

APPENDIX TABLE OF CONTENTS

| | |
|--|------|
| Memorandum Opinion of the Ninth Circuit (May 1, 2019) | 1a |
| Order Denying Plaintiffs' Motion to Assign Rental Income or Force Sale, and Staying Case Pending Appeals (November 9, 2018)..... | 5a |
| Order Granting in Part Erickson's Motion to Amend the Judgment (October 5, 2017)..... | 13a |
| Order of the Ninth Circuit Denying Petition for Rehearing En Banc (June 7, 2019) | 40a |
| California Probate Code Statutes and Definitions | 41a |
| Internal Revenue Service Code 671-678..... | 56a |
| Appellant's Informal Opening Brief (April 23, 2018) | 58a |
| Appellant Informal Reply Brief (June 6, 2018) | 115a |
| Appellant Informal Petition for Rehearing En Banc (May 15, 2019) | 145a |
| Black Oak Trust Document, Relevant Excerpt ... | 167a |
| County of San Mateo Assessor-County Clerk-Recorder Website Screenshot | 170a |

App.1a

MEMORANDUM* OPINION OF
THE NINTH CIRCUIT
(MAY 1, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERICKSON PRODUCTIONS, INC.;
JIM ERICKSON,

Plaintiffs-Appellees,

v.

KRAIG RUDINGER KAST,

Defendant-Appellant.

No. 17-17157

D.C. No. 5:13-cv-05472-HRL

Appeal from the United States District Court
for the Northern District of California
Howard R. Lloyd, Magistrate Judge, Presiding

Submitted March 25, 2019**

San Francisco, California

Before: THOMAS, Chief Judge,
HAWKINS and MCKEOWN, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

App.2a

Following a jury trial, the district court entered judgment against Kraig Kast (“Kast”) in favor of Jim Erickson and Erickson Productions, Inc. (collectively, “Erickson”), on Erickson’s copyright claims. We resolved Kast’s appeal of that judgment in a published opinion. *See Erickson Prods., Inc. v. Kast*, ___ F.3d ___, 2019 WL 1605668 (9th Cir. Apr. 16, 2019). We now address Kast’s appeal of the district court’s order adding several judgment debtors to the judgment, including “Kraig Kast as Trustee of the Black Oak Trust (a/k/a Kraig Kast, Trustee of The Black Oak Trust, dated March 11, 1995).” We have jurisdiction under 28 U.S.C. § 1291 and affirm.¹

Kast challenges the district court’s jurisdiction to amend the judgment while it was on appeal, and further asserts that the district court lacked jurisdiction over some of the parties it added to the judgment. While “an appeal to the circuit court deprives a district court of jurisdiction as to any matters involved in the appeal,” *Hoffman v. Beer Drivers & Salesmen’s Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976), the district court retains authority to “exercise ancillary jurisdiction . . . to manage its proceedings, vindicate its authority, and effectuate its decrees,” *Peacock v. Thomas*, 516 U.S. 349, 354 (1996) (citation and quotation marks omitted). Thus, the district court had jurisdiction to amend the judgment to facilitate its enforcement against Kast, but could not add parties “not already liable for that judgment.” *Id.* at 357.

The district court concluded that adding Kast in his capacity as trustee of the Black Oak Trust would not hold a new party liable for the copyright judgment.

¹ All pending motions are denied as moot.

Two premises supported this conclusion. First, the Black Oak Trust was a revocable trust. Second, Kast was the trustee of the Black Oak Trust. Thus, the trust property was subject to Kast's personal liability. *See* Cal. Probate Code § 18200; *Zanelli v. McGrath*, 82 Cal. Rptr. 3d 835, 850 (Cal. Ct. App. 2008) ("Property transferred to, or held in, a revocable *inter vivos* trust is nonetheless deemed the property of the settlor and is reachable by the creditors of the settlor."). We affirm on both points.

The district court did not err in concluding the Black Oak Trust entity containing Kast's rental properties was revocable. Erickson presented trust documents, deeds, and communications indicating Kast formed multiple Black Oak Trust entities to confuse creditors, but actually transferred his rental properties into a revocable trust. Kast's explanation that his attorney told him to utilize this unusual trust structure, and that clerical errors by his title company accounted for the relevant deeds' description of the Black Oak Trust as a "revocable" rather than "irrevocable" trust, is not persuasive.

Nor did the district court err in concluding that Kast is the trustee of the Black Oak Trust. As the district court acknowledged, Kast presented a notarized resignation from his position as trustee of the Black Oak Trust, dated December 31, 2015. However, based on evidence of Kast's communications with his financial advisor, the district court reasonably concluded that Kast continued to hold himself out as trustee and exercise control over the trust assets after that date. An individual "who is not a trustee, but has 'undertaken to act in the capacity of a trustee' . . . may be held liable as a trustee under certain circumstances."

Gaynor v. Bulen, 228 Cal. Rptr. 3d 243, 249 n.4 (Cal. Ct. App. 2018) (quoting *King v. Johnston*, 101 Cal. Rptr. 3d 269, 283 (Cal. Ct. App. 2009)); *see also In re Allustiarte*, 786 F.2d 910, 914 (9th Cir. 1986) (“A person who voluntarily acts as if he or she is a trustee is a *de facto* trustee.”); *cf. Solomon v. N Am. Life and Cas. Ins. Co.*, 151 F.3d 1132, 1138 (9th Cir. 1998) (party that “did not create, operate or control the trust,” or “perform any duties as trustee,” was not a *de facto* trustee). On these facts, we affirm the district court’s conclusion that Kast’s behavior after his alleged resignation rendered him a *de facto* trustee of the Black Oak Trust for purposes of judgment enforcement.

Thus, the district court’s addition of judgment debtors was supported by proper jurisdiction and complied with California trust law.

We also affirm the district court’s conclusion that Erickson’s motion to amend the judgment was timely. In light of the lengthy investigation Erickson engaged in to learn about Kast’s assets, the motion to amend was brought within a reasonable time. *See In re Levander*, 180 F.3d 1114, 1121 n.10 (9th Cir. 1999).

Finally, we affirm the district court’s denial of Kast’s motion to quash Erickson’s improperly-captioned subpoenas. Erickson was entitled to broad post-judgment discovery regarding Kast’s finances, including his assets held in trust. *See Fed. R. Civ. P.* 69. We are not persuaded the subpoenas were harmful to Kast, let alone fraudulent on Erickson’s part.

AFFIRMED.

**ORDER DENYING PLAINTIFFS' MOTION
TO ASSIGN RENTAL INCOME OR FORCE SALE,
AND STAYING CASE PENDING APPEALS
(NOVEMBER 9, 2018)**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ERICKSON PRODUCTIONS, INC.
and JIM ERICKSON,

Plaintiffs,

v.

KRAIG R. KAST, ET AL.,

Defendants.

Case No. 5:13-CV-05472

Re: Dkt. No. 307

Before: Lucy H. KOH, United States District Judge.

Plaintiffs Erickson Productions, Inc. and Jim Erickson sued Defendant Kraig Kast for copyright infringement. Plaintiffs prevailed at trial and were awarded \$450,000 in damages. Plaintiffs later moved to amend the judgment to add various corporate entities and trusts that Kast purportedly controlled. Plaintiffs also requested attorneys' fees and costs. Plaintiffs' motion was granted, and an amended judgment was entered for a total amount of \$636,186.58 plus post-

judgment interest. In an effort to collect on the judgment, Plaintiffs have filed a motion to request assignment of rental income from rental properties Defendants own, or in the alternative, force the sale of property to satisfy the judgment. Having considered the parties' submissions, the relevant law, and the record in this case, the Court DENIES Plaintiffs' motion to assign rental income or force sale for want of subject matter jurisdiction. Furthermore, the Court STAYS this case pending Defendants' Ninth Circuit appeals.

I. Background

A. Factual Background

Jim Erickson is a professional photographer who licenses his photographs through Erickson Productions, Inc. ECF No. 70 at 1. Plaintiffs claim that Kast copied several of his photos and used them without permission for Kast's business' website. *Id.* at 2.

B. Procedural History

On September 27, 2013, Plaintiffs sued Kast for copyright infringement, and contributory and vicarious copyright infringement in the United States District Court for the Central District of California. ECF No. 1 at ¶¶ 64-85. The parties then stipulated to transfer the case to the Northern District of California. ECF No. 13. Both parties consented to United States Magistrate Judge jurisdiction. ECF Nos. 26, 27. United States Magistrate Judge Howard Lloyd presided over the case. After lengthy pre-trial motions practice, the case was tried before a jury starting on April 13, 2015. ECF No. 102. On April 15, 2015, the jury found Kast guilty of vicarious infringement and contributory

App.7a

infringement, and found that the infringement was willful. ECF No. 107. The jury awarded damages totaling \$450,000. *Id.* On June 12, 2015, Plaintiffs moved for attorneys' fees and costs. ECF No. 108. The Magistrate Judge denied the motion for attorneys' fees without prejudice on July 22, 2016. ECF No. 174. On August 19, 2015, the Magistrate Judge entered judgment against Kast in his personal capacity in the amount of \$450,000. ECF No. 118.

On September 10, 2015, Kast filed his first notice of appeal to the Ninth Circuit. ECF No. 123. Plaintiffs cross-appealed, but eventually voluntarily withdrew the cross-appeal. ECF Nos. 124, 182.

On November 7, 2015, Kast moved to stay judgment pending appeal without a supersedes bond in the district court action. ECF No. 133. The Magistrate Judge denied Kast's motion. ECF No. 175.

On November 23, 2016, Plaintiffs moved to amend the judgment to include as judgment debtors various trusts and corporate entities allegedly controlled by either Kast or his fiancé, Mariellen Baker. ECF No. 189. The Magistrate Judge ordered additional briefing on whether the Court had jurisdiction to amend the judgment as requested during the pendency of an appeal. ECF No. 198. After briefing was completed on this issue, the Magistrate Judge entered on October 18, 2017 an amended judgment granting Plaintiffs' requested attorneys' fees and costs, and added as judgment debtors various trusts and corporate entities supposedly controlled by Kast. ECF No. 246. Thus, an amended judgment was entered against Kast, corporate entities, various trusts, and "Kraig Kast, Trustee of the Black Oak Trust (a/k/a Kraig Kast, Trustee of The Black Oak Trust, dated March 11, 1995)"

(collectively, “Defendants”) in the amount of \$636, 168.58 plus interest on October 18, 2017. *Id.* That same day, Defendants filed a second notice of appeal to the Ninth Circuit, this time appealing the amended judgment. ECF No. 247.

Both the first and second appeals to the Ninth Circuit remain pending. In Kast’s first appeal, the Ninth Circuit has appointed pro bono counsel to assist in briefing the case and to appear at oral argument. *Erickson Productions, Inc. v. Kast*, No. 15-16801, at Dkt. No. 54 (9th Cir. May 7, 2018).

On November 15, 2017, Kast filed a motion in his second Ninth Circuit appeal to stay the amended judgment. *Erickson Productions, Inc. v. Kast*, No. 17-17157, Dkt. No. 5 (9th Cir. Nov. 15, 2017). The Ninth Circuit denied Kast’s motion. *Id.*, Dkt. No. 13 (9th Cir. Feb. 27, 2018).

Now, Plaintiffs have filed a motion requesting that the rents from various properties owned by Defendants be assigned to Plaintiffs to satisfy the amended judgment. ECF No. 307 at 5-7 (“Mot.”). In the alternative, Plaintiffs request an order to force sale of one of the properties. *Id.* at 8-9. Kast filed a so-called first motion to dismiss Plaintiffs’ motion to assign/sell. ECF No. 311. Kast then filed a response to Plaintiffs’ motion. ECF No. 319. Plaintiffs filed a reply. ECF No. 320.

II. Legal Standard

A. A District Court's Jurisdiction During an Appeal

The United States Supreme Court has held that “a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously.” *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). However, “[a]bsent a stay or supersedeas, the trial court . . . retains jurisdiction to implement the judgment or order, but may not alter or expand upon the judgment.” *In re Padilla*, 222 F.3d 1184, 1190 (9th Cir. 2000). This is because district courts “may not finally adjudicate substantial rights directly involved in the appeal.” *McClatchy Newspapers v. Central Valley Typographical Union No. 46, Int'l Typographical Union*, 686 F.2d 731, 734-35 (9th Cir. 1982).

III. Discussion

First, the Court discusses why it lacks subject matter jurisdiction to entertain Plaintiffs’ motion to assign rent or force sale. Second, the Court discusses a stay of this case.

A. The Court Lacks Jurisdiction to Entertain Plaintiffs’ Motion to Assign Rent/Force Sale

Plaintiffs move to enforce the October 18, 2017 amended judgment that added as a judgment debtor “Kast as Trustee of the Black Oak Trust (a/k/a/ Kraig Kast, Trustee of The Black Oak Trust, dated March 11, 1995).” ECF No. 243 at 18.

Federal Rule of Civil Procedure 17(b) states that for “parties other than corporations or individuals

not acting in a representative capacity, capacity to sue or be sued is determined by the law of the state where the court is located.” *Green v. Cent. Mortg. Co.*, 148 F. Supp. 3d 852, 864 (N.D. Cal. 2015). Under California law, a “trust is not an entity separate from its trustees.” *Ziegler v. Nickel*, 64 Cal.App.4th 545, 548 (1998) (citing *Moeller v. Superior Court*, 16 Cal. 4th 1124, 1132 n.3 (1997)). The trust is not a legal entity that can sue or be sued. *Green*, 148 F. Supp. 3d at 864. Thus in litigation, the trustee, not the trust, “is the real party in interest.” *Moeller*, 16 Cal. 4th at 1132 n.3.

Here, Plaintiffs argue that they are entitled to rental income from properties owned by the Black Oak Trust. Mot. at 3.¹ Moreover, Plaintiffs contend that Kast, “through the Black Oak Trust,” collects rental income from these properties. Mot. at 4. However, Kast appears not to be the trustee of the Black Oak Trust. For example, one of Plaintiffs’ exhibits in support of their motion to assign rent or force sale shows that Mariellen Baker is listed as the trustee of the Black Oak Trust. ECF No. 308-7. Furthermore, Baker asserts that she assumed the role of trustee of the Black Oak Trust on December 31, 2015, when Kast resigned as trustee. ECF No. 213 at 3.

Because Baker now appears to be the trustee of the Black Oak Trust, a point that Plaintiffs’ brief concedes, Br. at 7 (describing a bank account “listed under the Black Oak Trust name, with Baker as trustee”), the Court lacks subject matter jurisdiction

¹ According to documents Plaintiffs submitted, two properties were transferred to the Black Oak Trust on January 3, 2012. ECF No. 308-1. See also Mot. at 3.

to enforce the terms of the amended judgment. Baker as trustee of the Black Oak Trust was not party to the copyright infringement lawsuit or original judgment against Kast. ECF No. 118. Thus, to enforce the amended judgment, the Court would need to include nonparties to the original judgment. Under *Padilla*, that would be an impermissible expansion of the scope of the original judgment, which only concerned Kast in his personal capacity. Therefore, the Court DENIES Plaintiffs' motion to assign rental income or force sale for want of subject matter jurisdiction.

B. A Stay of these Proceedings is Warranted

The Ninth Circuit has appointed pro bono counsel for Kast and ordered supplemental briefing on two issues that concern Kast's liability as to the copyright charges. *Erickson Productions, Inc. v. Kast*, No. 15-16801, at Dkt. No. 65 (9th Cir. Aug. 23, 2018). Furthermore, the Court is concerned that it lacks subject matter jurisdiction to enforce the terms of the amended judgment. "Courts have the power to consider stays *sua sponte*." *Washington v. Trump*, 2017 WL 1050354, at *3 (W.D. Wash. Mar. 17, 2017). Thus, in the interest of judicial efficiency, this Court will STAY the case until both of Kast's Ninth Circuit appeals have been resolved.

IV. Conclusion

For the foregoing reasons, the Court DENIES Plaintiffs' motion to assign rental income or force sale. Furthermore, the Court STAYS this case pending resolution of Ninth Circuit appeal numbers 15-16801 and 17-17157.

App.12a

The Clerk shall administratively close the file.
This is a purely internal administrative procedure
that does not affect the rights of the parties.

IT IS SO ORDERED.

/s/ Lucy H. Koh
United States District Judge

Dated: November 9, 2018

**ORDER GRANTING IN PART ERICKSON'S
MOTION TO AMEND THE JUDGMENT
(OCTOBER 5, 2017)**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ERICKSON PRODUCTIONS, INC, ET AL.,

Plaintiffs,

v.

KRAIG R. KAST,

Defendant.

Case No. 5:13-CV-05472-HRL

Re: Dkt. No. 189, 221, 231

Before: Howard R. LLOYD,
United States Magistrate Judge.

BACKGROUND

Erickson Productions, Inc. and Jim Erickson (collectively referred to in the singular as "Erickson") sued Kraig Kast for copyright infringement, alleging that he used, without permission, three of Erickson's photographs on a website for Kast's business, Atherton Trust. Erickson and Kast expressly consented that all proceedings in this matter may be heard and finally adjudicated by the undersigned. 28 U.S.C. § 636; Fed.

R. Civ. P. 73. Erickson's infringement claims proceeded to a jury trial. The jury returned a verdict for Erickson and awarded statutory damages of \$450,000. Judgment was entered accordingly. Kast appealed that judgment, and the appeal remains pending.

At trial, there was some evidence presented about trusts that Kast managed, including the Kraig Kast Living Trust and another one called the Black Oak Trust. With respect to the latter, Kast testified that his fiancée, Mariellen Baker, was the beneficiary. In December 2015, several months after judgment was entered, Kast says he resigned as trustee of the Black Oak Trust and Baker became the successor trustee.

Meanwhile, Erickson proceeded with efforts to collect on the judgment. He propounded written judgment debtor discovery to which, he says, Kast never responded. Erickson also served subpoenas on Baker, as well as a number of financial institutions and other entities.¹

Erickson now moves to amend the judgment to add judgment debtors, including Kast's birth name and alias (Warren Craig Rudinger) and various "doing business as" fictitious names; the "Kraig Kast Living Trust"; the "Black Oak Trust (a/k/a The Black Oak Trust, dated March 11, 1995)"; and Kast as "Trustee of the Black Oak Trust (a/k/a Kraig Kast, Trustee of The Black Oak Trust, dated March 11, 1995)." (Dkt. 189 at 2). Additionally, although she was not a party to the underlying litigation, Erickson moves to add Baker, as "Successor Trustee of the Black Oak Trust

¹ Kast and Baker/Black Oak Trust have filed several motions to quash the subpoenas. The court will address those motions in a separate order.

(a/k/a Mariellen Baker, Successor Trustee of the Black Oak Trust, dated March 11, 1995)" as a judgment debtor. (*Id.*). The basic premise of the motion is that Kast has used various aliases, "doing business as" fictitious names, and trusts in order to confound creditors and avoid paying the judgment. As for Baker and the Black Oak Trust, Erickson contends that they can be added to the judgment on the grounds that they are Kast's alter egos and that Baker is a successor to the debt.

Pursuant to an interim order, the parties submitted briefing on the question of this court's authority to entertain Erickson's motion to amend, in view of Kast's pending appeal. Erickson maintained that the requested relief would have no substantive impact on the appeal because, as oft-recited by California cases with respect to such motions, he does not seek to add new debtors, merely the true ones. Baker/Black Oak Trust, on the other hand, argued that the motion seeks to substantively amend the judgment to hold liable additional persons and entities who had no connection to this lawsuit. As for Kast, he suggested that this court should defer ruling on the motion to amend until after the Ninth Circuit decides his appeal and that the state court should address issues concerning trusts and alter ego liability.²

² Kast also argued that Erickson's motion was brought too late because it was not filed within 28 days after entry of judgment under Fed. R. Civ. P. 59(e). The Ninth Circuit, however, has rejected that same argument, instead requiring that such motions be brought within a reasonable time. *In re Levander*, 180 F.3d 1114, 1121 n.10 (9th Cir. 1999). As will be discussed more fully below, Erickson argues that the full scope of Kast's alleged subterfuge with respect to the subject trusts and assets has only recently come to light.

Although this court harbored some doubt as to the propriety of the relief Erickson sought, it nevertheless proceeded with full briefing and hearing on the merits of the motion to amend the judgment. In his reply brief, Erickson submitted a number of additional documents he said he recently obtained in response to subpoenas and which, he claims, show that Kast (1) created multiple "Black Oak" trusts on the same day, with only slightly different titles; (2) transferred various properties to a revocable trust, despite his claims that the properties were placed in an irrevocable one; and (3) treated the various trusts as his personal piggy bank. All this, says Erickson, was done in an effort to confuse creditors and avoid paying the judgment.

After briefing was submitted, and just a few days prior to the hearing on Erickson's motion to amend, Baker/Black Oak Trust filed a motion for leave to submit a supplemental brief addressing this court's subject matter jurisdiction to entertain Erickson's motion (Dkt. 221). Because the court has an ongoing duty to evaluate its subject matter jurisdiction, Fed. R. Civ. P. 12(h)(3), at the motion hearing the court granted Baker/Black Oak Trust's request and accepted the proffered supplemental brief. Additionally, at the motion hearing, the court inquired whether it is required to obtain Baker/Black Oak Trust's consent to proceed before a magistrate judge in these post-judgment proceedings. Everyone was given an opportunity to present oral argument on the issues. Additionally, at his request, Erickson was given leave to submit a supplemental written response on the subject matter and magistrate jurisdiction issues. And, at their request, Baker/Black Oak Trust were

App.17a

given leave to submit a supplemental written response to the arguments and evidence in Erickson's reply on the motion to amend.

Erickson filed his post-hearing supplemental brief on jurisdictional issues. Later that evening, Baker/Black Oak Trust filed a post-hearing supplemental brief that did not address Erickson's reply arguments and evidence. Instead, Baker/Black Oak Trust chose to address subject matter and magistrate jurisdiction issues.³ And, along with her supplemental post-hearing brief, she submitted a declination to proceed before a magistrate judge. (Dkt. 226).

During the pendency of this motion (involving several rounds of briefing on complex issues) and as made clear by Erickson's oral arguments presented, the focus of the motion shifted to whether the assets that Kast says are off-limits ever went to an irrevocable trust at all. As previewed above, Erickson contends that Kast transferred various properties to a revocable trust that he continues to own or control.

Having considered the moving and responding papers,⁴ as well as the oral arguments presented,

³ Erickson moves to strike Baker/Black Oak Trust's post-hearing supplemental brief on the ground that the brief does not address any of the issues for which leave to file that brief was given (Dkt. 231). As discussed above, however, the court has a continuing duty to evaluate its jurisdiction; and, the court did solicit views concerning magistrate judge jurisdiction. Accordingly, the court has accepted and considered Baker/Black Oak Trust's post-hearing supplemental brief. Erickson's motion to strike is denied.

⁴ The court conditionally sealed a number of documents submitted by Erickson, primarily to protect information such as Social Security numbers, account numbers, and the like. This order

this court now grants in part Erickson's motion to amend as follows:

DISCUSSION

A. Subject Matter Jurisdiction

The question is whether Erickson's motion to amend the judgment falls within this court's ancillary jurisdiction. The Supreme Court has identified two purposes for which a court may exercise ancillary jurisdiction over a claim that would otherwise not fall within the court's jurisdiction: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Peacock v. Thomas*, 516 U.S. 349, 354 (1996) (quoting *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379-380, 114 S. Ct. 1673, 1676, 128 L.Ed.2d 391 (1994)). Arguing that he is seeking to collect on the judgment, Erickson says it is the second purpose that applies here. *See id.* at 356 ("We have reserved the use of ancillary jurisdiction in subsequent proceedings for the exercise of a federal court's inherent power to enforce its judgments.").

As between those cases where ancillary jurisdiction exists and those where it doesn't, caselaw teaches that the key inquiry is whether the judgment creditor merely seeks to collect a judgment or whether it seeks to hold a new party directly liable for the original judgment on new claims or theories. If it is the latter,

only discusses information from those documents that are part of the public record in this matter.

courts have generally found that there is no ancillary jurisdiction, absent an independent basis for federal jurisdiction. Deciding where a case falls within this framework necessarily requires analysis of the nature of the post-judgment claims and allegations asserted in a particular case.

For example, in *Peacock*, after unsuccessful attempts to collect the judgment, the judgment creditor filed a new suit in federal court against the judgment debtor (a corporate entity) and the debtor's officer, alleging that the officer conspired to siphon the debtor's assets to prevent satisfaction of the judgment. In concluding that the district court did not have ancillary jurisdiction over that matter, the Supreme Court reasoned that ancillary jurisdiction may not be exercised to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment. 516 U.S. at 357. However, the Court declined to address arguments that the new action was simply an attempt to collect the judgment because neither the parties nor the lower courts had ever characterized the suit in that way. And, indeed, the judgment creditor expressly stated that the new action was not one to collect the judgment, but rather to pierce the corporate veil in order to establish the officer's liability for the judgment against the debtor. *Id.* at 357 n. 6.

Several months after *Peacock* was decided, the Ninth Circuit addressed the issue in *Thomas, Head, & Greisen Employees Trust v. Buster*, 95 F.3d 1449 (9th Cir. 1996). There, the judgment creditor brought supplementary proceedings against the debtor to collect on the judgment and then subsequently filed an amended complaint adding as defendants several

individuals and entities who were not parties to the original action or judgment. These additional defendants were included in the supplementary proceedings on allegations that the debtor had fraudulently transferred various properties to them in an effort to avoid paying the judgment. In concluding that the district court had subject matter jurisdiction over the supplementary proceedings, the Ninth Circuit began with the principle that “[t]here can be little question that federal courts generally possess the power to protect their judgments by setting aside fraudulent conveyances of the judgment debtor.” *Id.* at 1453. That power, the court observed, “derives from the long-recognized principle that a federal court may assert authority over non-federal claims ‘when necessary to give effect to the court’s judgment.’” *Id.* (quoting *Finley v. United States*, 490 U.S. 545, 551, 109 S. Ct. 2003, 2008, 104 L.Ed.2d 593 (1989)). The court went on to find that *Peacock* was inapposite because, unlike in *Peacock*, the judgment creditor was not attempting to hold the additional individuals and entities liable for the original judgment, but sought “only to disgorge from them, as alleged fraudulent transferees, the property [the debtor] wrongfully transferred to them.” *Id.* at 1454.

