

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>UNITED STATES OF AMERICA,</b>	:	
	:	<b>Case No. 2:14-cv-452</b>
<b>Plaintiff,</b>	:	
	:	<b>JUDGE ALGENON L. MARBLEY</b>
<b>v.</b>	:	
	:	
<b>RONALD E. SCHERER, et al.</b>	:	
	:	<b>Magistrate Judge Kemp</b>
<b>Defendants.</b>	:	

**OPINION & ORDER**

This matter comes before the Court on Plaintiff United States of America’s Motion to Dismiss the Counterclaim, for an Order Requiring Supplemental Responses to the Complaint, and for Award of Sanctions (Doc. 23) (hereinafter, “First Motion to Dismiss”), Motion for Sanctions under Rule 11 (Doc. 41) (hereinafter “First Motion for Rule 11 Sanctions”), Motion to Dismiss the Amended Counterclaim, for an Order Requiring Supplemental Responses to the Complaint, and for Award of Sanctions (Doc. 44) (hereinafter, “Second Motion to Dismiss”), Second Motion for Sanctions under Rule 11 (Doc. 58). This matter is also before the Court on the Scherer Defendants’ Motion to Bifurcate Proceedings and/or Stay Discovery (Doc. 73).

For the reasons set forth herein, Plaintiff’s First Motion to Dismiss (Doc. 23) is **MOOT in part** and **DENIED in part**; Plaintiffs First Motion for Sanctions (Doc. 41) is **DENIED**; Plaintiff’s Second Motion to Dismiss (Doc. 44) is **GRANTED in part** and **MOOT in part**; and Plaintiff’s Second Motion for Sanctions (Doc. 58) is **GRANTED in part**. Defendant’s Motion to Bifurcate Proceedings and/or Stay Discovery (Doc. 73) is **MOOT**.

## I. FACTUAL BACKGROUND

The underlying events relevant to this case began when Defendant's father, Roger L. Scherer, entered into a trust agreement with Bank One dated 1979, and reinstated in 1981 (the "1979 Trust"). Roger Scherer funded the trust with the stock of the family's wholesale magazine distribution business (the "family business"). After Roger Scherer died in April 1982, the Scherer trust was divided into three subtrusts ("family trust"): (1) a trust for Roger's son, Ronald E. Scherer, Sr. (2) a trust for Roger's daughter, Linda Scherer Talbott ("Talbott"), and (3) a "wife and mother trust" for Roger's surviving spouse and his mother.

The trusts' terms established income beneficiaries with distribution benefits, as well as remainder beneficiaries. The income beneficiaries are the named beneficiaries for each trust. The principal assets conveyed to the trust upon Roger's death consisted of, directly or indirectly, the stock of entities engaged or affiliated with his wholesale magazine, as well as real estate separately owned but used by these companies.

Upon their father's death, and pursuant to their father's desire, Scherer and Talbott became the chief executives in charge of day-to-day operations of the family business. In addition, in 1985, the original trust advisors resigned, and appointed Scherer and Talbott as successors pursuant to the terms of the trust agreement. Talbott served as trust advisor until 2002. Scherer served as trust advisor until the court removed him in 2008.

### **A. Overview of Probate Court Proceedings and Appeal<sup>1</sup>**

In a lawsuit that began in December 2004, Bank One Trust Company, N.A. (“Bank One”) now JP Morgan Chase Bank, N.A. (“Trustee”), as trustee under a trust agreement with Scherer and other beneficiaries, filed a complaint in probate court to compel Plaintiff to produce information allegedly needed to prepare a final trust accounting, wind up Bank One's trusteeship, and appoint a successor trustee.

In September 2004, Bank One filed a declaratory judgment action against Scherer and the other family-trust beneficiaries in the Franklin County, Ohio, Probate Court (“Bank One litigation”) in an effort to compel Scherer to produce the information needed to prepare a final trust accounting, wind up Bank One’s trusteeship, and appoint a successor trustee. In January 2006, Scherer and the other trust-beneficiaries filed a counterclaim against Bank One, asserting eight separate causes of action, including: breach of fiduciary duty, breach of trust agreement, defamation, fraudulent concealment, tortious interference of beneficiaries' right sand interest in trust assets, and a claim for rescission of the 1985 letter concerning management of the Family Business.

