

1 PHILIP S. WARDEN (Cal. State Bar No. 54752)  
 2 THOMAS V. LORAN III (Cal. State Bar No. 95255)  
 3 PILLSBURY WINTHROP SHAW PITTMAN LLP  
 4 Four Embarcadero Center, 22nd Floor  
 5 San Francisco, CA 94111-5998  
 6 Phone: (415) 983-1000  
 7 Fax: (415) 983-1200  
 8 philip.warden@pillsburylaw.com  
 9 thomas.loran@pillsburylaw.com

6 Attorneys for Appellant PASSPORT  
 7 MANAGEMENT, LLC

8 **UNITED STATES DISTRICT COURT**  
 9 **CENTRAL DISTRICT OF CALIFORNIA – SANTA ANA DIVISION**

<p>10 In re</p> <p>11</p> <p>12 JANA W. OLSON,</p> <p>13</p> <p>14 Debtor.</p> <p>15</p> <p>16</p> <p>17</p>	<p>District Court Case Number</p> <p>8:17-cv-01697-DSF</p> <p>Bankruptcy Court Case Number</p> <p>8:15-bk-12496-TA</p> <p>Adversary Case No.</p> <p>N/A</p>
<p>18</p> <p>19 PASSPORT MANAGEMENT, LLC,</p> <p>20</p> <p>21 Appellant,</p> <p>22 v.</p> <p>23 RICHARD A. MARSHACK,</p> <p>24 Chapter 7 Trustee,</p> <p>25</p> <p>26 Appellee.</p> <p>27</p> <p>28</p>	<p><b>REPLY BRIEF OF APPELLANT          PASSPORT MANAGEMENT, LLC</b></p>

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## INTRODUCTION

1  
2 The Trustee's<sup>1</sup> brief is both a tacit admission that the Bankruptcy Court's  
3 disposition of the Trustee's Rule 9019 Motion for Approval of the Trustee's  
4 Compromise with the Olson Children's Trust ("Compromise") on  
5 "reasonableness" grounds cannot be affirmed as issued, and an unsuccessful  
6 attempt to argue that only the approximately 80% of the trust funds that disgorged  
7 by the Children's Trust pursuant to the Compromise were "recovered" by the  
8 Trustee and became part of the estate and thus subject to Passport's lien.

9 The Trustee freely concedes that – if Passport is correct and *all* of the funds  
10 that were repatriated from the Cook Islands Trust<sup>2</sup> are and at all relevant times  
11 were part of the bankruptcy estate – the Trustee had no authority to distribute a  
12 portion of them to a non-creditor without Passport's consent, and the Bankruptcy  
13 Court had no discretion to approve it. (*See* Appellee Br. at 6). The Bankruptcy  
14 Court, however, expressly declined to resolve that question in ruling on the  
15 Trustee's Motion, and instead, believing it was sufficient for purposes of a Rule  
16 9019 motion, found that the settlement was "reasonable" under the difficult  
17 circumstances of the case, "because I don't know what the alternative is." (*Id.* at  
18 12 (quoting REC\_211:19-REC\_212:9); REC\_206:5-11). The Trustee argues that  
19 although the Bankruptcy Court reached the correct result, it did so for the wrong  
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22 <sup>1</sup> As previously defined in the Appellant's and Appellee's briefs, "Trustee" refers  
23 to Appellee Richard A. Marshack in his capacity as Chapter 7 Trustee for the  
24 Bankruptcy Estate of Jana W. Olson ("Debtor").

25 <sup>2</sup> As in Passport's Opening Brief, for simplicity, "Cook Islands Trust" refers to the  
26 Debtor's self-settled trust instrumentality located in the Cook Islands, which was  
27 originally titled "The 2009 Miyim Cook Islands Trust," and later renamed "The  
28 Pink Panther Trust."

1 reasons, because the fundamental legal question is whether the entirety or only a  
2 portion of the trust funds were part of the bankruptcy estate.

3 Passport agrees that the Bankruptcy Court ought to have considered the trust  
4 assets' status as property of the estate in reaching its decision – because the only  
5 supportable conclusion based on the law and the record is that they *are* estate  
6 assets, and therefore the court had no discretion (regardless of any “practical”  
7 considerations) to approve a distribution of estate assets in violation of Passport’s  
8 first-in-priority lien. The Trustee’s argument that only the portion of the Cook  
9 Islands Trust funds “recovered” through the Compromise became part of the  
10 bankruptcy estate and thus subject to Passport’s first-in-priority lien, while the  
11 remainder retained by the Children’s Trust never became part of the estate, is  
12 contrary to fundamental principles of California contract law, bankruptcy law, and  
13 the equitable principles that underscore both, as well as other rulings and findings  
14 of fact by the Bankruptcy Court, the Trustee’s own legal conclusions, and plain  
15 common sense.

## 16 ARGUMENT

### 17 **I. *Jevic* Stands for the Proposition that the Bankruptcy Code’s Rules and** 18 **Priorities for Distributions Cannot Be Circumvented Through** 19 **Manipulation of Substantive and Procedural Protections**

20 Whereas the Bankruptcy Court simply avoided addressing the question of  
21 whether the Cook Islands Trust funds were part of the estate, the Trustee attempts  
22 to interpret the Priority Agreement<sup>3</sup> and Compromise to mean that only a portion  
23 of the trust funds became part of the estate by operation of the Compromise while  
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25 <sup>3</sup> Passport’s compromise agreement with Trustee establishing, *inter alia*,  
26 Passport’s first-in-priority secured creditor status, as approved by the Bankruptcy  
27 Court in the Priority Order. *See* Opening Br. at 19.

1 the remainder did not. Both approaches seek to avoid the straightforward  
2 application of fundamental Bankruptcy Code principles, as recently reiterated by  
3 the Supreme Court in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017),  
4 which compel rejection of the Compromise.

5 The Trustee argues that *Jevic* “does not control the disposition of this  
6 matter” because the “real issue” is whether the Trustee recovered all or merely a  
7 portion of the repatriated Cook Islands Trust funds, since only the “recovered”  
8 portion is subject to Passport’s lien rights. (See Appellee Br. at 6-7). The Trustee  
9 also quotes the Bankruptcy Court’s interpretation that the specific ruling in *Jevic*  
10 “is somewhat narrow” and limited to the “*context of a dismissal* that violates the  
11 priority that would otherwise apply.” (*Id.* at 7, quoting REC\_187:25-188:9  
12 (emphasis added)).

