IN THE SUPREME COURT OF MISSOURI

SAMUEL KNOPIK,	)	
	)	
Appellant,	)	
	)	
v.	)	**Case No. SC97985**
	)	
SHELBY INVESTMENTS, L.L.C.,	)	
	)	
Respondent.	)	

ON APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
Honorable Mark A. Styles, Division 19
Circuit Court Case No. 17P8-PR1016
Court of Appeals, Western District, Case No. WD81931

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO TRUSTEE BECAUSE THE COURT'S JUDGMENT ERRONEOUSLY CONCLUDED THE NO-CONTEST CLAUSE IS ENFORCEABLE IN THAT THE NO-CONTEST CLAUSE IS NOT ENFORCEABLE FOR THE FOLLOWING REASONS: (1) NO-CONTEST CLAUSES DO NOT APPLY IN CASES INVOLVING TRUST ADMINISTRATION, (2) THE NO-CONTEST CLAUSE SHOULD NOT BE APPLIED TO PREVENT ENFORCEMENT OF THE TRUST, (3) THE NO-CONTEST CLAUSE IS REALLY AN EXCULPATORY CLAUSE WHICH IS SUBJECT TO LIMITATIONS, (4) ACTIONS FOR BREACH OF TRUST/REMOVAL DO NOT CONSTITUTE "CONTESTS," (5) A NO-CONTEST CLAUSE MAY NOT ELIMINATE THE CORE DUTIES OF A TRUSTEE, (6) NO-CONTEST CLAUSES SHOULD BE SUBJECT TO AN EXCEPTION IN CASES INVOLVING TRUST ADMINISTRATION, AND (7) NO-CONTEST CLAUSES SHOULD BE SUBJECT TO A GOOD FAITH/PROBABLE CAUSE EXCEPTION.

In its Substitute Brief, Shelby Investments, L.L.C. ("Trustee") argues that there have been no significant changes to the law regarding no-contest clauses since this Court last addressed the enforcement of such clauses in 1959. Trustee further argues that this Court should decline to adopt a good faith/probable cause exception to the enforcement of no-contest clauses pursuant to considerations of predictability, certainty, and freedom of contract. As explained below, Trustee's arguments in support of the status quo are not well-founded.

As Samuel S. Knopik ("Beneficiary") explains herein, there have been significant changes in the law since 1959 which warrant this Court reconsidering and revising its prior case law regarding the enforcement of no-contest clauses. The

simple truth is that absolute enforcement of no-contest clauses, without exception, leads to a miscarriage of justice that this Court should not countenance. The absolute enforcement of no-contest clauses – without exception – is contrary to Missouri public policy and statutory law. Accordingly, this Court should hold that no-contest clauses are not enforceable in actions for breach of trust or removal, which do not challenge the trust instrument. This Court should also recognize a good faith/probable cause exception, thereby bringing this Court in line with a large majority of courts nationally.

A. There Has Been A Significant Shift In The Law Regarding No-Contest Clauses Since This Court Last Addressed The Issue.

Trustee repeatedly suggests there have been no significant changes in the law that would warrant this Court's reconsideration of its decisions in Commerce Tr. Co. v. Weed, 318 S.W.2d 289 (Mo. 1958), and Cox v. Fisher, 322 S.W.2d 910 (Mo. 1959). In that regard, Trustee states: "Appellant has shown no change in circumstances that merit this Court upsetting more than fifty years of established precedent." (Respondent's Substitute Brief, p. 14).

In reality, there has been a significant shift in national law regarding no-contest clauses since this Court last addressed the issue in 1959. When this Court first rejected a good faith/probable cause exception in Rossi v. Davis, 133 S.W.2d 363 (Mo. 1939), this Court indicated that it believed it was adopting a majority

position in terms of national case law on the issue. Id. at 373. However, as Beneficiary explained at length in his Substitute Brief, thirty-eight states have now adopted a good faith/probable cause exception, while the number of states that expressly reject such an exception has dropped from ten states to seven states (including Missouri). (Appellant's Substitute Brief, pp. 81-91).

