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March 31, 2010

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Re: Merrill Lynch Trust Company, FSB v. Campbell, et al.
C.A. No. 1803-VCN
Date Submitted: December 14, 2009

Dear Counsel:

This letter opinion addresses the remaining dispute arising out of this trust accounting action: the amount of legal fees withdrawn by, and applied for the benefit of, Plaintiff Merrill Lynch Trust Company, FSB ("MLTC"), as trustee of the Mary F.C. Campbell Charitable Remainder Unitrust (the "Trust").

The Court's post-trial memorandum opinion, which generally rejected Defendant Mary F.C. Campbell's challenges to MLTC's investment strategies, concluded that MLTC was, in accordance with the Trust Agreement, entitled to its

attorneys' fees incurred in this action.¹ In short, MLTC was authorized to seek judicial approval of its trust accounting, and it was entitled to the attorneys' fees incurred in that effort, including the costs of defending the counterclaims lodged against it by Campbell. Campbell now challenges the appropriateness of the fees which have been charged to, and taken from, the Trust.

Although MLTC may have the right to recover from the Trust the attorneys' fees it incurred in pursuing this accounting action, those fees must, nonetheless, be reasonable.² The total amount of the fees and expenses, approaching \$300,000,³ when compared to the assets of the Trust at the time this matter was commenced, roughly \$315,000, is substantial. Indeed, MLTC's withdrawal of fees has so depleted the Trust's assets that the remaining balance may fairly be characterized as nominal.

¹ *Merrill Lynch Trust Co., FSB v. Campbell*, 2009 WL 2913893, at *13 (Del. Ch. Sept. 2, 2009) (the "Memorandum Opinion"). A certain familiarity with the Memorandum Opinion is presumed, and a few defined terms are now borrowed from that source. Earlier, the Court had held that Campbell's counterclaim challenging the formation of the Trust was time-barred. *Merrill Lynch Trust Co., FSB v. Campbell*, 2007 WL 2069867, at *4 (Del. Ch. July 11, 2007). That conclusion had a far-reaching effect on the subsequent course of this proceeding. Even MLTC now appears to concede that inducing Campbell to invest the bulk of her life savings in a charitable remainder unitrust with an unheard of 10% annual payout was, at best, questionable.

² See CX 1 ("All of the Trustee's fees and expenses (including *reasonable* attorneys' fees) attributable to any accounting and/or approval shall be paid by the [Trust].") (emphasis added).

³ MLTC seeks approval of \$252,762.62 in fees and \$34,403.23 in expenses. This does not include fees incurred in the Injunctive Action. See text accompanying note 4, *infra*.

The Court has already concluded that MLTC must rebate to the Trust those fees improperly withdrawn in related litigation—the Injunctive Action—that were primarily, if not exclusively, incurred for the benefit of an entity related to MLTC.⁴ MLTC’s willingness to use Trust funds for an inappropriate purpose bolsters Campbell’s argument that MLTC’s practices with respect to payment of attorneys’ fees from the Trust must be carefully reviewed.

The substantive trust administration and asset investment issues addressed in the Memorandum Opinion were difficult, novel, and close. Yet, it is the complexity of this case that—perhaps unfortunately—generated the need on the part of MLTC for a costly defense. That the attorneys’ fees consumed such a large portion of the Trust’s assets is, of course, troubling. There is, however, no formal proportional (or percentage of Trust assets) test to apply in this context.⁵ Although Campbell understandably focuses upon MLTC’s attorneys’ fees in relation to the Trust corpus, the extent of her claims against MLTC also inform a contextual review of the reasonableness of the contested fees. Indeed, MLTC faced substantial potential

⁴ Mem. Op. at *12.

⁵ See *In re Fischberg Family Trust*, 2009 WL 1451892, at *2 (Del. Ch. May 21, 2009).

exposure from Campbell's claims for a refund of all fiduciary, brokerage, investment and advisory fees, portfolio losses resulting from MLTC's investment strategies, a refund of all attorneys' fees paid on behalf of MLTC, and her own litigation costs and expenses.⁶ For example, Campbell claimed as much as \$636,833 just for damages resulting from MLTC's investment strategies.⁷ When considered as a fraction of MLTC's potential liability, MLTC's attorneys' fees appear significantly more reasonable.

Ultimately, Campbell's argument that MLTC's defense was just too expensive in light of the size of the Trust fails unless MLTC is unable to show that the fees were reasonably incurred in an effort to defend against her claims.⁸ MLTC, as one would expect, arranged for legal services that were billed on an hourly basis. The hourly rates of its law firm were reasonable for the work that MLTC required. The defense team was not "over staffed"—most of the work was done by two lawyers. Judging, from the Court's distance, whether time dedicated to a case was excessive is, of

⁶ See Mem. Op. at *5.

⁷ See Campbell Opening Post-Trial Br. at 34.

⁸ Although brought by MLTC as an action for judicial approval of a trustee's accounting, Campbell's counterclaims challenging fiduciary conduct formed the basis of virtually all of the contested matters.

course, not an easy task. Nevertheless, the Court finds that, at least based on the record before it, the hours billed were, from a general perspective, reasonable in light of the tasks to be performed.

Again, Campbell points to certain factors that give pause. For example, in its ill-fated effort to enjoin the NASD arbitration proceeding, MLTC racked up \$75,786 in fees while Campbell's successful defense cost only \$9,672. Other than enhancing sensitivity to the issue of fees, however, a relative comparison of fees from both sides of the Injunctive Action—without more—offers little guidance. Myriad factors—ranging from the skill and competence of Campbell's attorney to the difficulty of MLTC's litigation position—could account for the discrepancy. Neither side has presented any kind of useful factual record to support a more detailed analysis, and even a richer record might leave uncertainty and lead to speculation. Moreover, the fees charged in the Injunctive Action are, in accordance with the Memorandum Opinion, to be returned to the Trust.

As another example, Campbell questions MLTC's choice to retain lawyers from a state other than Delaware. She postulates that Delaware attorneys could have served MLTC more cheaply. Nonetheless, there is nothing that required MLTC to

hire lawyers from Delaware; given that the formation of the Trust involved conduct, in part, in Florida, MLTC's decision to use Florida counsel from a firm with an office in Delaware was within the reasonable exercise of its discretion. Moreover, MLTC has agreed to forego a claim for travel expenses incurred by its counsel and has committed to rebate such expenses to the Trust.⁹ Thus, Campbell's concerns about the use of out-of-state counsel are essentially moot.

Campbell also points out that MLTC incurred thousands of dollars in attorneys' fees in resisting her motions for discovery—motions upon which she prevailed. Although the Court ruled against MLTC's litigation position with respect to the discovery at issue, the decision to contest Campbell's discovery motions was not unreasonable or reflective of conduct in any way approaching bad faith. That a fiduciary, otherwise entitled to recover its legal fees, merely loses a discovery motion does not negate its right to recover those expenses.

Accordingly, as a result of the parties' post-trial submissions, and as considered in light of the Memorandum Opinion, the Court concludes that the attorneys' fees and expenses charged to the Trust by MLTC are reasonable, except, of

⁹ See MLTC's Response to Supp. Post-Trial Submission at 7.

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course, for those fees incurred with respect to the Injunctive Action.¹⁰ In addition, the travel expenses of MLTC's counsel, in accordance with MLTC's recent concession, will not be approved.

This should be sufficient for counsel to confer and to submit a final implementing order.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

¹⁰ This would also include those fees and expenses incurred in this action to defend the expenditure of Trust funds used to prosecute the Injunctive Action.