stated to the District Court that it would be unable to "elicit a factual record through deposition or written discovery" because discovery had closed,[49] but the added claim for attorney's fees does not require any additional discovery or any change in litigation theory.[50] Appellants have failed to assert or establish any specific prejudice, and therefore, we affirm the District Court's decision to grant the motion to amend.

II. CONCLUSION

For the foregoing reasons, we affirm the Orders of the District Court.

Footnotes

*This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

1Appellants do not challenge the judgment on the claim pursuant to the Investment Advisors Act of 1940.

2The District Court had jurisdiction pursuant to **18 U.S.C. § 3231**, and we have appellate jurisdiction under **28 U.S.C § 1291**. We review findings of fact in a bench trial for clear error and conclusions of law *de novo. VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 282–83 (3d Cir. 2014). We review a decision to grant or deny leave to amend a complaint for abuse of discretion. *Winer Family Tr. v. Queen*, 503 F.3d 319, 331 (3d Cir. 2007).

3The District Court correctly upheld the Trust Agreement's exculpatory provision as enforceable, and accordingly, Plaintiff-Appellants were required to show that Wilmington Trust actions, or lack thereof, constituted fraud, willful misconduct, or gross negligence. *Rogers v. Wilmington Tr. Co.*, Civil Action No. 18-116-CFC, 2021 WL 739048 at *——, 2021 U.S. Dist. LEXIS 35293 at *30 (D. Del. Feb. 25, 2021). Delaware courts routinely recognize the propriety of exculpatory provisions limiting a trustee's liability for innocent or negligent misrepresentation. *See, e.g., J.P. Morgan Tr. Co. of Del., Trustee of the Fisher 2006 Tr. v. Fisher*, 2021 WL 2407858, at *13 (Del. Ch. June 14, 2021) (upholding identical exculpatory provision).

4Specifically, Premier argued that because the Funds were not transferrable to other trustees without Wilmington Trust's consent and Wilmington Trust had an unwritten policy of never giving such consent, Wilmington Trust prevented Rogers from being able to replace the trustee without liquidating the Wilmington Private Funds assets, which would trigger significant tax consequences due to the capital gains accrued on those assets. App. 298; 803.

5*Rogers*, 2021 WL 739048, at ——, 2021 U.S. Dist. LEXIS 35293, at *27–28.

6App. 530; 619-20

7*See Clark v. Twp. of Falls*, 890 F.2d 611, 621 (3d Cir. 1989) (finding waiver regardless of “whether counsel's concession was made for strategic reasons or by mistake”).

8App. 378.

9*See La Rossa v. Sci. Design Co.*, 402 F.2d 937, 939 (3d Cir. 1968); *see also RES-GA Cobblestone, LLC v. Blake Const. & Development, LLC*, 718 F.3d 1308, 1313 n.6 (11th Cir. 2013) (concluding express disavowal of claims during oral argument constitutes abandonment).

10*Rogers*, 2021 WL 739048, at *——, 2021 U.S. Dist. LEXIS 35293, at *32.

11*Id.*

12*See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 474, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007) (a claim included in a pretrial order controls the action even if the pleadings were never formally amended).

13*Cf. In re Thomas Lawrence Reeves Irrevocable Tr.*, 2015 WL 1947360, at *9 (Del. Ch. Apr. 29, 2015) (finding § 3585 barred claim because beneficiary received generic account statements disclosing facts of claim).

14We note the District Court did not rely upon notice to Premier, and only relied upon notice to Rogers. Either way, the claim is time-barred.

15*See Taylor Milk Co. v. Int'l Bhd. of Teamsters, AFL-CIO*, 248 F.3d 239, 245 (3d Cir. 2001).

16*See Oliver v. Roquet*, 858 F.3d 180, 194 (3d Cir. 2017) (stating that an "unsupported conclusory assertion" is insufficient to plead causation); *see also A.G. ex rel. Maddox v. Elsevier Inc.*, 732 F.3d 77, 83 (1st Cir. 2013) (same).

17And in any case, Wilmington Trust is incorrect because the District Court did not find Wilmington Trust under no duty to conduct tax planning. The language Wilmington Trust cites is from a preliminary hearing where the District Court expresses hesitancy about Premier's theory.

18*Rogers*, at 30.

1912 Del. C. § 3302(a).

20*In re Couch Tr.*, 723 A.2d 376, 382 (Del. Ch. 1998).

21App. 948-49, 390, 512, 515-16
22App. 534.
2312 Del. C. § 3313(a).
24App. 888.
25App. 871.
26App. 3000.
27*In re Donald J. Trump Casino Sec. Litig.-Taj. Mahal Litig.*, 7 F.3d 357, 369 (3d Circ. 1999) (holding an omitted fact is material if there is "substantial likelihood that a reasonable [investor] would consider it important in deciding how to act").
28Based on Dr. Luna's audit, she testified that an additional $607,278.00 should have been transferred to the trust upon the dissolution of the RFLP.
29The District Court credited McCann's testimony and found Dr. Luna's testimony was based on an arithmetic error. Because this is a finding of fact, we review for clear error. *See VICI Racing, LLC*, 763 F.3d at 283.
30*See Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).
31*See Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d. 354, 360 (Del. 2013) (construing provision against drafter only when there is ambiguity).
32*Id.*
33*Wilmington Firefighters Ass'n Local 1590 v. City of Wilmington*, No. Civ. A. 19035, 2002 WL 418032, at *10 (Del. Ch. Mar. 12, 2002); *see also E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985) (stating that this rule is "one of last resort, such that a court will not apply it if a problem in construction can be resolved by applying more favored rules of construction").
34*In re Peierls Family Inter Vivos Trs.*, 77 A.3d. 249, 265 (Del. 2013) (quotations omitted).

35*See Zebroski v. Progressive Direct Ins. Co.*, No. 8816-VCP, 2014 WL 2156984, at *7 (Del. Ch. Apr. 30, 2014) (explaining that for equitable fraud, "the claimant need not show that the respondent acted knowingly or recklessly—innocent or negligent misrepresentations or omissions suffice.").

36*See Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 144 (Del. Ch. 2009) (equitable fraud requires a fiduciary relationship).

37*Rogers*, , 2021 WL 739048, at *——, 2021 U.S. Dist. LEXIS 35293, at *42.

38Appellants' Br. at 43.

39Cal. Welf. &Inst. Code § 15610.30(b), (c); *Hasbun & O'Connor*, No. B299648, 2021 WL 972875, at *5 (Cal. App. 3d Dist. Mar. 16, 2021).

40We agree and therefore, need not reach Roger's *mens rea* argument.

41On appeal, however, Rogers presents another theory—she was "held hostage by WTC *when WTC placed the bulk* of the Trust assets in the WPF investments which did not permit free transfer of the assets should Rogers select a successor trustee." Appellants' Br. 50 (emphasis added). In other words, the investment into the Private Funds is the crux of Roger's elder abuse claim, and any such claim was abandoned by counsel during opening arguments.

42Fed. R. Civ. P. 15(a)(2).

43*Arthur v. Maersk, Inc.*, 434 F.39 196, 204 (3d Cir. 2006).

44Fed. R. Civ. P. 16(b).

45*Premier Comp Sols., LLC v. UPMC* 970 F.3d 316, 319 (3d Cir. 2020).

46*See Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 84 (3d Cir. 2010).

