

PUBLIC VERSION

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES**

BETWEEN:

TENNANT ENERGY, LLC

Claimant

AND

GOVERNMENT OF CANADA

Respondent

(PCA Case No. 2018-54)

GOVERNMENT OF CANADA

Expert Report of Margaret Lodise

May 25, 2021

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I. QUALIFICATIONS

1. My name is Margaret G. Lodise. I am a partner with the law firm of Sacks, Glazier, Franklin & Lodise LLP, located at 350 S. Grand Ave., Suite 3500, Los Angeles, California, 90071.
2. I earned my Juris Doctor from the University of California, Los Angeles and an LLM in tax from Loyola Law School. I have been licensed to practice law in California since 1988 and have practiced in the field of Trusts & Estates law in California for 30 years.
3. During that time, I have chaired the Executive Committee of the Trusts & Estates Section of the State Bar of California (now known as the California Lawyers Association) (“TEXCOM”). During my eleven-year tenure with TEXCOM, I participated in the analysis of legislation and worked with legislators to determine appropriate trust law for California consonant with standards important to public policy in California.
4. I am the past Chair of the Los Angeles County Bar Association Trusts & Estates Section, where, again, I was involved in addressing policy issues relating to Trusts & Estates law and the relationship between attorneys and the California courts in the probate division.
5. I am currently a member of the Executive Committee of the American College of Trusts and Estates Counsel (“ACTEC”). ACTEC’s more than 2,400 members are called “Fellows” and practice throughout the United States, Canada, and other countries. To qualify for membership, a lawyer must have no less than 10 years’ experience in the active practice of probate and trust law or estate planning. ACTEC aims to improve and reform probate, trust, and tax laws, procedures, and professional responsibilities. I am also a past chair of ACTEC’s Fiduciary Litigation Committee and the Amicus Briefs Committee, both of which I still serve as a member. While chairing the Amicus Briefs Committee, I was involved in ACTEC’s submission to the United States Supreme Court in connection with the 2019 case of *North Carolina Dept. of Revenue. v. Kaestner*, in which the majority opinion relied upon ACTEC’s brief on trust law and taxation of trusts.¹ I also was the primary author of a request to the California Supreme Court to depublish an opinion on special needs trusts, in light

¹ **R-089**, *North Carolina Department of Revenue v The Kimberley Rice Kaestner 1992 Family Trust*, 139 S.Ct. 2213 (2019).

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of the potential national impact of the opinion on special needs trusts throughout the country.² The California Supreme Court agreed with ACTEC and others that the opinion should be depublished.

6. In connection with my private practice, I have conducted over 20 trials and evidentiary hearings on Trusts & Estates law, as well as countless legal motions on the subject. I have been involved in a dozen appeals, several resulting in reported decisions; acted as a mediator and a court settlement officer; and acted as a court-appointed guardian or fiduciary on multiple occasions.

7. I have been named one of the Top 50 Women Lawyers in Southern California for the past 11 years; rated a Notable Practitioner Chambers and Partners California High Net Worth, Private Wealth Disputes 2018-2020; included in Best Lawyers, 2011 to the present and Lawyer of the Year - Trusts and Estates, 2012; and named a Litigation Star by Benchmark Litigation in 2020 and 2021.

8. I have spoken frequently to national and local bar associations and individuals on pertinent issues of Trusts & Estates law. Over the course of my 30 years in this field, I have given over 80 presentations on issues ranging from fiduciary duty, to conservatorships, to ethics and malpractice.

9. I have been retained to act as an expert approximately 40 times concerning Trusts & Estates law, having testified at deposition or trial in at least half of those matters. I have never had a court refuse to certify me as an expert.

10. I have attached my current curriculum vitae to this Expert Report in Annex A.

II. INSTRUCTIONS PURSUANT TO WHICH I AM PROVIDING MY OPINIONS AND CONCLUSIONS

11. I have prepared this report at the request of the Government of Canada (“Canada”) to address issues of California trust law arising in the NAFTA Chapter Eleven arbitration captioned *Tennant Energy, LLC v. Government of Canada* (PCA Case No. 2018-54), between Canada and Tennant

² A special needs trust allows a physically or mentally ill person, or someone chronically disabled, to access funding without potentially losing benefits provided by public assistance programs. The aforementioned opinion had a significant potential national impact because the appellate court ruling contradicted longstanding federal and state law and policy on the proper use of special needs trust funds, jeopardizing both future special needs trust beneficiaries and trustees who had acted pursuant to decades-old legal standards.

Energy, LLC (the “Claimant” or “Tennant Energy”). In particular, I was asked to address the following issues in my Expert Report:

- (i) the requirements to establish the existence of an orally-created trust under California law, including the evidence necessary to meet these requirements;
- (ii) the application of California trust law to the relevant facts in this arbitration; and
- (iii) other issues relating to the Claimant’s alleged trust under California law.

III. STATEMENT OF INDEPENDENCE FROM THE DISPUTING PARTIES, LEGAL ADVISORS, AND THE TRIBUNAL

12. Other than my current retention as an expert for Canada, I have no past or present relationship with any of the disputing parties, legal advisors, or the Tribunal. Furthermore: (a) I understand that my duty in giving expert evidence in this arbitration is to assist the Tribunal in deciding the issues in respect of which expert evidence may be relevant. I have complied with, and will continue to comply with, that duty. (b) I confirm that this is my own, impartial, objective, unbiased opinion, which has not been influenced by the pressures of the dispute resolution process or by any party to the arbitration. (c) I confirm that all matters upon which I have expressed an opinion are within my area of expertise. (d) I confirm that I have referred to all matters which I regard as relevant to the opinions I have expressed. (e) I confirm that, at the time of providing this Expert Report, I consider it to be complete and accurate and to constitute my true, professional opinion. (f) I confirm that if, subsequently, I consider this Expert Report requires any correction, modification, or qualification, I will notify the disputing parties to this arbitration and the Tribunal forthwith.

