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February 7, 2011

VIA HAND DELIVERY

Essex Probate and Family Court
36 Federal Street
Salem, MA 01970
Attn: Clerk's Office

Re: *Alexander B.C. Mulholland, et al. v. Attorney General, et al.*
Civil Action No. ES09E0094QC

Dear Sir/Madam:

Enclosed for filing in the above-referenced action please find *Reply to Opposition to Motion to Substitute Parties and to join Parties as Defendants.*

If you have any questions, please do not hesitate to contact me. Thank you.

Very truly yours,

Christine M. Griffin (elb)
Christine M. Griffin

CMG/elb
Enclosures

cc: William Sheehan (by mail)(with enclosure)
Richard Allen (by mail)(with enclosure)
Johanna Soris (by mail)(with enclosure)
Mark E. Swirbalus (by mail) (with enclosure)✓

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS. PROBATE & FAMILY COURT
NO. ES09E0094QC

ALEXANDER B.C. MULHOLLAND, JR, PETER FOOTE, DONALD WHISTON, JAMES FOLEY, ELIZABETH KILCOYNE, PATRICK J. MCNALLY, AND INGRID MILES AS THEY ARE THE FEOFFEES OF THE GRAMMAR SCHOOL IN THE TOWN OF IPSWICH,
Plaintiffs,

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, IPSWICH SCHOOL COMMITTEE, AND RICHARD KORB, AS HE IS SUPERINTENDENT OF SCHOOLS IN THE TOWN OF IPSWICH,
Defendants.

REPLY TO OPPOSITION TO MOTION TO SUBSTITUTE PARTIES AND TO JOIN PARTIES AS DEFENDANTS

Plaintiff Patrick J. McNally ("McNally"), and substitute parties Raymond Morley ("Morley") and Charles Surpitski ("Surpitski"), have moved that the Court substitute Morley and Surpitski in this action for Plaintiffs Elizabeth Kilcoyne and Ingrid Miles, and that the Court realign McNally, Morley and Surpitski as Defendants in this action. At the hearing on Summary Judgment held in this matter on Monday, January 31, 2011, the Plaintiff Feoffees filed an Opposition to the Motion To Substitute Parties and Join Parties as Defendants (the "Motion"). At that hearing, the Court indicated that it would grant the portion of the Motion that requested substitution, and the Court would take the remainder of the Motion, requesting joinder as Defendants, under advisement. The Court also raised specific questions about the ability of

minority Trustees to appear separately and be heard. McNally, Morley and Surpitski now provide this Reply to the Plaintiff Feoffees' Opposition to their Motion to Join as Defendants addressing the issues raised at the hearing and the issues raised in the Feoffees' Opposition.

FACTS

Plaintiffs Alexander B.C. Mulholland, Jr., Peter Foote, Donald Whiston, James Foley, Elizabeth Kilcoyne, Patrick J. McNally and Ingrid Miles were the Feoffees of the Grammar School in the Town of Ipswich (the "Feoffees") at the time that this Civil Action was filed. The Feoffees own the real estate known as Little Neck, Ipswich, Massachusetts ("Little Neck"), containing approximately twenty-six acres (per Town Assessor's Records), in trust (the "Trust") for the benefit of the Ipswich Public Schools, which Trust was established by the Will of William Payne in 1660. *First Amended Complaint for Deviation Pursuant to G.L. c. 214, § 10B* ("Complaint"), at ¶1.

The governing structure for carrying out the Trust was established during the 18th century by the State Legislature.[1] Pursuant to the terms of that legislation, the Trust is presently governed by seven Feoffees, four of whom are appointed privately by their predecessors (the "Lifetime Feoffees") and three of whom serve by virtue of being members of the Ipswich Board of Selectmen (the "Selectmen Feoffees"). Answer at Counterclaim ¶ 3. The Court has granted McNally, Morley and Surpitski's Motion to Substitute, and McNally, Morley and Surpitski are therefore named Plaintiffs in this matter as Selectmen Feoffees.

