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STATE OF WASHINGTON

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No. 33966-8-II

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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NANCIE HATHEWAY,

Appellant/Cross-Respondent,

v.

U.S. TRUST COMPANY, N.A., a Connecticut corporation,

Respondent/Cross-Appellant.

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**REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT**

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## I. REPLY TO RESPONDENT'S BRIEF

### A. **This Court Should Apply a Meaningful Standard To Define the Fiduciary Duties of an Investment Manager.**

After 34 pages of avoiding the issue, U.S. Trust finally admits that it had a fiduciary duty to Ms. Hatheway. Respondent's Brief at 35. This admission is illusory, however, because U.S. Trust contends—like the trial court below—that this fiduciary duty can be satisfied by simply doing what the client says, regardless of whether the investment manager's actions are in the best interests of the client.

Although it was Ms. Hatheway's expert fiduciary, with complete discretion over her retirement savings, U.S. Trust claims that it was not required to substitute its "judgment for the expressed goal of the principal", Respondent's Brief at 35, even when those goals lead the client to financial ruin. Like the trial court below, Respondent's brief essentially argues that Ms. Hatheway's staggering losses were her own fault.

The trial court's and U.S. Trust's contention that a fiduciary has the right to shift responsibility to the plaintiff is contradicted by Respondent's expert, Roger DeBard. Mr. DeBard testified that the ultimate duty of an investment manager is "to put the client's interests first." Respondent's Brief at 28, RP 538. Putting the client's interest first

does not mean that an investment manager should blindly follow the statements of a client.

Here, Ms. Hatheway retained U.S. Trust as a fiduciary—with complete discretion over her account—to use its expert investment management skills. Ms. Hatheway did not hire U.S. Trust simply to carry out her orders. If Ms. Hatheway had wanted an Automated Teller Machine, she could have gone to the neighborhood bank.

Rather than applying the watered-down standard of care advocated by U.S. Trust and the trial court, Ms. Hatheway urges this Court to apply a standard of care that will protect all clients, including those clients who make statements or express goals that are opposite to the client's best interests. Under this standard of care, an investment manager who has been given complete discretion over a client's funds has a duty to act objectively in a client's best interests regardless of the client's statements, and to make suitable and prudent investments in light of the client's financial situation and needs.

Finally, to clarify the duty owed by investment managers, this Court should hold that these managers are governed by the prudent investor rule and total asset management approach codified in the Investment of Trust Funds Act, RCW Chapter 11.100. Under this statute, an investment manager must forego speculation in favor of prudent

investments and the total asset approach that uses the fiduciary's judgments and skills. RCW 11.100.020.

Because the trial court applied the wrong standard of care and because substantial evidence at trial demonstrated that U.S. Trust did not meet the proper standard of care, Ms. Hatheway requests that the decision below on liability be reversed and the case be remanded for a hearing on the damages she is entitled to recover from U.S. Trust for breach of its fiduciary duties to act in her best interest, as well as a determination as to the reasonable attorneys' fees she is entitled to recover, at the trial, on this appeal, and on the proceedings on remand.

As the following sections demonstrate, U.S. Trust fails to offer any meaningful objection to—let alone any authority in opposition to—the standard of care advocated by Ms. Hatheway.

**1. A Fiduciary Must Prudently Use His or Her Skills in Seeking the Best Interest of the Client.**

As the Washington Supreme Court has noted, in a fiduciary relationship one party may occupy “such a relation to the other party as to justify the latter in expecting that his interests will be cared for.” *Liebergessell v. Evans*, 93 Wn.2d 881, 889-90, 613 P.2d 1170 (1980) (quoting Restatement Contracts § 472(1)(c)) This fiduciary relationship may arise in several contexts, including attorney and client, doctor and

patient, trustee and beneficiary, principal and agent, and partner and partner. *Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002).

The U.S. Supreme Court has stated that this fiduciary duty is an affirmative duty of “utmost good faith, and full and fair disclosure of all material facts,” as well as an affirmative obligation “to employ reasonable care to avoid misleading” clients. *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 194, 84 S. Ct. 275 (1963).

Here, U.S. Trust’s agreement<sup>1</sup> with Ms. Hatheway gave U.S. Trust complete discretion over Ms. Hatheway’s account, “with the broadest power of management and investment over the account . . .” Ex. 190, Section 1. In the agreement, Ms. Hatheway agreed to pay U.S. Trust for the benefit of U.S. Trust’s expertise and “continuing study of economic conditions, security markets, industries, and other investment opportunities.” Ex. 190, Section 1. In return, U.S. Trust promised to exercise:

complete discretion in the management of the Account, make investment changes without prior consultation or approval, and invest and reinvest available funds at such time and in such manner as [U.S. Trust] deem[s] **to be in [Ms. Hatheway’s] best interests** and for [Ms. Hatheway’s] account and risk.”

Ex. 190, Section 1 (emphasis added)

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<sup>1</sup> Attached to this brief as Appendix A .

Thus, the agreement grants U.S. Trust complete discretion over the management and investment of Ms. Hatheway's funds and requires U.S. Trust to act in Ms. Hatheway's best interests. With this background, the trial court found that U.S. Trust was a fiduciary to Ms. Hatheway. (Finding No. 3, CP 689) In its response, U.S. Trust does not dispute this finding. Respondent's Brief at 35.

Nevertheless, U.S. Trust attempts to sidestep its responsibility to manage the account in the best interests of Ms. Hatheway by claiming:

The language of the agreement shows that the discretion to be employed was "with respect to investments" to make investment changes without prior consultation or approval. It was not discretion to make investment policy changes or allocation changes without her input.

Respondent's Brief at 28.

U.S. Trust's attempt at evading responsibility is a distinction without a difference. Moreover, this distinction is not supported by the plain language of the agreement.

The language of the agreement obligates U.S. Trust to make investment decisions in Ms. Hatheway's "best interests." Roger DeBard, U.S. Trust's expert witness, also testified that an investment manager must always "put the client's interests first." RP 538.

U.S. Trust ignores the agreement's requirement that it act in Ms. Hatheway's best interests and interprets Mr. DeBard's statement as merely requiring "loyalty" to a client. Respondent's Brief at 32.

According to U.S. Trust, blindly following what a client says and not engaging in self-dealing satisfy the duty to place the client's interests first.

However, merely being loyal to a client is not the same as acting in a client's best interests. Indeed, Michelle Dicus, a Certified Financial Analyst and Ms. Hatheway's first assigned Investment Account Manager at U.S. Trust, testified it would violate the standard of care to execute a client's wishes when doing so would be contrary to the client's best interests:

Q. In your opinion, can an investment manager ethically acquit herself, himself, and meet the standard of care applicable of acting with integrity where the investment manager believes the wishes of the client are contrary to the needs of the client?

A. I don't believe it's ethical to act in a manner where you are in conjunction with the wishes of the clients but against the best interest of the client.

Q. What would the standard of care be if you were faced with that situation and the client would not change her wishes? Would you proceed to execute those wishes against your own conviction of the needs?

A. I would not.

RP 371.

Moreover, courts in other jurisdictions have held that the investment manager is a fiduciary under duty to serve the best interests of a beneficiary.

**2. The *Erlich* Court Held that an Investment Manager Must Refuse To Follow a Client's Directives That Are Contrary to the Client's Best Interests.**

In *Erlich*, a plaintiff sought damages for the mismanagement of his investment account. *Erlich v. First National Bank of Princeton*, 505 A.2d 220 (N.J. Sup. Ct. Law Div. 1984). Unlike Ms. Hatheway, the plaintiff in *Erlich* was a long-time investor who kept abreast of investment magazines and newspapers, kept detailed records, belonged to an investment club, and authorized every purchase or sale of a stock. *Erlich*, 505 A.2d at 227-28. In addition, the plaintiff in *Erlich*, unlike Ms. Hatheway, retained final approval over the stocks purchased. *Erlich*, 505 A.2d at 232 (noting in dicta that “maximum responsibility” occurs when defendants have complete discretion over transactions). Despite the involvement of a sophisticated plaintiff who retained final approval over transactions, the court found the defendants negligent.

The *Erlich* court held that “the obligation of the investment manager to give prudent advice is the standard of care . . . .” As *Erlich* noted, this obligation to give prudent advice includes: “(1) knowing the customer, his assets and objectives; (2) diversifying investments; (3) engaging in objective analysis as the basis for purchase and sale recommendations and (4) making the account productive.” *Erlich*, 505 A.2d at 235.

Furthermore, the *Erlich* court stressed that “knowing the client” entails furthering the client’s investment objectives, but only when these objectives are in the client’s best interest:

An investment adviser is charged with furthering the customer's investment objectives, but he has an ongoing duty to refuse to approve investment strategies that are desired by the customer but appear to the adviser to be imprudent and too risky for the customer.