47*See Harris v. FedEx Nat. LTL, Inc.*, 760 F.3d 780, 786–87 (8th Cir. 2014) (affirming decision to grant motion to amend where amendment was premised on newly discovered evidence) *cf., e.g., Palmer v. Champion Mortg.*, 465 F.3d 24, 31 (1st Cir. 2006) (concluding the lack of newly discovered evidence evinced lack of good cause to amend).
48*Rutter v. Rivera*, 74 F. App'x 182, 186 (3d Cir. 2003) (collecting cases); *see also Arthur*, 434 F.3d at 204 ("prejudice to the non-moving party is the touchstone for the denial of an amendment") (quoting *Lorenz v. CSX Corp*, 1 F.3d 1406, 1414 (3d Cir. 1993)).
49App. 193.
50*Deakyne v. Comm'rs of Lewes*, 416 F.2d 290, 300 (3d. Cir. 1969) ("Prejudice under [Rule 15] means undue difficulty in prosecuting a lawsuit as a result of change of tactics or theories").

2021 WL 739048
Only the Westlaw citation is currently available.
United States District Court, D. Delaware.

Frieda Mae ROGERS f/k/a Frieda Mae Roen and Premier Trust, Inc., Plaintiffs,
v.
WILMINGTON TRUST CO. Defendant.

Civil Action No. 18-116-CFC

Signed 02/25/2021

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MEMORANDUM OPINION

COLM F. CONNOLLY, UNITED STATES DISTRICT JUDGE

As required by Federal Rule of Civil Procedure 52(a)(1), I have set forth separately below my findings of fact and conclusions of law after a four-day bench trial in this breach-of-trust case.

There are two plaintiffs in the case: Frieda Mae Rogers (formerly known as Frieda Mae Roen), the beneficiary of the Frieda Mae Roen Trust (the Roen Trust); and Premier Trust, Inc., the current trustee of that trust. The sole defendant is Wilmington Trust Company, the former trustee of the Roen Trust. (Wilmington Trust Investment Advisors, Inc. (WTIA) was named as a defendant in the Amended Complaint but was dismissed at trial by stipulation when Wilmington Trust agreed that it was legally responsible for any actions taken by WTIA. Tr. 389.)

The parties tried four claims from the Amended Complaint: (1) Premier's breach of fiduciary duty/breach of trust claim; (2) Premier's equitable fraud claim; (3) Premier's federal claim under the U.S. Investment Advisers Act of 1940; and (4) Rogers's financial abuse of an elder claim.

FINDINGS OF FACT

I. General Background

The Roen Trust is a Delaware trust that traces its roots to the so-called "original trust" created in 1934. The original trust was partitioned in 2004. One of the resulting trusts was the Rogers Family Trust. In 2008 the Delaware Court of Chancery partitioned the Rogers Family Trust into five newly created trusts, one of which was the Roen Trust.

Rogers is the beneficiary of the Roen Trust. Wilmington Trust was the trustee of the Roen Trust upon its formation in November 2008. In December 2008, Rogers appointed Wilmington Trust to act as the Trust's advisor. Wilmington Trust served as the trustee and advisor of the Roen Trust until Rogers appointed Premier to take on those roles in 2015. Under Delaware law, "a trust advisor is a fiduciary, somewhat in the nature of a co-trustee, and is sometimes described as a quasi-trustee." *Lewis v. Hanson*, 128 A.2d 819, 828 (Del. 1957) (internal citations omitted), *aff'd sub nom. Hanson v. Denckla*, 357 U.S. 235 (1958); *see also Wilmington Tr. Co. v. Stuart*, Civil Action No. 6793, 1983 WL 18030, at *10 (Del. Ch. July 21, 1983) ("A trust advisor has a power of control when certain actions of the trustee are made subject to his approval under the terms of the trust"), *aff'd*, 474 A.2d 121 (Del. 1984).

Rogers was 61 years old when the Roen Trust was created. By the time of trial, she was 74 and cut a sad figure. Wheelchair bound and hard of hearing, Rogers fell asleep during much of the trial, including while on the stand during her cross-examination, *see* Tr. 163–64. Rogers never finished high school and eloped at the age of 19 for the first of her three marriages, all of which ended in divorce. She had in vitro fertilization at the age of 65—paid for by the Trust—and gave birth to triplets, one of whom died shortly after birth and another of whom suffered brain damage in the womb. Rogers had little knowledge of or interest in financial matters except insofar as she spent a lot of money and was always desirous of more money to spend. She long ago "went through" (her words) $30 million she inherited upon her mother's death in 1993; and although she received more than $12 million from the Roen Trust between 2009 and 2014, Rogers was in constant battle with Wilmington Trust to obtain larger distributions.

The Roen Trust exists by virtue of a written Trust Agreement. The Trust Agreement empowered Rogers as of 2013 to replace and appoint both the trustee and the advisor of the Trust. For all times relevant to this case, the Trust Agreement granted the trustee, with the consent and approval of the advisor, the discretion to invest and sell trust assets as the trustee deemed advisable or desirable, and to spend so much of the Trust's income and principal as the trustee saw fit. JX-02.

The Trust Agreement contains an exculpation clause that limits the trustee and advisor's liability to "fraud, willful misconduct or gross negligence." JX-02. Rogers testified at trial that no one explained to her before she consented to the 2008 trust partition that this exculpation provision immunized the Roen Trust's trustee and advisor from liability for negligent misconduct. *See, e.g.*, Tr. at 85. But Wilmington Trust adduced credible testimonial and documentary evidence at trial that established that Rogers's personal attorney Myron Sugarman proposed the exculpation provision and that Sugarman obtained and provided a notarized consent form signed by Rogers that affirmed her consent to the provisions in the Trust Agreement that created the Roen Trust. That signed consent affirmed that Rogers had read the Petition For Division that partitioned the Rogers Family Trust, the Trust Agreement, and a redlined version of the Trust Agreement that showed how it was amended to create and govern the Roen Trust. Thus, I reject Rogers's testimony that she never consented to the exculpation clause.

II. Wilmington Trust's Administration of the Roen Trust

Of the $33.5 million in assets distributed from the Rogers Family Trust to create the Roen Trust in 2008, $25.4 million (or 75%) was invested in six Ballentine Private Funds. These funds were later renamed the Wilmington Private Funds. Non-party Wilmington Trust Investment Management (WTIM), a wholly owned subsidiary of Wilmington Trust, was the general partner or managing member of each of the Wilmington Private Funds. From January 2009 through December 2014, the Trust's investments in the six Wilmington Private Funds had a combined net gain of $23.9 million. The last purchase of any Wilmington Private Fund shares for the Trust occurred on January 3, 2011.

The Wilmington Private Funds were only offered to Wilmington Trust clients and Wilmington Trust affiliates. Private Placement Memoranda or "PPMs" for the Funds were provided by Wilmington Trust to Rogers in 2010 and 2011 and produced by Rogers in discovery. The PPMs disclosed that investors in the Funds were prohibited from selling, assigning, or transferring their interests in the funds except with the prior written consent of WTIM and that this consent could be withheld in WTIM's absolute discretion. Although this disclosure implies that WTIM would consider consenting to a transfer of assets to another institution, WTIM had an unwritten internal policy that it would never consent to the transfer of Wilmington Private Fund assets outside of Wilmington Trust. WTIM's Director of Fund Operations, Richard Capuano, testified at trial that WTIM adopted this unwavering policy because otherwise "WTIM would no longer receive the investment management fee normally paid by Wilmington Trust" and WTIM "would have to perform, or hire another company to perform, the services normally provided by Wilmington Trust including issuing client statements, tracking contributions and withdrawals, and providing K-1s." D.I. 357 ¶ 69. As a result of this unwritten but unwavering policy, if investors in the Wilmington Private Funds wanted to move their assets to another financial institution, they had no choice but to liquidate their holdings and, in all likelihood, incur substantial capital gains and tax liabilities.

