SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Intermediate Account of JPMorgan Chase Bank, N.A., as Trustee of the Trust Created by

JOHN D. ROCKEFELLER, JR.,
Settlor,

DECISION and ORDER
File No.: 1960-1623/B

For the Benefit of Lucy Aldridge Rockefeller, a/k/a Lucy Waletzky.

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M E L L A, S.:

The following papers were considered by the court in determining this motion to compel discovery:

PAPERS	NUMBERED
Objectant's Notice of Motion to Compel JPMorgan Chase Bank, N.A., to produce discovery in response to Objectant's document requests and interrogatories dated September 2, 2016, with affirmation of Justin M. Ellis, Esq., with exhibits and a memorandum of law	1,2,3
Affirmation of Zachary G. Newman, Esq., in Opposition to the Motion to Compel	4
Objectant's Reply in Support of Motion to Compel and Affirmation of Justin Ellis, Esq., in Support of Reply	5,6
Objectant's Second Demand for the Production of Documents, First Set of Interrogatories, and Request for Admissions, all dated September 2, 2016	7,8,9
Response and Objections of JPMorgan Chase to Objectant's Second Demand for the Production of Documents, First Set of Interrogatories, and Request for Admissions	10,11,12

In this contested intermediate trust accounting proceeding, Lucy Waletzky, trust beneficiary and objectant, has moved, pursuant to CPLR 3124, to compel JPMorgan Chase Bank, N.A., trustee, to comply with her disclosure demands, and to have the court deem admitted

matters raised in objectant's Requests for Admissions pursuant to CPLR 3123(a). The trustee opposes the motion and requests a protective order.

Background

The Trust ("the Waletsky Trust") was created under indenture dated December 27, 1943, by John D. Rockefeller, Jr., as grantor, and The Chase National Bank of the City of New York, as trustee, for the benefit of Lucy Aldridge Rockefeller, a/k/a Lucy Waletzky.[1] It is one of several trusts ("Relative Trusts") that John D. Rockefeller, Jr., created for his grandchildren, many if not all of which are currently administered by trustee JPMorgan Chase Bank, N.A. ("JPMorgan Chase" or "trustee"), which is the successor to The Chase National Bank by merger and consolidation. The Waletsky Trust was originally funded primarily with shares of stock of two oil companies, the Standard Oil Company of New Jersey and the Socony-Vacuum Oil Company, Inc.

Pursuant to the terms of the Waletsky Trust, income accumulated until Waletsky reached age 21, in 1962. At that time, the trustee accounted for its proceedings and all accumulated income was distributed outright to Waletsky. That accounting proceeding, for the period of 1943 through 1962, was uncontested and settled on Receipt, Ratification and Release dated June 26, 1962. There had been no subsequent proceedings concerning the trustee's account until 2012, when, upon the petition of Waletzky, this court ordered JPMorgan Chase to account for the period of March 9, 1962 to June 30, 2012.

An account and petition for its judicial settlement were filed by JPMorgan Chase on

[1] Pursuant to Article First of the Waletsky Trust, Waletsky has a limited testamentary power of appointment over the trust remainder. The takers in default of exercising this power are Waletsky's descendants or, if none, the Rockefeller Institute for Medical Research.

October 16, 2012, citation issued on May 23, 2013, and, after some prolonged initial discovery, Waletzky filed objections to the trustee's accounting on August 12, 2016. In her objections, Waletzky alleges that the trustee breached its fiduciary duty of loyalty to her, as beneficiary, as well as its duty to act with prudence, by engaging in self-dealing, and that this breach was further exacerbated by the trustee's failure to keep adequate records of its proceedings. Specifically, Waletzky alleges that, beginning in the latter half of 1967, the trustee, then Chase Manhattan Bank of New York, sold profitable oil stocks owned by the trust so that it could use the proceeds to purchase stock in 21 companies ("Trust Asset Companies") over which the trustee sought to gain power and exert influence. As a result of this alleged breach of the trustee's duties, Waletsky argues that the trust did not perform at the level it would have if the trustee had retained the original oil stocks. As a consequence, she contends, her beneficial interest in the trust was significantly impaired.

