

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 11-56430

ROTHWELL, LTD.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

**PLAINTIFF-APPELLANT ROTHWELL, LTD.'S
EXCERPTS OF RECORD
VOLUME 5**

Appeal from the Judgment of the United States District Court
for the Central District of California
D.C. No. 10-cv-00479-RGK-FFM
(Honorable R. Gary Klausner)

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8 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION

10 ROTHWELL, Ltd., a Cayman Islands
11 Corporation,

12 Plaintiff,

13 v.

14 UNITED STATES OF AMERICA,

15 Defendant.

) CASE NO. CV-10-479-RGK (FFMx)
)
) **REQUEST FOR JUDICIAL NOTICE**
) **BY PLAINTIFF ROTHWELL, LTD. RE:**
) **CONTROLLED FOREIGN CORPORATION**
) **RULES SET FORTH IN SECTIONS 951, ET**
) **SEQ. OF THE INTERNAL REVENUE CODE**
) **AND EXPERT REPORT**
)
) TRIAL: Tuesday, June 14, 2011
) TIME: 9:00 A.M.
) CTRM: Room 850, United States Courthouse
) 255 E. Temple Street
) Los Angeles, C
) [Hon. R. Gary Klausner]

18
19 Plaintiff Rothwell, Ltd., by and through counsel undersigned, pursuant to Federal Rule of
20 Evidence 201, hereby respectfully requests that this Court take judicial notice of: (1)“Controlled
21 Foreign Corporations” rules set forth in Sections 951 *et seq.* of the Internal Revenue Code (aka
22 “Subpart F”), and (2) the expert report by Michael C. Durney, Esq., on those rules as they apply
23 to the issues in the above-captioned matter (Trial Exhibit #160), attached hereto.

24 Under Fed.R.Evid. Rule 201(d), judicial notice is mandatory when requested by a party
25 who supplies the court with necessary information. *O’Toole v. Northrop Grumman Corp.*, 400
26 F.3d. 1218 (10th Cir. 2007). Although matters of law are generally inappropriate subjects for
27 expert testimony, the Ninth Circuit recognizes that there may be “instances in rare, highly
28

1 complex and technical matters where a trial judge utilizing limited and controlled mechanisms,
2 under the matter of trial management, permits some testimony seemingly at variance with the
3 general rule.” *Flores v. Arizona*, 516 F.3d 1140, 1166 (9th Cir. 2008), citing *Nieves-Villanueva v.*
4 *Soto-Rivera*, 133 F.3d 92, 101 (1st Cir. 1997). In *Flores*, the Ninth Circuit found that expert
5 testimony may be helpful especially in a bench trial “where there was no danger that a jury might
6 give too much credence to a legal expert.” Moreover, the Ninth Circuit has held that “in
7 considering the admissibility of testimony based on some ‘other specialized knowledge,’ Rule
8 702 generally is construed liberally.” *U.S. v. Hankey*, 203 F.3d 1160, 1168 (9th Cir.), cert.
9 *denied*, 530 U.S. 1268 (2000). Furthermore, the Ninth Circuit and other circuits have affirmed
10 trial court decisions to allow experts to refer to terminology from applicable law in expressing
11 their opinions. *Nationwide v. Cass Information Systems, Inc.*, 523 F.3d 1051 (9th Cir. 2008).

12 Because resolving questions of law is the distinct and exclusive province of this Court,
13 Plaintiff respectfully submits Mr. Durney’s expert opinion to assist this Court in determining the
14 law with respect to the United States’ Controlled Foreign Corporation laws in applying those
15 rules to the facts in this case.

16 RESPECTFULLY SUBMITTED this 9th day of June, 2011.

17 WILLIAM A. COHAN, P.C.

18 By: *s/ William A. Cohan*

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2011, I did cause the foregoing Request for Judicial Notice by Plaintiff Rothwell, Ltd. Re: the "Controlled Foreign Corporations" Rules set forth in Sections 951 *et seq.* of the Internal Revenue Code and Expert Report to be served via the ECF system on the following:

AUSA Valerie Makarewicz, Esq., E-Mail: valerie.makarewicz@usdoj.gov
AUSA Darwin Thomas, Esq., E-Mail: darwin.thomas@usdoj.gov

By: s/ Alicia Cisneroz
Alicia Cisneroz, Legal Assistant

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

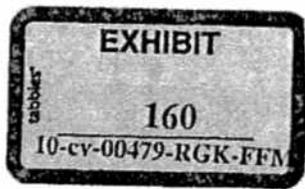
ROTHWELL, LTD.,
a Cayman Islands Corporation
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

Case No. CV-10-479-RGK (FFMx)

COMPLAINT FOR WRONGFUL LEVY

EXPERT REPORT OF MICHAEL C. DURNEY

February 22, 2011



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I, Michael C. Durney declare as follows:

1. I am over 18 years of age and otherwise competent to testify to the facts set forth herein. I would testify to them if called and sworn to testify as a witness before this Court.

2. I was retained by Plaintiff's counsel as an expert witness in this matter, regarding the foreign corporation rules of the Internal Revenue Code as they apply to Plaintiff's Morgan Stanley account and its earnings. My retention was conditioned on the understanding that I would, at all times, exercise my independent professional judgment based on my learning and experience in the profession, and not serve as an advocate for the Plaintiff.

3. In connection with this engagement, I have reviewed the Articles of Association of Rothwell Ltd, the Cayman Secretary Letter of Registration for Rothwell Ltd, the Certificate of Incorporation – Rothwell Ltd, The Companies Law Declaration for Rothwell Ltd, the Companies Law Memo of Association for Rothwell Ltd, Rothwell Ltd Issue of 100 Shares to Inceptre Holdings, the Register of Shares and Directors & Officers – Rothwell Ltd, Minute Book – Rothwell Ltd, First Meeting of the Board of Directors – Rothwell Ltd, Morgan Stanley Account Opening document– Rothwell Ltd, Affidavit for Section 184 of the Cayman Companies law– Rothwell Ltd, Rothwell Ltd Issue of 100 shares to Francis Trust 2010, the Francis Trust dated May 24, 1999, the Government's Proposed Jury Instructions in the Francis criminal case (U.S. District Court, C.D. CA, Case No.Cr-080494-SJO), and the Plea Agreement in the Francis criminal case.

4. Under the Internal Revenue Code, a person is usually taxed only on the income from property he actually owns; that is, property as to which the owner has

1 | legally enforceable rights to receive the income from the property and to dispose of the
2 | property by sale or otherwise.

3 | 5. In this case, Plaintiff, Rothwell, Ltd, is a foreign corporation wholly
4 | owned by the Francis Trust, not by Mr. Francis. While Mr. Francis is one of the
5 | beneficiaries of the Francis Trust, as a matter of law, Mr. Francis does not own any part
6 | of Plaintiff.

7 | 6. However, pursuant to the "Controlled Foreign Corporations" rules set out
8 | at Sections 951 *et seq.* of the Internal Revenue Code (also referred to as "Subpart F"),
9 | for United States tax purposes only, Mr. Francis, by reason of his being a beneficiary of
10 | the Francis Trust, is treated as the "owner" of Plaintiff's stock and is taxed on the
11 | income of Plaintiff.

12 | 7. The fact that Mr. Francis as a U.S. taxpayer is required to include the
13 | income of Plaintiff in his personal income tax returns does not mean that Mr. Francis is
14 | the actual "owner" of the Plaintiff's assets and income. The Internal Revenue Code
15 | cannot change the legal ownership of Plaintiff from the Francis Trust to Mr. Francis.
16 | Instead, all it means is that certain technical provisions of the Internal Revenue Code
17 | require inclusion of Plaintiff's income in the personal return of Mr. Francis.

18 | 8. In Proposed Jury Instruction 58 in the Francis criminal case, the
19 | government correctly described the general operation of the Controlled Foreign
20 | Corporation rules. I understand that this instruction was offered in connection with the
21 | Government's position at trial that the interest income earned by Rothwell with respect
22 | to accounts held at Morgan Stanley should have been reported on Mr. Francis' personal
23 | income tax returns.

24 | 9. In his Plea Agreement, Mr. Francis agreed that the interest income earned
25 | on Plaintiff's Morgan Stanley accounts should have been reported on his personal
26 |

1 income tax returns..

2 10. The Plea Agreement entered into between the government and Mr. Francis
3 is consistent with the Subpart F inclusion required under the Controlled Foreign
4 Corporation rules in this case.

5 11. The technical provisions of Subpart F work as follows:

6 a. To be a Controlled Foreign Corporation, at least 50% of the
7 ownership of the corporation must be owned by "United States
8 shareholders." 26 U.S.C. § 957(a). For these purposes, a "United
9 States shareholder" is a person owning at least 10% of the voting
10 stock in the foreign corporation. 26 U.S.C. § 951(b).

11 b. Even if the foreign corporation is a Controlled Foreign Corporation,
12 only certain types of income are subject to inclusion on the United
13 States shareholder's tax returns. 26 U.S.C. § 951(a)(1) and (2); 26
14 U.S.C. § 952(a). For example, most business income is not subject
15 to inclusion. However, the interest and dividends earned by a
16 Controlled Foreign Corporation are subject to inclusion. 26 U.S.C.
17 §§ 952(a)(2), 954(a)(1) and (c)(1)(A).

18 c. The amount of any Subpart F inclusion required to be reported on
19 the tax returns of United States shareholders is determined under
20 rules (26 U.S.C. §§ 951(a)(2)(A) and 958)), which incorporate (with
21 some minor adjustments) the complex constructive corporate tax
22 ownership rules of 26 U.S.C. § 318. These rules attribute ownership
23 among certain family members and between entities and their
24 owners/beneficiaries. For example, even if a taxpayer does not own
25 any interest in a Controlled Foreign Corporation in his own right,
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but he owns a 25% interest in a partnership and his grandson owns a 5% interest in that partnership, and that foreign partnership in turn owns 100% of the Controlled Foreign Corporation's stock, the taxpayer is treated as owning 30% of the Controlled Foreign Corporation's stock, and must report 30% of that income. See 26 U.S.C. §§ 951(a)(2)(A), 958, and 318(a)(1)(A)(ii) and (2)(A).

- 12. These Subpart F provisions apply to Mr. Francis as follows:
 - a. The Francis Trust, a foreign trust, is the sole shareholder of Plaintiff.
 - b. The Third Schedule to the Francis Trust states that the permissible beneficiaries of the Francis Trust were Mr. Francis, the mother and father of Mr. Francis, any children of Mr. Francis, and Oklahoma Film Holding Corporation, a company that I understand is owned 100 percent by Mr. Francis.
 - c. Under 26 U.S.C. §§ 958(a)(2), stock owned by a foreign trust is treated as if it were owned by the foreign trust's beneficiaries. Thus, Mr. Francis, his parents, his children (if any) and Oklahoma Film Holding Corporation are all treated for income tax reporting purposes as if owning interests in Plaintiff in proportion to their beneficial interest in the Francis Trust.
 - d. For purposes of the Subpart F inclusion, Mr. Francis is treated as owning any interests owned by his parents or children pursuant to 26 U.S.C. §§ 958(b) and 318(a)(1)(ii).
 - e. For purposes of the Subpart F inclusion, Mr. Francis is also treated as owning the full amount of any interest owned by his corporation. 26 U.S.C. §§ 958(b) and 318(a)(1)(ii).

1 13. Thus, for purposes of 26 U.S.C. §§ 958(a)(1) and 951(a)(2), which
2 requires the inclusion of the undistributed Subpart F income, Mr. Francis is treated for
3 income tax reporting purposes as owning all of Plaintiff's stock. Accordingly, he was
4 required to include the entire amount of the interest income of Plaintiff on his personal
5 return, irrespective of the fact that he was not the actual owner of Plaintiff.

6 14. The fact that Mr. Francis agreed in his criminal plea that he was required
7 to report the interest income from Plaintiff's Morgan Stanley does not mean that he
8 was, or that he agreed that he was, the actual "owner" of Plaintiff's Morgan Stanley
9 account, only that he was required to include the full amount of Plaintiff's interest
10 income on his personal tax returns pursuant to the requirements of Subpart F of the
11 Internal Revenue Code.