In applying these principles here, this court first addresses Erickson’s arguments as to Kast. For the reasons to be discussed, the court concludes that it has subject matter jurisdiction over Erickson’s motion as to Kast and finds it unnecessary to reach Erickson’s allegations as to Baker.

B. Motion to Amend re Kast

Erickson says that Kast has used various aliases and fictitious names in order to avoid paying the judgment. And, despite Kast's claims to the contrary, Erickson contends that Kast transferred various properties, not to an irrevocable trust, but to a revocable one of which he is the identified grantor or trustee with complete control over the trust assets. The relief sought by Erickson's motion as to Kast's strikes this court as nothing more than an attempt to collect on the judgment. Under the precedents discussed above, this court concludes that it has subject matter jurisdiction over Erickson's motion to amend the judgment as to Kast.

In responding to this court's interim order, Kast suggested that Erickson's motion should be decided by the state court—an argument that this court construes as a request that the court decline to exercise ancillary jurisdiction. There is no dispute that the exercise of ancillary jurisdiction is discretionary. *See Thomas, Head, & Greisen Employees Trust*, 95 F.3d at 1453 (stating that the power to protect judgments by setting aside fraudulent conveyances "derives from the long-recognized principle that a federal court may assert authority over non-federal claims when necessary to give effect to the court's judgment.") (citation omitted) (emphasis added). Nevertheless, "[w]ithout jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'" *Peacock*, 516 U.S. at 356 (quoting *Riggs v. Johnson Cnty.*, 6 Wall. 166, 187, 18 L.Ed. 768 (1868)). And, while Erickson could pursue proceedings against Kast in

the state court, this court finds that would not serve the interests of judicial economy or efficiency. Accordingly, the court will not decline to exercise jurisdiction.

Erickson seeks to amend the judgment to add Kast's aliases and fictitious business names. Erickson submits evidence that Kast has used his birth name "Warren Craig Rudinger" (or variations of it) on bank accounts. (Dkt. 191, Declaration of Kevin McCulloch ISO Motion ("McCulloch Decl.") ¶ 4, Ex. 2; Dkt. 215, Declaration of Kevin ISO Reply ("McCulloch Reply Decl.") ¶ 2, Ex. 1). Erickson has also presented evidence that Kast registered a number of fictitious "doing business as" names in California. (McCulloch Decl. ¶¶ 5-6, Exs. 3-4). The alias and businesses are not separate legal entities; they are merely Kast by other names. *Global Concierge Holdings v. Charbo*, No. CV 13-5203-RGK MANX, 2013 WL 6241589, at *4 (C.D. Cal. Dec. 3, 2013) ("Use of a fictitious business name does not create a separate legal entity"); *Pinkerton's, Inc. v. Super. Ct.*, 49 Cal.App.4th 1342, 1348, 57 Cal. Rptr. 2d 356, 360 (1996) (same); *see also Mad Dogg Athletics, Inc. v. NYC Holding*, 565 F. Supp. 2d 1127, 1130 (C.D. Cal. 2008) (stating that in cases involving fictitious business entities, post-judgment amendments are similar to clerical error corrections). The court grants Erickson's motion to amend the judgment to add Kast's birth name/alias Warren Craig Rudinger and the fictitious business names "Atherton Trust," "Atherton & Associates," "Atherton Insurance Services," "The Atherton Company," "Atherton Investment Advisors," and "CB Real Estate Wealth Management."

Erickson also seeks to amend the judgment to add: “Kraig Kast Living Trust and Black Oak Trust (a/k/a The Black Oak Trust, dated March 11, 1995)” and “Kraig Kast, Trustee of the Black Oak Trust (a/k/a Kraig Kast, Trustee of The Black Oak Trust, dated March 11, 1995).” (Dkt. 189 at 2). This court is told that there is no longer a Kraig Kast Living Trust (at least, not by that name). And, Kast says that he resigned as trustee of the Black Oak Trust; that Baker is now the trustee and beneficiary; and that the Black Oak Trust is irrevocable, so its assets are not subject to Erickson’s judgment anyway. *See Laycock v. Hammer*, 141 Cal.App.4th 25, 30, 44 Cal. Rptr. 3d 921 (2006) (stating that in order to reach the assets held by a trust, a judgment creditor must show that, notwithstanding the trust’s terms, the trust is revocable). As discussed, Erickson contends that, in order to confuse and avoid creditors, Kast created multiple “Black Oak Trusts” on the same day, with only slightly different titles, and transferred various properties to a revocable “Black Oak Trust” over which he maintains complete control, despite his claims that the properties were placed in an irrevocable one.

Federal Rule of Civil Procedure 69(a) pertains to the execution of judgment and provides that “[t]he procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.” Rule 69(a) “empowers federal courts to rely on state law to add judgment-debtors.” *In re Levander*, 180 F.3d 1114, 1120-21 (9th Cir. 1999). California Code of Civil Procedure § 187 permits a court to amend a judgment to add judgment debtors:

As a general rule, 'a court may amend its judgment at any time so that the judgment will properly designate the real defendants.'.... Judgments may be amended to add additional judgment debtors on the ground that a person or entity is the alter ego of the original judgment debtor. 'Amendment of a judgment to add an alter ego "is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant.... Such a procedure is an appropriate and complete method by which to bind new... defendants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit.

Greenspan v. LADT, LLC, 191 Cal.App.4th 486, 508, 121 Cal. Rptr. 3d 118 (2010) (quoting *Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conference Ctr. Bd.*, 41 Cal.App.4th 1551, 1554-55, 49 Cal. Rptr. 2d 286 (1996)). "California courts have applied the alter ego doctrine to trusts." *In re Schwarzkopf*, 626 F.3d 1032, 1038 (9th Cir. 2010) (citing *Torrey Pines Bank v. Hoffman*, 231 Cal.App.3d 308, 282 Cal. Rptr. 354, 359 (1991)). While a trustee may be added as a judgment debtor, a trust itself is not subject to the alter ego doctrine because it is not a legal entity. *Greenspan*, 191 Cal.App.4th at 496.

There are four California properties in question—three in Foster City and one in Valley Center. They will be referred to here as the "Beach Park" property;

“De Soto” property; “East Court” property; and “Valley Center” property.

It is undisputed that the Kraig Kast Living Trust was a revocable trust established on March 11, 1995, with Kast as the grantor or trustee with “all rights to all income, profits and control of the trust property” during his lifetime. (Dkt. 213-1, Declaration of Kraig R. Kast ISO Baker’s Opposition (“Kast Decl.”) ¶ 3, Ex. 1). The parties have submitted deeds showing that three of the properties at issue—De Soto, Beach Park, and East Court—were placed in the Kraig Kast Living Trust in 2005. (McCulloch Reply Decl. ¶ 23, Ex. 22; Kast Decl. ¶¶ 5-7, Exs. 2-4).

On this record there also seems to be no controversy that on December 11, 2007, the Kraig Kast Living Trust was amended. The import of those purported amendments, however, is disputed.

According to Kast, he amended and restated the Kraig Kast Living Trust, changing the name to “The Black Oak Trust,” converting it to an irrevocable trust, and adopting a new 100-page trust document. (Kast Decl. ¶¶ 12-14, Ex. 6; Dkt. 213-2 Declaration of Mariellen Baker ISO Opposition (“Baker Decl.”) ¶ 2). The trust document identifies Kast as the settlor and initial trustee and Baker as the sole lifetime beneficiary and designated successor trustee. (Kast Decl. ¶ 13, Ex. 6, Art. 2; Baker Decl. ¶ 2). Kast and Baker aver that Kast has never been the beneficiary of this trust. (*Id.*). Kast further states that the Beach Park, De Soto, and East Court properties (formerly held in the Kraig Kast Living Trust) and the Valley Center property (subsequently acquired by Kast later in December 2007), were all placed in this irrevocable Black Oak Trust pursuant to an “Addendum A” to the trust

document. (Kast Decl ¶¶ 12, 16, Ex. 6 Section 1.04, Addendum A). The “Addendum A” is a one-page document that says “Properties included in the Black Oak Trust,” followed by a list of the four properties at issue and by what appears to be Kast’s signature and the date December 30, 2007. (*Id.*). Kast says that, before putting the De Soto property in the irrevocable Black Oak Trust for Baker, he refinanced that property (Kast Decl. ¶¶ 21-22); and, at oral argument, he said that the proceeds were used to the buy the Valley Center property. He says that deeds subsequently were recorded to reflect the December 11, 2007 and December 30, 2007 actions as follows: February 20, 2008 for the Valley Center property; March 12, 2008 for the De Soto property; and on February 3, 2012 for the East Court and Beach Park properties. (Kast Decl ¶¶ 18, 22, 24, 25, Exs. 9, 12, 13, 16).

Kast says he placed these four properties in trust for Baker as a way of paying back \$470,000 in personal loans. (Kast Decl. ¶¶ 9-11; Baker Decl. ¶¶ 4-6). To that end, Kast submits a document titled “Promissory Note,” bearing what appear to be Kast’s and Baker’s signatures made at various times, and purporting to confirm this arrangement. The document is initially dated June 6, 2006 and contains handwritten updates dated September 2, 2006 and September 12, 2006. (Kast Decl. ¶¶ 9-11, Ex. 5).

As trustee, Kast says that he engaged in activities, in the ordinary course of trust business, that were done for trust purposes. For example:

- He carried out three refinancing transactions for: an East West Bank Loan, closed May 6, 2011, for the East Court property (Kast Decl ¶¶ 27-34, Dkt. 213-3 Biché Decl ¶¶ 4-7); a loan

obtained from Behrooz and Laurie Shahab, closed April 10, 2015, for the East Court property (Kast Decl ¶¶ 35-37; Biché Decl ¶¶ 8-9); and a loan obtained from Anthony and Valerie Vacarella, re the Beach Park property (Kast Decl ¶¶ 38-40, Biché Decl. ¶¶ 10-11);

- The De Soto property was sold on October 19, 2012, Kast says, to reduce debt and generate funds for trust purposes (Kast Decl. ¶ 41).

Kast says he resigned as trustee of the Black Oak Trust on December 31, 2015 (several months after judgment was entered here), and Baker became the successor trustee. (Kast Decl. ¶ 15, Ex. 6 section 3.02(a); Ex. 7; Baker Decl. ¶ 3). And, Baker says that in her capacity as trustee, she sold the Valley Center property on November 2, 2016, to reduce debt and generate funds for trust purposes. (Baker Decl. ¶¶ 7-10).

In sum, Kast maintains that as of December 30, 2007 (several years before Erickson filed this litigation), the subject properties were placed in an irrevocable trust for Baker to satisfy her personal loans to him and that all trustee transactions respected the irrevocable trust.

Erickson argues that documents he obtained show a different story—namely, that there were several “Black Oak Trusts” created on December 11, 2007; that the subject properties were placed in a revocable “Black Oak Trust” that Kast owns and controls; and that Kast continued to exercise ownership and control over the properties even after he resigned as trustee of the alleged irrevocable “Black Oak Trust” he says he established to repay Baker’s loans.

Here, Erickson presents documents indicating that on December 11, 2007, Kast actually executed three separate trust declarations, each with different beneficiaries and terms and using subtly different titles, but all containing the phrase “Black Oak Trust”:

- One document, entitled “Second Amended Living Trust/Black Oak Trust to the Kraig R. Kast Living Trust,”⁵ changes the name of the trust to “the Black Oak Trust, dated March 11, 1995.” It also identifies individuals who will become successor trustees and beneficiaries in the event of Kast’s death. Otherwise, this “Second Amended” document states that “the terms of [the Kraig R. Kast Living Trust] declaration shall remain in full force and effect.” (McCulloch Reply Decl. ¶ 3, Ex. 2). This document will be referred to as the “Second Amended Living Trust/Black Oak Trust” document.
- A second December 11, 2007 document purports to create an irrevocable trust by the name “Kraig R. Kast, Trustee of the Black Oak Trust dated December 11, 2007.” Although only a few pages of this document have been presented to the court, the pages that have been submitted indicate that Kast is the settlor and trustee. (McCulloch Reply Decl. ¶ 5, Ex. 4). This document will be referred to as the “December 11, 2007 Black Oak Trust.”

⁵ According to the terms of this document, the provisions of the “First Amendment” to the Kraig R. Kast Living Trust were made on March 26, 2005 and “are hereby revoked and shall be of no further force and effect.” (McCulloch Reply Decl. ¶ 3, Ex. 2).

- A third December 11, 2007 document bears the title “The Black Oak Trust” and appears to create an irrevocable trust by the alternate names “Kraig R. Kast, Trustee of the Black Oak Trust dated December 11, 2007” or “Kraig R. Kast, Trustee of the Black Oak Trust dated March 11, 1995.” Baker is identified as the lifetime beneficiary of the trust. (McCulloch Reply Decl. ¶ 4, Ex. 3). This would appear to be the same trust document Kast and Baker claim established the irrevocable trust to repay Baker’s loan.⁶ This document will be referred to as the “Baker/Black Oak Trust.”

In sum, these documents indicate that on December 11, 2007, Kast executed three different “Black Oak Trust” documents—and the purportedly irrevocable Baker/Black Oak Trust apparently was to be known by the names that appear to be similar, if not identical, to the other two December 11, 2007 Black Oak Trusts of which Kast is the identified settlor or grantor/trustee with control over the trust property. Notably, the Second Amended Living Trust/Black Oak Trust document did not change the revocable nature of the Kraig R. Kast Living Trust.

Erickson says that other documents show that the four properties Kast reportedly transferred to the irrevocable Baker/Black Oak Trust actually were transferred to himself (*i.e.*, the Second Amended Living Trust/Black Oak Trust of which he maintains control). For example, with respect to the property

⁶ As discussed more fully below, however, Erickson points out that there are discrepancies in the document submitted by Kast and Baker.

deeds that Kast and Baker say he recorded to confirm transfer of the properties to the Baker/Black Oak Trust:

- A February 20, 2008 grant deed transfers the De Soto property from "Kraig R. Kast, A Single Man" to "Kraig Rudinger Kast, a trustee of the Black Oak Trust, Dated March 11, 1995." (McCulloch Reply Decl. ¶ 7, Ex. 6; Kast Decl. ¶ 22, Ex. 12).
- Another February 20, 2008 grant deed shows that the Valley Center property (*i.e.*, the one Kast acquired about 2 weeks after creating the various December 11, 2007 "Black Oak" trusts) was transferred "into or out of [the grantor's] revocable trust" by "Kraig R. Kast, A Single Man" to "Kraig Rudinger Kast, Trustee of the Black Oak Trust, Dated March 11, 1995." (McCulloch Reply Decl. ¶ 9, Ex. 8) (emphasis added).
- A February 3, 2012 quitclaim deed shows that the East Court property was transferred from "KRAIG RUDINGER KAST" to "KRAIG R. KAST, as Trustee under the DECLARATION OF THE BLACK OAK TRUST, Dated 3/11/95." This deed states that the property is being transferred "into a Revocable Trust." (McCulloch Reply Decl. ¶ 8, Ex. 7; Kast Decl. ¶ 31, Ex. 16) (emphasis added).
- Another February 3, 2012 quitclaim deed transfers the Beach Park property from "KRAIG RUDINGER KAST, as Trustee under the DECLARATION OF THE KRAIG KAST LIVING TRUST, dated 3/11/95" to "KRAIG R.

KAST, as Trustee under the DECLARATION OF THE BLACK OAK TRUST, Dated 3/11/95.” This deed, too, says that the property is being transferred “into a Revocable Trust.” (McCulloch Reply Decl. ¶ 6, Ex. 5; Kast Decl. ¶ 25, Ex. 13) (emphasis added).

In view of the similar names of the various December 11, 2007 “Black Oak” trusts—it is somewhat ambiguous which one actually was receiving the property. But, the fact that at least three of the deeds expressly say that the subject properties were being placed into a revocable trust suggests that the properties were being transferred, not to the Baker/Black Oak Trust, but to the revocable Second Amended Living Trust/Black Oak Trust of which Kast is the grantor/trustee with control over all trust property. Kast says that the reference to “revocable” trusts in those deeds was just a mistake, saying he paid no particular attention to that word in the deeds. (Kast Decl. ¶ 20). However, the court finds that Kast’s assertions are not credible since (1) he executed several December 11, 2007 “Black Oak Trust” documents, purporting to create both revocable and irrevocable trusts; and (2) the alleged mistake occurred no less than three different times in deeds recorded over a period of several years.

Erickson argues that still other documents provide further reasons to doubt Kast’s and Baker’s arguments that Kast intended to put the subject properties into the purported irrevocable Baker/Black Oak Trust. For example, with respect to the purchase of the Valley Center property:

- A promissory note shows that Kast completed the purchase of the Valley Center property on December 14, 2007, several days after he created

the multiple "Black Oak" trusts. (McCulloch Reply Decl. ¶ 10, Ex. 9).

- Nevertheless, the Sale Closing Escrow Instructions show that Kast "direct[ed] that title to the Property be vested as follows: "Kraig R. Kast, an unmarried man." (*Id.* ¶ 22, Ex. 21 at 1).
- Kast also purchased title insurance from First American Title Insurance Company (First American), and the policy, dated December 28, 2007, stated that Kast personally was the buyer and excluded coverage if title was vested "other than" in "Kraig R. Kast, an unmarried man." (*Id.* ¶ 12, Ex. 11 at 2-3).
- The mortgage note, issued by J.P. Morgan/Chase ("Chase"), was also to Kast personally. (*Id.* ¶ 10, Ex. 9.)

At oral argument, Kast stated that the property purchase had to be done this way because the bank would not finance the purchase in the name of a trust. Even so, this court has not been presented with evidence that Kast ever changed the title insurance policy or the mortgage note to reflect that he no longer held title to the property. When viewed together with the subsequent February 20, 2008 deed transferring the Valley Center property "into or out of [the grantor's] revocable trust" by "Kraig R. Kast, A Single Man" to "Kraig Rudinger Kast, Trustee of the Black Oak Trust, Dated March 11, 1995," the evidence strongly suggests that Kast had no intention at the time of vesting title to this newly acquired property in an irrevocable trust.

But wait, says Erickson, there's more:

- Erickson presents a December 20, 2007 note that Kast faxed to the First American escrow officer, Carolyn Koontz ("Koontz"), which states: "Please find attached the 2nd Amendment to my Living Trust. When putting the Foster City and Valley Center homes back in the trust, please use the name Black Oak Trust." (McCulloch Reply Decl. ¶ 11, Ex. 10). The referenced "2nd Amendment to my Living Trust," says Erickson, could only mean the Second Amended Living Trust/Black Oak Trust document that simply renamed Kast's revocable living trust "Black Oak Trust, dated March 11, 1995." And, Erickson argues that the instruction to put the properties "back in the trust" suggests that Kast meant that the properties were to be placed, not in a newly-created irrevocable trust, but rather to his revocable trust, to which he transferred the De Soto property in March 2005 and later transferred back to himself on December 4, 2007 for refinancing. (*Id.* ¶¶ 23-24, Exs. 22 & 23).
- Erickson also presents a document indicating that Koontz prepared a grant deed transferring the De Soto property from "Kraig R. Kast, A Single Man" to "Kraig Rudinger Kast, a trustee of The Black Oak Trust, Dated March 11, 1995" on February 11, 2008, according to Kast's instructions and using the name of the revocable trust declaration he had sent her. (*Id.* ¶ 7, Ex. 6).

Erickson posits that Koontz worked for First American (Kast's title insurance company), and so would have (1) noticed if Kast intended to make a transfer that would have voided his insurance; and (2) been aware

of the need to file a Preliminary Change of Ownership Report (“PCOR”) as required under Cal. Rev. & Tax Code § 480 for transfers to an irrevocable trust. But, says Erickson, there is no evidence that a PCOR was ever recorded.

As for the alleged “Addendum A” that Kast says effectively placed the four subject properties in the purportedly irrevocable Baker/Black Oak Trust, Erickson argues that the document is rife with evidentiary problems:

- The document purports to be signed by Kast on December 30, 2007, but Kast offers no evidence, other than his own declaration, that the document was executed on that date.
- Erickson says that this “Addendum A” was not included in any copies of the trust declaration produced in response to his subpoenas for property transactions by Black Oak Trust prior to 2015. (McCulloch Reply Decl. ¶ 25).
- The Baker/Black Oak Trust declaration itself states that the properties to be included in the trust are listed in “Schedule A,” not “Addendum A.” (Kast Decl. ¶ 12, Ex. 6 at 16, § 1.04).
- Although the record indicates that Kast had other amendments to his trusts notarized, this “Addendum A” listing the properties that he purportedly is relinquishing to an irrevocable trust is not notarized. (Compare McCulloch Reply Decl. ¶ 3, Ex. 2 and Kast Decl., ¶ 12, Ex. 6). Kast argues that while notarization is allowed, it is not required. Nevertheless, Erickson says the lack of notarization is notable.

Further, Erickson points out that there are discrepancies in the Baker/Black Oak Trust declaration presented by Kast and Baker and the copy of that document Erickson says he received from First American in response to his subpoena. To begin, the document Kast and Baker present to the court does not include any of the referenced schedules, including "Schedule A," which the declaration expressly states was "attached to this agreement." (Kast Decl. ¶ 12, Ex. 6). Instead, Kast submitted the "Addendum A," the reliability of which Erickson says is questionable and which is missing from the copy Erickson says it obtained from First American. Additionally, in the Baker/Black Oak Trust documents submitted by both Kast and Erickson, the document begins on page 5, indicating that at least 4 pages preceding the table of contents is missing. (McCulloch Reply Decl. ¶ 3, Ex. 2; Kast Decl., ¶ 12, Ex. 6).

Additionally, the Baker/Black Oak Trust declaration presented by Kast is entirely different than the alternative, purportedly irrevocable "December 11, 2007 Black Oak Trust" that identifies Kast as the settlor and trustee that Erickson says he received in response to another subpoena. (McCulloch Reply Decl. ¶ 5, Ex. 4).

Erickson also presents evidence indicating that Kast claimed to hold the properties in his own name, even after having purportedly transferred them to the Baker/Black Oak Trust. For example, Erickson submits a "Wealth Advisory and Business Consulting Fee for Services Agreement," with SG Private Wealth Advisors ("SG"). (McCulloch Reply Decl., ¶ 17, Ex. 16). The agreement says that it is effective as of December 29, 2010, *i.e.*, several years after Kast reportedly

transferred the subject properties to an irrevocable trust. The agreement states that Kast agreed to pay SG 1% of the purchase or refinance price for any properties. The two identified properties are the Beach Park and De Soto properties, as to which Kast applied for loans. (*Id.* (Schedule 2)). Each loan application states that "title will be held" in the name of "Kraig R. Kast" and that the "manner in which Title will be held" was "unmarried man." (*Id.*). Each application also identifies "Kraig R. Kast" as the borrower. Neither Kast nor Baker have presented any evidence that these investments were for the benefit of a trust.

And, Erickson says that still other documents he obtained strongly suggest that Kast has not only continued to exercise control over the properties, but has also acted in a manner to avoid creditors. For example, in an email dated June 20, 2016—*i.e.*, six months after Kast resigned as trustee of the Baker/Black Oak Trust—from Kast to Laura Biché (identified as a mortgage advisor who assisted Kast with prior loans re the East Court and Beach Park properties) Kast says he is considering selling the "Townhouse and Beach Park Condo":

I'm thinking that selling is the only way to protect the equity. If I lose the appeal then their next step is to try to break up the trust. If the court doesn't accept your/our refi explanation then the court could rule fraudulent transfer and block a sale and pay them.

(McCulloch Reply Decl. ¶ 18, Ex. 17 (emphasis added)). And, some two months later—*i.e.*, about 8 months after Kast resigned as trustee of the Baker/Black Oak Trust —another email from Kast to Biché:

Please remember, I don't have a personal bank account so it can't be attached by the crazy woman. Everything is in the name of the Corporation or Trust and the trust owns the corporation. If they want bank statements from me personally I can't give them to a lender because they don't exist by design.

(*Id.* ¶ 21, Ex. 20) (emphasis added).⁷

Neither Kast nor Baker have responded to these exhibits submitted by Erickson. Indeed, at oral argument, when probed by the court about them and the assertions Erickson makes—and especially why there apparently are two entirely different “Black Oak Trust” documents purporting to establish irrevocable trusts (one naming Baker as beneficiary and successor trustee; the other identifying Kast as the settlor and trustee)—neither Baker nor Kast had an answer. Baker said that she had historically only been given the Baker/Black Oak Trust document. She claimed to have no knowledge about the other two December 11, 2007 documents and said that she had never before seen either one. As discussed above, the court granted Baker’s request for leave to submit supplemental briefing about Erickson’s reply documents and arguments; but, she apparently chose not to address them.

As for Kast, although he confirmed that he had received and read all of Erickson’s motion papers, he told the court that he could not comment about them

⁷ Erickson says that the “crazy woman” referenced in this email is Diana Reinecker, who has submitted papers with this court in connection with unrelated post-judgment matters, identifying herself as another one of Kast’s judgment creditors.

because he did not bring the papers with him to the hearing. When the court described some of the differences between the two purported irrevocable "Black Oak" trust documents, Kast said he could not answer because he did not have the documents in front of him. And, when further pressed by the court to respond to some of the other assertions made by Erickson (*e.g.*, that he continued to claim ownership of the properties, even after purportedly transferring them to the Baker/Black Oak Trust), Kast again said he could not comment and referred the court to his written opposition papers, saying that he had no more to add.