According to Waletsky, the actions underlying this alleged breach of the trustee's duties to invest prudently and to act with loyalty were part of a larger pattern of conduct on the part of Chase Manhattan Bank, as well as other financial institutions acting as trustees in the late 1960s and 1970s, by which trust funds were used to purchase stock in companies in which the trustees had, or attempted to have, influence. This activity, claims Waletsky, was documented in a 1968 Staff Report by the U.S. House of Representatives Subcommittee on Domestic Finance, part of the House Committee on Banking and Currency (Staff of S. Comm. on Domestic Fin., 90th Cong., Commercial Banks & Their Trust Activities: Emerging Influence in the Am. Econ. [Subcomm. Print 1968] ["the Patman Report"]). Waletsky alleges that the sale of the oil stocks stopped abruptly in 1968 after the Report issued, and that these stocks were not sold again (in any

significant amount) until the mid-1970s. According to Waletsky, by 1976, nearly all of the oil stocks had been sold.

Waletsky further contends that the trustee's alleged failure to maintain or retain records of its actions during much of the accounting period has thwarted her efforts to determine the trustee's investment strategy when it sold the oil stocks from the Waletsky Trust and that, because of this breach, the court should draw adverse inferences against the trustee.

In Waletsky's objections, she asks that the court surcharge the trustee to compensate the Waletsky Trust for the diminution in the value of the trust assets with its concomitant diminution in income distributions during the accounting period[2] as an alleged result of the sale of the oil stocks, deny the trustee's fees and commissions, and order the trustee to pay Waletsky's attorney's fees.

Disclosure Demands and Responses

In the course of discovery, the parties have fought over the breadth and relevance of objectant's disclosure requests. In July 2013, prior to the filing of objections, Waletsky served a first document demand on JPMorgan Chase, in response to which the trustee allegedly produced "all readily-available information" relating to the Waletsky Trust. For the fifty-year accounting period, the trustee produced 88 pages of documents, which Waletsky contends is insufficient and does not explain why the trustee sold the oil stocks. JPMorgan Chase concedes that there are limited trust records available, but explains that most of the accounting period was before such information was electronically stored. The trustee maintains, however, that the documents

[2]Waletsky alleges that she would have received in excess of $7 million more in net income from the Trust during the accounting period had the trustee not sold the oil stocks.

disclosed to objectant do provide the transactional history of the Waletsky Trust.

Soon after the objections were filed, Waletsky served on the trustee a Second Demand for the Production of Documents and a First Set of Interrogatories, both dated September 2, 2016. Objectant requested the production of 43 categories of documents and responses to 20 interrogatories relating to the trustee's decision to sell the oil stocks, the trustee's administration of the Waletsky Trust and the Relative Trusts, the trustee's disclosures to the Congressional subcommittee that led to the Patman Report, and the trustee's business relationships with companies whose stock was purchased with trust assets. Waletsky also sought information regarding the trustee's record-keeping during the accounting period. The trustee objected to these requests, arguing that they sought irrelevant information and were unduly burdensome.

Waletsky also served JPMorgan Chase with a Request for Admissions, dated September 2, 2016, in which she requested that the trustee admit or deny 87 matters, including, but not limited to, facts concerning Chase Manhattan Bank's sale of the oil stocks owned by the Waletsky Trust during the late 1960s and early 1970s; the Bank's holdings, in 1967, of stock issued by the Trust Asset Companies; its management of those companies' employee benefit plans; loans it made to those companies; and facts concerning the Bank's management of the Relative Trusts. JPMorgan Chase served a response on September 30, 2017, objecting to the Request for Admissions in its entirety, on many grounds, including that the requests did not seek the admission of matters of fact and that the trustee is asked to admit to matters which will be disputed at trial and go to the essence of the controversy between the parties.