Wilmington Trust never told Rogers that WTIM would never consent to a transfer of the Trust's interests in the Wilmington Private Funds outside of Wilmington Trust. I reject Wilmington Trust's insistence that an email sent to Rogers in December 2012 and a follow-up letter sent to her in January 2013 disclosed WTIM's "never consent" policy. Wilmington Trust told Rogers in those communications that "some of the assets" being distributed to her at the time as a result of the dissolution of the Rogers Family Limited Partnership were "not portable to other financial institutions." But neither these statements nor any discussions Wilmington Trust purported to have with Rogers about these unidentified assets constituted a disclosure that WTIM had a policy of never consenting to a transfer of Wilmington Private Fund assets to another financial institution.

Chris Sullivan was Wilmington Trust's investment advisor for the Roen Trust. Sullivan testified that when the Rogers Family Trust was partitioned and the Roen Trust was created, he chose to keep the Roen Trust invested in the Ballentine Funds "[b]ecause they were good investments and at the time it was Wilmington Trust's best thinking." Tr. at 614:8–9. Sullivan made no suggestion in his trial testimony that Wilmington Trust gave any thought to the circumstances of Rogers or her remaindermen in formulating an investment strategy for the Roen Trust. In truth, Sullivan could not have tailored the Trust's investment strategy to Rogers or the remaindermen, because he knew nothing about their circumstances or needs other than the fact that Rogers was in the highest tax bracket and lived in California. Tr. at 667–669. Based on Sullivan's trial testimony and the documents Wilmington Trust introduced in support of that testimony, the annual review of the Trust's performance conducted by Wilmington Trust could charitably be described as pro forma.

In fairness to Sullivan and Wilmington Trust, Rogers was not cooperative with Wilmington Trust. Tonia Kennedy was the Trust Officer for the Roen Trust and Wilmington Trust's principal point of contact with Rogers. Kennedy spoke with Rogers by phone two to three times each month and communicated with Rogers by email through Rogers's personal assistant, Shawna Baker. Kennedy testified that she repeatedly asked Rogers to provide Wilmington Trust with information about Rogers's personal circumstances, financial needs, and expenses. Rogers expressly denied this at trial (*see* Tr. 96–97, 106), but the documentary evidence makes clear that Kennedy's testimony about this matter is accurate. In a letter to Rogers dated August 5, 2011, for example, Kennedy wrote: "In order to continue to assist you in a meaningful way and fulfill our duties as a trustee, we really need you to provide more detailed information regarding your personal expenses and the expenses of [Rogers's] ranch." DX-424 at 1. In another 2011 letter, Rogers's personal attorney wrote to Wilmington Trust: "My client requests that any inquiries as to her lifestyle and standard of living cease and that detailed statements of expenses cease. Again, what purpose does this serve?" DX-39.

On five occasions, Kennedy and Sullivan made visits to Rogers in California to inform her about the state of the Trust and answer any questions she had. Rogers made sure the meetings were short—one took ten minutes—and asked no questions about the Trust's investments. Rogers admitted at trial that Sullivan and Kennedy "tried to explain the portfolio to me" but that their explanation was "way over my head." Tr. 104.

One thing Rogers and Wilmington Trust agreed on was that Rogers continually asked for larger distributions from the Trust. As Rogers conceded at trial: "I was always asking [Wilmington Trust] for extra money ... on top of the monthly [$]150,000" Wilmington Trust distributed to her from the Trust. Tr. 101. Ultimately, Rogers's constant requests for more money resulted in the conversion of the Roen Trust to a so-called "unitrust" that annually paid Rogers at a minimum a fixed percentage of the market value of the assets held by the Trust.

Over time, Shawna Baker became increasingly involved in Rogers's financial affairs and relationship with Wilmington Trust. Baker kept track of all the financial documents mailed to Rogers by Wilmington Trust, requested discretionary disbursements from the Trust for Rogers, and emailed Kennedy to ask clarifying questions about the Roen Trust and Rogers's other accounts with Wilmington Trust. Rogers described Baker as the manager of her ranch (Tr. 139) and her best friend (Tr. 89). In Rogers's words, "Shawna came into my life and saved me" just after Rogers's tragic experience with in vitro fertilization. Tr. 208.

As kind as Baker may have been to Rogers at times, there were troubling signs that Baker and Baker's husband Steve may have been taking advantage of Rogers. As Baker's involvement in Rogers's finances increased, so too did Rogers's requests for discretionary disbursements (i.e., disbursements above and beyond the minimum payments guaranteed to Rogers); and many of these discretionary disbursements appeared to directly benefit the Bakers. In July 2013, Rogers requested a $1.5 million disbursement to buy 900 acres of land adjacent to the ranch the Bakers managed for her. In early 2014, Rogers asked Kennedy to approve a $9 million disbursement to expand Rogers's cattle business to raise Wagyu cattle for beef that could be marketed to high-end restaurants. Kennedy didn't think Wilmington Trust would approve such a large disbursement and persuaded Rogers to submit instead a request for a $9 million loan to Wilmington Trust's loan committee. The business plan set forth in the loan application Rogers provided Wilmington Trust in March 2014 disclosed that the Bakers owned 50% of Rogers's cattle business. DX-94.

Kennedy testified that this business plan gave rise at Wilmington Trust to a “concern that Ms. Rogers was being taken advantage of” by the Bakers. Tr. 464. But if Wilmington Trust actually had such a concern, it did nothing to act on the concern. On the contrary, Wilmington Trust continued to manage its relationship with Rogers through Shawna Baker.

In June 2014, while Rogers's $9 million loan request remained pending, Baker sent Kennedy this email from her iPhone to follow up on Rogers's request for a $1.4 million discretionary disbursement to buy “raw land” to expand the ranch:

> Hello Tonia
>
> What did the [Trust's] board say we are very anxious we do not wanna loose out on this deal then she would never have to see [Rogers's ex-husband] Erik again!!

> Also Tonia I expect by next year those cows will making her some income!! I'm really trying to get some horse sold so we can prove to you guys we start bringing in a income not just money going out ...
>
> Please tell me the board ok?????
>
> Shawna

DX-100 (ellipses, punctuation, and spelling in original). Kennedy emailed Baker back ten minutes later to say that Wilmington Trust had approved the $1.4 million disbursement and that she "will check with Chris [Sullivan] to get the timing of when we'll have the funds to wire to Freida" and would "be in touch shortly" to confirm the timing of the wire transfer. *Id.* Baker then replied with this email:

> Ok thank you I'll prove to the board I can teach Frieda to earn money !!!! So please let me know when u have and idea how quickly we can get the money .. I won't let the board down I sold a half breed at 5 months old weighed 875 pounds case he was nursing off 5 of my Jersey cows and usually at that age they weigh 300 lb the mark was up he pulled in 1,500. Our cost was fuel to sale yard that was it!!!
>
> So I'll start a contract with the agent but please have Chris [Sullivan] let me know ASAP.
>
> Thank you Again.
> Shawna and Frieda

JX-18 (ellipses, punctuation, and spelling in original). Wilmington Trust wired the $1.4 million to Rogers's personal account six days later.