13 However, the well-established principles regarding the protections and  
14 priorities of the Bankruptcy Code articulated by the Supreme Court in *Jevic* are  
15 applicable to *all* dispositions of bankruptcy estate property. As the Court of  
16 Appeals for the Tenth Circuit’s Bankruptcy Appellate Panel recently recognized,  
17 “*Jevic* stands for the proposition that neither the parties, nor the courts, are free to  
18 circumvent the Bankruptcy Code’s rules and policies regarding priorities and  
19 distributions through manipulation of substantive and procedural protections.” *In*  
20 *re Bird*, 577 B.R. 365, 379 n.64 (B.A.P. 10th Cir. 2017) (citing *Jevic*, 137 S. Ct. at  
21 986-87).<sup>4</sup> Thus *Jevic* permits neither the Trustee’s attempts to manipulate the  
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25 <sup>4</sup> *Bird* reviewed a motion for approval of the sale of a fully-encumbered estate  
26 asset; the court’s point was that, although *Jevic* did not preclude all carve-out  
27 agreements, it did preclude reimbursement of the fees for this particular sale,  
28

1 terms of the Priority Agreement and the Compromise so as to avoid the priorities  
2 and protections of the Bankruptcy Code nor the Bankruptcy Court's head-in-the-  
3 sand approach to avoid addressing them.

4 *Jevic* specifically states that in Chapter 7 cases, *any* disposition of estate  
5 property that contravenes the protections established in the Bankruptcy Code is  
6 precluded. *Jevic*, 137 S. Ct. at 979, 983. This did not create new law, but merely  
7 restated in emphatic terms what the Bankruptcy Code already requires. Its analysis  
8 is thus not limited to the specific context of the case (a Chapter 11 structured  
9 dismissal, or dismissals more generally), as the Bankruptcy Court supposed. The  
10 Court specifically distinguished between Chapter 11 (in which departures from  
11 priority *might* be allowed in limited circumstances furthering Chapter 11's goals)  
12 and the rigid application of priority required in *all* Chapter 7 distributions: "[t]he  
13 Code also sets forth a basic system of priority ... and makes clear *that distributions*  
14 *of assets* in a Chapter 7 liquidation *must follow this prescribed order.*" *Jevic*, 137  
15 S. Ct. at 979 (emphasis added) (citing 11 U.S.C. §§ 725, 726) and 983 ("*[i]n*  
16 *Chapter 7 liquidations, priority is an absolute command*-lower priority creditors  
17 cannot receive anything until the higher priority creditors have been paid in full")  
18 (emphasis added); *see also* Opening Br. at 35-37.

19 Only the consent of the affected party could overcome this "absolute  
20 command" – so, although the Bankruptcy Court somewhat incredulously asked  
21 "But surely you're not saying that by reason of that [i.e., *Jevic*] now, the secured –  
22 the senior creditor has an absolute veto, and there's nothing, by way of settlement  
23 or otherwise the court could do about it?" (REC\_188:3-9), that is, in fact, exactly  
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25 because it improperly benefitted the Trustee and the creditor at the expense of the  
26 estate and the debtor; *Jevic* precludes such manipulations of bankruptcy  
27 procedures to circumvent the priorities and protections built into the Code.  
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1 what *Jevic* dictates a senior secured creditor such as Passport has in the case of a  
2 Chapter 7 disposition of estate property. *Jevic*, 137 S. Ct. at 983; *see also U.S. v.*  
3 *Speers*, 382 U.S. 266, 269, n.3 (1965); *accord Goggin v. Division of Labor Law*  
4 *Enforcement of California*, 336 U.S. 118, 126-28 (1949).

5 The Trustee's contract-based arguments are merely an improper attempt to  
6 "circumvent the Bankruptcy Code's rules and policies regarding priorities and  
7 distributions through manipulation of substantive and procedural protections." *See*  
8 *In re Bird*, 577 B.R. at 379 n.64 (citing *Jevic*, 137 S. Ct. at 986-87) By  
9 acknowledging that he had no authority without Passport's consent to ignore the  
10 Code's priority protections if the funds in question were part of the bankruptcy  
11 estate, the Trustee tacitly acknowledges that *Jevic* in fact recites the applicable law  
12 that the specific protections applicable to priority status are (as *Jevic* points out)  
13 "an absolute command" for all dispositions of Chapter 7 estate property. Nor do  
14 Trustee's or the Bankruptcy Court's "practical considerations" – *i.e.*, their view  
15 that getting something for the estate, on any terms, was better than nothing. *See*  
16 *Jevic*, 137 S. Ct. at 987 ("We cannot alter the balance struck by the statute, not  
17 even in 'rare cases.' ... [C]ourts cannot deviate from the procedures specified by  
18 the Code, even when they sincerely believe that creditors would be better off.")  
19 (internal citations and alterations omitted)).

20 **II. All of Debtor's Legal and Equitable Interests in Property Became**  
21 **Property of the Estate Independent of the Contracts**

22 The Trustee's entire argument depends upon the proper classification of the  
23 Cook Islands Trust funds prior to the Compromise – for if those trust funds were  
24 already part of the bankruptcy estate prior to the Compromise, it makes no  
25 difference what proportion of those funds the Trustee allegedly "recovered"  
26 because *all* of the funds are subject to the priorities and protections of the  
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1 Bankruptcy Code, which the Trustee had no authority to circumvent. *See Jevic*,  
2 137 S. Ct. at 983, 987.