12 15. The fact that Mr. Francis was taxed under Subpart F on the interest of the
13 Plaintiff's Morgan Stanley account does not make Plaintiff a nominee for Mr. Francis
14 as stated in the Notice of Levy dated November 6, 2009, served on the Rothwell
15 Morgan Stanley account. Accordingly, the taking of the Rothwell Morgan Stanley
16 account pursuant to this Levy in order to satisfy the asserted tax liabilities of Mr.
17 Francis had no legal basis.

18 16. My qualifications are as follows:

19 17. I am an attorney licensed to practice law in the District of Columbia and
20 the State of California. I received my JD Degree from the University of California
21 Hastings College of Law in 1968. From 1968 to 1972, I served as a Trial Attorney with
22 the Tax Division of the Department of Justice and from 1986 to 1988 I served as
23 Principal Deputy Assistant Attorney General and Acting Assistant Attorney General for
24 the Tax Division of the Department of Justice. Apart from those six years, I have been
25 continuously engaged in the private practice of law, specializing in Federal tax practice,
26

1 with particular emphasis on the representation of taxpayers before the Internal Revenue
2 Service and the Department of Justice in civil and criminal tax matters.

3 18. I have been the author and co-author of articles for national and
4 international tax and financial publications, principally on tax compliance matters, and
5 co-author of *Criminal Tax Procedure*, Tax Management Portfolio No. 162-2nd. In the
6 previous ten years, I co-authored "The FBAR (Foreign Bank Account Report): A
7 Primer", *Tax Management- Estates, Gifts and Trusts Journal*, September 2009.

8 19. I have testified as an expert witness in numerous matters before federal
9 and state courts and administrative agencies, involving issues concerning compliance
10 with and violations of U.S. tax laws, specifically in the previous four years, in the
11 following matters:

12 ***Dunkin' Donuts, Inc. v. Wentworth Donuts, Inc., et al.***

13 U.S. District Court- Northern District of Illinois, No. 05-C5245.

14 Retained by plaintiff on issues involving federal tax violations
15 committed by defendant-franchisee.

16 ***Praveen Prasad, et al. v. Cold Stone Creamery, Inc., et al.***

17 U.S. District Court- District of New Jersey

18 Nos. 06-64; 06-758 (MLC)(JJH) (Consolidated Actions).

19 Retained by defendant on issues involving federal tax violations
20 committed by plaintiff-franchisee.

21 ***Joel Bickell, et al. v. Ahrens & DeAngeli, PLLC, et al.***

22 U.S. District Court- Eastern District of Washington, Case No. CV7-008-
23 RSM.

24 Retained by plaintiffs claiming legal malpractice in civil tax
25 representation of plaintiffs.
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John Behnke, et al. v. Edward Ahrens, et al.

Superior Court of Washington, King County, No. 06-2-31638-OSEA.

Retained by plaintiff on issues involving professional malpractice by defendant-attorneys.

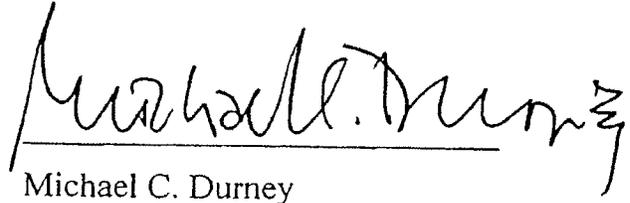
Joseph R. Francis v. United States

U.S. District Court- Central District of California, Case No. CV-09-9449-RGK

Retained by plaintiff's counsel on issues of taxation and ownership of foreign entities raised in jeopardy proceedings.

20. I am being compensated for my time in this matter at the rate of \$550 per hour.

Executed this 22nd day of February, 2011, in the District of Columbia.


Michael C. Durney

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10 UNITED STATES DISTRICT COURT
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 12 WESTERN DIVISION
 13

14 ROTHWELL, LTD., a Cayman
Islands Corporation,

15 Plaintiff,

16 v.

17 UNITED STATES OF AMERICA,

18 Defendant.

) Case No. CV 10-479-RGK(FFMx)

) TRIAL BRIEF BY UNITED STATES
) OF AMERICA

) Trial:

) Date: June 14, 2011

) Time: 9:00 a.m.

) Ctrm: 850

) Roybal U.S. Courthouse
) 255 East Temple St.
) Los Angeles, CA 90012

21
 22 In accordance with applicable local rule, the United States of America
 23 submits its trial memorandum in anticipation of the trial scheduled for June 14,
 24 2011.

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16 A. The federal tax lien attaches to property titled in the name of a

17 taxpayer’s nominee 12

18 B. California law recognizes nominee ownership 15

19 C. The California Supreme Court would likely adopt the familiar

20 factors relied upon by many other courts in determining

21 nominee ownership. 16

22 D. Rothwell is the nominee of Joseph Francis 20

23 IV. CONCLUSION 28

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**TABLE OF AUTHORITIES
FEDERAL CASES**

911 Management, LLC v. United States,
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5 Shades Ridge Holding Corp. v. United States,
 6 888 F.2d 725 (11th Cir. 1989) 13,17,19

7 Takahashi v. Loomis Armored Car Serv.,
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15 United States v. Beretta,
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17 United States v. Dubey,
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 20 363 U.S. 522, 80 S. Ct. 1282,
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24 United States v. Lang,
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2 W. Elliott, *Federal Tax Collections, Liens, and Levies,*
3 ¶ 9.10, p 18

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1 **I. INTRODUCTION**

2 The instant case is a wrongful levy action in which plaintiff Rothwell, Ltd.
3 (“Rothwell” or “plaintiff”), seeks the return of funds that were levied from its
4 securities account at Morgan Stanley to pay taxes assessed against Joseph R.
5 Francis (“Francis”). The account was seized by the IRS based on its determination
6 that plaintiff was holding the account as a nominee for Francis. Plaintiff disputes
7 that it was the nominee for Francis with respect to the account.

8 26 U.S.C. § 7426 allows a third party (a party other than the delinquent
9 taxpayer), to challenge an IRS levy as “wrongful.” A levy is “wrongful” if it is
10 upon property in which the taxpayer has no interest at the time the lien arose or
11 thereafter. Treas. Reg. § 301.7426-1(b); *Sessler v. United States*, 7 F.3d 1449,
12 1451 (9th Cir. 1993). Under certain circumstances, the United States may levy
13 upon property held by a third party, such as when a third party is the nominee of a
14 taxpayer who is indebted to the United States, or when a trust is a “sham.” *911*
15 *Management, LLC v. United States*, 657 F.Supp.2d 1186, 1191 (D. Or. 2009); *Juris*
16 *Trust Co. Ltd. v. United States*, 78 A.F.T.R.2d 96-6548 (E.D. Cal. 1996); *United*
17 *States v. Geissler*, 73 A.F.T.R.2d 94-459 (D. Id. 1993).

18 The claim of the United States of America is that plaintiff is the nominee of
19 Francis, Sands Media, Inc. (“Sands”), and Mantra Films, Inc. (“Mantra”), and the
20 levy served by the IRS on November 6, 2009 that seized the funds in Rothwell’s
21 Morgan Stanley account was not wrongful.

22 At the pre-trial conference held on June 6, 2011, the Court emphasized that
23 the issue in this case was whether Francis had control over plaintiff. While the
24 control a debtor has over an asset he placed out of the reach of his creditors is one
25 of the factors that determine nominee status, it is not the only factor. The United
26 States will establish not only that Francis retained control over the funds

1 transferred into plaintiff's levied securities account, but that plaintiff is the
2 nominee of Francis based on the following:

3 (1) No consideration or inadequate consideration paid by the nominee:

4 Francis transferred over \$15 million to Rothwell from Sands and
5 Mantra, and Rothwell provided no services or consideration to Sands
6 and Mantra in exchange. In turn, Francis fraudulently deducted the
7 \$15 million in transfers on the income tax returns of Sands and
8 Mantra.

9 (2) Property placed in the name of the nominee in anticipation of a suit or
10 occurrence of liabilities while the debtor continues to exercise control

11 over the property: Francis and his corporations have been involved in
12 a myriad of legal actions, both civil and criminal. Francis acted in
13 anticipation of liabilities he would otherwise have owed to the IRS
14 when he transferred funds to Rothwell.

15 (3) Close relationship between the debtor and the nominee: All ownership

16 interests held by Rothwell can be traced back to Francis, Sands and
17 Mantra. In addition, there is a strong and close relationship between
18 Francis and Rothwell through Francis' long-time personal attorney,
19 Brian Rayment, who serves as counsel to the Francis Trust, Rothwell,
20 and all Rothwell-related entities. Rayment is also the protector of the
21 Francis Trust, and his permission is needed before the Trustee
22 conducts any significant business on behalf of the trust.

23 (4) Failure to record a conveyance: there is no question regarding
24 Rothwell's ownership of the land in Mexico (which would obviate the
25 need for plaintiff to call its expert in Mexican law), yet Rothwell and
26 Francis have blurred the line as to the ownership of the residence in
27

1 Punta Mita, Mexico.

2 (5) Retention of possession by the debtor; and (6) continued enjoyment by
3 the debtor of benefits of the property. The millions transferred tax-
4 free from Sands and Mantra to establish Rothwell's levied securities
5 account was accessible to Francis when he requested the funds from
6 the Francis Trust's protector, his long time confidant, Rayment, that
7 Rothwell's funds be used to purchase property in Mexico. To date,
8 Francis still enjoys the use of the Punta Mita property for his personal
9 benefit.

10 For these reasons, not solely because of Francis' control but the other
11 aforementioned factors of nominee status, Francis had an interest in Rothwell's
12 levied securities account, as Rothwell is the nominee of Francis. As such, the levy
13 made by the IRS on November 6, 2009 upon Rothwell's Morgan Stanley account
14 was not wrongful under 26 U.S.C. § 7426.

15 II. STATEMENT OF FACTS

16 A. Francis, Sands and Mantra

17 Francis is the founder of "Girls Gone Wild" entertainment business and the
18 sole shareholder of two U.S. corporations, Sands and Mantra, which are engaged in
19 producing, promoting, marketing and distributing DVDs, infomercials, magazines,
20 apparel and other items for the "Girls Gone Wild" brand.

21 Francis, with the assistance of his personal attorney, Brian Rayment
22 ("Rayment"), incorporated Mantra in Oklahoma in 1998 and Sands in Nevada in
23 2001. Rayment has been involved in some capacity as Francis' legal counsel, as
24 well as counsel for Rothwell, The Francis Trust, Sands, Mantra, and a myriad of
25 other entities owned directly or indirectly by Francis.

26 For each of the calendar years 2002 and 2003, Sands and Mantra filed a U.S.
27

1 Income Tax Return for an S-Corporation, Form 1120-S, with the IRS reporting its
2 income for each respective year. As "S Corporations" for U.S. income tax
3 purposes, the profits from Sands and Mantra were required to be reported by their
4 owner, Francis, on his U.S. individual income tax returns.

5 **B. The Francis Trust**

6 With the assistance of Rayment, Francis created The Francis Trust ("Francis
7 Trust" or "Trust") on May 24, 1999, by and between himself as Settlor, and
8 Hallmark Trust Ltd., Trustee. The beneficiaries of the Francis Trust are Francis,
9 his parents, children, and Oklahoma Film Holding Corporation, a non-profit
10 corporation owned by Joseph R. Francis. The Francis Trust was drafted by Owen
11 Foley, an attorney and partner in the law firm of Misick & Stanbrook, in
12 Providenciales, Turks & Caicos Islands, B.W.I.

13 Hallmark Trust, Ltd., located in Providenciales, was selected to provide
14 trustee services for The Francis Trust. In 1991, Colin R. Chaffe ("Chaffe") and
15 Nicola S. Jordan ("Jordan") incorporated Hallmark Trust, Ltd., in the Turks &
16 Caicos Islands.

17 At least three corporations were formed in connection with the Trust. These
18 three corporations, which are owned by the Trust, are Island Films, originally
19 owned by Francis himself, and Summerland Holdings, Turks & Caicos
20 corporations, and the plaintiff Rothwell, Ltd., a Cayman Islands corporation
21 ("Rothwell" or "plaintiff").