*Erlich*, 505 A.2d at 235-36.

The *Erlich* court found the defendant “negligent in its supervision and periodic review of the account, its failure to provide for diversification and its failure to consider the risks to plaintiff, given his financial circumstances” because defendant failed to act as plaintiff’s fiduciary by not discussing with plaintiff his investment objectives beyond the initial inquiry and by allowing plaintiff to invest an imprudent amount of his portfolio in a single stock. *Erlich*, 505 A.2d at 238.

U.S. Trust attempts to distinguish *Erlich* by dismissing it as a “conflicts of interest” case because the defendant manager was obsessed with a particular stock. Respondent’s Brief at 33. Respondent’s attempt at distinguishing *Erlich* fails for the following reason:

The *Erlich* case is significant because the case holds that an investment manager has a duty to give prudent advice and that this duty requires that the investment advisor refuse to follow a client’s objectives when doing so would be contrary to the client’s best interests. Because the investment manager’s obsession with a particular stock prevented him from giving prudent advice does not undermine the significance of *Erlich* to the case at hand. In *Erlich*, the investment manager’s obsession with a particular stock prevented him from acting in the client’s best interests. Because U.S. Trust’s failure to act in Ms. Hatheway’s best interests was

caused by Mr. Yandle's incompetence and inattentiveness, rather than an obsession with a stock, does not excuse U.S. Trust's breach of its duty to Ms. Hatheway.

**3. The *Twomey* Court Required the Investment Manager to Make Suitable Investments Given the Client's Financial Situation and Needs**

The leading California case on the issue of a stockbroker's fiduciary duty is *Twomey v. Mitchum, Jones & Templeton, Inc.*, 262 Cal. App.2d 690, 69 Cal. Rptr. 222 (1968). See *Duffy v. Cavalier*, 215 Cal. App.3d 1517, 264 Cal. Rptr. 740 (1989) (applying *Twomey* and affirming judgment that defendants breached their fiduciary duty in the handling of a stock brokerage account). In *Twomey*, a widow brought suit against an individual stockbroker and the firm for which he worked, alleging, inter alia, breach of fiduciary duty in the handling of her account.

Like U.S. Trust, the *Twomey* defendants contended that their "sole obligation of the broker-dealer is to carry out the stated objectives of the customer." *Twomey*, 262 Cal. App.2d at 719. In rejecting this argument, the *Twomey* court discussed a situation where a "sweet trusting widow" client turns into a "greedy old lady." *Twomey*, 262 Cal. App.2d at 720. If the widow insists on obtaining speculative investments that are not suitable for her, then the broker-dealer must not purchase the speculative stocks for the client. *Twomey*, 262 Cal. App.2d at 721-22. Although the court's reasoning was based upon National Association of Securities Dealers' proposed guidelines, the *Twomey* court embraced the standard:

It may be asserted that the proposed guidelines are merely ethical standards and should not be a predicate for civil liability. **Good ethics should not be ignored by the law.** It would be inconsistent to suggest that a person should be defrocked as a member of his calling, and yet not be liable for the injury which resulted from his acts or omissions.

*Twomey*, 262 Cal. App.2d at 721-22 (emphasis added). Because the defendants breached their fiduciary duty, the court upheld the judgment. *Id.* at 722.

The standard applied by *Twomey* is the same standard that should govern this case: an investment manager who has been given complete discretion over a client's funds has a duty to act objectively in a client's best interests regardless of the client's statements, and to make suitable and prudent investments in light of the client's financial situation and needs. As the severe bear market more than consumed all of her gains from the preceding bull market, Ms. Hatheway's statements changed, but Mr. Yandle took no initiative to review his or her earlier assumptions.

U.S. Trust attempts to distinguish *Twomey* by claiming that the case concerned excessive trading (also called churning), a conflict of interest, a misrepresentation, and the failure to learn the plaintiff's financial situation. Respondent's Brief at 34. Like U.S. Trust's attempt at distinguishing *Erlich*, respondent's argument concerning *Twomey* is irrelevant. Indeed, the *Twomey* court itself noted that the defendant's excessive trading was simply a manifestation of its breach of fiduciary duty: "In this case the churning is merely a manifestation of the general

negligence and breach of fiduciary duty which left the plaintiff with unsuitable securities.” *Twomey*, 262 Cal. App.2d at 732. Because U.S. Trust’s failure to act in Ms. Hatheway’s best interests was caused by Mr. Yandle’s incompetence and inattentiveness, rather than the factors present in *Twomey*, does not excuse U.S. Trust’s breach of its duty to Ms. Hatheway.

**4. The Investment of Trust Funds Act Makes the Historic Prudent Investor’s Rule Applicable to Fiduciaries like U.S. Trust.**

U.S. Trust argues that RCW Chapter 11.100 does not apply because this chapter is entitled “Investment of Trust Funds” and Ms. Hatheway’s investment did not involve a trust instrument. Respondent’s Brief at 40. This argument fails because the Act itself states that it governs “**fiduciaries acting under . . . agreements . . .**” RCW 11.100.050 (emphasis added).

In addition, U.S. Trust argues that Ms. Hatheway cannot appeal the trial court’s order that RCW 11.100 does not apply because she is “not an aggrieved party entitled to appeal this decision.” This argument makes no sense.

In its Order Granting Summary Judgment Favor of Defendants In Part and Denying Motion in Part, dated April 22, 2005, the trial court specifically wrote: “ORDERED, ADJUDGED and DECREED that RCW 11.100 does not apply.” (CP 554) The trial court’s order could not be clearer. Ms. Hatheway has been harmed by the trial court’s failure to

apply the prudent investor rule and total asset management approach found in RCW 11.100 to her claim for breach of fiduciary duty.

Furthermore, under RCW 11.100, a fiduciary is governed by the “prudent investor standard.” RCW 11.100.020. This standard requires:

In acquiring, investing, reinvesting, exchanging, selling and managing property for the benefit of another, a fiduciary, in determining the prudence of a particular investment, shall give due consideration to the role that the proposed investment or investment course of action plays within the overall portfolio of assets. In applying such total asset management approach, a fiduciary *shall exercise the judgment and care* under the circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, and **if the fiduciary has special skills** or is named trustee on the basis of representations of special skills or **expertise, the fiduciary is under a duty to use those skills.**

(2) Except as may be provided to the contrary in the instrument, the following are among the factors that should be considered **by a fiduciary** in applying this total asset management approach:

- (a) The probable income as well as the probable safety of their capital;
- (b) Marketability of investments;
- (c) General economic conditions;
- (d) Length of the term of the investments;
- (e) Duration of the trust;

- (f) Liquidity needs;
- (g) Requirements of the beneficiary or beneficiaries;
- (h) Other assets of the beneficiary or beneficiaries, including earning capacity; and
- (i) Effect of investments in increasing or diminishing liability for taxes.

RCW 11.100.020(1) and (2) (emphasis added). Washington courts recognize that:

The “prudent investor standard” requires “that the fiduciary maintain a balance between the rights of income beneficiaries with those of the remainderman.” **This state’s version of the rule also requires that the trustee consider income as well as the safety of the capital and the requirements of the beneficiaries.** (Emphasis added.)

*In re Estate of Cooper*, 81 Wn. App. 79, 88-89, 913 P.2d 393, *review denied*, 130 Wn.2d 1011, 928 P.2d 414 (1996) (emphasis added). As the Supreme Court stated: “The court’s focus in applying the Prudent Investor standard is conduct, not the end result.” *Id.* at 88. In *Cooper* for example, while the value of the trust increased, the court found that the trustee violated his fiduciary duty by failing to weigh the percentage of the trust’s funds invested in various types of assets for diversification purposes. *Id.* at 90. This failure to properly diversify was a breach of fiduciary duty, in that the trust investments favored the income beneficiary over the remaindermen. *Cooper*, 81 Wn. App. 90.

The prudent investor standards of RCW 11.100 provide an excellent framework for measuring the fiduciary duty owed by U.S. Trust.

