VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

MISSION TRUST SERVICES, LLC, *et al.*, Plaintiffs, vs. INTERNACIONAL REALTY, INC., *et al.*, Defendant.	))))))))	Case No. CL 2010-17876
INTERNACIONAL REALTY, INC., *et al.*, Plaintiffs, vs. MISSION RESIDENTIAL, LLC, *et al.*, Defendants.	))))))))	Consolidated for discovery and trial with: Case No. CL 2011-04167

JUDGMENT AND FINAL ORDER

The above-referenced cases having proceeded to trial before this Court commencing April 9, 2012; the parties having presented their evidence and rested; the Court having considered this evidence pursuant to its rulings during the trial, along with the parties' trial briefs; and the Court having stated on the record its rulings on the merits of the parties' claims and defenses at a hearing before the Court on June 27, 2012; for the reasons stated on the record at the above hearing, the transcript of which is incorporated and made part of this Judgment and Final Order,

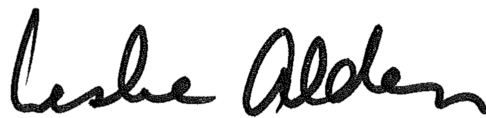
IT IS ORDERED that:

1. The claims by Plaintiff Mission Trust Services, LLC ("MTS") and its co-plaintiffs in Case No. CL 2010-17876 are granted, the beneficiaries of the subject Delaware statutory trusts (the "DSTs") did not have sufficient grounds to remove MTS as Signatory Trustee for the DSTs, MTS was not properly removed as Signatory Trustee for the DSTs, MTS was and remains Signatory Trustee for the DSTs and Defendant

Internacional Reality, Inc. ("IRI") is enjoined from acting as, or holding itself out as, Signatory Trustee for the DSTs.

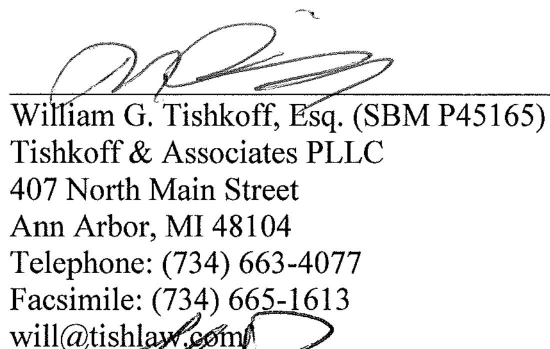
2. IRI's counterclaim in No. CL 2010-17876 ("IRI's Counterclaim") is dismissed, with prejudice, and judgment is entered in favor of MTS on each and all of the counts in IRI's Counterclaim.
3. With respect to the counterclaim of the beneficiaries named as counter-plaintiffs in Case No. CL 2010-17876, judgment is entered in favor of MTS on each and all of the counts.
4. With respect to the complaint of the beneficiaries named as co-plaintiffs and IRI in Case No. CL 2011-04167, judgment is entered in favor of all of the defendants in Case No. CL 2011-04167 on each and all of the counts.
5. With respect to the counterclaim in Case No. CL 2011-04167 of Christopher C. Finlay and Mission Residential, LLC, judgment is entered in favor of Marla Schmalle.
6. This is a Final Order.

ENTERED this 27th day of June, 2012.



Hon. Leslie M. Alden

Seen and agreed, except as to the dismissal of the defamation counterclaim in Case No. CL 2011-04167, which is objected to for the reasons stated at trial and in the applicable briefs:



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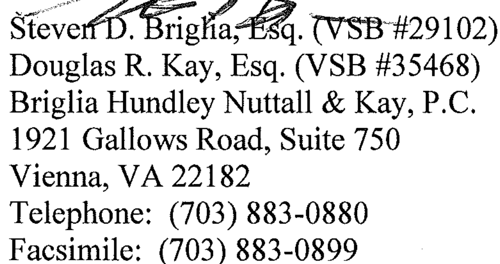

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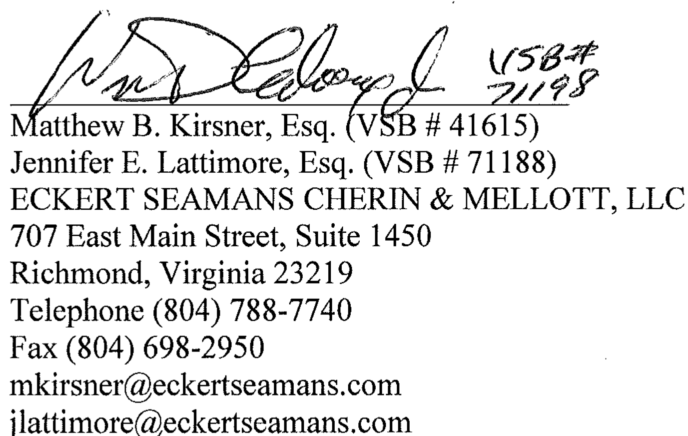
Seen and objected to for the reasons stated at trial and in the applicable briefs, except as to the judgment on the defamation counterclaim in Case No. CL 2011-04167, which is seen and agreed.