IV. STATEMENT OF FACTS WHICH ARE THE BASIS OF MY OPINIONS AND CONCLUSIONS

13. I have reviewed relevant portions of the Claimant’s Memorial on Jurisdiction, Canada’s Memorial on Jurisdiction, the Claimant’s Reply Memorial on Jurisdiction, John C. Pennie’s witness statement, John Tennant’s witness statement, Derek Tennant’s witness statement, and relevant exhibits on the arbitration record.³ In addition, I have reviewed the legal opinion of Margaret

³ Claimant’s Memorial on Jurisdiction, 7 August 2020; Canada’s Memorial on Jurisdiction, 21 September 2020; Claimant’s Reply Memorial on Jurisdiction, 1 March 2021; CWS-1, Witness Statement of John C. Pennie, 7 August 2020 (“CWS-1, John Pennie”); CWS-2, Witness Statement of John Tennant, 3 February 2021 (“CWS-2, John Tennant”); CWS-3, Witness Statement of Derek Tennant, 12 February, 2021 (“CWS-3, Derek Tennant”); C-113, Skyway 127, Certificate of Incorporation, 18 October 2007; C-114, Shareholder’s Ledger, Skyway 127, 30 December 2011; C-115,

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Grignon.⁴ The facts considered below derive from those documents. However, my opinions and conclusions do not categorically assume the truthfulness of the witness statements of John Tennant (“John”), Derek Tennant (“Derek”), and John Pennie (“Mr. Pennie”), particularly where the disputing parties contest certain facts or the explanations provided appear inconsistent with other facts and explanations.

14. Derek is the President of Skyway 127 Wind Energy, Inc. (“Skyway 127”).⁵ Derek is also a member and member of the management board of Tennant Energy. Derek is the brother of John, who lives in and is a resident of California⁶ and of Jim Tennant (“Jim”), who lives in Florida.⁷ John is a member and member of the management board of Tennant Energy.⁸ Jim is a member of the management committee of Tennant Energy.⁹ Mr. Pennie is also on the management committee of Tennant Energy.¹⁰

15. On September 12 and 19, 2007, John advanced to Derek a loan total of \$200,000.¹¹ The fund advance was formalized in a promissory note dated October 19, 2007¹² and secured by ████████ shares

Shareholder’s Ledger, Skyway 127, 15 January 2015; **C-116**, Shareholder’s Ledger, Skyway 127, 9 June 2011; **C-117**, Shareholder’s Ledger, Skyway 127, 20 June 2011; **C-140**, Shareholder’s Ledger, Skyway 127, 18 October 2007; **C-264**, John Tennant Bank Statements with copies of cashed cheques to Derek Tennant, September 2007; **C-265**, Promissory note between I.Q. Properties and John Tennant, 19 October 2011 (“Promissory Note”); **C-266**, Acknowledgement of Promissory Note between I.Q. Properties and John Tennant, 20 October 2007 (“Acknowledgement of Promissory Note”); **C-267**, Demand Notice to I.Q. Properties from John Tennant on Promissory Note, 19 October 2011 (“Demand Notice, 19 October 2010, p. 1” or “Direction, 20 June 2011, p. 2”); **C-268**, John Tennant to Tennant Energy regarding trust transfer and successor in Interest (“John Tennant Letter, 8 February 2016”); **C-269**, California Secretary of State registration of amendment for Tennant Travel Services LLC, 15 April 2015; **R-008**, Tennant Consulting LLC, Limited Liability Company Articles of Organization, 10 September 2001; **R-009**, Wine Destinations, LLC, Limited Liability Company Restated Articles of Organization, 05 March 2002; **R-010**, Tennant Travel Services, LLC, Limited Liability Company Restated Articles of Organization, 27 November 2002; **R-011**, Tennant Energy LLC, Amendment to Articles of Organization of a Limited Liability Company, 20 April 2015; Claimant’s Notice of Arbitration, 1 June 2017.

⁴ **CER-2**, Legal Opinion of Margaret Grignon, 23 February 2021.

⁵ **CWS-3**, Derek Tennant, ¶ 2; **CWS-2**, John Tennant, ¶ 7.

⁶ **CWS-2**, John Tennant, ¶¶ 1-2.

⁷ **CWS-2**, John Tennant, ¶ 4.

⁸ **CWS-2**, John Tennant, ¶ 3.

⁹ **CWS-2**, John Tennant, ¶ 36.

¹⁰ **CWS-1**, John Pennie, ¶ 50.

¹¹ **CWS-2**, John Tennant, ¶ 10; **C-265**, Promissory Note.

¹² **C-265**, Promissory Note.

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20. On June 20, 2011, John and Derek, as President of ██████ executed a written direction pursuant to Skyway 127's Acknowledgement, directing Skyway 127 to transfer and deliver to John the ██████ shares "forthwith".²² This is the same date that the share transfer was registered on the Skyway 127 corporate books.²³

21. Mr. Pennie²⁴ and John²⁵ say that John told Mr. Pennie that John was acting as a "bare trustee" of the Skyway 127 shares for Tennant Travel Services LLC ("Tennant Travel"),²⁶ but do not specify the date when this purported notification occurred. Derek says the three men confirmed the arrangement on a phone call on April 26, 2011.²⁷ I have seen no written notification to Skyway 127 for the transfer of shares to Tennant Travel in April or June 2011.

22. Tennant Travel was the personal holding company of Jim. According to John, Jim "let [John] have the company."²⁸ I have seen no written record of the transfer from Jim to John of Tennant Travel, or the membership interests in Tennant Travel at that time.