**B. U.S. Trust Breached Its Duty to Ms. Hatheway**

Instead of using its expertise and complete discretion over the account to act in Ms. Hatheway's best interests, U.S. Trust's employee Jeff Yandle responded by:

- Relying solely upon Ms. Hatheway's earlier bull-market statements without conducting an independent analysis of her financial needs and means, even after the market began to plunge;
- Failing to prioritize her investment goals properly, choosing growth over preservation of her principal for retirement;
- Failing to properly diversify her account to minimize her losses in a downturn;
- Failing to keep its express promise that Ms. Hatheway's investments would be diversified so that she would not be badly hurt in a downturn;
- Failing to comply with Ms. Hatheway's request in 1998 that U.S. Trust implement a defensive strategy to protect against a market downturn;
- Failing to comply with Ms. Hatheway's request in 1999 that U.S. Trust decrease its allocation to volatile technical stock in favor of fixed income allocation;
- Failing to calculate how much money Ms. Hatheway could withdraw and for how long without depleting her account;
- Failing to counsel Ms. Hatheway that her withdrawals were dangerously draining her account;

- Never calculating how much money Ms. Hatheway lost.

U.S. Trust's response, or lack thereof, cannot be considered to be in the best interest of Ms. Hatheway. U.S. Trust's failure to act in Ms. Hatheway's best interests is a breach of its duty.

## II. RESPONSE TO CROSS-APPEAL

U.S. Trust erroneously believed it could meet its burden to prove the reasonableness of its fees simply by "asking for everything with no segregation." RP 802; Findings of Fact and Conclusions of Law on Defendant U.S. Trust's Motion for Attorney's Fees and Costs, CP 697, attached as Appendix B; *Herring v. Dep't of Soc. and Health Serv.*, 81 Wn. App. 1, 34, 914 P.2d 67 (1996). The trial court disagreed:

In many instances, U.S. Trust did not carry this burden as to the attorneys' fees requested because U.S. Trust did not provide the court with sufficient detail and segregation to clarify for the court how the time was being used, whether time was spent on claims for which attorneys' fees were awardable, and whether the amount of time was reasonable as to the various services rendered.

CP 697. The Court should not allow U.S. Trust to do on appeal what it now acknowledges and regrets that it failed to do below.

**A. The Court Should Decline To Consider Arguments Not Raised Below.**

Generally, “[i]ssues not presented to the trial court will not be heard for the first time on appeal.” *Jones v. Stebbins*, 122 Wn.2d 471, 479, 860 P.2d 1009 (1993). Here, U.S. Trust raises several issues for the first time on appeal regarding the attorneys’ fees award.

Specifically, the Court should decline to consider U.S. Trust’s novel arguments regarding the number of exhibits identified at trial by plaintiff relative to the number identified by defendant; the value, or lack thereof, of co-counsel’s involvement; and whether the trial court had jurisdiction to award fees spent in the prior federal court filing. Respondent’s Brief at 45-46. U.S. Trust also makes two arguments for the first time challenging the trial court’s ruling denying U.S. Trust its attorneys’ fees for the hours spent on the statute of limitations defense. Respondent’s Brief at 42-43. The trial court did not rely on this defense in finding for U.S. Trust on the merits of the case. CP 697.

These are all arguments U.S. Trust failed to make below to justify the reasonableness of its attorneys’ fees. U.S. Trust thereby waived these arguments and should not be heard on them now.

**B. The Trial Court’s Attorneys’ Fees Award Was Well Within Its Considerable Discretion.**

Even if the Court considers U.S. Trust’s new and novel arguments on appeal, the trial court’s fee award was proper because the trial court did not abuse its discretion in making the award. A Washington Appellate Court will uphold a trial court’s award of attorneys’ fees and costs absent

a showing that the trial court clearly abused its discretion in making the award. *Ryan v. State*, 112 Wn. App. 896, 899, 51 P.3d 175 (2002); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.” *Junker*, 79 Wn.2d at 26. A trial court abuses its discretion if its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* In other words, a trial court has not abused its discretion if it arrives at its decision by correctly applying the facts that are supported by the record to the applicable legal standard. *Ryan*, 112 Wn. App. at 899 – 900.

In Washington, the lodestar method is the preferred legal standard to determine a reasonable fee award. *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 847, 9 P.3d 948 (2000) (citations omitted); *but see Naches Valley School Dist. No. JT3 v. Cruzen*, 54 Wn. App. 388, 399, 775 P.2d 960 (1989) (declining to apply the lodestar method to \$3,926.25 attorney fee award)). The lodestar method “sets attorney fees by ‘first determining the number of hours that were reasonably spent by the attorneys, multiplying it by a reasonable hourly compensation, and then adjusting this amount upward or downward based on additional factors.’” *Herring*, 81 Wn. App. at 33 (quoting *Bowles v. Dep’t of Retirement Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440 (1993)). These additional factors are

specified in RPC 1.5(a) and Washington court decisions and include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly and the terms of the fee agreement between the lawyer and client;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved in the matter on which legal services are rendered and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

RPC 1.5(a); *Herring*, 81 Wn. App. at 33-34.

Here, the trial court applied the facts and arguments provided by U.S. Trust and Ms. Hatheway regarding the reasonableness of U.S. Trust's fees to the lodestar factors and independently determined what fees were reasonable. CP 699. There was no abuse of discretion.

U.S. Trust simply fails to carry its burden to show how the fee arguments that it did not make – but claims that it would have made – to the trial court would make the trial court’s attorneys’ fees award manifestly unreasonable or that it was based on untenable grounds. For example, U.S. Trust now claims it would have addressed co-counsel’s value to the case. Respondent’s Brief at 45-46. However, the trial court observed co-counsel’s work at trial, and it did expressly review co-counsel’s billing records and independently valued co-counsel’s contribution to the case. CP 695.

The Court also should uphold the trial court’s denial of fees associated with the statute of limitations defense (CP 697) because the two new arguments U.S. Trust now brings to challenge that ruling are irrelevant to the issue of whether U.S. Trust is entitled to recover fees incurred on those matters. Whether U.S. Trust may recover fees associated with the statute of limitations defense depends only on whether such fees are authorized and reasonable. *Hume v. American Disposal Co.*, 124 Wn.2d 656, 672, 880 P.2d 988 (1994); *Herring*, 81 Wn. App. at 33. In this case, whether the statute of limitations is six years or three, or when Ms. Hatheway knew or should have known of her claims, has no effect on whether it is reasonable to award U.S. Trust fees incurred for counsel’s work on the statute of limitations defense.

The trial court properly found that the time spent on the statute of limitations defense should not be awarded because the defense was irrelevant. CP 697. In determining the number of hours that an attorney

reasonably expended in securing a recovery for the client, a court must “exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims.” *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632, 966 P.2d 305 (1998). Here, the statute of limitations defense played no role in the trial court’s decision for U.S. Trust. CP 697. In fact, as U.S. Trust points out, the trial court ruled against U.S. Trust on the statute of limitations defense or at least found an issue of fact regarding when the limitations period began to run. Respondent’s Brief at 42-43. The defense was unnecessary or unsuccessful, and the trial court did not abuse its discretion in denying fees on that defense.

*Hudson v. Condon*, 101 Wn. App. 866, 6 P.3d 615 (2000), on which U.S. Trust relies to support its position that the breach of contract claim should have been subject to the three-year statute of limitations that applies to tort claims, and not the six-year period that applies when a party breaches a contractual provision, has no application here. There, the breach of contract claims all originated from the tort claim of breach of fiduciary duty, not from an alleged breach of a specific term of the contract. *Hudson*, 101 Wn. App. at 873-74. Here, in addition to her claim for breach of fiduciary duty, Ms. Hatheway’s breach of contract claim alleges that U.S. Trust breached its contractual duty to act in her “best interests.” CP 62, 891-92. U.S. Trust also had a separate, distinct fiduciary duty to Ms. Hatheway as her investment advisor. *See, e.g., SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. at 194 (Congress has

recognized that an investment advisor is a fiduciary). Thus, even if this argument were relevant to the reasonableness of U.S. Trust's fees, the trial court exercised proper discretion in ruling that the breach of contract claim was subject to the six-year statute of limitations.

In any case, the trial court reviewed the entire fee demanded and determined in a reasoned, deliberate manner what a reasonable fee was, given the entire record of the case. As argued below, Washington law supports the trial court's rulings on the attorney's fee award under the facts here. Therefore, the trial court did not abuse its discretion on the attorneys' fees issue.

**C. The Trial Court Properly Rejected U.S. Trust's Mischaracterization Of The *Panorama Village* Holding and Limited U.S. Trust's Recovery Of Litigation Costs To Those Authorized By RCW 4.84.010.**

Washington courts have long taken a narrow view of recoverable litigation costs. *Hume.*, 124 Wn.2d at 674. Specifically, RCW 4.84.010 limits cost recovery to the following items:

- (1) Filing fees;
- (2) Fees for the service of process . . . ;
- (3) Fees for service by publication;
- (4) Notary fees, but only to the extent the fees are for services that are expressly required by law and only to the extent they represent actual costs incurred by the prevailing party;

(5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial . . . ;

(6) Statutory attorney and witness fees; and

(7) To the extent that the court . . . finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial . . . PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

RCW 4.84.010.

