PART VI: CONCLUSIONS

In reviewing the performance of each Provider, we analyzed a significant number of documents from each of their files and interviewed their representatives at length. In doing so, we went beyond simply recording their position. In the interest of gaining a complete understanding of their advice, we probed the rationale for their statements, challenged their assumptions, and reviewed earlier drafts of their written submissions for inconsistencies. We therefore have a high degree of confidence in our conclusions. We appreciate that no professional enjoys having his or her work scrutinized at the level of detail that we were determined to explore, but we believe all were well served by the process.

Before presenting our final conclusions, we make a general observation. There is a tendency on the part of some, as reflected in the Richards Report, to evaluate the actions of KS's professional advisors and the actions of the Former KS Trustees under the same set of standards and to lump the actions of these separate actors together. Professional advisors are subject to different standards, however, and it is not in the long-term interests of KS to require outside legal advisors to second-guess the motives of clients seeking advice. As reflected in Part IV of this Report, outside advisors should be entitled to rely on requests for legal assistance and advice unless it is clear that there is no legitimate Trust Estate interest involved. Finally, established mechanisms for monitoring, controlling, and correcting improper actions of the Former Trustees worked in this case. As recognized in Professor Langbein's October 30, 2000 letter, the legal system and legal professionals "responded in an exemplary manner" in KS's case—the inappropriate actions of the Former Trustees were detected and the Former Trustees were relieved of their stewardship of the Trust Estate. *See* Appendix C at 2.

ASHFORD & WRISTON

From the Ashford & Wriston firm, KS relied primarily on Bruce Graham. Mr. Graham had performed work for KS since 1973, and served as outside "trust counsel" in reviewing and filing (but not preparing) the Trust Estate's annual accountings. In addition, KS General Counsel Aipa often looked to Graham for advice on various trust law issues. Graham was a valuable and valued advisor to Aipa. Our review demonstrated that KS authorized Graham to act as "trust counsel" and to protect the Trust Estate's best interests. Throughout Graham's representation of KS, he was keenly aware of the issue of representing the Trust Estate as opposed to the individual Trustees. At all times, Graham clearly had the Trust Estate's interests in mind, and he did not perform work in furtherance of any individual Trustee's interests.

We also find that he did not violate any rules of professional conduct in performing his work. Our investigation uncovered no evidence to support a professional liability claim or a claim for disgorgement of legal fees by the Trust Estate against Graham or Ashford & Wriston. The decision whether KS should retain Ashford & Wriston in the future for legal services is one that falls within the Trustees' sound discretion. We see no reason why this firm could not be considered for future work.

CADES SCHUTTE FLEMING & WRIGHT

KS retained the Cades firm for over a decade to handle a large number of litigation and other related matters. Michael Hare was the primary contact with KS and worked on a number of matters personally. Hare's representation of KS in lease-to-fee conversion litigation resulted in significant gains to KS and his work in helping the Trust Estate defend against the IRS's challenge to KS's admissions policy was exemplary. Before being asked to perform work in relation to the AG's investigation, the Cades firm had also worked on several cases that involved large document productions. As a result, Cades acquired an extensive knowledge of many KS documents and of KS's filing systems. In addition, Cades had established an excellent rapport with KS employees in handling document productions.

Given this background, it is not surprising that KS turned to Cades to handle the document production responsive to the AG's subpoenas. KS's General Counsel clearly defined Cades' role with respect to the AG's investigation. The work that Cades performed was not duplicative. Indeed, Cades demonstrated the capability to respond timely to a torrent of subpoenas. Without Cades' work, the responses to the AG's subpoenas would have been delayed.

Given Hare's longstanding work for the Trust Estate, it is also not surprising that Aipa turned to Hare for general advice in formulating responses to various issues that arose during the AG's investigation and during the Master's review. We found no evidence that Hare represented the individual interests of the Trustees who voted in the majority; instead, it appeared that he approached each issue thoughtfully and with the best interests of the Trust Estate in mind. Moreover, the work that Cades performed was authorized either by the General Counsel's office or the Board of Trustees acting as a collective body.