Motion to Compel

Although the trustee and objectant appear to have made good-faith attempts at informally

resolving these discovery disputes, such attempts were to no avail. Objectant filed the instant motion to compel the trustee to comply with certain specific items in her September 2, 2016 Second Demand for the Production of Documents and her First Set of Interrogatories. She also moves for an order compelling the trustee to answer her September 2, 2016 Requests for Admissions or, in the alternative, asks the court to deem those matters admitted, pursuant to CPLR 3123(a).

In her motion, Waletsky maintains that New York courts allow broad pretrial discovery pursuant to CPLR Article 31, particularly where there is an allegation of a possible breach of a duty of loyalty, and that disclosure is justified where the responses could "possibly" show that the trustee had a conflict of interest regarding the trust.

Waletsky further contends that the responses received from JPMorgan Chase to her disclosure requests consist of broad, boilerplate objections and that, in response to allegations of privacy concerns, objectant had proposed the execution of a confidentiality agreement.

As to her Requests for Admissions, Waletsky argues that, since the trustee did not admit or deny the statements and did not seek a protective order within 20 days of service, all matters in the request should be deemed admitted as provided by CPLR 3123(a).

Response and Request for Protective Order

Amplifying the objections stated in its response to the demands, JPMorgan Chase maintains that Waletsky has failed to establish that the information sought in her expansive discovery demands is reasonably related to the accounting proceeding, citing *Matter of Gabay* (NYLJ, June 2, 2002, at 24, col 4 [Sur Ct, Westchester County, 2002]), or reasonably calculated to lead to the discovery of admissible evidence, citing *Matter of Kapon v Koch* (23 NY3d 32, 38

[2014]) and *Forman v Henkin* (134 AD3d 529, 530 [1st Dept 2015]), and instead is engaging in the type of "fishing expedition" that has been rejected by New York courts (*Matter of Aoki*, 78 AD3d 569 [1st Dept 2010]). The trustee further maintains that the discrete issue here is whether the trustee acted prudently in selling the oil stocks so as to diversify the trust holdings, or whether it should have kept the concentrated holdings for the fifty years of the accounting period. According to the trustee, objectant's sole basis for alleging a breach of the duty of loyalty stems from a congressional subcommittee staff report, that was not the product of hearings but was based on limited data from a 60-day period in 1967, and had nothing to do with the Waletsky Trust. This type of conjecture, the trustee argues, should not be a basis to permit excessively broad or improper discovery (*Mendelowitz v Xerox Corp.*, 169 AD2d 300 [1st Dept 1991] [discovery requests should specify items sought with "reasonable particularity"]) or to request documents concerning other trusts or accounts which are confidential (*Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Solow Bldg. Corp.*, 54 AD2d 830 [1st Dept 1976]).

The trustee also opposes the motion as it concerns the Requests for Admissions, arguing that objectant misuses this discovery device and, instead of attempting to pare down the issues for trial, is requesting that the trustee admit nearly every fact alleged in the objections. A party, the trustee contends, is not obligated to respond to improper requests (*Nacherlilla v Prospect Park Alliance, Inc.*, 88 AD3d 770 [2d Dept 2011]), including requests to admit matters which will be disputed at trial (*32nd Ave. LLC v Angelo Holding Corp.*, 134 AD3d 696 [2d Dept 2015]).

Based upon the foregoing, the trustee asks for the issuance of a protective order pursuant

to CPLR 3103, relieving it from having to provide any further responses to the discovery demands and Requests for Admissions. It argues that it has already produced all documents responsive to objectant's demands and that it should be protected from having to produce "irrelevant information concerning non-trust related banking records and transactions from decades ago or admit that such legacy documents are unavailable." In the alternative, the trustee requests that, should the court grant the motion to compel, the costs of such investigation and production of information be shifted to objectant.