3 The Trustee has tried to get around this issue by arguing that the Priority  
4 Agreement and Compromise dictate the funds' status – for example, when asked  
5 by the Bankruptcy Court “But is this a property analysis or is this a contract  
6 analysis?” the Trustee’s counsel replied that “I think it kind of comes down to a  
7 contract analysis and then after Your Honor interprets the contract, which is an  
8 issue of law, the property rights fall into line one way or the other.” (REC\_195:19-  
9 24). But the Trustee has it exactly backward – neither contract could (nor did)  
10 circumvent the normal operation of the Bankruptcy Code, and certainly not  
11 without express language stating such intent that is not present in these contracts.<sup>5</sup>

12 The “property of the estate” is defined as “all legal or equitable interests of  
13 the debtor in property” as of the commencement of the bankruptcy case. 11 U.S.C.  
14 § 541(a)(1)); *see also Begier v. IRS*, 496 U.S. 53, 54 (1990). The Ninth Circuit  
15 Court of Appeals, quoting from the Congressional Record, found that “property of  
16 the estate” was specifically drafted to be as broad as possible, and includes “all  
17 kinds of property, including tangible or intangible property, causes of action ... and  
18 all other forms of property” “wherever located[.]” *In re Feiler*, 218 F.3d 948, 955–  
19 56 (9th Cir. 2000); *see also U.S. v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983)  
20 (noting that “Congress intended a broad range of property to be included in the  
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22 <sup>5</sup> Trustee’s counsel indeed admitted that his attempt to use the contracts to get  
23 around the “property analysis” problem was a post-hoc justification that he  
24 developed only after reading Passport’s opposition to the Trustee’s Motion; it  
25 was *not* the Trustee’s analysis of his authority prior to drafting and entering into  
26 the Compromise or the Priority Agreement. (*See* REC\_154:11-15; *see also*  
27 198:6-199:20).  
28

1 estate .... The statutory language reflects this scope of the estate.... The house and  
2 senate reports on the Bankruptcy Code indicate that § 541(a)(1)'s scope is  
3 broad.”). Consequently, courts have consistently interpreted “property of the  
4 estate” as broadly as possible. *Id.*

5 A debtor’s failure to disclose an asset upon filing does not prevent it from  
6 becoming property of the estate, 11 U.S.C. § 554(d), nor does the fact that the  
7 Debtor here attempted to hide her assets from the estate through fraudulent  
8 transfers, because Section 541(a)(1)

9 include[s] in the estate any property made available to the estate by  
10 other provisions of the Bankruptcy Code. Several of these provisions  
11 bring into the estate property in which the debtor did not have a  
12 possessory interest at the time the bankruptcy proceedings  
13 commenced.

14 *Whiting Pools, Inc.*, 462 U.S. at 402 (citing Congressional Record). Once an asset  
15 becomes part of the bankruptcy estate, all rights held by the debtor in the asset are  
16 extinguished unless the asset is expressly and unequivocally abandoned back to the  
17 debtor. *See* 11 U.S.C. § 554(a)-(c).

18 Here, although the Debtor’s Schedules falsely stated that the “Miyim 2009  
19 Cook Islands Trust” was “defunded and defunct,” and that Debtor had “no current  
20 right to information,” the record demonstrates that Debtor was the settlor and  
21 original sole beneficiary of the trust, which had in fact been funded with several  
22 million dollars, and that the Debtor thereafter, in response to being served with  
23 Passport’s State Court Action, fraudulently transferred her interest in the trust to  
24 her children and caused its name to be changed to “The Pink Panther Trust” in an  
25 attempt to hide her assets from Passport. (*See* Opening Br. at 9-10).

26 As the Trustee has repeatedly asserted and as the record amply supports (*see*,  
27 *e.g.*, Opening Br. at 10-11, 14-18), the Debtor’s transfers to and among the Cook  
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1 Islands trusts were, in any event, avoidable both under the routine operation of the  
2 Bankruptcy Code as (1) transfers that were made to self-settled trusts within 10  
3 years of filing for bankruptcy, and (2) “slam dunk” examples of avoidable  
4 fraudulent transfers that the Debtor made to avoid her debts to Passport (*see, e.g.*,  
5 Appellee Br. at 3; REC\_198:16-20; REC\_539:24-25).

6 The Debtor later freely stipulated to a Turnover Order which compelled her  
7 to take all actions necessary to cause the Cook Islands Trust assets to be transferred  
8 to the Trustee in trust pending further proceedings.<sup>6</sup> (*See* REC\_764-67). It was  
9 Debtor’s failure to comply with the Turnover Order, as well as her email alerting  
10 the Cook Islands trustee that she was acting under duress (and accordingly, under  
11 the terms of the trust, that her instructions should be disregarded), that resulted in  
12 the Bankruptcy Court finding Debtor in contempt. (*See* Opening Br. at 12-17). In  
13 the Findings of Fact and Conclusions of Law accompanying the contempt order,  
14 the Bankruptcy Court specifically found that “Debtor has control over the [Cook  
15 Islands Trust] funds and the ability to cause all assets held by the Trust to be turned  
16 over to the Trustee” based on: Debtor’s sworn testimony that she had caused funds  
17 to be withdrawn from the trust; chat messages showing that Debtor retained control  
18 over trust assets; Debtor’s agreement to enter into the stipulation, which  
19 constituted an admission that she had control over the Trust funds and the ability to  
20 cause all assets to be turned over to the Trustee; Debtor’s representations regarding  
21 methods of communicating to Trustee that she wants actions taken and is not  
22 acting under duress; and an email sent by Debtor communicating that she was

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<sup>6</sup> The Trustee was permitted to request the turnover of Debtor’s assets by motion as an alternative to initiating an adversary proceeding for avoidance. *See In re Roussos v. Ehrenberg*, No. CV 17-552-JFW, 2017 WL 2259674, at \*7 (C.D. Cal. May 23, 2017).

1 acting under duress, which constituted an acknowledgment that her state of mind is  
2 relevant to the trustees of the Trust. (REC\_393-94 at ¶7). Debtor offered no  
3 admissible evidence that it was impossible for her to comply with the Turnover  
4 Order. (REC\_395 at ¶4).

5 There is thus little dispute that Debtor was in control and (at least) equitable  
6 possession of the Cook Islands Trust funds at all relevant times, and therefore that  
7 the trust was lawfully part of the bankruptcy estate at all relevant times. *See In re*  
8 *Chantel*, 693 F. Appx. 723, 724 (9th Cir. 2017) (bankruptcy court properly  
9 concluded that assets held in the trust were property of the bankruptcy estate  
10 because the trust’s assets were in the “possession, custody or control of the  
11 debtors” and the trust was used as the debtors’ “personal asset repository.”) (citing  
12 11 U.S.C. § 541(a)(1); *Turner v. Cook*, 362 F.3d 1219, 1225-26 (9th Cir. 2004).