22 The Francis Trust provides for the naming of a trustee, as well as a
23 "protector" of the Trust. The Francis Trust has had two protectors: (1) Rayment;
24 and (2) Pittsford, Ltd., a British Virgin Islands Company. Chaffe is the trustee of
25 the Francis Trust. Rayment was involved in the review and selection of the trustee
26 of the Francis Trust, Hallmark Limited and Chaffe.

1 Day-to-day monitoring of the Trust's assets are handled by the trustee. Trust
2 provisions require that when the Trust needs to act and decide certain specified
3 activities, the trustee must acquire the permission of the protector to carry out that
4 business. For example, the trustee needs to have the permission of the protector to
5 exercise powers of appointment and advancement of the trust, pay any portion of
6 the capital of the trust fund to any of the beneficiaries, exclude or include any
7 beneficiary of the trust, and ignore any interest of any beneficiary. If the trustee
8 makes any decision without the protector where the protector's permission is
9 needed, such action is null and void.

10 C. Rothwell Limited

11 On June 9, 2000, Chaffe incorporated Rothwell in the Cayman Islands. One
12 hundred percent of Rothwell's shares are held by Inceptre Holdings, Ltd., in trust
13 for The Francis Trust. Thus, all of the shares of Rothwell are owned by the Francis
14 Trust. Inceptre Holdings also acted as director of Rothwell until 2003, when
15 Hallmark Trust Ltd. became the director of Rothwell. Inceptre Holdings is
16 Hallmark Trust, Ltd.'s nominee company whose sole shareholders are Chaffe and
17 Jordan.

18 In 2005, Chaffe and Jordan sold their interests in Hallmark Trust, Ltd. to
19 Brian Trowbridge, who changed the name of Hallmark Trust, Ltd. to Hallmark
20 Bank and Trust, Ltd. ("Hallmark"). At that time, Hallmark became director of
21 Rothwell and continued as director until 2010, when Chaffe personally became
22 trustee of the Francis Trust and director of Rothwell.

23 In 2001, Chaffe and Jordan opened a bank account for Rothwell at the
24 Bermuda Commercial Bank in Hamilton, Bermuda. Records of Bermuda
25 Commercial Bank show that Chaffe admitted that Francis was the beneficial owner
26 of Rothwell.

1 On or about June 2, 2001, Chaffe and Jordan opened a Morgan Stanley
2 investment account for Rothwell in Irvine, California. Chaffe and Jordan were
3 signatories to Rothwell's Morgan Stanley account until late 2005, when
4 Trowbridge took over the account. John Welker was the broker responsible for
5 Rothwell's Morgan Stanley account from July 2001 through October 2008, when
6 Brian Stewart took over plaintiff's account. Welker and Stewart were the brokers
7 for other Morgan Stanley accounts for Francis and his related entities.

8 Rothwell's bank and brokerage accounts were used by Francis to perpetuate
9 several different tax schemes. Each scheme had in common the following: 1)
10 transferring funds tax-free to offshore entities; 2) causing false entries on the
11 corporate books and records of Sands and Mantra to conceal the transfers as
12 claimed business expenses; and 3) falsely deducting the transfers on the Mantra
13 and Sands corporate tax returns, resulting in a falsely reduced corporate net income
14 that flowed through to Francis' personal tax return, which accordingly, reported
15 less income and tax due and owing from Francis.

16 **D. Asia Pacific – False “Insurance” Expense**

17 From the start, Francis used Rothwell to hoard cash generated by claiming
18 false business deductions on the tax returns of Mantra and Sands. One scheme
19 involved false claims by both Mantra and Sands for “insurance” expenses. In
20 November 2002, with the assistance of their counsel, Rayment, both companies
21 entered into agreements with Asia Pacific Mutual Insurance Company (“APMIC”)
22 for “insurance” coverage for the period from November 16, 2002 to November 15,
23 2003. The insurance premium for Sands' policy was \$3,000,000 and the premium
24 for Mantra's policy was \$2,000,000. Between January 28, 2003 and June 20, 2003,
25 Mantra and Sands made payments to APMIC's Bank of Hawaii account totaling
26 \$5,000,000.

1 Simultaneously, between January and August 2003, APMIC made eleven
2 transfers totaling \$4,746,386 from its Bank of Hawaii account to an Abbey
3 National Bank account for Schedule Company, and two transfers totaling \$166,201
4 to a Bermuda Commercial Bank account for Schedule Company. Chaffe and
5 Jordan own Schedule Company, a nominee company used in carrying on the
6 business activities of Hallmark. Then, between February 18, 2003, and August 4,
7 2003, Schedule Company made eight fund transfers totaling \$4,489,050 into the
8 account plaintiff maintained at Bermuda Commercial Bank. Thus, \$4,489,050 of
9 the \$5,000,000 that was paid for the "insurance" premiums by Sands and Mantra
10 ended up, within a short period of time, in a Bermuda bank account held by the
11 plaintiff.

12 In turn, on their 2002 and 2003 U.S. Income Tax Returns for an S-
13 Corporation, Sands deducted all \$3,000,000 and Mantra deducted all \$2,000,000 of
14 the payments the companies made to APMIC.

15 **E. Transfers to Plaintiff's account—False Expenses for "Consulting
16 Expenses"**

17 Beginning in 2002, Francis transferred millions directly to plaintiff's bank
18 account in Bermuda from Sands' accounts with Wells Fargo. Between December
19 4, 2002 and April 23, 2003, Sands made nine wire transfers totaling \$10,411,020
20 directly to plaintiff's Bermuda bank account. Notably, during this same time frame
21 when \$10,411,020 was paid directly to plaintiff's Bermuda bank account, and
22 \$4,489,050 of the alleged "insurance" payments ended up in plaintiff's Bermuda
23 bank account, \$15,448,780 was wired from that account in Bermuda to plaintiff's
24 account at Morgan Stanley, which was accomplished with 18 wire transfers
25 occurring between May 10, 2002, and August 11, 2003.

26 On its 2002 tax return, Sands deducted the \$10,411,020 of transfers as
27 expenses for "consulting services," "footage," and "professional services."
28

1 **F. Casa Blanca de Punta Mita, S.A. de C.V. – False “Consulting,”**
2 **“Professional Services,” and “Footage” Deductions**

3 The third scheme Francis used to divert income from Mantra and Sands to
4 Francis’ personal use involved payments made to Crescent Capital for the purpose
5 of constructing a 35,000 square foot personal residence for Francis in Punta Mita,
6 Puerto Vallarta, Mexico. Francis’ personal attorney, Rayment, facilitated the
7 purchase of the lots upon which the personal residence was built, as well as the
8 construction of the residence.

9 In 2002, Rothwell purchased Lot 14 in Punta Mita, Puerto Vallarta, Mexico
10 through a Mexican corporation indirectly owned by Rothwell. Rayment, in his
11 capacity as protector of the Francis Trust, brought the “investment opportunity” to
12 Chaffe, after a trip with Francis to the Punta Mita area. Rayment arranged for the
13 establishment of a Mexican corporation, Casa Blanca de Punta Mita, S.A. de C.V.
14 (“Casa Blanca”), which would make the actual purchase of Lot 14. The shares of
15 Casa Blanca are owned by Island Films, Ltd.¹ and Summerland Holdings, Ltd., the
16 shares of which are owned 100% by the Francis Trust.

17 In April 2002, Casa Blanca purchased Lot 14 for \$1,054,980, where
18 Rothwell paid \$1,030,000 and Hallmark Trust Limited paid \$24,980. The funds for
19 Rothwell’s portion of the purchase came from either transfers made from the
20 transaction with APMIC, which was paid by Sands and Mantra, or the direct
21 transfers from Sands, with both amounts being eventually transferred to Rothwell’s
22 Bermuda account. After the purchase, Rothwell paid no consideration to Sands or
23 Mantra in exchange for the funds to purchase Lot 14, nor transferred the title of Lot
24 14 to Sands or Mantra.

25 Construction of a 35,000 square foot residence began soon after Rothwell’s

26 _____
27 ¹All of the shares of Island Films were originally owned by Francis, until he
28 assigned them to Hallmark.

1 purchase of Lot 14. The company that was first engaged to build the residence was
2 Crescent Capital Ltd., owned by Mohamed Hadid. From the beginning, Francis
3 directed and controlled the design and construction of the premises and
4 improvements made on Casa Blanca's Lot 14 ("Punta Mita residence"). Francis
5 himself had commenced the process of acquiring the land and building the
6 residence in Mexico on February 3, 2002, by giving Crescent Capital his personal
7 check for \$100,000 as a security deposit in connection with the purchase of Lot 14.
8 Francis has identified the Punta Mita residence as "his" residence on several
9 national television shows. Correspondence between Francis, Rayment and Hadid
10 show that the purchase of the land and the building of the Punta Mita residence
11 were undertaken at Francis' request and under his specific direction. In fact,
12 Rothwell admits that Francis uses the Punta Mita residence for personal purposes,
13 but alleges that the Punta Mita residence is an asset ultimately owned by Francis
14 Trust and anyone who wants to use the property needs to have permission of the
15 trustee (Chaffe) to do so. Yet, both Francis and Chaffe admit they have never met
16 or spoken with each other.

17 Between December 13, 2002, and November 12, 2003, Sands made 21
18 payments totaling \$3,784,290 to Crescent Capital, which Sands deducted on its
19 2002 tax return as "consulting" expenses. During March and July 2002, Mantra
20 made four payments to Crescent Capital by check, totaling \$560,000, which Mantra
21 accrued and deducted as expenses for "professional services" on its 2002 income
22 tax return. In 2002, Mantra made three other payments directly to Casa Blanca,
23 totaling \$443,141, which it accrued as "footage" expenses on its books and records.
24 Additional funds for constructing the residence in Mexico were paid directly by
25 Francis to Crescent Capital.

26 In 2005, acting in the same capacity as with Lot 14, Chaffe engaged
27
28

1 Rayment to purchase the adjoining Lot 13B for Casa Blanca. This lot was paid for
2 by two direct transfers of money from Rothwell's Morgan Stanley account in the
3 amount of \$1.023 million in September 2005.

4 The Punta Mita residence was neither listed on Sands, Mantra, or Rothwell's
5 books as an asset, nor depreciated on the corporate tax returns. No rent payments
6 were made to Rothwell when Francis used the residence, and Rothwell admits that
7 there is no written rental agreement between Rothwell, the Trust, Francis, Sands
8 and/or Mantra for the use of the property. Francis, not Rothwell, pays the utilities,
9 maintenance, insurance, and other expenses for the Punta Mita residence. Simply
10 put, the payments by Sands and Mantra were merely a way for Francis to transfer
11 funds to himself tax-free in order to build a personal vacation home.

12 **G. Transfers from Rothwell's Bermuda Commercial Bank to its**
13 **Morgan Stanley accounts**

14 During the period from May 10, 2002, to August 11, 2003, sixteen wire
15 transfers were made from Rothwell's Bermuda Commercial Bank account into
16 Rothwell's Morgan Stanley account; plus a seventeenth transfer on May 10, 2002
17 was made from another unidentified Bermuda Commercial Bank account in the
18 Cayman Islands, and an eighteenth transfer on October 30, 2002, was made from an
19 account of Island Films, Ltd. The total amount of the eighteen transfers from
20 Rothwell's Bermuda Commercial account to the Morgan Stanley account was
21 \$15,448,780.

22 **H. Francis' legal trouble**

23 Francis has been involved in many civil and criminal legal actions. Francis
24 was and is involved in several civil lawsuits that either resulted in judgments
25 against him or where judgments are still being sought. For example, in August
26 2008, a judgment against Francis was entered for \$2,838,356.00, in favor of Wynn
27 Las Vegas, LLC.

1 Francis has been the subject of several criminal cases, from racketeering,
2 drug trafficking, and child pornography charges in Florida, to gambling debt
3 charges in Nevada, to federal tax and bribery offenses in this Court.

