

[Cite as *Natl. City Bank. v. Noble*, 2005-Ohio-6484.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 85696

NATIONAL CITY BANK, TRUSTEE
OF THE WELKER J. SMUCKER
TRUST, et al.,

Plaintiffs-Appellees

vs.

DAVID D. NOBLE, TRUSTEE OF
THE LARRY SMUCKER REVOCABLE
LIVING TRUST, et al.,

Defendants-Appellants

DATE OF ANNOUNCEMENT
OF DECISION

CHARACTER OF PROCEEDING

JUDGMENT

DATE OF JOURNALIZATION

APPEARANCES:

For Plaintiffs-Appellees:

JOHN L. DAMPEER

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JOURNAL ENTRY

AND

OPINION

DECEMBER 8, 2005

Civil appeal from
Common Pleas Court -
Probate Division
Case Nos. 2002ADV0061597

AFFIRMED

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MARY EILEEN KILBANE, J.:

{¶ 1} David D. Noble, Trustee of the Larry Smucker Revocable Living Trust, et al., appeal from an order of the probate court partially denying its motion for summary judgment against National City Bank regarding alleged neglect of a family trust and awarding attorney fees incurred by both the corporate and individual trustees. Noble, et al., assert that no material questions of fact remain regarding the co-trustees' duties, the failure to properly diversify the trust, and whether the co-trustees engaged in activities that constituted a conflict of interest. They additionally claim error in the court's failure to recognize a breach of fiduciary duty in neglecting to find a failure to timely distribute trust assets, and in awarding attorney fees when such a right had previously been waived. We affirm.

{¶ 2} The record reveals that in 1965, Welker Smucker, son of the founder of the J.M. Smucker Company, established a trust for the benefit of his two children, Larry and Lana.¹ The trust assets

¹Lana Smucker, nka Lana Chadwick, has not asserted claims in

included life insurance policies for the benefit of Welker's wife, Helen, and over 1,000 shares of J.M. Smucker Company common stock, divided for both children's benefit. When Helen Smucker died, her allocation was also to be equally divided between the children.

{¶ 3} The Trust Agreement provides for administration by two co-trustees—a corporate trustee and an individual trustee. National City Bank ("NCB") was named as corporate trustee, and Welker appointed himself as individual trustee, to be succeeded upon his death by John Dampeer. No successor was named for Dampeer, and upon his death, all duties would pass exclusively to NCB.

{¶ 4} The duties of the trustees were outlined in the Trust Agreement which provides:

"2. The Trustees are empowered to retain as an investment, without liability for depreciation in value, any part or all of any securities *** from time to time hereafter acquired by the Trustees as a gift, devise or bequest from the Grantor or any other person, *** even though such property be of a kind not ordinarily deemed suitable for trust investment and even though its retention may result in a large part or all of the trust property's being invested in assets of the same character or securities of a single corporation. ***. Without limitation upon the generality of the foregoing, the Trustees are expressly empowered to retain as an investment, without liability for depreciation in value, any and all securities issued by The J.M. Smucker Company, however and whenever acquired, irrespective of the proportion of the trust properly invested therein ***.

these proceedings.

The Trustees are empowered to invest and reinvest any part or all of the trust property *** in such securities *** as they may select, irrespective of any limitation prescribed by law or custom upon the investments of trustees and even though the trust property may be entirely invested in common stocks or other equities ***." Trust Agreement, at Section E (2)-(3).

{¶ 5} The trust then provided that upon each child reaching the age of 21, the trustees would disburse monthly scheduled distributions from the trust. The payments were scheduled to increase every few years until the children reached the age of forty. On their fortieth birthday, both Larry and Lana would receive their full share of the trust, payable in installments.

{¶ 6} When Welker Smucker died in 1971, Dampeer succeeded Welker as individual trustee. As the children had not reached the age of forty, payments and investments continued at the discretion of the trustees for the next several years without incident. In January 1986, shortly before Larry's fortieth birthday, the co-trustees invoked the so-called spendthrift provision of the trust, which permitted them to retain control over distributions to one or both beneficiaries. The trustees invoked this right solely as to Larry, thereby circumventing his full access to the funds. The spendthrift provision remained in effect continuously until Larry's death in April 2000.

