

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date August 27, 2010

Honorable Marvin M. Lager

Honorable

Judge

S.L. Williams

Judge Pro Tem

Deputy Sheriff

None

Dept: CE99

Deputy Clerk

Court Assistant

Reporter

BP066539 r/w BC344151;
BC342738; BC347052

In re the

Counsel For
Petitioner:

Janice L. Taubman 1990 Revocable Trust

Counsel For
Objector:

Nature of Proceedings: CERTIFICATE OF MAILING OF COURT'S STATEMENT OF DECISION


CLERK'S CERTIFICATE OF MAILING/ NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of August 27, 2010 and STATEMENT OF DECISION upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully paid.

Date: August 27, 2010

John A. Clarke, Executive Officer/Clerk

By:


S.L. Williams, Deputy Clerk

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Petitioner:

Janice L. Taubman 1990 Revocable Trust

Counsel For
Objector:

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FILED

LOS ANGELES SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

AUG 27 2010

FOR THE COUNTY OF LOS ANGELES

JOHN A. CLARKE, CLERK
S. L. Williams
BY S.L. WILLIAMS, DEPUTY

) Case No. BP 066539

) **STATEMENT OF DECISION RE:**

8 IN THE MATTER OF:

9 THE JANICE L. TAUBMAN 1990
10 REVOCABLE TRUST,

11 U. S. BANK, N.A., TRUSTEE.

) (1) TRUSTEE U.S. BANK, N.A.'S FIRST
) ACCOUNT AND SECOND AND FINAL
) ACCOUNT AND REPORT OF TRUSTEE
) AND PETITION FOR INSTRUCTIONS,
) FILED SEPTEMBER 23, 2008, AS
) SUPPLEMENTED ON DECEMBER 12,
) 2008, AND ON MAY 15, 2009;

) (2) BENEFICIARY ANNE C. TAUBMAN'S
) PRELIMINARY OPPOSITION TO U.S.
) BANK'S PETITION FOR APPROVAL OF
) ACCOUNTINGS; REQUEST FOR
) SURCHARGE OF \$25,432,881.04,
) PAYMENT TO ANNE C. TAUBMAN OF
) \$5,165,463.34 AND RELATED RELIEF,
) FILED ON OR ABOUT NOVEMBER 4,
) 2008; AND

) (3) FORMER SPECIAL TRUSTEE AND
) BENEFICIARY ANNE C. TAUBMAN'S
) AMENDED ACCOUNTING RE:
) SEAPORT VILLAGE LTD.'S
) MERCHANT MARKETING AND
) PAYROLL ADJUSTMENT ACCOUNTS,
) FILED ON OR ABOUT SEPTEMBER 2,
) 2008

) Trial: July 27, 28, 30, and 31; Aug. 3-7,
) 10-12, and 14; Sept. 8, 10, 14, 15,
) 22-25, and 29; Oct. 6 and 7, 2009

) Dept.: 99

26 AND ALL RELATED CASES

1 JUDGE PRESIDING: Marvin M. Lager
2 COUNSEL FOR TRUSTEE U.S. BANK, N.A.: Brian C. Lysaght, Amman A. Khan, and Scott
3 E. Gizer, Glaser, Weil, Fink, Jacobs, Howard &
4 COUNSEL FOR ANNE C. TAUBMAN: John T. Blanchard, Law Offices of John T.
5 Blanchard, and Adam H. Braun, Law Offices of
6 COUNSEL FOR RICHARD J. TAUBMAN: Paul L. Stanton, Law Offices of Paul L. Stanton
7 COUNSEL FOR WYATT TAUBMAN: Thomas H. Lambert, Lambert Law Corporation
8
9

10
11 **STATEMENT OF DECISION**

12 After a twenty-four day court trial held on July 27, 28, 30, and 31, 2009, August 3-7, 10-12,
13 and 14, 2009, September 8, 10, 14, 15, 22-25 and 29, 2009, and October 6 and 7, 2009, the above-
14 captioned matters were submitted to the Court for decision. On January 4, 2010, the Court issued its
15 tentative decision on the matters. On January 11, 2010, Wyatt Taubman requested a statement of
16 decision. On January 19, 2010, Anne Taubman requested a statement of decision. U.S. Bank,
17 N.A. ("Trustee"), pursuant to this Court's order, prepared a proposed statement of decision. Three
18 hearings were held thereon.

19 **I. PRIOR ORDERS, JUDGMENTS, STATEMENTS OF DECISION AND APPELLATE**
20 **OPINIONS**

21
22 Many of the factual and legal issues presented by the Petitions at issue have been previously
23 determined in this probate case. The following are of relevance:

24
25 1. Judgment under Section 631.8 of the Code of Civil Procedure on Anne C. Taubman's
26 Petitions to Surcharge and Discharge Trustee for Breach of Fiduciary Duty and Conflict of Interest,
27 entered June 12, 2003;
28

1 2. Statement of Decision On U.S. Bank's Motion for Judgment under Section 631.8 of
2 the Code of Civil Procedure on Anne C. Taubman's Petitions to Surcharge and Discharge Trustee
3 for Breach of Fiduciary Duty and Conflict of Interest, entered May 22, 2003;

4 3. Judgment of Superior Court of California, County of Los Angeles, Regarding San
5 Diego Marwyn Action, *Anne C. Taubman v. U.S. Bank, N.A., et al.*, Case No. BC 283506, entered
6 September 16, 2003.

7 4. Statement of Decision, Superior Court of California, County of Los Angeles,
8 Regarding San Diego Marwyn Action, *Anne C. Taubman v. U.S. Bank, N.A., et al.*, Case No. BC
9 283506, entered September 16, 2003.

10 5. Order And Judgment: (1) Permanently Removing Anne Taubman As Special
11 Trustee; (2) Substituting U.S. Bank As Temporary Special Trustee, And; (3) Requiring That Anne
12 Taubman Provide An Accounting Of All Transactions Respecting Seaport Village, Particularly For
13 Proceeds Of Transactions With GMS Realty, which was entered on September 16, 2003 in the Los
14 Angeles County Superior Court, Case No.: BP066539, consolidated with BP073345.

15 6. Statement of Decision On U.S. Bank's Petition To Permanently Remove Anne
16 Taubman As Special Trustee, To Suspend Her Powers As Special Trustee In Favor Of U.S. Bank
17 Pending Removal And For An Order That Anne Taubman Provide An Accounting Of all
18 transactions respecting seaport village, particularly for proceeds of purchase by GMS Realty, which
19 was made on September 16, 2003 in the Los Angeles County Superior Court, Case No.: BP066539,
20 consolidated with BP073345.

21 7. Order And Judgment on U.S. Bank's First Account Current and Report of Trustee
22 and Petition for Instructions filed July 8, 2003, Supplement thereto, filed September 8, 2002, Second
23 Supplement thereto, filed January 28, 2003, and Third Supplement thereto, filed May 16, 2003,
24 which was entered on September 16, 2003 in the Los Angeles County Superior Court, Case No.:
25 BP066539, consolidated with BP073345.

26 8. Statement of Decision on U.S. Bank's First Account Current and Report of Trustee
27 and Petition for Instructions filed July 8, 2003, Supplement thereto, filed September 8, 2002, Second
28 Supplement thereto, filed January 28, 2003, and Third Supplement thereto, filed May 16, 2003,

1 which was entered on September 16, 2003 in the Los Angeles County Superior Court, Case No.:
2 BP066539, consolidated with BP073345.

3 9. Judgment and Decree on Anne Taubman's Supplemental and Amendment to
4 Petitions for Orders Surcharging and Discharging Institutional Trustee for Breach of Fiduciary
5 Duty, Etc., which was entered on September 16, 2003 in the Los Angeles County Superior Court,
6 Case No.: BP066539, consolidated with BP073345.