Under the Trust's governing structure statute, the Lifetime Feoffees are supposed to operate together with the Selectmen Feoffees as a "joint committee," governing the affairs of the

[1] Chapter 26 of the Acts of 1756, Chapter 5 of the Acts of 1765-66, and Chapter 55 of the Acts of 1786.

Trust by majority vote.[2] The Selectmen Feoffees have examined the facts, including a number of facts that have only recently become available regarding the appraised value of the land at issue, the impact of that value on settlement, and the pros and cons of renting the property versus selling it. Based on those facts, the Selectmen Feoffees oppose the entry of Summary Judgment in this matter. In this case, where the Lifetime Trustees seek a Complaint for Deviation to sell the Trust assets, it is vital that the Selectmen Trustees be permitted to separately participate in this civil action so that they can provide the Court with the public perspective that the legislature intended. Moreover, in their capacity as the minority trustees, with an independent fiduciary duty to the beneficiaries, it is also vital that they be permitted to participate in this matter. These goals can best be accomplished by designating the Selectmen Feoffees as Defendants, and permitting them to participate in the case, with their own counsel, in that capacity.

ARGUMENT

The Private Feoffees have filed an Opposition to the Motion to Join as Defendants. In that Opposition, the Private Feoffees argue that, pursuant to the governing legislation, they may sue or be sued and they may act "by the whole or the major part of them." See Chapter 5 of the Province Laws of 1765-66, a copy of which is attached to the Opposition as Exhibit A. The Private Feoffees argue that they, as the majority, have brought this suit, and that therefore the Selectmen Feoffees have no role to play in this litigation. This is a myopic reading of the governing legislation that entirely ignores both the structure of the "joint committee" of Feoffees established by the legislature, and the duty of the Selectmen Feoffees as Trustees and fiduciaries to ensure that the Trust acts in the best interests of the beneficiaries.

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[2] Originally, those affairs included the management of the Ipswich Grammar School itself; a role which has been superseded by the current municipal structure of school governance.

I. The Selectmen Feoffees Are Necessary Parties to this Action.

As argued more extensively in their Motion, McNally, Morley and Surpitski are Trustees who have been named individually as Plaintiffs in this action. They are necessary parties under the rules of Civil Procedure because the outcome of this litigation will foreclose their ability to participate in the decision-making process regarding the disposition of the trust asset, and full relief cannot be granted without their participation. See Mass.R.Civ.P. 19(a). That participation is both their right and their duty under the governing legislation and in their position as Trustees with a fiduciary obligation to the beneficiaries. McNally, Morley and Surpitski are not seeking to intervene, as they are already party Plaintiffs. They are not seeking to participate in this matter as individuals, but in their current status as party-Feoffees. Joinder of the Selectmen Trustees in this matter in the Complaint was proper because they are necessary parties, and re-alignment of those parties as Defendants is now proper because the Selectmen Trustees disagree with the requests for relief sought by the other Private Feoffee Plaintiffs.

II. The Governing Legislation Requires the Participation of the Selectmen Feoffees.

This civil action does not relate to day-to-day trust administration. It is not a simple tort or contract action. This civil action seeks a significant deviation from the terms of the Trust, to wit, the sale of the Trust asset when such a sale is specifically prohibited by the terms of the Trust. The Private Feoffees assert that they have the right, under the governing legislation, to pursue litigation as the majority Feoffees. They reason that, because they have the right to pursue litigation, the minority Feoffees have no right to be heard in this litigation. That reading of the governing legislation focuses on operational details, as opposed to the decision-making structure created by the legislature. That reading should not be adopted by the Court.

The governing legislation specifically provides that Trust decisions will be made by a "joint committee" of public Selectmen Feoffees and Private Feoffees. In order for the Selectmen portion of that joint committee to participate in the process of determining whether deviation is appropriate, they should be permitted to participate in this matter and present their positions to the Court. To read the governing legislation to authorize the majority Trustees to seek to deviate from the basic terms of the trust without the **participation** of the Selectmen Trustees in that litigation process ignores the establishment of the Feoffees as part of a "joint committee" with a unique, public viewpoint that was intended to be heard and considered.