RCW 4.84.010 does not authorize recovery for photocopying and postage costs. *In re Marriage of Van Camp*, 82 Wn. App. 339, 343, 918 P.2d 509 (1996), *review denied*, 130 Wn.2d 1019, 928 P.2d 416. Also, expert witness fees are not costs for which RCW 4.84.010 allows recovery. *State v. Howard*, 105 Wn.2d 71, 711 P.2d 1013, 1017 (1985) (“However, ‘costs,’ as defined in that statute, specifically exclude attorney fees and expert witness fees in excess of statutory fees.”)

The only instances under current Washington law in which a prevailing party may recover litigation costs beyond RCW 4.84.010 are when a statute expressly authorizes recovery of such costs or if an equitable principle applies. *Panorama Village Condominium Owners Ass’n v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 901 (2001) (equity allows expanded cost recovery when an **insured** “is forced to bring a lawsuit to obtain the benefit of his bargain with an insurer”); *Louisiana-Pacific Corp. v. Asarco Inc.*, 131 Wn.2d 587, 604, 934 P.2d 685 (1997)

(statute expressly allows recovery of non-RCW 4.84.010 costs in private actions to enforce the Model Toxics Control Act); *Hume*, 124 Wn.2d 656, 674, 880 P.2d 988 (1994) (expanded cost recovery not allowed absent a statute, such as for civil rights cases).

The trial court in this case properly applied the principles above to limit U.S. Trust's cost recovery to those costs authorized under Washington law. RP 808-09; CP 699-700. The trial court specifically rejected U.S. Trust's mischaracterization of *Panorama Village* that "[t]he Supreme Court of Washington has ruled that attorneys fees include costs and expenses of litigation – they are not limited to statutory costs defined in RCW 4.84.010. Respondent's Brief at 43-44; RP 803. The trial court corrected U.S. Trust, ruling that:

The *Panorama Village* case cited by the defendant relates to an *Olympic Steamship* fact pattern, which you probably weren't in the state of Washington when that was developing, but Mr. Walker and I were. It's a completely different fact pattern than what we have. It's based on equity and based on a clause in most of the contracts which allows for reasonable expenses to the **insureds**. So that's just a completely different fact pattern.

RP 803 (emphasis added).

Directly put, our courts have expanded the definition of "costs" only in cases where an insurer has forced an insured to sue to obtain the benefits of her insurance policy—clearly a narrow equitable ruling not applicable to this case.

The trial court then returned to the definition of “costs” under RCW 4.84.010 and 4.84.330:

So I'm looking at RCW 4.84.010. Again, when I look at 4.84.330, it talks about reasonable attorney's fees, costs and disbursements, but "costs" are defined in the statute. It doesn't say, "all of your expenses." It uses the word "costs," and "costs" are defined in the statute.

RP 803; CP 699-700. Thus, the trial court applied the correct legal standard to determine the costs U.S. Trust was allowed to recover. The trial court's ruling was well within its discretion.

**D. The Trial Court Correctly Ruled That U.S. Trust Is Not Entitled To Fees Under The Indemnification Provision Because That Provision Is Void As Against Public Policy.**

The trial court also applied the correct legal standard in ruling that U.S. Trust is not entitled to fees and costs under the contract's indemnity clause because that clause improperly attempted to limit U.S. Trust's liability for any negligent advice it may give or for breach of its fiduciary duty. CP 696; RP 802. Although Washington decisions have not addressed this issue, the trial court properly relied on the weight of authority from other jurisdictions holding that such indemnity clauses are inconsistent with an investment advisor's fiduciary duties and are therefore void. *Erllich*, 505 A.2d at 233 (“To allow investment advisers to exculpate themselves from the mischief caused by their breach of duty would violate the public policy of this State.”) This is the rule even in cases where a bankruptcy court supervises the investment advisor's work. *See, e.g., In re Metricom, Inc.*, 275 B.R. 364, 369 (Bankr. N.D. Cal. 2002);

*see also, In re WCI Cable, Inc.*, 282 B.R. 457, 479 (Bankr. D. Or. 2002) (the exculpatory clause would be valid only if “the exculpation exceptions are extended to cover negligence and breaches of fiduciary duty as well as gross negligence and willful misconduct”); *In re Drexel Burnham Lambert Group, Inc.*, 133 B.R. 13, 27 (Bankr. S.D.N.Y. 1991) (“We concur with Judge Bufford's holding *In re Realty Trust, supra*, that, ‘the reason for hiring a person is that the person has special expertise that is beneficial to the debtor or the committee. The court expects that such professionals would be especially diligent in making sure that they meet the standard of care for exercising their expertise in their work in this case. Indemnification is not consistent with professionalism.’ Simply stated, indemnification agreements are inappropriate.”) (citation omitted); *In re Allegheny Int'l, Inc.*, 100 B.R. 244, 247 (Bankr. W.D. Pa. 1989) (“... holding a fiduciary harmless for its own negligence is shockingly inconsistent with the strict standard of conduct for fiduciaries.”); *cf.*, *In re Joan and David Halpern, Inc.*, 248 B.R. 43 (Bankr. S.D.N.Y. 2000) (“while the indemnity may cover ordinary negligence, it may not include bad faith, breach of fiduciary duty (other than ordinary negligence), breach of trust, self-dealing, willful or reckless misconduct or gross negligence”). There is, however, a minority position to the contrary. *See In re DEC Int'l, Inc.*, 282 B.R. 423 (Bankr. W.D. Wis. 2002) (upholding the indemnity provision without analyzing whether it was reasonable under the circumstances of that particular case); *State ex rel. Udall v. Colonial Penn*

*Ins. Co.*, 812 P.2d 777 (N.M. 1991) (upholding the exculpatory clause without analysis).

The majority position followed by the trial court properly holds a fiduciary to a high standard of care. In particular, “decisions in the Ninth Circuit appear not to favor exculpation or indemnification provisions that limit liability for negligence or breaches of fiduciary duties.” *In re WCI Cable*, 282 B.R. at 479. Judge Cardozo explained why this is so in *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928): “Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden by those bound by fiduciary ties ... Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”

U.S. Trust cross-appeals the trial court's ruling voiding the indemnification provision in a footnote. Respondent's Brief at 44, n. 11. U.S. Trust is correct not to place much confidence in this argument because it goes against the weight of authority cited above.

U.S. Trust was Ms. Hatheway's fiduciary. CP 689; Respondent's Brief at 35. The indemnification provision, paragraph 14 of the Investment Management Account Letter of Agreement, is inconsistent with US Trust's fiduciary duty to Ms. Hatheway because it would only hold U.S. Trust responsible for its gross negligence or misconduct. Ex. 190. Therefore, the trial court correctly ruled that the indemnification provision was void on its face as against public policy, regardless of whether the Court finds that U.S. Trust breached its fiduciary duty. CP 696; RP 802. A fiduciary may not contract away its fiduciary duty.

**E. The WSSA Claim Is A Tort Action For Which No Attorneys' Fees Are Authorized.**

U.S. Trust is not entitled to attorneys' fees for prevailing on the Washington State Securities Act ("WSSA") claim because the trial court properly determined that the WSSA claim was distinct from the breach of contract claim, which was U.S. Trust's only basis to recover its reasonable attorneys' fees. CP 697; RP 805. Generally, a Washington court may only award a prevailing party its attorneys' fees and costs if recovery of such fees and costs is provided by private agreement, statute, or a recognized ground of equity. *Lay v. Hass*, 112 Wn. App. 818, 823, 51 P.3d 130 (2002) (citing *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986)). Where a party may recover attorneys' fees and costs for only some of the claims asserted, "the attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from the time spent on other issues." *Hume*, 124 Wn.2d at 672 (Attorneys' fees were recoverable for the successful constructive discharge claims under RCW 49.48.030, but not for the unsuccessful harassment of constructive discharge, age discrimination, and handicap discrimination claims. So the *Hume* court segregated the fees on these claims, even though all the claims "are related and to some extent rest on a common core of facts..."); *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 411, 759 P.2d 418 (1988).

Indeed, a court must make this segregation unless “the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made.” *Hume*, 124 Wn.2d at 672-73; *see also*, *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 165, 961 P.2d 371 (1998). It is important for the court to make such a segregation even where difficult because “it would be unjust to allow [the party] to recover virtually all of its attorney fees because of complexity.” *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 850, 726 P.2d 8 (1986) (emphasis added).