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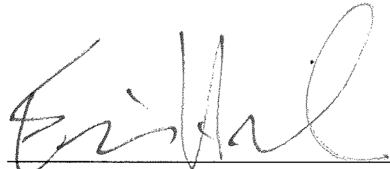
SEEN AND AGREED



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VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

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MISSION TRUST SERVICES, LLC,  :
et al.,                       :
                  Plaintiffs, :
     vs.                      : Case No. CL2010-17876
INTERNACIONAL REALTY INC.,    :
et al.,                       :
                  Defendants. :
- - - - - - - - - - - - - - - - x
INTERNACIONAL REALTY INC.,    :
et al.,                       : Consolidated for
                  Plaintiffs, : Discovery and Trial
     vs.                      : With
MISSION RESIDENTIAL, LLC,     : Case No. CL2011-04167
et al.,                       :
                  Defendants. :
- - - - - - - - - - - - - - - - x
APARTMENT TRUST OF AMERICA    :
HOLDINGS, LP, et al.,         : Consolidated for
                  Plaintiffs, : Discovery with
     vs.                      : Case No. CL2011-05456
MISSION RESIDENTIAL, LLC,     :
et al.,                       :
                  Defendants. :
- -- - - - - - - - - - - - - - x  Volume XIII
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Fairfax, Virginia

Wednesday, June 27, 2012

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1 The following pages constitute the
2 proceedings held in the above-captioned matter before
3 the HONORABLE LESLIE M. ALDEN, held at the Fairfax
4 County Circuit Court, 4110 Chain Bridge Road,
5 Courtroom 5-A, Fairfax, Virginia, before Leslie A.
6 Todd, RPR/CSR, a Notary Public of the State of
7 Virginia, of Capital Reporting Company, beginning at
8 11:33 a.m., when were present on behalf of the
9 respective parties:
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1 P R O C E E D I N G S
2 THE COURT: Good morning, everyone. I
3 apologize for the delay in getting started today.
4 ALL PRESENT: Good morning.
5 THE COURT: All right. This is
6 2010-17876, Mission Trust Services and Internacional
7 Realty, et al., and 2011-04167, Internacional Realty
8 and Mission Residential, et al.
9 Counsel, would you like to identify
10 yourselves for the record and state who is with you
11 today.
12 MR. TISHKOFF: Your Honor, Will Tishkoff,
13 Doug Kay, and Steve Briglia on behalf of the Mission
14 parties.
15 MR. FEILER: Your Honor, Eric Feiler, and
16 I have Edward Hyatt and Trevor Cox on behalf of
17 Apartment Trust of America.
18 MR. CAIOLA: Your Honor, Paul Caiola. I
19 have with me David Sommer, Tom Dane, Bill Ledoux, and
20 several investors. I also have a summer associate
21 with us today, Mary Kate Healy.
22 THE COURT: All right. Good morning.

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1 MR. TISHKOFF: Your Honor, Christopher
2 Finlay and his wife Rebecca Finlay are here too, just
3 to be clear.
4 THE COURT: All right. Good morning.
5 Thank you all for coming in today.
6 What I intend to do today is to give you
7 my ruling. I'm going to read it to you. Once I have
8 ruled, which will give you my rationale in the case,
9 I'm going to rule on each of the counts in each of
10 the lawsuits so there is a specific ruling on each
11 count.
12 First, I would like to thank all counsel
13 in this case for all the hard work that's been
14 prepared by all the parties in this case. As I have
15 said previously, this case is sui generis, and I
16 appreciate all of the research and the hard work, the
17 diligence that all counsel have put forth in this
18 case in helping the Court reach its decision.
19 The matter is before the Court today on
20 the motions to strike filed by ATA and the Mission
21 parties and the responses thereto filed by
22 Internacional and the beneficiary parties. But

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1 because the Court heard and considered all of the
2 evidence that was produced in this case by all of the
3 parties after 12 days of trial, I consider the case
4 to be submitted to the Court, and I'm going to rule
5 on the merits of all of the claims in both cases.
6 In doing so, I have considered the
7 voluminous evidence in the case, all of the briefs
8 and all of the arguments of the parties.
9 The gravamen of this case is the question
10 of whether the trustee committed willful misconduct
11 or gross negligence thus permitting Internacional and
12 the beneficiary parties to remove the trustee of the
13 DSTs. And the trustee being Mission Trust Services.
14 I'm probably just going to refer to the trustee as
15 "the trustee."
16 Internacional and the beneficiary parties
17 contend that the trustee committed willful misconduct
18 in that the trustee intended to benefit itself to the
19 detriment of the trust and the beneficiaries.
20 The term "willful misconduct" is not
21 defined in the trust agreement, and it is typically a
22 term that is used in tort law and not typically used

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1 in contract law. However, according to the terms of
2 the trust agreements, the trustee may only be removed
3 for cause, which is defined in the trust agreement as
4 willful misconduct, fraud or gross negligence.
5 Now, the trusts by their very terms in
6 Section 11.08 are governed by and construed in
7 accordance with the Delaware law as it is applicable
8 to the law of contracts. That provision in the
9 contract convinces me that the proper contention, and
10 what I conclude today, is that the parties have
11 eliminated by that agreement any common law duties of
12 the trustee.
13 Under the case of Auriga Capital v. Gatz
14 and other Delaware law, the parties have the absolute
15 right to set forth the duties and the standards of
16 liability which they intend to apply to their
17 business arrangement, and neither side has provided
18 the Court with a single case that is analogous to
19 this case. As I've said, this case is unique,
20 because here the trust was being operated pursuant to
21 IRS Code 1031 and special regulations regarding the
22 deferral of capital gains taxes. The trustee's