7 10. Statement of Decision on Anne Taubman's Supplemental and Amendment to
8 Petitions for Orders Surcharging and Discharging Institutional Trustee for Breach of Fiduciary
9 Duty, Etc, filed October 31, 2002, which was entered on September 16, 2003 in the Los Angeles
10 County Superior Court, Case No.: BP066539, consolidated with BP073345.

11 11. Judgment and Decree on Petitioner and Former Special Trustee Anne C. Taubman's
12 Report and Account of Special Trustee; Petition for Approval of Accounting and Related Relief,
13 which was entered on July 21, 2004 in the Los Angeles County Superior Court, Case No.:
14 BP066539.

15 12. Corrected Statement of Decision on Petitioner and Former Special Trustee Anne C.
16 Taubman's Report and Account of Special Trustee; Petition for Approval of Accounting and
17 Related Relief, which was entered on August 4, 2004 in the Los Angeles County Superior Court,
18 Case No.: BP066539.

19 13. Opinion of the Court of Appeal of the State of California, Second Appellate District,
20 Division 7, *In Re Anne C. Taubman v. U. S. Bank, N.A., et al.*, Case Nos. B177712 and B185170,
21 September 15, 2004.

22 14. Opinion of the Court of Appeal of the State of California, Second Appellate District,
23 Division 7, *In Re Anne C. Taubman v. U. S. Bank, N.A., et al.*, Case Nos. B170609 and B173609,
24 March 30, 2005.

25 15. Opinion of the Court of Appeal of the State of California, Second Appellate District,
26 Division 7, *In Re Anne C. Taubman v. U. S. Bank, N.A., et al.*, Case Nos. B177712 and B185170,
27 October 24, 2007.

28

1 16. Opinion of the Court of Appeal of the State of California, Second Appellate District,
2 Division 7, *In Re Richard J. Taubman v. Anne C. Taubman*, Case No. B194074, June 18, 2008.

3
4 **II. FACTS.**

5
6 **A. The Janice L. Taubman Revocable Intervivos Trust.**

7
8 The Janice L. Taubman 1990 Revocable Trust was created by the Trustor, Janice L.
9 Taubman (the “Trustor”) pursuant to a written declaration of inter-vivos trust, dated August 13,
10 1990. The Trustor amended the trust ten (10) times. A Fifth Amendment and Restatement of the
11 Trust was executed on March 15, 1994. It completely restated the original trust. The Trustor then
12 amended the Fifth Amendment by the Sixth through the Tenth Amendments. The Fifth through the
13 Tenth Amendments (collectively, the “Trust”) are the relevant documents and were admitted into
14 evidence. The Trustor died on September 5, 1999, and upon her death, the Trust became irrevocable.

15 The beneficiaries of the Trust are the Trustor’s children, Anne C. Taubman (“Anne”) and
16 Richard J. Taubman (“Ricky”). There is also a named contingent remainder beneficiary, Wyatt
17 Taubman (“Wyatt”), Ricky’s son. The overarching intent of the Trustor was to treat her two children
18 equally. She knew that there was hostility between them that could spawn litigation. Various parts
19 of the Trust discourage litigation, including provisions to relieve the trustees from liability under
20 many circumstances for breach of trust.

21 For the purpose of these proceedings, the Trust has two principal assets: (1) an ownership
22 interest in a retail shopping center known as Seaport Village, the grounds of which are leased from
23 the Port of San Diego, and (2) ownership in the Buffalo Oil Company and the Taubman Family
24 Trust Gas and Oil Interests.

25 On the date of the Trustor’s death, the Trust owned its interest in the Seaport Village
26 shopping center through the following entities: 45% ownership of a limited partnership that was
27 the ground leasee - San Diego Seaport Village Ltd. (“Limited”); 100% ownership of Limited’s
28 controlling general partner - San Diego Seaport Village, Inc. (“Inc.”); and, general partner of and

1 owner of a 0.5% interest in Anton Ltd. (“Anton”), which owned about 53% of Limited.

2 At the time of the Trustor’s death, Anne was the president of Inc.. She was also the
3 president of another Seaport Village related entity, San Diego Marwyn (“Marwyn”).

4 At the time of the Trustor’s death, the Trust’s oil and gas interests were, and continued to be,
5 managed by the Bank of Oklahoma as trustee for the Taubman family. The oil and gas interests
6 produce royalty income which is distributed monthly by the Bank of Oklahoma to the Trust.

7 Upon Janice’s death, as provided by the Trust, Anne became the “Special Trustee” of the
8 Trust’s Seaport Village assets. During her tenure two highly controversial transactions occurred: (a)
9 Anne’s personal 1999 purchase, at a discount, from Yasuda Bank, of a promissory note made by
10 Limited and secured by Seaport Village, and (b) Anne’s 2003 refinancing with a concurrent sale of
11 control of Seaport Village in a highly complex deal with GMS Realty, LLC (“GMS”).

12 The Yasuda Bank note purchase was accomplished by Anne after the Trust – by the trustee
13 U.S. Bank - declined to make the purchase. The GMS transaction was done without the knowledge
14 of U.S. Bank, or Ricky. Anne was ultimately removed as Special Trustee in its shaddow, and
15 surcharged \$8,850,530.29, primarily consisting of money from the GMS deal she diverted to
16 herself.

17 The Trust provides that Anne is the sole beneficiary of the Trust’s Seaport Village assets
18 (subject to an “equalizing payment” to Ricky), if she survives the Trustor by ten years, which has
19 now occurred. Ricky was a contingent remainder beneficiary of the Trust’s Seaport Village assets.
20 As Anne has now survived the Trustor by ten years, his contingent interest has lapsed. Ricky’s son,
21 Wyatt, is a named contingent remainder beneficiary of the Trust, who accedes to a beneficiary of the
22 trust only in the event that Anne and Ricky die before the ten year anniversary. This event has not
23 occurred and Wyatt’s interest in the trust has now lapsed.

24 Trustee U.S. Bank’s predecessor-in-interest, Santa Monica Bank, assumed co-trusteeship in
25 1999 on the death of the Trustor. Gilda-Ulloa Ochoa was appointed its co-trustee. She died in
26 March of 2002. U.S. Bank has been the sole trustee of the Trust since Ms. Ulloa-Ochoa’s death.

27 Key personnel of the Trustee and Anne have long had a frosty, mutually suspicious,
28 relationship. Anne and Ricky have had a highly contentious relationship since before the Trustor’s

1 death. Ricky pressured the Trustee – through threats and otherwise - to litigate with Anne. She
2 alleged in litigation with the Trustee that it favored Ricky.

3
4
5 **B. The Yasuda Note**

6
7 In 1999, while a Special Trustee, Anne personally purchased Yasuda Bank’s \$39.8 million
8 “interest only” note given it by Limited and secured by Seaport Village (the “Yasuda Note”), at
9 roughly a forty percent discount.

10 The principle amount of the Yasuda Note was due at that time and monies sufficient to meet
11 the obligation were not available to Limited. Foreclosure by Yasuda Bank, or a third party purchaser
12 of the note, would have meant the total loss of Seaport Village to the Trust. This prospect was
13 avoided by Anne purchasing the note and extending its term.

14 Anne made the purchase through a limited liability company she formed, Seaport Lending
15 Co., LLC (“Lending Co.”). Lending Co./Anne borrowed most of the money needed for the
16 purchase secured by Seaport Village’s ground lease.