Based on the foregoing, and in view of the unrefuted evidence submitted by Erickson in his reply brief, the court finds that there has not been a transfer of the subject properties to an irrevocable trust, but rather, to a revocable trust (*i.e.* the Second Amended Living Trust/Black Oak Trust) of which the record shows that Kast remains the grantor and trustee with all rights to income, profits and control of the trust property during his lifetime. And, on this record, it appears that Kast has used the purported conveyances to the Baker/Black Oak Trust as a ruse to avoid payment of the judgment as to Erickson. Accordingly, in addition to Kast's birth name/alias and fictitious business names, Erickson's motion to amend the judgment as to Kast is granted to add Kast as Trustee of the Black Oak Trust (a/k/a Kraig Kast, Trustee of The Black Oak Trust, dated March 11, 1995).

In view of the foregoing, the court finds it unnecessary to address Erickson's motion to amend the judgment to add Baker/Black Oak Trust as a judgment debtor. Because Baker is not and has never

App.39a

been a party to these proceedings, the court concludes that obtaining her consent to proceed before the undersigned is not required.

SO ORDERED.

/s/ Howard R. Lloyd
United States Magistrate Judge

Dated: October 5, 2017

ORDER OF THE NINTH CIRCUIT DENYING
PETITION FOR REHEARING EN BANC
(JUNE 7, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERICKSON PRODUCTIONS, INC.;
JIM ERICKSON,

Plaintiffs-Appellees,

v.

KRAIG RUDINGER KAST,

Defendant-Appellant.

No. 17-17157

D.C. No. 5:13-cv-05472-HRL
Northern District of California, San Jose

Before: THOMAS, Chief Judge,
HAWKINS and MCKEOWN, Circuit Judges.

Judges Thomas and McKeown have voted to deny
Appellant's petition for rehearing *en banc*, and Judge
Hawkins so recommends. The full court has been
advised of the petition for rehearing *en banc* and no
judge of the court has requested a vote on whether to
rehear the matter *en banc*. Fed. R. App. P. 35.

Appellant's petition for rehearing *en banc* is
DENIED.

CALIFORNIA PROBATE CODE STATUTES AND DEFINITIONS

2005 CALIFORNIA PROBATE CODE SECTIONS AND DEFINITIONS Division 9 Trust Law

15200.

Subject to other provisions of this chapter, a trust may be created by any of the following methods:

(e) An enforceable promise to create a trust.

15201.

A trust is created only if the settlor properly manifests an intention to create a trust.

15202.

A trust is created only if there is trust property.

15203.

A trust may be created for any purpose that is not illegal or against public policy.

15205.

(a) A trust, other than a charitable trust, is created only if there is a beneficiary.

15206.

A trust in relation to real property is not valid unless evidenced by one of the following methods:

App.42a

- (a) By a written instrument signed by the trustee, or by the trustee's agent if authorized in writing to do so.
- (b) By a written instrument conveying the trust property signed by the settlor, or by the settlor's agent if authorized in writing to do so.

15207.

- (b) The oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property.

15208.

Consideration is not required to create a trust, but a promise to create a trust in the future is enforceable only if the requirements for an enforceable contract are satisfied.

810.

The Legislature finds and declares the following:

- (a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.

16000.

On acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to this division.

App.43a

16002.

- (a) The trustee has a duty to administer the trust solely in the interest of the beneficiaries.

16004.

- (a) The trustee has a duty not to use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to the beneficiary.
- (b) This section may not be construed as affecting the trustee's right to:
 - (1) Maintain a reserve for reasonably anticipated expenses, including, but not limited to, taxes, debts, trustee and accounting fees, and costs and expenses of administration.

16006.

The trustee has a duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property.

16007.

The trustee has a duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust.

16009.

The trustee has a duty to do the following:

- (a) To keep the trust property separate from other property not subject to the trust.

App.44a

(b) To see that the trust property is designated as property of the trust.

16010.

The trustee has a duty to take reasonable steps to enforce claims that are part of the trust property.

16011.

The trustee has a duty to take reasonable steps to defend actions that may result in a loss to the trust.

16012.

(a) The trustee has a duty not to delegate to others the performance of acts that the trustee can reasonably be required personally to perform and may not transfer the office of trustee to another person nor delegate the entire administration of the trust to a co-trustee or other person.

(b) In a case where a trustee has properly delegated a matter to an agent, cotrustee, or other person, the trustee has a duty to exercise general supervision over the person performing the delegated matter.

(c) This section does not apply to investment and management functions under Section 16052.

16014.

(a) The trustee has a duty to apply the full extent of the trustee's skills.

(b) If the settlor, in selecting the trustee, has relied on the trustee's representation of having

App.45a

special skills, the trustee is held to the standard of the skills represented.

16015.

The provision of services for compensation by a regulated financial institution or its affiliates in the ordinary course of business either to a trust of which it also acts as trustee or to a person dealing with the trust is not a violation of the duty provided in Section 16002 or 16004. For the purposes of this section, "affiliate" means a corporation that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with another domestic or foreign corporation.

16040.

(a) The trustee shall administer the trust with reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument.

16352.

(a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or other activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

App.46a

- (b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and its other reasonably foreseeable needs, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or other activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business or other activity.
- (c) Businesses and other activities for which a trustee may maintain separate accounting records include the following:
 - (4) Managing rental properties.

18200.

If the settlor retains the power to revoke the trust in whole or in part, the trust property is subject to the claims of creditors of the settlor to the extent of the power of revocation during the lifetime of the settlor.

19001.

- (a) Upon the death of a settlor, the property of the deceased settlor that was subject to the power of revocation at the time of the settlor's death is subject to the claims of creditors of the

deceased settlor's estate and to the expenses of administration of the estate to the extent that the deceased settlor's estate is inadequate to satisfy those claims and expenses.

21101.

Unless the provision or context otherwise requires, this part applies to a will, trust, deed, and any other instrument.

21102.

(a) The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument.

21111.

(a) Except as provided in subdivision (b) and subject to Section 21110, if a transfer fails for any reason, the property is transferred as follows:

(1) If the transferring instrument provides for an alternative disposition in the event the transfer fails, the property is transferred according to the terms of the instrument.

21120.

The words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative. Preference is to be given to an interpretation of an instrument that will prevent intestacy or failure of a transfer, rather than one that will result in an intestacy or failure of a transfer.

21121.

All parts of an instrument are to be construed in relation to each other and so as, if possible, to form a consistent whole. If the meaning of any part of an instrument is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument.

21122.

The words of an instrument are to be given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained. Technical words are not necessary to give effect to a disposition in an instrument. Technical words are to be considered as having been used in their technical sense unless (a) the context clearly indicates a contrary intention or (b) it satisfactorily appears that the instrument was drawn solely by the transferor and that the transferor was unacquainted with the technical sense.

21205.

A non-vested property interest is invalid unless one of the following conditions is satisfied:

- (a) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive.
- (b) The interest either vests or terminates within 90 years after its creation.

21206.

A general power of appointment not presently exercisable because of a condition precedent is invalid unless one of the following conditions is satisfied:

- (a) When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive.
- (b) The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

21207.

A non-general power of appointment or a general testamentary power of appointment is invalid unless one of the following conditions is satisfied:

- (a) When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive.
- (b) The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

Part 2. Definitions (Relevant definitions in bold)

PROBATE CODE SECTION 20-88

- 20. Unless the provision or context otherwise requires, the definitions in this part govern the construction of this code.
- 21. “Account,” when used to mean a contract of deposit of funds between a depositor and a financial institution, includes a checking account,

App.50a

savings account, certificate of deposit, share account, mutual capital certificate, and other like arrangements.

22. "Account in an insured credit union" means a share account in a credit union, either federally chartered or state licensed, that is insured under Title II of the Federal Credit Union Act (12 U.S.C. § 1781, et seq.).
23.
 - (a) "Account in an insured savings and loan association" means a savings account or mutual capital certificate of either of the following:
 - (1) A federal association.
 - (2) A savings association doing business in this state which is an "insured institution" as defined in Title IV of the National Housing Act (12 U.S.C. Sec. 1724, et seq.).
 - (b) As used in this section:
 - (1) "Federal association" has the meaning given that term in subdivision (b) of Section 5102 of the Financial Code.
 - (2) "Mutual capital certificate" has the meaning given that term in Section 5111 of the Financial Code.
 - (3) "Savings account" has the meaning given that term in Section 5116 of the Financial Code.
 - (4) "Savings association" has the meaning given that term in subdivision (a) of Section 5102 of the Financial Code.

App.51a

24. "Beneficiary" means a person to whom a donative transfer of property is made or that person's successor in interest, and:
 - (a) As it relates to the intestate estate of a decedent, means an heir.
 - (b) As it relates to the testate estate of a decedent, means a devisee.
 - (c) As it relates to a trust, means a person who has any present or future interest, vested or contingent.
 - (d) As it relates to a charitable trust, includes any person entitled to enforce the trust.
29. "Conservatee" includes a limited conservatee.
30. "Conservator" includes a limited conservator.
32. "Devise," when used as a noun, means a disposition of real or personal property by will, and, when used as a verb, means to dispose of real or personal property by will.
34.
 - (a) "Devisee" means any person designated in a will to receive a devise.
 - (b) In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

39. **"Fiduciary"** means personal representative, trustee, guardian, conservator, attorney-in-fact under a power of attorney, custodian under the California Uniform Transfer To Minors Act (Part 9 (commencing with Section 3900) of Division 4), or other legal representative subject to this code.
40. **"Financial institution"** means a state or national bank, state or federal savings and loan association or credit union, or like organization.
42. **"General personal representative"** is defined in subdivision (b) of Section 58.
45. **"Instrument"** means a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property.
46. **"Insured account in a financial institution"** means an account in a bank, an account in an insured credit union, and an account in an insured savings and loan association, to the extent that the account is insured.
48.
 - (a) Subject to subdivision (b), **"interested person"** includes any of the following:
 - (1) An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.
 - (2) Any person having priority for appointment as personal representative.
 - (3) A fiduciary representing an interested person.

(b) The meaning of "interested person" as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.

56. **"Person"** means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, association, or other entity.

60. **"Probate homestead"** means a homestead provided for in Chapter 3 (commencing with Section 6520) of Part 3 of Division 6.

60.1.

(a) **"Professional fiduciary"** means a person who is a professional fiduciary as defined under subdivision (f) of Section 6501 of the Business and Professions Code.

62. **"Property"** means anything that may be the subject of ownership and includes both real and personal property and any interest therein.

68. **"Real property"** includes a leasehold interest in real property.

70. **"Security"** includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt, or certificate

of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

74. **“State”** includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.
81. **“Transferor”** means the testator, settlor, grantor, owner, or other person who executes an instrument.
- 81.5. **“Transferee”** means the beneficiary, donee, or other recipient of an interest transferred by an instrument.
82.
 - (a) **“Trust”** includes the following:
 - (1) An express trust, private or charitable, with additions thereto, wherever and however created.
 - (2) A trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust.
 - (b) **“Trust”** excludes the following:
 - (13) Trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind.
83. **“Trust company”** means an entity that has qualified to engage in and conduct a trust business in this state.

App.55a

84. "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.
88. "Will" includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.

INTERNAL REVENUE SERVICE CODE 671-678

671

“the grantor or another person shall be treated as the owner of any portion of a trust,”

672(a)

“the term “adverse party“ means any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or non-exercise of the power which he possesses respecting the trust.”

673

“The grantor shall be treated as the owner of any portion of a trust in which he has a reversionary interest”

674 (5)(a)

“A power to distribute corpus either to or for a beneficiary or beneficiaries or to or for a class of beneficiaries (whether or not income beneficiaries) provided that the power is limited by a reasonably definite standard which is set forth in the trust instrument”

675

“The grantor shall be treated as the owner of any portion of a trust”

676 (a)

"The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under any other provision of this part, where at any time the power to revest in the grantor title to such portion is exercisable by the grantor or a non-adverse party, or both."

677 (b)

Income of a trust shall not be considered taxable to the grantor under subsection (a) or any other provision of this chapter merely because such income in the discretion of another person, the trustee, or the grantor acting as trustee or co-trustee, may be applied or distributed for the support or maintenance of a beneficiary"

678 (c)

"Subsection (a) shall not apply to a power which enables such person, in the capacity of trustee or co-trustee, merely to apply the income of the trust to the support or maintenance of a person whom the holder of the power is obligated to support or maintain except to the extent that such income is so applied."

**APPELLANT'S INFORMAL OPENING BRIEF
(APRIL 23, 2018)**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
SAN FRANCISCO

KRAIG R. KAST,

Appellant Pro Se,

v.

ERICKSON PRODUCTIONS, INC. &
JIM ERICKSON,

Appellee(s).

Ninth Cir. Case No. 17-17157

Original Ninth Cir. Case No. 16-16801
District Court Case No. 5:13-cv-05472-HRL

1. Jurisdiction: 28 U.S.C. § 1291

- a. Timeliness of Appeal FRAP 4(a)(1)(a):
 - (i) Date of entry of judgment or order of originating court: August 19, 2015
 - (ii) Date of service of motion to amend: November 23, 2016
 - (iii) Date of entry of order deciding motion: October 6, 2017

(iv) Date notice of appeal filed: October 18, 2017

APPENDIX

Appellant Kast is Pro Se. As per FRAP 30-1.2 I will file individual pages containing excerpts and exhibits with my Reply Brief

FRAP 30-1.4 REQUIREMENTS

- (i) Notice of Appeal (Docket 123) ER Vol. 1
- (ii) District Court Docket Sheet-ER Vol 1
- (iii) District Court order appealed (Dkt 243) ER Vol. 1
- (iv) Other orders or rulings sought to be reviewed-Magistrates Order Regarding Appellant's Motion to Quash (Docket 244) ER Vol. 1

2. What are the facts of your case?

A. Introduction

Kraig Kast (Kast) is appealing the Magistrate's order (Dkt 243) to amend the judgment in the copyright infringement case (appellate case no. 15-16801). Should this court find in Kast's favor on the copyright case, this motion to amend (MTA) (Dkt 189), USDC-CAND case No. 3:17-cv-02427-RS and California Superior Court-San Mateo County case no. 17-cv-04633 are all moot. The Plaintiff's attorney, Kevin McCulloch's (McCulloch) MTA is nothing more than a malicious attempt to steal the retirement savings of Mariellen Baker (Baker), the 65 year old sole lifetime beneficiary of the Black Oak Trust.

App.60a

Kast is a 73 year old licensed Fiduciary, Insurance and Real Estate Broker with no negative notations on any of his licenses. Kast's focus, after leaving a career as a senior executive in Fortune 1000 companies, was to help seniors avoid being taken advantage of. Lawsuits have driven away all of his clients, depleted his savings and left him with only social security income.

There is no Federal probate code. Trusts are created, executed and usually litigated in state courts unless they involve bankruptcy, taxes or labor laws like ERISA. Neither the trust, the settlor/grantor, trustee or beneficiary have declared bankruptcy, they have no tax problems and this trust doesn't involve employee benefits.

This case is important for the court to consider because if the MTA is not dismissed it will spawn decades of litigation targeting trustees of family trusts, corporate trustees (like banks) and licensed fiduciaries. This order allows unscrupulous attorneys, who get a judgment against an individual, to claim pass-through and/or successor liability to seize the assets of a beneficiary of an irrevocable trust, simply because that individual acts as their trustee and the beneficiary has nothing to do with the judgment case. This pass through liability is prohibited in every state's probate code.

This case is very simple. Kast created a trust. Kast amended and restated the trust three times. The trust became valid when it was funded by residential income properties. The beneficiaries changed overtime. The percentages of the assets granted to beneficiaries changed overtime. The trust remains in effect. The properties remain in the trust to this day. The Trust's

App.61a

sole beneficiary has been the beneficiary of the Trust assets since 2007. Kast had no idea when he amended and restated the trust to become irrevocable, that over six years in the future he would be sued for copyright infringement.

McCulloch, knows the only way he can prevail in this case is by using “smoke and mirrors” to create doubt and confusion; to make simple facts seem complex to the court; to bury the court in irrelevant and misstated case law and volumes of paper while withholding evidence that would discredit his argument.

McCulloch took advantage of the magistrate’s lack of knowledge about trust law, trust taxation, title process and real estate finance. He forged USDC subpoenas, made perjured declarations, obtained Kast’s personal bank statements without a subpoena and violated the ABA’s code of ethics, numerous times.

Background

Kast’s attorney created, and Kast executed the revocable Kraig Kast Living Trust (KKLT) on March 11, 1995 (Exh. 1 Kast Decl. 213-1 ER Vol. 2). For a trust to be valid under California’s Probate Code (CPC) there must be Promise (CPC 15200(e), Intent (CPC15201), Property (CPC15202), Purpose (CPC15203), Beneficiary (CPC15205), Capacity (CPC810(a) and Governing Instrument (CPC 21102(a). No consideration is required (CPC15208). The KKLT was validated the same day by funding it with three residential income properties owned by Kast that were listed on the trust’s Schedule/Addendum A (CPC21111(1). *see* California Probate Code excerpts at Glossary ER Vol. 14.

April 2004. The first amendment and restatement of the trust was made. June 2006-September 2007. Kast borrowed \$470,000 of his fiancé, Mariellen Baker's retirement savings, at an interest rate of 5% for 5 years, to invest cash into Atherton Trust Co., his investment advisory business.

November 2007. Due to the rapidly developing financial crisis, Kast agreed to pay his debt to Baker with his properties, as required in his loan work out agreement. Kast's attorney recommended a two step approach. First he created and Kast executed the second amendment to the trust on December 11, 2007. Kast changed the name of the trust from the KKLT to the Black Oak Trust (BOT) and temporarily restated in writing previous verbal statements Kast had made about the trustee, beneficiaries and asset allocation, to eliminate any challenges to the trust after it was amended and restated to become irrevocable (CPC15207(b). The second amendment was required before the third amendment and restatement was executed.

In the second step, Kast's attorney created the third amendment, that restated the trust to become irrevocable and included a spendthrift provision and special powers of appointment which Kast executed on December 11, 2007, it met the same requirements for a valid trust under California Probate law as the KKLT. (Exh.6 Kast Decl. 213-1Vol. 2)

Kast funded and validated the trust on December 30, 2007 when he signed and dated Schedule/Addendum A to the trust, which listed the same three properties that had been in the KKLT as now being in the Black Oak Trust (De Soto, Beachpark and East Court) and added the Valley Center Property (Valley Center).

Simultaneous changes to the trust were not unusual, they had been done on 5/17/ 2001. (Beachpark Deed History ER Vol. 11 pg 63, 86, 89)

The third amendment removed several beneficiaries and changed the trustee. Baker was already a beneficiary of the KKLT so the third amendment to the trust just changed Baker's asset allocation to compensate her for the monies she lent Kast.

The sole beneficiary (Baker) and percentage of asset allocation (100%) remains the same to this day. All of Kast's actions as settlor/grantor and trustee were done in proper compliance with the third amendment to the irrevocable trust instrument, which is the governing instrument (CPC21102).

B. Summary of Facts

The declarations with their exhibits referenced below are located as follows, Mariellen Baker (Dkt 207) ER Vol. 3, Mariellen Baker (Dkt 213) ER Vol. 2 and Baker (Dkt 213-2) ER Vol. 3; Kraig Kast (Dkt. 213-1) ER Vol. 2, and Laura Biche (Dkt 213-3) ER Vol. 3 filed herewith, explain in detail and in context the Kraig Kast Living Trust (KKLT) amended and restated as the irrevocable Black Oak Trust, and the trust transactions involving the four Properties cited in the motion to amend (the Beach Park Property, De Soto Property, East Court Property, and Valley Center Property, as identified in Kast Decl 213-1 ER Vol. 2 ¶ 5-7, 17, collectively referred to as the "Properties"). These declarations and exhibits thereto establish the following dispositive facts:

- The Kraig Kast Living Trust (KKLT) was a revocable trust established March 11, 1995, with

Kast as the settlor, trustee and his mother as lifetime beneficiary (Kast Decl 213-1 ER Vol. 2 ¶ 2,5, Exh 1)

- The Beach Park Property, De Soto Property and East Court Property were placed in the Kraig Kast Living Trust by deed on April 8, 2005 (Kast Decl 213-1 ER Vol. 2 ¶ 4-8, Exh 5, 6, 7).
- Kast amended and restated the Kraig Kast Living Trust on December 11, 2007, converting it to an irrevocable trust, adopting a 100-page Trust instrument to govern the trust, and changing the name to the Black Oak Trust Dkt 213-1 (Kast Decl 213-1 ER Vol. 2 ¶ 12-14, Exh 6:44 Art. 1; Baker Decl 213-2 Vol. 3 ¶ 2).
- The Black Oak Trust is irrevocable and Kast has never been a beneficiary (Kast Decl 213-1 ER Vol. 2 ¶ 13, Exh 6 Art. 2; Baker Decl 213-2 ER Vol. 3 ¶ 2).
- The December 11, 2007 Trust instrument specified Kast as the settlor and initial trustee of the Black Oak Trust, and Mariellen Baker as the sole lifetime beneficiary and the designated successor trustee of the Black Oak Trust (Kast Decl 213-1 ER Vol. 2 ¶ 13, Exh 6 Art. 2; Baker Decl 213-2 Vol. 3 ¶ 2).
- The Beach Park Property, De Soto Property and East Court Property formerly held in the Kraig Kast Living Trust, and the Valley Center Property acquired by Kast on December 20, 2007, were all placed in irrevocable trust for the beneficiary Mariellen Baker, under the Trust instrument for the Black Oak Trust (Kast 213-

App.65a

1 ER Vol. 2 Decl 12, 16; Exh 6 Section 1.04, Addendum A).

- The four Properties became subject to the irrevocable trust effective on December 30, 2007, by Kast's execution on that date of Addendum A to the Trust Instrument, listing the four Properties as subject to the Black Oak Trust (Kast Decl 213-1 ER Vol. 2 12,16; Exh 6 Section 1.04, Addendum A, plus legal discussion *infra* at p. 11).
- Deeds were subsequently recorded to have record title reflect the December 11, 2007 and December 30, 2007 actions, confirming that title to the four Properties was held by Kraig Kast as trustee of the Black Oak Trust. This occurred on February 20, 2008 for the Valley Center Property (Kast Decl 213-1 ER Vol. 2 ¶ 18, Exh 9), on March 12, 2008 for the De Soto Property (Kast Decl 213-1 ER Vol. 2 ¶ 22, Exh 12), and on February 3, 2012 for the East Court Property and Beach Park Property (Kast Decl 213-1ER Vol. 2 ¶ 24-25, Exh 13, 16).
- If relevant, there was ample consideration for Mr. Kast placing the four Properties in an irrevocable trust for the benefit of Mariellen Baker, because this was done to compromise and satisfy \$470,000 in loans made by Baker to Kast in 2006-07 (Kast Decl 213-1 ER Vol. 2 ¶ 9-11; Exh 5; Baker Decl 213-2 ER Vol. 3 ¶ 4-6).
- The De Soto Property was refinanced by Kast before he placed it into the irrevocable trust (Kast Decl 213-1 ER Vol. 2 ¶ 21-22).

- While the four Properties were held in the irrevocable Black Oak Trust, Kast, as trustee, carried out three refinancing transactions that were done for proper Black Oak Trust purposes, in the ordinary course of trust business, in a proper manner that observed and respected the irrevocable trust's ownership. These were the East West Bank Loan closed May 6, 2011 (Kast Decl 213-1 ER Vol. 2 ¶ 27-34, Biche Decl 213-3 ER Vol. 3 ¶ 4-7), the Shahab Loan closed April 10, 2015 (Exh 17 Kast Decl 213-1 ER Vol. 2 ¶ 35-37, Biche Decl 213-3 ER Vol. 3 ¶ 8-9, pg 35), and the Vaccarella Loan (Kast Decl 213-1 ER Vol.2 ¶ 38-40, Biche Decl 213-3 ER Vol. 3 ¶ 10-11, pg 41).
- While the De Soto Property was held in the Black Oak Trust, Kast, as trustee, sold the De Soto Property on October 19, 2012, to reduce debt and generate funds for proper Black Oak Trust purposes (Kast Decl 213-1 ER Vol. 2 ¶ 41).
- Kast resigned as trustee of the Black Oak Trust on December 31, 2015, and Mariellen Baker thereby automatically assumed the role as trustee, because she [sic] was designated as the successor trustee in the December 11, 2007 Trust Instrument (Kast Decl 213-1 ER Vol. 2 ¶ 15; Exh 6 section 3.02(a); Exh 7; Baker Decl 213 Vol 3 ¶ 3).
- While the Valley Center Property was held in the Black Oak Trust, Baker as trustee sold the Valley Center Property on November 2, 2016, to reduce debt and generate funds for proper Black

Oak Trust purposes (Baker Decl 213 ER Vol. 3 ¶ 7-10).

The bottom line of this factual showing is that on December 30, 2007, over 5 years before this litigation started, the four Properties were assigned to an irrevocable trust for Mariellen Baker in satisfaction of \$470,000 in personal loans Baker made to Kast in 2006-07. All trustee transactions after December 30, 2007 respected the irrevocable trust.

3. What did you ask the originating court to do?

To dismiss the Motion to Amend the 2015 Copyright Judgment based on Subject Matter Jurisdiction, Insufficient Evidence, Statute of Limitations and California Trust law.