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1 duties in this case are expressly limited in the
2 trust agreement. And also unusual in this case is
3 the fact that the beneficiaries have expressly waived
4 in the trust agreement all potential and actual
5 conflicts of interest arising from the trustee's
6 other business activities.
7 In this case, under the agreement, the
8 trustee has the right to self-deal. And of course
9 the right to self-deal is the antithesis of arm's
10 length transacting.
11 Over the course of these cases,
12 Internacional and the beneficiary parties have
13 vacillated regarding the source of and nature of the
14 trustee's duties. However, for the purposes of this
15 ruling, I have considered the question of whether
16 common law duties exist, and I conclude that the
17 trustee's duties are confined by the trust agreement
18 and supplant any common law duty.
19 In this regard the following provisions
20 of the trust agreement are particularly relevant to
21 the trustee's duties and to the Court's ruling.
22 Section 2.05 of the trust agreement

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1 places limitations on certain actions of the trustee.
2 I believe that this section is intended to benefit
3 the lender. Nevertheless, arguably, I conclude that
4 this section also sets up protections that inure to
5 the benefit of the investors. Relevant particularly
6 in this section is subsection 6, which prevents the
7 trustee from transacting business with an affiliate
8 except on arm's length terms.
9 Section 6.02 sub (a) of the trust limits
10 the individual accountability of the trustee except
11 for willful misconduct or gross negligence.
12 Section 6.04 of the trust defines the
13 responsibilities of the trustee as having the duty
14 to conserve and protect the trust property.
15 Section 7.01 of the trust limits the duties of the
16 trustee to those expressly provided for in the trust
17 document. And Article 10 of the trust is the
18 provision that allows the trustee to be removed for
19 willful misconduct, fraud, or gross negligence.
20 Under Delaware law, gross negligence is
21 defined as signifying more than ordinary inadvertence
22 or attention, as set out in the case of Jardel

11

1 Company, Inc. v. Hughes at 523 A.2d 518. The
2 Delaware code at 12 Delaware, Section 3301(h)(4)
3 defines willful misconduct as intentional wrongdoing,
4 malicious conduct, or conduct designed to defraud or
5 seek an unconscionable advantage.
6 So it is within those definitions and
7 trust provisions that the Court considers the central
8 issue in this case of whether the trustee acted in
9 such a manner as would permit Internacional and the
10 beneficiary parties to remove the trustee for cause.
11 Internacional and the beneficiary parties
12 have identified a number of actions taken by the
13 trustee that the beneficiaries argue amount to
14 willful misconduct or gross negligence entitling the
15 trustee's removal. And I'm going to address each of
16 those claims in turn.
17 The primary argument of the beneficiaries
18 has to do with the master lease amendments. And
19 that's the first issue that the Court will address:
20 The amendments to the master lease between the DSTs
21 and the LeaseCos.
22 First, all parties have agreed the

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1 evidence shows that the master leases needed to be
2 amended in order to avoid a default that would permit
3 the lenders to declare a default. There was no
4 dispute regarding the state of the real estate market
5 at the time the amendments were made, nor was there a
6 dispute about the imminent onset of the amortization
7 of the loans. There was no dispute that these
8 factors were going to result in economic losses to
9 the DSTs.
10 Now, Internacional and the beneficiary
11 parties argued that the terms of the master lease
12 amendments, however, constituted improper
13 self-dealing because the terms were not commercially
14 reasonable or favorable to the LeaseCos and put the
15 LeaseCos in a better position than they were in under
16 the original master lease.
17 Essentially, Internacional and the
18 beneficiary parties argue that the investors bore
19 more of the economic loss than did the LeaseCos, and
20 that the structure of the deal that was reached was
21 more favorable to the LeaseCos and to the
22 beneficiaries.

13

1 To support this contention, Internacional
2 and the beneficiary parties primarily point to the
3 fact that the LeaseCos refused to subordinate the
4 lease termination fee as part of the amendment. The
5 Court concludes that this argument fails. Had this
6 transaction been an arm's length transaction
7 involving unaffiliated parties, the trustee was
8 simply not in a position to force the LeaseCo to
9 terminate or subordinate the lease termination fee in
10 order to amend the master lease and avoid default.
11 A default of the master lease meant the
12 investors would not receive their stated rent, and it
13 also presented a likelihood of lender foreclosure
14 resulting probably in the beneficiaries' complete
15 loss of investment.
16 However, as a result of the master lease
17 amendments, the immediate foreclosure threat was
18 removed, and by the provision of the accumulation of
19 stated rent term, the beneficiaries gained a
20 possibility of recovering their stated rent at a
21 future time.
22 The Court is not persuaded that the