17 Anne profited personally from the differential in interest payments Limited made on the
18 Yasuda Note and the interest payments Lending Co./Anne made on monies borrowed for its
19 purchase. This Court by Judge Leonard Wolf (ret.) held the transaction was not itself a breach of
20 Anne’s duty as a fiduciary because the Trust was given notice and declined to purchase the Yasuda
21 Note.

22 **C. The GMS Transaction**

23
24 By January, 2003, the Trust again faced the possibility that Seaport Village would be lost by
25 foreclosure. Anne avoided this by – in substance - refinancing debt by way of a complex transaction
26 with GMS. But, the deal spun-off cash that should have gone to the Trust. Instead it went to an
27 entity controlled by Anne.

28 Pursuant to the deal Anne sold GMS a 50% interest in the Yasuda Note by selling it a

1 controlling interest in Lending Co. Simultaneously, Anne assigned to GMS the Master Lease of the
2 entire Seaport Village, through the vehicle of a sub-lease to a new entity, Seaport Village Operating
3 Company, LLC (“Operating Co.”), with GMS as the controlling and managing member. GMS paid
4 approximately \$7.2 million in cash.

5 As a result of the transaction, the Trust received a 25% non-managing interest in Operating
6 Co. and Anne’s advisor, Michael A. Cohen, received a 25% non-managing interest. The \$7.2
7 million was not paid to the Trust, but to Davanne LLC, an entity controlled by Anne.

8
9 **D. Michael A. Cohen**

10
11 Michael A. Cohen (“Cohen”) is a sophisticated mortgage broker. He advised Anne in
12 purchasing the Yasuda Note. He also advised her in the GMS transaction. As Trustee of the Marion
13 #2 - Seaport Trust U/A/D June 21, 2002, Cohen acquired a 25% interest in Operating Co. in the
14 GMS transaction. Anne testified at trial that while Cohen provided important services, it was not
15 the agreement that he would receive a 25% interest in Operating Co. Anne testified, in substance,
16 that Cohen obtained this interest by breach of fiduciary duty and fraud. He placed the 25% provision
17 in the deal documents without her authorization.

18 In the prior surcharge trials, Judge Wolf found that Anne failed to meet her burden to
19 establish what portion of Cohen’s services were rendered in connection with the GMS transaction as
20 opposed to the services he rendered in connection with Anne’s purchase of the Yasuda Note. He
21 held that Anne was accordingly responsible for any money due him.

22 In this trial, the Trustee seeks to set-off against any distribution to Anne an amount equal to
23 the 25% of the value of Seaport Village that she allegedly “gave “to Cohen. It offered no proof that I
24 credit that Cohen lawfully acquired his 25% interest. Anne established that the 25% interest was
25 obtained by breach of fiduciary duty and fraud. Anne and the Trust were victims. The Trust
26 benefitted from Cohen’s expertise and participation in negotiating the GMS transaction. Without
27 his involvement the deal would not have been accomplished; it avoided the complete loss of Seaport
28 Village by foreclosure. Anne’s breach of her duty to keep the Trustee and Ricky informed, and her

1 misappropriation of Trust monies, do not render her liable for Cohen's conduct. Also, the Trustee
2 offered no proof that I credit of the value of Seaport Village. The amount of the purported set-off
3 cannot be calculated from the evidence presented at trial and is speculative.

4
5 **E. Prior Actions for Removal and Surcharge**

6 **1. The Removal Petitions and the Trustee's First Account**

7
8 In May 2002, Anne filed a petition in this Court to remove and surcharge the Trustee for
9 alleged excessive payments of attorneys' fees and costs. In June 2002, Anne filed a separate
10 petition in this Court to remove and surcharge the Trustee due to an unequal distribution of Trust
11 income to Anne and Ricky.

12 In May 2002, the Trustee filed its First Account Current through which the Trustee sought,
13 among other things, approval of administrative costs and trustee's fees. The Trustee later filed a
14 supplement to its First Account in which it sought instructions regarding the proper interpretation of
15 the Trust's property allocation and distribution procedures.

16 On February 18, 2003, the Trustee filed its own action to remove Anne as Special Trustee. It
17 alleged that Anne had concealed from the Trustee and from Ricky the GMS Transaction, in which
18 Anne sold the Trust's Seaport Village assets and transferred the proceeds from the sale to entities
19 outside the trust that she controlled.

20 On September 17, 2003, after an eight-day trial, this Court (by Judge Leonard Wolf, ret.)
21 denied Anne's petitions and granted the Trustee's petition to permanently remove Anne as Special
22 Trustee for breaches of fiduciary duty. The Court rejected Anne's defense that she was the sole
23 beneficiary of the Seaport Village assets and, as a result, had no duty to anyone other than herself.
24 The Court found that under the terms of the Trust, Ricky was a beneficiary of the Seaport Village
25 assets contingent on Anne not surviving the Trustor by ten years. Also, Ricky was a beneficiary of
26 Seaport Village assets, independent of Anne's survival, if utilization of those assets was needed to
27 fund an "equalizing payment" due him. In other words, Ricky had an interest in the Seaport Village
28 assets until, at a minimum, September 5, 2009, or the final distribution of the equalizing payment,

1 whichever was later. The Court approved all aspects of the Trustee's First Account, except for the
2 issue of income distributions between Anne and Ricky. Lastly, the Court determined that the
3 Trust's assets, including the Seaport Village assets, are appropriately valued as of the date of final
4 allocation and distribution, which had not yet occurred.

5 The Court's decisions regarding the Trustee's Removal Petition against Anne and the
6 Trustee's First Account were affirmed on appeal on September 15, 2004 in Appellate Case Nos.
7 B177712 and B185170.¹

8 **2. The Surcharge Trial against Anne**

9
10 While the appeal from the removal order was pending, Anne submitted an accounting of her
11 administration of the Seaport Village assets in response to an order of the court. The Trustee and
12 Ricky objected to the accounting reports. After a trial to address the Trustee's and Ricky's
13 objections, the Court found Anne liable to the trust for \$7,935,150 and \$870,536 in prejudgment
14 interest for breaches of fiduciary duty and misappropriation of Trust funds.² The surcharge award
15 was affirmed on appeal on October 24, 2007. (Appellate Case Nos. B177712 and B185170.³)

16 **3. The Marwyn Litigation**

17
18 In October 2002, Anne filed an action against the Trustee and Ricky for declaratory relief
19 relating to Anne's purchase of Ricky's shares in Marwyn and also sought compensatory and
20 punitive damages against the Trustee in an amount of not less than \$1.8 million.⁴ Ricky cross-
21 claimed against Anne for rescission of the sale of his Marwyn shares on the grounds that Anne had
22 committed constructive fraud by concealing from him the GMS transaction, which had a direct
23 impact on the value of his Marwyn shares.⁵ Anne dismissed her damages claim against the Trustee
24 approximately one year after she filed her petition.⁶ After a three day court trial, this Court denied
25 Anne's declaratory relief action against the Trustee and Ricky, and granted Ricky's cross-claim for

26 ¹ Ex. T-298.

27 ² Ex. T-420, *5-6.

28 ³ Ex. T-402.

⁴ Ex. T-62.

⁵ Ex. T-183, p. 1:9-12.

⁶ Ex. T-94.

1 rescission.⁷ The Court's decisions regarding Marwyn were affirmed on appeal on March 30, 2005.
2 (Appellate Case Nos. B170609 and B173609.⁸)

3 **F. The Issues in This Trial**

4 **1. Anne's Accounting of Limited's Merchant Marketing and Payroll**
5 **Adjustment Accounts**

6
7 Anne was generally ordered to account for all aspects of her administration of the Seaport
8 Village assets by Judge Wolf on September 17, 2003, when she was removed as Special Trustee.
9 She did not provide an accounting for two SPV accounts, informally referred to by their uses as the
10 "Marketing" and "Payroll" accounts. The accounts are more accurately – but more confusingly-
11 referred to as the "Merchant" and "Payroll Adjustment" accounts. The Trustee and Ricky sought to
12 surcharge Anne based on her failure to account for the Marketing and Payroll accounts in
13 proceedings before Judge Wolf primarily relating to the GMS transaction. On August 3, 2004 Judge
14 Wolf held such issues could only be raised by a new Petition.