13 **III. The Trustee’s Interpretation of the Priority Agreement and**  
14 **Compromise Is Unreasonable Under California Contract Law and Does**  
15 **Not Alter the Status of the Trust Funds as Property of the Estate**

16 The Trustee first argues that under the Priority Agreement, Passport’s first-  
17 in-priority lien applies only to “property recovered” from the Cook Islands Trust,  
18 and thus if the Compromise “resulted in the estate recovering only the approximate  
19 \$3.4 million already transferred to the Trustee, then Passport would not have a lien  
20 on the approximate \$965,000 balance because such funds were never recovered by  
21 the Trustee.” (Appellee Br. at 6). This argument is necessary to support Trustee’s  
22 further argument that the Compromise properly facilitated this approximate 80/20  
23 split of the trust assets, in spite of the Compromise’s plain language conceding  
24 without contingency that the assets of the Cook Islands Trust are the property of  
25 the Debtor’s bankruptcy estate in their entirety, and acknowledging that the  
26 Trustee’s agreement to permit the Children’s Trust to retain approximately  
27 \$965,000 is contingent on approval of the Bankruptcy Court.

1 The Trustee's interpretation of these contracts is both contrary to the  
2 applicable principles of California contract law and, in any event, does not alter the  
3 fact that the Cook Islands Trust assets – however challenging to obtain while  
4 offshore – were nonetheless always the property of the bankruptcy estate from the  
5 moment the Debtor filed her Chapter 7 petition.

6 **A. Applicable Principles of California Contract Law**

7 Under California law, “[a] contract must receive such an interpretation as  
8 will make it lawful, operative, definite, reasonable, and capable of being carried  
9 into effect, if it can be done without violating the intention of the parties.” *Brawner*  
10 *v. Wilson*, 271 P.2d 937, 939 (Cal. App. 1954) (quoting Cal. Civ. Code § 1643).

11 A contract's language governs its interpretation only insofar as it “is clear and  
12 explicit and does not involve an absurdity.” *Id.* (quoting Civ. Code § 1638).

13 Language involving an absurdity must thus be rejected, as must any phrase or  
14 clause inconsistent with the object and intent of the parties. *Id.* (citing Cal. Civ.  
15 Code §§ 1638, 1650, 1652, 1653). The contract must be construed as a whole and  
16 the intention of the parties must be ascertained from the consideration of the entire  
17 contract, not some isolated portion of it. (Cal. Civ. Code § 1641).

18 Where a contract admits of two constructions, the court ought to adopt that  
19 which is most equitable and which will not give an unconscionable advantage to  
20 one party over the other. *Brawner*, 271 P.2d at 939; *see also Cty. of Marin v.*  
21 *Assessment Appeals Bd.*, 64 Cal. App. 3d 319, 325 (1976) (“The court shall avoid  
22 an interpretation which will make a contract extraordinary, harsh, unjust,  
23 inequitable or which would result in absurdity.”) (citations omitted). Because a  
24 contract entered into for the parties' mutual benefit must be interpreted to give  
25 effect to the main purpose of the contract and avoid defeating the mutual objectives  
26 of the parties, “[I]anguage which is inconsistent with the objective of the contract  
27 shall be rejected[.]”). *Cty. of Marin*, 64 Cal. App. 3d at 325.

1           **B. The Trustee’s Interpretation of the Priority Agreement Is**  
2           **Inconsistent Its Terms, Particularly the Parties’ Stated**  
3           **Intentions, and Thus Leads to Absurd Results**

4           The Trustee spends little time analyzing the Priority Agreement, but merely  
5 points to the clause stating that Passport’s lien extends to “*all property recovered*  
6 under any theory of law or by consent from the trusts Debtor in the Cook Islands  
7 ... and elsewhere and other funds...” and then states that if the Court interprets the  
8 Compromise as having “recovered” (as the Trustee argues) only a portion of the  
9 Cook Islands Trust funds for the estate, as opposed to the entirety of the funds that  
10 were repatriated to the United States (as Passport argues). Appellee Br. at 6  
11 (quoting REC\_421 ¶4) (emphasis in Appellee brief). The Trustee’s interpretation  
12 is contrary to California contract law for a host of reasons, not least because it is  
13 inconsistent with the agreement read as a whole, because it violates the stated  
14 intentions of the parties, and because it has the absurd result that Passport’s first-  
15 in-priority secured creditor status – the stated benefit of its bargain with the Trustee  
16 – is rendered effectively meaningless.

17           First, the Trustee’s interpretation of “all property recovered” is read in  
18 isolation, without considering the operation of the Bankruptcy Code to define what  
19 is in the bankruptcy estate. As the Priority Agreement expressly acknowledges,  
20 “*all of Debtor’s assets ... became property of the estate as of the petition date*  
21 *pursuant to 11 U.S.C. § 541(a)*” and were subject to Passport’s Judgment Liens.  
22 (REC\_421 ¶4). The Trustee’s reading also conflicts with a separate clause  
23 agreeing that the Trustee will not “apply to the court to abandon estate property”  
24 without first conferring in good faith with Passport and considering whether to  
25 retain Passport’s counsel as special counsel for the estate to pursue such assets for  
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1 the benefit of the estate.<sup>7</sup> (REC\_422-23 at ¶11). This clause on its face refers to as-  
2 yet unrecovered assets as “estate property” prior to any “recovery” of those funds  
3 by the Trustee.

4 Second, in order for the term “property recovered” to support the Trustee’s  
5 interpretation of the Compromise agreement, one must imply that the Trustee alone  
6 determines what proportion of assets are “recovered” to the estate and thus subject  
7 to Passport’s lien, and what proportion he may otherwise distribute to others as he  
8 deems fit. This both violates the parties’ stated mutual objectives for entering into  
9 the agreement in the first place<sup>8</sup> and gives the Trustee an inequitable advantage –  
10 the power to dispose of assets as though they were not subject to the priorities and  
11 protections of the Bankruptcy Code – thus depriving Passport of the benefit of its  
12 bargain, namely, the Code-provided protections inherent in secured priority  
13 creditor status. *See Brawner*, 271 P.2d at 939; *see also Cty. of Marin*, 64 Cal. App.  
14 3d at 325; Cal. Civ. Code §§ 1643, 1650, 1652, 1653.