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1 master lease going into default would have been more
2 beneficial to the beneficiaries than the deal that
3 was struck.
4 In addition, but for the master lease
5 amendments, there would have been no accumulated
6 stated rent potentially recoverable by the
7 beneficiaries.
8 Internacional and the beneficiary parties
9 presented no evidence that there was some actual
10 superior deal that existed in the marketplace; that
11 there existed some actual substitute master tenant
12 who was willing to come into a default situation
13 under terms that were any more favorable to the
14 beneficiaries either by foregoing a lease termination
15 fee or by the inclusion of any other term. The proof
16 simply failed in this regard. Rather, Internacional
17 and the beneficiary parties presented expert
18 testimony of hypothetical alternative master lease
19 amendments.
20 However, the Court was not persuaded by
21 Mr. Lipton's testimony. First, the evidence showed
22 that there is a paucity of these deals in the

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1 marketplace with which to compare the master lease
2 amendments in this case, even though both sides
3 agreed that the master lease had to be amended.
4 Mr. Lipton testified that he had worked as the
5 primary attorney on three or four DST deals, and that
6 all of the deals he had worked on involved lease
7 termination fees that had substantially decreased
8 over a period of time. In other words, his
9 experience was with deals which were not analogous to
10 this one.
11 The Court concludes that his testimony is
12 simply insufficient to prove that there is some
13 standard in the industry with regard to the
14 subordination of lease termination fees in a case
15 like this one. Secondly, the lease termination fee
16 that was due under the master lease was due upon any
17 sale of the property except a foreclosure sale, and
18 the default of the master lease alone was not
19 sufficient to forfeit the lease termination fee.
20 Finally, no evidence was presented to
21 prove that any actual damage resulted from the master
22 lease amendment, as the beneficiaries have complained

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1 of it, and I conclude that any such evidence based on
2 the evidence that was presented would have been
3 nothing more than pure speculation of injury.
4 Now, Internacional and the beneficiary
5 parties claim that the fact that the trustee's
6 attorney raised the issue of the subordination of the
7 lease termination fee as probative evidence that such
8 a term was required in an arm's length transaction.
9 The Court concludes that that evidence is
10 insufficient to constitute probative evidence. The
11 fact that Mr. Meier discussed with the trustee the
12 idea of a subordination -- of a termination fee shows
13 at best, in the Court's determination, that
14 reasonable minds could differ over whether such terms
15 or other possible terms ought to be included in an
16 agreement.
17 The evidence, however, is insufficient to
18 rise to the level of providing a standard below which
19 the trustee acted in this case.
20 Internacional and the beneficiary parties
21 next contend that the master lease amendments were
22 not made on commercially reasonable terms because the

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1 accrued stated rent under the master lease amendment
2 was payable only out of available cash flow, rather
3 than from proceeds of a sale.
4 Under the original master lease, however,
5 the concept of accrued stated rent did not exist and
6 the stated rent under the master lease was payable
7 only out of cash flow. And, furthermore, to argue
8 that the accrued stated rent should be paid from the
9 sale proceeds, as the beneficiaries have done, is
10 really to give the beneficiaries only what they were
11 entitled to have anyway. So the Court concludes this
12 argument is not persuasive.
13 The beneficiaries also argue that
14 misconduct should be found regarding the master lease
15 amendments as they relate to tenant advances. The
16 amendments allowed the LeaseCos to recover tenant
17 advances from available cash flow and provided that
18 the amount would be offset against the amount of
19 accrued stated rent. Internacional and the
20 beneficiary parties argue that this change benefited
21 the LeaseCos to the detriment of the beneficiaries
22 and constituted willful misconduct on the part of the

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1 trustee. However, as the Court construes the
2 original master lease, it allowed for tenant advances
3 to be taken out of reserves, and if there was an
4 insufficient amount of money in reserves to cover the
5 tenant advances, then the advances could be offset
6 against the stated rent. So the Court concludes that
7 the provision regarding tenant advances is not
8 functionally different from the mechanism for tenant
9 advances under the master lease, and, as a result,
10 the Court concludes this argument is not persuasive.
11 Internacional and the beneficiary parties
12 argue that the trustee committed willful misconduct
13 by failing to obtain prior written consent of the
14 lenders before entering into the master lease
15 amendments. The beneficiaries argue that this action
16 was risky and could have resulted in the lenders
17 declaring a default on the loans. The beneficiaries
18 argue that the better course of action would have
19 been to obtain a waiver of default from the lenders
20 until such time as the lenders could provide written
21 consent to the amendments. However, the Court
22 concludes this argument is also without merit. There

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1 was no evidence to show that the lenders would have
2 waived a default, and there was no evidence to prove
3 that there was any injury associated with the
4 trustee's action in this regard, or that any lender
5 would have withheld consent to the master lease
6 amendments, or that any lender declared a default as
7 a result of the lack of prior written consent to the
8 amendment. So for all of these reasons, the Court
9 concludes that the trustee did not commit willful
10 misconduct or gross negligence in relation to the
11 amendments to the master leases.
12 Accordingly, there's no basis for the
13 rescission of the master lease amendments, even
14 assuming without deciding, which I do not do today,
15 that the beneficiaries have standing to seek such
16 relief under the trust agreement. Had Internacional
17 and the beneficiary parties proved that the trustee
18 had engaged in willful misconduct, the remedy under
19 the trust agreement is to remove the trustee. The
20 Court concludes that the requisites for the equitable
21 remedy of rescission of the amendments have simply
22 not been shown.