The trial court ruled that the WSSA claim was distinct enough from the breach of contract and breach of fiduciary duty claims such that the contract’s attorneys’ fees provision did not apply to the WSSA claim. CP 697; RP 805. The WSSA claim is independent of the contract because it is derived from the statute, RCW 21.20.010, not out of the letter agreement between Appellant and Respondent. *See, e.g., Western Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wn. App. 293, 299, 716 P.2d 959 (1986) (an action “on a contract” is an action alleging a person is liable on a contract). The WSSA claim alleges that U.S. Trust violated a statutory obligation, not a contractual one. The relationship between Ms. Hatheway and U.S. Trust that the contract established is irrelevant to the WSSA claim. Further, the WSSA claim focuses on untrue statements or omissions of material fact in connection with the offer, sale or purchase of any security, not whether U.S. Trust failed to meet a contractual obligation. *See*, RCW 21.20.010.

U.S. Trust exaggerates and misstates what the court held in *Western Stud* as “awarding attorneys’ fees for claims other than breach of contract where [the] contract [was] central to [the] existence of claims.” Respondent’s Brief at 42. The *Western Stud* court held that the appellants were entitled to fees because the contract was central to the dispute, but remanded the case to the trial court to determine the amount of reasonable fees. *Western Stud*, 43 Wn. App. at 299-300.

Under Washington law, on remand, the *Western Stud* trial court’s award of reasonable fees would then have to properly reflect a segregation of the time counsel spent on issues that alleged liability on the contract that contained the attorneys’ fees provision from the time spent on issues that did not arise out of the contract. See, e.g., *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993) (no recovery of attorneys’ fees for claims that do not arise out of the contract); *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 197, 692 P.2d 867 (1984) (“action on a contract” means an action in which it is alleged that a person is liable on a contract). Thus, the *Western Stud* court simply determined whether the appellant was entitled to recover its reasonable attorneys’ fees in defending the entire lawsuit, not whether the appellant was entitled to recover reasonable attorneys’ fees for particular claims. Since Appellant here does not appeal the trial court’s determination that U.S. Trust is entitled to attorneys’ fees given the trial court’s ruling for U.S. Trust, *Western Stud* is of no guidance in discerning which fees for what services would be part of proper award. Therefore,

the circumstances here, when applied to Washington law, support the trial court's ruling that the WSSA claim is separate from the breach of contract claim.

Appellant appeals the trial court's decision on the merits of Ms. Hatheway's claims and consequently also appeals the trial court's fee award to U.S. Trust because U.S. Trust should not have prevailed. However, for the reasons above, Ms. Hatheway understands that the Court will uphold the reasonableness of the trial court's attorney's fees award if the Court does not overrule the trial court's decision for U.S. Trust on Ms. Hatheway's claims. The law supports the trial court's rulings on the limitation of costs to RCW 4.84.010 the statute of limitations defense, the indemnity clause and the WSSA claim. Given U.S. Trust's failure to meet its burden to prove the reasonableness of its fees, the trial court's fee award was well within the trial court's discretion.

DATED this 26<sup>th</sup> of May, 2006.

Respectfully submitted,

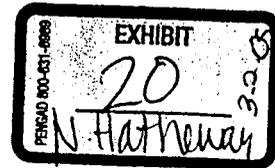
VANDEBERG JOHNSON &  
GANDARA

By 

G. Perrin Walker, WSBA #4013  
Daniel C. Montopoli, WSBA #26217  
Neal Luna, WSBA #34085  
Attorneys for Appellant

## APPENDIX A

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U. S. TRUST COMPANY OF THE PACIFIC NORTHWEST

INVESTMENT MANAGEMENT ACCOUNT

Letter of Agreement

Account Name: NANCIE LEE HATHWAY Account Number 752 80880

U. S. Trust Company of the Pacific Northwest:

Please establish an Investment Management Account (the "Account") in my name upon the following terms and conditions:

**1. INVESTMENT MANAGEMENT**

You are to give the Account the benefit of your continuing study of economic conditions, security markets, industries, and other investment opportunities. On the basis of these studies, you will be prepared to review your conclusions with me.

With respect to all investments in the Account, you are to have complete discretion in the management of the Account, make investment changes without prior consultation or approval, and invest and reinvest available funds at such time and in such manner as you deem to be in my best interests and for my account and risk. In order that you may accomplish the foregoing, I appoint you my agent and attorney-in-fact with the broadest possible power of management and investment over the Account and, with the assurance of your good faith, I hold you harmless from any loss or damage arising therefrom.

Without limiting the foregoing investment authority, you are authorized, without first consulting me, to invest available cash in such mutual funds, money market or other short-term funds, instruments or deposit accounts as you deem appropriate, including any such funds or accounts of which you or any of your affiliates are a sponsor, investment advisor, manager or custodian or for which you or any of such affiliates performs other services or functions and, in any such case, by which you or such affiliate are separately compensated for such services or functions. I hereby authorize you to invest Account assets in any such funds or accounts if you deem such investment to be appropriate for the Account.

Unless otherwise instructed by me, when selling part of my holdings of a given security, you are to use the highest cost lot first and when processing a gift, you are to use the lowest cost lot first.

Payment for investments may be made by utilizing available cash or funds in mutual funds, money market or other short-term funds or instruments, as you shall in your discretion determine, unless you shall have received other instructions from me.

**2. SAFEKEEPING**

I will deliver to you, from time to time cash, marketable securities or other property acceptable to you, to be held in the Account. You are to arrange for the safekeeping of the property in the Account making use of other custodians and depositories to the extent you deem advisable, and you are to hold my registered securities in the name of a nominee maintained by you or by any such custodian or depository. In order that you may transfer registered securities into the name of any such nominee, I hereby appoint you as attorney-in-fact with authority to act in my name, place and stead, and in any way in which I could, to

transfer and deliver any and all bonds, debentures, certificates of stock or other securities now or hereafter registered in my name or owned by me. You may also endorse such securities and make, execute and deliver any and all written instruments necessary or proper to effectuate the authority hereby conferred.

**3a. INCOME COLLECTION**

You are to collect and credit to the Account all income as it is received, holding it subject to my instructions. From time to time you may elect to credit, but shall not be so obligated, the Account with interest or dividend payments in anticipation of receiving such payments from a payor, central depository, broker or other agent. Any such crediting or posting shall be at my risk, and you are hereby authorized to reverse any such advance posting in the event you do not receive good funds from any such payor, central depository, broker or other agent.

**3b. DISTRIBUTION OF INCOME**

Transfer to principal for reinvestment

Remit to me by check:  Monthly  Quarterly

Remit to Bank Account:  Monthly  Quarterly *\$15,000 TO MERRILL LYNCH*

Bank Name MERRILL LYNCH *3, 6, 9 + 12 MONTHS*

Bank Address TACOMA, WA

Account Name NANCIE LEE HATHEWAY

Account Number 325 - 98447

**4. REPORTS**

You are to provide (i) a periodic statement of investments held in the Account, (ii) a periodic statement of security transactions and cash receipts and disbursements, (iii) an annual statement of the income collected and a schedule of securities sold, listing the proceeds, and if available to you, the income tax costs and dates of acquisition, and (iv) any other reports required by statute or regulatory authority.

**5. ISSUER INFORMATION**

You are to vote on my behalf all proxies unless you have received other instructions from me.

I hereby direct you (by initialing one of the following):

to disclose  
 not to disclose

my name, address and securities positions to issuers of securities held in the Account, pursuant to SEC rules implementing the Shareholder Communications Act of 1985.

**6. COMPENSATION**

Your annual compensation will be payable from the Account in quarterly installments at your rates in effect at the time of payment. You shall notify me at least thirty days in advance of any change in your rates of compensation. You shall also be entitled to reimbursement for out-of-pocket expenses and may pay all such expenses and your compensation from the Account in the same manner as payment for investments may be made as provided in Section 1. Your fee is to be charged as follows:

to income  
 to principal  
 1/2 to income, 1/2 to principal

## **7. NOTICES AND INSTRUCTIONS**

You may rely upon any instructions given by me in connection with the Account, orally, by electronic means or in writing (including facsimile transmissions, telexes and telegrams). I agree to confirm in writing all oral instructions, but my failure to do so shall not affect your right to rely on them. Notices to me may be oral or in writing, and any written notice shall be deemed received by me two business days after the day on which it is mailed to me at the address set forth below or such other address specified by me in writing for such purpose.

## **8. FIDUCIARY ACCOUNTS**

If this account is established by the undersigned in a fiduciary capacity, the undersigned hereby certifies that (i) all beneficial interests in the estate, trust or other account for which the undersigned is acting as such fiduciary are owned by individuals or by non-profit organizations, and (ii) the undersigned is legally empowered to enter into and perform this Agreement in the capacity indicated; and in the undersigned's individual capacity, the undersigned hereby indemnifies you and agrees to hold you harmless from any claim, liability or expense resulting from either of the foregoing statements being incorrect.