4. State the Claim or claims you raised at the originating court.

- A. The District Court lacked subject matter jurisdiction.
- B. The District Court should dismiss the Motion to Amend the Copyright Judgment based on Statutes of Limitations.
- C. District Court should find no fraudulent transfer
- D. District Court should find the Black Oak Trust is irrevocable based on California Trust Law and confirmed by third parties

5. **What issues are you raising on appeal? What do you think the originating court did wrong?**
 - A. The District Court lacked Subject Matter Jurisdiction. Please review based on De Novo-Insufficient Evidence-Abuse of Discretion.
 - B. The District Court Abused its Discretion by not dismissing The Motion To Amend the Copyright Judgment Under Statutes of Limitations. Please review based on De Novo-Insufficient Evidence-Abuse of Discretion.
 - C. The District Court Abused Its Discretion by taking Baker's property without Due Process-Insufficient Evidence-Abuse of Discretion-De Novo.
 - D. The District Court to found that the irrevocable Black Oak Trust is invalid-Abuse of Discretion-Insufficient Evidence
 - E. District Court abused its discretion by finding MTA was not a sustentative change to copyright judgment
 - F. District Court's order is contrary to California Trust Law. De Novo-Abuse of Discretion
 - G. District Court Abused Its Discretion by denying Kast's Motion to Quash Plaintiff's forged and fraudulent subpoenas.
6. **Did you present all of the issues listed in #5 to the originating court?**

Yes.

7. What law supports these issues on appeal?

I. The Motion to Amend Seeks a Substantive and Significant Amendment of the Judgment

The motion to amend seeks to add the Black Oak Trust (the Trust) and Mariellen Baker as trustee of The Black Oak Trust (the Trustee) as additional defendants, fully liable for the judgment. This motion, if granted, would subject all of the Trust's assets to liability for the judgment entered against Kraig Kast personally.

This is not a clerical error correction, like adding a new spelling of Kast's name. On its face, this is a substantive amendment that has a drastic effect on the rights and property of the Trust, affecting the financial interest of the sole beneficiary of the Trust, Mariellen Baker. It would impose liability for the judgment on third parties who did not participate in the underlying action and would void Kast's payment of his debt to Baker. It would directly affect the appeal because the terms of the judgment on appeal would be amended years after decision. Regardless of the result, the losing party on the motion to amend could file an appeal of the order or denial of order to amend judgment.

I believe it is sufficient factual background, for purposes of deciding the procedural question raised, to make a *prima facie* showing that the Trust has existed since December 2007 as an irrevocable trust for the benefit of Mariellen Baker as the sole beneficiary. Therefore, adding that Trust and its Trustee as liable defendants when they were never named as a party to the copyright lawsuit is a substantive amendment with significant effects on the

rights of new parties. I submit attached the Declaration of Mariellen Baker in Response to Interim Order regarding Motion to Alter or Amend Judgment (the "Baker Declaration"), to make a *prima facie* showing that:

- the Trust was formed on December 11, 2007, almost 6 years before this litigation was filed
- the Trust is an irrevocable trust, with Mariellen Baker as the sole lifetime beneficiary since 2007
- the Trustee may only apply the trust assets, income and principal, for the support and benefit of Mariellen Baker
- the four real properties addressed in the underlying motion to amend were all placed in the Trust in December 2007

The purpose of executing the irrevocable Trust was as a way for Kast to settle \$470,000 in loans made from Mariellen Baker to Kast during the 18 months prior to the December 2007 Trust restatement. Clearly this is not a motion that can be characterized as "correction of a clerical error" or any other obvious and ministerial correction. This is a substantive motion seeking to extend liability to new parties based on new evidence, new post-judgment discovery and new legal arguments and theories, not raised in the underlying copyright action, but directly affecting the scope of the existing copyright judgment on appeal.

The motion also seeks a substantive change in the judgment because the Trust and the Trustee cannot be added as defendants liable for the judgment as a mere clerical correction, without making substantive factual and legal findings on some legally sufficient

and factually proven basis to establish their liability. *Nelson v. Adams*, 529 U.S. 460, 471-72 (2000) (due process requires opportunity to appear and defend on the merits, before judgment against corporation is amended to add individual corporate officer as liable defendant).

The motion also seeks a very substantive change in the judgment, because it seeks an amendment contrary to the well-established principle of California trust law that creditors of the settlor have no claim against assets placed in an irrevocable trust for some other beneficiary. *Laycock v. Hammer*, 141 Cal.App.4th 25 (2006) (judgment creditor of settlor has no right to collect against assets of irrevocable trust established by settlor for benefit of his granddaughter). California trust law is strongly protective of the rights of the beneficiary once an irrevocable trust is validly created. Plaintiffs' attempt to collect against an irrevocable trust using "alter ego" type arguments are inconsistent with California trust law. As noted in *Laycock*, "There are no cases that permit the settlor of a trust to make an irrevocable trust revocable by way of conduct after the trust has been established." *Id.* at 30. As the court explained:

[Appellant] contends that as a creditor it should be able to show [the settlor] treated the trust as his own property and thereby revoked the provisions of the trust. . . . However, by expressly giving settlor's creditors the right to reach only the assets of revocable trusts, the Legislature in Probate Code sections 18200 and 19001 has clearly indicated an intention that creditors are to be bound by the terms of an irrevocable trust to

the same extent settlors, beneficiaries and other claimants are bound by such an instrument. *Id.* at 31.

In any event, factual or legal disputes on the merits of the motion do not change the character of what is at stake in the motion. What is at stake is an amendment that would, as a practical matter, have a drastic and significant financial effect on new third parties. The motion therefore seeks a substantive change to the scope and extent of the judgment, in a manner that the trial court may not undertake while the judgment is on appeal to the Ninth Circuit.

II. The Amendment Order and Judgment Did Not and Could Not Adjudicate Title to the Properties

For many reasons, it is clear that the Amended Judgment did not and could not adjudicate title to the Properties or resolve the competing claims of Baker and Erickson to the Properties. For many reasons, it is clear that the Amended Judgment did not and could not adjudicate title to the Properties or resolve the competing claims of Baker and Erickson to the Properties.

First, the Amended Judgment is silent as to the Properties and silent as to Baker (see Copyright Action Dkt 246). By its express terms, the Amended Judgment does not purport to quiet title to the Properties in favor of some revocable or irrevocable version of the Black Oak Trust, nor to adjudicate the priority of Baker's and Erickson's respective claims against the Properties.

Second, such relief could not have been granted on the pleadings at issue in the Copyright Action.

The complaint in the Copyright Action (Copyright Action Dkt 1) alleges two counts of copyright infringement and does not include any reference to the Properties or any quiet title allegations. Where federal courts have some basis for federal subject matter jurisdiction in a dispute including quiet title issues, the plaintiff is required to satisfy California's specific pleading requirements for quiet title actions in order to obtain such relief. *See, e.g., Rosenfeld v. JP Morgan Chase Bank N.A*, 732 F.Supp.2d 952, 974 (N.D. Cal. 2010).

Third, the motion to amend the judgment did not seek such relief. The motion to amend the judgment in the Copyright Action (Copyright Action Dkt 189, page 2) sought only to add the names of specified defendants to the judgment, and did not seek to amend the judgment to add quiet title type findings or to adjudicate competing claims of Baker and Erickson to the Properties.

Fourth, Baker was never made a party to the Copyright Action, so her claims and rights to the Properties could not be adjudicated in that action. Baker's lack of party status also denied her any opportunity to conduct discovery, including the ability to subpoena documents from third parties.

Fifth, Baker declined to consent to a Magistrate deciding the Copyright Action (Dkt 226), such that Magistrate Lloyd had no authority to decide her claims.

Sixth, there was neither a proper summary judgment motion nor a full trial on the merits conducted in the Copyright Action to adjudicate Baker's and Erickson's competing claims to the Properties. There is no statutory authority allowing these claims to be

tried on written declarations, using an abbreviated motion procedure.

Seventh, the pending appeal with the Ninth Circuit deprived the district court of jurisdiction to amend the judgment in this substantial manner. This issue is further briefed below.

Eighth, even if no appeal were pending, the district court lacked federal subject matter jurisdiction to expand the copyright judgment in a way that purports to adjudicate title to the Properties and the state law claims of non-diverse persons who are not parties to the action. This issue is further briefed below.

Ninth, the Amendment Order is contrary to California trust law on the factual record presented. This issue is further briefed below.

III. The District Court Had No Jurisdiction to Alter or Expand Upon the Judgment While It Is on Appeal

A. The District Court Lacked Jurisdiction to Make Substantive Amendments to the Judgment While an Appeal to the Ninth Circuit Is Pending

"The filing of a notice of appeal generally divests the district court of jurisdiction over the matters appealed. *Taylor v. Wood*, 458 F.2d 15, 16 (9th Cir. 1972); *Sumida v. Yumen*, 409 F.2d 654, 656 (9th Cir. 1969), *cert. denied*, 405 U.S. 964 (1972); 9 Moore's Federal Practice, P 203.11 (2d ed. 1968)." *Davis v. United States*, 667 F.2d 822, 824 (9th Cir. 1982). "[A] trial court cannot enter an order that

supplements the order on appeal because such supplementation would change the status quo. *McClatchy Newspapers v. Central Valley Typographical Union*, 686 F.2d 731, 734-35 (9th Cir. 1982)." *In re Mirzai*, 236 B.R. 8, 10 (B.A.P. 9th Cir. 1999). Absent a stay or supersedeas, the trial court retains jurisdiction to implement or enforce the judgment or order but may not alter or expand upon the judgment. See *In re Combined Metals Reduction Co.*, 557 F.2d 179, 190 (9th Cir. 1977); *In re Hagel*, 184 B.R. 793, 798 (1995); *In re Marino*, 234 B.R. 767, 770 (B.A.P. 9th Cir. 1999).

The Ninth Circuit has applied a strict and jurisdictional view of these rules, holding that District Courts may not issue an order that would have the effect of changing the status quo and/or substantively extending or expanding the scope of an order or judgment that was already on appeal.

In *McClatchy, supra*, 686 F.2d at 734-35, a district court judgment determined that a union's strike did not extinguish job guarantee rights, but did not include any reinstatement of employment remedy. The Ninth Circuit held that this judgment could not be amended by the district court to add the reinstatement remedy while the original judgment was on appeal, because that would be changing rather than preserving the status quo. *Id.* at 735.

The Ninth Circuit in McClatchy also reasoned that the requested amendment was a substantive change because original judgment "was not necessarily a determination that the remedy of reinstatement is appropriate.... This matter must abide further inquiry

... in which each party has the opportunity for a full and fair presentation of its case." *Id.* at 735.

This reasoning applies directly to my case, because the appropriateness of alter ego and successor liability remedies were not evaluated in the underlying copyright judgment, and further evidentiary proceedings are needed to conclude whether such remedy is or is not appropriate. *Cf. Nelson v. Adams, supra*, 529 U.S. at 471-72 (due process requires opportunity to appear and defend on the merits, before judgment against corporation is amended to add individual corporate officer as liable defendant). As to the procedural issue at hand, under the Ninth Circuit's reasoning in McClatchy, an amendment so substantial that it requires a new evidentiary hearing is a clearly substantive change and cannot be done during the appeal.

In *Davis, supra*, 667 F.2d at 824, plaintiff's Federal Tort Claims Act claims were dismissed by District Court for failure to state a claim, and plaintiff appealed that dismissal. While the appeal was pending, plaintiff sought leave to amend its complaint in District Court to assert various non-FTCA claims against same defendants. The Ninth Circuit held that the District Court had no jurisdiction to hear the motion to amend while the appeal was pending.

Davis illustrates that it is jurisdictionally improper to substantively amend the judgment on appeal, even if the claims or issues raised by the new order requested of the District Court are not at issue in the appeal. In the *Davis* example, the non-FTCA claims plaintiff wanted to add were not part of the issues on appeal, but it was still improper to amend the judgment of dismissal while it was on appeal.

Davis also illustrates the strict "jurisdictional" nature of these rules, as applied by the Ninth Circuit. The Ninth Circuit held it was reversible error for the District Court even to deny the improper motion to amend, given the lack of jurisdiction to consider the motion. Instead of upholding the denial, the Ninth Circuit vacated the District Court order entirely as beyond the jurisdiction of the District Court. *Id.* at 824.

The Ninth Circuit's strong jurisdictional view of these rules is also reflected in *Matter of Combined Metals Reduction Co.*, *supra*, 557 F.2d at 201 (9th Cir. 1977), holding that a bankruptcy court lacked jurisdiction to vacate its prior order denying the right to file objections, while that denial order was on appeal. The court stated, "We are of the opinion that no lower court should be able to vacate or modify an order under appeal." This jurisdictional rule was held to take precedence over "the well-established rule that a bankruptcy court has wide latitude to reconsider and vacate its prior decisions." *Id.* at 200.

I also note that the lack of any stay pending appeal does not allow the circumvention of these rules simply by calling the actions "enforcement." *In re Marino*, *supra*, 234 B.R. 767 (B.A.P. 9th Cir. 1999), debtor moved the Bankruptcy Court to vacate its original judgment, in an effort to "enforce" an un-stayed BAP appellate order overturning the judgment. The Ninth Circuit held that the Bankruptcy Court had no power to "enforce" the un-stayed BAP judgment in this manner, while further Ninth Circuit appeals of the BAP order were pending. *See also In re Mirzai*, *supra*, 236 B.R. 8 (B.A.P. 9th Cir. 1999) (same fact pattern and holding).

There are also many examples of decisions outside the Ninth Circuit holding that a District Court lacks jurisdiction to proceed with an order that would alter or extend the scope of an order that was on appeal. *See, e.g., In re Neuman*, 67 B.R. 99 (S.D.N.Y. 1986) (amendment of previous order granting control of debtor's business in bankruptcy, to remove one of the two parties in control, exceeded jurisdiction because it changed the status quo); *In re Wonder Corp. of America*, 81 B.R. 221 (D. Conn. 1988) (while order awarding attorneys' fees was on appeal, district court had no jurisdiction to issue new order awarding sanctions based on same attorney actions); *Matter of Excavation Construction, Inc.*, 8 B.R. 752 (D. MD 1981) (amendment of Ch.11 plan order to change payment dates, to facilitate obtaining supersedeas bond to stay action pending appeal, exceeded jurisdiction as a substantive modification of plan order on appeal); *Brasier v. United States*, 229 F.2d 176 (10th Cir. 1955), *cert. denied*, 351 U.S. 925 (1956) (district court lacked jurisdiction to allow amendments to pleadings while appeal was pending).

B. Exceptions Allowing Certain Trial Court Actions While Appeal Is Pending Are Not Applicable to the Present Motion to Amend

While case law does recognize certain limited exceptions allowing a District Court to issue new orders while an appeal is pending, those exceptions do not authorize substantive amendments and expansions of the scope of the existing judgment, in the manner sought by the present motion to amend.

In briefings in the trial court, Plaintiffs' cited one unpublished 4th Circuit opinion where the District

Court was held to have jurisdiction to add certain successor corporations as defendants to an existing judgment for damages under FRCP Rule 25(c). *Greater Potater Harborplace, Inc. v. Jenkins*, 935 F.2d 267 (Table of Unpublished Decisions) (4th Cir. 1991). The court held that the District Court was authorized under Rule 25(c) to substitute a successor corporation, even after judgment, where the substitution was necessary for enforcement of the judgment. This unpublished opinion from a different circuit is not consistent with the strict and jurisdictional approach taken by the Ninth Circuit, as discussed above. The decision fails to cite or consider any of contrary authority from the Ninth Circuit. It is distinguishable because we are dealing here with a motion to amend judgment under FRCP 69(a) (see Interim Order at It is also distinguishable because we are dealing here with a creditor of the settlor attempting to claim assets from an irrevocable trust established for some other beneficiary on alter ego type theories, a type of relief specifically barred under California trust law, as opposed to the substitution of a successor corporation specifically authorized under FRCP 25(c). None of the other exception cases cited by plaintiffs in the trial court briefings are remotely applicable or relevant.

Several of the cases cited by plaintiffs do not reflect exceptions at all, or address the procedural issue here, because there was no appeal pending when the trial court proceeded with its action, as in this case. *Innovation Ventures, LLC. v. N2G Distributing, Inc.*, No. SACV 12-717 ABD (EX), 2014 WL 10384631 (motion heard in trial court to amend judgment to add new parties, but no appeal pending); *Madd Dogg Athletics, Inc. v. NYC Holding*, 565 F. Supp. 2d 1127

(C.D. Cal. 2008) (motion heard in trial court to amend judgment to add new parties, but no appeal pending); *Carr v. Barnabey's Hotel Corp.*, 23 Cal.App.4th 14 (motion decided in trial court to amend judgment to add new parties, before any appeal was filed);

Plaintiffs cited several “injunction order supervision” cases, where the rationale for allowing the trial court to amend an order during an appeal was that the trial court is responsible for ongoing supervision of the defendant subject to an injunctive relief order, and new violations have occurred that need to be addressed. *Hoffman v. Beer Drivers & Salesmen's Local Union*, No. 888, 536 F.2d 1268 (9th Cir 1976) (trial court amendment of contempt order against labor organization to reinstate previously suspended fines, while contempt order was on appeal, was proper to address subsequent violations); *Meinhold v. U.S. Dep't of Defense*, 34 F.3d 1469, 1480 n.14 (9th Cir. 1994) (injunction issued against Navy to prohibit discrimination against homosexual sailor; relief broadened while injunction is on appeal in response to Sailor's motion for contempt re new violations); *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 589 (6th Cir. 1987) (where original order compelling compliance with subpoena to produce documents is on appeal but not stayed, and party seeks contempt order for continuing violation, trial court can issue new order specifying which documents must be produced where new order “required production of nothing outside the scope of the original subpoena.”). *See also* FRCP 62(c) (authorizing modification of injunctions during pendency of appeal). This exception does not apply because the motion to amend is not seeking

further orders to enforce an existing injunction against new violations.

Plaintiffs cited one “unrelated interlocutory appeal” case, where the rationale for the trial court being able to proceed was that the interlocutory appeal of one unrelated order did not deprive the trial court of jurisdiction to keep deciding other unrelated matters still pending in the trial court. *United States v. Watlington*, No. 5:05-CR-4-1-F3, 2010 WL 2772356 (pending appeal of order re restitution did not divest trial court of jurisdiction over remaining matters still pending in trial court, including motions to disqualify judge and motion to vacate criminal conviction). This exception does not apply because the appeal in this case is from the final judgment not an interlocutory appeal of one order in the case, and the proceedings in the District Court here are completed and closed.

Plaintiffs cited one case where the trial court was allowed to issue orders “enforcing” the order on appeal “without expanding or altering it”. *In re Hagel*, 184 B.R. 793,798 (B.A.P. 9th Cir 1995) (while order disapproving Ch.13 bankruptcy reorganization plan was on appeal, trial court could enforce such order by dismissing Ch.13 case, so that automatic stay would not remain in effect throughout the appeal). This example is *not remotely analogous* to the relief sought by the present motion. The Ch.13 case dismissal allowed in Hagel followed as a matter of procedural course from the prior Ch.13 plan disapproval order that was on appeal. The District Court in Hagel was not expanding the judgment to add new parties, but merely implementing the procedural consequences of the existing scope of the prior order.

Plaintiffs cited one case where an unopposed substitution of the plaintiff entity was allowed. In *Air Line Pilots Ass'n Int'l v. Texas Int'l Airlines*, 567 F.Supp.78 (S.D. Tex. 1983), a union representing flight attendants (AFA) as plaintiff won an order compelling arbitration of their grievances. While that order was on appeal, the flight attendants elected a different union to represent them (UFA). The district court granted an unopposed motion to substitute UFA for AFA as the plaintiff entity, under FRCP Rule 25. The district court held that this unopposed substitution of a successor plaintiff entity was proper while the underlying order compelling arbitration was on appeal, as part of enforcing the existing judgment. This example is not analogous to the present motion because the substitution of parties was under FRCP 25, voluntary, unopposed, on the plaintiff side, and did not affect the scope or extent of the judgment against defendant that was on appeal.

IV. An Independent Basis for Federal Subject Matter Jurisdiction Is Required Before the District Court Can Amend a Judgment to Add New Parties on Alter Ego Theories

Even if no appeal of the copyright judgment were pending, the district court here also lacked federal subject matter jurisdiction to expand the copyright judgment to adjudicate ownership of the Properties, as against the interests of Baker and the Irrevocable Black Oak Trust, who were non-diverse person with claims under California real property and trust law, and who were not parties to the underlying copyright action. The interests of Baker and the Irrevocable Black Oak Trust in the Properties had nothing to do with the federal questions of copyright law that

provided the only basis for federal subject matter jurisdiction for the copyright judgment.

The underlying motion to amend asserted state law alter ego claims against new parties under California Code of Civil Procedure 187, alleging that "very liberal" remedies are available under California law to assert alter ego claims through an amendment of judgment procedure. Plfs. Motion, Dkt 189 at 6:25-7:6. These are not federal questions, and there is no diversity jurisdiction asserted here.

The Supreme Court in *Peacock v. Thomas*, 516 U.S. 349, 357-58 (1996) held that there is no supplemental or ancillary subject matter jurisdiction over claims seeking to make new parties liable for an existing federal judgment on alter ego type theories:

"Our recognition of these supplementary proceedings has not, however, extended beyond attempts to execute, or to guarantee eventual executability of, a federal judgment. We have never authorized the exercise of ancillary jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment. Indeed, we rejected an attempt to do so in *H.C. Cook Co. v. Beecher*, 217 U.S. 497, 30 S. Ct. 601, 54 L.Ed. 855 (1910). In Beecher, the plaintiff obtained a judgment in federal court against a corporation that had infringed its patent. When the plaintiff could not collect on the judgment, it sued the individual directors of the defendant corporation, alleging that, during the pendency of the original suit, they had authorized continuing sales of the infringing

product and knowingly permitted the corporation to become insolvent. We agreed with the Circuit Court's characterization of the suit as 'an attempt to make the defendants answerable for the judgment already obtained' and affirmed the court's decision that the suit was not 'ancillary to the judgment in the former suit.' *Id.*, at 498-499, 30 S. Ct., at 602. Beecher governs this case and persuades us that Thomas' attempt to make Peacock answerable for the ERISA judgment is not ancillary to that judgment." (emphasis added)

The court in Peacock reasoned that there was no supplemental jurisdiction because the claims were based on entirely new theories of liability not addressed in the original case:

"These principles suggest that ancillary jurisdiction could not properly be exercised in this case. This action is founded not only upon different facts than the ERISA suit, but also upon entirely new theories of liability. In this suit, Thomas alleged civil conspiracy and fraudulent transfer of Tru-Tech's assets, but, as we have noted, no substantive ERISA violation. The alleged wrongdoing in this case occurred after the ERISA judgment was entered, and Thomas' claims—civil conspiracy, fraudulent conveyance, and "veil-piercing"—all involved new theories of liability not asserted in the ERISA suit. Other than the existence of the ERISA judgment itself, this suit has little connection to the ERISA case. This is a new action based

on theories of relief that did not exist, and could not have existed, at the time the court entered judgment in the ERISA case.” 516 U.S. at 358-59 (emphasis added). *Accord Ellis v. All Steel Const., Inc.*, 389 F.3d 1031, 1034 (10th Cir. 2004) (When post-judgment proceedings seek to hold nonparties liable for judgment on theory that requires proof on facts and theories significantly different from those underlying judgment, independent basis for federal jurisdiction must exist; applies to both alter ego and veil piercing theories); *U.S.I. Properties Corp. v. M.D. Const. Co.*, 230 F.3d 489, 492 (1st Cir. 2000) (no federal subject matter jurisdiction over suit to collect existing federal judgment against non-diverse alter ego party). In *21st Century Fin. Servs., LLC v. Manchester Fin. Bank*, No. 15CV1848 BTM (BGS), 2016 WL 2931128 (S.D. Cal. May 19, 2016), the district court applied these rules in the same procedural context as this case—a motion to amend judgment to add non-diverse alter ego defendants under the California amendment of judgment procedure. After raising the lack of jurisdiction *sua sponte*, the district court denied the motion to amend the judgment because “The Court lacks subject matter jurisdiction to enforce a judgment against non-diverse parties pursuant to an alter-ego theory of liability.” *Id.* at 2.

The distinction that triggers the applicability of Peacock here is that Plaintiffs are seeking to make a new party liable for the entire judgment, based on

facts and legal theories not adjudicated in the underlying judgment. The importance of this distinction is explained in detail in *USI Properties Corp v MD Const. Co.*, 230 F.3d 489 (1st Cir. 2000), as follows:

"Where a post judgment proceeding presents an attempt simply to collect a judgment duly rendered by a federal court, even if chasing after the assets of the judgment debtor now in the hands of a third party, the residual jurisdiction stemming from the court's authority to render that judgment is sufficient to provide for federal jurisdiction over the post judgment claim. *See, e.g., Thomas, Head /& Griesen Emp. Trust v. Buster*, 95 F.3d [1449 (9th Cir. 1996)] at 1454 (allowing plaintiff to disgorge from third parties the fraudulently conveyed assets of the judgment debtor because plaintiff is 'not attempting to establish [the third parties'] liability for the original judgment'). However, where that post judgment proceeding presents a new substantive theory to establish liability directly on the part of a new party, some independent ground is necessary to assume federal jurisdiction over the claim, since such a claim is no longer a mere continuation of the original action. *See, e.g., id.* at 1454 n.7, citing *Peacock*, 516 U.S. at 356 n.6, 116 S. Ct. 862; *Futura II [Futura Development of Puerto Rico, Inc. v. Estado Libre Asociado de Puerto Rico*, 144 F.3d 7 (1st Cir. 1998)] 144 F.3d at 11 n. 2 "[Enforcement jurisdiction] cannot extend to most cases that seek to assign liability for the judgment to a new

party.); *Sandlin* [v. *Corporate Interiors, Inc.*, 972 F.2d 1212, 1216-17 (10th Cir. 1992)], 972 F.2d at 1217 ('[W]hen post judgment proceedings seek to hold nonparties liable for a judgment on a theory that requires proof on facts and theories significantly different from those underlying the judgment, an independent basis for federal jurisdiction must exist.)" *Id.* at 498.