20

1 I turn next to the argument regarding the
2 trustee's payment of audit fees and attorney's fees.
3 The beneficiary parties contend that the payment of
4 these fees constituted willful misconduct by the
5 trustee. The Court concludes that these fees
6 incurred were reasonable fees, necessary and related
7 to the usual functions to be performed in the regular
8 course of the business. The fact that the audit was
9 not completed, due, I conclude, in large part, to the
10 disputes between the parties in this case, is an
11 insufficient basis upon which to conclude that the
12 payment of any of these fees was improper. So the
13 Court rejects this argument.
14 I turn next to the argument regarding
15 evidence discovered post-litigation. Internacional
16 and the beneficiary parties have argued that
17 discovery in these litigations has revealed
18 additional conduct of the trustee that supports the
19 trustee's removal for cause. Delaware courts have
20 allowed the use of what I will call after-acquired
21 evidence in breach of contract cases and a case
22 involving the removal of a general partner in a

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1 limited partnership. And for this proposition I
2 refer to the case of Davenport Group MG LP v.
3 Strategic Investment Partners, Inc. Because I
4 conclude this is Delaware law, I conclude that it is
5 appropriate to consider this so-called
6 after-discovered evidence of conduct in this matter.
7 The after-discovered evidence relied upon
8 by the beneficiaries relates primarily to certain
9 accounting practices that were maintained by the
10 trustee, including principally the treatment of the
11 so-called investment in LeaseCo loans, later referred
12 to as the due-to-affiliate category, and the
13 upstreaming of cash from the LeaseCos to a parent
14 LLC, the sponsor.
15 I'll take first the issue of the
16 investment in LeaseCo loans.
17 The evidence showed, and both sides
18 agreed, that the money that was denominated as the
19 investment in LeaseCos was money that was paid
20 initially by the DST for obligations belonging to the
21 LeaseCos at the time of closing. And while this
22 money was originally and incorrectly classified as an

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1 investment in the LeaseCo, once the auditor indicated
2 that the money was improperly so classified, the
3 LeaseCos remedied the accounting error and
4 reclassified the money properly as amounts due to
5 affiliates.
6 The Court was persuaded by Mr. Barsky's
7 testimony that transactions of the nature just
8 described were loans that did not require specific
9 written terms and conditions, and were more akin to
10 being viewed as open accounts, as transfers of monies
11 between the companies. Accordingly, the Court
12 concludes that the accounting treatment of these
13 monies does not amount to willful misconduct of the
14 DST.
15 Regarding the second issue, Internacional
16 and the beneficiary parties argue that the LeaseCos
17 did not retain sufficient earnings or assets to fund
18 future operations, and that the failure of the
19 LeaseCos in that regard should be attributed to a
20 default by the trustee. Again, the Court concludes
21 that this argument fails.
22 Had the LeaseCos not been affiliated with

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1 the trustee, again, the trustee was not in a position
2 in the marketplace to force the LeaseCos to hoard
3 cash. There was no dispute that this so-called
4 upstreaming of cash, which was cash that belonged to
5 the LeaseCos, not the DSTs, occurred prior to the
6 master lease amendments. Nor was there a dispute
7 that prior to the master lease amendments all of the
8 base rent and the stated rent was paid.
9 Nevertheless, the beneficiaries complained that the
10 upstreaming of the cash was done too often, was
11 excessive, and was done at the same time that the
12 demand notes were being drawn.
13 Now, the experts presented by both sides
14 disagreed on how the so-called upstreaming of cash
15 should be evaluated. The accountants disagreed also
16 on how to tally or account for the flow of money
17 between the LeaseCo and the sponsor, which again were
18 transactions not involving the DSTs. Assuming that
19 the beneficiaries have standing to complain about the
20 transfer of cash and the drawdown of the demand
21 notes, the evidence failed to establish that the
22 movement of the money was improper or amounted to a

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1 violation of the trustee's duty.
2 Although Ms. Scruggs testified that the
3 upstreaming of cash would have or should have
4 occurred optimally on an annual basis, she did not
5 testify that the transfers by the LeaseCos were
6 improper, particularly under the scenario where the
7 investors were being paid their stated rent on a
8 monthly basis, not on an annual or a quarterly basis.
9 Furthermore, it would be pure speculation
10 on the part of the Court as to whether some other
11 management of this cash would have produced a
12 different result more favorable to the beneficiaries.
13 In addition, there was nothing in the
14 lease agreement or the trust agreement which required
15 the LeaseCos to maintain a particular level of
16 liquidity in order to anticipate some future market
17 condition.
18 The beneficiaries also complained that
19 the demand notes were not drawn down and should have
20 been drawn down in order to increase the cash flow to
21 the LeaseCos. However, the private placement
22 memorandum, which is referenced in the trust

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1 agreement, clearly identified to the beneficiaries
2 the risk that the demand notes might not be fully
3 funded and that the demand notes' funding obligations
4 were spread among the several LeaseCos.
5 Consequently, the failure of the sponsor to fully
6 fund the demand notes to the benefit of a particular
7 DST cannot constitute improper conduct of the
8 trustee.
9 Finally, the beneficiaries complain that
10 the timing of the master lease amendments was
11 improper in that it was done too soon. No evidence
12 was presented to show that amendments at a later time
13 or a different time would have had a different result
14 more favorable to the beneficiaries. The Court would
15 be speculating to conclude that the timing of the
16 master lease amendments was improper, and therefore
17 the Court cannot find willful misconduct in the
18 trustee's actions in that regard.
19 Internacional and the beneficiary parties
20 also complain that the trustee acted improperly by
21 entering into the asset purchase agreement and the
22 purchase and sales agreements with ATA, formerly

