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In re Jerome Markowitz Trust

Superior Court of Pennsylvania - May 23, 2013 - A.3d - 2013 PA Super 128

Trustee hired Wachovia Bank to hold \$9 million of Trust funds in its Short Term Investment Management ("STIM") product while the Trust explored longterm investment strategies. Wachovia's STIM portfolio at that time included Auction Rate Securities ("ARS"). [Foreshadowing alert.]

Trustee retained Glenmede as an investment advisor for the Trust and notified Wachovia that the Trust assets would be moved to another manager.

Unbeknownst to Trustee or Glenmede, and despite having received and acknowledged notice of its removal as investment advisor, Wachovia continued to engage in purchases after that date, most significantly, on December 27, 2006, when it purchased a \$300,000 investment in Jefferson County, Alabama Sewer Revenue Warrants. [Yet more foreshadowing.]

Wachovia transferred to Glenmede the majority of Trust assets in its possession, 11 of which were ARSs, the Jefferson ARS, and the Mobile ARS among them. However, Wachovia's transfer of the ARSs failed to include the auction rights associated with each ARS. When it realized that Wachovia had failed to transfer the auction rights and/or to notify remarketing agents, Glenmede began to work to obtain the auction rights for the ARSs. Glenmede did not inform Trustee that it had not received the auction rights from Wachovia.

Glenmede was able to obtain auction rights for some, but not all, ARSs, and to successfully liquidate certain ARSs without auction rights.

After the collapse of the ARS market, the Trust sued Wachovia for its handling of the ARSs. That suit was settled. The Trust then sued Glenmede for its handling of the ARSs.

Trustee directed its new investment advisor to sell the Mobile ARS, which sold for \$234,500, which represented 67% of its \$350,000 par value. Slightly more than a month later, the ARS were redeemed at full par value. Had it not been sold by Trustee, the Trust would have realized no loss.

Also at Trustee's direction, the Jefferson ARS was sold and the Trust realized \$90,000, which represented 30% of its \$300,000 par value. However, the Jefferson ARS had not been declared in default and continued to pay all ARS holders increased interest.

The Orphans' Court concluded that Glenmede had breached its fiduciary duty to the Trust, as it was more concerned with positioning itself favorably vis a vis responsibility for the delay in its receipt of auction rights, than passing along the relevant market information. Glenmede's conduct in this regard fell short of the scrupulous good faith and candor that are the cornerstones of a fiduciary relationship and constituted a breach of the fiduciary duty.

On appeal, the Trust argued that the surcharge levied against Glenmede for the breach of its fiduciary duty should be \$325,500 - which represents the amount lost by the Trust by the forced sale

of the Jefferson and Mobile ARSs in the secondary market - rather than the surcharge of \$11,700 levied by the Orphans' Court.

Neither party produced evidence regarding the method of calculation of the \$161,549.42 fee paid to Glenmede. Thus, the appeals court stated that it was, "left to simple arithmetic and discretion." The fee paid to Glenmede (\$161,549.42) represented 1.8% of the Trust assets that it was given to invest (\$9 million). Applying that percentage to the aggregate \$650,000 carrying value of the Mobile ARS and the Jefferson ARS (which is the value at which those assets were reflected on receipt and upon transfer by Glenmede), revealed that the amount of compensation attributable to those two investments is \$11,7000.00. Accordingly, Orphans' Court was correct to impose a surcharge upon Glenmede in the amount of \$11,700.00 for breach of its fiduciary duty.