## **9. JOINT ACCOUNTS**

If more than one individual signs this Agreement, the Account shall be deemed to be a joint account with right of survivorship, unless you are advised in writing to the contrary. Each individual shall be jointly and severally liable for all obligations hereunder, and the words "I," "me" and "the undersigned" wherever used herein shall be deemed to refer to each and all of such individuals. All instructions and notices to you may be given by any one of such individuals with the same effect as though consented to in writing by all of such individuals, and the cash, securities or other property in the Account may be paid or delivered to or on the order of any one of the undersigned, or the survivor.

## **10. BACKUP WITHHOLDING**

Under the penalties of perjury, the undersigned certifies that the Social Security Number (Taxpayer Identification Number) set forth below is correct and that the undersigned is not subject to "backup withholding" under Section 3406(a)(1)(C) of the Internal Revenue Code, or any successor provision.

## **11. ALLOCATION OF BROKERAGE**

Unless I have instructed you to employ the services of a specific broker, you may designate a broker or dealer to engage in any transaction involving the Account. In the selection of such brokers and dealers, it is understood and agreed that you may take into consideration not only available price and rates of brokerage commissions, but also other relevant factors, such as execution capabilities, reliability, efficiency, research and other services provided by such brokers or dealers (without having to demonstrate that such factors are a direct benefit to me).

## **12. TERMINATION AND MODIFICATION**

This Agreement may be modified upon such terms as may be mutually agreed upon in writing. This Agreement may be terminated upon notice by either party hereto and the annual fees payable hereunder shall be prorated to the termination date.

## **13. SERVICE TO OTHER CLIENTS**

It is understood that you perform investment advisory services for various clients, which may include investment companies or other collective investment entities. I agree that you may give advice and take actions with respect to any of your other clients, which may differ from advice given or the timing or nature of actions taken with respect to the Account, so long as it is your policy, to the extent practical, to allocate investment opportunities to the Account over a period of time on a fair and equitable basis relative to other clients. It is understood that you shall not have any obligation to purchase or sell, or to recommend for purchase or sale, for the Account any security that you, your principals, affiliates or

employees may purchase or sell for your or their own accounts or for the account of any other client, if, in your opinion, such transaction or investment appears unsuitable, impractical or undesirable for the Account.

**14. INDEMNIFICATION**

I agree to indemnify and hold you harmless from any loss or liability, including attorney fees and other expenses, arising from compliance with the terms of this Agreement or compliance with instructions given to you, unless such loss or liability is caused by your gross negligence or misconduct.

**15. GOVERNING LAW; ATTORNEY FEES**

This Agreement shall be governed by the laws of the State of Oregon and shall not be affected by my subsequent disability or incompetence. You shall be under no obligation to determine whether or not any instructions given to you are contrary to any provision of law. If suit or action is brought to enforce or interpret this Agreement, the prevailing party shall be entitled to recover, in addition to other relief that the court may award, an amount that the court may award as reasonable attorney fees prior to trial, on trial or on any appeal.

**16. FURTHER INFORMATION**

• **INDIVIDUALS:**

I, the undersigned, NANCIE LEE HATHWAY, am a citizen of USA

Legal Residence 2322 N HARMON  
TACOMA, WA 98406

Home Telephone Number 206-759-7777 Business Telephone Number 206-752-7777

Social Security Number 535-40-1937 Date of Birth OCTOBER 4, 1942

• **TRUSTS (ESTATES):**

Name of Trust Beneficiary (Decedent) \_\_\_\_\_

Citizenship of Trust Beneficiary (Decedent) \_\_\_\_\_

Legal Residence of Trust Beneficiary \_\_\_\_\_

Trust's (Estate's) Taxpayer Identification Number \_\_\_\_\_

Beneficiary's Tax Identification Number \_\_\_\_\_

Date: January 2, 1996

Very truly yours,  
Nancie Lee Hathway

U. S. Trust Company of the Pacific Northwest assumes responsibility in accordance with this Letter of Agreement for property received for this Account.

Date: January 4, 1996

By: [Signature]  
Title: Vice President

Nancie Lee Hatheway  
Account No. 752-808-80

**SCHEDULE A**

Cash

\$1,000,000.00 wire  
transferred from Merrill  
Lynch account no. 325-98447  
(1/3/96)

NH 002313

U.S. TRUST COMPANY  
OF THE PACIFIC NORTHWEST

THE RIVER FORUM, SUITE 450  
4380 S.W. MACADAM AVENUE  
TELEPHONE: 503 228-2300  
FAX: 503 228-1724

**U.S. TRUST**

**FEE SCHEDULE**

**DISCRETIONARY TRUSTEE  
OR  
INVESTMENT AGENT SERVICES**

**PERSONAL AND TAXABLE TRUSTS**

**GENERAL PRACTICES**

Account acceptance fees may be charged to accumulate and review documentation, transfer assets and establish the account on internal operating systems. Fees will be charged at current hourly rates.

Minimum acceptance fee \$300.00

Fees for services are prorated and charged to the account quarterly. Clients have the option to reimburse their accounts for amounts charged. Additional charges may apply to multiple operational and/or investment account structures; personal or real property. Fees for these services will be quoted.

**ANNUAL SERVICE FEES**

|                 | <b>USTPN<br/>Global<br/>CTF</b> | <b>UST<br/>Master<br/>Funds Portfolios</b> | <b>All Equity or<br/>Balanced<br/>Portfolios</b> | <b>Fixed Income<br/>(Only)<br/>Portfolios</b> |
|-----------------|---------------------------------|--|--|---|
| Annual Base Fee | \$1,200                         | \$1,000                                    | \$1,200  | \$1,200                                       |

**INVESTMENT MANAGEMENT**

Discretionary management utilizing USTPN-sponsored Common Trust Funds, Domestic Depository Securities, external Mutual Funds or UST Master Funds:

|                           | <b>USTPN<br/>Global<br/>CTF</b> | <b>*UST<br/>Master Fund<br/>Portfolios</b> | <b>All Equity or<br/>Balanced<br/>Portfolios</b> | <b>Fixed Income<br/>(Only)<br/>Portfolios</b> |
|---------------------------|---------------------------------|--|--|---|
|                           | mv @ 1.50%                      |  |  |   |
| \$ 0 - 500,000            |                                 |  | 1.10%  | .75%  |
| \$ 500,000 - \$1,000,000  |                                 |  | 1.00%  | .60%  |
| \$1,000,000 - \$2,000,000 |                                 |  | .90%   | .55%  |
| \$2,000,000 - \$5,000,000 |                                 |  | .75%   | .50%  |
| \$5,000,000 +             |                                 |  | QUOTE  | QUOTE   |

\*Investment Management fees charged within the Funds as disclosed in the Fund prospectus.

\*Irrevocable Trusts are not eligible for investment in UST Master Funds

**TRUST ADMINISTRATIVE SERVICES**

Annual Fiduciary Tax Reporting ~~\$500~~

**Distributions and Payments** -- including State and Federal tax withholding/reporting:

Payment of expenses \$ 8.50 each  
Wire transfers \$15.00 each

**Insurance Policies/Annuity Contracts**

Premium payments \$8.50 each  
Asset maintenance \$50.00 each per year

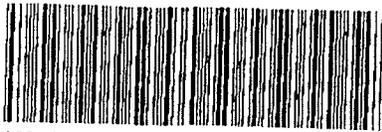
**EXPENSES, OTHER SERVICES AND TERMINATION FEES**

Expenses incurred in the daily operation of an account, including postage, insurance or transfer costs will be charged to the account.

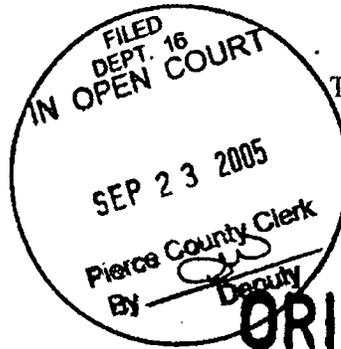
Fees for services not specifically stated in this fee schedule will be determined commensurate with time required and USTPN responsibility. Administrative time will be charged at current administrative hourly rates.

Account termination fees will include a base charge of \$500.00 plus asset transfer or liquidation fees of \$25.00 per security, reimbursement for any extraordinary expense incurred and administrative time charges at current hourly rates. Fees for account relationships which include multiple operational or beneficiary/participant accounts will be quoted at the time of termination. Minimum closing base fee is \$1,000.00 for multiple account arrangements.