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1 known as GEAR. They argue that in forming this deal,
2 or these deals, the trustee breached duties to the
3 beneficiaries and that ATA conspired with and
4 assisted the trustee in committing this breach.
5 The evidence showed that from the
6 beginning of the conversations between the Mission
7 parties and ATA, the ATA transactions carried all
8 indicia of lawful, unchoreographed, free market
9 behavior. Both sides were represented by established
10 lawyers, both sides were assisted by established
11 investment bankers, and the ultimate deals that were
12 reached were procured through the typical
13 give-and-take negotiation of the marketplace.
14 Furthermore, even though there was a
15 disagreement raised by the beneficiary parties as to
16 the value of the OP units, no evidence was presented
17 that there was a more favorable deal waiting for the
18 DSTs. I conclude that the beneficiaries simply have
19 no standing to seek rescission of a contract to which
20 they were not a party, that being the APA, the asset
21 purchase agreement, and the Court concludes that the
22 DST is not a third party beneficiary to the asset

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1 purchase agreement.
2 Even if the beneficiaries did have
3 standing, the Court concludes that rescission is not
4 appropriate in this case. And I must note that the
5 beneficiary parties' latest argument is that the
6 Court should rescind only the management termination
7 fee of that provision rather than the entire
8 provision, but the Court would not under any scenario
9 rescind any portion of the agreement because the
10 Court cannot restore the status quo ante. It is
11 simply not possible to put ATA back in its
12 precontract position, it now having executed that
13 contract for more than -- or nearly two years.
14 Furthermore, based on the evidence, the
15 Court concludes the asset purchase agreement has not
16 burdened the DSTs. In other words, there is no
17 evidence of damage to the DSTs as a result of the
18 APA. The beneficiaries have claimed that the
19 structure of the APA is harmful to the DSTs.
20 However, under the DST structure, neither the DSTs
21 nor the beneficiaries has an ability to challenge the
22 agreement, and the fact that some other entity may

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1 have benefited from the APA is simply of no legal
2 consequence to the DSTs.
3 Under the trust agreement the trustee had
4 the absolute right to sell the properties at any
5 time. The investors were charged with the knowledge
6 that this investment was undertaken under those
7 conditions, was risky, and that the beneficiaries
8 were able to exercise no control over the management
9 of the property. The trustee entered into an
10 agreement to sell the properties to an unaffiliated
11 party, now known as ATA, and the Court concludes that
12 there is simply no issue of self-dealing regarding
13 this transaction.
14 Now, Internacional and the beneficiary
15 parties attempt to raise the specter of improper
16 conduct of self-dealing by attempting to link the
17 PSAs with the APA. Now, the PSAs were agreements
18 between the DSTs and then Grubb & Ellis, now ATA, and
19 the APA agreement was between MR Property Management
20 and Mission Residential Management. And the Court
21 concludes, based on the evidence presented, that as a
22 matter of fact those two deals were separate deals.

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1 The APA and the PSA were separate deals. They were
2 negotiated separately, albeit in the same time frame,
3 but they were conceived, the Court concludes, and
4 executed as separate deals. And of course the most
5 compelling evidence of that is the fact that the APA
6 was consummated and the real estate sales were not.
7 And nearly two years later, the ATA continues to
8 manage the properties as the APA was intended. It's
9 hard to ignore that reality.
10 Now, the beneficiaries also complain that
11 by entering into the PSAs the trustee committed
12 willful misconduct. At the time of the deal, the
13 beneficiaries objected to the sale of the properties,
14 and expressed their views and opinions to the trustee
15 of their displeasure. However, Section 5.03 of the
16 trust agreement gave the trustee sole discretion.
17 After considering the views of the beneficiaries, the
18 trustee was not bound by the opinions of the
19 beneficiaries and retained the sole discretion to
20 make the decision. Furthermore, it was anticipated
21 from the onset of this investment relationship that
22 the DSTs had a limited duration as a 1031 tax

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1 vehicle, and upon any sale of the property, the
2 beneficiaries would be required to locate some
3 alternate investment vehicle.
4 Now, although the beneficiary parties'
5 evidence of the value of the properties did not
6 differ significantly from the trustee's value of the
7 properties or ATA's value of the properties,
8 nevertheless, the beneficiary parties claim that the
9 resulting value of the OP units was simply
10 inadequate.
11 The beneficiary parties also claim that
12 the timing of the sale was inopportune and that the
13 trustee was more concerned about its own advantage
14 than that of the DSTs. Both sides presented experts
15 who testified regarding the value of the OP units.
16 Experts on all sides applied the net asset value --
17 valuation methodology to determine the proper value
18 of the OP units, so the experts used the same
19 methodology. Despite using the same methodology, the
20 experts used different variables in their
21 calculations and arrived at different opinions as to
22 the proper value of the OP units.