15 Finally and relatedly, the Trustee’s interpretation of “recovered” in effect  
16 circumvents Passport’s first-in-priority lien rights and their associated absolute  
17 priority protections provided under the Bankruptcy Code. The Trustee’s reading of  
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19 <sup>7</sup> The Trustee did not frame the Compromise as an “abandonment” of 20% of the  
20 estate assets, and as noted previously, did not confer with Passport regarding the  
21 specific terms of the Compromise. (*See* REC\_185:13-187:23).

22 <sup>8</sup> In addition to settling Passport’s claims and eliminating the related risk to the  
23 estate, the Trustee and Passport also entered into the agreement to allow them to  
24 “jointly pursue” Debtor’s hidden assets and to allow Trustee to where  
25 appropriate allow the Trustee to employ Passport’s counsel as special counsel in  
26 those endeavors. (REC\_420, Recital N). The Recitals are “acknowledged by the  
27 parties to be true and form the basis of this Agreement.” (*Id.* ¶1).



1 the Priority Agreement thus leads to the absurd result that Passport gave up its  
2 rights and agreed to a carve out benefitting Trustee and other creditors in exchange  
3 for a merely illusory benefit. That is not a reasonable reading of the agreement.  
4 *See Brawner*, 271 P.2d at 939 (citing Cal. Civ. Code §§ 1650, 1652, 1653).

5 Specifically, in exchange for the Trustee's agreement that Passport should  
6 have secured first-in-priority claim status in the principal amount of  
7 \$11,590,628.98 (REC\_421 ¶3), Passport gave up, among other things, its right to  
8 claim that it had a constructive trust over *all* of the Debtor's property pursuant to  
9 its Judgment Liens against Debtor and her well-documented efforts to defraud  
10 Passport, which if it had succeeded would have resulted in the bankruptcy estate  
11 having no assets at all (*see* REC\_418, Recital E, REC\_419, Recitals G and L).  
12 Passport also agreed to a carve-out allowing payment of the estate's administrative  
13 expenses and of other unsecured claims *for pari passu* as though Passport's claim  
14 were unsecured. (*See* REC\_421 ¶6; REC\_422 ¶8).

15 But, as noted above, Passport's priority status is rendered effectively  
16 meaningless if – as the Trustee argues – the Priority Agreement allows some assets  
17 that the Code defines as “property of the estate” to nonetheless be distributed  
18 outside the priority scheme because they are not deemed “recovered” and not  
19 subject to Passport's lien. This leads to the absurd result that although Passport  
20 made important concessions for priority status, the contract would nonetheless  
21 allow the Trustee *more* authority (not less) to dispose of estate assets than he  
22 would otherwise have – such that Passport ended up in a worse position than if it  
23 had never entered into the agreement at all.

24 **C. Trustee's Interpretation of the Compromise Is Refuted by Its**  
25 **Plain Terms and California Law**

26 The Trustee next argues that the Compromise – despite an express  
27 concession that *all* the repatriated Cook Islands Trust funds are the property of the  
28

1 bankruptcy estate – must nonetheless be read to limit the Trustee’s “recovery” for  
2 the estate to the approximately 80% that the Children’s Trust agreed to (and did)  
3 transfer to the Trustee for the benefit of the estate. In short, the Trustee argues that  
4 the Compromise should be interpreted to ignore the express concession – made  
5 without contingency – that the fraudulent transfers to the children are avoided and  
6 the are funds subject to the bankruptcy estate in their entirety, and to support a  
7 shell game in which the trust funds both are and are not part of the bankruptcy  
8 estate, as it is convenient to Trustee’s argument. This, too, is a thinly-veiled  
9 attempt to avoid the Bankruptcy Code’s substantive and procedural protections that  
10 does not withstand any scrutiny.

11 The Bankruptcy Court – perhaps aware that the Trustee’s contract-based  
12 arguments were unsupportable – declined to decide the question, thus avoiding the  
13 necessary implications, and instead chose to rule only that he approved the  
14 Compromise as (in his view) reasonable under the circumstances, “because I don’t  
15 know what the alternative is.”<sup>9</sup> (REC\_206:5-11). Both approaches improperly  
16 ignore that *Jevic* (among other authority) precludes manipulation of the  
17 Bankruptcy Code’s substantive and procedural protections in order to circumvent  
18 the Code’s rules and priorities for distributions – which is precisely what happened  
19 here.

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20  
21 <sup>9</sup> As recounted at length in Passport’s Opening Brief, the Bankruptcy Court was  
22 concerned about engaging in “duplicity” by not approving the Compromise after  
23 the funds had already been repatriated. *See* Opening Br. at 25, 28-31. Of course,  
24 neither the court nor Passport were asked in advance to approve the terms of the  
25 Compromise, nor were the parties to the agreement compelled to execute without  
26 seeking approval.  
27

1 In any event, the Compromise read as a whole does not support the Trustee's  
2 interpretation. A brief summary of the operative provisions of the Compromise is  
3 appropriate.

4 Recitals<sup>10</sup>

- 5 • The Debtor, as the settlor and initial sole beneficiary, “made certain  
6 transfers [of funds] to [the Children,] including naming them as primary  
7 beneficiaries of the [Pink Panther Trust]” and further recites that  
8 “[Trustee] claims that all funds transferred by [Debtor] to the Children[,]”  
9 including the funds in the [Pink Panther Trust,] belong to [Debtor's]  
10 bankruptcy estate or that any rights of the Children to such funds are  
11 subject to avoidance and recovery as fraudulent transfers.” (REC\_547,  
12 Recitals C, D and F).
- 13 • The parties intend to work together “for the purpose[s] of [first,] the  
14 Children's Trust obtaining possession of all funds and property  
15 transferred by [Debtor] to the Children including the [Pink Panther Trust  
16 funds]” – *i.e., for the purpose of repatriating the entirety of the trust  
17 funds to the United States* – and, upon achieving that goal, then  
18 “resolv[ing] the competing claims to ownership of such funds.” (*Id.*  
19 Recitals I and J).
- 20 • The parties wish to settle their claims relating to the Pink Panther Trust  
21 funds “To avoid additional attorneys' fees, the uncertainties, costs and  
22 burdens of litigation[.]” (*Id.* REC\_547-48).