23. In December 2011, John received additional shares of Skyway 127 when another investor exited, increasing John's shareholding to ██████. Those shares were also registered on the books of Skyway 127 in John's individual name.²⁹

24. On January 15, 2015, the shares of Skyway 127 held in John's individual name were transferred on the books of Skyway 127 to Tennant Travel.³⁰ On that same date, additional shares were

²² C-267, Direction, 20 June 2011, p. 2.

²³ CWS-1, John Pennie, ¶ 47; C-117, Shareholder's Ledger, Skyway 127, 20 June 2011.

²⁴ CWS-1, John Pennie, ¶ 48.

²⁵ CWS-2, John Tennant, ¶ 20.

²⁶ CWS-3, Derek Tennant, ¶ 21. Tennant Travel is the former name of Tennant Energy, a California limited liability company. C-269, California Secretary of State registration of amendment for Tennant Travel Services LLC, April 20, 2015. A limited liability company is a business structure in California law whereby the owners who are often described as members are not personally liable for the company's debts or liabilities.

²⁷ CWS-3, Derek Tennant, ¶ 24.

²⁸ CWS-2, John Tennant, ¶ 18.

²⁹ CWS-2, John Tennant, ¶ 25; C-114, Shareholder's Ledger, Skyway 127, 30 December 2011.

³⁰ C-115, Shareholder's Ledger, Skyway 127, 15 January 2015.

transferred on the books to Tennant Travel pursuant to the departure of another investor, such that Tennant Travel acquired █████ of the shares in Skyway 127.³¹

25. John says that he “did not worry about how the shares were held until sometime in late 2014,” having assumed that they were reflected on the Skyway 127 corporate records as belonging to Tennant Travel.³²

26. On February 8, 2016, John wrote a memo to the management board of Tennant Energy confirming his “irrevocable transfer of all interests and rights under the North American Free Trade Agreement that I might have as trustee or personally, related to the holding of shares in Skyway 127 to Tennant Travel Services, LLC.”³³

V. OPINIONS AND CONCLUSIONS

27. In arriving at my legal opinions and conclusions, I relied on certain aspects of the above-described witness statements and supporting documents for the facts, and California statutory law and case authority. All of my opinions and conclusions are based on California law.

28. Under the California Probate Code, a trust may be created for any purpose that is not illegal or against public policy.³⁴ Where the purpose is indefinite or general, the trust may still be valid if it can be determined with reasonable certainty that a particular use of the trust property comes within that purpose.³⁵

29. A trust is created only if there is a beneficiary³⁶ and there is trust property.³⁷

³¹ CWS-2, John Tennant, ¶¶ 28-29; C-115, Shareholder’s Ledger, Skyway 127, 15 January 2015.

³² CWS-2, John Tennant, ¶ 28.

³³ C-268, John Tennant Letter, 8 February 2016.

³⁴ R-090, California Probate Code, Division 9 - Trust Law [15000-19530], Enacted by Stats. 1990, Ch. 79 (“California Probate Code”) [Excerpt], §15203.

³⁵ R-090, California Probate Code, §15204.

³⁶ R-090, California Probate Code, §15205.

³⁷ R-090, California Probate Code, §15202.

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30. Consideration is not required to create a trust. However, a promise to create a trust in the future is enforceable only if the requirements for an enforceable contract, including consideration, are satisfied.³⁸

31. Moreover, while oral trusts of personal property, such as shares in a company, are recognized in California, they must be established by clear and convincing evidence.³⁹ The oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property.⁴⁰

32. When enacting the law codifying the creation of oral trusts, the California Law Revision Commission stated:

A major problem with an oral trust is the difficulty of proving its terms. It is highly unlikely that an oral trust will specify the elements that should be included in the declaration of trust, such as the trust property and purpose, who are the beneficiaries and trustees and special administrative provisions relating to trustee's powers, duties, liabilities, compensation, and bond. There is also a risk of perjury, particularly by those with something to gain after the death of the purported settlor. In response to these problems, the courts have required that the elements of an oral trust be proven by clear and convincing evidence. The proposed law codified the requirement that the existence and terms of an oral trust be established by clear and convincing evidence.

The clear and convincing evidence standard may not be sufficient to guard against overreaching in cases where there is no transfer of property. The problem is acute where, after the death of the purported settlor, evidence is offered of the settlor's past statement, but there has been no transfer of the property claimed to be in trust. The proposed law requires some corroboration in the form of a transfer, earmarking, or written evidence in order to uphold a trust supported by an oral rather than written declaration of the settlor. Hence, if the owner of shares of stock makes an oral declaration that he or she holds it in trust for his or her children, the trust would fail unless there was some written evidence of a transfer in trust.⁴¹

³⁸ R-090, California Probate Code, §15208.

³⁹ R-090, California Probate Code, §15207(a).

⁴⁰ R-090, California Probate Code, § 15207(b). A settlor is a person or entity that establishes a trust. A trustee is a person or entity that holds and administers property or assets for the benefit of a third party, the beneficiary.

⁴¹ R-091, *California Law Revision Commission Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm's Reports, 1986 [Excerpt] ("Revision Commission Recommendation"), p. 525 (emphasis added).