4 Mantra has also been subject to civil and criminal prosecution. In December
5 2006, Mantra was sentenced in the Northern District of Florida to a fine of \$1.6
6 million, and Francis, as Mantra's Chief Executive Officer, was sentenced to serve
7 32 hours of community service for a term of 30 consecutive months, stemming
8 from criminal violations of 18 U.S.C. § 2257. United States v. Mantra Films, Inc.,
9 5:06-cr-78-RS (N.D. Fla.). In this Court, Mantra has been permanently enjoined
10 from certain business activities under the Federal Trade Commission Act and the
11 Electronic Fund Transfer Act, and a judgement in the amount of \$1,089,627 has
12 been entered against it in the matter of United States v. Mantra Films, Inc., et al.,
13 CV 03-9184 RSWL (MANx).

14 On April 11, 2007, a federal grand jury in the District of Nevada indicted
15 Francis on two counts of tax evasion in violation of 26 U.S.C. § 7201 for taxable
16 years 2002 and 2003, which was transferred to the Central District of California,
17 United States v. Joseph R. Francis, CR 08-494-SJO (C.D. CA.). On September 23,
18 2009, in that case, Francis pled guilty to a three-count Information. Francis
19 admitted to two violations of 26 U.S.C. § 7207 with respect to the 2003 tax year,
20 admitting that he willfully filed his 2003 U.S. Personal Income Tax Return and his
21 Amended 2003 U.S. Personal Income Tax Return knowing that the returns were
22 false as to a material matter in that they omitted interest income earned on the
23 Rothwell Morgan Stanley account, and one violation of 18 U.S.C. § 201(c)(1)(A),
24 bribing a public official. On November 6, 2009, the Court sentenced Francis.

25 On November 6, 2009, the IRS notified Francis that a determination had
26 been made that jeopardy existed with respect to the ability of the IRS to collect his
27

1 2001, 2002, and 2003 income tax liabilities. On the same day, the IRS levied the
2 accounts of Francis and Rothwell at Morgan Stanley, as it determined that
3 Rothwell was a nominee of Francis and such funds held in both accounts were
4 determined to be in jeopardy of being moved out of the reach of the Government.

5 On November 19, 2009, Francis filed a Complaint against the United States
6 requesting a temporary restraining order against the IRS for collecting on the
7 November 6, 2009 levy, and an injunction order to release any funds the IRS had
8 already collected. See Joseph R. Francis v. United States, Case No. CV 09-8521
9 VBF (RZx). Francis' request for an injunction was denied on December 10, 2009.
10 Id., at Docket No. 26.

11 On December 24, 2009, Francis filed a Compliant pursuant to 26 U.S.C. §
12 7429, seeking the abatement of the IRS's jeopardy assessments taken against him,
13 as well as a release of levies issued on two bank accounts. See Joseph R. Francis v.
14 United States, Case No. CV 09-9449 RGK (FFMx). On January 13, 2010, this
15 Court found that the IRS's jeopardy assessments and levy of accounts was
16 reasonable under the circumstances and the amount of the assessment was also
17 appropriate. Id., at Docket No. 39.

18 In the interim, on December 31, 2009, in compliance with the IRS nominee
19 levy on Rothwell's account, Morgan Stanley liquidated Rothwell's Morgan Stanley
20 investment account and surrendered the funds to the United States, as follows: (1)
21 December 31, 2009, Check #27603880 in the amount of \$19,412,427.21; (2)
22 January 4, 2010, Check #27603884 in the amount of \$690,571.21; and (3) January
23 5, 2010, Check #27603887 in the amount of \$301,639.79.

24 III. CONCLUSIONS OF LAW

25 A. The federal tax lien attaches to property titled in the name of a 26 taxpayer's nominee

27 26 U.S.C. § 7426 allows a third party (a party other than the delinquent
28

1 taxpayer), to challenge an IRS levy as “wrongful.” A levy is “wrongful” if it is
2 upon property in which the taxpayer has no interest at the time the lien arose or
3 thereafter. Treas. Reg. § 301.7426-1(b); *Sessler v. United States*, 7 F.3d 1449,
4 1451 (9th Cir. 1993).

5 When a taxpayer fails to pay an assessed tax liability after receiving notice of
6 the assessment and demand for payment, a lien for the unpaid tax automatically
7 arises in favor of the United States upon all property and rights to property
8 belonging to the taxpayer. 26 U.S.C. § 6321. Under certain circumstances, the
9 United States may levy upon property held by a third party, such as when a third
10 party trust is the nominee of a taxpayer who is indebted to the United States, or
11 when a trust is a “sham.” *911 Management, LLC v. United States*, 657 F.Supp.2d
12 1186, 1191 (D. Or. 2009); *Juris Trust Co. Ltd. v. United States*, 78 A.F.T.R.2d 96-
13 6548 (E.D. Cal. 1996); *United States v. Geissler*, 73 A.F.T.R.2d 94-459 (D. ID.
14 1993).

15 It is settled law that the federal tax lien attaches to property held by a
16 taxpayer’s nominee or alter ego, and that such property is subject to the collection
17 of the taxpayer’s tax liability. See *G.M. Leasing Corp. v. United States*, 429 U.S.
18 338, 350–51, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977) (the IRS “could properly regard
19 petitioner’s assets as [taxpayer’s] property subject to the lien under § 6321”); *Wolfe*
20 *v. United States*, 798 F.2d 1241, 1244 n.3, *amended* 806 F.2d 1410 (9th Cir. 1986);
21 *Holman v. United States*, 505 F.3d 1060, 1065 (10th Cir. 2007); *Scoville v. United*
22 *States*, 250 F.3d 1198, 1202–03 (8th Cir. 2001); *Oxford Capital Corp. v. United*
23 *States*, 211 F.3d 280, 284 (5th Cir. 2000); *LiButti v. United States*, 107 F.3d 110,
24 120, 125 (2d Cir. 1997); *Shades Ridge Holding Corp. v. United States*, 888 F.2d
25 725, 728–29 (11th Cir. 1989); *Towe Antique Ford Found. v. IRS*, 791 F. Supp.
26 1450, 1454 (D. Mont. 1992), *aff’d*, 999 F.2d 1387 (9th Cir. 1993).

1 In bringing an action under 26 U.S.C. § 7426, plaintiff bears the initial
2 burden of proving title to the levied property. *911 Management v. United States*,
3 *supra*; *Tri-State Equipment v. United States*, 79 A.F.T.R.2d 97-2502, 9 (E.D. Cal.
4 1997). If the plaintiff is able to establish title to the property, the burden of
5 persuasion shifts to the United States to show that there exists a nexus between the
6 taxpayer and the levied property. *911 Management LLC, supra*; *Tri-State*
7 *Equipment, supra*. The United States may establish the required nexus by showing
8 that a third party entity is actually the nominee of the delinquent taxpayer. *911*
9 *Management LLC, supra*; *Tri-State Equipment, supra*. However, the plaintiff bears
10 the ultimate burden of proving to the district court that the property which appears
11 to belong to the taxpayer actually is plaintiff's property and does not belong to the
12 delinquent taxpayer. *911 Management LLC, supra*; *Tri-State Equipment, supra*.

13 Property is held by a nominee when someone other than the taxpayer has
14 legal title but, in substance, the taxpayer enjoys the benefits of ownership. *Oxford*
15 *Capital Corp.*, 211 F.3d at 284. A third party is the taxpayer's nominee where "the
16 taxpayer has engaged in a legal fiction by placing legal title to property in the
17 hands of a third party while actually retaining some or all of the benefits of true
18 ownership." *Holman*, 505 F.3d at 1065; *see also United States v. Miller Bros.*
19 *Constr. Co.*, 505 F.2d 1031, 1036 (10th Cir. 1974). "[T]he nominee theory stems
20 from equitable principles. Focusing on the relationship between the taxpayer and
21 the property, the theory attempts to discern whether a taxpayer has engaged in a
22 sort of legal fiction, for federal tax purposes, by placing legal title to property in the
23 hands of another while, in actuality, retaining all or some of the benefits of being
24 the true owner." *In re Richards*, 231 B.R. 571, 578 (E.D. Pa. 1999). *See also,*
25 *Black's Law Dictionary* 1072 (7th ed. 1999) (defining nominee as "[a] party who
26 holds bare legal title for the benefit of others").

1 272 F.3d 1114, 1125 (9th Cir. 2001) (same). Moreover, the Ninth Circuit has said
2 that it will give deference “to the district court’s construction of the law of the state
3 in which the district court sits.” *Takahashi v. Loomis Armored Car Serv.*, 625 F.2d
4 314, 316 (9th Cir. 1980). *Cf. United States v. Durham Lumber Co.*, 363 U.S. 522,
5 525, 80 S.Ct. 1282, 4 L.Ed.2d 1371 (1960) (“in dealing with issues of state law that
6 enter into judgments of federal courts, we are hesitant to overrule decisions by
7 federal courts skilled in the law of particular states unless their conclusions are
8 shown to be unreasonable”).

9 Although none of the federal district courts in California ostensibly purport
10 to predict what factors the California Supreme Court would adopt for determining
11 nominee status, those courts have uniformly applied the same factors. And the
12 factors routinely applied by the district courts in California are similar (and in
13 many instances identical) to those applied by courts in other jurisdictions.

14 In *United States v. Bell*, 27 F. Supp. 2d 1191, 1195 (E.D. Cal. 1998), for
15 example, the district court held that nominee status “is determined by the degree to
16 which a party exercises control over an entity and its assets.” In support of this
17 statement of the law, the district court relied upon decisions of the Second Circuit
18 (*LiButti*, 107 F.3d at 119), and the Eleventh Circuit (*Shades Ridge Holding Co.*,
19 888 F.2d at 729). The district court in *Bell* then listed the following six factors that
20 courts have considered to be relevant in determining nominee status:

- 21 (1) No consideration or inadequate consideration paid by the nominee;
- 22 (2) Property placed in the name of the nominee in anticipation of a suit or
23 occurrence of liabilities while the debtor continues to exercise control
24 over the property;
- 25 (3) Close relationship between the debtor and the nominee;
- 26 (4) Failure to record a conveyance;

1 (5) Retention of possession by the debtor; and

2 (6) Continued enjoyment by the debtor of benefits of the property.

3 Indeed, reliance upon these six factors is widespread. As the district court
4 stated in *United States v. Secapure*, 2008 WL 820719, at *7 (N.D. Cal. 2008),
5 “[c]ourts throughout the Ninth Circuit rely on [these] six factors to determine
6 nominee status.” *See also, Cal Fruit Int’l v. Spaich*, 2006 WL 27116644, at *5
7 (E.D. Cal. 2006); *Tri-State Equipment v. United States*, 1997 WL 375264, at *11
8 (E.D. Cal. 1997). In support of its own reliance on these factors, the district court
9 in *Bell* cited *Towe Antique Ford, supra*, a case that involved Montana law and was
10 affirmed by the Ninth Circuit (999 F.2d 1387), and the Tenth Circuit’s decision in
11 *United States v. Miller Bros. Constr. Co., supra*. Other federal courts of appeals
12 have relied upon the same, or nearly the same, factors. *Oxford Capital*, 211 F.3d at
13 284 n.1; *Scoville*, 250 F.3d at 1202.

14 The courts, however, do not necessarily require that each of these factors be
15 present in every case. As the Second Circuit explained in *LiButti*, 107 F.3d at 119,
16 courts should avoid an “over-rigid preoccupation with questions of structure, * * *
17 and apply the preexisting and overarching principle that liability is imposed to
18 reach an equitable result.” *See generally*, W. Elliott, *Federal Tax Collections*,
19 *Liens, and Levies*, ¶ 9.10, p. 9-95 (2d ed. 2003) (“There are no particular elements
20 whose presence the courts always insist on to determine that property that is being
21 held in the name of a nominee is in fact the property of another,” and then listing
22 eight factors, including the six listed above). *LiButti* itself discusses both nominee
23 and alter ego doctrine, and, indeed, some courts have recognized that there is an
24 overlap between the two doctrines. *E.g., 911 Mgmt. LLC v. United States*, 657 F.
25 Supp. 2d 1186, 1195, 1214 (D. Ore. 2009) (“[m]any of the factors overlap with the
26 nominee analysis” and “the presence of absence of a particular factor is not
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1 dispositive”); *In re Callahan*, 419 B.R. 109, 128 (Bankr. Mass. 2009), *remanded*
2 *on other grounds*, 2010 WL 1170112 (D. Mass. 2010) (“alter ego theory is similar
3 in some respects to a nominee theory”). This makes sense because the nominee
4 and alter ego doctrines are closely related equitable creditor’s remedies that focus
5 on control – in one, a debtor’s control over an entity, and in the other, a debtor’s
6 control over a willing nominee with respect to a specific asset. Indeed, nominee
7 cases may be viewed as single-asset alter ego cases; although one individual cannot
8 be the alter ego of another for all purposes, he may serve in that role with respect to
9 holding a specific piece of property.²

10 In any event, that federal courts across the nation have routinely relied upon
11 the six factors listed above is not surprising. As the Eleventh Circuit explained in
12 *Shades Ridge Holding Co.*, 888 F.2d at 728, the standards for establishing nominee
13 status under state and federal law “are so similar that the distinction is of little
14 moment,” because “[t]he [nominee] issue under either state or federal law depends
15 upon who has ‘active’ or ‘substantial’ control.”