15 On July 19, 2007, the Trustee filed a Petition to Compel Anne to Account for Limited's SPV
16 Merchant [Marketing] and Payroll Adjustment Accounts ("Marketing and Payroll Accounts"), and
17 for Surcharge ("Marketing and Payroll Petition"). Anne was ordered to so account for the
18 Marketing and Payroll Accounts by Judge Mitchell Beckloff and on August 12, 2008, Judge
19 Beckloff denied approval of Anne's accounting. It was based on general ledger entries, which are
20 summary in form. Anne was ordered to submit an amended accounting on or before September 5,
21 2008.

22 Anne filed her Amended Accounting on or about September 2, 2008. This Amended
23 Accounting was detailed, based on copies of checks and computer generated information from the
24 payroll service used by Limited. The Trustee filed objections to Anne's Amended Accounting on or
25 about October 17, 2008.

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28 ⁷ Ex. T-184.

⁸ Ex. T-324.

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2. The Trustee's Final Account and Petition for Instructions, and Anne's Surcharge Requests

On September 23, 2008, the Trustee filed a "First Account and Second and Final Account and Petition" seeking Orders and instructions from the Court to: (1) approve the Trustee's First and Second and Final Account; (2) terminate the Janice L. Taubman Trust, effective immediately; (3) approve the allocation of certain administration expenses of the Trust as between the two Trust beneficiaries, Anne and Ricky; (4) approve the request by the Trustee for extraordinary compensation; and (5) approve the Trustee's final allocation plan.

Ricky filed a joinder approving all aspects of the Trustee's Final Account and Petition for Instructions, and waived any objections thereto. Wyatt did not file a formal response to the Trustee's Final Account and Petition for Instructions; nor and did he take any position on the matter at trial.

On November 8, 2008, Anne filed her "Opposition to U.S. Bank's Petition for Approval of Accountings; Request for Surcharge of \$25,432,881.04, Payment to Anne C. Taubman of \$5,165,463.34 and Related Relief Based on the Trustee's Dissipation of Trust Assets and Related Acts of Misconduct."

III. TRUSTEE U.S. BANK. N.A.'S PETITION TO COMPEL FORMER SPECIAL TRUSTEE ANNE C. TAUBMAN TO ACCOUNT FOR SPV MERCHANT AND PAYROLL ADJUSTMENT ACCOUNTS, AND FOR SURCHARGE, AND FORMER SPECIAL TRUSTEE AND BENEFICIARY ANNE C. TAUBMAN'S AMENDED ACCOUNTING RE: SEAPORT VILLAGE LTD. MARKETING ACCOUNT AND SEAPORT VILLAGE LTD PAYROLL ADJUSTMENT ACCOUNT

1 A. **The Trustee's Marketing and Payroll Petition and Anne's Amended Accounting**

2 Anne was ordered to account as to Limited's Marketing and Payroll Accounts. She now has
3 done so to the satisfaction of the Court and demonstrated that neither account was used for an
4 improper purpose. Her Amended Accounting is approved.

5 The Marketing account was funded by a portion of the rent paid by the Seaport Village sub-
6 tenants. It was used to pay for expenses incurred to promote Seaport Village as a tourist and
7 shopping destination. It is common for shopping centers to maintain this type of account. Anne was
8 not a signatory on the checking account. The Marketing Director and General Manager executed all
9 checks. Neither Anne nor any entity under her control received any payment from the Marketing
10 account, which was only used to promote Seaport Village.

11 The Payroll account was used to fund Limited's payroll. Salary checks to Limited's
12 employees came from a payroll service, Pay-Net, which drew payroll checks on its own accounts.
13 Each payroll period Limited sent Pay-Net a check for the amount needed from the Payroll account.
14 Anne was not paid a salary by Limited. Deposits into and withdrawals from this account should
15 have been - and were - significant. Neither Anne nor any entity under her control received any
16 payment from the Payroll account, which was used only for its intended proper purpose.

17 The Trustee suggests the long delay (2003- 2008) until Anne provided a detailed accounting,
18 i.e., the Amended Accounting, which it argues is still deficient, is evidence of Anne's bad faith and
19 continuing misconduct. I disagree.

20 Anne was generally ordered to account in 2003, and in 2004 the Trustee and Ricky sought to
21 surcharge her for the expenditure of all the money that had been deposited into the Marketing and
22 Payroll Accounts, totaling \$4,191,427. But, in his August 3, 2004 Corrected Statement of Decision
23 Judge Wolf declined, citing essentially two reasons: (1) Anne did not have sufficient notice that the
24 details of these accounts was needed, and (2) the amounts paid from the accounts for marketing and
25 payroll was not "inherently suspicious." Judge Wolf concluded that any issue as to these two
26 accounts that remained after the Trustee was able to analyze them "should be resolved by way of a
27 future petition...which the Bank and Ricky may institute...." This did not happen until July 19,
28 2007.

1 Although Anne’s obligation to account for the Marketing and Payroll Accounts was not
2 unambiguously suspended pending the filing of a new Petition, it was not bad faith or misconduct
3 for Anne to await one. A new Petition would telegraph that the Trustee had concluded that there was
4 indeed something suspicious about the accounts and that it demanded a detailed accounting. This is
5 what Judge Wolf arguably contemplated. Once the Trustee filed a new Petition, after a long hiatus
6 suggesting that it did not intend to do so, Anne did not then have within her possession, custody or
7 control the documents needed to provide one. As of trial, some documents could not be obtained
8 because of the passage of time. The Court finds that Anne acted in good faith in accounting for the
9 Marketing and Payroll Accounts.

10 Anne claims that the Trustee breached its duty and acted in bad faith by filing its Marketing
11 and Payroll Petition, and for continuing to seek a surcharge against her following the submission of
12 her Amended Accounting.

13 The Court finds no bad faith and no breach of duty by the Trustee (at least through the last
14 attorney’s fee invoice paid herein; i.e., prior to Judge Beckloff’s order requiring advance court
15 approval for the payment of attorney’s fees.)

16 Anne finds support for her position in the October 3, 2004 Corrected Statement of Decision.
17 Judge Wolf did reject a surcharge based on the pleadings before him but also noted that “Neither the
18 Bank nor Ricky should be foreclosed from examining the expenditures made from these accounts
19 and seeking recovery of any disbursement that Anne cannot justify.” Judge Wolf was clear: “Anne
20 is not now entitled to a finding absolving her from liability from any such improper disbursements
21 and the denial of the imposition of a surcharge at this particular time cannot and should not be
22 construed as a finding, either expressed or implied, that no such improper disbursements were made
23 by Anne.”⁹ Anne was not, as she now seems to assert, clearly relieved of the duty to account or that
24 it was made conditional; at a minimum, the Trustee acted in good faith and was justified in so
25 concluding..

26 The Trustee was justified, breached no duty, and acted in good faith, in filing its Marketing
27 and Payroll Petition, and pursuing the matter toward trial. During the 1999-2004 timeframe Anne

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⁹ Ex. T-289, p. 23:19-25.