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33. The Law Revision Commission also noted that the requirements of certainty as to purpose and beneficiaries were to enable the trust to be enforced.⁴²

34. Finally, while trusts are presumed to be revocable in California unless the trust states otherwise, the irrevocability of an oral trust may be shown by the evidence. Where a trust is irrevocable, additional reporting requirements attach, requiring the trustee to report information and account to the beneficiaries. For instance, the trustee has the duty to keep beneficiaries of the trust reasonably informed of the trust and its administration⁴³ and to account at least annually to the beneficiaries.⁴⁴ At the time the trust becomes irrevocable, the trustee has a duty to serve notification of the identity of the settlor, the identity of each trustee of the trust, and the physical place of administration of the trust to each beneficiary of the trust.⁴⁵

35. The clear and convincing evidence standard for oral trusts “in personalty” (or personal property) was set forth by the California Supreme Court (the highest court in California) in *LeFrooth v. Prentice*.⁴⁶ There, the court declared, “[i]t is a cardinal rule that trusts in personalty may be created, declared, or admitted verbally and may be proved by parole evidence, but the authorities are uniform to the effect that such evidence must at all times be clear and unequivocal.”⁴⁷ The California Supreme Court applied this standard in *Chard v. O’Connell*⁴⁸ to find that oral conversations among family members concerning the intent to share proceeds of a suit among siblings did not suffice to create an oral trust.⁴⁹ California’s 5th Circuit Court of Appeal recently described the standard as requiring evidence “clear enough to leave no substantial doubt and strong enough that every reasonable person would agree.”⁵⁰

⁴² **R-091**, Revision Commission Recommendation, pp. 525-528.

⁴³ **R-090**, California Probate Code, §16060.

⁴⁴ **R-090**, California Probate Code, §16062.

⁴⁵ **R-090**, California Probate Code, §16061.7.

⁴⁶ **R-092**, *LeFrooth v. Prentice*, 202 Cal. 215 (1927).

⁴⁷ **R-092**, *LeFrooth v. Prentice*, 202 Cal. 215 (1927), ¶ 8 (emphasis added).

⁴⁸ **R-093**, *Chard v. O’Connell*, 7 Cal.2d 663 (1936).

⁴⁹ **R-093**, *Chard v. O’Connell*, 7 Cal.2d 663 (1936), ¶¶. 666-667.

⁵⁰ **R-094**, *Higgins v. Higgins*, 11 Cal.App.5th (2017), p. 21 (emphasis added).

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36. Taxation authorities in particular may question the validity of self-serving statements regarding an oral trust. In *Newman v. CIR*, the federal appellate court agreed with the tax commissioner that an oral statement did not create an irrevocable oral trust as required by California law, despite the alleged trustor having filed a gift tax return in the same year as the purported irrevocable gift.⁵¹

37. In my experience, oral trusts are rarely argued or proven, due to the high standard of proof. In 30 years of practice, I have encountered an argument as to the existence of an oral trust only a handful of times. Where one is proven, it is because there is some other reliable evidence of the existence of the trust beyond oral words alone – whether written documentation by the trustee; a tax return or balance sheet reflecting the trust; or other documentary evidence of an intention to create a trust, such as notes by the settlor, revisions on an existing trust, or delivery of the trust assets to a third party.

38. The alleged trust in this case runs afoul of many of the rules on the creation and proof of oral trusts under California law. The stated purpose, beneficiary, and timing of the alleged trust cast credible doubts that it was validly created. Fundamentally, the lack of contemporaneous documentation indicates that the available evidence does not meet the clear and convincing standard to prove the existence of an oral trust.

39. The purpose of the alleged trust is unclear. The Skyway 127 shares were turned over to John in payment of an outstanding debt owed to him. While John had an interest in being an investor in Skyway 127, he states that, “I never owned the shares in Skyway 127 for my personal benefit.”⁵² All the documents I have seen suggest that Tennant Travel, and then Tennant Energy, was a jointly controlled entity. (See the discussion on the ownership of Tennant Energy, at ¶ 44, below.) It is unclear why John would put shares in a company in which he wished to invest (Skyway 127) into trust for an entity over which he exercised only joint control and may have not been the sole owner (Tennant Travel).

40. The witnesses’ account that John created the trust to address Derek’s stated concern that the shares might be deemed community property in California fails to offer a credible purpose for the

⁵¹ **R-095**, *Newman v. CIR*, 222 F.2d 131 (9th Cir., 1955), ¶¶. 134-136. Although a federal case arising from the 9th Circuit Court of Appeal, the case applied California law to the issue of creation of a trust. A trustor is an individual or organization that gifts funds or assets to others.

⁵² **CWS-2**, John Tennant, ¶ 35.

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alleged trust.⁵³ As the shares were security for a loan of \$200,000 from John individually, the community property character of the shares would depend in part on whether the \$200,000 loaned by John was community property. If so, then the ultimate payment (the shares in Skyway 127) would similarly be community property, regardless of whether it was put in trust. John's apparent purpose of attempting to hide marital assets could be against public policy, in which case the alleged trust would not be valid under California law.

41. Moreover, if John were going to make an argument in a dispute that the shares should not be considered community property, the fact that the shares were transferred to John and held in his individual name on the corporate books for many years significantly undermines that argument. Yet John states that, "I did not worry about how the shares were held until sometime in late 2014. As a trustee, I had assumed that the corporate records of Skyway 127 reflected the fact that I had the investment in Skyway 127 for the benefit of Tennant Travel Services LLC."⁵⁴

42. Further, if the true purpose for the alleged trust was to "protect" the Skyway 127 shares from a community property claim, it would be critical to produce and retain documentary records of the transfer of the shares into trust, both from the perspective of John as a spouse and John as a trustee. Yet none of the parties states that they were concerned with documenting the alleged trust. Thus, the stated purpose to protect the shares from being considered community property appears both ill-conceived and un-executed.

43. Ms. Grignon refers to another purpose of the alleged trust, which is not stated in the witness statements. She suggests the purpose of the alleged trust was to prevent the dilution of voting control for the shares.⁵⁵ While this might be a legitimate purpose (as opposed to hiding marital assets), there is no evidence on the record to suggest this actually was the purpose. Assuredly, there is no evidence that suggests the certainty of purpose required to support the creation and enforcement of a trust under California law.