{¶ 7} Following Larry's death, his will was admitted to probate, and pursuant to the terms of his will, the balance due under the Welker Smucker trust was appointed to David Noble, as

trustee of the Larry Smucker Trust. (Section B(7) of the Trust Agreement). When an immediate distribution of the assets was not forthcoming, suit was filed in Holmes County, alleging both a failure to timely distribute the assets of the Larry Smucker Trust and a breach of fiduciary duty.

{¶ 8} On July 31, 2001, an agreed judgment entry was filed which provided:

"The Plaintiffs, * desiring to have a complete distribution of the assets of the Welker Smucker Trust to the Larry Smucker Trust *** do specifically release *** the co-trustees *** of and from all claims, demands and causes of action specifically and explicitly set forth in Holmes County Court of Common Pleas Case No. 00MS012 ***."**

{¶ 9} Shortly thereafter, on February 27, 2002, the Welker Smucker Trust was terminated in its entirety and its assets were distributed.

{¶ 10} Throughout the life of the Welker Smucker Trust, at issue has been the amount of Smucker Company common stock retained by the trust. As early as September 1980, Smucker stock constituted 87 percent of the trust's assets, which prompted Noble, on behalf of the trust, to request a diversification that same year. While no diversification occurred in 1980, in 1983 and 1985 the trustees diversified the trust through the sale of Smucker Company stock and purchased other equities with the proceeds. By 2001, Smucker Company stock constituted only 25 percent of the total value of equities held in the trust. At the time of distribution, the trust

included 40,000 shares of Smucker Company common stock and 73,030 shares of other stock.

{¶ 11} In April 2002, NCB filed the instant lawsuit seeking a declaration from the probate court approving its final accounting and seeking a release of liability from its administration duties.

NCB named the beneficiaries of the trust as defendants, which included: David D. Noble, as trustee of the Larry Smucker Trust and executor of his estate; Larry's children, Mendy and Jeremy; and Larry's grandchildren, Ryan and Chaz (we collectively refer to these parties as the "Smucker Defendants"). NCB also named John Dampeer as a defendant. In January of 2003, the Smucker Defendants filed counterclaims against NCB and cross-claims against Dampeer, and Dampeer ultimately filed cross-claims against the Smucker Defendants seeking the same relief as NCB for his duties as co-trustee.

{¶ 12} In May 2003, Dampeer moved for judgment on the pleadings which the court granted in January 2004 on counts one, two, three, six, seven, eight and ten. NCB also moved for judgment on the pleadings on counts one through eight of the Smucker Defendant's counterclaims.

{¶ 13} In March 2004, the Smucker Defendants moved for partial summary judgment against NCB alleging a failure to compel diversification of the trust accounts.

{¶ 14} In August 2004, the court granted NCB's motion for

judgment on the pleadings, denied the Smucker Defendants' motion for partial summary judgment, and granted summary judgment to Dampeer on the remaining claims against him.

{¶ 15} As a result, both Dampeer and NCB moved for attorney fees, which were granted in November 2004.

{¶ 16} The Smucker Defendants appeal from these collective orders in the assignments of error set forth in the appendix to this opinion.

I. STANDARD OF REVIEW

{¶ 17} In reviewing an award of summary judgment, this court must apply a de novo standard of review. *Cole v. American Industry & Resources Corp.* (1998), 128 Ohio App.3d 546, 552. We apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511, 1994-Ohio-172. "A 'material fact' depends on the substantive law of the claim being litigated." *Hoyt, Inc. v. Gordon & Assocs., Inc.* (1995), 104 Ohio App.3d 598, 603, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 247-248.

II. NEGLIGENCE OF TRUST HOLDINGS

{¶ 18} In their first assignment of error, the Smucker Defendants assert that after Noble requested a review of the trust for diversification in 1980, this triggered a continuing duty on the part of NCB to monitor the retention of Smucker stock. They further allege that NCB neglected this duty even though it believed Dampeer refused to sell the Smucker stock because of his service on Smucker's board of directors. Finally, the Smucker Defendants contend that NCB never raised an issue of material fact in response to their motion for partial summary judgment.

{¶ 19} The record reveals that in 1980, Noble, in his capacity as legal counsel for Larry Smucker, requested that NCB and Dampeer review the Smucker Company stock contained in the trust. Although there is no allegation that NCB failed to respond to this request, the crux of the argument is that, based on this 1980 request, Noble maintains that NCB had a continuing duty to monitor the trust, and that regardless of this duty, NCB nonetheless had a duty to exercise due care and prudence.

