

STATE OF MAINE  
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET  
DOCKET NO. BCD-CV-18-27

FREDERIC J. POOR, et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 BAR HARBOR TRUST SERVICES, et )  
 al., )  
 )  
 Defendants, )

ORDER ON DEFENDANT BAR  
HARBOR TRUST SERVICES' MOTION  
TO DISMISS

When Phyllis Poor (“Poor”) passed away, she left an estate valued at over six million dollars, much of which was to be held in trust for the benefit of her son, Frederic J. Poor, as well as her grandchildren, in two testamentary trusts. Plaintiffs allege Poor’s intention was undermined by Defendants in this matter, principally Defendant Robert Kenneth Lindell, Jr. (“Lindell”), who significantly misappropriated trust funds. Plaintiffs also allege that Defendant Bar Harbor Trust Services (“BHTS”), as administrative trustee of the two trusts, allowed Lindell to loot the assets of the two trusts.

BHTS moves to dismiss the Complaint in its entirety for failure to state a claim, or, alternatively, for a stay of this action to allow the Hancock County Probate Court (the “Probate Court”) to rule on a declaratory judgment action BHTS filed there before it was named in this lawsuit.<sup>1</sup> M.R. Civ. P. 12(b)(6). Plaintiffs—Frederick Poor and Maryellen Sullivan, Esq., in her capacity as trustee of each trust—oppose the motion. The Court heard oral argument on the motion on August 7, 2019. Eric Wycoff, Esq. represented BHTS and Sarah Irving Gilbert, Esq.

<sup>1</sup> The Court denies BHTS’s motion to stay and declines to consider its argument for dismissal on procedural grounds. This action was commenced first and BHTS either knew, or should have known, that it would be brought into this litigation.

represented Plaintiffs. For the reasons discussed below, the Court grants BHTS's Motion in part, and denies the Motion in part.

## BACKGROUND

The operative pleading in this matter is Plaintiffs' Second Amended Complaint (the "Complaint"), filed March 1, 2019 and naming multiple defendants: BHTS and Lindell as well as Lindell's former spouse, Althea Latady, and Barbara Gray, previously co-personal representative of Poor's estate along with Lindell. The Complaint purports to state numerous claims against BHTS: conversion (Count I, also pled against other defendants); breach of fiduciary duty (Count II, also pled against other defendants), fraud (Count III, also pled against other defendants), unjust enrichment (Count V, also pled against other defendants), punitive damages (Count VI, also pled against other defendants), negligence (Count VII, also pled against another defendant); tortious interference (Count VIII, also pled against other defendants), fraudulent conveyance (Count IX, also pled against other defendants), civil conspiracy (Count X, also pled against other defendants), and intentional infliction of emotional distress (Count XI, also pled against other defendants).

According to the Complaint, Poor died testate on June 30, 2019.<sup>2</sup> She left a detailed Last Will and Testament (the "Will"). (Pl.'s Compl. ¶ 6 & Ex. B.) The Will appoints Barbara Gray and R. Kenneth Lindell as co-Personal Representatives of the Estate. (Pl.'s Ex. B, at 1.) The

<sup>2</sup> Poor's date of death is shown on Exhibit C to the Complaint, and was agreed upon at oral argument. As a document attached to the Complaint, Exhibit C is a part of the Complaint "for all purposes" and thus can be considered on a motion to dismiss without converting the motion into one for summary judgment. M.R. Civ. P. 10(c). Otherwise, "only the facts alleged in the complaint may be considered on a motion to dismiss," although a "narrow exception allows a court to consider official public documents, documents that are central to the plaintiff's claim, and documents referred to in the complaint, without converting a motion to dismiss into a motion for a summary judgment when the authenticity of such documents is not challenged." *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶¶ 8, 10, 843 A.2d 43. Both parties attached multiple exhibits to their memoranda in support of and opposition to the instant motion, some of which were not attached to or referred to in the Complaint, and fail to explain how those exhibits fit into the so-called "*Moody* exception." The Court declines to treat BHTS's motion as one for summary judgment, and disregards all attached exhibits to each party's memorandum, unless the exhibits were attached to the Complaint.

Personal Representatives are given “full power and authority” to dispose of estate assets to effectuate the terms of the Will, as well as all powers, rights, and responsibilities of Personal Representatives under Maine law. (Pl.’s Ex. B, at 1.)