⁵³ In California, most income and assets acquired by either spouse during a marriage are considered community property belonging equally to both partners. During marriage, spouses owe fiduciary duties to each other in connection with the management of community property. At death or divorce, spouses are entitled to their respective shares of the community property, which cannot be disposed of by one spouse without the consent of the other or a court.

⁵⁴ CWS-2, John Tennant, ¶ 28.

⁵⁵ CER-2, Legal Opinion of Margaret Grignon, ¶ 16.

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44. The identity of the beneficiary of the alleged trust creates additional uncertainties. The witness statements assert that the beneficiary was ultimately named as Tennant Travel, a holding company.⁵⁶ However, the persons who owned Tennant Travel at the time appear unclear. As noted above, there appears to be no evidence of how John allegedly received Tennant Travel from Jim, or whether John was then the sole member/owner of Tennant Travel. Instead, the witness statements state that John and Derek are currently members of Tennant Energy, and that Mr. Pennie and the three brothers are on its management team.⁵⁷ The witness statements and evidence do not clarify if all three brothers, and maybe others, were the beneficiaries of the alleged trust. The fact that John says he never owned the shares for his benefit creates greater uncertainties over the true beneficiary.

45. The timing of the creation of the alleged trust is also uncertain. John and Derek testify that, at the time that Derek allegedly transferred the shares to John (April 19, 2011) pursuant to John's demand, John agreed to hold them in a holding company to be named later.⁵⁸ While John, Derek, and Mr. Pennie all state that John designated Tennant Travel as of April 26, 2011, the shares were transferred to John's name on the Skyway 127 corporate books on June 20, 2011. Apparently in accord with the Acknowledgement, John and Derek executed a "direction" to the Skyway 127 Corporate Secretary on June 20, 2011 to transfer the shares to John.⁵⁹ That written direction does not mention Tennant Travel or a trust. The shares were never transferred to Tennant Travel until January 15, 2015. Under California trust law, an agreement to set up a trust in the future would not have given rise to a trust at the time of the agreement because the elements of an enforceable contract were not present in John's alleged naked promise to put shares into a trust in the future.

46. This raises the primary problem with the alleged trust, namely the lack of evidence of its existence which could meet the clear and convincing evidence standard under California law. Notably, the opinion of Ms. Grignon simply accepts as true everything that is said in John and Derek's witness statements and finds that meets the clear and convincing evidence standard without further

⁵⁶ CWS-2, John Tennant, ¶ 18.

⁵⁷ CWS-2, John Tennant, ¶¶ 3, 36; CWS-3, Derek Tennant, ¶ 2; CWS-1, John Pennie, ¶ 50.

⁵⁸ CWS-2, John Tennant, ¶ 35; CWS-3, Derek Tennant, ¶ 20; C-268, John Tennant Letter, 8 February 2016.

⁵⁹ C-267, Direction, 20 June 2011, p. 2.

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analysis.⁶⁰ However, a review of the witness statements shows they do not meet that standard and that the available evidence is, in fact, inconsistent with them.

47. John made the initial loan to Derek, which resulted in payment in the form of Skyway 127 shares. That promissory note is documented.⁶¹ At the time the promissory note was executed, Skyway 127 acknowledged the fact that the shares were pledged with a statement that they “may not be transferred to any other party without the express written consent and Direction to the Corporation by both of the Parties.”⁶² When the debt became due on October 29, 2010, John sent a demand notice asking for payment of the shares to John Tennant. That demand notice is documented.⁶³ On June 20, 2011, [REDACTED] and John agreed to transfer the shares to John. That agreement is documented.⁶⁴ John’s ownership of the shares on June 20, 2011 is also documented in the Skyway 127 corporate books.⁶⁵

48. There is, however, no contemporary documentation of the creation of the alleged trust and trust property. Given the requirement in the Acknowledgement that any transfer to another party be by written direction to Skyway 127, the only transfer of the shares in conformance with the Acknowledgement was to John on June 20, 2011.⁶⁶ The direction of June 20, 2011 does not reference Tennant Travel even though, according to each of the witness statements, the arrangement to put the shares in the name of Tennant Travel was made in late April 2011. John’s statement that he “assumed” the shares were held in the name of Tennant Travel appears to be directly contrary to his own written direction to Skyway 127 on June 20, 2011.

49. Finally, as the purported trust is oral, it would be presumed to be revocable. However, John’s February 16, 2016 memo states that he has “irrevocably” transferred away his interests in the shares.⁶⁷

⁶⁰ CER-2, Legal Opinion of Margaret Grignon, ¶ 12.

⁶¹ C-265, Promissory Note.

⁶² C-266, Acknowledgement of Promissory Note. John C. Pennie signed the Acknowledgement as Corporate Secretary of Skyway 127.

⁶³ C-267, Demand Notice, p. 1.

⁶⁴ C-267, Direction, 20 June 2011, p. 2.

⁶⁵ C-117, Shareholder's Ledger, Skyway 127, 20 June 2011.

⁶⁶ C-266, Acknowledgement of Promissory Note; C-267, Direction, 20 June 2011, p. 2.

⁶⁷ C-268, John Tennant Letter, 8 February 2016.

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This statement may create an irrevocable trust. If that transfer occurred in April 2011, as John alleges, the transfer would be a taxable gift from John to Tennant Travel, as the agreed value of the shares (\$200,000) would substantially exceed the amount that can be given from one person to another in any one year without the requirement of any tax reporting.⁶⁸ Moreover, if the shares were irrevocably transferred to what the Claimant labels the “Tennant Travel Trust”, then John, as trustee, would have not only had reporting requirements to the taxing authorities, but would also have had reporting requirements to the beneficiary, Tennant Travel, as discussed in ¶ 34, above. There is no indication that John ever made any report to Tennant Travel or any of its members or managers regarding the assets of the alleged trust or filed any report to any taxing authority concerning the transfer of the shares or the administration of the alleged trust.