With the exception of the advice given as to Holt's legal expenses, Cades' work for the Trust Estate clearly met all relevant professional standards. As to the Holt advice, it appears to us that Hare failed to gather relevant facts and failed to identify the legal standard for indemnification of legal fees. We do not believe, however, there is a viable professional liability claim or claim for disgorgement of fees. The decision whether KS should continue using Cades in the future for legal services is one that falls within the Trustees' sound discretion. We see no reason why this firm could not be considered for future work.

McCORRISTON MILLER MUKAI MacKINNON

The McCorriston firm represented the Trust Estate on two separate matters. First, Scott MacKinnon performed legal work in connection with real-estate transactions and, second, KS retained William McCorriston to act as litigation counsel in the AG investigation. No third party has questioned MacKinnon's work and our review found no basis to do so.

We did not find the use of the McCorriston firm in the 1997-1999 time frame to be unreasonable. Understanding that the Former Trustees, and not KS General Counsel, retained this firm to defend against the AG's investigation, the Former Trustees appear to have received exactly what they asked for—a very aggressive, tenacious litigator. While one can question whether the tactics employed by the McCorriston firm were the most effective from a strategic standpoint, they do not strike us as atypical. Clients invariably want their own lawyers to be aggressive, while opposing counsel frequently view aggressive behavior by opposing lawyers to be excessive.

Throughout its representation of KS, McCorriston recognized the issue of representing the Trust Estate's interests as opposed to individual Trustees' interests and represented only the interests of the Trust Estate, as determined by the Board of Trustees. Although we recognize that a perception existed that McCorriston represented the individual interests of those Former Trustees who voted in the majority, our review showed that he did represent the interests of the Trust Estate (even if such interests were at times defined by a simple majority of the Board). Thus, McCorriston acted reasonably in the scope of his representation of KS.

Our review uncovered no evidence that the McCorriston firm violated any rule of professional conduct. In addition, we conclude that KS does not have any basis to assert a professional liability claim against the McCorriston firm because there is no evidence that

McCorriston breached its duties related to its representation of KS. Moreover, we find no basis for KS to assert a claim for disgorgement against McCorriston. Finally, the decision to retain legal advisors is a matter of trust administration that falls within the Trustees' discretion. We see no reason why this firm could not be considered for future work.

PITLUCK KIDO SATO & STONE

KS retained the Pitluck firm to provide primarily corporate advice. None of this work has been questioned. In addition, through General Counsel, KS retained Wayne Pitluck to provide advice during the AG's investigation. Such a retention was not surprising as KS General Counsel Nathan Aipa had worked for Pitluck before being hired at the Trust Estate and Aipa had confidence in him. Given the extraordinary challenges that faced the Trust Estate, General Counsel's seeking advice from Pitluck was neither unusual nor a waste of Trust assets. We note that Pitluck did not work extensively on the matter. Our review demonstrated that at all times Pitluck represented the interests of the Trust Estate as opposed to individual Trustee interests. We found no basis for asserting a professional liability claim or a claim for disgorgement of fees against the Pitluck firm. We also see no reason why this firm could not be considered for future work.

VERNER LIIPFERT

We focused our review of Verner Liipfert primarily on four discrete areas: the change in domicile and tax status project; the intermediate sanctions lobbying effort; the work performed in responding to the AG's subpoenas and inquiries; and the work performed to justify the intermediate sanctions lobbying effort to the Master and to the Probate Court.