In addition, the views of commentators and other secondary sources have shifted strongly in favor of a good faith/probable cause exception. Ironically, an excellent example of this shift is illustrated by the authorities cited in Trustee's own Brief. At page 13 of its Brief, Trustee cites a portion of this Court's Commerce Trust decision in which this Court cited the Restatement of Property as supporting its rejection of a good faith/probable cause exception. (Respondent's Brief, p. 13). In Commerce Trust, this Court was citing the RESTATEMENT (FIRST) OF PROPERTY, which was issued in 1936. Subsequently, the RESTATEMENT (SECOND) OF PROPERTY, DON. TRANS. was issued in 1983, and the RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) was issued in 1999.[1]

[1] While the Restatement (First) of Property consisted of one consolidated volume, the Restatement (Second) of Property consisted of two separate volumes (one pertaining to Donative Transfers and one pertaining to Landlord and Tenant), and the Restatement (Third) of Property consists of three separate volumes (one for Mortgages, one for Servitudes, and one for Wills and Other Donative Transfers).

The issuance of these subsequent Restatements is significant, because the American Law Institute's view of no-contest clauses completely shifted following the Restatement (First) of Property. The Restatement (Second) of Property stated as follows regarding no-contest clauses:

> An otherwise effective provision in a will or other donative transfer, which is designed to prevent the acquisition or retention of an interest in property in the event there is a contest of the validity of the document transferring the interest or an attack on a particular provision of the document, is valid, **unless there was probable cause for making the contest or attack**.

RESTATEMENT (SECOND) OF PROPERTY, DON. TRANS. § 9.1 (emphasis added). Similarly, the Restatement (Third) of Property provides:

> A provision in a donative document purporting to rescind a donative transfer to, or a fiduciary appointment of, any person who institutes a proceeding challenging the validity of all or part of the donative document is enforceable **unless probable cause existed for instituting the proceeding**.

RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.5 (emphasis added).[2] And both of the more recent Restatements note that recognition of a good faith/probable cause exception is the majority position nationally. RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.5 cmt. a ("[T]he majority of

[2] Recent Missouri decisions have relied upon the RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.). See, e.g., Atkinson v. Firuccia, 567 S.W.3d 190, 195 (Mo. App. 2018); Denny v. Regions Bank, 527 S.W.3d 920, 925-26 (Mo. App. 2017).

decisions and statutes, provide[] that a no-contest clause is valid and enforceable unless the challenge was based on probable cause."); RESTATEMENT (SECOND) OF PROPERTY, DON. TRANS. § 9.1, Reporter's Note 2 ("The position taken by this Restatement, that a no-contest condition is unenforceable against one who, with probable cause, contests a will or other donative transfer on any ground, is the law in a majority of American states.").

Thus, the very secondary source that this Court previously relied upon in rejecting a good faith/probable cause exception has now adopted a good faith/probable cause exception, and recognizes that this is the majority position nationally. That is clearly a significant change in the law that warrants reconsideration of this Court's prior decisions regarding no-contest clauses.

Trustee also suggests, repeatedly, that this Court has already considered all of the arguments raised by Beneficiary. (Respondent's Substitute Brief, pp. 12-13). That is simply not true.

While this Court has previously addressed no-contest clauses, this Court has never addressed the application of such clauses in a case that involves trust administration rather than a challenge to the trust instrument (addressed in Appellant's Substitute Brief at pp. 32-40). Indeed, the Western District Court of Appeals recognized in its Opinion that this Court's prior decisions had not addressed that issue. (App. A14). In addition, this Court has never addressed the issue of

whether a no-contest clause which seeks to apply to issues of administration is really an exculpatory clause which should be subject to the limitations that normally apply to such clauses (addressed in Appellant's Substitute Brief at pp. 43-49). And obviously, this Court's prior opinions regarding no-contest clauses – the most recent of which was issued in 1959 – could not possibly have addressed the impact of the Missouri Uniform Trust Code, which was adopted in 2005.

B. Rejection Of A Good Faith/Probable Cause Exception Is An Extreme Minority Position.

As explained in Beneficiary's Substitute Brief, thirty-eight states have now adopted a good faith/probable cause exception, while only seven states (including Missouri) continue to reject a good faith/probable cause exception. At page 16 of its Brief, Trustee suggests that there are twelve states which join Missouri in rejecting a good faith/probable cause exception.[3] (Respondent's Substitute Brief, p.

[3] It is not entirely clear how Trustee arrives at the number twelve. As Beneficiary explained in his Substitute Brief, thirty-eight states have adopted a good faith exception, five states have neither adopted nor rejected a good faith exception, and seven states (including Missouri) have expressly rejected a good faith exception. (Appellant's Substitute Brief, pp. 81-86). It is significant to note that of the five states which have not taken a position, two have adopted an exception for administration (the issue in this case), one has spoken favorably of a good faith exception without reaching the issue, and two have simply not addressed the issue. (Appellant's Substitute Brief, pp. 85-86).