1 oversaw the distribution of over \$5,000,000 from the Marketing and Payroll Accounts; her oversight
2 continued even after she was removed as President of Limited's general partner and removed as
3 Special Trustee. Further, despite Anne's fiduciary duties to keep books and records, protect Trust
4 assets, and to account for her use of the Seaport Village funds, no detailed accounting was provided
5 for these Marketing and Payroll Accounts and no documentation was provided to explain these
6 expenditures until the Amended Accounting. The Trustee examined 19 banker's boxes worth of
7 documents provided by Anne via Ann Lane that supposedly contained the financial records of
8 Limited, but none of these records explained how these funds were used. Indeed, there were no
9 marketing or payroll records turned over to the Trustee whatsoever heightening the Trustee's
10 reasonable suspicions that the Marketing and Payroll Accounts, like other accounts of Limited and
11 Inc., were used improperly by Anne. Also, Ricky demanded action against Anne.

12 While the Amended Accounting ultimately produced by Anne has been found sufficient by
13 this Court, that outcome could not be predicted with any reasonable degree of certainty. The
14 Amended Accounting fails to include the probate schedules ordered by the Court on August 12,
15 2008, fails to provide back up documentation in support of the disbursements, and does not cover
16 the entire time period that Anne was ordered to account for (September 5, 1999 through December
17 31, 2003). More than \$1,000,998.00 in disbursements are undocumented.

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B. Anne's Request for Attorneys' Fees

The Court grants Anne's request for attorneys' fees for the defense of her Amended Accounting. She may file a noticed motion in Department 99 to determine the amount.

1 **IV. TRUSTEE U.S. BANK, N.A.'S FIRST ACCOUNT AND SECOND AND FINAL**
2 **ACCOUNT AND REPORT OF TRUSTEE AND PETITION FOR INSTRUCTIONS,**
3 **ETC; AND BENEFICIARY ANNE C. TAUBMAN'S PRELIMINARY**
4 **OPPOSITION...; REQUEST FOR SURCHARGE OF \$25,432,881.04, ETC.**

5 **A. Anne's Claims for Breach of Trust and Surcharge**

6
7 In the context of this Trust, the Trustee is relieved from liability from breach of trust except
8 where the misconduct is intentional, reckless, grossly negligent, or in bad faith. Probate Code
9 section 16461(b); Trust, Fifth Amendment, section 5.09 A. This limitation of liability was granted
10 "by reason of the Trustor's desire that the Trustee not act in a manner which the Trustor would find
11 too conservative." Further, to give additional protection to the Trustee, the Trustor provided that
12 "[r]eliance in good faith on any advice or recommendation given by any of the advisers reasonably
13 employed or selected by the Trustee shall constitute evidence of an absence of fraud, willful
14 misconduct, gross negligence." Trust, Fifth Amendment, section 5.09 A. The Court declines to find
15 that the Trustee acted recklessly, with gross negligence or in bad faith with respect to all or any of
16 its challenged conduct, as explained below.

17
18 **1. Anne's Claims re Alleged Excessive Attorneys' Fees and Costs**

19 a. Retaining attorneys and agreeing to the rates charged was not a breach of trust.

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21 "[T]he Probate Code is studded with provisions authorizing the trustee to hire and pay (or
22 seek reimbursement for having paid) attorneys to assist in trust administration. For example, *section*
23 *16247* empowers the trustee 'to hire persons, including ... attorneys ... or other agents ... to advise or
24 assist the trustee in the performance of administrative duties.' *Section 16243* provides, 'The trustee
25 has the power to pay ... reasonable compensation of the trustee and of employees and agents of the
26 trust, and other expenses incurred in the ... administration ... and protection of the trust.' And *section*
27 *15684, subdivision (a)* provides in part, 'A trustee is entitled to the repayment out of the trust
28 property for ... [¶] [e]xpensures that were properly incurred in the administration of the trust.' "

1 *Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 97; see also *Wells Fargo Bank v. Superior Court*
2 (2000) 22 Cal.4th 201, 213 ("Under California law, a trustee may use trust funds to pay for legal
3 advice regarding trust administration").

4 Attorneys hired by a trustee to aid in administering the trust, which would include preparing
5 an accounting and responding to the beneficiaries' objections to that accounting, are entitled to
6 reasonable fees paid from trust assets. *Kasperbauer v. Fairfield* (2009) 170 Cal.App.4th 785, 791.
7 The Trust provides in its Fifth Amendment, paragraph 5.08 H, that the Trustee may hire lawyers and
8 other advisors as it deems "helpful" and "to pay such persons reasonable compensation...."
9 Reasonable compensation is broadly defined by the Trust: "the Trustee shall not be limited to
10 customary charges for such services in the community, but instead may employ experts whose rates
11 of compensation may be in excess of such customary charges..."

12 Paragraph 5.10 of the Fifth Amendment to the Trust states the Trustor intended to give the
13 trustee "maximum flexibility" in administering the Trust and, for the "protection of the trustee,"
14 urged the trustee to "consult with legal counsel concerning the exercise of any power or discretion
15 granted herein."¹⁰

16 The Trustee hired top tier lawyers who charged rates consistent with their skill. The
17 selection of such lawyers was reasonable, and not an intentional, reckless, grossly negligent or bad
18 faith breach of trust. The issues at hand were often complex requiring special expertise. Large sums
19 were at issue. The attorney's billing rate charged is consistent with billing rates in Los Angeles of
20 comparable law firms. In hiring the lawyers and other advisors that it did, or in agreeing to pay the
21 compensation that it did, the Trustee breached no duty. ¹¹

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23 ¹⁰ If an advisor is reasonably selected by the Trustee "Reliance in good faith on any advice
24 or recommendation given...shall constitute evidence of an absence of fraud, willful misconduct, or
25 gross negligence." Trust, Fifth Amendment, section 5.09 A.

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27 ¹¹ Further, the Trustee's reliance on the advice of its advisors, in the context of this litigation,
28 was in good faith, as was the advice itself.

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b. There was no intentional, reckless, grossly negligent or bad faith breach of trust.

Anne urges that the Trustee breached its duty by incurring attorneys' fees and costs that were grossly excessive in view of the circumstances of the Trust. Mindful of the intentional/reckless/gross negligence/bad faith standard mandated by the Trust, described above, I do not so conclude.

The testimony of the Trustee's employees, Robert Tiedemann and David Hilgenberg, and the Trustee's advisors, Barry E. Fink, Esq. and fiduciary consultant David Mackenzie, was that the Trustee was mindful of the attorneys' fees and costs being incurred and took measures to reduce and hold-down legal fees. I credit this testimony.

The Trustee had multiple persons reviewing its attorneys' fees bills, including employees both at its Los Angeles office, and its corporate headquarters in Minneapolis. Specifically, the following testimony which I credit was given:

- Mr. Tiedemann and Mr. Hilgenberg testified that all litigation engaged in, and all administrative acts carried out by the Trustee, were performed after consulting with counsel, accountants, or other consultants.
- Mr. Tiedemann and Mr. Hilgenberg also testified that they consistently consulted with in-house counsel, the Trustee's Chief Fiduciary Officer, and other internal experts regarding the administration of the Trust.
- Mr. Tiedemann and Mr. Hilgenberg testified that all invoices received from outside-counsel and consultants were reviewed both at the local level, and at corporate headquarters by an in-house attorney, before being approved. All attorneys' fees and costs were paid only after it was determined that they were reasonable and necessary.

- 1 • Mr. Mackenzie and Mr. Fink testified that all litigation undertaken by the Trustee
- 2 was upon the advice of Mr. Fink or other attorneys, and that Mr. Mackenzie was
- 3 regularly consulted.
- 4 • Mr. Tiedemann and Mr. Fink testified that the Trustee negotiated a 10% discount on
- 5 the attorneys' fees incurred with the Glaser Weil firm, and made every effort to keep
- 6 the costs of Trust administration down.
- 7 • Mr. Mackenzie testified that all of the attorneys' fees and costs paid by the Trustee
- 8 were necessarily incurred.