50. In conclusion, the available evidence does not meet the clear and convincing standard to prove the existence of the alleged oral trust under California law in my opinion. The record contains no contemporaneous documentation supporting the existence of the alleged trust, but instead indicates that John Tennant nominally and beneficially owned the shares until transferring them to Tennant Travel in January 2015. The available evidence is not strong enough to conclude that every reasonable person would agree that the alleged oral trust existed, as California law requires.⁶⁹

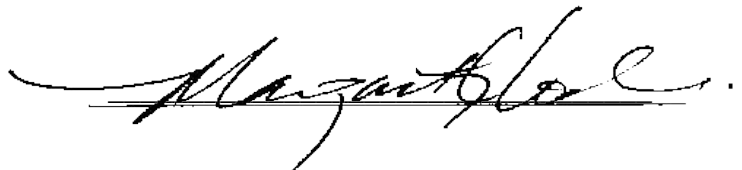
VI. AFFIRMATION OF GENUINE BELIEF

51. I affirm that the legal opinions in this Expert Report are my opinions alone and I have a genuine belief in those opinions.

VII. CONSENT TO USE OF PERSONAL DATA

52. I expressly consent to the use and processing of my personal data, in or related to this Expert Report, being used by the Tribunal and the disputing parties for this dispute, including its subsequent consideration and enforcement.

May 25, 2021
Los Angeles, CA
Margaret Lodise



⁶⁸ **R-096**, Title 26 of the U.S. Code of Federal Regulations - Internal Revenue Code, Subtitle B., Estate and Gift Taxes, Ch. 12., Subchapter A., Determination of Tax Liability, Current to May 19, 2021 [Excerpt], § 2503(b)(1).

⁶⁹ **R-103**, *Higgins v. Higgins*, 11 Cal.App.5th (2017), p. 21.

VIII. ANNEX A – CURRICULUM VITAE

PUBLIC VERSION

MARGARET G. LODISE
SACKS, GLAZIER, FRANKLIN & LODISE LLP
350 South Grand Avenue, Suite 3500
Los Angeles, California 90071-3475
Telephone (213) 617-2049
Facsimile (213) 617-9350

Specializing in trust, estate and conservatorship litigation including fiduciary and professional liability at trial and appellate level; expert testimony

Admitted State Bar of California, 1988, United States District Court, Central, Eastern and Southern Districts of California

LLM, Loyola Law School, December 2002

Juris Doctor, UCLA School of Law, 1988

Bachelor of Arts, cum laude, Pomona College, 1985

PROFESSIONAL ASSOCIATIONS

Fellow, American College of Trusts and Estates Counsel (2004), Member, Fiduciary Litigation Committee (2011- , Chair 2015-2018), Member, Professional Responsibility Committee (2011-), Amicus Review Committee (2017-, Chair 2018-), Program Committee (2020-).

State Bar of California, Member, Trusts and Estates Section (1991-), Executive Committee (2003-2014, Chair, 2010-2011) Chair, Ethics Subcommittee(2008-2010), Chair, Incapacity Subcommittee(2007- 2010) Co-chair, Ethics Subcommittee (2005- 2008)

Los Angeles County Bar Association, Member, Trusts and Estates Section, Executive Committee, 1998-2005, Chair, 2003-2004, Vice-Chair, 2002-2003, Secretary, 2001- 2002; Member, Trusts and Estates Litigation Section; Member, Litigation Section; Member, Bench and Bar Committee

Probate Settlement Officer, San Fernando Valley Bar Association Sponsored for Los Angeles County (2017-)

Member, Judicial Council Probate Conservatorship Task Force, April 2006-October 2007

Los Angeles County and Beverly Hills Bar Associations, Member, Committee to Draft and Implement Pro Per Conservatorship Guidelines for Guardianship and Conservatorship Panel

Chancery Club, Member

PUBLIC VERSION

Women Lawyers Association of Los Angeles, Life Member; President, (1999-2000); President-Elect, (1998-99); First Vice-President (1997-98), Treasurer (1996-1997), Chair, Special Events Committee (1995-96), Chair, Adopt-A-School Committee (1994-95), Conference of Delegates Committee (1999-2008), Speakers Bureau (1999-)

California Women Lawyers, Affiliate Governor, 1999- 2000

Conference of Delegates of California Bar Associations, Board of Directors, 2003- 2006, Resolutions Committee, 2002-2003 (Sub-committee Chair, 2002-2003)

American Bar Association, Member, Real Property, Probate and Trust Law Section, Member, Litigation Section, Member, Taxation Section

Association of Business Trial Lawyers, Member (1988-1991)

WRITTEN MATERIALS

California Trust & Estates Quarterly, Incapacity Alert, Volume 14, Issues 2 & 3, Volume 13, Issue 4

California Trusts & Estates Quarterly, Crisis in Conservatorships, Volume 12, Issue 4, Winter 2006, with Peter Stern and Edward Corey

California Trusts & Estates Quarterly, Ethics Alert, Volume 11, Issue 3, Fall 2005

CEB, Action Guide, Establishing a Conservatorship, Sharon A. Isenhour, Margaret G. Lodise, Sandra R. Riley (2003)

SPEAKING ENGAGEMENTS

March 2021 ACTEC, Trust Protectors: What's Troubling You Is the Nature of Their Game, Panelist

November 2020 USC Gould School of Law 46th Annual Trusts and Estates Conference, Love in the Time of COVID-19: Trustee and Beneficiary harmony in Years Like 2020, panelist