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1 Now, these disparate calculations show,
2 and the evidence demonstrated, that valuations of
3 these somewhat esoteric assets is perhaps more art
4 than science. The Court concludes that both experts
5 were credible, and it's obvious from the evidence
6 that reasonable minds can differ as to the valuation
7 of this asset.
8 However, the Court must note that ATA's
9 calculation of the OP unit value was related to an
10 actual sale of ATA shares in the market, which the
11 beneficiaries claimed was not an accurate
12 representation of value. Nevertheless, it was
13 related to an actual market sale, and the Court found
14 that evidence persuasive.
15 Now, Internacional and the beneficiary
16 parties also complain that the transfer to ATA of
17 certain reserves under the PSAs constituted a
18 transfer of DST property, but the Court concludes
19 that this argument is really nothing more than an
20 argument that the purchase price bargained for for
21 the properties was deficient. And considering all of
22 the evidence that was presented, the Court concludes

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1 that the value of the OP units bargained for was not
2 unreasonable and does not constitute indicia of
3 willful misconduct or gross negligence on the part of
4 the trustee.
5 Now, as to the timing of the PSAs, well,
6 no one disputed the drop in the real estate market,
7 no one disputed the fact that the loans were set to
8 begin amortization, and I suppose we could all sit
9 around and second guess the best time to buy or sell
10 real estate. However, here there was simply no
11 evidence to support a conclusion of willful
12 misconduct or gross negligence in the timing of these
13 deals. Of course it's also dispositive that these
14 deals were not consummated, and consequently
15 Internacional and the beneficiary parties have simply
16 proved no damages related to them.
17 Finally, I address the argument that the
18 trustee was concerned more about its own advantage
19 than that of the DSTs. And in this regard, it must
20 be noted that the investors were charged with the
21 knowledge that the trustee would be dealing with
22 affiliates, including engaging directly or indirectly

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1 in business activities that may relate to their real
2 estate or compete with the real estate in the DSTs.
3 And, indeed, the beneficiaries waived any claim or
4 cause of action, potential or actual, arising from
5 such a conflict. Consequently, the Court concludes
6 that the fact that an affiliated entity may have
7 benefited from a transaction is insufficient to rise
8 to the level of willful misconduct on the part of the
9 trustee.
10 The Court concludes that by entering into
11 the PSAs or the APA, the trustee did not engage in
12 willful misconduct or breach its duties under the
13 trust in a way that would justify termination. And
14 to the extent that the beneficiaries have invited the
15 Court to restructure this complicated investment
16 product in such a way as to reallocate the burden of
17 the risk that the parties assumed in entering into
18 the investment, the Court declines to accept.
19 Separately, the Court concludes that the
20 evidence failed to show that ATA, formerly known as
21 Grubb & Ellis, which is a nationally known real
22 estate company in the business of doing real estate

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1 deals every day, was a knowing participant acting
2 with mens rea in the consummation of any breach of
3 duty of the trustee. The testimony of the principles
4 of ATA was clear, was reasonable, was reliable, and
5 was credible. At each step of the transaction, ATA
6 employed its independent professionals to conduct due
7 diligence in an arm's length transaction, and there
8 is simply no evidence of scienter on the part of ATA.
9 Even if the Court were to draw the negative
10 inferences that the beneficiary parties have asked
11 the Court to draw from certain circumstantial
12 evidence that was introduced relating to ATA, the
13 Court concludes that the circumstances are consistent
14 with innocent conduct, and, in any event, are plainly
15 sufficient to meet the beneficiary parties' burden of
16 proof.
17 To the contrary, the two pieces of
18 evidence that stand out to support the Court's
19 conclusion that the parties were not aligned
20 intentionally to the detriment of the beneficiaries
21 are, one, the PSAs contained a provision that gave
22 the trustee the absolute discretion to revoke the

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1 deal, and, secondly, ATA sought to have a right of
2 first refusal to purchase other Mission properties
3 included in the deal but was unable to negotiate that
4 provision into the contracts. So for all of those
5 reasons, the Court concludes the trustee was not
6 properly removed.
7 I'll turn also to the claim of Finlay and
8 the Mission parties for defamation against Marla
9 Schmalle.
10 For the purpose of this ruling, I will
11 assume for the sake of argument that one or more of
12 Ms. Schmalle's statements is capable of being proven
13 true or false and could be prejudicial to Mr. Finlay
14 or Mission Residential in the trade.
15 However, I conclude that Ms. Schmalle
16 enjoyed a qualified privilege in discussing the
17 conduct of the trustee and the actions of the trustee
18 with respect to the common interests of the other
19 investors in the trust, and I conclude that
20 Ms. Schmalle did not exceed the qualified privilege
21 that she enjoyed.
22 So having explained my rationale, I will

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1 now rule on the counts of the various complaints.
2 And I begin with Case No. 2010-17876, what we are
3 calling Fairfax I. This is Mission Trust and the
4 DSTs against Internacional and the beneficiary
5 parties.
6 On Count 1, the Court concludes that no
7 sufficient cause exists for the removal of the
8 trustee. The trustee has not been properly removed.
9 The trustee remains as the trustee, and any purported
10 removal and/or replacement of Mission Trust Services
11 is null and void. And to the extent an injunction is
12 necessary, Internacional is enjoined from acting as
13 the trustee.
14 On Internacional's counterclaim, because
15 I have concluded that Internacional has not properly
16 been named as the trustee, there is no standing for
17 Internacional to assert the counterclaim, and it is
18 in each of its counts dismissed.
19 In the same case I turn to the
20 counterclaim of the beneficiary parties. On Count 1,
21 the breach of trust agreements, I conclude that the
22 counterclaim plaintiffs have not shown a breach