Among other things, the Will creates two trusts: a special needs trust for Poor’s son, Frederic J. Poor (the “Special Needs Trust”), and a trust for the benefit of her grandchildren (the “Grandchildren’s Trust”) (collectively, “Trust” or the “Trusts”) (Pl.’s Compl. ¶ 11 & Pl.’s Ex. B, at 2-9.) Each Trust was to be funded equally with one-third of Poor’s residuary estate; two-thirds of her residuary estate were thus to be held in trust for the beneficiaries of the trusts. (Pl.’s Compl. ¶ 12 & Pl.’s Ex. B. at 2, 6-7.)

The Will appoints two types of trustees for each trust: a Personal Trustee and an Administrative Trustee. For each of the Trusts, the Personal Trustee has “sole authority and responsibility” for all matters regarding distributions to the beneficiaries, and decisions regarding the acquisition and disposition of assets for use by the beneficiaries. (Pl.’s Ex. B, at 6, 8.) The Administrative Trustee has “sole authority and responsibility” for all other matters regarding the Trusts, including but not limited to tax matters, investments, and bookkeeping. (Pl.’s Ex. B, at 6,8.) As to each Trust, the Personal Trustee’s decision to acquire an asset for use by a beneficiary, or make a distribution, takes priority over the Administrative Trustee’s authority to invest trust assets. The Personal Trustee is also given the power for each Trust to remove and replace the person serving as the Administrative Trustee. (Pl.’s Ex. B, at 6,8.)

The Will appoints R. Kenneth Lindell as the Personal Trustee for each Trust, and Bangor Savings Bank as the Administrative Trustee for each Trust. (Pl.’s Ex. B, at 6,8.) Section XI(C) of the Will is entitled “No Duty to Inquire,” and provides in relevant part as follows: “No person who deals with any Fiduciary named in or pursuant to this Will shall have a duty to . . . ascertain

whether assets paid or transferred to the Fiduciary are properly applied.” (Pl.’s Ex. B, at 11,12.) Section XI(D) of the Will is entitled “Exculpation of Fiduciaries,” and purports to disclaim Fiduciary liability unless it is shown the Fiduciary “acted in bad faith or with reckless disregard of the Fiduciary’s duties.” (Pl.’s Ex. B, at 12.) The final sentence of Section XI(D) additionally provides as follows: “No Fiduciary shall incur any personal liability for any action taken or not taken by any Co-Fiduciary or for any action taken or not taken by any predecessor Fiduciary.” (Pl.’s Ex. B, at 12.)

On April 5, 2013, nine months after Poor’s death, Lindell exercised his authority as the Personal Trustee to remove Bangor Savings Bank as the Administrative Trustee of each Trust,<sup>3</sup> and appoint BHTS as their successor Administrative Trustee. (Pl.’s Compl. ¶¶ 15-17.) BHTS is a corporation, with a principal place of business in Bar Harbor. (Pl.’s Compl. ¶ 8.) It is a wholly owned subsidiary of Bar Harbor Bank and Trust. (Pl.’s Compl. ¶ 8.) BHTS accepted the appointment. (Pl.’s Compl. ¶ 16.) Five days later, on April 10, 2013, Lindell funded the Trusts. (Pl.’s Compl. ¶ 28.)<sup>4</sup>

The Complaint alleges that BHTS “took no steps to ascertain the actual value of Ms. Poor’s estate,” (Pl.’s Compl. ¶ 18); “allowed the trusts to be funded unequally by Lindell in 2013,” (Pl.’s Compl. ¶ 19); “allowed both trusts to be underfunded in amounts exceeding \$1,000,000,” and “never sought to locate the missing funds or to notify the beneficiaries,” (Pl.’s Compl. ¶ 20). The Complaint alleges that on “April 22, 2013—just 12 days after Lindell funded the trusts with BHTS,” the Maine Office of Securities publicly sanctioned Lindell for a second time. The Complaint alleges that “BHTS was, or should have been, on notice that as early as June 27, 2013

<sup>3</sup> It was explained at oral argument, without dispute, that Bangor Savings Bank never accepted its appointment.

<sup>4</sup> The date Lindell funded the Trusts is established by reference to another date alleged in Paragraph 28. At oral argument, BHTS agreed this was a proper way to establish the date the Trusts were funded.

Lindell was engaging in suspicious and unorthodox behavior with regards to securities used to fund both trusts.” (Pl.’s Compl. ¶ 26.) The Complaint alleges that BHTS allowed Lindell to wrongfully “extract hundreds of thousands of dollars” from the Special Needs Trust, (Pl.’s Compl. ¶ 22), and, with regard to both Trusts, alleges BHTS otherwise committed multiple acts of mismanagement, concealment, obstruction, and improper use of funds (Pl.’s Compl. ¶¶ 21 – 48).