In February 2006, Bank One filed a “Further Claim and/or Third-Party Complaint” against Scherer, personally, alleging Scherer breached his fiduciary duty as the person in charge of the family business by failing to provide required information by Bank One, and a conversion claim against Scherer, personally, alleging he had conveyed

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<sup>1</sup> This Court recently decided a motion for summary judgment in a related case. *See Scherer v. Wiles*, No. 2:12-cv-1101, 2015 WL 4512393 (S.D. Ohio July 24, 2015). The Court takes judicial notice of this decision as a public record. *See See Wyser-Pratte Management Co., Inc. v. Telxon Corp.*, 413 F.3d 553, 560 (6th Cir. 2005) (holding “the court may also consider other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice” without converting a motion to dismiss to a motion for summary judgment). Therefore, the relevant underlying facts decided therein that are pertinent to the present matter are included in this Opinion and Order.

various trust assets to himself or companies he controlled without informing the trustee or seeking approval.

The probate case was tried by bench trial in August 2007. The court issued its 60-page decision on May 14, 2008. *See Bank One Trust Co., N.A. v. Scherer*, No. 430379–C. Bank One sought approval of its accounting, and a judgment in excess of \$6.2 million against Scherer, Sr. for conversion of assets. The court concluded, among other findings, that according to Bank One's accounting, beginning in 1999 Scherer had misappropriated \$6,202,623.00 of trust assets over the course of seven years. The court held that Scherer breached his fiduciary duties as an officer and director of the family business and entered judgment against Scherer for \$6,202,623.00 plus interest. It also held that “[a]ny further objections to [Bank One's] final accountings, and any and all claims against [Bank One] arising from or relating to its final accountings, its administration of the Trusts, or any other matters pertaining to the Trusts and Trust Agreement are hereby adjudicated and hereafter barred.”

Scherer and the other beneficiaries appealed the judgment against them. On November 24, 2009, the Ohio court of appeals unanimously affirmed both the \$6,202,623.00 judgment against Scherer for improper diversion of trust assets and the dismissal of Scherer's January 2006 counterclaims as a discovery sanction. *Bank One Trust Co., N.A. v. Scherer*, 2009 WL 4049123 (Ohio Ct.App. Nov. 24, 2009). The appeals court explained that the evidence “was nearly one-sided in support of the probate court's factual conclusions regarding unauthorized transactions.” *Id.* at \* 14. The court reversed, however, the probate court's decision to strike Scherer's co-beneficiaries’ counterclaims, reasoning that such sanctions were based “principally and most

egregiously on Ronald Sr.'s misconduct during discovery.” *Id.* at \*13. The court further concluded that the decision to strike the beneficiaries’ objections to the final accounting was erroneous because it was predicated on the rationale that the objections were a guise for litigating the stricken counterclaims. *Id.* Thus, the appeals court remanded the case for resolution of the all beneficiaries' counterclaims, but Scherer's (although the other beneficiaries' counterclaims were identical in all respects to Scherer's excluded counterclaims), and also for a new final accounting as to all of the beneficiaries, including Scherer. *Id.* at \*16.

The probate court held a new trial on the accuracy of Bank One's final accounting and original counterclaims filed by the Wiles firm, with Scherer serving as the beneficiaries' representative on all matters. The court issued its decision on December 1, 2011. *Bank One Trust Co., N.A. v. Ronald E. Scherer*, No. 430379–C, Defendants' Exhibit G. Thus, the trial court approved Bank One's final accounting, resolved all original counterclaims—including Scherer's latter counterclaims alleging Bank One committed fraud on the court—in favor of Bank One, and generally confirmed all of Bank One's actions as trustee as legitimate and appropriate.

### **B. Plaintiff’s Complaint**

Plaintiff United States of America (“United States” or “Plaintiff”) commenced this action on May 15, 2014 against Ronald E. Scherer, Ronald E. Scherer Restatement of Trust, PNC Bank (as successor to National City Bank) Trustee, College Properties Limited Partnership, Marsha Jo Scherer (n/k/a Marsha Jo Lustnauer Amicon), Scherer Family Irrevocable Trust, David Thompson, Trustee, Municipal Tax Investment, LLC, and Franklin County Treasurer. Plaintiff brings this civil action to:

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