A. The Basis for Jurisdiction Asserted by Plaintiffs Is Inapplicable

Plaintiff cited *Thomas, Head & Greisen Emp. Trust v. Buster*, 95 F.3d 1449 (9th Cir 1996) ("Thomas, Head") as the basis for the district court's power to grant this motion. Plaintiffs. Resp. to Interim Order, Dkt 199 at 5:5-10. In Thomas, Head, the Ninth Circuit found that supplemental jurisdiction existed to hear certain fraudulent conveyance claims in federal court, but noted that this was possible only because alter ego type claims were NOT asserted, distinguishing Peacock on the basis that:

"Thomas, Head seeks only to disgorge from them, as alleged fraudulent transferees, the property Buster wrongfully transferred to them. Because Thomas, Head is not attempting to establish the Johnson parties' liability for the original judgment, we find Peacock inapposite." 93 F.3d at 1454.

Thus, the Ninth Circuit in *Thomas, Head* recognized that, under the supreme court's decision in *Peacock*, there was no supplemental jurisdiction to add new parties liable for the judgment under alter ego theories.

**B. Use of State Law Remedies Under Rule 69(a)
Still Requires an Independent Basis for Subject
Matter Jurisdiction**

While federal courts have the authority to utilize state law enforcement of judgment procedures under FRCP Rule 69(a), exercising that authority still requires an independent basis for subject matter jurisdiction. As the court in USI Properties explained:

“Nor is it sufficient to rely on the incorporation of state procedures in Rule 69(a) to establish federal enforcement jurisdiction. State courts, as courts of general jurisdiction, are free to employ any enforcement mechanisms warranted by state law, even where those mechanisms allow liability to be established directly against a third party to the original action. However, the limited nature of federal jurisdiction in general confines the scope of enforcement jurisdiction as well. The incorporation of state enforcement procedures through Rule 69 is not alone sufficient to create federal jurisdiction over such enforcement proceedings. The fact that Rule 69(a) may (by way of state law) afford procedural mechanisms for enforcing an existing federal judgment against a third party not otherwise liable does not obviate the need to establish the jurisdiction of the federal court over the supplemental proceeding. The Federal Rules of Civil Procedure can neither expand nor limit the jurisdiction of the federal courts, Fed. R. Civ. P. 82, and the issue of jurisdiction remains distinct from the question of

procedure. *See Sandlin*, 972 F.2d at 1215 ('Rule 69 creates a procedural mechanism for exercising post-judgment enforcement when ancillary jurisdiction exists, . . . but cannot extend the scope of that jurisdiction.')" 230 F.3d at 498 fn.8.

A clear example applying this to alter ego amendments under Rule 69(a) and California law is *21st Century Fin. Servs., LLC v. Manchester Fin. Bank*, No. 15CV1848 BTM (BGS), 2016 WL 2931128 (S.D. Cal. May 19, 2016) at p. 2 ("The Court lacks subject matter jurisdiction to enforce a judgment against non-diverse parties pursuant to an alter-ego theory of liability.")

C. Even If Supplemental Jurisdiction Were Available, the Court Abused Its Discretion in Not Declining to Exercise Such Jurisdiction Under These Circumstances

Even if subject matter jurisdiction were available here which it is not, Magistrate Lloyd should have exercised his discretion under 28 U.S.C. § 1367(c) to decline to exercise such jurisdiction under the circumstances of this case. It was an abuse of discretion for Lloyd not to decline under these circumstances.

Under 28 U.S.C. § 1367 (c), the district court has discretion to decline to exercise supplemental jurisdiction, as follows:

"(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the

claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction."

Ground (c)(1) strongly applies in this case because the dispute involves novel and complex issues of California trust law and trust interpretation, as reflected in our briefing on the merits. Ground (c)(2) strongly applies because the underlying Copyright Action is concluded at the trial court level and the only issues that will be litigated in the proposed new action are the state law trust and fraudulent conveyance issues. Ground (c)(4) strongly applies given the other unusual procedural problems presented here, including: (i) whether a separate action is permitted; (ii) if a separate action is not permitted, whether the new claims could be raised in the Copyright Action while it is pending on appeal; and (iii) whether the entire Copyright Action must be assigned to a district court judge in light of Baker's declination to consent to a Magistrate (Copyright Dkt 226). The potential for protracted procedural disputes and appeals based on procedural issues is manifest given the unusual posture of this case.

This is a factually and legally complicated case under California trust and fraudulent conveyance law, that should have been left to the state courts. There is zero overlap between these state issues and the federal copyright infringement issues. Even if there were overlap, the trial is over in the copyright case so no efficiencies were had by trying the state claims in federal court.

California Trust Law

V. The Amendment Order and Judgment Is Contrary to California Trust Law

As demonstrated in this brief, there is insufficient evidence in the record to support Magistrate Lloyd's factual finding that the Properties were *never* conveyed to the Irrevocable Black Oak Trust. Without factual support for such a finding, the Judgment is contrary to California law in purporting to subject the Properties to the Claims of Kast's individual creditors.

The California Probate Code only allows creditors of the settlor to recover against revocable trust assets: "If the settlor retains the power to revoke the trust in whole or in part, the trust property is subject to the claims of creditors of the settlor to the extent of the power of revocation during the lifetime of the settlor." Cal. Prob. Code § 18200.

Under California trust law, irrevocable trusts cannot be reached to satisfy the personal debts of the settlor or trustee. This is confirmed in the main California trust law treatises as fundamental concept of California trust law. "[I]f the decedent-grantor transferred assets during his or her lifetime to an irrevocable trust in which the grantor retained no ownership interest, the trust's assets are not subject to the claims of the decedent's creditors. [*Laycock v. Hammer* (2006) 141 Cal.App.4th 25, 27, 31, 44 C.R.3d 921, 922, 925 (irrevocable life insurance trust)—settlor's conduct after establishment of trust does not affect trust's irrevocability]" Cal. Prac. Guide, Probate, Inter Vivos Trusts Ch. 2-B, § 2:109. Accord, Cal. Civ. Prac. Probate and Trust Proceedings § 24:171; 60 Cal.Jur.3d

Trusts § 84; 13 Witkin, Summary 10th Trusts § 260 (2005); 60 Cal.Jur.3d Trusts § 313.

These rules have been recognized and applied in many California trust law cases. *DiMaria v. Bank of California*, 237 Cal.App.2d 254, 258-259 (1965) (creditor of settlor cannot reach trust assets contrary to terms of irrevocable trust); *Laycock v. Hammer*, 141 Cal.App.4th 25, 30-31 (2006) (creditor of settlor/trust cannot reach life insurance asset in irrevocable trust); *Finnie v. Smith*, 83 Cal.App. 707 (1927) (creditor of trustor could not lien land in trust, as trustor had no right to revoke the trust, and had transferred his interest to trust before the lien attached); *Heaps v. Heaps*, 124 Cal.App.4th 286, 291-292 (2004) (attempted transfer of assets from irrevocable trust to different trusts constituted conversion); *Walton v. Bank of California*, 218 Cal.App.2d 527 (1963) (trustor may not rescind irrevocable trust); *Aguilar v. Aguilar*, 168 Cal.App.4th 35, 40 (2008) (surviving settlor was not at liberty to change the terms of trust that became irrevocable upon death of co-settlor, and could not remove her home from the irrevocable trust); *In re Barnes*, 275 B.R. 889, 895-896 (Bankr. E.D. Cal. 2002) (settlor was not owner of assets of irrevocable trust and hence trust assets were not protected by exemptions available to settlor).

The leading California case cited in the treatises is *Laycock v. Hammer*, 141 Cal.App.4th 25, 30-31 (2006). *Laycock* involved factual allegations similar to the present case, where personal creditors of the original settlor and trustee sought to recover against irrevocable trust assets, based on alter ego type claims that the settlor/trustee had disregarded or

revoked the trust by engaging in several financing and loan transactions for his personal benefit. *Id.* at 28.

The Laycock court held that the actions of the settlor/trustee after the trust became irrevocable could not somehow make the trust revocable or allow recovery by creditors as if the trust were revocable. "There are no cases that permit the settlor of a trust to make an irrevocable trust revocable by way of conduct after the trust has been established." *Id.* at 30. As the court explained, the statutory scheme in California does not permit such claims by creditors:

"[Appellant] contends that as a creditor it should be able to show [the settlor] treated the trust as his own property and thereby revoked the provisions of the trust. . . . However, by expressly giving settlor's creditors the right to reach only the assets of revocable trusts, the Legislature in Probate Code sections 18200 and 19001 has clearly indicated an intention that creditors are to be bound by the terms of an irrevocable trust to the same extent settlors, beneficiaries and other claimants are bound by such an instrument." *Id.* at 31.

II. Under California Trust Law, Creditors Collecting Upon the Personal Debts of the Settlor or Trustee May Not Recover Against Assets Held in an Irrevocable Trust for the Benefit of Another Person

The California Probate Code only allows creditors of the settlor to recover against revocable trust assets: "If the settlor retains the power to revoke the trust in whole or in part, the trust property is subject

to the claims of creditors of the settlor to the extent of the power of revocation during the lifetime of the settlor." CPC 18200.

Under California trust law, irrevocable trusts cannot be reached to satisfy the personal debts of the settlor or trustee. This is confirmed in the main California trust law treatises as fundamental concept of California trust law. "[I]f the decedent-grantor transferred assets during his or her lifetime to an irrevocable trust in which the grantor retained no ownership interest, the trust's assets are not subject to the claims of the decedent's creditors. [*Laycock v. Hammer* (2006) 141 Cal.App.4th 25, 27, 31, 44 CR3d 921, 922, 925 (irrevocable life insurance trust)—*settlor's conduct after* establishment of trust does not affect trust's irrevocability]" Cal. Prac. Guide, Probate, Inter Vivos Trusts Ch. 2-B, § 2:109. *Accord*, Cal. Civ. Prac. Probate and Trust Proceedings § 24:171; 60 Cal.Jur.3d Trusts § 84; 13 Witkin, Summary 10th Trusts § 260 (2005); 60 Cal.Jur.3d Trusts § 313.

These rules have been recognized and applied in many California trust law cases. *DiMaria v. Bank of California*, 237 Cal.App.2d 254, 258-259 (1965) (creditor of settlor cannot reach trust assets contrary to terms of irrevocable trust); *Laycock v. Hammer*, 141 Cal.App.4th 25, 30-31 (2006) (creditor of settlor/trust cannot reach life insurance asset in irrevocable trust); *Finnie v. Smith*, 83 Cal.App. 707 (1927) (creditor of trustor could not lien land in trust, as trustor had no right to revoke the trust, and had transferred his interest to trust before the lien attached); *Heaps v. Heaps*, 124 Cal.App.4th 286, 291-292 (2004) (attempted transfer of assets from irrevocable trust to different trusts constituted conversion); *Walton v. Bank of*

California, 218 Cal.App.2d 527 (1963) (trustor may not rescind irrevocable trust); *Aguilar v. Aguilar*, 168 Cal.App.4th 35, 40 (2008) (surviving settlor was not at liberty to change the terms of trust that became irrevocable upon death of co-settlor, and could not remove her home from the irrevocable trust); *In re Barnes* 275 B.R. 889, 895-896 (Bankr. E.D. Cal. 2002) (settlor was not owner of assets of irrevocable trust and hence trust assets were not protected by exemptions available to settlor).

The leading California case cited in the treatises is *Laycock v. Hammer*, 141 Cal.App.4th 25, 30-31 (2006). *Laycock* involved factual allegations similar to the present case, where personal creditors of the original settlor and trustee sought to recover against irrevocable trust assets, based on alter ego type claims that the settlor/trustee had disregarded or revoked the trust by engaging in several financing and loan transactions for his personal benefit. *Id.* at 28.

The *Laycock* court held that the actions of the settlor/trustee after the trust became irrevocable could not somehow make the trust revocable or allow recovery by creditors as if the trust were revocable. “There are no cases that permit the settlor of a trust to make an irrevocable trust revocable by way of conduct after the trust has been established.” *Id.* at 30. As the court explained, the statutory scheme in California does not permit such claims by creditors:

[Appellant] contends that as a creditor it should be able to show [the settlor] treated the trust as his own property and thereby revoked the provisions of the trust. . . . However, by expressly giving settlor’s creditors the right to reach only the assets of revoca-

ble trusts, the Legislature in Probate Code sections 18200 and 19001 has clearly indicated an intention that creditors are to be bound by the terms of an irrevocable trust to the same extent settlors, beneficiaries and other claimants are bound by such an instrument. *Id.* at 31.

III. The Moving Papers Do Not Establish Any Basis to Allow Amendment of the Judgment to Allow Recovery Against Black Oak Trust Assets

Plaintiff's motion does not articulate any valid basis as to why the rules set forth above would not apply to protect the assets of the irrevocable Black Oak Trust from creditors seeking to collect on the personal debts of Kraig Kast.

A. No Consideration Argument

In several different legal contexts, Plaintiff bases his arguments primarily on the assertion that there was "no consideration" for Kast to put assets into the Black Oak Trust. Plaintiffs' Motion to Alter or Amend Judgment ("MTA") 10:19; 11:22 (argues trust is revocable if no consideration); 11:9-10; 12:26-13:10 (argues alter ego is proven by no consideration); 12:28 (argues miscarriage of justice if no consideration); 15:16-21 (argues successor liability because no consideration). All of this is factually inapplicable, because the Properties were placed in the Black Oak Trust for ample consideration in the form of satisfying Baker's \$470,000 loans (Kast Decl 213-1 Vol. 2 ¶ 9-11; Exh 5; Baker Decl 213-2 ER Vol 3 ¶ 4-6).

This is also legally inapplicable, because under California law (CPC 15208), "A conveyance in trust

needs no consideration." *Mahoney v. Crocker*, 1943, 58 Cal.App.2d 196, 136 P.2d 810. *See also Haskins' Estate v. United States*, 240 F. Supp. 492, 496 (N.D. Cal. 1965), *aff'd*, 357 F.2d 492 (9th Cir. 1966). This rule should be obvious as a practical matter, because settlors frequently put property into trusts to provide for family members or other beneficiaries they care about, almost always without consideration being paid by the beneficiary.

Finally, it is important that these Properties were placed into the irrevocable Black Oak Trust for Mariellen Baker's benefit on December 30, 2007, over 5 years before this litigation was commenced. Even if that were a gift with no consideration to Mariellen Baker (though it clearly was not when she paid \$470,000), creditors of Mr. Kast cannot come along many years later and ask Baker to return her interest.

B. Trust is Revocable Argument

Plaintiff's next argument for collection against Black Oak Trust assets is that the Black Oak Trust is revocable, and revocable trusts are indistinguishable alter egos of the settlor. MTA 9:11-10:24; 12:1-20; 16:9-17:4. This legal argument is entirely inapplicable, because the evidence submitted herewith shows the Black Oak Trust is clearly irrevocable and has been since its inception on December 11, 2007.

Plaintiff argues that revocable trust rules apply because of the transfer tax statement in the grant deed attached as Exhibit 9 to McCulloch's Declaration (also Exhibit 9 to Kast Decl 213-1 ER Vol 2), claiming an exemption from transfer tax for transfers to/from a revocable trust. MTA 10:20. As Kast explained in ¶ 20 of his declaration, this may have been a mistake

on the deed. However, it is unlikely there was a mistake because a California title company knows California's laws better than McCulloch, a copyright attorney from New York.

The fact is transfer tax is due on the sale of property, not when it is refinanced. *see* California Board of Equalization section 11911. (ER Vol.13). If there is any error in collection of the transfer tax is the title company's not Kast's, because the title companies determine whether tax is due under the law. If tax is due, it is deducted by the title company at the time of closing on the property.

Because the trust is irrevocable the title company determined there was no tax due if it was taken out of the trust for refinancing, with the intent to put it back into the trust. No Sale No Tax. If the county's audit determined taxes should have been paid, the County would have issued a demand. No transfer tax demand was issued to Kast, as trustee, or to Kast as an individual or to the Black Oak Trust by San Mateo County. A demand for taxes is public record, there is no such demand in the public record.

In any event, under the clear holding of *Laycock*, no such statement by Mr. Kast after the irrevocable trust has been created can make the trust revocable.

Plaintiff argues that revocable trust rules apply if Kraig Kast was the trustee and settlor on the date the judgment was entered. MTA 10:14-23. This makes no sense. Irrevocable trusts have settlors and trustees. An irrevocable trust is not made revocable, and not made liable for the personal debts of the settlor or trustee, simply because the debtor was serving as

trustee on the same date the personal debt was incurred.

C. Alter Ego Factual Arguments

Plaintiff's factual allegations in support of its alter ego claims are incorrect and/or irrelevant.

Plaintiff asserts that the two deeds to Black Oak Trust on February 3, 2012 for the East Court Property and the Beach Park Property (McCulloch Decl 213-1 ER Vol 2 Exhs 5, 12) were fraudulent. MTA 11:1-3. There is no explanation why they were supposedly fraudulent. This is comprehensively refuted by our factual showing above, including the detailed explanation of the circumstances surrounding these two deeds (Kast Decl 213-1 ER Vol. 2 ¶ 23-25) and the explanation of the related East West Bank Loan (Kast Decl 213-1 ER Vol. 2 ¶ 27-34).

Plaintiff argues, and is repeated by the magistrate (OA Trans), that there was something "sham" or "fraudulent" about the Shahab Loan and Vaccarella Loan, and the assignment of rents clause in the standard form deed of trust used to additionally secure these loans. MTA 11:4-6, 11:19-21. McCulloch gave no explanation why these loans were supposedly fraudulent, or why the standard assignment of rents clause in a printed form deed of trust is somehow fraudulent. This is comprehensively rebutted by our factual showing above, including the detailed explanation of these loans (Kast Decl 213-1ER Vol. 2 ¶ 35-40).

Plaintiff argues that the Black Oak Trust should be considered Kast's alter ego if he resided in trust owned residential property. MTA 11:7. Plaintiff cites no authority that this is improper or forbidden. If one

of the trust properties is provided for Mariellen Baker's use as a residence, and she decides to invite Mr. Kast to live there too, there is nothing improper or inconsistent with trust purposes about that. Regardless, under *Laycock* and the other authorities discussed above, conduct by the settlor/trustee after the trust becomes irrevocable, including conduct "treating trust property as his own", cannot change the character of the trust as irrevocable or subject the trust assets to personal debts of the settlor/trustee.

Plaintiff argues that the Black Oak Trust should be considered Kast's alter ego because he let Mariellen Baker take over as trustee "without consideration". MTA 11:11-14, 11:24-26; 14:8. This makes no sense, because Mariellen Baker was the successor trustee designated in the December 11, 2007 Trust instrument, who had an absolute right to take over as trustee when Kast resigned. Doing so did not increase the extent of Baker's beneficial interest in Black Oak Trust, as she was already the sole lifetime beneficiary before and after Kast's resignation. Plaintiff cites no authority or explanation for the bizarre proposition that it would have been required or even appropriate for Kast to insist on consideration from Baker before resigning as trustee.

Plaintiff argues that the Black Oak Trust should be Kast's alter ego, because Kast's resignation somehow thwarted enforcement of liens. MTA 11:11-18. Plaintiff's only support for this claim is a citation to McCulloch's Decl Exh 7 (the Deed to Webb for Valley Center Sale), McCulloch Decl Exh 17 (an inadmissible title report on Valley Center Property), and Dkt 184 at 14 (Kast's resignation trustee). The propriety of the Valley Center Sale is explained in detail in Baker's Decl 213

at ¶ 7-9 (ER Vol. 3), and the response to Plaintiff's illegal Lien at ¶ 10. Plaintiff implies there is something sinister in the fact that the sales proceeds "were paid to Baker as 'successor trustee'" (MTA 11:18), when in fact she was the only proper party to receive the sales proceeds as the successor trustee. The only impropriety around liens was the unscrupulous attempt by Plaintiff's counsel to encumber the Valley Center Property, owned by the irrevocable Black Oak Trust, with a lien for the personal debts of Kast, before plaintiff even brought this motion to add Black Oak Trust as a liable party. The willingness of First American Title Company to proceed with the sale and insure the buyer's title demonstrates the invalidity of this Purported and illegal Lien. (ER Vol 13 First Am Emails)

D. Successor Liability Argument

Plaintiff next attempts to confuse and conflate Baker's job description as "successor trustee" with an entirely unrelated set of legal rules on "successor liability".

Specifically, plaintiff argues that "Black Oak Trust and Mariellen Baker in her role as 'successor trustee' to the Black Oak Trust qualify as successor entities to Kast and his debt." MTA 13:23-25 (emphasis added)

Under California law, a successor trustee is bound by all trust obligations incurred by a former trustee, such as contracts entered into on behalf of the trust. *Moeller v. Superior Court*, 16 Cal.4th 1124, 1131, (1997). However, the successor trustee is not liable for personal liabilities of the former trustee, such as

liability for breach of fiduciary duty by the former trustee. Cal. Prob. Code § 16403.

The general corporate successor rules cited in plaintiff's brief (MTA 14:1015:15) do not provide any authority for the proposition that a successor trustee somehow inherits the personal debts of her predecessor trustee. Not many people would serve as a successor trustee if that were the law.

Factually, plaintiff's successor liability argument is based on the false premise that "Mariellen Baker assumed his [sic] position as controller and beneficiary of the Black Oak Trust assets on December 31, 2015, months after judgment was entered." MTA 14:1-2. On the contrary, Mariellen Baker had been the sole lifetime beneficiary from the Black Oak Trust's inception on December 11, 2007, starting over 4 years before the litigation was even commenced (Kast Decl 213-1 ER Vol 2 ¶ 13, Exh 6 Art.2).

Factually, plaintiff's successor liability argument is based on the false premise that "Nor is there any evidence that Kast is not the actual beneficiary of the Black Oak Trust." On the contrary, the Trust Instrument is clear that Kast is not a beneficiary and never has been. (Kast Decl 213-1 Vol. 2 ¶ 13, Exh 6 Art.2).

E. Argument if Black Oak Trust is Irrevocable

When Plaintiff finally addresses the facts of this case after dozens of pages of irrelevant allegations and citations and misstatements of law—that the Black Oak Trust is irrevocable—he makes only two brief and inapplicable arguments.

Plaintiff argues that, if the Black Oak Trust is irrevocable, plaintiff can still recover against its assets "when the settlor is also the beneficiary." MTA 17:5-18. As noted above, Kast has never been a beneficiary of the trust and this argument does not apply.

Plaintiff argues that, if the Black Oak Trust is irrevocable, plaintiff can still recover against "Kast's interests in the trust corpus," citing Cal. Code Civ. Pro. § 708.010. MTA 17:19-27. However, Section 708.010(b) provides that "The judgment debtors interest as a beneficiary of a trust is subject to enforcement of a money judgment only upon petition under this section . . ." Since Kast has never been a beneficiary of the Black Oak Trust, this entire argument is inapplicable.

The motion completely fails to explain any basis for adding the Black Oak Trustor any Trustee of the Black Oak Trust to the judgment, if the court determines factually that the Black Oak Trust is irrevocable.

VI. Other Issues Relevant to the Motion

A. The Properties Were Legally Conveyed into the Black Oak Trust on December 30, 2007 by Operation of the Trust Instrument and Addendum A

The Kast Declaration establishes that title to all four Properties was vested in the irrevocable Black Oak Trust on December 30, 2007, when Schedule/ Addendum a to the Trust Instrument was executed (Kast Decl 213-1 12,16; Exh 6 Section 1.04, Addendum A). Mr. Kast declares that it was his intent and understanding at the time that Section 1.04 and

Schedule/Addendum A of the Trust instrument were sufficient to effectively place the four Properties listed on Addendum A into the irrevocable Black Oak Trust.

Mr. Kast's understanding was legally correct. Under California law, a separate grant deed is not necessary to place properties in trust:

"It is well established that if two specific requirements are met, real property may be made part of a trust's assets without a separate deed transferring property to the trust. [citation] The first requirement is that the owner of real property is the settlor creating the trust with himself or herself as the trustee. [citation] Second . . . the statute of frauds requires that the declaration of trust must be in writing signed by the trustee."

Ukkestad v. RBS Asset Finance, Inc., 235 Cal.App.4th 156 (2015). *See also Came v. Worthington*, 246 Cal. App.4th 548 (2016) (settlor's signature on irrevocable trust instrument was sufficient to convey title to property held in earlier revocable trust).

These requirements are satisfied here because Kast was the owner of the Properties individually (as to Valley Center Property) or in the earlier revocable Kraig Kast Living Trust (as to the other three) KKLIT, he was the settlor creating the Black Oak Trust with himself as the initial trustee, and the Trust instrument for the Black Oak Trust and Addendum A transferring the Properties into the Black Oak Trust were in writing signed and dated by Kast.

B. Specific Parties Sought to Be Added

While the motion should be denied entirely, Respondents have other objections to some of the specific additional party names requested in the motion (MTA 2:10-23).

Given the name of the Black Oak Trust specified in Section 1.01 of the Trust Instrument, and Mr. Kast's resignation as the trustee, any order seeking to make the Black Oak Trust assets liable for the judgment would have to refer to "Mariellen Baker, Successor Trustee of the Black Oak Trust dated December 11, 2007" or "Mariellen Baker, Successor Trustee of the Black Oak Trust dated March 11, 1995. Both descriptions refer to the same trust and same trustee.

Adding the "Black Oak Trust" or similar descriptions would be incorrect, because trusts are not legal entities and the proper party to name in litigation by or against "a trust" is the trustee. *Galdjie v. Darwish*, 113 Cal.App.4th 1331, 1343.

Adding Mr. Kast in his capacity as Trustee of the Black Oak Trust in any manner would be incorrect, because he no longer serves in such capacity or holds Black Oak Trust assets in trust for the beneficiary.

Adding the "Kraig Kast Living Trust" or similar descriptions would be incorrect for the same reason, it is not an entity.

Adding the Kraig Kast Living Trust would also be incorrect because that revocable trust ceased to exist as such when its trust instrument was amended and restated on December 11, 2007 to become the Black Oak Trust.