III. The Feoffees Are Permitted, and Required, To Join This Action In Their Capacity as Trustees.

The Selectmen Feoffees recognize that they are the minority Trustees in this Trust. However, their minority status does not relieve them of their fiduciary duty to the beneficiaries. As minority Trustees, they are concerned that the course of action currently proposed by the majority Trustees may not be in the best interests of the beneficiaries and as such, they have not only a right but a duty to alert the Court to their concerns.

A trustee is required to use diligence and wise discretion in conducting the affairs of the trust. In the context of a sale of land, this means obtaining the best price possible. See *Exchange Trust Co. v. Doudera*, 270 Mass. 227, 229 (1930)(in a case where sale of trust property was specifically authorized by the trust, the question in determining whether the trustees had acted properly was whether the trustees exercised proper diligence, proper care, sound judgment and wise discretion to obtain the best price for the property). In this case, the minority trustee Selectmen Feoffees are concerned that the deviation that is requested may not be in the best interests of the beneficiaries, in part, because they are concerned that the proposed sale price is not the best price for the property.

When minority Trustees have concerns about the wisdom of the actions of the majority Trustees in seeking to reform the Trust, they have an affirmative duty to alert the Court to their concerns, and they should participate in any related court action. See Charles E. Rounds, Jr. and Charles E. Rounds, III, Loring and Rounds: A Trustee's Handbook, § 6.2.10, p. 6-239 (2010) (discussing affirmative obligation of Trustees to petition court for relief when trust purpose is frustrated, and noting that, "[i]n any proceeding that involves the reformation, modification, or outright elimination of a dispositive provision it is critical that each interested party be represented by independent counsel, or a guardian ad litem to the extent appropriate."). See also *Rutanen v. Ballard*, 424 Mass. 723, 731 (1997) (noting, in the context of a dispute over whether sale of trust assets should have occurred, that a trustee must "participate in the administration of the trust" and "use reasonable care to prevent a co-trustee from committee a breach of trust" and stating that, "[i]f one trustee refuses to exercise a power that the trustees are under a duty to exercise, 'the other trustees are not justified in merely acquiescing in the non-existence of the power. In such a case it is their duty to apply to the court for instructions.'"). Internal citations omitted.

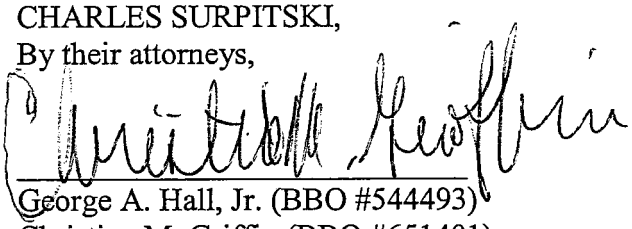
Here, the minority Trustees have a right and a duty to participate in this proceeding, where reformation of the Trust is sought by the majority Trustees and the minority Trustees have serious questions about the wisdom of that request. This is a Complaint for Deviation pursuant to G.L. c. 214, § 10B. This equity action is distinct from an action at law in which the Feoffees might litigate over a tort or a contract claim and in which the views of the minority Trustees might not be relevant to the Court. In this case, the Court must examine all of the facts and circumstances to determine whether the intent of the donor has been frustrated and whether the Trust asset is wasting. In an equity action such as this, Section 10B contemplates that all

interested parties will have the chance to participate and be heard, the governing legislation is structured to require participation by the Selectmen Feoffees in the decision-making, and the Selectmen Feoffees have a fiduciary duty to make their concerns known to the Court. That is precisely what the Selectmen Feoffees seek to do here.

Conclusion

WHEREFORE Plaintiff Patrick J. McNally, and substitute parties Raymond Morley and Charles Surpitski, hereby move that the Court join McNally, Morley and Surpitski as Defendants in this action.

Respectfully submitted,
Plaintiff PATRICK J. MCNALLY and
Proposed Parties
RAYMOND MORLEY and
CHARLES SURPITSKI,
By their attorneys,



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Dated: February 7, 2011

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2011, I caused a true and accurate copy of the foregoing document to be served by mail upon all counsel of record in this matter.

Christine M. Griffin