16). But consideration of the cases cited by Trustee illustrates that statement is inaccurate.

Trustee cites cases from five states: Louisiana, Wyoming, Virginia, Massachusetts, and Ohio. (Respondent's Substitute Brief, pp. 16-17). But three of those states – Wyoming, Massachusetts, and Ohio – are among the seven states which Beneficiary has already recognized as rejecting a good faith/probable cause exception. And there is nothing in the cases that Trustee cites which do anything to alter the analysis.

As Beneficiary noted in his Substitute Brief, Wyoming rejected a good faith/probable cause exception in Dainton v. Watson, 658 P.2d 79 (Wyo. 1983). In its response, Trustee cites EGW v. First Fed. Sav. Bank of Sheridan, 413 P.3d 106 (Wyo. 2018). However, EGW simply follows the prior ruling from Dainton.

In EGW, a beneficiary of a trust sought to challenge the trust instrument based on an allegation that it was the result of undue influence. EGW, 413 P.3d at 108. The claim of undue influence was tried to a jury, and the jury rejected the claim of undue influence. Id. Subsequently, the Court held that the beneficiary had breached the no-contest clause in the trust by pursuing the claim of undue influence. Id. at 109. In appealing that ruling, the beneficiary argued that no-contest clauses are void as a matter of public policy. Id. at 110. However, the beneficiary failed to acknowledge the prior ruling in Dainton. Id. at 111. Furthermore, as the Court

noted, the beneficiary did not identify any basis to distinguish Dainton. Id. Given this failure to address or distinguish the prior decision in Dainton, the Court reaffirmed its prior holding from Dainton, that no-contest clauses are not subject to a good faith/probable cause exception. Id. at 110-112.

The EGW decision adds nothing new to the analysis. The Court simply followed its prior decision in Dainton, given that the beneficiary had not identified any reason to deviate from that prior decision. That is certainly not true in this case. Beneficiary has identified numerous reasons why this Court should change course from its prior decisions in Commerce Trust and Cox.

The Massachusetts case that Trustee relies upon – Savage v. Oliszczak, 928 N.E.2d 995 (Mass. App. 2010) – does not even address a good faith/probable cause exception. In Savage, an intermediate Massachusetts appellate court addressed a claim that a beneficiary had triggered a no-contest clause in a trust by bringing a challenge to a separate will. Id. at 997. The Court noted the prior decision of the state supreme court in Rudd v. Searles, 160 N.E. 882 (Mass. 1928) – the same case that Beneficiary discussed in his Substitute Brief. The intermediate appellate court recognized that the prior decision of the state supreme court was binding precedent, but held that this precedent had no application to the case before it because there had been no violation of the no-contest clause at issue. Id. There was no discussion of

a potential good faith/probable cause exception. Indeed, the phrases "good faith" and "probable cause" are not even mentioned in the decision.

Savage adds absolutely nothing to the analysis. Beneficiary has already acknowledged in his Substitute Brief that Massachusetts is one of a small handful of states that has rejected a good faith/probable cause exception in Rudd v. Searles. Savage is simply a case from an intermediate Massachusetts appellate court, which recognized the Rudd decision, but held that it was not applicable on the facts before it. There was no effort to reverse the prior decision in Rudd, and the intermediate appellate court could not have done so even if there had been such an effort. This case simply has no bearing upon the issue currently before this Court.

In Nickles v. Spisak, 2014 WL 2882429 (Ohio App. 2014) – another case cited by Trustee – there is no discussion of a good faith/probable cause exception. In Nickles, the beneficiaries challenged a trust instrument based on an allegation that the trust was the result of undue influence. Id. at *1. The trial court granted summary judgment against the beneficiaries on this claim, finding that there was no evidence to support a claim of undue influence. Id. at *2. The appellate court affirmed this judgment, agreeing that there was absolutely no evidence to support a claim of undue influence. Id. at *3. Given this finding, the appellate court also affirmed the application of the no-contest clause in the trust. Id. at *5. In doing so, the Court cited to Modie v. Andrews, 2002 WL 31386482 (Ohio App. 2002), an earlier

decision which had noted that no-contest clauses are enforceable in Ohio. Modie relied upon the earlier decision in Bradford v. Bradford, 19 Ohio St. 546, 1869 WL 90 (Ohio 1869) – the same case that Beneficiary noted in his Substitute Brief.