{¶ 20} Noble urges this court to recognize the "Prudent Man Rule," a rule which originated in *King v. Talbot* (1869), 40 N.Y. 76, and which Ohio has codified in R.C. 2109.371. This rule suggests that, "[a] fiduciary holding funds for investment may invest the same in such securities as would be acquired by prudent men of discretion and intelligence in such matters, who are seeking a reasonable income and preservation of their capital." See *In re:*

Dumont (2004), 791 N.Y.S.2d 868.

{¶ 21} Although the prudent person rule did not require that a trustee diversify the estate, it declared that such diversification was a factor in the determination of "prudence." *Matter of Newhoff*, 107 A.D.2d 417; *Durant v. Crowley* (1921), 197 A.D. 540. Ohio courts have interpreted this rule to mean that "when the fiduciary is a corporate executor and trustee, with greater skill and facilities for handling trust estates than those possessed by the "ordinary prudent man," such fiduciary is held to a higher degree of care, consonant with its greater skill and facilities. 1 Restatement of the Law, Trusts 2d, Section 227, Comment d; 2 Scott, Trusts 3d ed., Section 174, pages 1410-1411; *id.* Section 174.1. The principle has been recognized in Ohio, at least by dicta. *In re Estate of Sedgwick* (1944), 74 Ohio App. 444, motion to certify overruled, Jan. 17, 1945; *Freeman v. Norwalk Cemetery Assn.* (1950), 88 Ohio App. 446."

{¶ 22} The Smucker Defendants assert that NCB neglected the trust holdings and refused to compel diversification, a duty they claim was initiated by a 1980 request for diversification. They also claim that pursuant to expert testimony, a prudent trustee would not have permitted the concentration of one company's stock to exceed 10 percent of a trust's portfolio. They claim that when the Trust Agreement is read as a whole, it is evident that Welker Smucker's primary concern was to create a trust to benefit his

heirs and not merely to retain Smucker stock.

{¶ 23} The Smucker Defendants place great emphasis on a claimed 52 percent loss in value because of the retention of Smucker stock; however, there is no question that the amount contained in the trust increased over the life of the trust. The question then becomes: *How much more* should or could have been contained in the trust? To answer this question, this court must look at the Trust Agreement itself and the duties assigned to the co-trustees in light of Welker Smucker's intent.

{¶ 24} In *Stevens v. National City Bank* (1989), 45 Ohio St.3d 276, the Ohio Supreme Court found that "a trustee, except as otherwise provided by the terms of the trust, is under a duty to the beneficiaries to distribute the risk of loss within the trust by prudent diversification, limiting the proportion of the total assets which are invested in any one stock or class of securities." *Id.* at 281. This duty includes the disposal or sale of investments in the trust at the time of its creation which, although otherwise proper investments to retain, are improper because such are not properly diversified. However, this case offers a key distinction from *Stevens* in that the specific language of the trust document itself states that "the Trustees are expressly empowered to retain as an investment, without liability for depreciation in value, any and all securities issued by the J.M. Smucker Company." (Welker Smucker Trust, Sect. E, paragraph

2).

{¶ 25} We find that the Smucker Defendants failed to meet their burden of proof regarding an alleged neglect of the trust holdings to survive the partial denial of their motion for summary judgment in favor of NCB. However, and as the Smucker Defendants raise issues in both their first and third assignments of error regarding the parties' respective service on the Smucker Company board of directors, the remaining issues are more appropriately addressed collectively under the parties' third assignment of error.

{¶ 26} The portion of the Smucker Defendants' first assignment of error, as it relates to neglect of the trust and a continuing duty to monitor, lacks merit.

"II. BREACH OF FIDUCIARY DUTY FOR FAILURE TO PROPERLY DIVERSIFY

{¶ 27} The powers and duties of a trustee are controlled by the terms of the trust instrument itself. *Daloia v. Franciscan Health Sys.*, 79 Ohio St.3d 98, 102, 1997-Ohio-402. Diversification is "imposed in the expectation that it will minimize the possibility of large losses of capital through the failure of only one of the investments in the entire portfolio." *Steiner v. Hawaiian Trust Co.* (1964), 47 Haw. 548, 393 P.2d 96.