August 2020 ABA, Skills Training for Estate Professionals, Planning for the Probate contest, Co-presenter

November 2019 ACTEC/ALI CLE, I'm President and Sole Trustee, Resolving Conflicts When Fiduciaries Hold Entity Interests, Co-presenter

PUBLIC VERSION

July 2019 ABA, Skills Training for Estate Professionals, Planning for the Probate Contest, Co-presenter

March 2019 ACTEC, Warring Siblings, Second Spouses, and Quirky Personalities: The neuroscience and Handling of Difficult Beneficiaries, Panelist

January 2019 USC Gould School of Law 2019 Tax Institute, Conflicts and Confusion: Ethical Issues Surrounding Multiple Party Representation and clients with Diminished Capacity

January 2019 University of Miami, 53rd Annual Heckerling Institute on Estate Planning, Preparing for the Unexpected: Designing and Drafting Estate Plans That Can Withstand the Heat, panelist

October, 2018 Long Beach Bar Association, New Ethics Rules, a Primer on Changes of Note for Trusts & Estates Practitioners

July, 2018 South Bay Estate Planning Council, Shut Your Mouth, A Multi-Disciplinary Look at Standards of Privilege, panelist

April, 2018 UCLA/CEB Estate Planning Institute, Clients with Diminished Capacity: Facts, Strategies and Ethics

November, 2017 OCBA, Riding the Practical and Ethical Waves of Acting as Court Appointed Counsel, panelist

June, 2017 BHBA, New Ethics Rules on the Horizon (We Mean It This Time!) and Other Recent Developments, panelist

January, 2017 51st Annual Heckerling Institute on Estate Planning, “Arriving by Plane with a Briefcase—Lawyers Serving as Expert Witnesses,” panelist

March, 2016 ACTEC, I’ve Got You Under My Skin: Are You Rolling the Dice on Trustee Fees: Drafting, Understanding and Enforcing Reasonable Compensation for Trustees, panelist

November, 2015 USC Gould School of Law 41st Annual Probate and Trust Conference, My Client Has Issues! Dealing with Diminished Capacity and Undue Influence: A Practical and Litigation Context, panelist

September, 2015 LA Estate Planning Counsel, Estate of Duke: The Wild West of Will Contests?

PUBLIC VERSION

September, 2015	BHBA, An Overview of Ethical Considerations for Trust and Estate Lawyers, Including New Issues in the Digital World, panelist
September, 2015	OCBA, Estate of Duke: The Wild West of Will Contests?, panelist
April, 2015	Woodland Hills Estate Planning Council, Twilight Zone, The Pros and Cons of Conservatorships: Why Trusts and Powers of Attorney Aren't Enough
September, 2014	LACBA, Trusts & Estates Section, Beneficiaries and Trustees Behaving Badly, panelist
September/October 2014	State Bar of California, Conduct a Better Deposition in Trust and Estate Litigation, panelist
May 15, 2014	NAELA, 2014 Annual Meeting, Kruse Lecturer, Ethics of Ancillary Practices
January, 2014	BHBA, Sycamore Row, Ethics and Probate Issues, panelist
December, 2013	CEB, Ethics and Malpractice Issues - - Protection Tips for Trust and Estate Attorneys, Los Angeles, panelist
September, 2012	Beverly Hills Bar Association, Conservatorship, Recent Developments, panelist
January, 2012	Central Valley Trusts & Estates Day, The Overlapping Roles of Fiduciary, Beneficiary and Company Officer-Litigation Issues and Strategies
January, 2012	South Bay Estate Planning Council, Recent Developments in Ethics: What Should We Be Concerned About Now?
September, October, December 2011	Judicial Council of California, Administrative Office of the Courts, Trusts 101, Court Investigator Training
August 5, 2011	CEB, Planning for and Dealing with A Client's Incapacity, Los Angeles, panelist
March 22, 2011	Judicial Council of California, CJER, Probate and Mental Health Institute, Undue Influence, panelist

PUBLIC VERSION

March 10-11, 2011 ACTEC, Dealing with the Overlapping Roles of Individual Fiduciary, Business Manager and Beneficiary, panelist

February, 2011 ALI-ABA, In Terrorem Clauses, Avoiding Will Contests and Disinheritance, panelist

October, 2010 CEB, Estate Planning Scams, Botched Trusts and Other Disasters, Los Angeles, panelist

August, 2010 Beverly Hills Bar Association, Engagement Letters

November, 2009 ABA Teleconference, Dealing with the Difficult or Impaired Client, panelist

September 2009 Recent Developments in Conservatorships, State Bar of California, panelist

May 2009 UCLA/CEB Estate Planning Institute, Attorney Client Confidentiality and Privilege: How to Survive Death and Other Mysteries

March 2009 CEB, No Contest Clauses: California's Reform Legislation, panelist

February 2009 Beverly Hills Bar Association, No Contest Clause Reform, Panelist

December 2008 CEB, Estate Litigation: Tactical Issues, Case Studies and Resolution Scenarios (Advanced Course of Study), Panelist

November 2008 USC Gould School of Law, 34th Annual Probate and Trust Conference, New and Revised Rules of Professional Conduct On the Way, I think!