Discussion

CPLR 3101(a) directs full disclosure of all information material and necessary in the prosecution or defense of an action. The Court of Appeals has held that the words "material and necessary" are to be interpreted liberally to require disclosure of information which will "assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Estate of Carvel*, 168 Misc 2d 442 [Sur Ct, Westchester County 1996].) Pretrial disclosure of information which may be inadmissible but which may lead to the disclosure of admissible proof is permitted (*Fell v Presbyterian Hospital in City of N.Y. at Columbia-Presbyterian Med. Ctr.*, 98 AD2d 624 [1st Dept 1983]). The court has wide discretion to determine the scope of disclosure (*Allen v Crowell-Collier Publ. Co., supra*).

The court is mindful of the concern expressed by JPMorgan Chase that permitting the full extent of the requested discovery here would set a precedent whereby broad disclosure of the commercial relationships of financial institutions would be allowed in any case in which a trust beneficiary alleges a breach of the duty of loyalty. Paramount here, however, is the trustee's

"unwavering duty of complete loyalty to the beneficiary of the trust to the exclusion of the interests of all other parties" (*Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, 38 Misc 3d 363 [Sur Ct, NY County 2012], citing 106 NY Jur 2d Trusts § 247).

A fiduciary's actions motivated by an interest to benefit itself, even if indirectly, at the expense of the estate or trust constitutes self-dealing and a breach of that duty (*Matter of Rothko*, 84 Misc 2d 830, 842-844 [Sur Ct, NY County 1975], *aff'd and modified on other grounds* 56 AD2d 499 [1st Dept 1977], *aff'd* 43 NY2d 305 [1977] [executor's sale and consignment of artwork owned by estate to a company for which he served as director and secretary motivated by desire to preserve his status and prestige as art collector and dealer benefited him indirectly at expense of estate and constituted breach of duty of loyalty]). Objectant's allegation that JPMorgan Chase sold the oil stock owned by the Waletsky Trust in order to buy stock in companies in which it had or wanted to have influence describes a similar type of indirect self-dealing to that condemned by the courts in *Rothko*, which objectant should be allowed to explore in discovery. After all, if objectant were to prove at trial that, in engaging in these transactions, the trustee invested imprudently and in violation of its duty as fiduciary (*see* EPTL 11-2.3 [b][6]), and thereby caused a diminution of value of the trust assets and income distributions, the trustee would be liable for any loss (*Matter of Witherill*, 37 AD3d 879 [3d Dept 2007]). Therefore, whether the oil stocks were sold to raise cash in furtherance of a plan to engage in or facilitate alleged self-dealing could be relevant to objectant's case.

Because the court concludes that some of objectant's requests may lead to the disclosure of admissible proof concerning her allegations of breach of the trustee's duty to act with loyalty and invest prudently, and of the failure on the part of the trustee to retain adequate records of its

proceedings during the accounting period, the court denies the request of JPMorgan Chase to strike objectant's Second Demand for the Production of Documents, the First Set of Interrogatories, and the Requests for Admissions in their entirety. In their current form, however, many of the individual requests are too vague, overbroad or burdensome for the court to compel a response. Therefore, although the court is hesitant to "prune" the discovery requests (*see Lerner v 300 W. 17th St. Hous. Dev. Fund Corp.*, 232 AD2d 249 [1st Dept 1996]), here, a review of the individual requests is necessary to attempt to balance objectant's right to broad disclosure with the need to relieve the trustee from the unfair burden of responding to overly broad or improper requests.

Rulings Concerning the Specific Document Demands and Interrogatories Addressed in the Motion to Compel

As to the document requests relevant to the sale of oil stocks owned by the Waletsky Trust, JPMorgan Chase is directed to respond to document demands 28 (except as relates to the Relative Trusts) and 30 through 36,[3] and to Interrogatory 7. Document demands 4, 6, 7, 27, 29 and 37, and interrogatories 8, 9 and 10, are overly broad and/or unduly burdensome and are stricken.