{¶ 28} As stated in R.C. 1339.54(B), Scope of investment authority; diversification, it provides that, "[a] trustee shall diversify the investments of a trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." This duty "may

be expanded, restricted, eliminated or otherwise altered by the trust agreement." R.C. 1339.52(C).

{¶ 29} The issue of diversification was recently addressed in *Wood v. U.S. Bank, N.A.*, 160 Ohio App.3d 831, 2005-Ohio-2341, where the first district held that "even if the trust document allows a trustee to 'retain' assets that would not normally be suitable, the trustee's duty to diversify remains unless there are special circumstances." The court went on to hold that this duty is true only if the instrument creating the trust "clearly indicates an intention to abrogate the common-law, now statutory, duty to diversify." *Id.* at 834.

{¶ 30} The language contained in Welker Smucker's Trust Agreement is clear on its face that the trustees could retain investments without liability or depreciation. The trust went even one step further to insulate NCB as the corporate trustee, providing specifically that it had no duty to review or to make recommendations without the specific request of the individual trustee.

{¶ 31} Unlike *Wood*, *supra*, where the majority of stock held in the trust was actually that of the trustee, there is no allegation that Welker Smucker's Trust contained an inordinate amount of NCB stock. While the trust certainly contained a large amount of stock in the family company, it is unquestionable that the value of the trust increased since its inception – providing both for the

retention of Smucker stock and for the benefit of the beneficiaries.

{¶ 32} Moreover, the trust was clear on its face that Dampeer retained almost unfettered discretion over the trust until his own death, providing that if the trustee exercises his discretion to retain the trust assets, he may do so "*** without liability for depreciation in value ***." Based on this clear intent of Welker Smucker, the Smucker Defendants have failed to allege sufficient facts to support that both NCB and Dampeer's retention of the stock was done for their own pecuniary gain.

{¶ 33} Noble's second assignment of error lacks merit.

III. BREACH OF FIDUCIARY DUTY FOR A CONFLICT OF INTEREST

{¶ 34} In their third assignment of error and partially in their first assignment of error, the Smucker Defendants contend that both NCB and Dampeer breached their fiduciary duties to the beneficiaries by acting in their own pecuniary interests. They contend that Dampeer's service as individual trustee while a member of the Smucker Company's board of directors and corporate counsel to Smucker's from 1971 through 1989 was a conflict of interest. The Smucker Defendants additionally claim an inherent conflict of interest on the part of NCB because of Claude Blair's service on the board of directors while Chief Executive Officer of NCB. The Smucker Defendants concede that there is no Ohio case law on this precise issue, but contend that persuasive authority provides for

claims of breach of trust.

{¶ 35} The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty ***. It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries." *Pergram v. Herdrich* (2000), 530 U.S. 211, 224, 120 S.Ct. 2143; see, also, 2 A A. Scott & W. Fratcher, *Trusts* 170, 311 (4 Ed.1987); G. Bogert & G. Bogert, *Law of Trusts and Trustees* Section 543 (2 Ed.Rev.1980) ("Perhaps the most fundamental duty of a trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons"). *Pergram*, at 224, citing *Bogert*, *supra*.

{¶ 36} With regard to the corporate trustee, the trust provided that "the corporate trustee shall have no duty to review or to make any recommendations with respect to the sale or other disposition of, any such securities unless requested so to do [sic] by the individual Trustee or by the beneficiary of the trust estate in which such securities are held. The corporate trustee also shall have no duty, so long as the grantor is serving as the individual trustee hereunder, to review, or to make any recommendations with respect to the investment, sale or other disposition of, any other property held under Section A of this instrument." (Welker Smucker Trust, Sect. E, paragraph 2).

{¶ 37} Further, and as noted by the trial court, the Smucker Defendants concede that service as both a trustee and a director “does not per se, create a conflict sufficient to establish a breach of a fiduciary duty.” (Smucker Defendants’ Memorandum in Opposition to Judgment on the Pleadings, at 21).

{¶ 38} The third assignment of error and that portion of the first assignment of error, lack merit.

IV. ATTORNEY FEES

{¶ 39} In their fourth assignment of error, the Smucker Defendants claim that the co-trustees have no right to indemnity because the trust has terminated. They further claim that even if such a right did exist, the co-trustees have waived this right in the Agreed Judgment Entry resolving *Smucker I*.