## APPENDIX B



04-2-12094-8 23789782 FNFL 09-28-05



The Honorable Lisa Worswick

ORIGINAL

SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

NANCIE HATHEWAY,

Plaintiff,

v.

U.S. TRUST COMPANY, N.A., a Connecticut corporation,

Defendant.

No. 04 2 12094 8

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT U.S. TRUST'S MOTION FOR ATTORNEYS' FEES AND COSTS

Defendant's Motion for Attorneys' Fees and Costs was heard pursuant to notice in Pierce County Superior Court before the Honorable Lisa R. Worswick, Department 16, on Friday, July 29, 2005. The moving party, Defendant U.S. Trust Company, N.A. appeared through its counsel of record Grace M. Healy of Grace M. Healy, PLLC and Peter T. Petrich of Davies Pearson, P.C.; Plaintiff Nancie Hatheway appeared through her counsel of record G. Perrin Walker of Vandenberg Johnson & Gandara. The Court, having reviewed the briefs and declarations in support and in opposition to the motion and the legal authority cited and documentary exhibits provided therein, including each of U.S. Trusts' attorneys' time records and other invoices; having heard argument on behalf of Plaintiff and Defendant; and having made her oral decision in open court immediately thereafter, Now, Therefore, enters the following:

\*  
\*

*and having requested Plaintiff's Counsel to prepare findings and conclusions so that Plaintiff will*

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT U.S. TRUST'S MOTION FOR ATTORNEYS' FEES AND COSTS - 1

VANDEBERG JOHNSON & GANDARA A PARTNERSHIP OF PROFESSIONAL SERVICE CORPORATIONS 1201 PACIFIC AVENUE, SUITE 1900 P.O. BOX 1315 TACOMA, WASHINGTON 98401-1315 (253) 383-3791 (TACOMA) FACSIMILE (253) 383-8377

*not be required to pay the fees of Defendant's Counsel in so doing,*

*Handwritten notes and signatures on the right margin, including 'H. Luna', 'J.P.', 'G.P.', 'AP', 'J. Perrin Walker', and a circled 'w'.*

FINDINGS OF FACT

Any Conclusions of Law that are determined to include Findings of Fact are incorporated into these Findings of Fact. The Court finds that:

1. Insufficient Detail or Segregation in Attorneys' Time Records. In many instances, the attorneys' time records failed to provide the court with sufficient detail and segregation to clarify for the court how the time was being used and whether the time was reasonably spent. This court reviewed each of Ms. Healy's and Mr. Petrich's time entries and either allowed them or disallowed them based on what the Court could determine was reasonable for this case. *When in the middle of a trial, it is understandable that the day's hours are not segregated as to particular tasks.* (u)

2. Duplication. There were three people sitting in at trial for the Defendant, and the records submitted disclosed three to four people doing very similar things with no declaration as to why such was necessary or to show that much of such work was not duplicative. Much of Mr. Petrich's work was to review Ms. Healy's work and to accompany Ms. Healy to meetings, depositions and at trial. *There would well be several reasons why that might be necessary, however, U.S. Trust failed to explain the reasonableness of having two attorneys doing the same work.* *did not* Mr. Petrich prepared for and conducted Jeff Yandle's examination and April Sanderson's examination at trial.

3. Fees for Unknown Individuals. U.S. Trust claimed over \$5,000 in fees for "HK" without identifying "HK" or his/her duties or qualifications. U.S. Trust *did not* ~~failed to~~ provide the same information for "DGW", who delivered things to the courthouse at something close to the hourly rates shown for attorneys, and "JC", a legal assistant.

4. Segregation of Claims. Much of the evidence presented on the issues of breach of fiduciary duty and breach of contract was the same, and the two claims were too intertwined to be treated separately. For example, Plaintiff's counsel argued in his closing that the facts in this case amounted both to a breach of fiduciary duty and breach of contract.

\*  
\*

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
ON DEFENDANT U.S. TRUST'S MOTION FOR  
ATTORNEYS' FEES AND COSTS - 2

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(253) 383-3791 (TACOMA)  
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*Handwritten notes and initials on the right margin:*  
- A large checkmark or signature.  
- Initials: "JP", "MP", "JW", "R", "MP", "JP".  
- Circled "u" marks.

1 5. Reasonable Hourly Rates. The Court finds that the respective hourly rates of  
2 Counsel for Defendant are reasonable in Pierce County, Washington.

3 6. Costs.

4 a. U.S. Trust's invoices included numerous expenditures, such as for expert  
5 analysis and witnesses, costs of mediator, travel, meals, parking, lodging, photocopying and  
6 postage.

7 b. U.S. Trust put into evidence only a portion of the second volume of  
8 Michelle Dicus' deposition.

9 Having entered the foregoing Findings of Fact, the court now, therefore, enters the  
10 following:

11 **CONCLUSIONS OF LAW**

12 Any of the foregoing Findings of Fact, which include conclusions of law, are  
13 incorporated herein by this reference as Conclusions of Law. From the foregoing Findings, the  
14 court concludes:

15 1. The Indemnity Clause. Defendant U.S. Trust was a fiduciary as to Plaintiff  
16 Nancie Hatheway. *The indemnity clause has been construed against U.S. Trust, the drafter*  
17 paragraph 14, in the Investment Management Account Letter of Agreement between the parties *of the*  
18 (Trial Exh. 190, "the Letter of Agreement"), because that clause does not apply to the facts of *agreement.*  
19 this case. It is against public policy for a fiduciary to require its ward to indemnify the fiduciary  
20 against the fiduciary's negligence, just as it would be for a fiduciary to require an indemnity  
21 against the fiduciary's gross negligence or misconduct in carrying out its fiduciary duties.

22 2. The Contract Clause. Paragraph 15 of the Letter of Agreement is the basis for an  
23 award of attorneys' fees and costs to Defendant as the prevailing party on the breach of contract  
24 claims in this case.

*Handwritten notes and signatures on the right margin, including "The indemnity clause has been construed against U.S. Trust, the drafter of the agreement." and initials "PB" and "W".*

3. Segregation of Claims/Defenses.

a. The WSSA claim is distinct from the breach of contract claim. There is no legal principle under which U.S. Trust would be entitled to recover any attorneys' fees or costs spent defending the WSSA claim.

b. The breach of contract claims and the breach of fiduciary duty claims were too intertwined to separate because the same facts were used to support and defend against both such claims. Proof of one was proof of the other.

c. The statute of limitations defense was not relevant, because the case was brought within the six (6) year breach of contract limitation period. No attorneys' fees are awardable to Defendant on this defense.

4. U.S. Trust's Burden to Prove Reasonableness. U.S. Trust's attorneys bore the burden of proving that their fees are reasonable and their costs are recoverable under the applicable "costs" statutes. In many instances, U.S. Trust ~~failed to~~ <sup>did not</sup> carry this burden as to the attorneys' fees requested because ~~of~~ <sup>did not</sup> U.S. Trusts' ~~failure to~~ <sup>failure to</sup> provide the court with sufficient detail and segregation to clarify for the court how the time was being used, whether time was spent on claims for which attorneys' fees were awardable, and whether the amount of time was reasonable as to the various services rendered.

5. The lodestar method is properly used to assist the Court in determining reasonable attorneys' fees, with due consideration of other factors from RPC 1.5 and case law.

6. Beginning Date. This court lacks jurisdiction to award fees or costs to defend a federal lawsuit, such as the case that was voluntarily non-suited from Federal Court preceding the filing of this action in this Court; therefore, U.S. Trust is not entitled to any fees and costs incurred before <sup>the starting date of this lawsuit, and the court started with</sup> ~~the~~ <sup>no date of</sup> October 4, 2004, the date of U.S. Trust's attorneys' first invoices.

7. Fees for Unknown Individuals. All of "HK's" time is disallowed because U.S. Trust ~~failed to~~ <sup>did not</sup> carry its burden to prove these fees are reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
ON DEFENDANT U.S. TRUST'S MOTION FOR  
ATTORNEYS' FEES AND COSTS - 4

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*[Handwritten signatures and initials on the right margin, including "JW", "PG", and "G"]*

1 8. Reasonable Rates. Mr. Petrich's hourly rates of \$235.00 in 2004 and \$245.00 in  
2 2005 and Ms. Healy's hourly rate of \$265.00 are reasonable for attorneys of their experience in  
3 Pierce County.

4 9. Ms. Healy's Reasonable Hours.

5 a. October 2004. Time in excess of 10.4 hours is excluded. A significant  
6 portion of the excluded time was spent on the Washington State Securities Act ("WSSA") claim.