Rogers's request for disbursements for the remainder of 2014 were significantly above what she had requested in prior years, and, according to Kennedy, "concerned" Wilmington Trust because, if approved, the requests could prematurely exhaust the Trust. But any concern on Wilmington Trust's part didn't stop it from approving the requests. In August 2014, Wilmington Trust approved a $300,000 distribution to cover Rogers's medical expenses. DX-105. The following month, it approved a $193,000 disbursement for "unanticipated hay expenses" at the ranch. *Id.* And in November 2014, it approved Rogers's request for $150,000 for Christmas shopping.

Kennedy met with Wilmington Trust's loan committee on December 4, 2014 to review Rogers's pending request for the $9 million loan for the cattle business. On December 5, Kennedy notified Rogers by letter that "[t]he Committee has a few questions regarding the business plan submitted by Shawna before it will make a decision regarding this request." DX-107. Kennedy set forth in the letter numerous requests for information about the business plan. Kennedy also asked in the letter for permission to speak with Rogers's accountant about the possible gift tax implications of structuring the business in the manner described in the business plan, and she requested a copy of the LLC agreement for the cattle business. *Id*

According to Kennedy, "at some point" after Rogers's $150,000 Christmas shopping request—likely in late November or early December 2014—Rogers and Kennedy spoke privately by phone. Kennedy testified that during this call, Rogers said that Shawna had told her that she had to use the $150,000 Christmas money "on other people." Tr. 474. When Kennedy told Rogers that "that was not the case," Rogers said she "was going to send [Kennedy] a secret note, and in the secret note she would give [Kennedy] a telephone number for [Kennedy] to be able to call her so that whenever there was a request for, like, a special distribution, [Kennedy] was supposed to call her just to kind of talk to her about it." *Id.* Kennedy testified that Rogers later sent Kennedy the "special note." *Id.*

Wilmington Trust never offered the note as evidence at trial and never adduced testimony about the note's contents. Kennedy testified that after she received the note, she again spoke with Rogers on the phone, but that Rogers said on that occasion that "everything was fine with Shawna." *Id.* With respect to this second call, Kennedy testified:

> So I don't know. At that point my interactions with [Rogers] became a lot more limited. I would call only to her home. She would not be available. The phone would just ring. There wouldn't be like an answering service or anything. So I was concerned. I didn't know what was going on, and I'm far, I'm very far. She's not in communication with her children or with her family members, so I was concerned for her.

Tr. 474–75.

The exact timing of this second call was never made clear at trial. The call appears to have occurred just before or just after December 19, 2014. On that date, Kennedy spoke with Shawna Baker. Kennedy provided a summary of the December 19 call with Baker and the events that immediately preceded and followed the call in a contemporaneous memorandum she wrote for Kemp Stickney, Wilmington Trust's Chief Fiduciary Officer. The memorandum reads as follows:

> Frieda left a message for me regarding a letter I sent her to sign requesting a discretionary distribution from her trust. Frieda, her assistant and her assistant's husband called and spoke to [one of Kennedy's work colleagues]. Supposedly, they wanted to know if the Committee made a decision about the business plan. They asked that I return their call. I called, but no one answered. I left Shawna a message.
>
> Shortly after leaving the message, Shawna returned my call. She claimed Frieda had left, but she would discuss it with her. She wanted to know if a decision was made about the business plan. I explained that we would discuss the plan with them at our meeting in January. At that point, she became a little irate. She accused us of not wanting Frieda to have her money or share the money with her. She ranted for about 10-20 minutes and explained that Frieda would probably move her Trust. She also said that she would tell Frieda that we would not proceed with the plan until meeting with them.
>
> Shawna also tried to ask me questions about my recent conversation with Frieda, but she became even more angry when I would not disclose the information. At the end of the call, she claimed she was washing her hands with the matter.

> [Fellow employee] Regina listened to the call and can confirm my statements regarding the call.
>
> About an hour after the call, Frieda called and left a message about the letter I sent. She did not mention anything about the business plan.
>
> I guess we should discuss. I'll send a request for a meeting.

DX-109.

Baker's threat that Rogers might move the Trust to another trustee sprung Wilmington Trust into action. Plans were made for Stickney, Sullivan, and Kennedy to meet with Rogers on January 8, 2015. And on December 24, 2014 Kennedy approved Rogers's requests for distributions of “$100,000 for additional Christmas shopping and $100,000 towards her American Express bill.” DX-112 at 2.

Asked at trial to explain the purpose of the planned January 2015 meeting, Kennedy testified: “we were going to meet with -- we were going -- you know, they were like, well, just --people were just emotionally involved, but let's, you know, try and, you know, meet with her, see what happens, and maybe we can move forward.” Tr. 475. Kennedy, Stickney, and Sullivan flew to California the week of January 8 for the meeting, only to be told by Shawna Baker when they arrived that Rogers would not meet with them and that Rogers intended to fire Wilmington Trust as trustee. Notably, no one from Wilmington Trust thought it necessary at this time to contact the applicable authorities in California to investigate whether the Bakers were taking advantage of Rogers.

III. Premier Takes over as Trustee

On January 15, 2015, Rogers's personal attorney, James Cunningham, notified Wilmington Trust by letter that Rogers had terminated Wilmington Trust as trustee. The termination letter reads in relevant part:

> Please follow your process to expedite the transfer of this trust to the new trustee and please provide Premier Trust, Inc., and I with the contact information and name of persons assigned to close out Frieda's interest in the above trust.
>
> Mark Dreschler, President of Premier Trust, Inc. will contact whomever you designate to follow up on the expeditious transfer of the trust assets to Premier Trust, Inc.
>
> I understand that many of the assets are your own proprietary funds and understand that it may take time to liquidate those assets. However, the publicly traded and cash equivalents, etc., should be transferred as soon as possible. Mr. Dreschler will provide you with transfer instructions. You should discuss with Mr. Dreschler who should prepare the 2014 income tax return. You should also discuss with Mr. Dreschler when and whether to liquidate certain publicly traded holdings of the trust.

DX-113.

On January 22, 2015, Cunningham emailed Kennedy to confirm that she had received the termination notification. JX-22. Cunningham requested in his email that Kennedy send him within 24 hours the Tax Identification Number (TIN) of the Trust, the last

Trust statement, and the name of a contact at Wilmington Trust's "Closing Department." He also asked that Kennedy provide him for each of the Wilmington Private Funds the PPMs and "any redemption paperwork." Although he asked for the Wilmington Private Funds information "as soon as possible," he also said that if that information "will take time to gather, please do not delay sending the other information and documents requested in this email." *Id.*

The next day Kennedy sent an email to Cunningham and Dreschler "in response" to Cunningham's termination notice and January 22 email. Kennedy's January 23 email, which was approved in advance by Sullivan, reads in relevant part:

> First, I'm not sure if you're aware, but Wilmington Trust Company is currently serving as the Advisor of the Frieda Roen Resulting Trust. Please let me know if Frieda desires for us to continue to serve as Advisor. If not, please forward document(s) that remove Wilmington trust Company and appoints a new Advisor,
>
> Second, we will work with Premier to ensure a smooth transition. As stated previously, I am the contact while we terminate Frieda's Trust at Wilmington Trust Company.
>
> Third, as you may be aware, *there are significant gains on assets within Frieda's Trust that are not transferable to Premier. We will forward correspondence shortly to all parties involved (including Ms. Roen) so that everyone is aware of the gains associated with liquidating the assets for transfer.*
>
> Fourth, since Wilmington Trust is no longer trustee, we can't continue to make

> payments to Frieda. However, we will seek approval to advance funds to Premier so that Premier is able to make Frieda's next monthly distribution which is scheduled to be sent on 2/17th. Kindly arrange for Premier to forward delivery instructions as soon as possible.
>
> Additionally, since Wilmington Trust is no longer trustee, we will not prepare the 2014 fiduciary income tax return on behalf of the trust. However, we will forward a tax worksheet to Premier so that Premier can complete the tax return.
>
> We will forward the TIN and 12/31st statement sometime this afternoon.
>
> We will be in touch shortly regarding your request for Private Placement Memorandums[.]