On May 4, 2015, two years after BHTS accepted appointment as Administrative Trustee, Maine Revenue Services issued an Estate Tax Closing Document indicating the Maine Gross Estate was valued at \$6,668,592, and the Maine Taxable Estate was valued at \$4,985,865. (Pl.’s Compl. ¶ 9, & Pl.’s Ex. C.)

#### STANDARD OF REVIEW

In reviewing a motion to dismiss under Rule 12(b)(6), courts “consider the facts in the complaint as if they were admitted.” *Bonney v. Stephens Mem. Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123. The complaint is viewed “in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.” *Id.* (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830). “Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim.” *Id.* “The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law” and thus subject to de novo appellate review. *Marshall v. Town of Dexter*, 2015 ME 135, ¶ 2, 125 A.3d 1141.

#### DISCUSSION

##### **Conversion—Count I**

Count I pleads conversion against all Defendants. With respect to BHTS specifically, Plaintiffs allege that BHTS utilized trust assets to fund its legal defense and, generally, as a member

of the class of Defendants acted in concert and conspired with the other Defendants to convert trust assets and as such are jointly and severally liable for other Defendants' conversion. (Pl.'s Compl. ¶¶ 81-83.) BHTS addresses only the first allegation.

To recover for conversion where property is taken wrongfully,<sup>5</sup> a plaintiff must prove that he has a property interest in the converted property and that he had a right to possess the property at the time of conversion. *Estate of Barron v. Shapiro & Morley, LLC*, 2017 ME 51, ¶ 14, 157 A.3d 769; *Withers v. Hackett*, 1998 ME 164, ¶ 7, 714 A.2d 798. Plaintiffs allege many facts in support of these elements. BHTS argues implicitly that these are not facts but erroneous legal conclusions, because BHTS had a legal right to utilize trust assets to pay its legal fees.

In support of its arguments, BHTS points out that the Will states trustees “shall be reimbursed for the reasonable costs and expenses incurred *in connection with their fiduciary duties* under this Will.” (Pl.'s Ex. B, at 10 (emphasis added).) BHTS also analogizes to 18-A M.R.S. § 3-720,<sup>6</sup> which pertains to personal representatives and provides that a personal representative who “defends or prosecutes any proceeding in good faith, whether successful or not, . . . is entitled to receive from the estate necessary expenses and disbursements including reasonable attorney's fees incurred.” BHTS's legal arguments, however, do not convert the Plaintiffs factual allegations into legal conclusions. The Complaint is replete with factual allegations that BHTS's expenses were incurred in *breach* of its fiduciary duty and that it has *not* defended this action in good faith. Taken as true, the allegations are sufficient to state a claim for conversion against BHTS, notwithstanding

<sup>5</sup> Plaintiffs do not allege that they made a demand for the return of the property; however, this requirement is waived where the property was taken wrongfully. *Withers v. Hackett*, 1998 ME 164, ¶ 7, 714 A.2d 798.

<sup>6</sup> In 2018, Maine's legislature enacted 2018 ch. 402, § A-2, which repealed Title 18-A and replaced it with Title 18-C M.R.S. §§ 1-101—9-404, with the new statutes taking effective July 1, 2019. Section 3-720 was preserved in its entirety with the codification of Title 18-C in 18-C M.R.S. § 3-720.

any defenses BHTS may have under the will or pursuant to Maine statutory law. BHTS's motion must be denied as to Count I.

### **Breach of Fiduciary Duty—Count II**

Count II pleads breach of fiduciary duty against all Defendants. For the purposes of analysis with respect to BHTS, it is useful to divide Plaintiffs' breach of fiduciary duty allegations into two categories: (1) the allegations that BHTS allowed the Trusts to be improperly funded (both underfunded and unequally funded); (2) all the other allegations that BHTS committed mismanagement as Administrative Trustee. The first category appears to present a question of first impression in Maine: Does the trustee of a testamentary trust have a fiduciary duty to ensure that the personal representative of an estate properly funds the trust?<sup>7</sup> For the reasons discussed below, the Court answers the question in the affirmative. The second category easily states a claim against BHTS, and at the Motion to dismiss stage does not warrant extended analysis.

#### Category 1—Improper Funding of the Trusts

In Maine, the law of trusts derives from the Maine Uniform Trust Code, 18-B M.R.S. §§ 101—1104 (2018)(the "Trust Code"), and from the common law and principles of equity, which are used to supplement the Trust Code. 18-B M.R.S. § 106. The Law Court has not yet had occasion to determine whether, based on any of these sources of law, the trustee of a testamentary trust has a fiduciary duty to ensure that the personal representative of an estate properly funds the trust.