16 In view of the widespread reliance by the courts upon the six factors listed
17 above, this Court should be able to predict with confidence that the California
18 Supreme Court would also adopt them (or something very similar to them) to
19 determine nominee status. Indeed, California’s intermediate appellate courts,
20 although not adopting a discrete list of factors, have applied such factors in their
21 nominee determinations. For example, in *Baumann v. Harrison*, 46 Cal. App.2d at
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23 ² The California Supreme Court would thus likely also consider its alter ego
24 decisions when considering what factors to adopt in nominee cases. And in
25 California, alter ego doctrine is not as rigid as in some states. *E.g.*, *Gordon v.*
26 *Aztec Brewing Co.*, 33 Cal.2d 514, 523, 203 P.2d 522, 527 (Cal. 1949) (“[i]t is not
27 necessary that the plaintiff prove actual fraud. It is enough if the recognition of
the two entities as separate would result in an injustice”); *Paul v. Palm Springs*
Homes, Inc., 192 Cal. App.2d 858, 862, 13 Cal. Rptr. 860, 862 (Cal. App. 1961)
28 (“[t]he conditions under which a corporate entity may be disregarded vary
according to the circumstances in each case”).

1 91-92, the court relied upon the facts that the nominee “did not assume or agree to
2 pay the indebtedness secured by the deed of trust” (factor # 1), and that the
3 principals “had at all times been in control and possession of the premises” and had
4 been receiving all rents from the property (factors # 5 & 6).

5 Moreover, it is apparent that the nominee issue presented here arises more
6 often in the federal tax-collection context than in other areas of the law.

7 That this is so is evident from the numerous tax cases arising in recent years in the
8 federal district courts in California alone, and the comparatively small number of
9 nominee cases in the California state courts. Because of the prevalence of the issue
10 in federal tax cases, it is reasonable to conclude that the California Supreme Court,
11 if and when presented with the issue, would give deference to the many federal
12 court decisions that have arisen, and would adopt the same factors that have
13 routinely been applied in those cases. The California Supreme Court’s adoption of
14 those factors would go a long way toward promoting uniformity in the law.

15 **D. Rothwell is the nominee of Joseph Francis**

16 At the pre-trial conference held on June 6, 2011, the Court emphasized that
17 the issue in this case centered around whether Francis had control over Rothwell.
18 As noted previously, while the control a debtor has over an asset he placed out of
19 the reach of his creditors is one factor, it is only one of the six factors that
20 determine nominee status. Based on the evidence as applied to the six nominee
21 factors enumerated above in *Bell*, plaintiff is the nominee of Francis.

22 1) No consideration or inadequate consideration paid by the
23 nominee

24 The money seized in Rothwell’s Morgan Stanley brokerage account by the
25 IRS was there by virtue of a series of deposits totaling over \$10 million made by
26 Sands and the \$5 million APMIC insurance premiums made by Sands and Mantra.
27 Though millions of dollars were transferred to Rothwell from Sands and Mantra,

1 Rothwell provided no services or consideration to Sands and Mantra in exchange.

2 The most compelling evidence of the lack of consideration between Sands
3 and Rothwell are the nine wire transfers which occurred in December 2002 and
4 January, February and April 2003, ranging in amounts as small as \$250,000 to as
5 large as \$5,461,020, which were deposited from Sands' Wells Fargo account in
6 California directly into Rothwell's Bermuda Commercial account. The
7 "consideration" given from Rothwell to Sands was an illegal one: for tax purposes,
8 the nine transfers were booked on the general ledger of Sands as "accrued expenses
9 for Casablanca" or "consulting services" and in turn, deducted on Sands' income
10 tax return as business expenses of over \$10 million. Put simply, Francis' large cash
11 transfers to Rothwell were part of a fraudulent scheme to significantly and
12 improperly reduce Francis' and Sands' tax liability.

13 As to the Punta Mita residence, in 2002, \$1.03 million was transferred from
14 Rothwell's Bermuda account to pay for the first lot, No. 14. Rothwell got the
15 money to purchase this lot from either transfers made from the insurance
16 transactions with APMIC, and were paid by Sands and Mantra, or direct transfers
17 from Sands, all of which were eventually transferred to Rothwell's Bermuda
18 account. Rothwell paid no consideration to Sands or Mantra in exchange for the
19 funds to purchase the lot. After Rothwell bought the lot through Casa Blanca,
20 Rothwell did not transfer the land to Sands or Mantra. The second lot purchased
21 by Rothwell, Lot No. 13B, was funded by a \$1.023 million transfer from
22 Rothwell's Morgan Stanley account to the seller. Again, the funds in Rothwell's
23 Morgan Stanley account were there by virtue of the transfers of insurance
24 premiums from APMIC, or direct transfers from Sands, which eventually were
25 transferred from Rothwell's Bermuda account. Again, Rothwell did not
26 compensate Sands, or any other Francis-owned entity, for the funds it needed to
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1 purchase Lot No. 13B, and it did not transfer title of the property to Sands or
2 Mantra once the purchase of Lot No. 13B was completed.

3 For these reasons, this factor of nominee status weighs in favor of the
4 Government.

5 2) Property put in the name of a nominee in anticipation of a suit
6 or occurrence of liabilities while the debtor continues to
7 exercise control over the property.

8 Francis has been involved with a myriad of legal actions, both civil and
9 criminal in nature. Francis was/is involved in several civil lawsuits that either
10 resulted in judgments against him or where judgments are still being sought. For
11 example, in August 2008, a judgment against plaintiff was entered for
12 \$2,838,356.00, in favor of Wynn Las Vegas, LLC.

13 Francis has been the subject of several criminal cases, from racketeering,
14 drug trafficking, and child pornography charges in Florida, to gambling debt
15 charges in Nevada, to the tax and bribery offenses which lead to his guilty plea in
16 this Court. The basis for the tax convictions was Francis' failure to report interest
17 income generated upon Rothwell's Morgan Stanley account on his tax returns.
18 Though the United States need not prove Francis' criminal activities to establish its
19 civil nominee case, it is important to note that from the beginning, Francis made the
20 wire transfers to Rothwell as part of an overarching scheme on the part of Francis
21 to fraudulently reduce his claimed tax liability. The vast majority of Francis'
22 (Sands/Mantra) cash was subsequently transferred back to the United States where
23 it generated thousands of dollars of interest, none of which was disclosed on
24 Francis' returns. The transfers were thus undertaken with the specific purpose of
25 evading Francis' federal income taxes for 2002 and 2003, as well as keeping the
26 transferred cash out of the reach of Francis' creditors, while Francis continues to
27 use and enjoy the benefits of his transfers. Clearly, the transfers Sands and Mantra

1 made to plaintiff were for the purpose of defeating Francis' anticipated tax
2 liabilities to the IRS.

3 Mantra has also been subject to civil and criminal prosecution. In December
4 2006, Mantra was sentenced in the Northern District of Florida to a fine of \$1.6
5 million, and Francis, as Mantra's Chief Executive Officer, was sentenced to serve
6 32 hours of community service for a term of 30 consecutive months, stemming
7 from criminal violations of 18 U.S.C. § 2257. United States v. Mantra Films, Inc.,
8 5:06-cr-78-RS (N.D. Fla.). In this Court, Mantra was permanently enjoined from
9 certain business activities under the Federal Trade Commission Act and the
10 Electronic Fund Transfer Act, and a judgment in the amount of \$1,089,627 was
11 entered against it in the matter of United States v. Mantra Films, Inc., et al., CV 03-
12 9184 RSWL (MANx).

13 The aforementioned cases serve as examples of on-going matters that put
14 Francis, Mantra, and/or Sands at risk, in personam or in rem. Moving millions off-
15 shore with the help of Rothwell was beneficial to Francis, Mantra and Sands, as it
16 kept assets out of the hands of potential creditors, which were still utilized,
17 controlled, and accessed by Francis for his benefit.

18 Thus, this factor on nominee status of Rothwell weighs in favor of the
19 Government. It is clear that Sands and Mantra acted in anticipation of litigation or
20 an anticipated liability to the IRS and other creditors of Francis, Sands and Mantra.

21 3) Close relationship between the debtor and the nominee

22 All ownership interests held by Rothwell can be traced back to Francis,
23 Sands and Mantra. The funds from which Rothwell purchased Lots Nos. 14 and
24 13B, as well as the funds which comprise Rothwell's Morgan Stanley account, can
25 be directly traced back to Sands and Mantra. The evidence shows that Rothwell is
26 nothing more than a funnel through which money passes to accounts and property
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1 with a close relationship with Francis, Sands and Mantra.

2 There is also a strong and close relationship between Francis and Rothwell
3 through Francis' long-time personal attorney, Rayment. Rayment and Francis met
4 through Rayment's relationship with Francis' parents, and have continued a
5 relationship for almost 20 years. Though licensed to practice in Oklahoma,
6 Rayment has served as Francis' personal attorney, the sole attorney for Sands,
7 Mantra, other "Girls Gone Wild" corporate entities, and the attorney for Rothwell,
8 The Francis Trust, Island Films, Summerland Holding, and Casa Blanca. Rayment
9 assisted with incorporating Sands and Mantra. Rayment appeared at depositions in
10 this case as counsel for Rothwell, the Francis Trust and its related entities, as well
11 as the protector of the Francis Trust.

12 With respect to the Francis Trust, in 1999, Rayment contacted Owen Foley,
13 an attorney in the Turks and Caicos Islands, for assistance in establishing the
14 Francis Trust. Rayment was involved in the review and selection of the trustee of
15 the Francis Trust, Hallmark Limited and Chaffe. After such research, Rayment
16 reported his findings regarding the formation of the Trust to Francis.

17 The Francis Trust provides for the naming of a trustee, as well as a
18 "protector" of the Trust. Rayment is the protector of the Francis Trust, and Chaffe
19 is its trustee. Many day-to-day decisions of the Trust can be handled by the trustee,
20 but the Trust provisions require that when the Trust needs to act and decide certain
21 specified activities, the trustee must acquire the permission of the protector to carry
22 out that business. For example, the Francis Trust trustee needs to have the
23 permission of the protector to exercise powers of appointment and advancement of
24 the trust, pay any portion of the capital of the trust fund to any of the beneficiaries,
25 exclude or include any beneficiary of the trust, and ignore any interest of any
26 beneficiary. If the trustee makes any decision without the protector where the

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1 protector's permission is needed, such action is null and void. In short, any vital
2 decision for the advancement of the Francis Trust needs Rayment's approval.

3 When Brian Trowbridge was named as trustee of the Francis Trust,
4 according to Trowbridge, Rayment presented himself to Trowbridge not as the
5 protector of the Trust, but rather, as a representative of Francis.

6 Rayment was also the intermediary between Francis, Rothwell, and Crescent
7 Capital for the purchase of the land in Punta Mita and the building of the residence
8 on the land. Rayment suggested the investment in the Mexican property to Chaffe
9 after visiting the development with Francis. Rayment, along with the assistance of
10 a Mexican attorney, established the corporation, Casa Blanca, which owns the land
11 on behalf of the Trust. Rayment discussed setting up the Mexican corporation with
12 Francis. During the time the residence was being built, Rayment would
13 communicate Francis' wishes regarding the building of the home to the builder,
14 mitigated disputes between Francis and the builder, and assisted in arranging for
15 payment to the builder, either from Sands or Mantra.