October 2008 ACTEC, Getting Into the Client's [Testator's] Head: A Lawyer's Guide to Diminished Capacity and the Use of Medical Experts

May/June 2008 State Bar of California, Battling Fiduciaries, Panelist

March 2008 Women In Health Administration, Conservatorship Basics

January 2008 CEB, Ethics and Malpractice Issues - - Protection Tips for Trust and Estate Attorneys, San Diego, Garden Grove, Los Angeles, Panelist

October 2007 Southern California Tax & Estate Planning Forum, Ethical Concerns in

PUBLIC VERSION

Trusts and Estates Litigation

October 2007	Orange County Bar Association, Symposium, Avoiding Malpractice: Tips to Sleep Soundly at Night; Engagement Letters and File Retention and Management
September 2007	State Bar of California, Crisis in Conservatorships, Panelist
July 2007	CEB, Estate Planning Scams, Botched Trusts and Other Disasters, Irvine and San Diego
May 2007	UCLA/CEB Estate Planning Institute, Hot Topics and Recent Developments in Ethics
April 2007	LACBA, Panelist, PVP Training Program for Los Angeles County Attorneys
January 2007	LACBA, Trusts & Estates Section, Crisis in Conservatorships
November 2006	USC Gould School of Law, 32nd Annual Probate and Trust Conference, "Engagement Letters, How to Start So It Works Out Right in the End"
March 2006	LACBA, Trust & Estate Section, Litigation Subsection, Trust & Estate Litigation Files: Creation, Maintenance, Retention & Destruction
February/March 2006	CEB, Advising Fiduciaries, Avoiding Minefields, Panelist
December 2005	CEB, Estate Litigation: Tactical Issues, Case Studies and Resolution Scenarios, Panelist
November 2005	USC Gould School of Law, 31st Annual Probate and Trust Conference, "Practical Tips: Solutions to Common Planning and Administration Problems"
March/September 2005	LACBA/State Bar of California: Abolishment of No Contest Clauses: Point/Counterpoint
December 2004	San Fernando Valley Estate Planning Council: Fiduciary Litigation Issues
October/November	CEB, Estate Planning Scams, Botched Trusts and Other Disasters, Irvine

PUBLIC VERSION

2003 and San Diego

April 2003 Los Angeles Estate Planning Council, “Ethics . . .Again!? Latest Hot Topics in Ethics and Malpractice”

April 2003 CEB, Fundamentals of the Estate Planning Process: Complexities, Issue Spotting and Resources, Irvine and Los Angeles, Panelist

October 2002-2003 LACBA, PVP Training Program for Los Angeles County Attorneys, Panelist

March 2002 CEB, Assessing Capacity and Undue Influence: Avoiding Will Contests, Los Angeles and Beverly Hills, Panelist

March 2002 CEB, Litigating Will Contest, Undue Influence, and Capacity Cases, Los Angeles and Beverly Hills, Panelist

January 2002 California State Bar, Section Education Institute, Special Liability Issues in Conservatorship Related Litigation, San Diego, panelist

October 2001 CEB, Expanding and Managing Your Estate Planning Practice, Los Angeles, Panelist

July 2001 CEB, Estate Planning Scams, Botched Trusts and Other Disasters, Irvine and San Diego

June 2001 California State Bar Trusts and Estates Section, Mock Trial Presentation, Los Angeles and San Francisco

October 2000 “Ghosts & Goblins of Conservatorships,” LACBA Trust and Estate Section

May 2000 Professional Fiduciaries Association of California, Annual Conference, Long Beach, Fiduciary Abuse and Recovery, Panelist

May 2000 Riverside Estate Planning Council, Legal Ethics and Estate Planning

April 2000 DAR, Covina Chapter, Elder Law

October 1999 California Women Lawyers’ Business Development Seminar, Business Development in Solo and Small Firms, Moderator

PUBLIC VERSION

- September 1999 Beverly Hills Bar Association, Trusts and Estates Section, Whose Lawyer Am I? Pitfalls and Problems of Handling Cases Involving Parties with Diminished Capacity, including conservatorships and estate planning
- May 1999 Matthew Bender, Los Angeles, Challenges of Trust Practice: Advising the Nonprofessional Trustee, Panelist
- April 1999 Women Lawyers Association of Los Angeles, Mediation Advocacy, Panelist
- June 1998 Los Angeles County Bar Association, Trusts and Estates Litigation Section, Recovering Against Fiduciary Bonds
- April 1996 LACBA, Trusts and Estates Litigation Section, Surety Litigation/Is Your Estate Truly Protected?
- Spring 1996 Professional Fiduciary Association of California, Anaheim, Report on Rodney Swanson Conservatorship Cases

SIGNIFICANT CASES

Appellate counsel, *Estate of O'Connor*, (2018) 26 Cal.App.5th 871

Trial and appellate counsel, *Estate of Duke*, (2015) 61 Cal.4th 871

Appointed by L.A. County Superior Court to act as Guardian ad Litem for minor children of deceased celebrity in connection with disputes involved in multi-million dollar estate.

EMPLOYMENT

Sacks, Glazier, Franklin & Lodise LLP, Partner, 2001-

Ross, Sacks & Glazier, LLP, 1991 to 2001 (Associate 1991-1996, Partner 1997-2001)

Orrick, Herrington & Sutcliffe, Los Angeles, Litigation Associate, 1988-1991

Adjunct Professor, Loyola Law School, Los Angeles, 2012-

COMMUNITY ACTIVITIES

Pomona College, Trustee, 2007- , (Chair, Presidential Search Committee 2016), Alumni Council, 1997-1999, Torchbearers Board, (President 2007-2010, member 1998-2005, 2007-2015), President, Associates Board, 1996-1998, Alumni Member, Nominating Committee, Pomona College Board of Trustees, 1998-2001.

WYSE (Women and Youth Supporting Each Other), Member, Board of Directors, 1998- 2008; Development Chair, 2000-2006; Vice Chair, 2006- 2008.

City Club on Bunker Hill, Board of Governors, 2003- , Chair, 2012, Food & Wine Committee, Chair 2015-2016, Membership Committee, 1999-2004, Chair 2004, Ambassadors Committee, 2000-2003, City Connections, Chair 2003.