Although the question appears novel in Maine, other jurisdictions consider it "settled trust law that 'a trustee owes a duty to the cestui on taking over property from the executor to examine

<sup>7</sup>At oral argument, BHTS argued that holding institutional trustees responsible for a failure by the personal representative to transfer assets into a testamentary trust would represent a shift in the way the trust services industry in Maine has heretofore done business.

the property tendered and see whether it is that which he ought to receive.” *In re First Nat’l Bank*, 307 N.E.2d 23, 25 (Oh. 1974)(quoting 6 *Bogert, Trusts and Trustees* § 583 (2d ed. 1960)); *see also In the Matter of Estate of Erlie*, 527 N.W.2d 389, 395 (Wis. App. 1994)(“the trustee, once named and upon assumption of office, does have a duty to the beneficiaries of the trust to ensure that the personal representative of the estate transfers to the trustee all property to which” the beneficiaries are entitled); *Bullis v. DuPage Trust Co.*, 391 N.E.2d 227, 231 (Ill. 1979)(trustee of a testamentary trust has the duty “to carefully examine the terms of the trust in order to ascertain exactly what property forms the subject-matter of the trust,” *quoting Bogert, Trusts & Trustees* § 583, at 218-219 (2d ed. 1960)); *Pepper v. Zions First Nat’l Bank*, 801 P.2d 144, 151 (Ut. 1990)(“[t]he law is settled” that a trustee owes a duty to the beneficiary on taking over property from the executor to ensure the trust receives what is due).

The common law duty of a trustee to ensure testamentary trusts are properly funded is more than one of mere inquiry.

The trustee should familiarize himself with the duties of the executor toward him and exact accurate performance of these duties. The trustee should also inquire of the executor concerning the history of all the property tendered since it may be important for the trustee to know whether the property delivered was purchased by the testator himself or was an investment made properly or improperly by the executor.

Bogert, *The Law of Trusts and Trustees* § 583. The Restatement of Trusts describes the duty as follows:

The trustee’s duty to administer the trust includes a duty, at the outset of administration, to take reasonable steps to ascertain the assets of the trust estate and to take and keep control of those assets. In the case of a testamentary trust, these initial steps should include obtaining and examining an accounting from (or the records of) the settlor’s executor. . . . Furthermore, in cases of these types, the trustee ordinarily has the associated responsibility of taking



reasonable steps to uncover and redress any breach of duty committed by a predecessor fiduciary.

Restatement (Third) of Trusts § 76 cmt. d (2007). In other words, pursuant to the common law of trusts as developed in other jurisdictions and in well regarded treatises and secondary sources, the trustee must take reasonable steps, in the nature of due diligence, to ensure the personal representative properly funds the trust.

This common law duty is abrogated or limited by statute in some states. Bogert, § 583, n. 64.50. In New York, for instance, the state's trust code cloaks trustees in nonliability for the acts of a predecessor executor, at least under certain narrowly defined situations. N.Y. Surr. Ct. Proc. Act Law § 1506 (McKinney). The Maine Uniform Trust Code contains no comparable provision. To the contrary, the Trust Code generally appears to codify the common law duty, or at least to impose duties consistent with the common law. 18-B M.R.S. § 106

The Trust Code applies equally to inter vivos trusts as well as testamentary trusts. See 18-B M.R.S. § 401(1). The Trust Code requires a trustee to take reasonable steps “[t]o compel a former trustee or other person to deliver trust property to the trustee.” 18-B M.R.S. § 812(1). Lindell was not a former trustee, but as a Personal Representative he was an “other person,” and thus proper subject of BHTS’s duty under Section 812 to ensure the delivery of trust property. The Trust Code similarly requires a trustee to “take reasonable steps to take control of and protect the trust property.” 18-B M.R.S. § 809. Implicit in the duty to “take control of” trust property is the requirement to know the scope and extent of the trust property. The Trust Code imposes on trustees the obligation of prudent administration, which requires the exercise of reasonable care, skill and— notably—caution. 18-B M.R.S. § 804. The Trust Code imposes on trustees with special skills, such as institutional trustees, the duty to use those special skills or expertise to administer the trust. 18-B M.R.S. §§ 801, 806. In this case, BHTS is not a lay person unfamiliar with activities of a

trustee, but rather an institutional trustee, a wholly owned subsidiary of Bar Harbor Bank and Trust. Finally, the Trust Code requires trustees to take reasonable steps to enforce claims of the trust. 18-B M.R.S. § 811. These provisions taken together, and supplemented by the common law of trusts, impose on the trustee of a testamentary trust in Maine a fiduciary duty to take reasonable steps to ensure that the personal representative of the estate properly funds the trust.