16 Rayment was consulted regarding the execution of the contract between
17 Sands, Mantra and APMIC. Rayment found out about APMIC from Francis, when
18 Francis asked Rayment to review the insurance policies. Rayment and Francis met
19 with the insurance representatives in Hawaii to review the contract and discussed
20 the tax deductibility of the premium payments.

21 When Francis was arrested in Florida on a criminal matter, Rayment was the
22 attorney who went to Florida to assist him and arrange for his bail. When Francis
23 was sued for a bad debt by the Wynn Casino in Nevada in 2008, Rayment spoke
24 with Francis' attorneys and inquired as to the status of the case. Rayment has given
25 sworn testimony when Francis and Crescent Capital filed suits against each other.

26 For all of these reasons, there exists a close relationship between Francis and
27

1 Rothwell, and Francis' access to his (Sands/Mantra) money placed into Rothwell is
2 facilitated through Rayment. Rayment has an established long term and close
3 relationship with Francis and has represented all of the entities involved with
4 Rothwell. Rayment has an established relationship with Francis. Serving as the
5 Trust's protector, Rayment can instruct the Trust to carry out Francis' wishes, just
6 as he did in the APMIC transaction and the building of the Punta Mita property.

7 This factor of nominee status weighs heavily in favor of the Government.

- 8 4) Retention of possession by the debtor; and
9 5) Continued enjoyment by the debtor of benefits of the property.

10 The millions transferred from Sands and Mantra established assets that
11 remained in the control of Francis, and which benefitted Francis. It was not until
12 the IRS levied the funds in November 2009 that Francis ceased "enjoyment" of the
13 Rothwell Morgan Stanley account. Francis still "enjoys" the benefit of the Punta
14 Mita property.

15 Through a series of transfers, Sands and Mantra have transferred (tax-free)
16 millions through off-shore entities to establish the Rothwell Morgan Stanley
17 account. By the terms of the Francis Trust and its ownership of the shares of
18 Rothwell, the money was accessible to Francis, whenever Rayment, Francis'
19 personal attorney and confidant, might instruct the trustee on how to dispose the
20 funds. Thus, such distributions were only a matter of Francis requesting Rayment
21 to instruct the trustee to make such distributions. All of the funds that Sands and
22 Mantra transferred off-shore and deducted as business expenses on Francis'
23 corporations' income tax returns also directly benefitted Francis, as false business
24 expenses that reduced corporate net income which flowed through to Francis'
25 personal tax return.

26 To date, Francis still enjoys the use of the Punta Mita property for his
27 personal benefit. Rothwell freely admits that Francis uses the property.

1 Correspondence between Francis, Rayment and Crescent Capital show that the
2 purchase of the land and the building of the estate were undertaken at Francis'
3 request and under his specific direction. The close coordination of these activities
4 underscores the control exerted by Francis over the use of assets placed in
5 plaintiff's name. The land upon which the property sits was purchased with, again,
6 funds from Sands and Mantra that were transferred to Rothwell's Bermuda bank
7 account and the Morgan Stanley account. As for the 35,000 square-foot residence,
8 such was built from tax-free funds transferred directly from Sands and Mantra to
9 the builder and deducted on Mantra and Sands returns as false business expenses,
10 again, reducing the corporations' income and, in turn, reducing Francis' income
11 and tax due and owing.

12 For these reasons, this nominee factor weighs in favor of the Government.

13 6) Whether the parties to the transfer failed to record the
14 conveyance.

15 There is no question regarding the ownership of Lots No. 14 and 13B in
16 Punta Mita; while title to such has been recorded in the name of Casa Blanca, and
17 the ownership of the shares of the Mexican corporation can be traced back to
18 Rothwell, Rothwell and Francis have blurred the line as to the ownership of the
19 35,000 square foot residence built upon the lots.

20 Rayment suggested the idea of "investing" in the property to Chaffe as an
21 investment for the Trust. Chaffe, on behalf of Rothwell and Casa Blanca, entered
22 into the contract with the builder in 2002. Rothwell alleges that the entire property
23 is an asset ultimately owned by Francis Trust and anyone who wants to use the
24 property needs to have permission of the trustee to do so. It is uncontested that
25 Francis uses the property regularly. Yet both Francis and Chaffe stated they have
26 never spoke or met.

27 Yet, Rothwell admits that Francis directed and controlled the design and
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1 construction of the Mexican residence. Rothwell admits that it contributed no
2 funds for the purpose of building the residence. Rothwell admits that although
3 Francis, Sands, and Mantra use the property, no rent has ever been collected from
4 Francis or his entities for such use. In fact, Rothwell admits that there is no written
5 rental agreement between Rothwell, the Trust, Francis, Sands or Mantra for the use
6 of the property. Rothwell does not pay the utilities, maintenance, insurance, or
7 other expenses for the Mexican property; such are paid by Francis and his entities.

8 In sum, neither Rothwell, the Trust, Francis, Sands nor Mantra have adhered
9 to the formalities one would expect them to adhere to in managing the Mexican
10 property, an "income-producing" property for the Trust. The lack of record
11 keeping regarding the ownership rights and responsibilities for the property raises
12 serious questions about the lack of separation between Rothwell and Francis, Sands
13 and Mantra.

14 For these reasons, this factor of nominee status weighs in favor of the
15 Government.

16 **IV. Conclusion**

17 The evidence shows that 1) Rothwell paid no consideration to Francis,
18 Sands, and/or Mantra for the millions of dollars transferred to Rothwell from those
19 entities; 2) transfers of cash to Rothwell were made in anticipation of the tax
20 liabilities of Francis, 3) Rothwell and Francis, Sands, and Mantra have a close
21 relationship, through their own actions and through the actions taken on behalf of
22 these entities by Rayment, 4) Rothwell maintains no records regarding the "rental"
23 of the Mexican property to Francis, Sands, and Mantra, 5) Francis retains
24 significant control over property in the name of Rothwell, and 6) Francis, Sands,
25 and Mantra continue to enjoy the benefit of the property of Rothwell and Francis
26 hold himself out to be the owner of such property.

1 For these reasons, Francis had an interest in the property of Rothwell and its
2 Morgan Stanley account at the time the tax levy against Francis arose for his 2001,
3 2002 and 2003 income tax liabilities. As Rothwell is the nominee of Francis, the
4 levy made by the IRS on November 6, 2009 that seized the funds in Rothwell's
5 Morgan Stanley account was not wrongful under 26 U.S.C. § 7426 .
6

7 Respectfully submitted,

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7
8 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION

10 ROTHWELL, Ltd., a Cayman Islands
11 Corporation,

12 Plaintiff,

13 v.

14 UNITED STATES OF AMERICA,

15 Defendant.
16
17

) CASE NO. CV-10-479-RGK (FFMx)

)
) PLAINTIFF ROTHWELL, LTD.'S
) TRIAL BRIEF

)
) TRIAL: Tuesday, June 14, 2011
) TIME: 9:00 A.M.
) CTRM: Room 850, United States Courthouse
) 255 E. Temple Street
) Los Angeles, CA
) [Hon. R. Gary Klausner]

18 Plaintiff Rothwell, Ltd., by and through counsel undersigned, respectfully submits its
19 Trial Brief pursuant to L.R. 11-6 and 16-10.

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<i>Flores v. United States</i> , 551 F.2d 1169 (9 th Cir. 1977)	1

1 *Floyd v. IRS,*
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3 *Francis v. U.S.,*
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4 *Gregory v. State,*
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5

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7 *In re Bass,*
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8

9 *In re Richards,*
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23

24 *911 Management, LLC v. United States,*
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25 *Olympic Capital Corp. v. Newman,*
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26

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1 *Oxford Capital Corp. v. United States*,
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2

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4 *Philatelic Leasing, Ltd. v. United States*,
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5

6 *Postal Instant Press, Inc. v. Kaswa Corp.*,
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7 *Sessler v. United States*,
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8

9 *Sequoia Prop. & Equip. Ltd. v. United States*,
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10 *Shades Ridge Holding Co., Inc. v. United States*,
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12 *State of Nevada v. Joseph R. Francis*,
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13

14 *Tennessee Valley Authority v. Hill*,
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15 *United States v. Bell*,
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16

17 *United States v. Carucci*,
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18 *United States v. Delano*,
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19

20 *United States v. Isabel*,
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21 *United States v. Khanani*,
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22

23 *United States v. Lovett*,
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24 *United States v. National Bank of Commerce*,
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25

26 *Wilson v. United States*,
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1	<i>Young v. McCoy</i> , 147 Cal.App.4th 1078 (2007)	5
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4	18 U.S.C. §1957	12
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5	18 U.S.C. §1961	12
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---	-----------------------	---

7	Calif. Evid. Code	
8	§913	19

9	OTHER AUTHORITY	PAGE:
---	------------------------	--------------

10	AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS §155 (4 th ed. 1987)	5
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1 **I. INTRODUCTION.**

2 This is a Wrongful Levy action brought by Plaintiff Rothwell pursuant to 26 U.S.C. §7426
3 to recover proceeds from (1) a seizure based on an IRS levy served on Morgan Stanley Smith
4 Barney (“MSSB”) on November 6, 2009, directed at Rothwell’s account as “nominee” of Joseph
5 R. Francis to collect Francis’ alleged outstanding tax liabilities; (2) the subsequent liquidation of
6 Rothwell’s investment account; and (3) surrender of the proceeds of the liquidation by MSSB to
7 the United States. A levy is wrongful if it is placed upon property in which the delinquent
8 taxpayer has no interest. *Sessler v. U.S.*, 7 F.3d 1449, 1451 (9th Cir. 1993); *911 Management, LLC*
9 *v. U.S.*, 657 F.Supp.2d 1186, 1191 (D. OR 2009).

10 The Defendant United States has the burden of proving by substantial evidence either that
11 (1) Rothwell, Ltd. is Francis’ nominee; or (2) Rothwell, Ltd. held it’s MSSB investment account
12 as nominee for Francis on November 6, 2009. *Flores v. U.S.*, 551 F.2d 1169, 1175 (9th Cir. 1977);
13 *Oxford Capital Corp. v. U.S.*, 211 F.3d 280, 283 (5th Cir. 2000)(following *Flores*); *Cheung, Inc. v.*
14 *U.S.*, No. 04-2050, 2006 WL 2473487, at *5 (W.D. Wash. Aug. 28, 2006)(same); *Sequoia Prop.*
15 *& Equip. Ltd. v. U.S.*, No. 97-5044, 2002 WL 31409620, at *12 (E.D. Cal. Sept. 19, 2002)(same).
16 Nominee status is determined by the degree to which a delinquent taxpayer – here Joseph R.
17 Francis – exercises control over an entity and its assets. *Oxford Capital Corp. v. U.S.*, *supra*, 211
18 F.3d at 284, *LiButti v. U.S.*, 107 F.3d 110, 119 (2nd Cir. 1997), *Shades Ridge Holding Co., Inc. v.*
19 *U.S.*, 888 F.2d 725, 729 (11th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990); *U.S. v. Bell*, 27
20 F.Supp.2d 1191, 1195 (E.D. CA 1998).