{¶ 40} Decisions regarding the award of attorney fees are within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Motorists Mut. Ins. Co. v. Brandenburg*, 72 Ohio St.3d 157, 1995-Ohio-281.

{¶ 41} The Trust Agreement is specific that:

“The corporate Trustee shall be entitled to receive for its ordinary services hereunder compensation at the rates prescribed for similar trust services in its standard compensation, or such lesser amount as from time to time may be agreed upon with any individual Trustee then serving hereunder; and the corporate trustee also shall be entitled to receive reasonable additional compensation for any extraordinary services. During any period in which John L. Dampeer is serving as individual Trustee hereunder, he shall be entitled to such reasonable compensation for his ordinary services as may be agreed

upon with the corporate Trustee; and he also shall be entitled to receive reasonable additional compensation for any extraordinary services. All compensation shall be paid out of and charged against the income from or the principal of the several trust estates from time to time held hereunder, and in such proportions as the corporate Trustee shall deem equitable, except that any compensation payable upon the distribution of any part of the principal of any trust estate shall be deducted from the remaining principal thereof or, if none, from the principal otherwise distributable." (Trust Agreement, Section E, paragraph 14).

{¶ 42} "When the trustee's administration of the assets is unjustifiedly assailed it is a part of his duty to defend himself, for in so doing he is realizing the settlor's purpose. To compel him to bear the expense of an unsuccessful attack would be to diminish the compensation to which he is entitled and which was a part of the inducement to his acceptance of the burden of his duties." *Weidlich v. Comley*, (C.A.2, 1959), 267 F.2d 133, 134.

{¶ 43} As a matter of policy, failure to allow the co-trustees this remedy of attorney fees allows and encourages litigation by beneficiaries post distribution. The trustee(s) must then defend against this litigation without resources or risk a potential depletion of the resources earned in their capacity as a trustee.

{¶ 44} As this Court has determined that the plain language of the Trust Agreement is clear in that the co-trustees were entitled to retain Smucker Company stock and that they maintained the discretion to administer the trust, this assignment of error lacks merit.

V. FAILURE TO TIMELY DISTRIBUTE

{¶ 45} In their final assignment of error, the Smucker Defendants claim error in the trial court's determination that an agreed judgment entry disposing of prior litigation between the parties released the claim. The trial court found that this claim was barred against Dampier since he had no legal ability or power to distribute the assets (Judgment Entry, Aug. 5, 2004). We agree.

{¶ 46} The Smucker Defendants rely on the following portion of the agreed entry which states:

The Releasors do not agree to release, remise, acquit or discharge the Releasees from any claim of any kind whatsoever whether accrued or to accrue, which may now or may hereafter exist or arise against Releasees relating to or occurring as a result of any actions taken by or omitted by Releasees prior to the date of final Distribution or of any such matters arising prior to the date of final Distribution, except as set forth specifically, explicitly and exclusively in this Entry."

{¶ 47} In *Smucker I*, the complaint for declaratory judgment and equitable relief, paragraph four, section "e" requested that judgment be entered against the trustees and claimed "[b]y failing to distribute the Welker Smucker Trust assets to David D. Noble *** National City is in breach of its fiduciary duties as Trustee of the Welker Smucker Trust, entitling Plaintiffs to an award of damages."

{¶ 48} Paragraph seven of the agreed judgment entry also provides that "the Releasors desiring to have a complete distribution of the assets of the Welker Smucker Trust to the Larry

Smucker Trust *** do specifically release, remise, acquit and discharge the Co-Trustee, National City Corporation *** of and from all claims, demands and causes of action specifically and explicitly set forth in Holmes County Court of Common Pleas Case No. 00MS012."

{¶ 49} With reference to additional exercises of discretion and distribution, the agreed judgment entry provides:

"The Co-Trustees are hereby released from any claims the beneficiaries of the Trust may have or may have had arising solely from the exercise of the discretion by the Co-Trustees in connection with distributions of income and/or of principal from the Trust prior to the death of Larry L. Smucker and made for his direct benefit pursuant to the provisions of the so-called spendthrift provision."

{¶ 50} The record is clear that Dampeer, as individual trustee, had no control over the distribution of funds. Additionally, and as it relates to the role of NCB for failing to timely distribute the funds, we find that the agreed judgment entry adequately provided for the release of this claim.

{¶ 51} The Smucker Defendants fifth assignment of error lacks merit.

{¶ 52} The ruling of the trial court is affirmed.