JX-22 (emphasis added). An hour later, Kennedy emailed Cunningham and Dreschler the Trust's TIN and December 31, 2014 statement.

On January 27, Kennedy emailed Cunningham and Dreschler a letter that stated in relevant part:

> I understand Ms. Roen has decided to remove Wilmington Trust as trustee from the [Roen] Trust. However, as we begin to review the Trust portfolio *in anticipation of possibly selling the [Wilmington Private] funds that are not transferable to the successor trustee, we want to inform you of the capital gains associated with liquidating those assets. Based on the enclosed lot detail report, we estimate capital gains in excess of $9 million if the Wilmington proprietary funds are liquidated since they are not transferrable outside of Wilmington Trust.*

> As you are aware, this will result in a tax liability to the Trust in excess of $2.2 million dollars. Also, please note these figures may change as the 2014 k-ls are received.
>
> We are willing to work with the successor trustee to make the transition as efficient and cost effective as possible.
>
> In addition, we are flexible and may be amenable to an arrangement to spread the tax liability over multiple tax years.
>
> Please let me know if there are questions or if you are interested in discussing the matter further.

JX-23 (emphasis added).

Premier argues that Kennedy's January 23 email and January 27 letter "were false, incomplete and misleading" because they "stated that the [Wilmington Private Funds] had to be liquidated because Rogers elected to retain Premier as her new trustee." D.I. 359 at 41; *see also id.* at 41–42 ("Kennedy emphasized that the [Wilmington Private Funds] had to be liquidated."). I do not agree that Kennedy expressly stated in either the January 23 email or the January 27 letter that because Premier replaced Wilmington Trust as the trustee the Trust's holdings in the Wilmington Private Funds had to be liquidated. But I agree that the January 23 email implied that Premier had no choice but to liquidate the Wilmington Private Fund assets; and I find that Premier reasonably understood the January 23 email to communicate that Premier had no choice but to liquidate those assets. I base these findings on these two sentences from the email:

> [T]here are significant gains on assets within Frieda's Trust that are not transferable to Premier. We will forward correspondence shortly to all parties involved (including Ms. Roen) so that everyone is aware of the gains associated with liquidating the assets for transfer.

JX-22.

The January 27 letter, on the other hand, implies that liquidation was not necessarily required. I base this finding on the statements in the letter that (1) Wilmington Trust was "begin[ning] to review the Trust portfolio in anticipation of *possibly* selling the [Wilmington Private] funds that are not transferable to the successor trustee," JX-23 (emphasis added); (2) "we estimate capital gains in excess of $9 million *if* the Wilmington proprietary funds are liquidated," *id.* (emphasis added); and (3) "we are flexible and may be amenable to an arrangement to spread the tax liability over multiple tax years," *id.* This conditional language and the offer of a potential arrangement to spread out the tax liability over time suggest (and should have been read by Premier to suggest) that liquidation of the Wilmington Trust Funds was not preordained. That said, the letter does not suggest in any way *how* Premier could avoid liquidation.

In an ideal world, the ambiguities in the January 23 email and the January 27 letter would have prompted communications between Wilmington Trust and Premier to clarify whether the liquidation of the Trust's assets in the Wilmington Private Funds could be avoided and, if so, how. But Premier did not ask for clarification or follow up on the implicit suggestions in the January 27 letter that liquidation was not preordained. And Wilmington Trust, for its part, did not offer clarification of Kennedy's email or letter; nor did it ever share with Premier how liquidation of the funds could be avoided.

Wilmington Trust states in its posttrial briefing that "Wilmington Trust advised Premier that, although the funds could not be transferred, Wilmington Trust could continue to hold the Wilmington Private Funds such that they need not be liquidated." D.I. 362 at 40. But I flatly reject this assertion. At trial, Kennedy testified on direct examination that in her January 27 letter she was "saying that there was no requirement at that point to sell these proprietary assets." Tr. 480. Kennedy explained that "we could have held them in a custodian relationship or as an agent for ... the trust on behalf of Premier Trust, and they could have decided to liquidate [the assets] over multiple tax years if that's what they decided." Tr. 480. But the January 27 letter says nothing about a custodial relationship and on cross examination Kennedy admitted that she never told Premier that maintaining a Wilmington Trust custodial account for the Trust's assets in the Private Funds could avoid liquidation:

> Q. [Wilmington Trust's counsel] had asked you, did you have an understanding that one of the options was that the funds could be held in a custodial account? Do you remember that question?
> A. Yes.
> Q. Okay. Do you see any language in [the January 27 letter] where the words custodian or custodial account are used?

A. No, but I see language that says, we are willing to work with the successor trustee to make the transition as efficient and as cost-effective as possible.
Q. When you were asked by [counsel] who spoke with Mr. Cunningham after you sent this letter, I believe your testimony was you never spoke to him?
A. Yes, I don't recall speaking to him.
Q. So you never spoke to Mr. Cunningham at any time from or after the date of this letter, January 27, 2015, advising him that one of the options was a custodial account. That's true; right?
A. That's true.
Q. And you never told that to Mr. Dreschler, did you?
A. No, because we told him we would work with them and they never wanted to work with us.
Q. But you never told Mr. Dreschler one of the options was a custodial account; is that correct?
A. If someone says they're willing to work with you and the person never responds and says, well, what do you mean, then that's it.
Q. I understand that, but you never told him there's a custodial account option if you want it; right?
A. I told him we were willing to work with him.
Q. But you never said, we'll give you a custodial account if you want it; right?
A. I never said those exact words.

Tr. 569–70. Based on this testimony and Dreschler's testimony that "we understood that [the funds] couldn't be transferred and they had to be liquidated," Tr. 223, I find that Wilmington Trust never told Premier that

Wilmington Trust could hold the Trust's assets in the Wilmington Private Funds under Premier's trusteeship and never shared with Premier how Premier could avoid liquidation of the Wilmington Private Funds.

On February 5, Dreschler told Kennedy in an email: "please consider this your authorization to liquidate all the nontransferable Wilmington Trust proprietary funds currently in the Trust." DX-122. Cunningham was not copied on this email; and under the Trust Agreement, liquidation could not occur without the advisor's consent, which Wilmington Trust was not willing to give because of the tax implications associated with a liquidation. Accordingly, in a February 6 email sent to Cunningham and cc'd to Dreschler, Kennedy told Cunningham:

> I'm not sure if you're aware, but [Wilmington Trust] has received instructions from Premier to liquidate all non-transferrable Wilmington Trust proprietary funds currently in the [Roen] trust. As the Advisor of the Trust, [Wilmington Trust] does not consent to the sale of the assets. If [Wilmington Trust] has been removed as Advisor, please forward copies of the Removal and Appointment documents for our records.