9 In addition, the Trustee submitted the testimony of attorneys' fee expert, Ken Moscaret,
10 through his report and supplement, to establish that all of the attorneys' fees and costs incurred by
11 the Trustee were reasonable. He reviewed each of the factors set forth in California Rules of Court,
12 Rule 4-200, as well as other factors, and concluded that the attorneys' fees and costs incurred by the
13 Trustee were reasonable. Mr. Moscaret's full report was received in evidence in lieu of live
14 testimony by stipulation of the parties.

15 As evidenced by Exhibits T-2 and T-3 and the testimony at trial, some of the attorney's fees
16 and costs were incurred in defense of pleadings seeking relief against the Trustee. It was reasonable
17 and appropriate for the Trustee to defend, and the Trust was benefited by a defense.

18 Anne argues that the significant attorneys' fees and costs incurred by the Trustee were
19 objectively unreasonable, inappropriate, and did not benefit the Trust. She reasons that the high cost
20 of attorney time (more than \$9 million) cannot be justified when compared to the low value of the
21 Trust's Seaport Village assets (\$1 million or less¹²). Also, Anne argues that the price of litigation
22 against her (more than \$2 million), although the Trustee was successful (about \$9.5 million
23 recovered), was unreasonable. She reasons that as the beneficiary of the Seaport Village assets the
24 money recovered from her ultimately would be returned to her; hence, the litigation did not
25 benefit the Trust.

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28 ¹² Anne's exact valuation position is unclear: "the Trust's interest in Seaport Village ... is worth several million dollars and perhaps many million dollars...." BENEFICIARY ANNE C. TAUBMAN'S OBJECTIONS TO STATEMENT OF DECISION PROPOSED BY TRUSTEE U.S. BANK, pp. 17-18.

1 The problem with Anne’s theory that the Seaport Village assets had a low value is that
2 neither the Trustee – nor anyone else – could so conclude with reasonable confidence. This is
3 because the answer to two central questions was unknown: (1) would the Port extend the term of the
4 Seaport Village ground lease? and, (2) would the surrounding waterfront area be developed in a
5 manner optimally beneficial to Seaport Village’s business? At least some – apparently including a
6 sophisticated GMS – thought the answer to both questions was “yes” and that the Seaport Village
7 assets were accordingly of great value.

8 The Trustee knew of several valuations by apparently knowledgeable persons: In discussions
9 with the Trustee, Ricky and his attorney valued the Seaport Village assets at as much as \$100
10 million. GMS represented to a third party that its 50% controlling interest in Seaport Village had a
11 value of approximately \$39 million. Yasuda Bank valued Seaport Village at roughly \$24 million
12 (through its arms length sale of its \$39.8 million note to Anne at about a 40% discount).

13 Anne’s secretive conduct in the GMS transaction and her scorched -earth tactics vis-à-vis the
14 Trustee and Ricky suggested that she placed a significant – although not quantified - value on
15 Seaport Village.

16 The Trustee did not itself seek to value the Seaport Village assets. It undertook to preserve
17 those potentially very valuable assets for the Trust based on the valuations described above and as
18 demanded by Ricky. Doing so was not an intentional, reckless or grossly negligent breach of Trust.

19 The Trustee presented uncontroverted evidence that it undertook a cost-benefit analysis,
20 through consultation with its counsel, an outside fiduciary consultant, and the inside Chief Fiduciary
21 Officer at U.S. Bank, before initiating any litigation. The Trustee did not act in bad faith.

22 As to Anne’s claim that the surcharge funds were to be returned to her by the Trust (about
23 \$9.5 million, including interest), Judge Wolf actually held these funds were to be paid-out according
24 to the Trust instrument. This meant that all or a portion of the money might be returned to Anne in
25 future distributions. It would not necessarily be “returned” to her. The Trustee incurred about \$2
26 million in fees and costs in recovering the \$9.5 million. The Court concludes that the Trustee did
27 not act in bad faith, or engage in a breach of trust intentionally, recklessly or with gross negligence
28 in incurring and paying these administrative costs.

1 **2. Anne's Claims re Alleged Excessive Trustee's Fees**

2 The Trustee is entitled to reasonable trustee's fees for its administration of the Trust.
3 Pursuant to the Trustee's fee schedule, it collects a yearly fee of approximately 1% of the market
4 value of the Trust's assets. This is a reasonable fee. Anne claimed that the Trustee overcharged
5 Trustee's fees by (1) charging both an investment fee and a trustee fee for Trust assets that were
6 invested in mutual funds owned by U.S. Bank; (2) improperly valuing the Trust's oil and gas
7 interests; and (3) improperly valuing the Trust's Seaport Village assets.

8 Robert Tiedemann testified he was familiar with how the Trustee calculated its trustee's fees
9 and stated that the Trustee (1) did not charge both an investment fee and a trustee fee on those assets
10 invested in U.S. Bank's mutual funds; (2) did not charge a trustee's fee on the Trust's oil and gas
11 interests; and (3) did not overcharge trustee's fees based on the Seaport Village assets. As to (3),
12 Mr. Tiedemann testified the Trustee did not change its trustee's fee after the sale of the Seaport
13 Village carousel. However, there was no overcharge because the Trust's Seaport Village assets
14 (Limited and Inc. together) had a higher market value than the \$989,500 amount that was used to
15 calculate the fee, even after the sale of the carousel. I credit his testimony.

16 Anne offered the testimony of her expert Andrew Gifford. Mr. Gifford never reviewed the
17 Trustee's fee schedule. He did not know how the Trustee's fees were calculated, did not know how
18 the Trustee was valuing the Trust's assets for purposes of calculating its trustee's fee, and did not
19 know if the Trustee actually overcharged any fees.

20 **3. Anne's Claims re Surcharge Funds Awarded to Limited**

21 Pursuant to Judge Wolf's August 3, 2004 Corrected Statement of Decision, approximately
22 \$1 million in surcharge funds were awarded against Anne independent of GMS because she had
23 misappropriated those funds directly from Limited's bank accounts. Judge Wolf ordered that these
24 funds were to be maintained by the Trustee on behalf of Limited. Anne claims the Trustee violated
25 Judge Wolf's order and commingled Limited's surcharge funds with Trust assets, and thus, the
26 Trustee should be surcharged. The evidence does not support Anne's claims.

27 David Hilgenberg and Robert Tiedemann both testified that the Trustee uses software that
28 allows the Trustee to earmark funds that are the property of a particular entity, such as Limited, and

1 track all expenses paid on that entity's behalf. Mr. Hilgenberg and Mr. Tiedemann further testified
2 that the surcharge funds recovered on behalf of Limited were spent defending Limited against
3 several lawsuits filed against it as part of the "blowback" of the GMS transaction, and for other
4 administrative activities, such as filing amended tax returns. It needed to incur expense to handle a
5 potential tax liability problem for "cancellation of indebtedness" income. The issue arose because
6 of Anne's discounted purchase of the Yasuda Note. As successor Special Trustee of the Trust's
7 Seaport Village assets, the Trustee was authorized to hire attorneys to defend Limited in these
8 lawsuits and use Limited's funds to pay the attorneys' fees. Likewise, as successor Special Trustee,
9 the Trustee was authorized to pay its accountants a reasonable fee, using Limited's funds, to draft
10 and file tax returns on Limited's behalf.

11 The evidence establishes that all of the funds recovered on behalf of Limited were
12 earmarked by the Trustee's accounting software and then spent to satisfy reasonable and necessary
13 expenses and liabilities incurred by Limited.