The motion did not request to add Mr. Kast in his capacity as Trustee of the Kraig Kast Living Trust, and that would be improper anyway because that revocable trust ceased to exist as such when its trust instrument was amended and restated on December 11, 2007 to become the Black Oak Trust

C. Objections to Evidence

Respondents objected to admission or consideration of Exhibits 10, 11, 15 and 17 to the declaration of McCulloch [Dkt.191], on the grounds of hearsay and lack of foundation, and lack of authentication. These are all unrecorded "property reports" purporting to represent certain facts about property ownership or past transactions, being offered by plaintiff for the truth of the matters stated in the reports. They are therefore hearsay, and not authenticated sufficiently to qualify for any exception. They should be stricken.

VII. Statutes of Limitations

Plaintiff's counsel, Kevin McCulloch (McCulloch), filed his Motion to Amend (MTA) (Dkt 189) the copyright Judgment 463 days after the copyright judgment was entered on August 19, 2015 and the case closed. He added Mariellen Baker and the Black Oak Trust as defendants days later. Kast responded (Dkt 190 and 204) that the MTA was filed significantly beyond the statute of limitations under rule 59(e). McCulloch had a responsibility to check the statute of limitations before filing his MTA, but he intentionally did not. Even after being put on notice by Kast (Dkt 186) in his opposition to the MTA, McCulloch didn't withdraw the MTA.

Once the copyright appeal was filed September 10, 2015 the magistrate shouldn't have entertained the motion to amend the copyright judgment for the reasons set forth above.

The magistrate also abused his discretion under rule Fed. R. Civ. P. 6(b)(2) (providing “[district] court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).”

The magistrate abused his discretion by not dismissing the (MTA). Kast stated the MTA was not filed within 28 days of August 19, 2015, the copyright judgment's entry, as required by Fed. R. Civ. P. 59(e) Kast also stated the same thing including rule 60 in Dkt 204 ER Vol. 3 1:18-2:17. In rejecting Kast's argument the magistrate cited: “The Ninth Circuit, however, has rejected that same argument, instead requiring that such motion be brought within a “reasonable time” *In re Levander*, 180 F.3d 1114, 11121 n.10 (9th Cir. 1999). As will be discussed more fully below, Erickson argues that the full scope of Kast's alleged subterfuge with respect to the subject trusts and assets has only recently come to light”.

The magistrate abused his discretion by leaving out the most applicable part of rule 60(c). The full text of rule 60 says: (c) Timing and Effect of the Motion. (1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

Under rule 60 (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal

representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief

The 1946 amendment to rule 60(b) provides guidance as to what is "reasonable time". Under subdivision (b)

¶ 2 "The reconstruction of Rule 60(b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the rules as it is proposed to amend them. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be

begun in the court which rendered the judgment.”

¶ 3 “If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action.”

¶ 3 “On the other hand, one of the purposes of the bill of review in equity was to afford relief on the ground of newly discovered evidence long after the entry of the judgment. Therefore, to permit relief by a motion similar to that heretofore obtained on bill of review, Rule 60(b) as amended permits an application for relief to be made by motion, on the ground of newly discovered evidence, within one year after judgment.”

McCulloch/Erickson claimed “newly discovered evidence”, but he didn’t state a claim under rule 60(b)(2) as the basis for his MTA, which in of its self [sic] is a basis for dismissal. Even if McCulloch had stated a claim under 60(b)(2) that too is subject to the one year statute of limitations. The “new evidence” that McCulloch supposedly discovered in November 2016 was the Black Oak Trust is irrevocable, but his claim of “new evidence” is pure fiction.

In October and December 2015 Kast stated to both the magistrate and McCulloch the Black Oak Trust is “irrevocable”. McCulloch saying it is “newly discovered evidence” is another intentionally false statement to the court. (ER Vol. 13 Dkt 133, DKT163)

What actually happened is the trust's Valley Center property sold November 2, 2016. McCulloch's disputed and illegal lien was removed prior to the sale by First American Title after reviewing the Black Oak Trust instrument (Kast Decl 213-1 ER Vol. 2 Exh 6). After the sale, McCulloch contacted First American Title to find out when he was going to be paid. First American told McCulloch that his lien on the Valley Center property was illegal and was removed because the original copyright judgment was against Kraig Kast, as an individual only (ER Vol 13). That Kast was not the trustee when the property was sold and that the Black Oak Trust is irrevocable therefore, McCulloch had no claim against the Valley Center property.

McCulloch was livid, on November 17-18, 2016 he subpoenaed First American, Wells Fargo and Cal-West Home Loans. Kast filed his Motion for Protective Order on November 18, 2016 (ER Vol. 13 Dkt 184) and Motion to Quash McCulloch's forged subpoenas (ER Vol 13 Dkt 186) on November 22, 2016. McCulloch then filed his Motion to Amend on November 23, 2016 and added Mariellen Baker, the Black Trust and Kast's FBNs as defendants.

In January 2017 McCulloch issued the same forged subpoenas to Laura Biche and the County of San Mateo. McCulloch knew he couldn't get them to respond unless he forged the subpoenas by adding Kraig Kast "individually and/or as trustee of the Black Oak Trust dtd [sic] 3-11-95" to the description of the copyright judgment (Exhibit Vol. 4.2). When caught in his forgery and fraud, McCulloch first lied to the court, then he blamed "clerical error" on his paralegal Lesly Ayala and then blamed his Pro Hac

App.111a

Vice partner Robert Wright in California as the culprit (Dkt 190). But, the subpoenas were signed by McCulloch and came from his New York office, not California. Every time he was caught in a lie he changed his story. The magistrate ignored McCulloch's intentional fraud, forgery and ethics violations again.

The only way McCulloch could get any money before the copyright appeal is decided was to file his Motion to Amend the Copyright Judgment in a friendly court, before the same magistrate who had denied every one of Kast's pre-trial and post trial motions and had overruled every objection Kast's attorney made during the trial, except two minor attorney client privileged objections.

McCulloch knew the magistrate should dismiss his motion to amend based on rules 6(b)(2), 59(e) and 60(b) amended 1946 and (c). So he filed his new lawsuit on April 27, 2017 in USDC-CAND case number 3:17-cv-02427-RS in compliance with rule 60(b) amended 1946. His filing is tangible proof McCulloch read 60(b) and knew the MTA exceeded the Statute of Limitations and should be dismissed. McCulloch's new lawsuit is suspect due to the statute of limitations.

If McCulloch had adhered to the statutes of limitations, he would never have filed this motion to amend, which is wasting the court's time and resources. Once filed, the magistrate abused his discretion by not dismissing the motion to amend because it was filed significantly beyond 59(e)'s 28 days, 60(b) and (c)'s one year statute of limitations and rule 6(b)(2)'s limit to extension of time resulting all of which result in a lack of jurisdiction. Once McCulloch filed his new action in another court as per 60(b), he should

have withdrawn his motion to amend the copyright judgment but he didn't, a violation of rule 11.

Hundreds of cases at every level of the justice system support dismissal of this motion to amend based on the statutes of limitations, which also eliminate jurisdiction. For example, In *Howard v RJF financial* CV-11-1213-PHX-GMS "Motions for reconsideration are disfavored and are not the place for parties to make new arguments not raised in their original briefs and arguments". *Hanko v. Nestor*, 2016-Ohio-2976. "The Trial Court erred in granting Plaintiff-Appellee relief from judgment under Civ. R. 60(B)(5) as Plaintiff-Appellee's Motion was not made within a reasonable amount of time." *In Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) ("Without jurisdiction, court cannot proceed at all in any cause; jurisdiction is power to declare law, and when it ceases to exist, the only function remaining to court is that of announcing the fact and dismissing the cause").

Motion to Quash

Kast asks the court to review the magistrate's order (Dkt 244) denying his Motion to Quash the Plaintiff's six forged and fraudulent subpoenas (Dkt 184,186) that were issued interstate to Wells Fargo Bank, First American Title Insurance, Cal-West Home Loans, San Mateo County Assessor, San Mateo County Treasurer and Laura Biche, based on Abuse of Judicial Discretion. Please see Dkt 204 for Kast's discussion. If this court decides to reverse the magistrate's order and grant Kast's Motion to Quash, Kast asks the court to order that all documents obtained from McCulloch's fraudulent subpoenas be stricken from the record before the court makes its final decision about the Motion

to Amend. The court may also decide whether to penalize Kevin P. McCulloch under 8 U.S. Code § 1324c—Penalties for Document Fraud, Rule 11 and the American Bar Assn. and New York ethics code.

SUMMARY

There is insufficient factual evidence for the District Court to claim subject matter jurisdiction. The District Court abused its discretion by ignoring the statutes of limitations. The District Court abused its discretion by taking Baker's property without due process. The District Court abused its discretion by denying Kast's motion to quash. Kast deeply appreciates the Ninth Circuit reviewing the magistrate's order to amend the copyright judgment.

7. Do you have any other cases pending in this court? If so, give the name and docket number of each case.

Yes, appeal of copyright judgment case no. 16-16801

8. Have you filed any previous cases which have been decided by this court? If so, give the name and docket number of each case.

No

VIII. Conclusion

Kraig R. Kast on behalf of himself and all defendants, asks the Ninth Circuit to reverse and dismiss Plaintiff's motion to amend the copyright judgment, with prejudice.

App.114a

/s/ Kraig R. Kast

Kraig R. Kast
PO Box 4612
Foster City, CA 94404

Dated: April 23, 2018

**APPELLANT INFORMAL REPLY BRIEF
(JUNE 6, 2018)**

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT
SAN FRANCISCO

KRAIG R. KAST,

Appellant Pro Se,

v.

ERICKSON PRODUCTIONS, INC. &
JIM ERICKSON,

Appellees.

Appeal Case No. 17-17157

Related Appeal Case No. 15-16801

District Court Case No. 5:13-cv-05472-HRL

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INTRODUCTION

The informal opening brief contained Kast's legal arguments, this informal reply brief contains his factual arguments.

This is an easy case for the court to decide. Kast's declaration (Vol 2 Dkt 2131) succinctly explains the Black Oak Trust's (BOT) transaction history. Biche's declaration (Vol. 2 Dkt 213-3) succinctly explains the BOT's financing.

1. McCulloch's most glaring omission in his answer brief is he doesn't cite one section of the California Probate Code (CPC) that supports his arguments; whereas, Kast cites dozens of CPC sections and cases in his opening and reply briefs that support his arguments.

2. The magistrate doesn't cite one California Probate Code or FRCP that supports his decision. He also lacks a fundamental understanding of trusts and trust law. The magistrate simply restated McCulloch's arguments nearly word for word.

3. McCulloch's answer brief has provided no evidence the irrevocable Black Oak Trust (Vol 2 Dkt 213-1) is not valid under California law and no evidence to contradict First American Title stating the BOT is irrevocable as of December 2007 (Vol 13 emails).

4. There's no evidence the loans made to the BOT are illegal, because they are not.

5. The magistrate's order claims McCulloch's evidence is "unrefuted" (Dkt 243 18:10-14). Not true. Kast, Baker and Biche's declarations (Vol 2 and 3 Dkt 213, 213-1, 213-2, 213-3) strongly "refuted" McCulloch's arguments.

The magistrate erred in his order amending the copyright judgment. His order was based on only one thing "Court finds that there has not been a transfer of the subject properties to an irrevocable trust", nothing more. (Vol 1. Dkt 243 18:11-12) The magistrate didn't say the irrevocable BOT is invalid, didn't say the Kraig Kast Living Trust (KKLT) was invalid; didn't say Kast, acting as trustee of any trust, is the alter ego of Kast acting as an individual in the copyright case and didn't say Kast is a beneficiary of any trust.

The magistrate erred in finding that the legal disclosure "Kraig R. Kast as trustee of the Black Oak Trust dated 3-11-95" is a fictitious business name (Vol 1 Dkt 243 18:16-19) and (Vol 15-5). The magistrate erred when he denied Kast's motion to quash.

ARGUMENT

I . The District Court Lacked Subject Matter Jurisdiction Rule 12(b)(1)

A. Magistrate Didn't Have Enforcement Jurisdiction During Appeal

Kast's legal argument in the Opening Brief shows the magistrate shouldn't have heard the motion to amend (MTA), while the appeal is pending.

B. Amendment Order Substantially Expanded or Altered the Judgment

Kast's Opening brief, shows, without question, the magistrate's order expanded and altered the judgment. Ms. Baker was never part of the copyright action. The magistrate dismissed Ms. Baker from the

MTA; he had no jurisdiction over her. The magistrate can't legally take her property without due process.

C. Peacock and Thomas, Head are not trusts under California law

The magistrate erred when he claimed subject matter jurisdiction based on *Peacock v. Thomas* and *Thomas, Head et al. v Buster*. Both are ERISA (employee benefit) cases. CPC definition 82(b)(13) (Vol 15-2 Glossary) says ERISA trusts are not trusts under California Law. Those cases can't be used by the magistrate to assert subject matter jurisdiction.

There is no Federal Probate Code, so there's no legal basis for the magistrate to assert subject matter jurisdiction over a California private trust. The magistrate asserted subject matter jurisdiction over a California private trust, he must apply the California Probate Code and law, but he ignored it.

D.

By reference, this Reply Brief includes California case law *Laycock v Hammer*, *Wilmington Capital v Big Whale Trust* and other cases in Kast's Opening Brief that support the private irrevocable Black Oak Trust is valid.

**II. The Magistrate's Order Amending the Judgment
Is Contrary to California Law**

**A. No Justification for Amending Judgment to
Include Kast as Trustee of the Black Oak Trust**

1. California Probate Code

There is no Federal Probate Code. There are Probate Codes in every state. The IRS recognizes that trust and probate law is vested in the states, not the federal government (Vol. 15 Exh 1). Therefore, the California Probate Code (CPC) should be the basis for the court to make its decision. The magistrate ignores the BOT's governing instrument and doesn't cite the CPC in his order (Vol. 1 Exh. 2, Dkt 243).

CPC 82 (a)(1) a "trust" is defined as a "private" trust (like the BOT) (Vol 15 Exh. 2 Glossary). CPC 21102(a) says the trust instrument controls the legal effect of what happens after the trust is created. The requirements for a valid California trust are: there needs to be a conveyance of property (CPC 15202, 15206); intent (CPC 15201); promise (CPC 15200(e); purpose (CPC 15203); a beneficiary (CPC 15205) and capacity (CPC 810). CPC 15208 says no consideration is required to create a trust (contrary to McCulloch's lie). CPC 15400 "Unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor". The BOT instrument's first page and section 1.03 (Vol. 2 Exh 1 Dkt 213-1, pg 44) states it is irrevocable (Vol 15 Exh 3). Therefore, the BOT is irrevocable under CPC 15400.

The first page of the BOT instrument clearly states "This Irrevocable Trust Agreement is created on December 11, 2007 by amendment to the Kraig R.

Kast Living Trust dated March 11, 1995". The word amendment is not ambiguous. The magistrate can't ignore the word amendment, its meaning and intent, but he did.

By amending the KKLT to become irrevocable on December 11, 2007, the entire KKLT instrument was made irrevocable. By restating, the wording in the KKLT was replaced by the wording in the BOT instrument dated December 11, 2007, all of which is governed by California law. When the BOT became valid Kast gave up equitable and legal ownership of the properties.

The magistrate erred when he said there are two trusts (Vol. 1-2 Dkt 243 18:3-5) BOT section 5.01 says there is "a single trust". (Vol 2 Dkt 213-1 pg 65) (Vol 15 Exh 7). Only one BOT instrument is in evidence in this appeal (Vol. 2 Dkt 213-1 Exh 6 pg 33-141).

BOT Article Two (Vol 2 Dkt 213-1 Pg 50) is unambiguous. "The "lifetime beneficiary of my trust is Mariellen Baker" (Vol 15 Exh. 4). Now here in the BOT or KKLT does it say Kast is the beneficiary. The magistrate didn't know what a "lifetime" beneficiary is (Vol 1 Transcript Pg 22:2) basic trust law.

Every third party who lent money to the trust, insured the title on the trust's properties, rented from the trust and provided services under contract to the trust, recognizes the BOT is irrevocable and recognizes it was created on March 11, 1995 (Vol 15 Exh 5 First Am email, Shahab, Vacarella loans). Kast's intent (CPC 15201) was always for the KKLT to become irrevocable on December 11, 2007.

No title company, lender, mortgage broker, real estate broker or CPA would put their license or money

at risk if the BOT instrument, financing process or tax filing was not legal. Prior to the order, San Mateo County refused McCulloch's lien on the Beachpark and East Court properties because the judgment was against Kast as an individual, not in his capacity as trustee of the BOT. Mariellen Baker has always been BOT's beneficiary and successor trustee, not Kast *See* (BOT section 3.02 (Vol. 2 Dkt 213-1 Pg 50).

BOT's instrument clearly states in section 1.04 (Vol 2 Dkt 213-1 pg 45) (Vol. 15 Exh 8) that the properties listed in Schedule/Addendum A are attached to the BOT. Schedule/Addendum A (Vol 2. ER 213-1 Pg 137) (Vol 15 Exh 9) lists four properties: 1061 Beachpark Blvd. #112, Foster City, CA; 13 East Court Lane, Foster City, CA; 969 Desoto Lane, Foster City, CA and 12155 Vista Terraza Court, Valley Center, CA. The court will also note Schedule/Addendum A is signed and dated by Kast, the grantor/settlor, on December 30, 2007 complying with CPC 15206 (note there is nothing in CPC 15206 that says the settlor/grantor's signature must be notarized). BOT became valid on December 30, 2007 when the properties were conveyed into the BOT on Schedule/Addendum A in compliance with CPC 15206, 15202 and BOT section 1.04.

The BOT instrument (Vol 2, 213-1, pg 108) section 10.11 allows a property to be "taken out" and be put "back in" the trust for financing purposes. Ms. Biche, the mortgage broker's declaration (Vol 2. Dkt 213-3), clearly explains that taking a property "out of the trust" and putting it "back into" the trust is a common real estate financing practice dating back long before 2007 and mandated by the lender.

There is no notarization of a trust instrument requirement under California law.

The American Bar Assn.'s Chapter 5 of the trusts section Pg. 4 "typically no public record is required" and ABA Chapter 5 trusts Pg. 5 "most states do not require witnesses to execute trusts or amendments to it" (Vol 15 Exh 11). California has no requirement that a trust must be recorded with the County or State to be valid.

A. The BOT's Spendthrift provision and Special Powers of Appointment prevent McCulloch from taking Baker's property under California law

The magistrate erred when he ignored the BOT's Special Powers of Appointment section 1.05 (Vol 2 Dkt 213-1 P 46-47) and CPC 681 and Spendthrift provision section 11.02 (Vol 2 Dkt 213-1 P 122) and CPC 15300-15301.

Powers of Appointment CPC 681:

"Property covered by a special power of appointment is not subject to the claims of creditors of the donee or of the donee's estate or to the expenses of the administration of the donee's estate."

California is one of the most creditor-friendly states. However, even in California, a private irrevocable trust with Special Power of Appointment was upheld in *Wilmington Capital LLC vs. The Big Whale Trust* in May 2012.

Spendthrift Provision 15300-15301

McCulloch said at oral argument (Vol 1 transcript 13:4) that he's not holding Ms. Baker personally liable. The magistrate dismissed Ms. Baker from the MTA. The magistrate has no jurisdiction over Ms. Baker. Ms. Baker was never named in the copyright case. She had nothing to do with the copyright case and was

never a judgment debtor and she has not filed bankruptcy. Ms. Baker is not liable for Kast's debts, she is one of Kast's creditors BOT Section 11.02 (Vol 2 Dkt 213-1 P122).

Kast fully paid his debt, up to that time, to Ms. Baker in 2007 when he executed and funded the BOT with property. The BOT can be used by Ms. Baker for her health, education, maintenance and support.

2. Title

The magistrate erred when he said the deeds indicated the properties were not transferred to the BOT. The San Mateo County Recorder's website states "When a document is presented to our office for recording, it is only examined for "recording requirements" and not for its correctness or legal sufficiency". (Vol 15 Exh. 13-screenshot) The court should ignore the deeds (Answer brief Exh 11, 20, 21, 22, 23) because they are unauthenticated and have no "legal sufficiency".

Actual v. Constructive Notice in the Recording Process

Actual notice consists of express information of a fact. Constructive notice means notice given by the public records. By means of constructive notice, people are presumed to know the contents of recorded instruments. Publicly recording instruments of transfer /conveyance or to encumber/lien the title to real property imparts constructive notice. Cal. Civil Code 2934 enacted in 1872 states in part, "Any assignment of a mortgage and any assignment of the beneficial interest under a deed of trust may be recorded, and from the

time the same is filed for record operates as constructive notice of the contents thereof to all persons . . . ”.

Recording a document is simply a constructive public notice, not much different than placing a notice in a newspaper. First American Title Insurance said the BOT is irrevocable (Vol 13-emails) that confirms the BOT is irrevocable.

A. Deeds

The magistrate erred when he said the properties were not put into the BOT. The deed history in declarations (Vol 2 Dkt 213, 213-1, 213-2, 213-3) and deeds (Vol 2 Dkt 213-1 Exh 8-19) show the properties were put into the BOT in 2007 and 2008. However, the San Mateo County recorder says the recording of a document doesn't imply any “correctness or legal sufficiency”.

B. Errors on Deeds

The magistrate erred when he said the errors on the deeds showed the properties were not put into the BOT. Errors on deeds are not uncommon and understandable.

When lenders and title companies process hundreds of transactions a day, each involving several hundred pages, it is understandable that typos occur. Most of the loan and title documents are fill forms. Add to the process an uncommon document like an irrevocable trust that sounds to processing clerk like a common revocable trust and it is easy to see why mistakes over the two letters “Ir” occur.

Most borrowers, buyers and sellers rely on the title company and their mortgage broker to read and understand the forms they are signing at the closing

table, few people read every page. When an error is caught after signing the documents, there is an established corrective deed process in California (Vol 15 Exh 14).

If Kast, Baker or the title company caught the errors, he would have made a corrective deed. But, neither Kast, Baker or the title company caught the errors before the refinancing in 2014 and 2015. This lawsuit created an obstacle to using corrective deeds. Had Kast or First American caught the errors and made a corrective deed McCulloch would have claimed that the corrective deed was done to avoid his collection efforts; if the deed was not corrected, McCulloch could claim that the properties were not in the irrevocable trust, neither of which is true.

The title to the Beachpark and East Court properties was corrected when the Shahab and Vacarella loans were recorded. When the MTA issue is decided the BOT's successor trustee, Ms. Baker, may be advised to correct the title history by her attorney.

C. Title Company Instructions

McCulloch misrepresents Kast's fax sent to First American (Vol 15 Exh 15) dated December 20, 2007 which is ten days before the BOT became valid. The first part is Kast's response to Ms. Koontz's request for a copy of the KKLT second amendment. Second part is Kast's instruction to Ms. Koontz that when the Valley Center and Desoto property transaction closes (and the BOT becomes valid in compliance with CPC 15202, 15206) the properties are to be put into the BOT (not the KKLT). Valley Center property was conveyed from Kast to the BOT in February 2008 (Vol 12), Desoto in February 2008 (Vol. 5 pg 23).

(Vol 15 Exh 5) Ms. Koontz was under tremendous pressure from the seller's agent to close the transaction by December 20, 2007, so it's easy to see that mistakes could happen.

The San Mateo County recorder's website says, the deed errors had no "legal sufficiency". The deeds didn't prevent the financing, purchase or sale of a trust property or a title company insuring the title and none of the errors changed the beneficiary, Ms. Baker, who has been the "lifetime beneficiary" since 2007.

D. Title Process

First American Title Insurance Co. handled the escrow and title insurance in 2007 for both the Desoto and Valley Center properties and in 2016 for Valley Center, which gives them a historically detailed and accurate record of the property history. Please see the emails from First American confirming the BOT is irrevocable as of 2007 restated to 1995 (vol. 13 and vol 15 Exh 5).

Ms. Lawrence (Vol. 5-11), a highly respected mortgage broker with over 30 years of experience, brokered financing for the KKLT and BOT properties from 1998 to 2007. Several times over the years there were corrections in the recorded documents (vol. 5-1/30/01 title vesting corrected 11/09/04) and misspellings (Vol 5 1/07/08). In 2007, the Desoto property was "taken out" of the Kraig Kast Living Trust (KKLT) (Vol 5 Pg. 59) and put "back into" the BOT (Vol 5 pg. 27). Had Kast's intent been to put the Desoto property into the revocable KKLT the title would have said the KKLT aka of Black Oak Trust, it didn't, it only said the BOT.

McCulloch is lying to the court when he says the KKLT second amendment is valid and the third amendment creating the irrevocable trust is not valid. Remember, for a trust to be valid there must be a transfer of property under CPC 15202, 15206. The court will note there is no Schedule/Addendum A attached to the KKLT second amendment (Answer brief Exh 2) proof the second amendment was not valid and was never intended to be valid under California Probate law.

There is a signed and dated Schedule/Addendum A to the irrevocable BOT instrument (Vol 15 Exh 9) therefore, under CPC 15202, 15206 the irrevocable trust amendment is valid. The irrevocable trust instrument restates the effective date to be March 11, 1995. All of the loan and title documents correctly refer to the BOT as dated 3-11-95.

E. Title Company Confirms Black Oak Trust Is Irrevocable

Please see First Am emails (Vol. 15 Exh 5) confirming BOT is irrevocable

3. Lenders

Kast as trustee of the BOT was empowered by CPC 16241 to take out loans on trust properties. As Kast's Declaration (BOT section 10.11 (Vol 2. Dkt 213-1 P107-108) and Biche's Declaration (Vol 2 Dkt 213-3) state the common practice when financing/refinancing residential mortgages held in trust is to "take it out", which means to temporarily remove title from the trust in name only, then after financing to put it "back into" the trust. This is usually done by the title company at the time of closing on the loans.

The magistrate stated in his order there was no evidence the loans were modified from Kast as an individual borrower to reflect the irrevocable BOT as the borrower (Dkt 243 14: 10-12). The magistrate doesn't understand real estate finance and either didn't read or ignored Ms. Biche's (the mortgage broker) declaration (Vol 2 Dkt 213-3) explaining why the BOT's loans are made in the name of Kast as an individual and not the BOT and then the title returned to the trust. (Vol 2 Dkt 213-1 pg 9).