Once again, Nickles adds nothing new to the analysis. Nickles is simply an unpublished opinion of an intermediate Ohio appellate court which recognizes the authority of Ohio's Supreme Court. There is absolutely no discussion of good faith or probable cause in the Nickles decision. Furthermore, even if the beneficiaries in Nickles had sought to apply a good faith/probable cause exception, it is clear such an exception could not have applied under the facts of that case because both the trial and appellate courts agreed there was absolutely no evidence to support the underlying claim of undue influence. Given that there was no basis for the claim of undue influence, there could have been no reasonable argument that the claim was pursued in good faith.

Finally, it is worth noting that in each of these three cases, the claim at issue was a claim that directly challenged the trust instrument based on allegations of undue influence. That is wholly different from the claims at issue in this case which involve trust administration, and which do not involve any challenge to the trust instrument.

The other two cases that Trustee relies upon are from states which have not yet directly ruled upon the adoption or rejection of a good faith/probable cause exception.

Trustee devotes substantial attention to the decision in Succession of Laborde, 251 So. 3d 461 (La. App. 2018). However, upon close inspection, Succession of Laborde provides substantially less guidance that Trustee suggests. In Succession of Laborde, an intermediate Louisiana appellate court addressed the question of whether a no-contest clause contained in a codicil to a will could be applied to a challenge to the underlying will. Id. at 463. The Court held that, based upon the language of the specific no-contest clause, the clause did apply to the action in question. Id. at 464. In that regard, the Court noted that the no-contest clause did not include any exception for good faith/probable cause. Id. However, the Court did not engage in any analysis of whether a good faith/probable cause exception to no-contest clauses should be recognized. Id.

While Succession of Laborde might be read as suggesting that a good faith/probable cause exception is not viewed with favor in Louisiana, other more recent Louisiana decisions place that issue in question. For example, in Succession of Robinson, 277 So. 3d 454 (La. App. 2019), while the Court cited Succession of Laborde for the proposition that "[n]o-contest clauses are not expressly prohibited by Louisiana law," the Court also noted that there are multiple Louisiana decisions

in which courts have refused to enforce no-contest clauses. Succession of Robinson, 277 So. 3d 454 (La. App. 2019). Thus, at best, it appears that Louisiana courts are split on this issue. Furthermore, it is important to note that Succession of Laborde is merely one decision of one intermediate Louisiana appellate court. To Beneficiary's knowledge, the Louisiana Supreme Court has still not addressed the potential application of a good faith/probable cause exception.

Trustee also cites Rafalko v. Georgiadis, 777 S.E.2d 870 (Va. 2015) for the proposition that no-contest clauses are "given full effect." Once again, a review of Rafalko illustrates that it adds nothing to the analysis.

As Beneficiary noted in his Substitute Brief, the Virginia Supreme Court previously addressed the potential for a good faith/probable cause exception to no-contest clauses in Womble v. Gunter, 95 S.E.2d 213, 218 (Va. 1956). However, the Court concluded that the beneficiaries in that case had not acted in good faith. Id. Accordingly, the Court held that it need not reach the question of whether a good faith/probable cause exception should be applied to no-contest clauses in Virginia. Id. The Rafalko decision does nothing to alter this analysis. Indeed, the Rafalko decision does not address the potential application of a good faith/probable cause exception.

In Rafalko, the trial court rejected a claim that the beneficiaries of a will had triggered the no-contest clause in the will. Rafalko, 777 S.E.2d at 874. The Virginia

Supreme Court affirmed that finding, holding that the no-contest clause had not been triggered, and that the beneficiaries had not forfeited their interests under the will. Id. at 880. In reaching that conclusion, there was no discussion of a good faith/probable cause exception. There is nothing in Rafalko which contradicts or expands upon the prior analysis in Womble. Thus, the law in Virginia continues to be as Beneficiary represented in his Substitute Brief: Virginia has noted the possibility of a good faith/probable cause exception, but has not directly addressed the issue to date.

In short, while Trustee attempts to minimize the significant shift in national law that has occurred since this Court last addressed no-contest clauses, there is simply no getting around the fact that a large majority of jurisdictions have now adopted a good faith/probable cause exception, and the only courts which reject a good faith/probable cause exception have not reconsidered the issue in decades.