PX-70.

On February 10, Cunningham sent Kennedy a notice of appointment executed by Rogers that removed Wilmington Trust and named Premier as the Trust's advisor. Later that day, Dreschler emailed Kennedy, stating that "now that we are trust advisor, please execute the directives to sell the proprietary funds and transfer the other assets per instructions previously provided." PX-72. Thereafter, Wilmington

Trust liquidated the Trust's holdings in the Wilmington Private Funds and transferred the sale proceeds and remaining Trust assets to Premier. Neither side addressed in its proposed findings of fact whether the Roen Trust incurred tax liabilities because of the Wilmington Private Funds' liquidation. Accordingly, I make no finding of fact with respect to that issue. *Cf. United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.).

On March 9, 2015, at the direction of her managers and Wilmington Trust's legal department, Kennedy completed and filed with the California Health and Human Services Agency (CHHSA) a Report of Suspected Dependent Adult/Elder Abuse form. JX-31. In the designated boxes in the CHHSA form, Kennedy identified Rogers as the victim, Shawna Baker as the suspected abuser, "financial" as the type of abuse, and the Roen Trust as the "targeted account." Kennedy attached to the form a two-page, single-spaced summary of her dealings with Rogers in November and December 2014 that she said "caused [her] to be concerned about [Rogers's] welfare." *Id.* Kennedy testified that someone from CHHSA called her to let her know "they were going to investigate the claim." Tr. 508. But neither Kennedy nor anyone else from Wilmington Trust were able to say whether the investigation was pursued by CHHSA or any other authority in California. *Id.* No one from Wilmington Trust ever followed up with CHHSA to make that determination. And neither side presented evidence at trial that would make it possible to tell what became of Kennedy's report of suspected abuse.

Shawna Baker died before trial. Steve Baker accompanied Rogers at trial each day but did not testify.

CONCLUSIONS OF LAW

I. Breach of Fiduciary Duty Claim

To sustain its breach of fiduciary duty claim, Premier was required to prove by a preponderance of the evidence that Wilmington Trust breached a fiduciary duty owed to the Trust and that the Trust suffered damages as a result of the breach. *Glick v. KF Pecksland LLC*, No. 12624-CB, 2017 WL 5514360, at *19 (Del. Ch. Nov. 17, 2017). Because of the Trust Agreement's exculpation clause, Premier was also required to establish that Wilmington Trust's actions or lack of actions constituted fraud, willful misconduct, or gross negligence. *In re Rohlf*, C.A. No. 4464-MG, 2011 WL 3201798, at *2 (Del. Ch. July 12, 2011) (holding that whether a trustee satisfied or breached fiduciary duties under a trust agreement is governed by the language of the trust agreement itself). Under Delaware law, "gross negligence" is an "extreme departure from the ordinary standard of care that signifies more than ordinary inadvertence or inattention." *Hecksher v. Fairwinds Baptist Church, Inc.*, 115 A.3d 1187, 1199 (Del. 2015) (citations and internal quotation marks omitted).

Premier alleges seven instances of Wilmington Trust breaching its fiduciary duties to the Trust. It alleges first a duty breach based on Wilmington Trust's "maintain[ing] an investment portfolio dominated by the [Wilmington Private Funds] which acted as a lockup and fail[ing] to disclose this risk to Rogers." D.I. 359 at 26. Premier states that "[t]he lockup [was] occasioned by the $36 million invested in [the Wilmington Private Funds].” *Id.* Although I am disturbed by Wilmington Trust's failure to disclose to Rogers WTIM's unwavering (and unwritten) practice of never consenting to a transfer of assets from the Wilmington Private Funds to another financial institution, the Trust's last investment in a Wilmington Private Fund occurred in 2011. When Wilmington Trust argued at trial that any claim based on the Trust's purchase of Wilmington Private Fund shares would be barred by the statute of limitations, I asked Plaintiffs’ counsel: “are you alleging that the purchase of the private funds is part of your case?” Plaintiffs’ counsel replied: “No, we're not.” Tr. 47. Accordingly, Plaintiffs abandoned any fiduciary duty breach claim premised on Wilmington Trust's investment in a Wilmington Private Fund.

Premier next argues that Wilmington Trust “took for itself excess fees not permitted under the Trust Agreement.” D.I. 359 at 28. Premier, however, never alleged in the Amended Complaint or the Pretrial Order and never alleged at trial that Wilmington Trust collected fees that exceeded what the Trust Agreement permitted. Accordingly, Premier waived this theory of liability. *Dean v. Brandywine Studios, Inc.*, No. Civ.A. 99–679–KAJ, 2003 WL 299362, at *1 (D. Del. Feb. 10, 2003) (“Having failed to raise the issue in the pretrial order and having failed to address it at trial, defendants have waived any right they might have had to assert a statute of limitations defense.”); *Colli v. Wirth*, No. 94 Civ. 3234 (LBS), 1996 WL 442835, at *1 (S.D.N.Y. Aug. 6, 1996) (“It is an established procedural principle that a party's failure to include a legal theory or defense in the pre-trial order results in its subsequent abandonment or waiver.”).

Even if this liability theory were not waived, I would reject it for failure of proof and on statute of limitations grounds. First, under the terms of the Trust Agreement, Advisors are entitled to receive "a reasonable sum, to be fixed by the Trustee and the Advis[o]rs to the Trustee, for services rendered by them." JX-02 at 31. Neither of Plaintiffs' fiduciary experts performed or offered at trial any analysis about the reasonableness of the fees charged to the Trust. Second, Wilmington Trust disclosed the fee schedule for the Trust's investments to Rogers in July 2011 and explained the fee calculations in a statement provided to her in December 2012. DX-40; DX-59. This suit was not filed until March 2017; and thus any claim based on Wilmington Trust's fees is barred by 12 Del. C. § 3585, which precludes claims brought more than two years after a "beneficiary was sent a report that ... adequately disclose[d] the facts constituting a claim."

Premier next alleges a fiduciary duty breach based on Wilmington Trust's "fail[ure] to assess the suitability of the Trust's portfolio for Rogers and the remaindermen." D.I. 359 at 30. Here, again, I was disturbed by the evidence at trial. Sullivan's demeanor and the substance of his testimony made clear to me that he was indifferent to and largely ignorant of Rogers's personal circumstances. His articulation of the reasons for selecting the Wilmington Private Funds—essentially that they were "very good" and "very diversified"—was perfunctory.

But Delaware law does not require a trustee to select investments that are "suitable" for trust beneficiaries. Instead, under 12 Del. C. § 3302(a), a trustee is obligated to select investments that "attain the purposes" of the Trust. Section 3302(a) provides:

> When investing, reinvesting, purchasing, acquiring, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account. In making investment decisions, a fiduciary may consider the general economic conditions, the anticipated tax consequences of the investment and the anticipated duration of the account and the needs of the beneficiaries.