Institutional lenders like East West Bank rarely, if ever, make loans directly to trusts, but they will make loans backed by the trust assets to trustees, grantors/settlors or beneficiaries as individuals. It would not be possible to modify the name on the loan from Kast to the BOT, as the lender would not allow it.

Two private lenders, the Shahab and Vacarella Trusts, made loans directly to the BOT (Vol 15 Exh 17). The mortgage brokers, Ms. Biche representing the BOT and Cal-West Home Loans representing the Shahab and Vacarella Trusts, both reviewed the irrevocable BOT instrument, as did the lenders. They knew the properties were held in an irrevocable trust and made the loans directly to the trust.

4. Taxes

McCulloch claims that Kast, declaring the BOT's loss on his personal tax return (Sealed Document), shows he is the alter ego of the BOT and has benefited personally from the BOT, not true. The IRS (Vol 15 Exh 18) says it is a legal deduction.

McCulloch claimed Kast, as trustee of BOT, committed tax fraud under Cal Revenue Sect. 480,

another lie. Statute 480 says nothing about taxation of revocable or irrevocable trusts. When trusts are refinanced, there is no change of ownership.

Prior to the magistrate's order, McCulloch claimed Kast committed tax fraud because the BOT didn't pay taxes on the refinancing of trust properties, not true. When confronted with Cal Bd. of Equalization Section 11911 (Vol 15 Exh 20) that says no taxes are payable on refinancing. McCulloch claimed that because Kast as trustee of the BOT paid property taxes it means the BOT was his alter ego, not true per CPC 16243.

A. IRS Taxation of Grantor Trusts

During oral arguments, the magistrate asked Mr. Lund who represents Ms. Baker and the BOT (Kast's co-defendants), to explain grantor trust taxation to him (Vol 1 Exh 5 22:2), this is basic trust tax law. The IRS excerpt describes trusts and tax treatment in (Vol 15 Exh 18). An "irrevocable trust" can be treated as a grantor trust if any of the grantor trust definitions contained in Internal Revenue Code §§ 671, 673, 674, 675, 676, or 677 are met which allows a trust's gain or loss to be filed on the settlor/grantor's personal tax return. Kast's 2013 tax return prepared by a CPA (Sealed), shows the BOT is a grantor trust. The BOT section 1.07 (Vol 2. 213-1 P 47) references IRS code 671-678 as the basis for its taxation.

5. Third Party Agreement to Be Bound (Cal. Civil Code 1624(b)(1)(B) and 1624 (I)(D))

Third parties recognize the BOT is valid, the properties were conveyed into it and they agree to be bound by it. The BOT, lenders and title companies agree to be bound by their contracts including loans.

BOT section 1.02 references "reliance" by Third parties (Vol. 2 Dkt 213-1 Pg. 44). BOT section 1.03 says BOT is irrevocable (Vol 2 Dkt 213-1 Pg. 45).

CCC 1624 (b)(1)(B) "The parties thereto by means of a prior or subsequent written contract, have agreed to be bound by the terms of the qualified financial contract from the time they reached agreement (by telephone, by exchange of electronic messages, or otherwise) on those terms."

CCC 1624 (I)(D) "There is a note, memorandum, or other writing sufficient to indicate that a contract has been made, signed by the party against whom enforcement is sought or by its authorized agent or broker".

6. San Mateo County Recognizes Black Oak Trust Is Irrevocable

San Mateo County refused to record McCulloch's lien against the Black Oak Trust's properties prior to the magistrate's order because the copyright judgment was against Kast as an individual, not against Kast as trustee of the Black Oak Trust.

7. No Basis to Add "Kast as Trustee" as Alter Ego of Kast as an Individual"

McCulloch claims that because Kast, as trustee, managed the BOT's real estate and paid the BOT's bills, that proves the BOT is Kast's alter ego. Not true. Under CPC 16352(c)(4) and BOT section 10.18 (Vol 2 Dkt 213-1 Pg 112) Kast, as trustee, was empowered to manage rental properties. Under CPC 16352 (a) and BOT section 9.13 (Vol 2 Dkt 213-1 Pg 85-86) and his

App.131a

Fiduciary license Kast as trustee was empowered to provide accounting services to the BOT.

Kast incorporates by reference CPC 16000-16249 Trustees Powers in this reply brief and as they relate to the powers granted to the trustee in the BOT instrument. Under CPC 16225(a)(1) and BOT section 10.04 Kast as trustee was empowered to open bank accounts for the BOT. CPC 16228 and BOT section 10.11, Kast as trustee has the power to encumber, mortgage or pledge trust property. Kast's Professional Fiduciary license 558 empowers him to provide accounting services for BOT. CPC 16014 Kast as trustee is required to apply the "full extent of his skills" including his skills as a licensed Fiduciary, Real Estate Broker (license 01426063) and Insurance Broker (License 0G91440) in the best interests of the BOT and its beneficiary Ms. Baker.

Kast's real estate broker license empowers him to represent buyers and sellers in real estate transactions. CPC 16102, 16231, 16247 the trustee can hire a real estate agent like Kast or a mortgage broker like Ms. Biche or Ms. Lawrence, to provide advice and services to the trustee regarding selling/leasing property. *See* a description of the services Kast is permitted, and in some cases, legally required to provide under his Professional Fiduciaries License (Vol. 15 Exh 19).

Atherton's development website, which is the basis of the copyright action, had nothing to do with the BOT. Kast, as trustee of the BOT, never provided any of the services in the copyright action. Kast, as trustee of the BOT, was never associated in any way with contracting for construction of the development website. The BOT had no income, no expenses and no

profit from the development website. The BOT doesn't seek clients, as it is not a business. Kast, as trustee of the BOT, had no control over the developers of the website. Kast received no personal or professional benefit from the website on behalf of the BOT. The BOT was never named as a defendant in the copyright action. Ms. Baker and the BOT were never a defendant in the copyright action. The BOT and Ms. Baker, the successor trustee and sole lifetime beneficiary of the BOT had no due process in the copyright action. Ms. Baker as sole beneficiary of the BOT, as an individual or as successor trustee were not named as debtors by the magistrate in his MTA order because he had no jurisdiction over her.

To associate Kast's liability as an individual or the employee of an unrelated business, with his responsibilities as a trustee of the BOT or any other trust, is a grave injustice setting a dangerous precedent that creates litigation extortion exposure for the beneficiaries of millions of private trusts. People would be unwilling to act as a family or professional trustee and it would keep grantors from naming anyone as a trustee for fear the beneficiary's assets could be seized based on pass-through-liability. Private, professional and corporate fiduciaries may not be able to get insurance. Finding Kast, as an individual, in an unrelated action has pass through liability to him functioning as a trustee is contrary to the intent of California Business and Professions Code 6500, the Professional Fiduciaries Act.

8. "Kast as Trustee of the Bot Dated 3-11-95" Is Not a Fictitious Business Name

The magistrate erred again when he said the disclosure "Kraig R. Kast as Trustee of the Black Oak Trust dated 3-11-95" on the Shahab and Vacarella loan instruments and deeds was Kast's fictitious business name that was meant to "confound creditors". This is profoundly false.

CPC 16009 "The trustee has a duty to do the following:

- (a) To keep the trust property separate from other property not subject to the trust.
- (b) To see that the trust property is designated as property of the trust."

Cal BPC 17900(a)(1) says "The filing of a fictitious business name certificate is designed to make available to the public the identities of persons doing business under the fictitious name."

17900(b)(1) says "As used in this chapter fictitious business name means: In the case of an individual, a name that does not include the surname of the individual or a name that suggests the existence of additional owners, as described in subdivision (c)".

CPC 16222. For the purpose of this subdivision, the lease of four or fewer residential units is not considered to be the operation of a business or other enterprise. BOT had 4 properties before this lawsuit.

BOT section 1.01 Identifying My Trust describes how the trust is to be referred to (Vol 2. Dkt 213-1 Pg 44).

Obviously "Kraig R. Kast as Trustee of the Black Oak Trust Dated 3-11-95" complies with CPC 16009(b) and BOT section 1.01. It is not a FBN under Cal. BPC 17900 because it includes Kast's family name. BOT's Section 1.01 ¶ 2 states how the trust is described. CPC 16222 BOT is not as business so it doesn't require a FBN. Describing Kast as trustee of the BOT does not and is not intended to "confound" Kast's or the BOT's creditors.

As Kast said during the copyright trial ER 166:17-18, the Department of Insurance doesn't allow him to use the word "Trust" in a FBN (Vol 15 Exh. 20). The Bureau of Real Estate and the Professional Fiduciaries Bureau have similar rules about what words are not permitted to be used by licensees. No FBN, no alter ego of Kast.

9. Kast Never Used the Bot for His Personal Benefit

McCulloch alleges Kast, as trustee of the BOT, opened bank accounts this proves Kast personally benefited from the trust and that the BOT's Kast's alter ego, not true per CPC 16004 and CPC 16225. BOT section 10.04 (Vol 2 Dkt 213-1 pg 95) allows the trustee to open bank accounts. BOT section 10.11 (Vol. 2 dkt 213-1 pg 107) empowers the trustee to encumber trust property (*i.e.* with loans). BOT section 10.19 (Vol 2 Dkt 213-1 pg 112-113) allows Kast and Baker to rent property from the BOT. BOT section 10.21(Vol 2. Dkt 213-1 pg. 114-115) allowed Kast as trustee to invest

in securities. Neither Kast or Baker ever abused or used the trust for their personal benefit.

CPC 16004

- (a) The trustee has a duty not to use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to the beneficiary.
- (b) This section may not be construed as affecting the trustee's right to:
 - (1) Maintain a reserve for reasonably anticipated expenses, including, but not limited to, taxes, debts, trustee and accounting fees, and costs and expenses of administration.

CPC 16225(1) permits the trustee to have an "insured account in a financial institution"
(e) checking account.

10. Biche Consultation About BOT Property, Sale or Lease Permitted

In June 2016, Ms. Baker, BOT's successor trustee, asked Kast as a real estate broker, to explore ways for him to sell, lease or refinance the BOT's Valley Center property. CPC 16012(b) and BOT Section 9.08 (Vol 2 Dkt 213-1 Pg 83) empower her to do this.

Answer Brief Page 22 ¶ 2 line 3-6, Order (Vol. 1. Dkt 243 17: 6-8). The magistrate erred. Kast would not and could not sign to sell any BOT property after he resigned as trustee 12/31/15. All title companies review trust documents before agreeing to insure the title to see who is empowered to sign for the trust,

just as First American did (Vol 15 Exh 5). BOT is irrevocable. Kast couldn't finance the BOT property because he didn't have a personal bank account. Unable to finance the Valley Center property herself Ms. Baker, as successor trustee, decided to sell using a local real estate broker and signed the sale documents. McCulloch tampered with the Biche email evidence, for the full text of the emails *see* (Vol. 15 Exh 21).

(Vol 1 Dkt 243 17:19-20) The magistrate was confused by McCulloch about the difference between a beneficiary, a settlor and trustee, which is basic trust law (*see* CPC definitions in Glossary).

11. No Comingle Between Personal and Bot Funds

Kast and Ms. Baker put their social security into a bank account under Wellington Alexander & Co., a corporation affiliated with California Trust Co., a California registered company (Vol. 15 Exh. 22) (Vol 15 Exh. 2-Glossary CPC 82). California Trust Co. provides trust management services as permitted under CPC 16225(2)(b) "company affiliated with trustee" and Wellington provides bill payment services. Wellington and California Trust Co. are not owned by the private Black Oak Trust (Vol 15 Exh 2 Glossary CPC 83).

Kast and Ms. Baker agreed in 2007 that they would equally share their living expenses. Should Kast or Baker be unable to contribute his/her equal share that month and the other has the means to make up the difference, then the person who is able to do so will lend to the other the amount of their shortfall. (Vol 15 Exh. 23)

The Wellington account is to separate Baker and Kast's personal living expenses like rent, utilities, food, health care, etc. from the BOT's operating account to avoid any comingling between their personal expenses and the BOT. Kast is not the beneficiary of California Trust Co. or any other business or private trust. None of Kast's activities as trustee meets California's test for alter ego. Due to this lawsuit, which has driven away Kast's former and potential clients and exhausted Kast's nominal inheritance, Baker has supported Kast for the last 10 years.

III. Motion to Amend the Copyright Judgment Should Be Dismissed Based on Statute of Limitations

The magistrate erred again by not dismissing the MTA. In Kast's Opening Brief, he stated why Rule 6(b)(2), 59(e) and 60(b) and its 1946 amendment required the magistrate to dismiss the MTA. McCulloch's answer doesn't mention his compliance with Rule 60(b) amended 1946 by filing two lawsuits, USDC case no. 3:17-cv-02427-RS before Judge Seeborg and his San Mateo County lawsuit no. 17-cv-04633. McCulloch knew when he filed the MTA that it should be dismissed which is why he filed the independent lawsuits that justify why the MTA should be dismissed. The magistrate's intentional partial statement of rules 59 and 60 and omitting rule 60's one year time limit in his order shows his bias against Kast.

None of McCulloch's "motion practice" prior to filing the MTA had anything to do with the BOT or discovery about whether the BOT was revocable or irrevocable. The truth is all of McCulloch's "motion practice" was opposing Kast's IFP application, Kast's motion to stay the judgment without supersedes bond,

his opposition to Kast's discovery and motion to compel how McCulloch came to possess Kast's stolen bank statements, without a subpoena to the banks.

McCulloch's claim that the BOT was revocable in any of his filings was corrected by Kast in ER Dkt 133 15:3 and ER Dkt 163: 6 (vol 15 exh 26) 463 days before McCulloch's ostensibly "new evidence". His "new evidence" was First American Title telling him in November 2016 that he had no claim on Ms. Baker or the BOT's property because the BOT became irrevocable in 2007.

IV. Oral Argument Transcript and Magistrate's Order Excerpts of Record

The transcript supports Kast's assertion that the magistrate lacked sufficient knowledge of California trust law and was therefore taken advantage of and intentionally "confused" by McCulloch.

McCulloch stated he never intended Baker to be personally liable for Kast's debt. By the magistrate saying the properties "never transferred from the KKLT to the BOT", the magistrate has taken away Ms. Baker's retirement savings without due process and exposed them to McCulloch, an unjustified overreach by the magistrate.

12:5-8 Court: Baker as Kast alter ego doesn't fly

13:4-13 Court—No Federal Jurisdiction over Baker (or her property).

13:9 McCulloch—We're not saying Baker is personally liable

13:20-24 McCulloch—alter ego to include Kast's fictitious businesses

14:18-21 McCulloch—"Baker not being personally held liable for anything, not being added as a party".

15:8 Court—"I don't like that phrase, alter ego"

22:2-23:19 Court—"what's a lifetime beneficiary" (basic trust law)

22:18-23:18 Court—regarding "grantor trust" tax treatment (basic trust law)

22: 21-25:13 Lund—Subject Matter Jurisdiction discussion

29:1-6 Lund—Statute of Limitations has expired on fraudulent conveyance

29:7 Lund—Baker is a bona-fide creditor of Kast

30:14-18 Court—"Mr. McCulloch, do you seriously think that there's more than one trust here?"

34:4-9 McCulloch—created a revocable trust that becomes irrevocable when his wife or he dies. McCulloch says his revocable trust that converts to an irrevocable trust is legal whereas, Kast's revocable trust that converted to irrevocable without Kast dying is not legal, doesn't make sense.

34:23-24 Court to McCulloch. "When you speak fast, the difference between "revocable" and "irrevocable" gets lost sometimes".

44:5-10. McCulloch lies to the court about grantor trust tax treatment, see taxes above.

49:4-22. Kast denies McCulloch allegation that Kast as an individual and Kast as trustee of the BOT are the same, they are not

- 50:17-23 McCulloch forged subpoenas
- 51:9-20 Kast refutes McCulloch's lies that the subpoenas were sent in error.
- 54:1-10 No requirement that trusts be notarized in California (basic trust law)
- 67:1-11 McCulloch lies to confuse magistrate about sending six forged subpoenas by referencing subpoena sent later to Baker
- 69:13-70:1 McCulloch lied to the court about forged subpoenas that bear his signature

V. Motion to Quash

FRCP 69(a)(2) doesn't say a creditor can commit fraud and forge court documents to obtain discovery. It is coercion and intimidation to threaten a respondent with a motion to compel, before the court makes its decision on a motion to quash. (Vol 15 Exh. 24) McCulloch's coercion enabled him to obtain documents that could be barred if Kast's Motion to Quash was granted.

Kast asks the court to strike all documents produced in response to the forged subpoenas. If the court strikes the subpoenas and respondents documents then there is insufficient evidence to grant the Plaintiff's motion to amend the judgment.

VI. Pattern of Deceit

Kast believes that he and McCulloch are required to be honest with the court. Kast has been truthful however, there is no doubt that McCulloch has been repeatedly dishonest with the courts. McCulloch violated the American Bar Association code of ethics

sections 3.3 Candor (honesty) toward the tribunal, 4.1 Truthfulness to Others (forged subpoenas), 5.1 Supervisory responsibilities (forged subpoena cover up) and several others. McCulloch has repeatedly violated the ethics code, his declarations mean nothing. There's no doubt McCulloch forged six USDC subpoenas. (Vol 15 Exh. 24) bearing his signature, sent from his New York office, by his partner.

For a list and exhibits of McCulloch and his associates potentially unethical and criminal violations please *see* (Vol 15 Exh. 24).

From the beginning of this lawsuit McCulloch, Kleinman, Ayala, McCulloch's disbarred and incarcerated partner Danial Nelson, Jim Erickson and his employee Jessie Hughes, have shown they will commit perjury, forge court documents, obtain stolen property, commit fraud on the court, wire fraud and ethics violations to win this case so they can steal an innocent person's (Baker) retirement savings. Kast asks the court to take the appropriate action including sanctions for their disdain for the rule of law, it shouldn't be overlooked or given a slap on the wrist.

SUMMARY

The magistrate's order contains many significant errors. The evidence and the law are overwhelmingly in Kast's favor.

There is no doubt the California Probate Code and statutes prove the Black Oak Trust instrument is a properly drafted, executed and legal irrevocable trust under California law. Kast, as the trustee of the irrevocable Black Oak Trust, acted within the law.

There is only ONE trust in evidence (Vol 2 Dkt 213-1 Pg 34-141). There's no doubt under BOT section 5.01 that there is SINGLE irrevocable trust, not two trusts. There is no doubt that the magistrate lacked subject matter jurisdiction for the reasons cited in Kast's Opening Brief and the fact that there is no Federal Probate Code. The deed errors should be ignored because San Mateo County Recorder and the State of California, say they lack "legal sufficiency".

The BOT's special powers of appointment and spendthrift clauses prevent McCulloch from taking Ms. Baker's property and income.

The magistrate erred when he omitted important sections of Rules 59(e) and 60(b) amended 1946 that have a one year time limit, which justifies dismissing the motion to amend the copyright judgment based on the statute of limitations and McCulloch never stating a Rule 60 claim.

There's no doubt the properties transferred to the irrevocable Black Oak Trust in compliance with the California Probate Code 15202 and 15206 and BOT section 1.04 on December 30, 2007. There was no fraudulent transfer because the properties were transferred to satisfy Kast's to Ms. Baker 5 years before McCulloch's lawsuit was filed or Kast knew McCulloch was asserting any claim against him.

"Kraig R. Kast as trustee of the Black Oak Trust dated 3-11-95" is not a fictitious business name under California law. The disclosure doesn't tie Kast as an individual to Kast as trustee of the irrevocable Black Oak Trust as an alter ego under California law. The irrevocable Black Oak Trust is recognized by numerous third parties including title companies, lenders and

service providers as legal, all of whom agreed to be bound by it. It is also recognized by San Mateo County, *i.e.* State of California as a valid trust.

There is proof that McCulloch lied to the court dozens of times, withheld evidence, intentionally misstated and omitted portions of the law, obtained and used Kast's stolen property, made perjured declarations, violated Rule 11 and potentially committed wire fraud by sending Kast's stolen property over the Internet to the District Court's ECF system. In addition, he filed documents with Kast, Baker and a BOT tenant's confidential financial information unredacted, in violation of the ECF rules, to harass Kast and Baker in violation of Article 1 Section 1 (Privacy) of the California Constitution.

In October 2015, Kast filed for In Forma Pauperis. The magistrate denied Kast's IFP application based on McCulloch's tampering with Kast's bank statements. Kast's fundamental right to representation was taken away and he has had to represent himself believing that the court will see the truth and dismiss the motion to amend and the copyright judgment.

The magistrate dismissed Ms. Baker from the plaintiff's motion to amend the copyright judgment. The District Court has no jurisdiction over Ms. Baker. There is no justification or legal basis for the magistrate to take her property and retirement savings and give it to Kast, McCulloch and Erickson through this motion to amend the copyright judgment.

CONCLUSION

Kraig R. Kast respectfully asks the court to GRANT his appeal to dismiss, with prejudice, Erickson

App.144a

Productions Inc. and Jim Erickson's motion to amend
the copyright judgment (Dkt 189) for all of the reasons
stated herein.

/s/ Kraig R. Kast

Appellant Pro Se
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Foster City, CA 94404
(415) 806-9292

Dated: June 6, 2018

APPELLANT INFORMAL PETITION
FOR REHEARING EN BANC
(MAY 15, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERICKSON PRODUCTIONS INC.
and JIM ERICKSON,

Plaintiffs-Appellees,

v.

KRAIG KAST,

Defendant-Appellant.

17-17157

On Appeal from the United States
District Court for Northern California

Kraig R. Kast
Pro Se Appellant
PO Box 4612
Foster City, CA 94404
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STATEMENT PURSUANT TO FRAP 35(B)(1)

Defendant-Appellant Kraig R. Kast (Kast) respectfully petitions the En Banc Court for rehearing De Novo of his appeal of the District Court's order (Dkt 243) known as the Plaintiff Erickson's Motion to Amend the Copyright Judgment (Dkt 189) pursuant to FRAP 35(b)(1).

Kast, the defendant and appellant, denies each and every allegation contained in the Plaintiff's complaint and denies each and every one of the panel's affirmations of the district court's order (dkt 243) contained in the panel's memorandum Dkt 348. Kast includes his opening and reply briefs and exhibits in his appeal of the motion to amend and his answer brief and exhibits from the motion to assign in this informal En Banc Petition.

The panel's decision has wide-ranging effect, not only in California, but in 49 other states as it directly impacts private Testamentary and Inter Vivous [sic] Trusts. I respectfully request the En Banc Court to re-examine the facts and give careful consideration to my arguments and requests.

INTRODUCTION

Following a jury trial, during which Kast had inadequate legal representation, the district court entered judgment in case no. 5:13-cv-05472, against Kraig Kast ("Kast") as an individual only, in favor of Jim Erickson and Erickson Productions Inc. (collectively, "Erickson") on Erickson's copyright claims. Kast appealed Pro Se the judgment, case no. 15-16801. One year 98 days after the copyright judgment was entered, Erickson filed a motion to amend

the copyright judgment (Dkt 189) to include several unrelated parties including Kraig Kast as Trustee of the revocable Black Oak Trust and Mariellen Baker (Baker) as Successor Trustee and Sole Lifetime Beneficiary of the irrevocable Black Oak Trust.

Baker Declined the District Court's Jurisdiction (Dkt 222).

In October 2017, the district court magistrate entered a judgment (Dkt 243) amending the copyright judgment to include Kraig Kast as Trustee of the revocable Black Oak Trust. As part of that judgment the district court declared, 10 years after Kast funded the irrevocable trust to repay Baker's loan to him, that Kast's property never transferred from the revocable trust to the irrevocable trust. The district court made this decision in part based on deeds that are considered by California to have no "legal sufficiency or correctness". The district court also incorrectly decided that Kast as an individual is an alter ego of Kast as trustee of a trust, based on California's Fictitious Business Name law.

Kast appealed the district court's decision case no. 17-17157, Kast's opening and reply briefs and exhibits were filed as dkt 19, 28, 29 and dkt 311-312 of case no 5:13-cv-05472.

The panel resolved Kast's appeal of the copyright judgment, case no. 1516801, in a published opinion *See Erickson Prods., Inc. v. Kast*, ___ F.3d ___, 2019 WL 1605668 (9th Cir. Apr. 16 2019). The panel then addressed Kast's appeal of Erickson's motion to amend the copyright judgment, case no. 17-17157, District court's order that added Kraig Kast as Trustee of the Black Oak Trust (a/k/a Kraig Kast, Trustee of the

Black Oak Trust dated March 11, 1995)." as a judgment debtor. The panel had jurisdiction under 28 U.S.C. § 1291.

In its Memorandum dated May 1, 2019 (Memorandum) (Dkt 348), the panel affirmed the district court's order that there was no transfer of property from Kast to his creditor, Baker, in 2007. It should be noted that the district court's order was almost word for word what Erickson's attorney submitted to the district court.

SUMMARY OF THE ARGUMENTS

The panel's conclusion that the district court magistrate did not err in his order to amend the copyright judgment (Dkt 243) cannot be reconciled with district court Article Three Judge Kho's [*sic* "Koh", this change has been made going forward] order (Dkt 341) which cited FRCP 17(b) lack of Capacity as it applies to Baker. In that order, Judge Koh correctly recognized that the irrevocable trust is valid; that Kast resigned as trustee of the irrevocable trust before Erickson filed his motion to amend the copyright judgment and Baker is the successor trustee and beneficiary of the irrevocable Black Oak Trust.

Judge Koh's order denied Erickson's claims against Baker as Trustee of the irrevocable Black Oak Trust (who Erickson named as a co-defendant in the motion to amend). In Erickson's pleadings, his attorney Kevin McCulloch reiterated that he didn't hold Baker, as an individual, liable for anything.