JPMorgan Chase need not respond to document demands 8 through 12, 27, 28 and 33, nor to interrogatories 2, 6 or 10, which request information concerning the Trustee's investment decisions and practices concerning other private trusts, including the Relative Trusts, and therefore seek information that is not relevant to the issue of whether the trustee has violated the

[3] Even though Waletsky does not include in her reply demands 34, 35 and 36 as items for which she is seeking to compel a response, in the initial memorandum in support of her motion, objectant indicates that she is moving to compel the trustee to respond to these demands.

duty of loyalty to Waletsky.

JPMorgan Chase is directed to comply with document demand 14 concerning information the trustee may hold related to the Patman Report. Document demands 13 and 15, and interrogatories 18 through 20, are overbroad and unduly burdensome, and are stricken, as objectant has not demonstrated that the information sought is material and necessary to this trust accounting.

As to demands relating to alleged business relationships with the Trust Asset Companies, JPMorgan Chase must comply with document demands 16 through 18. Document demands 19 through 26, and interrogatory 11 are stricken for being overly broad and vague.[4]

Finally, JPMorgan Chase is directed to comply with document demand 42 and interrogatory 15, relating to record retention. Document demand 43 is overly broad and vague and is stricken.

Requests for Admissions

Waletsky's request to deem admitted the matters in her September 2, 2016 Requests for Admissions is denied. Although the trustee did not admit or deny the matters in that notice within the time period specified in CPLR 3123, the court concludes that many of the requests were improper and beyond the scope of a proper notice to admit, acting instead as a substitute for other means of discovery.

The purpose of the notice to admit is to eliminate from litigation factual matters which will not be in dispute at trial, but not to obtain information in lieu of other disclosure devices (*Taylor v Blair*, 116 AD2d 204, 206 [1st Dept 1986]; *Nader v General Motors Corp.*, 53 Misc 2d

[4] Objectant's motion to compel a response to document demand 45 has been withdrawn.

515 [Sup Ct, NY County 1967], *aff'd* 29 AD2d 632 [1967]).

Furthermore, objectant's Requests for Admissions included statements of fact which were vague or overbroad, asked for admission of facts that are not easily ascertainable, or called for speculation or opinion rather than factual admissions. Specifically: as to requests numbered 1 through 26, and 81, the court finds that these requests require the trustee to conduct extraordinary research and investigation over a time period of decades. These requests are denied, although objectant may narrow and refine these requests by submitting a revised notice to admit.

As to admissions 27 through 45 and 85, the court finds that these requests are made with sufficient specificity that they should be ascertainable by the trustee, and are not overly broad or unduly burdensome. The court therefore directs JPMorgan Chase to respond to those requests.

Objectant does not address, in the motion to compel, the following requests for admission. They are addressed here, however, to avoid any dispute or the need for motion practice in the future.

As to requests 46 through 67, the court finds that these requests are not the proper subject of a notice to admit but may be more properly pursued through other discovery devices.

Requests 68 and 69 are stricken insofar as they require speculation or request information that can be obtained in the public domain.

Requests for Admission 70 through 73 are overly broad and vague and are also stricken.

Finally, requests 74 through 80, 82 through 84, and 86 and 87 seek admissions to facts that are in controversy in this matter. For example, in request number 77 objectant asks the following: "Admit that the Oil Stocks were a suitable investment for the Waletzky Trust for the years 1967 and 1968." This is clearly not a proper request for admission as it asks to admit a fact

that is at the heart of the controversy and that, ultimately, must be resolved at trial.

JPMorgan Chase's Request for Cost-Shifting

The trustee's request for an order directing objectant to pay, in advance, for the costs and expenses to produce any discovery allowed by the court is denied at this time. The trustee may renew this request upon a showing that the cost associated with complying with the court's direction for production of documents is prohibitive or that the magnitude of the task involved justifies such relief (*U.S. Bank, N.A. v GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58 [1st Dept 2012]; *Matter of New York City Asbestos Litigation*, 133 AD3d 463, 464 [1st Dept 2015]).

The parties are directed to attend a court conference with a court attorney-referee, to establish a revised discovery schedule.

This decision constitutes the order of the court.

Clerk to notify.

Dated: April 13, 2018

SURROGATE