It is ordered that appellee shall recover of appellant costs herein taxed.

The court finds that there were reasonable grounds for this

appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE
JUDGE

SEAN C. GALLAGHER, P.J., And

KENNETH A. ROCCO, J., CONCUR

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

APPENDIX A

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED BY DENYING THE SMUCKER

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST CO-TRUSTEE NCB FOR ITS NEGLIGENCE OF THE SMUCKER HOLDINGS OF TRUST, WHERE (A) THE BENEFICIARIES' REQUEST FOR DIVERSIFICATION TRIGGERED NCB'S DUTY UNDER THE TRUST TO MONITOR THE RETENTION OF SMUCKER STOCK, (B) NCB'S OWN DOCUMENTS ESTABLISH THAT IT NEGLECTED THIS DUTY EVEN THOUGH IT BELIEVED DAMPEER REFUSED TO SELL THE STOCK BECAUSE HE SERVED ON THE BOARD OF DIRECTORS OF THE J.M. SMUCKER COMPANY AND (C) NCB NEVER RAISED A SINGLE MATERIAL ISSUE OF FACT IN OPPOSITION TO THE PARTIAL SUMMARY JUDGMENT MOTION (8/5/04 JUDG. ENTRY RE SMUCKER DEFTS' MOT. FOR PARTIAL SUMMARY JUDGMENT AT P.1).

II. THE TRIAL COURT ERRED BY HOLDING THAT THE SMUCKER DEFENDANTS FAILED TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST CO-TRUSTEES DAMPEER AND NCB FOR FAILURE TO PROPERLY DIVERSIFY THE TRUST ASSETS WHERE THE SMUCKER DEFENDANTS ALLEGED THAT THE CO-TRUSTEES RETENTION OF SMUCKER STOCK AS IT DECLINED 52% IN VALUE AROSE NOT FROM AN EXERCISE OF JUDGMENT, BUT RATHER FROM INACTION AND NEGLIGENCE. (1/2/04 JUDG. ENTRY AT PP. 2-3, 5; 8/5/04 JUDG. ENTRY AT PP2-5).

III. THE TRIAL COURT ERRED BY HOLDING THAT THE SMUCKER DEFENDANTS FAILED TO STATE A CLAIM AGAINST CO-TRUSTEES DAMPEER AND NCB FOR BREACH OF FIDUCIARY DUTY FOR CONFLICT OF INTEREST WHERE THE SMUCKER DEFENDANTS ALLEGED THAT (A) DAMPEER AND NCB'S PRESIDENT SERVED ON THE BOARD OF DIRECTORS OF THE J.M. SMUCKER COMPANY DURING THE TIME THAT DAMPEER AND NCB SERVED AS CO-TRUSTEES OF THE TRUST, (B) THE CO-TRUSTEES PLACED THE INTEREST OF THE COMPANY OVER THE INTEREST OF THE SMUCKER DEFENDANTS BY RETAINING SMUCKER STOCK AS IT PLUMMETED IN VALUE, AND (C) THAT DAMPEER RECEIVED TRUSTEE FEES WHILE PERFORMING NO ADMINISTRATIVE OR INVESTMENT SERVICES FOR THE TRUST. (1/9/04 JUDG. ENTRY AT PP. 3-4; 8/5/04 JUDG. ENTRY AT P. 3).

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN AWARDING ATTORNEY FEES TO CO-TRUSTEES NCB AND DAMPEER WHERE NCB AND DAMPEER WAIVED ANY SUCH RIGHT TO INDEMNIFY IN AN AGREED JUDGMENT ENTRY RESOLVING PRIOR LITIGATION BETWEEN THE PARTIES AND SOUGHT INDEMNITY ONLY AFTER THEY TERMINATED THE TRUST AND DISTRIBUTED ITS ASSETS. (11/30/04 JUDG. ENTRY AWARDING FEES TO NCB; 11/30/04

JUDG. ENTRY AWARDING FEES TO DAMPEER) .

V. THE TRIAL COURT ERRED BY HOLDING THAT THE SMUCKER DEFENDANTS' CLAIM AGAINST NCB FOR FAILURE TO TIMELY DISTRIBUTE THE ASSETS OF THE TRUST WAS BARRED BY THE DOCTRINE OF RELEASE. (8/5/04 JUDG. ENTRY AT PP. 3-4)."