In an effort to avoid imposition of the duty, BHTS first argues that the Probate Code expressly relieves a person that deals with a personal representative from a duty of inquiry. The Probate Code provides in relevant part as follows:

A person who in good faith either assists a personal representative or deals with the personal representative for value is protected as if the personal representative's power was properly exercised. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. . . .

18-A M.R.S. § 3-714.<sup>8</sup> The Law Court has not addressed the scope and applicability of Section 3-714. Nevertheless, BHTS's reliance on Section 3-714 fails for several reasons.

Based on its plain language, Section 3-714 does not apply to BHTS. BHTS was not assisting the Personal Representative or dealing with the Personal Representative for value. BHTS was acting as a trustee. Second, Section 3-714 appears to protect an innocent third party who purchases estate property from the Personal Representative; it does not on its face annul the duties of a trustee of a testamentary trust who must ensure the Personal Representative properly funds the trust. *See Lane v. Bolduc*, No. CV-94-132, 1995 Me. Super. LEXIS 131, \*4 (March 29, 1995) (citation omitted) (Section 3-714 "is designed to protect a person who deals with a personal representative when the personal representative acts ultra vires and sells property when such sale

<sup>8</sup> Section 714 was preserved in the new version of the probate code. 18-C M.R.S. § 3-714.

is prohibited by the decedent's will."); Unif. Probate Code § 3-714, cmt. (amended 2010) ("This section qualifies the effect of a provision in a will which purports to prohibit sale of property by a personal representative."). Third, even if Section 3-714 ostensibly applies to BHTS in this case, Plaintiffs have adequately pled facts that establish a lack of good faith. At the Motion to Dismiss stage, therefore, BHTS's reliance on Section 3-714 must be denied.

BHTS next argues that to the extent a duty exists in the abstract, it does not apply to BHTS under the terms of the Will. BHTS first points to the "No Duty to Inquire" provision in Article XI(C) of the Will. (Pl's Ex. B. at 11,12). "A court must interpret the will within the four corners of the document but may use the context of the entire will to interpret specific sections." *Estate of Silsby*, 2006 ME 138, ¶ 15, 914 A.2d 703 (quoting *Estate of Wilson*, 2003 ME 92, ¶ 11, 828 A.2d 784). On its face, Art. XI(C) plainly protects persons who are not fiduciaries named in the Will, not persons such as BHTS who are fulfilling the role of a Fiduciary named in the Will.<sup>9</sup> The fact that the "No Duty to Inquire" provision is located in Article XI, and not in the sections describing the duties of trustees, supports the conclusion that "No Duty of Inquiry" provision is not meant to permit the Administrative Trustee to turn a blind eye to whether the Personal Representative properly funded the Trusts. (Pl.'s Ex. B, at 6,8.)

BHTS then points to the Will's "Exculpation of Fiduciaries" clause, Will, Art. XI(D), for the proposition that in the event it had a duty to ensure the Personal Representatives properly funded the Trusts, it is not liable for breach of that duty. (Pl.'s Ex. B at 12). Although exculpation clauses are not per se unenforceable under Maine law, "exculpatory clauses are not favored by the law and are strictly construed against the benefited party." *Martin v. Harris*, No. BCD-CV-14-07, 2015 Me. Bus. & Consumer LEXIS 39, \*38-39 (September 9, 2015) (quoting *In re Trusteeship of*

<sup>9</sup> Art. XI(C) thus appears to be roughly equivalent to 18-A M.R.S § 3-714.

*Williams*, 591 N.W.2d 743, 747 (Minn. Ct. App. 1999)). *See also* 1-12 Maine Probate Procedure § 12.01 (2017) (“18-B M.R.S. § 1008 gives the first formal statutory approval in Maine to exoneration or exculpatory clauses, but it circumscribes their use and specifies acts which cause such clauses to be unenforceable.”) “A term of a trust relieving a trustee of liability for a breach of trust is unenforceable to the that it . . . [r]elieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries[.]” 18-B M.R.S § 1008(1)(A).<sup>10</sup>

In this case, viewing the Complaint in the light most favorable to the Plaintiffs, the Complaint adequately alleges that BHTS acted in bad faith and with reckless indifference in its alleged breaches of trust, particularly once it knew or should have known that the Trusts were improperly funded and that Lindell was to blame. (Pl.’s Compl. ¶¶ 23-48.) If Plaintiffs succeed in proving these allegations at trial, the exculpation clause will be no bar to their recovery given that the allegations are sufficient to support a finding of bad faith. The exculpation clause is thus not grounds to dismiss Count II.