There is no federal probate code; all probate law resides in the states, for this reason probate issues are litigated in the states. Trusts that litigate in Fed-

eral Court are Employee Benefit Trusts (ERISA) and private trusts where there is a bankruptcy or tax issue. In this case there are no bankruptcy or tax problems with the trust or with the trustee and the trust is not an ERISA trust, it is a private trust under California law which should be litigated in state court.

It is settled law all 50 States that the instant a private irrevocable trust is executed and funded by the settlor nothing the settlor does or says after that date makes the irrevocable trust revocable.

The panel's memorandum can't be reconciled with the facts of this case as well as the superseding order by Judge Koh; the California Probate Code (CPC); the State of California and San Mateo County's governmental laws 27201 regarding the lack of "legal sufficiency or correctness" of recorded of documents, the California Business and Professions Code 6500-6592- The Professional Fiduciaries Act, the Internal Revenue Services' recognition that private Trust's are governed by State law not Federal law, Subject Matter Jurisdiction Rule 12(b)(1), Rule 17(b) Baker's lack of capacity and the Statute of Limitations under FRCP 59(e), FRCP 60(b) amended 1946. The memorandum did not address California Government Code 27201 regarding legal sufficiency of recorded documents. The panel never addressed Kast's reference to *Laycock v. Hammer*, in the California Court of Appeal, No. D046422. Decided: July 06, 2006, which is directly relevant.

There are also issues for the En Banc Court to consider related to Kast's Res judicata rights and Baker's collateral estoppel [sic] rights, Mariellen Baker rights to due process under the Fifth Amend-

ment Section 1 and sustentative due process under the Fourteenth Amendment Section 5 of the US Constitution. There are also California's state's rights issues as to whether the state's have the right to create and enforce their own probate and governmental laws.

Kast asks the En Banc Court to review Kast's opening and reply briefs and evidence fairly and impartially. The law is on Kast, Baker, First American Title, The County of San Mateo, California and the lender's side. As Kast's briefs and exhibits in this appeal amount to several hundred pages, Kast will not burden the Court with a second set of the documents in this De Novo Petition. Kast asks the En Banc Court to please review the documents in evidence and attached here to for emphasis. Should the En Banc Court wish Kast will provide additional documentation that occurred after the initial filing of the appeal.

ARGUMENTS

I. Jurisdiction

Memorandum Paragraph (MP) 3 ¶ 1.

Opinion

The panel asserted jurisdiction by citing two cases *Peacock v. Thomas*, 516 U.S. 349 (1996) and *Hoffman v. Beer Drivers*, 536 F.2d 1268 (9th Cir. 1976). The District court asserted jurisdiction based on *Peacock v. Thomas and Thomas, Head v. Buster*, 95 F.3d 1440 (9th Cir. 1996)

a. No Jurisdiction over Baker

Erickson sued Baker as Kast's co-defendant on the motion to amend the copyright judgment (dkt

189) in November 2016. Baker, as Trustee of the Black Oak Trust, was never sued in the copyright judgment; Baker was not added as a defendant after the trial but before the judgment was entered, Baker as Trustee of the Black Oak Trust declined the district court's jurisdiction (dkt 222); the panel should have considered Baker's collateral estoppel rights; the panel should have considered the spendthrift and Powers of Appointment clauses in the trust agreement that prohibits taking a beneficiaries property; the panel should have considered that Baker didn't have Capacity under FRCP 17(b) and the panel should have considered Baker's rights to due process under the Fifth and Fourteenth Amendment to the US Constitution.

The panel should have considered Judge Koh's order dkt 341. The panel should also have considered sending the question of the Black Oak Trust's validity to the California Superior Court for San Mateo County.

As Judge Koh stated in her order (dkt 341) Erickson sued Mariellen Baker as Trustee of the Black Oak Trust dated 3-11-95. Under FRCP 17(b), Baker doesn't have Capacity to sue or be sued. Judge Koh correctly dismissed Erickson's claims against Baker as Trustee of the Black Oak Trust dated 3-11-95. The panel also should have dismissed Baker as Trustee of the Black Oak Trust as well.

b. No Subject Matter Jurisdiction

CPC 82 doesn't recognize ERISA trusts as trusts under California law. The panel and district court cited *Peacock v Thomas* 516 U.S. 349 (1996), but that dealt with ERISA issues, *Hoffman v Beer Drivers*

536 F.2d 1268 (9th Cir. 1976), but that dealt with a National Labor Relations Board boycott issue. The district court cited *Thomas, Head et al Plaintiffs-appellees, v. Jack Buster, Defendant-appellant, et al* 24 F.3d 1114 (9th Cir. 1994), but this case also involves ERISA trusts that are not considered trusts under California law. These cases support why litigation of a California private trust should be litigated in California Courts not Federal Courts.

These cases are irrelevant under California law to establish subject matter jurisdiction in this case. A more relevant case is *Laycock v. Hammer* that directly challenged the validity of a California irrevocable trust that was decided in the California Court of Appeals. Kast briefed this case dkt 311-1 of case no. 5:13-cv-05472.

For the panel to determine that the district court did not err, they should have decided that Amendment 2 to the revocable Kraig Kast Living Trust dated 3-11-95 is valid, even though it fails that test under California Probate Code (CPC) 15202 and 15206, because it was never funded and never notarized.

The panel should have decided whether Amendment 2 or Amendment 3 was valid under California law, they did not. This lack of clarity resulted in the panel creating two trusts that exist side by side, where before there was only "a single" trust as stated in the irrevocable trust agreement section 5.01.

The panel should have sought guidance from the California Supreme Court, as it has in the past when private trust issues are before it.

Because the panel didn't request guidance from California, the issue of which trust is or is not valid remains unresolved. An irrevocable trust that was easy to administer has become a quagmire.

Basic contract law states that the most recent contract, *i.e.* Amendment 3, is the binding contract. Therefore, Amendment 3 that created the irrevocable trust and which was correctly funded is the only valid trust agreement.

The panel cited California case *Zanelli v. McGruth*, and California Probate Code (CPC) 18200 Please note that while the panel ignored Laycock v. Hammer which is more relevant. The panel's reliance on Zanelli is wrong for the following reasons. CPC 21102(a) says "The intention of the transferor (Kast) as expressed in the instrument controls the legal effect of the dispositions made in the instrument". Amendment 3 page 1 Dkt 213-1 states twice on page 1 that the intent of the settlor is that the trust is irrevocable. CPC 18200 and Zanelli are irrelevant in this case.

The district court and the panel said that the properties never transferred from the revocable trust to the irrevocable trust, this is wrong under California law. CPC 15202, 15206(b) state a trust is only valid when it is funded.

CPC 15202 says: "A trust in relation to real property is not valid unless evidenced by one of the following methods:

- (b) By a written instrument conveying the trust property signed by the settlor, or by the settlor's agent if authorized in writing to do so."

CPC 15206 says: "A trust in relation to real property is not valid unless evidenced by one of the following methods:

- (a) By a written instrument signed by the trustee, or by the trustee's agent if authorized in writing to do so.
- (b) By a written instrument conveying the trust property signed by the settlor, or by the settlor's agent if authorized in writing to do so.

The En Banc Court will please refer to the irrevocable trust agreement Amendment 3 Schedule/Amendment A (dkt 213-1) which lists the four properties Kast conveyed (transferred) into the irrevocable trust and is signed by Kast as settlor on December 30, 2007, which complies with CPC 15202(b) and 15206.

The En Banc Court will note there is NO written instrument attached and signed that conveys the property to the revocable trust therefore it is not valid.

Kast asks the En Banc Court to reverse the district court's order Dkt 243.

c. Relevant District Court Order

Following the retirement of district court magistrate the motion to amend the Copyright Judgment (Dkt 189) was inherited by Judge Koh. While the panel was deciding Kast's appeal of the Copyright Judgment, Erickson sought to enforce District court Lloyd's order (Dkt 243) and to take Baker's property. To do this Erickson filed a motion to assign (Dkt 321). In the motion to amend, Erickson's attorney

Kevin McCulloch concocted a bizarre story that claimed Kast's revocable trust and irrevocable trust both exist.

Judge Koh read the full case history of Erickson's motion to amend and Erickson's motion to assign and decided to deny the motion to assign (Dkt 341). In Judge Koh's order she decided three important things.

1. Judge Koh agreed with First American Title. The irrevocable trust's lenders and the County of San Mateo that Baker was and is the successor trustee and beneficiary of the irrevocable trust.
2. Kast was not the trustee of the irrevocable trust at the time Erickson's attorney filed the Motion to Amend the Copyright Judgment (Dkt 189).
3. Baker is not subject to the District Court's jurisdiction because of FRCP 17(b)'s capacity to be sued.

With this appropriate order, Judge Koh denied Erickson's motion to assign to enforce the motion to amend the Copyright Judgment.

Judge Koh's order was submitted to the panel as a Motion to Augment the Record and Request for Judicial Notice (Dkt 338) on November 6, 2018, six months before the panel made its decision.

Kast asks the En Banc Court to either grant Kast's appeal of Erickson's motion to amend or at the very least remand the question of the validity of the irrevocable trust to the California Superior Court for the County of San Mateo, which is the proper jurisdiction.

II. Statute of Limitations

Opinion

M4 ¶ 2-3 and 4 ¶ 3. The district court and the panel asserted that the Statute of Limitations under Rule 60(b) amended 1946 and 59 (e) didn't apply citing the In Levander case which said that a motion could be filed within a "reasonable" time. The panel stated "in light of the lengthy investigation Erickson engaged in to learn about Kast's assets, the motion to amend was brought within a "reasonable time"

Argument

The truth is Erickson didn't do or need to do a "lengthy investigation". In 2011 Erickson and McCulloch thought that Kast's company Atherton Trust Co. was a big wealthy company. They didn't know Atherton was a start-up company.

Kast borrowed money from Baker and hired a attorney who claimed to be an experienced copyright trial attorney. However, Kast realized during the trial in April 2015, when his attorney didn't object when he should have, that he was receiving inadequate legal representation. This was confirmed by the panel in its decision on Kast's appeal of the copyright judgment (dkt 348). After the judgment was entered in August 2015, Erickson learned in Kast's In forma Pauperis application and motion for a stay of judgment without supersedes bond in October 2015, that Kast, as Kast had repeatedly said, didn't have any money and that Atherton had no clients and no assets due to the copyright lawsuit.

McCulloch didn't know Kast resigned as trustee in December 2015. McCulloch placed a lien against a

Black Oak Trust property, in January 2016 long before he filed the motion to amend. Erickson could have filed his motion to amend before the statute of limitations expired, but didn't.

McCulloch filed the motion to amend after he learned on November 3, 2016 that First American Title had removed his illegal lien when Baker, the successor trustee, sold the trust property on November 2, 2016. McCulloch concocted a bizarre story about two trusts and took advantage of the district court who knew almost nothing about California trust law.

Argument

a. No Fictitious Name

see California B & P Code 17900

“(b) As used in this chapter, “fictitious business name” means: (1) In the case of an individual, a name that does not include the surname of the individual or a name that suggests the existence of additional owners, as described in subdivision (c).”

see CPC 16222(b)

“(b) Except as provided in subdivision (c), the trustee may continue the operation of a business or other enterprise only as authorized by the trust instrument or by the court. For the purpose of this subdivision, the lease of four or fewer residential units is not considered to be the operation of a business or other enterprise.”

The district court used California's FBN law as justification for his saying “no transfer of property occurred”. and applied it three ways: To say that

Kast as an individual is the same as Kraig Kast as Trustee of the Black Oak Trust dated 3-11-95 to add Kast as Trustee as a judgment debtor, to say no transfer of property from Kast to the irrevocable trust took place, and to say that Kast as Trustee shows the FBN is Kast's Alter Ego to support using the In Levander case to extend and neuter Kast's statute of limitations defense. In fact, the district court's entire decision about the statute of limitations decision relies on California's FBN statute. and stated that Kraig Kast as an individual is the same as Kraig Kast as Trustee of the Black Oak Trust because California's legally mandated description Kraig Kast Trustee of the Black Oak Trust is a "Fictitious Name" for Kraig Kast as an individual. In Levander is based on California CCP 187. Since that didn't directly apply, the district court had to use California's Fictitious Business Name (FBN) Statute to try to support his decision on Alter Ego so he could cite In Levander. The district court's reasoning fails on multiple fronts.

The legal description on the Trust's loans complies with CPC 16009(b) that says:

"The trustee has a duty to do the following:

- (b) To see that the trust property is designated as property of the trust."

and the irrevocable trust agreement section 1.01.

Next, consider California's Fictitious Business Name Statute 17900(a)(1) and (b)(1) requirements for when a Fictitious Name must be used. A FBN is used when the business or person's name "doesn't include the surname of the individual". The legally mandated description Kraig Kast Trustee of the Black

Oak Trust dated 3-11-95 contains his surname" Kast" it is not a FBN, it is not Kast's Alter Ego under CCP 187. If the FBN is not Kast's Alter Ego, then In Levander doesn't apply.

b. Black Oak Trust Not a Business

There is a second FBN Alter Ego test that the district court's decision fails, "The Black Oak Trust is not a business". Under CPC 16222(b), for a trust to be considered a business it must own more than four (4) properties. The Black Oak Trust has never owned more than four properties.

III. California Governmental Law

MP 3 ¶ 2.

Opinion

The panel heavily relied on deeds to determine that the irrevocable trust was revocable. It claimed that Kast's explanation as to why errors on the deeds occur was "unpersuasive".

Argument

Deeds

The deeds in evidence refer to property transactions that took place between 2008-2011. The En Banc Court will note that they read "from the Kraig Kast Living Trust to the Black Oak Trust". If it was Kast's intent to put the properties into the Kraig Kast Living Trust the deeds would have read from the Kraig Kast Living Trust to the Kraig Kast Living Trust, they did not.

Please see Exhibits in the opening and reply briefs that include copies of deeds that shows the properties were correctly conveyed.

California knows that a significant amount of deeds have transposed APN (parcel) numbers, spelling and property description errors. That is why under California governmental law 27201, California and San Mateo County view recorded documents, *i.e.*, deeds as not having any "legal sufficiency or correctness" (Exhibit in Reply brief-screenshot referring to Gov Code 27201). The San Mateo County Recorder's website says: "When a document is presented to our office for recording, it is only examined for "recording requirements" and not for its correctness or legal sufficiency". Thus the deeds are irrelevant because they lack legal sufficiency under California law.

IV. Behavior

Opinion

After Kast resigned as trustee, Kast "behaved" as if he was the trustee therefore, Kast is the trustee

Argument

MP 3 ¶ 3 and MP 4 ¶ 1.

CPC 16247 says:

"The trustee has the power to hire persons, including accountants, attorneys, auditors, investment advisers, appraisers (including probate referees appointed pursuant to Section 400), or other agents, even if they are associated or affiliated with the trustee, to advise or assist the trustee in the performance of administrative duties."

The panel cited California case *Gaynor v. Bulen*, the case is irrelevant because it involved a person who was not a trustee conspiring with the trustees to enrich himself and the trustees at the expense of the beneficiaries. Kast and Baker didn't conspire with Baker at the expense of Baker (herself) as the Beneficiary.

The panel also cited *In re Allustiarte*, 786 F 2d 910,914 (9th Cir 1986). This case is a bankruptcy case that alleged fraudulent transfer. This case is based on Intent. Kast stated his intent (CPC 15201) to convey the property in compliance with CPC 15202 and 15206 listing the properties on the signed Schedule A on December 30, 2007. There was no intent by Kast to "confound" Kast's creditors.

Next the panel cited *Solomon v N. Am. Life and Cas. Ins. Co.*, 151 F.3d 1132, 1138 (9th Cir. 1998) This excerpt was taken out of context. The court said "there is no evidence that Allianz and Solomon had a fiduciary relationship from which a fiduciary duty would flow".

Kast is a licensed Professional Fiduciary (license #558). The panel stating that Kast's actions as a licensed Professional Fiduciary amounted to "behaving" as a trustee, when he was not the trustee, is in direct conflict with California's Professional Fiduciaries Act-Bus & Prof Code 6500-6592 that permits him to provide a broad range of services to his clients see Exhibit in reply brief, in this case to Baker and the irrevocable trust under CPC 16247. The other cases cited are irrelevant for the same reasons.

Kast is a licensed Professional Fiduciary (License #558), a licensed Real Estate Broker (#014226063) and

a licensed Insurance Broker (0G91440) with no negative notations on any of his licenses. It is perfectly legal under CPC 16247 for Baker as trustee to ask Kast to manage the trust property after he resigned as trustee, given his licenses and experience with managing the properties.

If Kast forgot to change a subtitle on a bank account after he resigned as trustee, from Trustee to POA (Exh 3) or Fiduciary it is not sufficient under CPC 16247 and 6500 to say that Kast was "behaving" as the Trustee.

After he resigned as trustee, Kast could not and did not sign legal documents opening or closing a trust bank account, sign property sales, rental or purchase documents or any other legal document after he resigned as trustee of the irrevocable trust on December 30, 2015, only Baker the successor trustee could do that.

Kast's reply brief enclose correspondence from First American Title showing that First American read the same irrevocable trust agreement the panel and district court read and decided Kast is not the Trustee, that the irrevocable trust is valid and that Baker is the legitimate successor trustee. They then insured the title to the trust's properties for hundreds of thousands of dollars. Kast also included documents related to the sale of a trust property that showed they were signed by Baker not Kast. First American Title's and Judge Koh's decision that Baker is the legal successor trustee of the irrevocable Black Oak Trust carries greater weight than Kast's oversight on a bank statement when he was under duress.

Clearly "behavior" is not the criteria for being considered a trustee. Judge Koh saw no evidence that Kast was acting as the Trustee.

V. Taking Baker's Property Violates the Trust's Spendthrift & Power of Appointment Clauses

Once again CPC 21102(a) states that the trust agreement (instrument) controls the legal effect of what happens after a trust is executed. Baker was never a named defendant or judgment debtor. The spendthrift provision CPC 15300-15301 and section says:

"no beneficiary (Baker) may assign, anticipate, encumber, alienate, or otherwise voluntarily transfer the income or principal of any trust created under this trust. In addition, neither the income nor the principal of any trust created under this trust is subject to attachment, bankruptcy proceedings or any other legal process, the interference or control of creditors or others, or any involuntary transfer."

Under CPC 681(a)-Powers of Appointment it says:

"property covered by a special power of appointment is not subject to the claims of creditors of the powerholder or of the powerholder's estate or to the expenses of the administration of the powerholder's estate."

There are also Constitution issues for the en Banc Court to consider. The district court and the panel cannot take Baker's retirement savings, 10 years after she was repaid, without due process under the Fifth and Fourteenth Amendments.

Most importantly Judge Koh in her decision (Dkt 341) recognized Baker is the trustee of the irrevocable Black Oak Trust and cited FRCP 17(b) capacity to be sued, as the basis for the district court not having jurisdiction over Baker or the irrevocable Black Oak Trust. Judge Koh's order over road the district court's decision regarding the motion to amend in Dkt 243.

VII. Baker Should Not Be Deprived of Her Constitutional Right to Due Process

Opinion

The district court and the panel said that the Kast never transferred (conveyed) the properties to the irrevocable trust in settlement of his debt to Baker.

Argument

Fifth Amendment. no person shall be deprived of life, liberty, or property, without due process of law.

Fourteenth Amendment, Section 1. The district court took Baker's retirement savings without consideration of her substantive due process.

Collateral Estoppel

As the motion to amend the copyright judgment is the same suit as the copyright lawsuit, Baker's collateral estoppel [sic] right is applicable.

Kast also raises the argument of the doctrines of res judicata (United States Supreme Court *Federated Department Stores, Inc. v. Moite* (1981) No. 79-1517 which held that "Res judicata bars re-litigation of the un-appealed adverse judgments against respondents as to their federal-law claims".

VIII. Constitutionality-States Rights

IRS recognizes that trust law resides in the States not the federal government. The IRS states it's position on private trusts and jurisdiction, see:

<https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-questions-and-answers>

The panel should have asked the California Supreme Court for its guidance before making its decision, as it has on other probate and trust issues because this decision directly effects California's State's rights to establish and enforce its own Probate, Governmental and Civil Laws.

The panel's decision undermines and voids California's right to make laws regarding probate, private trusts, what recorded documents lack "Legal Sufficiency and Correctness" and what licensed professionals can do and cannot do.

XI. Pro Bono Representation

Kast respectfully asks for an En Banc review and Pro Bono representation which was provided to him by the panel on the related copyright appeal.

XII. Conclusion

Kast's opening and reply briefs and this petition, support his objection to the motion to amend the copyright judgment. There is overwhelming evidence and law that supports his motion to reverse Erickson's motion to amend. Kast respectfully asks the En Banc Court to grant his petition for a rehearing. Kast asks the En Banc Court to please ask the California Supreme

App.166a

Court for its guidance as to the validity of the Irreversible Black Oak Trust dated 3-11-95.

Respectfully submitted:

/s/ Kraig R. Kast

Appellant and Defendant Pro Se

Dated: May 14, 2019

**BLACK OAK TRUST DOCUMENT,
RELEVANT EXCERPT**

The Black Oak Trust

Article One

This Irrevocable Trust Agreement is created on December 11, 2007 by amendment to the Kraig R. Kast Living Trust dated March 11, 1995. The parties to the agreement are: Kraig R. Kast, an individual residing in Foster City, California (the "Settlor") and Kraig R. Kast, an individual residing in Foster City, California (my "Trustee").

I intend that this agreement create a valid trust under the laws of California and under the laws of any state in which any trust created under this agreement is administered. The terms of this trust agreement prevail over any provision of California law, except those provisions that are mandatory and may not be waived.

Section 1.01 Identifying My Trust

My trust may be referred to as "Kraig R. Kast, Trustee of the Black Oak Trust dated December 11, 2007 or Kraig R. Kast, Trustee of the Black Oak Trust dated March 11, 1995."

For the purpose of transferring property to my trust, or identifying my trust in any beneficiary or pay-on-death designation, any description referring to my trust will be effective if it reasonably identifies my trust. Any description that contains the date of my trust, the name of at least one initial or successor Trustee and an indication that my Trustee is holding

the trust property in a fiduciary capacity will be sufficient to reasonably identify my trust.

Section 1.02 Reliance by Third Parties

From time to time, third parties may require documentation to verify the existence of this agreement, or particular provisions of it, such as the name or names of my Trustee or the powers held by my Trustee. To protect the confidentiality of this agreement, my Trustee may use an affidavit or a certification of trust that identifies my Trustee and sets forth the authority of my Trustee to transact business on behalf of my trust in lieu of providing a copy of this agreement.

The affidavit or certification may include pertinent pages from this agreement, such as title or signature pages.

A third party may rely upon an affidavit or certification of trust that is signed by my Trustee with respect to the representations contained in the affidavit or certification of trust. A third party relying upon an affidavit or certification of trust shall be exonerated from any liability for actions the third party takes or fails to take in reliance upon the representations contained in the affidavit or certification of trust.

A third party dealing with my Trustee shall not be required to inquire into the terms of this agreement or the authority of my Trustee, or to see to the application of funds or other property received by my Trustee. The receipt from my Trustee for any money or property paid, transferred or delivered to my Trustee will be a sufficient discharge to the person or persons paying, transferring or delivering the money

App.169a

or property from all liability in connection with its application. A written statement by my Trustee is conclusive evidence of my Trustee's authority. Third parties are not liable for any loss resulting from their reliance on a written statement by my Trustee asserting my Trustee's authority or seeking to effectuate a transfer of property to or from the trust.

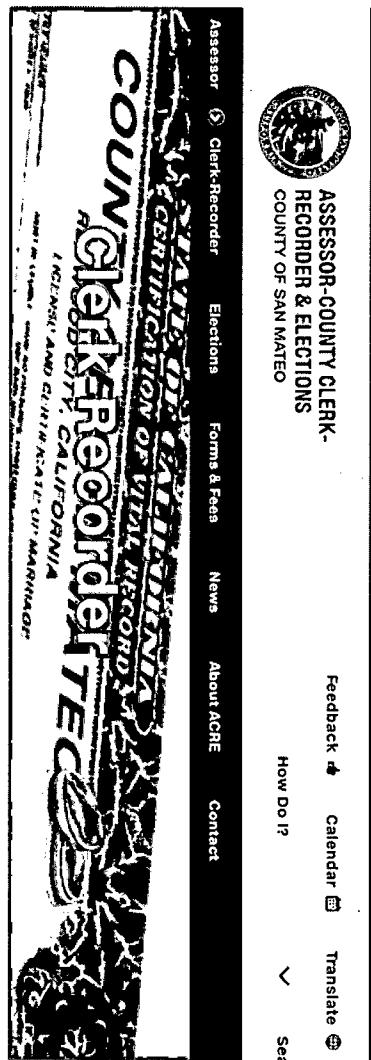
Section 1.03 An Irrevocable Trust

This Trust is irrevocable, and I cannot alter, amend, revoke, or terminate it in any way.

Section 1.04 Transfers to the Trust

I transfer to my Trustee the property listed in Schedule A, attached to this agreement, to be held on the terms and conditions set forth in this instrument.

Note: Image modified to fit inside the margins



COUNTY OF SAN MATEO ASSESSOR-COUNTY CLERK-RECORDER WEBSITE SCREENSHOT



Recording Requirements

When a document is presented to our office for recording, it is only examined for "recording requirements" and not for its correctness or legal sufficiency. Although we would like to give you as much information as possible, under California law, we are prohibited from providing any legal advice. (BPC 6125) This includes advising what document to record, providing any legal forms, and assisting with the preparation of any legal documents. It is recommended that you seek assistance from an attorney or authorized individual.

Each document presented for recording must conform to the following basic document requirements. Most documents have specific requirements that are not listed here.

- Property must be located in the county where the document is presented for recording. (CC 1169)
- Be authorized or required by law to be recorded. (GC 27201)
- Meet statutory requirements for that document.
- Be submitted with the proper fees and taxes. (CC 6301, 22201, 27351)
- Be photographically reproducible by microphotographic processes. (GC27201, 27361.6, 27361.7)