23 Agreement

- 24 • The guardian ad litem for the Children “agrees that all transfers of  
25 property by [Debtor] to the [Olson] Children *are avoided, recovered by,*  
26

27 <sup>10</sup> The Recitals are expressly incorporated into the agreement. (REC\_548).  
28

1            *and preserved for the benefit of [Debtor's] bankruptcy estate.”*

2            (REC\_548 ¶2 (emphasis added)).

- 3            • Upon execution of the agreement, the guardian ad litem “shall request
- 4            that all property transferred to the Children by [Debtor] be deposited into
- 5            the Settlement Escrow Account related to the Children’s Trust.” (*Id.*).
- 6            • Within one business day after those funds are received and become
- 7            available for withdrawal, the Trustee of the Children’s Trust shall to
- 8            distribute 77.78% of those funds to the Trustee and to retain 22.22% of
- 9            the funds within the Settlement Escrow Account. (*Id.* ¶3).
- 10           • The agreement provides that “the effectiveness of the consideration
- 11           provided by the Trustee pursuant to this Agreement is *contingent upon*
- 12           *the [Bankruptcy] Court entering an order approving it.* Failure of the
- 13           Court to approve this Agreement shall render such provisions void and
- 14           without effect. The date that the Court enters its order approving this
- 15           Agreement shall be referred to as the “Effective Date.” (*Id.* ¶1 (emphasis
- 16           added)).
- 17           • Only upon the entry of “a final, non-appealable order by the bankruptcy
- 18           court” approving the Compromise may the Trustee of the Children’s
- 19           Trust access the retained funds at which point, *and not before*, such funds
- 20           are agreed to “not constitute property of [Debtor’s] bankruptcy estate.”
- 21           (*Id.* ¶4).
- 22           • The Trustee, “upon receipt of all funds required to be distributed to [the
- 23           Trustee]” and upon “the Effective Date” (as above, the date the
- 24           bankruptcy court approves the agreement), the Trustee “waives and
- 25           releases any and all right, title to and interest in the [Pink Panther Trust]
- 26           Funds retained by [the Children’s Trust trustee]” for the Children’s Trust
- 27
- 28

1 AND “releases any fraudulent transfer claims against the Children arising  
2 from transfers received from [Debtor].” (*Id.* ¶5(a)).

- 3 • The agreement is *severable*, such that, to the extent possible, either the  
4 provisions of the agreement that may prove to be ineffective or  
5 prohibited by applicable law shall be deemed modified to meet minimum  
6 legal requirements, or if not so modified, “it shall be ineffective and  
7 invalid only to the extent of such prohibition or invalidity without  
8 affecting the remaining provisions of this agreement[.]” (REC\_550  
9 ¶10(f)).

10 The Trustee and the Children’s Trust<sup>11</sup> argue that Paragraph 1 would render  
11 Trustee’s consideration for the entire agreement void if the Court does not approve  
12 the Compromise, but that assertion is demonstrably wrong: the Trustee’s release  
13 of the claims against the Children, his forbearance to sue them while the  
14 Compromise was being negotiated and court approval sought, the establishment of  
15 the Children’s Trust as an interested party entitled to be heard by the Bankruptcy  
16 Court as to Children’s right to the retained funds, and the Trustee’s advocacy on  
17 behalf of the Children’s Trust’s right to retain those funds through his Motion for  
18 approval and this appeal all represents adequate consideration for the avoidance  
19 clause and the act of repatriating the entirety of the trust funds, which was a  
20 primary stated goal of the parties. Cal. Code § 1605; *see also Zhang Xudong v.*  
21 *Flecke*, No. CV-17-2876-CAS, 2017 WL 4179872, at \*10 (C.D. Cal. Sept. 18,  
22 2017) (“[f]orbearing suit or extending time for performance which suspends a legal  
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25 <sup>11</sup> The Children’s Trust filed a brief in support of the affirmance of the Bankruptcy  
26 Court’s Approval Order; though styled as an “Appellee” brief, the Children’s  
27 Trust is merely an interested party. (*See* Dkt. 9).  
28

1 right constitutes a sufficient consideration”) (quoting *Levine v. Tobin*, 210 Cal.  
2 App. 2d 67, 69 (1962)).

3 Moreover, the language of Paragraph 1 of the Compromise is better read, in  
4 the context of the agreement as a whole, as limited to the *additional* consideration  
5 – the 22.2% of the funds retained in escrow by the Children’s Trust – that was  
6 offered conditionally on the approval of the court, but not to the other  
7 consideration that the Trustee provided under the agreement which was not  
8 conditional and which, as discussed above, conferred sufficient benefit to support  
9 the remaining contractual promises. *See* Cal. Civ. Code § 1605.<sup>12</sup> For similar  
10 reasons, the Trustee’s related argument that the 22.2% of the funds retained by the  
11 Children’s Trust were the only consideration offered for the guardian ad litem’s  
12 performance (*see* Appellee Br. at 11) is also incorrect.

13 Particularly in light of the severability clause, but also by operation of  
14 California canons of contract interpretation, the remaining promises in the  
15 agreement continue to be in full force and effect, regardless of whether court  
16 approval is obtained for the Children’s Trust’s retention of 22.2% of the funds.  
17 The Compromise, after securing the guardian ad litem’s agreement to the  
18 avoidance clause establishing that the trust funds are the rightful property of the  
19 bankruptcy estate, then requires the Children’s guardian ad litem to take the  
20 necessary actions to cause all of the fraudulently conveyed property to be  
21 transferred to the United States, and directs the Children’s Trustee to transfer  
22

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23 <sup>12</sup> Cal. Code § 1605 defines “good consideration” as “[a]ny benefit conferred or  
24 agreed to be conferred, upon the promisor, by any other person, to which the  
25 promisor is not lawfully entitled, or any prejudice suffered, or agreed to be  
26 suffered, by such person, other than such as he is at the time of consent lawfully  
27 bound to suffer, as an inducement to the promisor...[.]”