BHTS poses a number of other arguments to deflect potential liability for its alleged breach of the duty to ensure Lindell properly funded the Trusts (e.g. the bifurcated nature of the Trusts, lack of knowledge, lack of damages, etc.), but none of those arguments are persuasive or merit any specific discussion. In this case, BHTS had a fiduciary duty to ensure Lindell properly funded the Trusts. Plaintiffs have more than adequately alleged facts in the Complaint to state a claim that BHTS breached that duty. Whether BHTS is protected by the exculpation clause cannot be

<sup>10</sup> Exculpation clauses “inserted as the result of an abuse by the trustee” or “drafted or caused to be drafted by the trustee” are also unenforceable. 18-B M.R.S. § 1008(1)(B), (2). However, as BHTS correctly points out, Plaintiffs’ argument that Mr. Lindell caused the drafting or insertion of the exculpation clause into the Will lacks support in the Complaint. *See also id.* § 1008(1),(2).

determined at this stage of the proceeding. Accordingly, BHTS's Motion to Dismiss the breach of fiduciary duty claim based on the Category 1 allegations is denied.

#### Category 2—Mismanagement of the Trusts

Plaintiffs allege that after Lindell funded the Trusts, BHTS allowed Lindell to misappropriate funds from the Trusts; failed to notify the beneficiaries; attempted to conceal the misconduct; and used monies from the Trust to fund its legal defense. Taking the facts alleged in the Complaint as admitted, and viewing the Complaint in the light most favorable to the Plaintiffs, the Complaint states a claim that BHTS breached its fiduciary duty to impartially administer the Trusts in good faith, as a prudent person would, solely in the interests of the beneficiaries, incurring only costs reasonable in relation to the purposes of the Trusts, and keeping the beneficiaries reasonably informed. *See* 18-B M.R.S. §§ 801-805, 810, 813. As explained above, whether BHTS is protected by the Will's exculpation clause cannot be determined at this stage of the proceeding. Accordingly BHTS's Motion to Dismiss the breach of fiduciary duty claim based on the Category 2 allegations is denied.

#### **Fraud—Count III**

Count III alleges fraud against BHTS. BHTS argues that these allegations fail to state "the circumstances constituting fraud . . . with particularity[,]" in contravention of M.R. Civ. P. 9(b). BHTS correctly argues that certain of Plaintiffs' allegations do not rise to the level of fraud, such as the allegation that BHTS attempted to have Frederic Poor sign a waiver of all liability. Requesting someone sign a waiver is not fraud, regardless of if otherwise actionable as, for example, a breach of fiduciary duty. *See Cianchette v. Cianchette*, 2019 ME 87, ¶ 20, 209 A.3d 745 (quoting *Drilling & Blasting Rock Specialists, Inc. v. Rheume*, 2016 ME 131, ¶ 17, 147 A.3d 824) (fraud requires false representation).

Nonetheless, the Complaint pleads that BHTS engaged “in a concerted and coordinated effort to hide relevant information and mislead the Plaintiffs . . . .” (Pl.’s Compl. ¶ 95.) Elsewhere, the Complaint similarly alleges in detail how BHTS failed to communicate facts to Plaintiffs that it had a duty to communicate and rather took active steps to conceal the truth of its own misfeasance while under a duty to report. (Pl.’s Compl. ¶¶ 24, 31-34.) While omission of a material fact is generally not proof of a false representation, both exceptions to that general rule apply here: BHTS allegedly actively concealed the truth from Plaintiffs while acting as a fiduciary to Plaintiffs. *McGeechan v. Sherwood*, 2000 ME 188, ¶ 61, 760 A.2d 1068 (quoting *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me. 1995)) (failure to disclose rises to level of misrepresentation with proof of either (1) active concealment of the truth, or (2) a specific relationship imposing on the defendant an affirmative duty to disclose); *see also Glynn v. Atl. Seaboard Corp.*, 1999 ME 53, ¶ 12, 728 A.2d 117 (quoting *Binette v. Dyer Library Ass’n*, 688 A.2d 898, 903 (Me. 1996)). Thus, these allegations are sufficiently detailed to state a claim for fraud under M.R. Civ. P. 9(b). The Motion to Dismiss the fraud claim in Count III is denied.