12 Del. C. § 3302(a).

There is no express statement of purpose in the Trust Agreement. But the totality of the Agreement indicates that it was the settlor's intent for the Trust to last for multiple future generations. The Agreement grants the trustee, for example, "uncontrolled discretion" to "distribute so much, if any, of the net income and principal of the Resulting Trust to or for the benefit of the Primary Beneficiary." JX-02. And the broad grant of authority to invest in any securities that the trustee may deem advisable indicates an intent to maintain the independence of the trustee from any given beneficiary. Premier did not prove by a preponderance of the evidence that Sullivan's balanced growth investment choices—which resulted in $25 million in gains and $12 million in distributions to Rogers from 2009 through 2014—were inconsistent with the purposes of the Trust. It therefore failed to prove that the decisions to make those investments constituted fraud, willful misconduct, or gross negligence.

Premier next argues that Wilmington Trust breached its fiduciary duties because it "had an inherent conflict of interest when it acted as the Trustee and Advis[o]r." D.I. 359 at 31. Neither the Trust Agreement nor Delaware law, however, prohibits a single entity from acting as both trustee and advisor. Moreover, when Rogers appointed Wilmington Trust to act as the advisor of the Trust, it was already acting as trustee. And Rogers effectuated the appointment with the assistance of a personal attorney.

Next, Premier argues that Wilmington Trust breached its fiduciary duties by "ma[king] misrepresentations to Rogers and Premier regarding the restrictions on the [Wilmington Private Funds]." D.I. 359 at 32. According to Premier, Wilmington Trust "is presented with" a "mutually exclusive choice": either (1) it committed securities fraud by failing to disclose in the PPMs that WTIM would never consent to a transfer of assets to another financial institution or (2) it "made false statements to Premier in January 2015 when it was [sic] represented that the [Wilmington Private Funds] could not be transferred outside [Wilmington Trust]." *Id.* With respect to the first "choice," although I agree and am troubled by the fact that Wilmington Trust failed to disclose in the PPMs it provided Rogers in 2010 and 2011 that WTIM would never consent to an outside transfer of the Wilmington Private Funds, I need not decide whether that failure constituted securities fraud, because the statute of limitations would bar such a claim. *See State v. Attarian*, No. ID 1303009480, 2014 WL 4782859, at *5 (Del. Super. Ct. Sept. 8, 2014) ("[Delaware] securities-fraud allegations are subject to a five[-]year statute of limitations"). As for the second "choice," the record evidence is undisputed that WTIM would never have consented to a transfer of the Wilmington Private Funds to an outside entity. Thus, Wilmington Trust's statements to Premier in January 2015 that the Private Funds were not transferrable were not false.

Premier next argues that Wilmington Trust breached its fiduciary duties because it "did not undertake any tax or financial planning for the Trusts' $61.5 million corpus." D.I. 359 at 33. In support of this argument, Premier relied on the Rule 30(b)(6) deposition testimony of Katherine Burns, whom Wilmington Trust offered as its corporate designee on the topic of "financial or tax planning Wilmington Trust did for the [Roen] trust." JX-38 at 7:23–8:9. The following exchange occurred during Burns's testimony:

> Q. Do you know what the tax planning was done for the Roen Resulting Trust?
> A. No.
> Q. Do you know if any financial planning was done for the Roen Resulting Trust?
> A. I do not.
> Q. Do you know if any tax planning was done for the Roen Resulting Trust?
> A. Not to my knowledge.
> Q. Do you know how – if or how tax consequences were communicated to Ms. Rogers?
> A. I do not.

JX-38 at 77:13–78:6.

Wilmington Trust offered no explanation for this testimony at trial; nor did it mention the testimony it in its posttrial answering brief. The testimony constitutes a binding admission by Wilmington Trust that it did not engage in tax planning for the Trust and did not communicate to Rogers the tax consequences of the investments it made for the Trust. When a corporate designee for a Rule 30(b)(6) deposition topic lacks the ability to answer questions about the topic, the corporation is bound by the witness's "not to my knowledge" answers to questions on the topic. *Ierardi v. Lorillard, Inc.*, Civ. A. No. 90-7049, 1991 WL 158911, at *3 (E.D. Pa. Aug. 13, 1991); *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 690 (S.D. Fla. 2012).[1]

Nonetheless, Premier never explained, let alone established, how Wilmington Trust's failure to engage in tax planning proximately caused damage to the Trust. Accordingly, its breach of fiduciary duty claim fails insofar as it is based on lack of tax planning. *See Glick*, 2017 WL 5514360, at *19 ("[T]o sustain their [breach of fiduciary duty] claim ..., [plaintiffs] have the burden to prove, by a preponderance of the evidence, not only that [the defendant] breached a fiduciary duty owed to them, but that they suffered damages....").

Lastly, Premier argues that Wilmington Trust breached its fiduciary duties by not delivering the Private Funds' 2014 K-1s to Premier by September 2015. D.I. 359 at 33. I rejected this argument at trial. Tr. 1250–51. Premier failed to establish by a preponderance of the evidence that Wilmington Trust did not deliver the 2014 K-1s. The unrebutted testimony of Richard Capuano established to my satisfaction that Wilmington Trust sent Premier all required K-1s before September 2015.

In sum, I do not find that Wilmington Trust is liable for a breach of its fiduciary duties.

II. Equitable Fraud Claim[2]

Premier's equitable fraud claim is based on alleged false, misleading, and incomplete statements made by Kennedy in her January 23 email and January 27 letter about the need to liquidate the Wilmington Private Funds and in a July 2015 email to Premier about the availability of the Private Funds' 2014 K-1s.

Under Delaware law, a claim of equitable fraud "requires special equities, typically the existence of some form of fiduciary relationship, such as that between a director and stockholder or a trustee and *cestui que trust*[.]" *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 144 (Del. Ch. 2009). "The elements of equitable fraud are similar to those for common law fraud, except that the claimant need not show that the respondent acted knowingly or recklessly—innocent or negligent misrepresentations or omissions suffice." *Zebroski v. Progressive Direct Ins. Co.*, C.A. No. 8816-VCP, 2014 WL 2156984, at *7 (Del. Ch. Apr. 30, 2014) (internal quotation marks and citations omitted). As the court explained in *Zebroski*, "the concept of equitable fraud is more flexible [than common law fraud] and includes all willful or intentional acts, omissions, and concealments which involve a breach in either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained." *Id.* (internal quotation marks and citation omitted).

Wilmington Trust argues that Premier's equitable fraud claim fails because it is duplicative of Premier's breach of fiduciary duty claim. D.I. 362 at 47. There is Delaware case law that supports the proposition that equitable fraud "describe[s] a breach of fiduciary duty," and is not "a separate, independent tort." *Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1236–37 (Del. Ch. 2001); *see also In re*

Wayport, Inc. Litig., 76 A.3d 296, 327 (Del. Ch. 2013) (holding that breach of fiduciary duty claim "render[ed] [plaintiff's] constructive fraud count redundant and superfluous"). And Premier's fiduciary duty and equitable fraud claims arise out of the same events. But in its posttrial briefing Premier has based its fraud claim on alleged false and misleading statements that it does not rely on in pressing its breach of fiduciary duty claim. Accordingly, I will treat the equitable fraud claim as a separate tort in this case.

Although innocent or negligent misrepresentations or omissions may as a general matter be sufficient to establish an equitable fraud claim, *Zebroski*, 2014 WL 2156984, at *7, under the express terms of the Trust Agreement, Wilmington Trust can only be liable if its actions constituted fraud (i.e., common law fraud), willful misconduct, or gross negligence. Thus, the question before me is whether Premier established by a preponderance of the evidence that Kennedy's challenged statements and omissions were at a minimum grossly negligent.