1 77.8% of that property to the Trustee, in exchange for a release of what the Trustee  
2 has characterized as a “slam dunk” fraudulent transfer claim against the Children.  
3 The remaining 22.2% of the funds represents *further* consideration that is  
4 contingent upon the court’s approval.

5 To the extent that the Trustee might argue that the Trustee’s forbearance to  
6 sue in the absence of court approval is unclear from the contract’s terms, “[a]n  
7 *implied* promise to forbear exercising a right can be consideration as readily as an  
8 explicit promise not to do so.” *Union Oil Co. of Cal. v. Terrible Herbst, Inc.*, 331  
9 F.3d 735, 741 (9th Cir. 2003) (emphasis added). It is also plainly consistent with  
10 the terms of the Compromise and the intent of the parties that the Trustee’s  
11 agreement to waive and release claims against the children be implied to be  
12 effective if court approval of the agreement is denied *and* the Children’s Trust  
13 accordingly remits the remaining 22.2% share to the Trustee; it would not be  
14 effective only with regard to any funds that continue to be retained by the  
15 Children’s Trust after court approval has been denied.

16 Relatedly, the Children’s Trust argues that if the Bankruptcy Court’s  
17 Approval Order is reversed, then the Trustee’s consideration is null and void under  
18 the terms of the Compromise, and the Trustee must therefore return all funds the  
19 Children’s Trust transferred pursuant to its obligations under the Compromise.<sup>13</sup>  
20 (Dkt. 9 at 9-10). Similar to the discussion above, however, this ignores that only a  
21 portion of the Trustee’s performance would be voided by reversing the Bankruptcy  
22 Court’s order – *i.e.*, the Children’s Trust’s access to and Trustee’s release of claims  
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24 <sup>13</sup> The Children’s Trust’s further argument that, as non-creditor, it is “not subject to  
25 the Priority scheme,” misapprehends the import of that statement – of course the  
26 Bankruptcy Code applies and the Trustee is not free to distribute estate assets to  
27 non-creditors in derogation of the Code’s priority scheme.  
28

1 on the \$965,000 currently retained in escrow by the Children’s Trust, which is  
2 specifically contingent on court approval – the remainder of the consideration  
3 provided by the Trustee remains effective and is sufficient to support the remaining  
4 promises in the agreement.

5 In any event, as the Children’s Trust acknowledges, even if the funds were  
6 to be returned to the Children’s Trust, it would be subject to avoidance proceedings  
7 that in all likelihood would ultimately result in the funds being returned to the  
8 bankruptcy estate. This result would undermine the agreement’s stated purpose to  
9 “avoid additional attorney’s fees, the uncertainties, costs and burdens of litigation”  
10 (REC\_547), and the agreement should not be construed to defeat this important  
11 objective of the parties.

12 **IV. Approval of the Compromise Was Also an Abuse of Discretion Under**  
13 **Rule 9019 Analysis**

14 Finally, the Trustee briefly reiterates his arguments as to the reasonableness  
15 of the Compromise under the *A&C Properties* factors. (See Appellee Br. at 12-15,  
16 referencing *Martin v. Kane (In re A & C Properties)*), 784 F.2d 1377, 1381 (9th  
17 Cir. 1986), cert. denied 479 U.S. 854 (1986). While Trustee is certainly correct  
18 that the Debtor’s behavior has made recovery of assets difficult, as discussed in  
19 Passport’s Opening Brief, this cannot make an inherently inequitable compromise  
20 agreement “fair and equitable,” as it must for approval under Rule 9019. (See  
21 Opening Br. at 40-44). Even under the relatively liberal standard of review for  
22 rulings on Rule 9019 motions, it is a *per se* abuse of discretion to approve a  
23 settlement that is contrary to the applicable law. See, e.g., *In re Debbie Reynolds*  
24 *Hotel & Casino*, 255 F.3d 1061, 1065 (9th Cir. 2001); see also *In re Arden*, 176  
25 F.3d 1226, 1228 (9th Cir. 1999).

26 While the Trustee and the Children’s Trust take care to emphasize that  
27 Debtor and her former husband will not benefit “directly” from the \$1 million if it  
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1 were to be released to the Children’s Trust (*see* Appellee Br. at 4; Children’s Trust  
2 Br. at 9), plainly there *would be* substantial benefit to the Debtor and Erlend Olson  
3 if they were to have \$1 million in trust assets available for distributions to  
4 “institutions furthering [the] health, welfare and education” of their minor children  
5 to finance what would otherwise have to be paid for out of their own assets, if  
6 indeed they could afford similar payouts from their own assets, rather than assets  
7 fraudulently obtained from Passport. It is no exaggeration to characterize this  
8 Compromise, as the Bankruptcy Court did, as “a bunch of frauds” making off with  
9 a substantial portion of bankruptcy estate’s “loot,” even if their presumably  
10 innocent children enjoy some direct benefit as well. Despite the Trustee’s business  
11 judgment otherwise, it was objectively unreasonable and inequitable to reward the  
12 Debtor’s “piracy” at the expense of the creditor whose assets the Debtor  
13 fraudulently transferred in the first place, and thus the Bankruptcy Court’s  
14 approval of the Compromise was a *per se* abuse of discretion.

15       Nothing in either the Trustee’s stated reasons for entering into the  
16 Compromise, nor in the Bankruptcy Court’s decision that practical considerations  
17 and its misplaced misgivings about disapproving the Compromise after the trust  
18 funds had already been repatriated, undercuts the conclusion that approval of the  
19 Compromise was a *per se* abuse of discretion that should be reversed as contrary to  
20 applicable law and equitable considerations.

21       Regarding the reasonableness of entering into a settlement agreement with  
22 the family members of a fraudulent debtor – the terms of which even Trustee’s  
23 counsel agrees are extraordinary (*see* REC\_198:13-20<sup>14</sup>), the Trustee does not  
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25 <sup>14</sup> “[T]here’s a certain amount of fairness going back to the Court’s comment about  
26 unpalatable alternatives, you know, I can’t recall a time in my 25 plus years, and  
27  
28

1 adequately explain why he did not in the alternative pursue the “slam dunk”  
2 fraudulent transfer action against the Debtor’s children – or at least permit  
3 Passport’s counsel to do so as contemplated in the Priority Agreement – rather than  
4 proceed with an inequitable compromise that benefits the Debtor’s family without  
5 Passport’s or the court’s participation or approval. The Debtor’s minor children  
6 are presumably innocent of their mother’s fraud, but they have no more legal right  
7 to retain any part the fraudulently transferred funds than she did.