#### **Unjust Enrichment—Count V**

Count V, which alleges unjust enrichment, is pleaded in the alternative and the allegations contained in the Complaint more than adequately describe a situation where Plaintiffs (1) conferred a benefit on BHTS; (2) BHTS had “appreciation or knowledge of the benefit;” and (3) the “acceptance or retention of the benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value.” *Howard & Bowie, P.A. v. Collins*, 2000 ME 148, ¶ 13, 759 A.2d 707 (citing *June Roberts Agency v. Venture Properties*, 676 A.2d 46, 49 (Me. 1996)). Accordingly, the Court declines to dismiss Count V.

### **Punitive Damages—Count VI**

Count VI seeks an award of punitive damages as opposed to pleading a cause of action, and BHTS raises no argument for its dismissal in the instant motion. In the absence of argument, the Court declines to dismiss Count VI.

### **Negligence—Count VII**

In Count VII, Plaintiffs contend that BHTS was negligent in failing to take appropriate action to safeguard the funds of the Frederic J. Poor SNT. The Law Court has characterized the elements of negligence as “a duty owed, breach of that duty, and an injury to the plaintiff that is proximately caused by a breach of that duty.” *Stanton v. Univ. of Maine Sys.*, 2001 ME 96, ¶ 7, 773 A.2d 1045, 1049. Plaintiffs allege that BHTS owed a duty to beneficiaries to exercise oversight and reasonable care regarding the funding of the trusts, as well as with regard to disbursements made to Lindell. Plaintiffs further allege that BHTS’ failure to exercise their duty proximately caused the theft of hundreds of thousands of dollars from the Frederic J. Poor SNT.

In response, Defendants BHTS contend they possess no duty to examine trust property received from a personal representative (Lindell) and thus without a breaching a duty cannot be held negligent. Because the court concludes BHTS did in fact have a fiduciary duty to ensure Lindell properly funded the Trusts, this is not grounds to dismiss Count VII.

Plaintiffs allegations, if true, are sufficient to establish a cause of action for negligence, and thus the Court declines to dismiss Count VII.

### **Tortious Interference—Count VIII**

Count VIII pleads one count for tortious interference with economic relations/ expectancy. Tortious interference requires proof of, inter alia, “. . . interference with [a] contract or advantage through fraud or intimidation . . . .” See *Harlor v. Amica Mut. Ins. Co.*, 2016 ME 161, ¶ 12, 150

A.3d 793. The law court has extended these protections by recognizing a cause of action for wrongful interference with an expected legacy or gift under a will. *Cyr v. Cote*, 396 A.2d 1013, 1018 (Me. 1979).

BHTS argues that because “fraud or intimidation” is an essential element of that claim, this count must likewise be dismissed based on the Complaint’s failure to allege fraud with particularity. Because the Court concludes that Plaintiffs *have* alleged fraud against BHTS with sufficient particularity, this is not grounds to dismiss Count VIII.

### **Fraudulent Conveyance—Count IX**

Count IX pleads one count of fraudulent conveyance against BHTS under Maine’s Uniform Fraudulent Transfer Act (UFTA). 14 M.R.S.A. §§ 3571-3582. Fraudulent Conveyance laws, such as found in the UFTA, generally aim to protect creditors from fraudulent acts by debtors that would undermine their ability to collect amounts owed to them. *In re Ohio Corrugating Co.*, 91 B.R. 430, 435 (Bankr. N.D. Ohio 1988)

Plaintiffs assert that BHTS committed a transfer with the actual intent to hinder, delay, or defraud the Plaintiffs. (Pl.’s Compl. ¶ 118.) Despite these assertions, Plaintiffs do not specify which transfers were fraudulent, nor do they discuss how BHTS participated in such transfers. Instead, Plaintiffs assert facts stemming from either: 1) Lindell transferring trust assets to himself while acting as Personal Representative; or 2) BHTS’ conduct in failing to examine and determine whether the trusts for which they were acting as Trustee were properly funded. These allegations, viewed in the light most favorable to the Plaintiffs, do not amount to the fraudulent transfer of trust assets by BHTS for the purpose of hindering, delaying, or defrauding the beneficiaries of the estate. Thus, the complaint fails to state a claim for fraudulent conveyance and BHTS’ motion is granted with respect to Count IX.