C. Missouri Courts Are Capable Of Addressing Determinations Of Good Faith And Probable Cause.

Trustee suggests that the current Missouri rule, rejecting a good faith/probable cause exception to no-contest clauses, is beneficial to both grantors and grantees because it provides predictability and certainty. (Respondent's Substitute Brief, pp. 17-19). It is not clear how Trustee can legitimately assert that the lack of a good faith/probable cause exception has provided any benefit to Beneficiary in this case.

Beneficiary was faced with a situation in which Trustee was refusing to comply with the most basic terms of the Trust. Beneficiary had two choices: (1) say nothing and continue to get no benefit from the Trust, or (2) bring the Trustee's misconduct to the attention of the Court and lose all interest under the Trust. Absent some exception to the enforcement of no-contest clauses, Beneficiary is faced with a no-win situation, in which he is helpless to address the clear breach of trust committed by Trustee. The only certainty in this case is the certainty that Trustee will get away with a gross breach of trust under current Missouri law, unless this Court recognizes some exception to the absolute enforcement of no-contest clauses.

More generally, Beneficiary rejects the notion that Missouri courts are not up to the task of applying a good faith/probable cause standard when considering no-contest clauses. Missouri courts regularly make determinations of good faith and probable cause in numerous types of cases. See, e.g., State v. Boss, 577 S.W.3d 509, 515 (Mo. App. 2019) (Addressing State's good faith in disclosing records.); Southside Ventures, LLC v. La Crosse Lumber Co., 574 S.W.3d 771, 781 (Mo. App. 2019) (Addressing party's good faith in filing notice of appeal.); Hanlon v. Legends Hosp., LLC, 568 S.W.3d 528, 532 (Mo. App. 2019) (Addressing good faith of party in effort to set aside default judgment.); Mickles v. Maxi Beauty Supply, Inc., 566 S.W.3d 274, 278 (Mo. App. 2019) (Addressing good faith termination of employment in context of unemployment compensation.); State ex rel. D&D

Distributors, LLC v. Missouri Comm'n on Human Rights, 579 S.W.3d 318, 322 (Mo. App. 2019) (Addressing probable cause determination under MHRA.); State v. Johnson, 576 S.W.3d 205, 220 (Mo. App. 2019) (Addressing probable cause for search warrant.); Howe v. Dir. of Revenue, 575 S.W.3d 246, 249 (Mo. App. 2019) (Addressing probable cause for arrest.); Interest of Z.N.O. v. R.O., 566 S.W.3d 609, 616 (Mo. App. 2018) (Addressing probable cause for protective custody of a child.); Caplinger v. Rahman, 529 S.W.3d 326, 330 (Mo. App. 2017) (Addressing probable cause to maintain medical malpractice action pursuant to statute.).

As the above cases illustrate, Missouri can, and often do, make determinations of good faith and probable cause. The fact that such determinations require the exercise of judgment, rather than rote application of a black letter rule, does not weigh against adoption of a good faith/probable cause exception. Beneficiary suggests that Missouri courts will be just as capable of making determinations of good faith and probable cause in the context of no-contest clauses as they are in all other cases involving determinations of good faith or probable cause.

D. The Concept Of Freedom Of Contract Does Not Alter The Analysis.

Trustee cites the decisions in Soars v. Easter Seals Midwest, 563 S.W.3d 111 (Mo. banc 2018) and Sanger v. Yellow Cab Co., 486 S.W.2d 477 (Mo. banc 1972) for the proposition that the No-Contest Clause in this case should be upheld based

on the notion of "freedom of contract." But in so arguing, Trustee fails to note that Missouri courts recognize several limitations on the concept of freedom of contract.

As this Court has recognized, "a Court will not recognize contractual provisions that are contrary to the public policy of Missouri as expressed by the legislature." First Nat. Ins. Co. of Am. v. Clark, 899 S.W.2d 520, 521 (Mo. banc 1995). "A contract is not enforceable if it is illegal, or violates public policy." Malan Realty Inv'rs, Inc. v. Harris, 953 S.W.2d 624, 627 (Mo. banc 1997) (internal citations omitted).