21 Where, as here, the focus is on the relationship between the parties, the validity of the
22 nominee theory rests on the relationship between the taxpayer (Francis) and a particular piece of
23 property (Rothwell’s MSSB investment account). *Holman v. U.S.*, 505 F.3d 1060, 1065 (10th Cir.
24 2007); *Sequoia Prop. & Equip. Ltd. P’ship v. U.S.*, No. 97-5044, 2002 WL 31409620 (E.D. Cal.
25 Sept. 19, 2002). Axiomatically, under the nominee analysis, the issue is: whether Rothwell held
26 the MSSB account for Francis while Francis actually exercised control over Rothwell and/or

1 Rothwell's MSSB account. *Oxford Capital Corp. v. U.S.*, *supra*, 211 F.3d at 284.

2 **II. THE UNITED STATES LACKS EVIDENCE TO PROVE FRANCIS**
3 **CONTROLLED ROTHWELL OR ROTHWELL'S MSSB ACCOUNT.**

4 The United States lacks evidence to prove that Francis controlled Rothwell and/or
5 Rothwell's MSSB account. The government admitted in the Joint Statement of Undisputed and
6 Disputed Facts ("JSUDF") filed on May 16, 2011 (CR #44)(hereinafter "Admitted Fact"):

7 (1) The Francis Trust was settled on May 24, 1999, by and between Joseph Raymond
8 Francis, Settlor, and Hallmark Trust Ltd., Trustee (Admitted Fact ¶3);

9 (2) In 1991 Colin Chaffe ("Chaffe") and Nicola Jordan ("Jordan") incorporated Hallmark
10 Trust, Ltd. ("Hallmark"), in the Turks & Caicos Islands ("TCI") (Admitted ¶15);

11 (3) Pursuant to the provisions of The Francis Trust all power and discretion, including
12 decisions concerning investments and/or disbursements, is determined at the sole discretion of the
13 Trustee, with the exception of specified powers noted within the Schedules of the Trust which
14 need the permission of the protector (Admitted Fact ¶6);

15 (4) The Francis Trust beneficiaries are Joseph Francis ("Francis"), his parents and
16 children and Oklahoma Film Holding Corporation, a non-profit corporation owned by Francis
17 (Admitted Fact ¶13);

18 (5) On June 9, 2000, Chaffe incorporated Rothwell Ltd. ("Rothwell") in the Cayman
19 Islands and one hundred percent (100%) of Rothwell.'s shares are held by Inceptre Holdings, Ltd.,
20 in trust for The Francis Trust (Admitted Fact ¶20);

21 (6) Inceptre Holdings, Ltd., was incorporated in TCI on March 5, 1992; the sole
22 shareholders are Chaffe (50 shares) and Jordan (50 shares) (Admitted Fact ¶23);

23 (7) In 2001, Chaffe and Jordan opened a Morgan Stanley Smith Barney ("MSSB")
24 investment account for Rothwell in Irvine, California (Admitted Fact ¶21);

25 (8) In 2001, Chaffe and Jordan opened a bank account for Rothwell at the Bermuda
26 Commercial Bank in Hamilton, Bermuda (Admitted Fact ¶25);

27 (9) Chaffe and Jordan were signatories to Rothwell's Morgan Stanley account until late
28

1 2005 (Admitted Fact ¶28);

2 (10) According to Chaffe and Francis, neither has ever met the other (Admitted Fact ¶19);

3 (11) From June 9, 2000, to November 29, 2005, Chaffe and Jordan controlled,
4 directed and managed the operations, finances, assets and investment decisions of Rothwell
5 (Admitted Fact ¶18) (emphasis added);

6 (12) Chaffe and Jordan sold 100% of their interests in Hallmark to Brian Trowbridge
7 (“Trowbridge”), a Canadian citizen, attorney and resident of TCI, who changed the name to
8 Hallmark Bank and Trust, Ltd. (Admitted Fact ¶31);

9 (13) On November 29, 2005, Hallmark became the director of Rothwell and continued to
10 do so until March, 2010, when Hallmark Bank and Trust, Ltd. resigned and Chaffe was appointed
11 Trustee of The Francis Trust and Director of Rothwell (Admitted Fact ¶32);

12 (14) According to Trowbridge, Trowbridge never met Francis nor spoke to him (Admitted
13 Fact ¶33);

14 (15) Trowbridge and Hallmark Bank and Trust, Ltd. directors and officers were
15 signatories on Rothwell’s MSSB account (Admitted Fact ¶34);

16 (16) From July 2001, through October 2008, John Welker (“Welker”) was the broker
17 responsible for Rothwell’s MSSB account (Admitted Fact ¶35)

18 (17) Welker never discussed the Rothwell MSSB account with Francis (Admitted Fact
19 ¶37);

20 (18) Francis did not have signatory authority on Rothwell’s MSSB account (Admitted Fact
21 ¶38);

22 (19) Brian Stewart (“Stewart”) became the MSSB broker on the Rothwell account in 2009
23 (Admitted Fact ¶48);

24 (20) According to Stewart, Stewart never had any discussion with Francis concerning the
25 Rothwell account before the “nominee” levy on November 6, 2009, on Rothwell’s account
26 (Admitted Fact ¶56);

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1 (21) Following the levy, Stewart spoke to Francis who requested information about “time
2 stamps” and a copy of the levy; according to Stewart, Francis did not ask what Rothwell’s account
3 balance was or for Rothwell’s accounting statements (Admitted Fact ¶57).

4 **A. The United States Cannot Seize The Assets Of A Distinct Legal Corporation To**
5 **Satisfy The Debts Of A Third Party.**

6 Notably, the government does not (1) claim that Francis is a stockholder of Rothwell; nor
7 (2) dispute that Rothwell is (i) a distinct legal entity separate from it’s sole stockholder The
8 Francis Trust and (ii) validly incorporated in the Cayman Islands. *Cf.* CR #44 JSUDF disputed
9 facts at ¶¶113 -151.

10 It is fundamental that a corporation is a legal entity that is distinct from its shareholders...
11 The authority to manage the business and affairs of a corporation is vested in its board of
12 directors, not in its shareholders... This includes the authority to commence, defend, and
13 control actions on behalf of the corporation.... Because a corporation exists as a separate
14 legal entity, the shareholders have no direct cause of action or right of recovery against
15 those who have harmed it.

16 *Grossett v. Wenaas*, 42 Cal.4th 1100, 1108, 72 Cal.Rptr.3d 129, 135 (2008).

17 Francis is the sole shareholder of Blue Horse Trading, LLC. The United States admitted
18 that “[s]ince Blue Horse Trading, LLC is a separate legal entity from Joseph Francis, the property
19 would not be immediately, or possibly ever, subject to an IRS lien.” (Admitted Fact #66) Francis
20 is not a stockholder of Rothwell as conceded by the government at Admitted Fact ¶5. The Francis
21 Trust is and always has been Rothwell’s sole stockholder; all shares in Rothwell are and always
22 have been held in trust for The Francis Trust by Inceptre Holdings, Ltd.

23 Furthermore, in his deposition on November 18, 2010, Owen Foley testified: (1) The
24 Francis Trust is a discretionary trust; (2) no beneficiary has any vested interest in the trust’s assets
25 until and unless the trustee exercises his discretion in favor of that beneficiary; (3) because a
26 beneficiary does not have a vested interest, a creditor cannot attach trust assets; (4) once property
27 is transferred to the trust the Settlor cannot revoke the transfer; (5) Rothwell’s shares are assets of
28 The Francis Trust; and (6) Rothwell’s assets do not belong to The Francis Trust. RT (11/18/10)
39:2-41:15; 60:2-65:14; 120:9-122:25. “A universal canon of Anglo-American trust law

1 proclaims that when the trustee's powers of distribution are wholly discretionary, the beneficiary
2 has no ownership interest in the trust or its assets until the trustee exercises discretion by electing
3 to make a distribution to the beneficiary." *In re Bass*, 171 F.3d 1016, 1028 (5th Cir. 1999); *See*
4 *also*, AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS §155 at 152
5 (4th ed. 1987) (A discretionary trust is one "[w]here by the terms of the trust a beneficiary is
6 entitled only to so much of the income or principal as the trustee in his uncontrolled discretion
7 shall see fit to give him, [and] he (the beneficiary) cannot compel the trustee to pay him or to
8 apply for his use any part of the trust property."); *Wilson v. U.S.*, 140 B.R. 400, 404 (N.D. TX
9 1992) (holding that there was no property to which an IRS lien may attach, beneficiary did not
10 have either property interest or rights to property in the discretionary trust and IRS could not
11 compel trustee to disburse funds to debtor beneficiary); *Young v. McCoy*, 147 Cal.App.4th 1078
12 (2007) (under California law trustees of discretionary trusts cannot be compelled to pay a
13 beneficiary's creditors); *U.S. v. Delano*, 182 F.Supp.2d 1020, 1022 (D. Colo. 2001) (beneficiary
14 of discretionary trust has mere expectancy rather than a property interest in trust).

15 It is well settled that the assets of a corporation cannot be used to satisfy the debts of a
16 shareholder. *Postal Instant Press, Inc. v. Kaswa Corp.*, 162 Cal.App.4th 1510, 1517, 77
17 Cal.Rptr.3d 96, 101 (2008) (holding third party creditors may not pierce corporate veil to reach
18 corporate assets to satisfy a shareholder's personal liability); *Olympic Capital Corp. v. Newman*,
19 276 F.Supp. 646, 658 (C.D. Cal. 1967); *Floyd v. IRS*, 151 F.3d 1295, 1299-1300 (10th Cir. 1998)
20 *Cascade Energy and Metal Corp. v. Banks*, 896 F.2d 1557, 1576-1577 (10th Cir. 1990). As the
21 Ninth Circuit held in *In re Schwarzkopf*, 626 F.3d 1032(9th Cir. 2010), at 1038:

22 We first address the Debtors' reverse piercing argument. As they correctly note, the
23 California Court of Appeal held in *Postal Instant Press, Inc.* That "a third party creditor
24 may not pierce the corporate veil to reach corporate assets to satisfy a shareholder's
25 personal liability." 77 Cal.Rptr.3d at 97. We "must follow the decision of the intermediate
26 appellate courts of the state unless there is convincing evidence that the highest court of
27 the state would decide differently." *Owen By and Through Owen v. United States*, 713
28 F.2d 1461, 1464 (9th Cir. 1983).

Here, the United States seized the assets of Rothwell to satisfy the debts of Francis -- who

1 is not even a shareholder of Rothwell.

2 **III. ACCUSATIONS AND THEORIES DO NOT CONSTITUTE EVIDENCE -- THEY**
3 **CANNOT FILL THE UNITED STATES' EVIDENTIARY VOID.**

4 The government has no evidence that Francis has ever: (1) owned or controlled, directly or
5 indirectly, any interest in Hallmark, The Francis Trust trustee; (2) owned or controlled, directly or
6 indirectly, any interest in Inceptre Holdings; (3) controlled Chaffe, Jordan, Trowbridge, or any
7 other director of Hallmark and/or Rothwell; (4) controlled, directed or managed any of Rothwell's
8 corporate or financial affairs; (5) transferred or deposited any of his personal funds into either
9 Rothwell's Bermuda Commercial Bank account or Rothwell's Morgan Stanley account; (6)
10 controlled The Francis Trust protectors; (7) used or had any benefit from Rothwell's assets to
11 pay his personal expenses or otherwise; (8) nor that Sands Media and/or Mantra Films were
12 insolvent at the time of nor as a result of monetary transfers to Rothwell. Instead, the government
13 states in it's Memorandum Of Contentions Of Fact And Law (CR#47 (hereinafter "USCFL")) at
14 7:16-25:

15 The key evidence the Government relies upon in support of its claim that the subject levy
16 was not "wrongful" pursuant to 26 U.S.C. §7426 include, but are [sic] not limited to, 1)
17 bank records of Sands, Mantra, Rothwell, APMIC, Bank of Hawaii, Bermuda Commercial
18 Bank and Morgan Stanley, 2) business records regularly kept in the course of business of
19 the aforementioned entities, as well as business records of the Internal Revenue Service
20 (tax returns), Stewart Title Information International, Inc. (Escrow files), Crescent Capital,
21 Ltd. and Hadid Interiors (contracts), Casa Blanca de Punta Mita, S.A. de C.V. (Contracts),
22 3) public records of the Secretaries of State of Oklahoma and Nevada, and civil complaints
23 filed by Francis in this court.

24 To fill it's evidentiary void, the United States contends in the USCFL:

25 Rothwell's bank and brokerage accounts were used by Francis to perpetrate several
26 difference [sic] tax schemes. Each scheme had in common the following: 1) transferring
27 funds tax-free to offshore entities; 2) causing false entries on the corporate books and
28 records of Sands and Mantra to conceal the transfers as legitimate business expenses; and
3) falsely deducting the transfers on the Mantra and Sands corporate tax returns, resulting
in 4) a falsely reduced corporate net income that flowed through to Francis' personal tax
return, which accordingly, reported less income and tax due and owing from Francis. * * *
From the start, Francis used Rothwell to hoard cash generated by claiming false business
deductions on the tax returns of Mantra and Sands [*Id.*, USCFL 3:19-4:4, 4:5-6]

29 **A. Francis' Alleged "False Tax Deductions Schemes."**

Evidence that Francis controlled the funds before he caused their transfer to Rothwell does

1 not constitute evidence that Francis retained control over the funds nor controlled Rothwell or
2 Rothwell's MSSB account after the transfers were made. Likewise, that the source of those funds
3 – U.S. Corporations wholly owned by Francis – falsely claimed tax deductions purportedly based
4 on transfers of those funds, does not constitute evidence that Francis exercised control over
5 Rothwell and/or Rothwell's MSSB account. That logic compels the foregoing conclusions is
6 established by the fact that even assuming *ad arguendo* Francis (1) had never claimed the false
7 deductions or (2) he could lawfully claim them, neither fact would rebut actual evidence that
8 Francis controlled Rothwell or Rothwell's MSSB account.