As to the first three areas, we conclude that the legal services that Verner Liipfert provided to KS do not establish any breach of duty by Verner Liipfert. The difficult issue is whether Verner Liipfert breached a professional duty or obligation through its submissions to the Master and to the court. In this regard, we believe that a potential claim exists based on the lack of candor exhibited in Verner Liipfert's August 3, and September 18, 1998 letters and its October 15, 1998 memorandum, but we recommend against KS asserting such a claim. We believe that there are substantial legal and factual obstacles to sustaining a claim against Verner Liipfert based on a lack of candor to the Master and to the court. When we couple those obstacles with the potential cost of prosecuting such an action, and then weigh this against the potential recovery, we conclude that it is not in KS's interest to pursue the claim. Moreover, KS would not be well served by the negative publicity and controversy that would accompany prolonged litigation, and which would occasion a revisiting of an unpleasant period in KS's history.

In reaching these conclusions we by no means condone the actions of Verner Liipfert. We believe that the Verner Liipfert submissions to the Master and to the court demonstrate a lack of forthrightness and do not reflect the care that KS was entitled to expect from its outside counsel in these circumstances. For that reason, we believe that Verner Liipfert's past work for the Trust Estate demonstrates that this firm is not worthy of future assignments.

PRICEWATERHOUSECOOPERS

PWC provided many years of loyal, competent advice to the Trust Estate. For example, PWC candidly advised or cautioned the Former Trustees against certain proposed courses of action that would be harmful to the Trust Estate (*e.g.*, delaying KS's responses to the IRS IDRs until the source of a leak to the press could be discovered, voluntarily relinquishing the Trust Estate's tax-exempt status, and trying to restructure the Trust Estate as a church that ran a school). The tax advice that PWC provided to KS with respect to various investments resulted in significant tax savings to the Trust Estate. Along with Nathan Aipa, Mark McConaghy co-engineered the idea of a Conflicts Panel to address the conflicts raised by the IRS audit, which was a preliminary step in ensuring the ultimate removal of the Former Trustees. PWC also played a significant role in the final resolution of the issues raised by the IRS audit, which ended up in a closing agreement that preserved KS's tax-exempt status and significantly reduced the Trust Estate's tax bill from the amount initially proposed by the IRS.

We did, however, find one occasion to question PWC's performance. Although a detailed review of the documents reveals that PWC gave the Trustees proper advice with respect to what they could and could not do regarding intermediate sanctions lobbying, and although PWC was generally successful in keeping some distance from Verner Liipfert, they did participate in the "justification" effort with respect to the intermediate sanctions lobbying. One document stands out—a fact sheet prepared on September 9, 1997 that was misleading. It is not clear how this document came to be drafted or how PWC was placed in the position of sending this fact sheet to their client on PWC letterhead. It is unclear why PWC was asked to recount events in which they were not the principal participants, and it is equally unclear why the person who reviewed and revised the document was not involved in the original lobbying effort. This document is unflattering to PWC, because they never should have allowed one of their professionals to provide such uninformed comments on an issue of such significance. In the context of the years of exemplary service to the Trust Estate, however, it is insignificant.

The co-investment issues also warrant comment. Lead tax engagement partner Mark McConaghy invested $25,000 in the SG Methane project, after urgings of undetermined degree from former Trustee Takabuki. There were dozens of investors in this project, many of whom were associated with the Trust Estate. As the Interim Trustees know, this investment failed and all investors lost their money, including McConaghy. The Trust Estate was not an audit client, there were no rules prohibiting co-investment, full disclosures were made, and no actual conflicts arose as a result of the McConaghy co-investment in the SG Methane venture.

The second investment was Benson Forests, which McConaghy introduced to the Trust Estate. Here, Trustee Takabuki insisted that McConaghy co-invest, as a way of demonstrating his own personal level of confidence in Benson, whom McConaghy was introducing. This investment turned out to be one of the better investments the Trust Estate made during the Review Period. Issues have been raised with respect to the tax treatment and the amount of the distribution to McConaghy of the proceeds of his partnership interest in Benson Forests. As we discussed *supra*, however, we found no impropriety in this distribution.

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We are grateful for the opportunity to be of service to Kamehameha Schools and to have teamed with Miller & Chevalier in the process.

Morgan Lewis & Bockius LLP

List of Appendices in Provider Report