Missouri courts likewise have held that a term of a trust is not enforceable if it would violate some rule of law or public policy. Bruce G. Robert QTIP Marital Trust v. Grasso, 332 S.W.3d 248, 254 (Mo. App. 2010); Blue Ridge Bank and Trust Co. v. McFall, 207 S.W.3d 149, 160 (Mo. App. 2006); Boone County Nat. Bank v. Edson, 760 S.W.2d 108, 111 (Mo. banc 1988). As the Court in Bruce G. Robert QTIP Marital Trust observed, it is not enough to simply determine the intent of the settlor – the Court must also assess whether that intent is illegal or violates public policy. Bruce G. Robert QTIP Marital Trust, 332 S.W.3d at 256 ("Having found a clearly defined intention of the testator set forth in [the] Trust, we must further analyze whether this intention, 'if carried out, will violate some positive rule of law, or subvert some rule of public policy.'").

This limitation on the freedom of contract is significant in the context of trusts, because Missouri law recognizes multiple public policies and statutory limitations that apply to trusts.

With respect to public policy, Missouri trust law incorporates a "strong policy consideration of ensuring that someone has the power to enforce the trustee's fiduciary duties." In re Estate of Spencer, 417 S.W.3d 364, 369 (Mo. App. 2013); see also Peters v. Peters, 323 S.W.3d 49, 52 (Mo. App. 2010). And Missouri courts have held consistently that "[a] court of equity has the inherent power to exercise jurisdiction over trust estates, to supervise their administration, and to make all orders necessary for their preservation and conservation." Betty G. Weldon Revocable Trust ex rel. Vivion v. Weldon ex rel. Weldon, 231 S.W.3d 158, 173 (Mo. App. 2007) (internal punctuation omitted); see also Williams v. Duncan ex rel. Pauline M. Babcock, Living Trust, 55 S.W.3d 896, 901 (Mo. App. 2001); Kimpton v. Spellman, 173 S.W.2d 886, 891 (Mo. 1943).

Given these public policy considerations, a no-contest clause that seeks to prevent a court from addressing issues of trustee misconduct should be deemed unenforceable.

Missouri statutes also impose specific limitations regarding trusts. The MUTC provides that "[a] trustee shall administer the trust solely in the interests of the beneficiaries." R.S.Mo. § 456.8-802.1. The MUTC further provides that "the

trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries." R.S.Mo. § 456.8-801. And Section 1008 of the MUTC provides that "[a] term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it . . . relieves 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." R.S.Mo. § 456.10-1008.1(1).

Section 105 of the MUTC provides that there are certain aspects of trust law that the settlor cannot vary or override by the terms of the trust, including the following:

> (1) the requirements for creating a trust;
>
> (2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;
>
> (3) the requirement that a trust and its terms be for the benefit of its beneficiaries;
>
> * * *
>
> (10) the effect of an exculpatory term under section 456.10-1008; [and]
>
> * * *
>
> (13) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

R.S.Mo. § 456.1-105.

These provisions of the MUTC plainly indicate that there are certain requirements of trust law which are mandatory, and cannot be waived by the settlor. Thus, any effort to circumvent the requirements of the MUTC by use of an overly broad no-contest clause is in direct contravention of Missouri statutes. Thus, such no-contest clauses are unenforceable.

Trustee's freedom of contract argument also ignores the fact that "[u]nder Missouri law, a duty of good faith and fair dealing is implied in every contract." Arbors at Sugar Creek Homeowners Ass'n v. Jefferson Bank & Tr. Co., 464 S.W.3d 177, 185 (Mo. banc 2015); see also Bishop & Assocs., LLC v. Ameren Corp., 520 S.W.3d 463, 471 (Mo. banc 2017). Thus, to the extent that a no-contest clause is viewed from the perspective of contract law, it makes perfect sense to recognize a good faith/probable cause exception.

CONCLUSION

For the reasons stated in this Substitute Reply Brief, and in Beneficiary's Substitute Brief, Beneficiary requests that this Court reverse the judgment of the Circuit Court granting summary judgment to Trustee, and remand this action for further proceedings consistent with this Court's decision. Beneficiary further requests that this Court issue one or both of the following holdings:

1. Hold that no-contest clauses may only be applied to actions which seek to challenge a trust instrument, and that no-contest clauses do not apply to actions for breach of trust and/or removal of a trustee.

2. Hold that no-contest clauses are subject to a good faith/probable cause exception.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Substitute Reply Brief includes the information required by Rule 55.03, and that this Substitute Reply Brief conforms to the type-volume limitations set forth in MO. R. CIV. P. 84.06(b) in that the Substitute Reply Brief contains 5,269 words, excluding the cover, certificate of service, certificate of compliance and signature block, as counted using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 103.08, a copy of the foregoing document was furnished through the Missouri Electronic Filing System to the following on this 10th day of October, 2019:

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