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1 entitling them to the relief that they seek.
2 Judgment on Count 1 is for MTS.
3 On Count 2, breach of the fiduciary duty
4 of loyalty, I've concluded that the trustee's duties
5 were contained within the contract; there were no
6 common law duties. Judgment on Count 2 is for MTS.
7 On Count 3, the breach of fiduciary duty,
8 for the reasons that I've stated, a judgment is for
9 MTS.
10 On Count 4, civil conspiracy, for the
11 reasons I've stated, judgment is for MTS.
12 Similarly, Count 5, the statutory
13 conspiracy count, judgment is for MTS.
14 On Count 6, the count seeking books and
15 records, I conclude that this count is moot.
16 Count 7, the declaratory judgment count,
17 for the reasons that I've stated, I conclude the
18 beneficiaries are not entitled to the relief sought.
19 Judgment is for MTS.
20 On Count 8, the aiding and abetting the
21 conversion of funds, for the reasons that I've
22 already stated, I conclude that the beneficiaries are

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1 not entitled to this relief. Judgment is for MTS.
2 Count 9, aiding and abetting the
3 conversion of the funds, as I've stated, judgment is
4 for MTS.
5 On Count 10, the claim for accounting and
6 turnover of funds, books and records, I conclude this
7 count is moot.
8 In Case No. 2011-04167, what we've been
9 calling Fairfax II, this is the case of Internacional
10 and the beneficiaries against Mission Residential,
11 Chris Finlay, ATA, et al.
12 Count 1, for breach of fiduciary of duty
13 of loyalty against Finlay, for the reasons I have set
14 out, judgment is for the defendant.
15 Count 2, breach of fiduciary duty, for
16 the reasons that I have already explained, the
17 judgment is for the defendant.
18 Count 3, aiding and abetting breach of
19 the fiduciary duties of ATA and Finlay, for the
20 reasons I have explained, the evidence was
21 insufficient to show ATA acted with the requisite
22 mens rea. Judgment is for the defendants.

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1 Count 4, tortious interference with
2 contractual relations against ATA, for the reasons
3 that I have set forth, including that there's been no
4 evidence of damage, judgment is for the defendant.
5 Count 5, the civil conspiracy against all
6 defendants, for the reasons I have set forth,
7 judgment is for the defendants.
8 Count 6, the statutory conspiracy, for
9 the reasons I have explained, judgment is for the
10 defendants.
11 Count 7, the declaratory and injunctive
12 relief request is dismissed.
13 Count 8, the breach of the lease against
14 the LeaseCos. This is a derivative claim of the DST
15 versus the LeaseCos. I have declined to rescind the
16 master lease amendments, so this count is moot. And
17 as I've previously explained, in any event, judgment
18 is for the defendants.
19 Count 9, conversion of funds for improper
20 payments, for the reasons I have previously
21 explained, this judgment is in favor of the
22 defendants.

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1 Count 10, conversion of funds for audit
2 services, as I previously explained, judgment is for
3 the defendants.
4 Count 11, the request seeking an
5 accounting and the turnover of books and records
6 I determine is moot.
7 Finally, in this case on the
8 counterclaim, the claim of Finlay and Mission
9 Residential against Marla Schmalle, for the reasons I
10 have explained, I find my judgment for the defendant.
11 All right. That concludes the Court's
12 ruling. I would like to enter orders in this case as
13 soon as possible.
14 Do counsel have orders today?
15 MR. TISHKOFF: We don't have orders
16 prepared, but I do have a computer here, and I would
17 be happy to try to work with the other side.
18 THE COURT: Mr. Caiola?
19 MR. CAIOLA: We also do not have orders
20 prepared, Your Honor.
21 THE COURT: Is this something we can
22 prepare today?

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1 MR. TISHKOFF: I think we would certainly
2 like to. We'd be happy to meet with them and do
3 that.
4 MR. CAIOLA: Your Honor, we believe that
5 that would be workable.
6 THE COURT: All right. Well, then, why
7 don't we take a recess so that counsel can have time
8 to prepare orders, and you can let me know when you
9 are ready.
10 MR. TISHKOFF: We will do that. Thank
11 you very much, Your Honor.
12 (Whereupon, at 12:27 p.m. the
13 proceedings were concluded.)
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1 CERTIFICATE OF NOTARY PUBLIC
2 I, LESLIE A. TODD, the officer before whom
3 the foregoing proceedings were taken, do hereby
4 certify that the proceedings were taken down by me in
5 stenotypy and thereafter reduced to typewriting under
6 my direction; that said transcript is a true record
7 of the proceedings; that I am neither counsel for,
8 related to, nor employed by any of the parties to the
9 action in which these proceedings were taken; and,
10 further, that I am not a relative or employee of any
11 counsel or attorney employed by the parties hereto,
12 nor financially or otherwise interested in the
13 outcome of this action.
14
15 Dated this 28th day of June, 2012.
16
17 ______________________________
LESLIE A. TODD
18 Notary Public in and for the
Commonwealth of Virginia
19
My commission expires:
20 September 30, 2013
Notary Registration No.: 311305
21
22