14 **4. Anne's Claims re Accountings of Inc., Limited and Marwyn**

15 Anne argues the Trustee was required to separately account for Inc., Limited and Marwyn.
16 The Court disagrees. A trustee is not required to account for the activity of a business entity owned
17 by a trust unless ordered to do so. A Trustee is only required to account for a change in value and
18 any net income received by the Trust for a business. Probate Code Section 1061, et. seq. The
19 Trustee provided this information in its accountings. There is no order requiring the Trustee to
20 separately account for Inc., Limited and Marwyn. Thus, the Trustee satisfied its accounting duties
21 regarding the Trust's Seaport Village assets under the Probate Code.

22
23 **B. The Trustee's Final Account and Petition for Instructions**

24 **1. The Trustee's Second and Final Account Current**

25 All aspects of the Trustee's Second and Final Account Current are approved, except as noted
26 herein. The Final Account cannot be approved in its entirety.

27 The Final Account does not provide for equal distributions of income and principal to Anne
28 and Ricky. As discussed in this subsection, it must do so.

1 (The Court has awarded attorney's fees to Anne, in an amount to be determined for her
2 successful defense of her Amended Accounting, as discussed above. The Court does not approve the
3 Trustee's distribution proposal, as discussed below. The Court does not grant a surcharge against
4 Anne for alleged shortages in the Marketing and Payroll Accounts, as discussed above.)

5 The Trust instrument provides that Anne and Ricky are to receive equal distributions of
6 income on a monthly or other periodic basis. "The Trustee may also pay to or apply for the benefit
7 of the child so much of the principal of the Share as the Trustee shall deem necessary in the
8 Trustee's sole and absolute discretion for the child's health and education ... after taking into
9 consideration, to the extent the Trustee deems advisable, any income or resources of the child
10 outside of this Trust, known to the Trustee." Trust, Ninth Amendment, paragraph 3.02B(b)(i).

11 The discretion granted the Trustee as to principal distributions is broad but not unlimited.
12 Before exercising its discretion to pay principal to a beneficiary the Trustee must consider evidence
13 that allows it to decide what amount is "necessary" for his or her health and education; i.e., "The
14 Trustee may ... pay ... principal ... as necessary ... for the child's health and education...." The
15 Trustee never obtained evidence of Ricky's health and education status, his wants or needs, or
16 reached a conclusion of the amount "necessary." Also, before the Trustee may pay principal to only
17 one child, the Trustee must consider whether it is "advisable" to "take into consideration ... any
18 income or resources of the child outside this trust, known to the Trustee." The Trustee never did
19 this.

20 The Court does not credit the testimony that distributions of principal were made to Ricky to
21 allow him to participate in Trust-related litigation. Distributions of principal were made to Ricky
22 because he demanded them.

23 Anne is entitled to be paid the aggregate total of monthly distributions, plus interest, that the
24 Trustee has withheld from her while paying Ricky.

25 The Trustee did not make equal distributions to Anne because it concluded that Anne was
26 liable for millions of dollars in offsets (such as for the Marketing and Payroll Accounts and Cohen's
27 claim to 25% of Seaport Village Operating Co.), that easily exceeded the amount owing to her. This
28

1 conclusion was not reached in bad faith, and it was not an intentional, reckless or grossly negligent
2 breach of trust to so conclude.

3 Anne argues that because the Trust now lacks the money to pay what was withheld from her,
4 the Trustee should be surcharged for its improper administration.. I disagree. As explained below,
5 Seaport Village assets that would otherwise be distributed to Ricky are sufficient to cover any
6 deficiency in what Anne receives.

7 Anne is owed a total of \$5,477,538.19 including interest through February 15, 2010. Interest
8 accrues thereafter at the legal rate.

9 The Trustee is to submit an amended Final Account, taking into account the amounts owed
10 to Anne that equalizes the Shares to be received by Anne and Ricky¹³.

11 The Trustee is not required to utilize any of its own funds to make any payment to Anne or
12 to equalize the shares of Anne and Ricky. The Trustee must distribute a greater pro-rata percentage
13 of Trust assets (except for Seaport Village assets) to Anne in order to equalize - to the extent
14 feasible - Anne and Ricky's Shares. Assets must be valued at their current fair market value.

15 The Trustee may not treat the 25% interest that Cohen received in Operating Co. as a
16 distribution to Anne. First, the Trustee has not established the value of a 25% non-managing
17 member interest in Operating Co. Second, the Trustee has not established that this 25% interest was
18 "given" to Cohen by Anne. According to Anne, Cohen obtained his 25% by fraud. No convincing
19 contrary evidence has been presented to me. I credit Anne's testimony.

20 Anne involved Cohen in the negotiations with GMS for a proper Trust purpose; specifically,
21 to refinance Seaport Village and thereby avoid its total loss by foreclosure. While Cohen's
22 compensation for his services might be Anne's responsibility (due to her failure of proof before
23 Judge Wolf), his unauthorized act of taking the 25% is not her personal liability.

24 The Trustee shall demand that Ricky reimburse the Trust for any amounts he has been
25 overpaid.

26
27 ¹³ Mention was made at trial regarding the potential for a significant tax refund to the Trust. Nowhere is it noted that the
28 Trust has a potential for a tax refund. If there is such a potential it should be referenced and fully explained in the Trustee's Amended Final Account.

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2. The Trustee's Proposed Pro-Rata Distribution Plan

The Trust contemplates that Anne will ultimately receive all of the Trust's Seaport Village assets, and will pay Ricky an equalizing amount based on the Trust's definition of fair market value of the assets, at the time of final allocation and distribution, essentially to compensate Ricky for not receiving half of the Seaport Village assets. "[F]air market value" includes "the value of any future expansion of Seaport Village." Trust, Tenth amendment, section 3.02 H. The Trustee has recommended and proposed a distribution schedule that deviates from the terms of the Trust. The Trustee proposes that the Trust be divided into two equal Shares, one for Ricky and one for Anne, and that all of the Trust assets be distributed equally and pro-rata between the Shares, subject only to the certain charges against Anne's share and Ricky's share.

Such a deviation from the Trust can only be permitted upon the finding of changed circumstances. *Leonardini v. Wells Fargo Bank & Union Trust Co.* (1955) 131 Cal.App.2d 9. On petition by a trustee, the court may modify the provisions of the trust if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust. The Court finds that changed circumstances do exist that were not anticipated by Janice and frustrate her intent. The Court primarily relies upon the testimony of Robert Tiedemann, Barry Fink and David Mackenzie in making this finding. Thus, an in-kind distribution of the Trust's assets, including the Seaport Village assets is warranted. Probate Code §15409.

Janice was well aware of the day to day involvement of Anne in the active management of the Seaport Village and Anne's desire that Ricky have no involvement or ability to interfere with the affairs of the shopping center. Ricky was to receive half of the fair market value of Seaport Village (as defined by the Trust) but its management was given to Anne. Accordingly, the Trust contemplated that Anne (but not Ricky) would manage Seaport Village first as a Special Trustee, and ultimately as the 100% owner of Seaport Village, and Ricky would receive a monetary "equalizing" payment. The GMS transaction, however, changed the nature of the Seaport Village

1 investment. It is no longer of import that Anne exclusively control the business, as it has been
2 changed from an actively managed investment to one that is passive. The condition that caused
3 Janice to allocate the Seaport Village interests to Anne (Ricky's potential interference with Anne's
4 management) was eliminated by the GMS transaction, and as a result, there are changed
5 circumstances not anticipated by Janice, and it would not frustrate Janice's intent to now allocate the
6 remaining Seaport Village interests 50-50 between Anne and Ricky. What would frustrate her
7 intent is for the Trust to needlessly incur the cost of compliance with the valuation procedure set
8 forth in paragraph 3.02H of the Tenth Amendment, and to needlessly continue the high cost of
9 administration. She contemplated the Trust would easily have the money on hand. But, the Trust
10 appears to lack the funds needed to complete the valuation procedure and for continued
11 administration. It has been depleted by costly litigation; litigation promises to begin again if the
12 valuation procedure is undertaken. For these reasons, the Court approves the Trustee's pro-rata
13 distribution plan, as modified hereby, and orders that all Seaport Village assets of the Trust are to be
14 divided 50-50 between Anne and Ricky, subject to any amounts owed to Anne relating to
15 overpayments to Ricky described above. The amount owed but unpaid to Anne, plus interest thereon
16 at the legal rate, shall be an equitable lien on Ricky's distribution.