8       The record leaves little doubt such an action would have succeeded, and the  
9 Olson children would have found themselves saddled with – as the Trustee points  
10 out – a non-dischargeable debt in the amount of the offshore trust. Even though  
11 international law in a creditor-unfriendly jurisdiction would have been in play,  
12 Trustee ignores that, at that point, payment of the Children’s non-dischargeable  
13 multimillion dollar debt would surely have been in the best interests of the  
14 children, even as assessed by the Cook Islands trustees and, to the extent she  
15 continues to direct them, the Debtor. And, if the offshore trustees continued to  
16 refuse to comply, the children would always have had recourse against the  
17 fraudulent transferor – their mother, the recalcitrant Debtor, who at that point  
18 would have been out of options beyond continued incarceration.

19       Passport, like the Trustee, did not relish legal action against the Olson  
20 Children, but this option and others should have been fully considered as viable  
21 and potentially successful alternatives to gaining repatriation of the funds without  
22 paying \$1 million of estate funds to the Debtor’s dependents. It was not reasonable  
23 for the Trustee to simply throw up his hands in frustration and accept the  
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25 I don't know if Your Honor can recall a time, where we were leaving family  
26 members of a debtor with close to a million dollars to resolve what I think is  
27 probably a slam dunk fraudulent transfer action.”  
28

1 inequitable terms the Debtor's family required for their purported assistance,  
2 particularly given Passport's interest and stated willingness to assist the Trustee in  
3 recovering assets.

4 In any event, international law is no longer in play, as the assets are now in  
5 the United States and subject to United States law. Despite the qualms of the  
6 Bankruptcy Court with regard to this issue, that transfer occurred through no fault  
7 or action of either the United States courts or Passport. There is thus no injustice  
8 in the normal operation of United States law here, and no reason to override  
9 fundamental principles of law and equity to reward the Debtor's fraud and  
10 contempt merely because the parties to the Compromise took the risk of  
11 performing before asking for the court's required approval of its terms.

#### 12 CONCLUSION

13 While the fact record relating to the Debtor's fraud and contempt is long, the  
14 issues for decision here are relatively simple. Briefly stated, the Cook Islands  
15 Trust funds became part of the bankruptcy estate upon the filing of Debtor's  
16 Chapter 7 petition, and nothing in the Compromise or the Priority Agreement could  
17 or did change that. As such, as articulated in *Jevic*, the Bankruptcy Code's priority  
18 scheme and other protections applied. The Compromise's contingent promise that  
19 the Children's Trust could keep a portion of the repatriated funds violated the  
20 Code's priority scheme and did not have Passport's consent, and the Bankruptcy  
21 Court accordingly abused its discretion in approving this provision of the  
22 Compromise. Even if the law permitted court approval, it was also an abuse of  
23 discretion for the Bankruptcy Court to approve under Rule 9019 analysis an unfair  
24 and inequitable agreement that rewards the Debtor's fraud and contempt at the  
25 expense of the very party that the Debtor defrauded.

26 For all of the reasons stated herein and in Passport's Opening Brief, the  
27 Approval Order should be reversed.



**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. Bank. P. 8015(a)(7)(C), the undersigned certifies that the preceding Brief of Appellant Passport Management, LLC complies with the type-volume limitation in Fed. R. Bankr. P. 8015(a)(7)(B)(ii), Local Rule 11-3.1.1, and the Standing Order for Cases Assigned to this Court, because has been prepared in Times New Roman style 14-point font and contains 6,970 words, excluding the items identified in Fed. R. Bank. P. 8015(a)(7)(B)(iii).

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**PROOF OF SERVICE BY ECF AND OVERNIGHT COURIER**

I, Deirdre Campino, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop Shaw Pittman LLP in the County of San Francisco, State of California.

2. My business address is Four Embarcadero Center, 22nd Floor, San Francisco, CA 94111-5998. My mailing address is P.O. Box 2824, San Francisco, CA 94126-2824.

3. January 17, 2018, in the city where I am employed, I served a true copy of the attached document(s) titled exactly **REPLY BRIEF OF APPELLANT PASSPORT MANAGEMENT, LLC**, electronically to the parties of record in this matter through the Court’s ECF System, and also by depositing it/them in a box or other facility regularly maintained by FedEx, an express service carrier providing overnight delivery, or delivering it to an authorized courier or driver authorized by the express service carrier to receive document, in an envelope or package designated by the express service carrier, with overnight delivery fees paid or provided for, clearly labeled to identify the person being served at the address shown below:

United States Trustee Attn.: Frank Cadigan 411 W. Fourth Street, Suite 9041 Santa Ana, CA 92701 Tel: (714) 338-3400	D. Edward Hays, Esq. Marshack Hays LLP 870 Roosevelt Avenue Irvine, CA 92620 Tel: (949) 333-7777  <i>Counsel for Appellant, Chapter 7  Trustee Richard A. Marshack</i>
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<p>Cicely T. Ray, Esq. Cicely T. Ray &amp; Associates 4740 Green River Road, Suite 314 Corona, CA 92880 Tel: (951) 735-2488</p> <p><i>Counsel for Interested Party Olson Children's Irrevocable Trust</i></p>	<p>Michael H. Weiss, Esq. Weiss &amp; Spees 1925 Century Park East, Suite 650 Los Angeles, CA 90067 Tel: (424) 245-3100</p> <p><i>Counsel for Creditor Erland Olson</i></p>
<p>Jana W. Olson, Debtor In Pro Per 431 Vista Grande Newport Beach, CA 92660 Tel: (949) 500-4793</p>	<p>Barret Weekes, Trustor of Olson Children's Irrevocable Trust In Pro Per 431 Vista Grande Newport Beach, CA 92660</p>

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of January, 2018, at San Francisco, California.

*Deirdre Campino*  
\_\_\_\_\_  
Deirdre Campino