### **Civil Conspiracy—Count X**

BHTS allege a civil conspiracy between all Defendants in Count X. (Pl.’s Compl. ¶¶ 122-126.) BHTS argues that this count fails because the allegations fail to state a claim for “the actual commission of some independently recognized tort[.]” *See Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 1998 ME 70, ¶ 8, 708 A.2d 283. The Court concludes above that Plaintiffs have stated claims for multiple torts. BHTS’s motion must be denied as to Count X.

### **Intentional Infliction of Emotional Distress—Count XI**

BHTS next argues that the allegations are insufficient to state a claim for intentional infliction of emotional distress (“IIED”), which is pleaded in Count XI. (Pl.’s Compl. ¶¶ 127-129.) Indeed, Plaintiffs allege simply that all Defendants “acted in an extreme and outrageous manner and caused emotional distress to Frederic Poor[,]” but there are no allegations of the extent of his emotional distress or even whether any Defendant caused the purported emotional distress intentionally.

“Recent Law Court decisions have endorsed the trial court’s role as gatekeeper regarding IIED claims, meaning to evaluate an IIED claim to determine whether the facts alleged could reasonably justify a verdict for the plaintiff.” *Temm v. LPL Fin. LLC*, No. BCD-CV-16-14, 2016 Me. Super. LEXIS 68, at \*7 (Bus. & Consumer Ct. Apr. 29, 2016). “[I]t is for the Court to determine in the first instance whether the Defendant’s conduct may reasonably be regarded as so extreme and outrageous to permit recovery . . . .” *Champagne v. Mid-Maine Med. Ctr.*, 1998 ME 87, ¶ 16, 711 A.2d 842 (quoting *Colford v. Chubb Life Ins. Co. of Am.*, 687 A.2d 609, 616 (Me. 1996)). The allegations against BHTS describe behavior that fell far below the standard of care for a fiduciary, but do not allege anything that could be described as “extreme and outrageous.” *Cf. Liberty v. Bennett*, No. CV-09-459, 2010 Me. Super. LEXIS 2, \*13-15 (Jan. 19, 2010) (declining

to dismiss IIED claim because the “court [could] not say as a matter of law that the Defendant’s actions definitively were not extreme and outrageous such that they would be regarded as atrocious and utterly intolerable” where the defendant was alleged to have, inter alia, destroyed “the parent/child relationship between the Plaintiff and her father,” “took control of the day-to-day lives of the family,” “threatened to foreclose a mortgage . . . if [Plaintiff] did not comply with his dictates,” “disparaged Plaintiff by screaming at her, calling her names, and telling lies about Plaintiff to other people in her community . . . .”). Furthermore, the Complaint alleges only “emotional distress” on the part of Frederic Poor, and not that it “was so severe that no reasonable [person] could be expected to endure it.” See *Curtis v. Porter*, 2001 ME 158, ¶ 10, 748 A.2d 18. In sum, the Complaint does not state a claim for intentional infliction of emotional distress against BHTS. BHTS’s motion is granted as to Count XI and Count XI is dismissed with prejudice.

#### **Motion to Stay in Anticipation of Probate Court’s Declaratory Judgment**

Finally, BHTS argues that alternative to dismissing the claims against them, this action should be stayed in anticipation of the Probate Court ruling on a declaratory judgement action BHTS filed in that court prior to being named in this lawsuit. This court, as well as the Hancock County Probate Court have concurrent jurisdiction over the dispute regarding BHTS. Generally, in cases of concurrent jurisdiction, the court given priority is the first to exercise jurisdiction. *Stevens v. Stevens*, 390 A.2d 1074, 1077 (Me. 1978).

The Plaintiff’s first complaint is dated January 23, 2019. Shortly thereafter, on March 1, 2019, Plaintiffs amended their complaint to include BHTS. Despite the fact BHTS filed their Hancock Probate Court action in the interim, on February 6, 2019, they were well aware of their likelihood of being joined in this action. This court had already exercised jurisdiction over the

Plaintiff's action prior to BHTS filing in Hancock County Probate Court. For these reasons, the court declines BHTS' motion to stay this proceeding.

### **CONCLUSION**

For all the foregoing reasons, BHTS's motion is granted in part and denied in part. The motion is granted with regards to Count IX (Fraudulent Conveyance), and Count XI (Intentional Infliction of Emotional Distress) and these Counts are dismissed with prejudice as against BHTS. BHTS's motion is otherwise denied.

Pursuant to M.R. Civ. P. 79(a), the Clerk is instructed to incorporate this Order by reference on the docket for this case.

So Ordered.

Dated: September 11, 2019

\_\_\_\_\_/s/\_\_\_\_\_  
Michael A. Duddy  
Judge, Business and Consumer Docket