I have already made a finding that Kennedy implied in her January 23 email that Premier had no choice but to liquidate the Wilmington Private Funds. Dreschler reasonably inferred from the email that liquidation was Premier's only option. But Kennedy's January 27 letter suggested that liquidation was not a foregone conclusion.

Both Wilmington Trust and Premier bear responsibility for the 2015 liquidation of the Trust's assets in the Wilmington Private Funds. The January 23 email and the January 27 letter should have been clearer, and, as the Advisor (and former Trustee) of the Trust, Wilmington Trust should have explained to Premier that Wilmington Trust could act as a custodian and hold the Trust's Wilmington Private Fund assets to avoid a premature liquidation that would result in unnecessary tax liabilities. For its part, Premier was a sophisticated corporation that managed more than 5,000 trusts with more than $2 billion in assets. It should have asked Wilmington Trust what "arrangement" Wilmington Trust professed to be "amenable to" that could "spread the tax liability over multiple tax years." JX-23.

Both parties failed to exercise responsibly their duties here. But Premier is the plaintiff. And it did not establish by a preponderance of the evidence that Wilmington Trust's failures with respect to its communications with Premier constituted the kind of "extreme departure" from industry norms that is required for a finding of gross negligence.

Premier also argues that Kennedy "made untrue statement regarding the availability of [Wilmington Private Fund] K-1s in July 2015." D.I. 358 at 42. In July 2015, Premier wrote Kennedy, asking "[w]hen do you expect the 2014 K-1's to be available for the Wilmington proprietary funds?" JX-33. Kennedy responded by email: "I have been informed that K1s for the Wilmington proprietary funds will be available in early September." *Id.* Premier argues this was a false statement because four K-1s for the Wilmington Private Funds were prepared in March 2015. *See* D.I. 359 at 42 (citing DX-128).

As an initial matter, Kennedy's statement was that she "*[had] been informed* that K1s for the Wilmington proprietary funds will be available in early September." JX-33 (emphasis added). Premier has put forward no evidence to suggest that Kennedy had not been so informed. Thus, there is no evidence that this was a false statement. But even if I were to read

Kennedy's email less literally, I find that a reasonable interpretation of Kennedy's statement is that she told Premier that not all the K-1s would be available until early September. Although it is true that several K-1s had been prepared in March 2015, the remainder of the K-1s for the Wilmington Private Funds were not prepared until September 2015. *See* Tr. at 717–718 (testimony of Richard Capuano). Therefore, even under a less literal reading, Kennedy's statement was true, and Wilmington Trust cannot be liable for equitable fraud.

III. Investment Advisers Act Claim

Premier argues that Wilmington Trust violated the U.S. Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.*, and seeks as a remedy "restitution of the fees [Wilmington Trust] collected from the [Roen Trust.]" D.I. 359 at 49. The Investment Advisers Act, however, does not authorize a private right of action for restitution. Rather, it creates only "a limited private remedy ... to void an investment advisers contract[.]" *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 24 (1979). "[T]he Act confers no other private causes of action, legal or equitable." *Id.* Because Premier does not seek to void an investment adviser's contract, its claim for relief under the Investment Advisers Act fails.

IV. Financial Elder Abuse Claim

Rogers accuses Wilmington Trust of committing financial elder abuse in violation of section 15610.30 of the California Welfare & Institutions Code. Although Rogers faults Wilmington Trust for "never attempt[ing] to negotiate a larger ownership stake for Rogers [in the cattle business operation owned by her and the Bakers] and ... wait[ing] a year to actually file the report of suspected elder abuse," D.I. 359 at 23, she does not base her elder abuse claim on those failures. Rather, the gravamen of her claim is that Wilmington Trust "knew or should have known that once the Trust monies were placed in the [Wilmington Private Funds,] Rogers was 'hostage' to [Wilmington Trust] as the Trustee—a de facto retention of the Trust with [Wilmington Trust as Trustee] absent Rogers incurring adverse tax consequences." *Id.* at 45.

***16** Section 15610.30(a) provides that

> "[f]inancial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:
> (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
> (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
> (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70.

Cal. Welf. & Inst. Code § 15610.30. Under section 15610.30(c), "a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, ... regardless of whether the property is held directly or by a representative of an elder or dependent adult."

Assuming that section 15610.30 creates an independent cause of action for elder abuse, Rogers's claim fails for at least two reasons.[3] First, Rogers did not establish that Wilmington Trust took her property. Assuming *arguendo* that causing adverse tax consequences could constitute a taking of property, it was Premier, not Wilmington Trust, that ordered the liquidation of the Trust's assets in the Wilmington Private Funds that caused the adverse tax consequences. And, as discussed above, an immediate liquidation and its adverse tax consequences could have been avoided.[4] Second, Rogers points to no evidence that Wilmington Trust acted with an intent to defraud or exercise undue influence over her when it invested Trust assets in the Wilmington Private Funds or executed Premier's order to liquidate the Funds in 2015.

CONCLUSION

For the foregoing reasons, I do not find Wilmington Trust liable for any of the claims brought by Plaintiffs Premier Trust, acting as trustee of the Roen Trust on behalf of the Roen Trust, and Frieda Mae Rogers.

The Court will issue an Order consistent with this Memorandum Opinion.

Footnotes

1Wilmington Trust cites the trial testimony of Sullivan and Capuano as evidence that its “selection of investments took into account relevant tax considerations” and that “the Wilmington Private Funds offered tax deferrals in a way that is not possible with mutual funds.” D.I. 362 at 40. Burns's testimony precluded Wilmington Trust from offering at trial testimony to show that it engaged in tax planning. *QBE Ins. Corp.*, 277 F.R.D. at 690. But in any event, the conclusory testimony cited by Wilmington Trust did not establish that Wilmington Trust ever formulated a tax plan for the Trust.

2In the Amended Complaint, Premier alleged a “constructive fraud” claim. In its posttrial brief, Premier styles the claim as “equitable fraud.” Delaware law equates equitable fraud with constructive fraud. *See In re Wayport, Inc. Litig.*, 76 A.3d 296, 327 (Del. Ch. 2013).

3Courts in California are divided over whether section 15610.3 creates a cause of action or provides enhanced remedies for other causes of action. *See Gross v. Wells Fargo Bank*, No. 13-cv-1250-W(BGS), 2014 WL 232272, at *5 (S.D. Cal. Jan. 21, 2014).

4I also note that Wilmington Trust last used Trust assets to purchase shares in the Wilmington Private Funds in January 2011—nine months before Rogers turned 65. Thus, Wilmington Trust's use of Rogers's property to buy shares in the Funds could not form the basis of an elder abuse claim under section 15310.30. *See* Cal. Welf. & Inst. Code § 15610.27 (defining “elder” as “any person residing in this state, 65 years of age or older”).

6/29/22

United States Court of Appeals, Third Circuit.

Frieda Mae ROGERS, formerly known as Frieda Rogers Roen; Premier Trust Inc., a Nevada corporation, as Trustee of the Frieda M. Roen Resulting Trust u/a/d July 19, 1934, Appellants

v.

WILMINGTON TRUST COMPANY, a Delaware corporation; Wilmington Trust Investment Advisors Inc., a Maryland corporation

No. **21-1473**

SUR PETITION FOR REHEARING

Before: SHWARTZ, RESTREPO, and SCIRICA Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case, having been submitted to the judges who participated in the decision of this Court, is denied.

BY THE COURT,
s/ L. Felipe Restrepo
Circuit Judge