7 b. November 2004. Time in excess of 5.2 hours is excluded.

8 c. December 2004. Time in excess of 1.7 hours is excluded. The hours  
9 excluded were for items such as conferencing with Mr. Petrich.

10 d. January 2005. Time in excess of 8.1 hours is excluded.

11 e. February 2005. Time in excess of 41.4 hours is excluded. The hours  
12 excluded were for items such as part of the document review and researching the marital  
13 privilege, which did not apply in this case.

14 f. March 2005. Time in excess of 109.2 hours is excluded. The hours  
15 excluded were for items such as the statute of limitations defense, the WSSA claim, and  
16 approximately eight hours of the summary judgment revisions.

17 g. April 2005. Time in excess of 80.6 hours is excluded. The hours  
18 excluded primarily were for some of the legal research and drafting.

19 h. May 2005. Time in excess of 150.2 hours is excluded. The hours  
20 excluded were primarily for HK's time and for "attention to plaintiff's documentary evidence,"  
21 which is too ambiguous to allow this court to determine its reasonableness.

22 i. June 2005. Time in excess of 10.2 hours is excluded.

23 j. July 2005. Time in excess of 12.5 hours is excluded. The hours excluded  
24 primarily consisted of approximately four hours of research on attorneys' fees and the standard  
25 of review which time was spent before ~~the hearing of July 29, 2005 and this court's decision on~~  
26 ~~the motion.~~

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
ON DEFENDANT U.S. TRUST'S MOTION FOR  
ATTORNEYS' FEES AND COSTS - 5

F:\10000-10999\10539\10539-00003\PLEADINGS\WLP1JS - FF & CL (ATTY FEES).DOC

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(253) 383-3701 (TACOMA)  
FACSIMILE (253) 383-8377

1 k. Ms. Healy's Total Reasonable Hours. The Court <sup>held that</sup> ~~adjusted~~ Ms. Healy's  
2 total hours to be allowed as reasonable to ~~417~~ <sup>and 429.5</sup> hrs. (D)

3 10. Mr. Petrich's Reasonable Hours. The Court reviewed each of Mr. Petrich's time  
4 entries and either allowed them or disallowed them based on what was reasonable for this case.  
5 Ten (10) hours is a reasonable amount of time to prepare and conduct Jeffrey Yandle's and April  
6 Sanderson's examinations at trial.

7 11. Lodestar Adjustment. This case was over prepared. For example, the Court  
8 received eleven notebooks of documents, but the documents that were actually admitted into  
9 evidence at trial filled only two and one-half notebooks. <sup>The above</sup> ~~Therefore, a lodestar~~ adjustment  
10 downward to the ~~417~~ <sup>429.5</sup> allowed hours <sup>was</sup> made to come to a reasonable number of hours for Ms.  
11 Healy's services. Considering all of the RPC 1.5(a) factors of a reasonable attorneys' fee,  
12 including the novelty and difficulty of the issues involved, the skill and time required, the  
13 amount involved in the matter and results obtained, and the nature and length of the professional  
14 relationship between U.S. Trust and its attorneys, the Court allows 75% of Ms. Healy's ~~417~~ <sup>429.5</sup>  
15 hours of allowed time as reasonable. (D)

16 12. Costs.

17 a. Recovery Limited to Statutory Costs. The reasonable attorneys' fees  
18 clause, paragraph 15 of the Letter of Agreement, does not provide for the Defendant to recover  
19 all of its litigation expenses or "costs" in this action. Recoverable "costs" for breach of contract  
20 actions, provided in RCW 4.84.330, are defined by and limited to the "costs" listed in RCW  
21 4.84.010. Therefore, U.S. Trust is not entitled to recover all of its claimed litigation expenses,  
22 including expenditures for expert analysis or witnesses, a mediator, travel, meals, lodging,  
23 parking, photocopying and postage.

24 b. Recoverable Costs. U.S. Trust referred to and used at trial a part of the  
25 second volume of Michelle Dicus' deposition and is therefore entitled to recover a reasonable  
26

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
ON DEFENDANT U.S. TRUST'S MOTION FOR  
ATTORNEYS' FEES AND COSTS - 6

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part of the cost thereof; allowing \$100.00, or approximately twenty percent (20%) of the costs listed by U.S. Trust for that deposition, is reasonable.

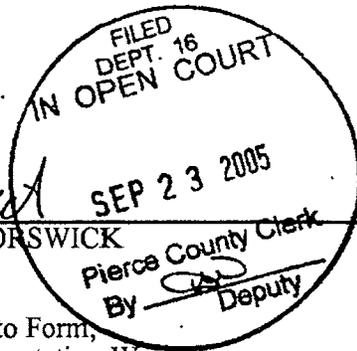
13. Total Attorneys' Fees and Costs Award. Defendant U.S. Trust is entitled to recover from Plaintiff Nancie Hatheway the following as reasonable attorneys' fees and costs:

- a. 75% of Ms. Healy's 417 hours of allowed time at her hourly rate, or \$ 85,323.37  
~~\$82,878.75~~
- b. plus, 10 hours of Mr. Petrich's time, or \$ 2,450.00
- c. plus, a reasonable part of the cost of the Dicus deposition, second volume, or \$ 100.00
- d. total award to U.S. Trust ~~\$85,428.75~~  
\$ 87,773.37

Judgment should be entered forthwith in accordance with these Findings and

Conclusions.

DONE IN OPEN COURT this 23<sup>rd</sup> day of September, 2005.



Lisa Worswick  
JUDGE LISA R. WORSWICK  
By [Signature] Deputy

Presented by and Approved as to Form:

Approved as to Form,  
Notice of Presentation Waived:

VANDEBERG JOHNSON & GANDARA

GRACE M. HEALY, PLLC

By [Signature]  
G. Perrin Walker, WSBA #4013  
Neal Luna, WSBA #34085  
Attorneys for Plaintiff

By [Signature]  
Grace M. Healy, WSBA #30991  
Attorney for Defendant

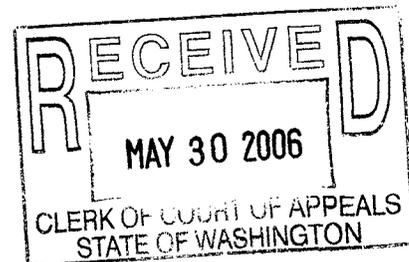
DAVIES PEARSON, P.C.

By [Signature]  
Peter T. Petrich, WSBA #8316  
Attorneys for Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
ON DEFENDANT U.S. TRUST'S MOTION FOR  
ATTORNEYS' FEES AND COSTS - 7

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## VANDEBERG JOHNSON &amp; GANDARA

A PARTNERSHIP OF PROFESSIONAL SERVICE CORPORATIONS  
ATTORNEYS AT LAW1201 PACIFIC AVENUE, SUITE 1800  
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| Lisa                      | Court of Appeals                            | 253/593-2970          | 253/593-2806    |
| <b>Date:</b> May 30, 2006 | <b>No. of Pages</b> 3 (including this page) |                       |                 |
| <b>From:</b> Ginny Tucker | <b>File No.:</b> 10539.5                    |                       |                 |
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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

---

NANCIE HATHEWAY,

Appellant/Cross-Respondent,

v.

U.S. TRUST COMPANY, N.A., a Connecticut corporation,

Respondent/Cross-Appellant.

---

**CERTIFICATE OF SERVICE**

---

VANDEBERG JOHNSON & GANDARA

G. Perrin Walker, WSBA #4013  
Daniel C. Montopoli, WSBA #26217  
Neal Luna, WSBA #34085  
Attorneys for Appellant

1201 Pacific Avenue, Suite 1900  
P. O. Box 1315  
Tacoma, WA 98401-1315  
(253) 383-3791

I hereby certify under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct:

That on May 26, 2006, I caused to be delivered a true and correct copy of: **REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT** to:

Grace M. Healy  
Grace M. Healy, PLLC  
1420 - 5th Ave., Ste. 2200  
Seattle, WA 98101-1346  
healygm@comcast.net

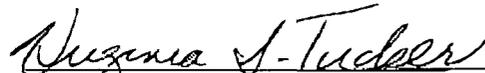
Peter T. Petrich  
Davies Pearson, P.C.  
920 Fawcett Avenue  
P. O. Box 1657  
Tacoma, WA 98401  
ppetrich@dpearson.com

by the following methods:

Depositing same postage pre-paid in the United States Mail, addressed to the persons identified above.

Forwarding by e-mail to the persons identified above at the e-mail address provided above.

DATED this 26<sup>th</sup> day of May, 2006, at Tacoma, Washington.

  
VIRGINIA S. TUCKER