17 18 **3. The Trustee's Proposed Allocation of Administrative Expenses**

19 The Trustee proposed allocating a large amount of the administrative fees to Anne under the
20 "tort of another doctrine." The Trustee argued that substantial attorneys' fees and costs were
21 incurred initiating and defending litigation resulting from Anne's breaches of fiduciary duty as
22 Special Trustee.

23 If a party, in order to protect its interests, is required to bring or defend an action due to the
24 tort of another, that party is entitled to recover compensation for attorney's fees incurred from the
25 person who committed the tort. This is the so-called "tort of another" or "third party tort" doctrine.

26 The expenses sought were not caused by Anne's breaches of fiduciary duty. Those breaches,
27 for the most part, were based on her failure to disclose the GMS transaction to the Trustee and
28 Ricky, and her failure to account for and deliver to the Trustee its proceeds. The transaction itself

1 was a benefit to the Trust and its beneficiaries. The shopping center would otherwise have been lost
2 in foreclosure. Anne's decision as Special Trustee to enter into the GMS transaction was not -
3 standing alone- a breach of fiduciary duty. The "tort of another" doctrine requires that the third
4 party's tort cause the claimed loss; i.e. the tort must be a substantial factor in bringing about the
5 claimed loss. That requirement is not met here¹⁴.

6 Accordingly, the Trustee's proposed allocation of administrative expenses is not approved.

7 **4. The Trustee's Request for Confirmation of Ownership of Trust Assets**

8 The Trustee requested clarification as to the ownership of Limited. Anne originally claimed
9 that the entity, Anton, owned a 53.73% interest in Limited. However, Judge Wolf's Corrected
10 Statement of Decision, dated August 3, 2004, held that all of the income from Seaport Village, other
11 than that allocated to GMS in the GMS Settlement, is income of the trust estate, to be delivered to
12 the Trustee. The Corrected Statement of Decision dated August 3, 2004, pages 16 and 17, provides
13 as follows: "If the GMS proceeds were specifically Limited's, as Anne now asserts, then she would
14 have had the proceeds paid to Limited and Limited would have then distributed the proceeds to its
15 partners, which included the Trust. Anne did not do that. She kept the money for herself. Under
16 these circumstances, she is not entitled to receive a portion of the GMS proceeds through her
17 ownership of Anton, Ltd. which has a roughly 53% limited partnership stake in Limited."

18 The import of Judge Wolf's holding is that Anton no longer has a stake in Limited and that,
19 whatever its value, all of the interests in Limited (apart from the management share belonging to
20 GMS) beneficially belong entirely to the Trust. Indeed, Anne has admitted in other proceedings that
21 this is the import of Judge Wolf's ruling. In Anne's Respondent's Brief in In re the Janice L.
22 Taubman 1990 Trust, Court of Appeal Case No. B194074, at page 3, Anne states as follows: "In
23 prior proceedings, Seaport Village Ltd. has effectively been found – in its entirety (including both
24 Janice's minority interest and Anne's pre-existing majority interest) – to be an asset of the Trust."

25 Accordingly, this Court follows Judge Wolf's equitable determination and finds that, as a
26 result of the GMS Transaction, Limited is now beneficially owned 100% by the Trust.

27
28 ¹⁴ It is also worth noting that Anne was not "another." While an outside fiduciary – such as a broker - can be "another" the same is not true of a predecessor or co-trustee.

1 **5. Anne’s “Third Alternative”**

2 Anne offers what she terms a “third alternative” as a means to resolve all controversies
3 presented by this case. This “third alternative” would, in general terms, have Ricky purchase for
4 cash all of Anne’s interests in the Seaport Village assets, using a loan from the Trustee secured by
5 Seaport Village, or by using money generated by a proposed surcharge of the Trustee, to finance the
6 transaction. The Trustee declines to voluntarily make the needed loan and opposes any surcharge.
7 Anne urges that it be compelled to make the loan, or be surcharged. The Court declines to do so.
8 There is no breach of trust upon which to base a surcharge. Under the circumstances of this case this
9 Court lacks the power to order a Trustee to loan the sums proposed.

10
11 **6. Remaining Matters in the Trustee’s Final Account and Petition for**
12 **Instructions**

13
14 The Trustee's request for extraordinary trustee compensation is deferred until a final
15 accounting is approved.

16 The Trustee's allocation of surcharge sums to principal is approved.

17 The Trustee's allocation of oil and gas revenue is approved.

18 The Trustee's power to pay itself and its attorneys reasonable compensation under the Trust
19 instrument without prior court order is reinstated. The Trustee may pay or protest outstanding fees
20 it has already incurred, or pay or protest fees that it incurs in the future without the need for advance
21 application to the Court. The Trustee must follow the Trust and the law. Anne may challenge such
22 payments by future petition.

23
24 **C. Wyatt’s Request for Clarification**

25
26 Wyatt has requested clarification on three matters: (1) his standing to participate in further
27 Trust proceedings given that the Trust has now terminated by its own terms; (2) how the Trust estate
28 is to be divided upon termination; and (3) Wyatt’s interest in the “oil and gas” interests.

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1. Wyatt's standing to participate in further Trust proceedings

The Trust was a 10-year Trust that terminated by its terms on September 5, 2009. While Judge Wolf previously held that the Trust could continue past the 10-year term if the necessary equalizing payment had not been to Ricky on or before September 5, 2009, the provision for the equalizing payment has now been eliminated. With both Anne and Ricky surviving the Trust's term it only exists to the extent the Trustee needs to wind -up the affairs of the Trust. Accordingly, Wyatt's contingent interest in the Trust no longer remains and with no interest in the Trust, he no longer has any standing to participate in further Trust proceedings.

2. Wyatt's Request for Clarification regarding the Termination and Distribution of the Trust

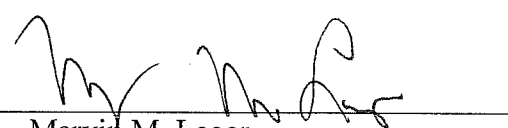
Once the Trustee submits its Amended Final Account, and it is approved, the Court will issue an order regarding the final termination and distribution of the Trust.

3. Wyatt's Interest in the Trust's "oil and gas" interests

Wyatt's interest in the Trust was eliminated once Anne and Ricky survived the Trust's term. There is no provision in the Trust that provides for Wyatt to receive a continuing interest in the Trust's "oil and gas" interests upon the Trust's termination. If Wyatt has any remaining interest in the "oil and gas" interests, it would only be through the estate of his father Ricky, either by will or intestacy. The Trustee is not required to consider this potential interest of Wyatt while it is winding-up the Trust for final distribution.

The Trustee shall forthwith prepare a concise final order, including updating interest.

Dated: AUG 27 2010, 2010



Marvin M. Lager
Judge of the Superior Court