9 To further clarify the illogic of the government's misguided and unsupported theories one
10 need only consider the scenario inadvertently presented by the government itself: other creditors
11 whom the government claims have not been paid by Mr. Francis, *viz.* could Francis' other
12 creditors claim that Francis controlled Rothwell and/or its MSSB account based on the false
13 deductions? Of course not, because claiming false tax deductions for the transfers has no legal
14 nor logical nexus with controlling *vel non* the transferee. Another obvious example is a non-
15 deductible expenditure for a vacation: if a taxpayer spends \$10,000. on a vacation and claims the
16 \$10,000. payment to the resort as a deductible "consulting" expense, does the false claim of
17 deduction constitute evidence that our vacationing tax cheat controls the resort to which he made
18 the payment? Accordingly, if the resort is owned by a subsidiary of a discretionary trust of which
19 the vacationing tax cheat is merely a potential beneficiary with no right to a distribution, does the
20 false deduction constitute evidence the transferor controlled the transferee resort? Every transfer
21 to the trust increased the potential size of future distributions to any of the beneficiaries but not
22 the likelihood of any distribution. *A fortiori* false tax deductions based on transfers do not affect
23 the likelihood of any such distribution nor constitute control over the trust or Rothwell. Similarly,
24 increasing the size of one's bet on a horse does not increase the likelihood the horse will win nor
25 constitute evidence the bettor controls the outcome of the race.

26 Moreover, the evidence establishes Rothwell's directors and officers were the only
27
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1 authorized signatories on and the only ones who ever exercised control over Rothwell's Bermuda
2 bank account and MSSB account. Francis had no signatory authority over Rothwell's accounts.
3 Since a levy only applies to such property or property rights as actually exist at the time the levy is
4 made, as a matter of state and TCI law Francis had no property rights in Rothwell's MSSB
5 account because under state and TCI law Francis could not compel MSSB to do anything, viz. to
6 liquidate assets and distribute proceeds to him or anyone else. *Craig v. U.S.*, 89 F.Supp.2d 858,
7 868-69 (S.C. TX 1999). This case is unlike *National Bank of Commerce* because Francis did not
8 have the "unrestricted right to withdraw," nor were the MSSB or Bermuda Commercial Bank
9 accounts "accessible to him." *Cf. U.S. v. National Bank of Commerce*, 472 U.S. 713, 724 (1985).

10 After he made monetary transfers to Rothwell Francis had neither the ability nor authority
11 to exercise control and he did not exercise control over Rothwell's Bermuda Commercial Bank
12 and MSSB accounts as established by Bermuda Commercial Bank's and MSSB's records.

13 Admitted Fact ##18-21, 25, 27, 28, 34-38. The wire transfers "are not merely evidence of a gift or
14 other grant, they are the gift itself, and ipso facto operate[] to transfer or convey the title of the
15 property described to the grantee." *Hamilton v. Hubbard*, 134 Cal. 603, 605, 65 P.321, 322
16 (1901). In short, Francis gave up possession of and responsibility over the transferred funds.
17 Assuming *ad arguendo* that Francis later falsely claimed and/or caused false claims that the
18 transfers constituted deductible expenses, there is no evidence or inference that the transferee is
19 aware of nor controlled by the transferor or his agent(s).

20 A gift has been judicially defined as a voluntary transfer of property by one to another
21 without any consideration or compensation therefor. It has sometimes been defined by
22 statute as a transfer of personal property made voluntarily and without consideration, and
23 also, generally, as that which is given, anything given or bestowed, or any piece of
24 property voluntarily transferred by one person to another. Hence, it is apparently well
25 established at law that to constitute a valid gift a transfer must be voluntary, absolute, and
26 without consideration. * * *[W]here a trustor created an irrevocable, present trust (as
27 distinguished from one conveying a future interest), not subject to modification, the corpus
28 of the trust conveyed to the trustee constitute[s] a present gift to the trust....

Gregory v. State, 77 Cal.App.2d 26, 30-31, 174 P.2d 863, 866 (Cal.App., 4th Dist., 1946).

With respect to Casa Blanca de Punta Mita, S.A. de C.V., it is a distinct legal entity in

1 which Francis has no legal or beneficial interest as a matter of Mexican law. Casa Blanca was
2 incorporated at the behest of the Trustee of the Francis Trust. The Francis Trust -- through
3 ownership of the shares of two Turks and Caicos Islands corporations which own all the shares of
4 Casa Blanca -- indirectly owns the shares of Casa Blanca. The decision to purchase the property
5 in Mexico was solely the decision of the Trustee. Admitted Fact #68. Rothwell provided a little
6 over \$2 million dollars for the Mexican corporation to purchase two lots (Lot ##13B and 14) in
7 Mexico as an investment for the benefit of The Francis Trust. Admitted Fact #81.

8 Francis directed and controlled the design, construction and improvements on Casa
9 Blanca's Lot#14, but did not use his personal funds. Admitted Fact ##78,79. Mantra Films, Inc.
10 and Sands Media, Inc. paid approximately \$5.3 million in 2002 and 2003 to fund the design and
11 construction of improvements on Casa Blanca's Lot #14. Admitted Fact ## 78,79. Francis, Sands
12 Media and Mantra Films use the Casa Blanca property at the sole discretion of and pursuant to the
13 powers invested in the Trustee under provisions of ¶9 of The First Schedule of The Francis Trust.
14 The funds provided by Sands Media and Mantra Films in 2002 and 2003 to improve Lot #14
15 added value to Casa Blanca's Lot #14 of approximately \$5.3 million dollars. Admitted Fact ## 79,
16 81. The United States' entire case rests on piling inference on inference, notwithstanding lack of
17 any logical nexus, viz. assuming *ad arguendo* that Rothwell's funding the purchase of Lot #14
18 constitutes evidence that Francis received a benefit from the trust of which he is a beneficiary,
19 such a benefit does not constitute evidence of control. In 2002 and 2005 Rothwell invested a total
20 of approximately ten percent (10%) of its MSSB account to purchase realty for a corporation
21 owned by two corporations owned by the trust, which thereby acquired realty into which Francis
22 invested more than \$5.3 million from his wholly owned S-corporations to pay for design and
23 construction of a luxury residence.

24 Francis and his wholly owned corporations have used the residence since its completion.
25 Francis has orally referred to Casa Blanca's residence he occupies as "his." The trust notes that it
26 obtained a \$5.3 million dollar contribution in the form of the residence constructed on property it
27

1 purchased for investment at a cost to the trust of about \$2.1 million. In other words, the value of
2 the trust's real estate investment was more than trebled, i.e. \$2.1 million plus improvements
3 costing \$5.3 million equals \$7.4 million. The trust conferring a benefit on Francis does not
4 constitute evidence Francis controlled the trust because the trust at the behest of the Trustee as
5 approved by the protector can independently confer benefits on any, one, some or all of the
6 beneficiaries. On the other hand the benefit conferred on the trust, i.e. a \$5.3 million addition to
7 the value of the trust's property in which the trust invested \$2.1 million clearly exceeds the benefit
8 of month-to-month occupancy by Francis for the last eight (8) years. Even at a guaranteed benefit
9 of 10% annual tax free income for its \$2.1 million investment, it would take more than twenty
10 (20) years for the trust to receive such a benefit, hence it would have been unreasonable for the
11 trust to refuse to take advantage of Francis' offer to build and pay all expenses of maintaining the
12 Mexican property, from which the trust can remove Francis at any time with reasonable notice
13 under Mexican law – which may occur in the near future depending on the outcome of the
14 criminal prosecution currently pending against Francis in Clark County, Nevada, *State of Nevada*
15 *v. Joseph R. Francis*, Case No. C-11-270780-1.

16 The United States has neither direct nor circumstantial evidence that Francis controlled
17 The Francis Trust, nor any of the corporations all shares of which are owned by the trust,
18 including Plaintiff Rothwell, Ltd., Summerland Holdings, Ltd., Island Films, Ltd. and Casa
19 Blanca de Punta Mita, S.A. de C.V., the Mexican corporation which owns the real estate paid for
20 by funds from Rothwell; all shares of Casa Blanca are owned 50% by Island Films, Ltd. and the
21 other 50% by Summerland Holdings, Ltd. As the Tax Court held in *Dalton v. CIR*, 135 T.C. No.
22 20, 2010 WL 3719274 (U.S. Tax Ct. 2010) *at *15*:

23 Petitioners' oral arrangement to live in the residence, which began in 1997, subjects them
24 to rental payments to the owners of the beneficial interest. However, the oral agreement
25 does not create in petitioners an express or implied beneficial interest in the Trust.
26 Whether the act of living on the trust property may appear to create a form of beneficial
27 interest, we conclude that it did not create such an interest since petitioners paid rent in the
28 form of payments for mortgage debt service, property taxes, maintenance, and costs of
occupancy and also cared for Mr. and Mrs. Dalton Sr. Additionally, the appointment of
Mr. Dalton Jr. as trustee does not create property or a right to property to which the section

1 6331 levy could attach. On the basis of the record, we conclude that petitioners do not
2 have a beneficial interest in the Poland property held in trust. [Emphasis added].

3 Furthermore, settlement of The Francis Trust, an irrevocable discretionary trust,
4 incorporation of Rothwell, Ltd. and Casa Blanca, purchases of the Mexico property and
5 completion of the improvements to the Mexico Lot #14 all occurred from May 24, 1999 through
6 September, 2005 -- all prior to the commencement of the IRS investigation of Francis which
7 began in 2006. Admitted Fact ##4, 15, 67, 72, 79. In fact there is no dispute that no transfers by
8 anyone, including Francis have been made to Rothwell since 2003. Admitted Fact ## 39, 30, 99,
9 100.

10 Moreover, no evidence of Francis' alleged insolvency has been adduced. It is also
11 undisputed that Francis expended \$5.3 million from Sands and Mantra to pay for design and
12 construction of the residence. In fact: (1) on November 5, 2002, Blue Horse Trading, LLC
13 purchased Francis' Los Angeles residence with a \$5,450,000 transfer from Francis' personal
14 Morgan Stanley account (Admitted Fact #65); and (2) Francis admitted in this Court on February
15 12, 2010, that on November 6, 2009, he had over \$2 million dollars in his personal accounts at
16 UBS which the IRS levied against. *See*, CR #51, 10:14-18, *Francis v. U.S.*, Case No. 2:09-cv-
17 09449-RGK-FFM, More important Francis has apparently continued to operate his businesses
18 without any evidence of any bankruptcy even now in 2011 – some eight (8) years after the last
19 transfer to Rothwell.

20 The fact that Sands Media and Mantra may have claimed bogus tax deductions is
21 irrelevant to whether The Francis Trust or the corporations of which it owns all the stock are Mr.
22 Francis' nominees. *See, e.g., In re Richards*, 1998 WL 205915 (Bkrtcy. E.D. Pa. 1998) at *10:

23 [A]ll of the aforementioned cases involved so-called “family trusts.” created with the
24 intent of avoiding taxes. FN32 Not only does this case not involve the typical “family
25 trust,” but there is no evidence that Debtors created the trust [in 1983] to avoid the
26 payment of taxes. ... While they took deductions to which they were not entitled and these
27 resulted in deficiency assessments which remain unpaid, there is no evidence that Debtors
28 created the trust in 1984 in order to circumvent their obligation for these assessments.

29 FN32. * * * “The Leo Itz Trust is a typical example of the ‘family trust’ ... The taxpayers
30 purchased information, including trust forms and “how to” manuals from a promoter.

1 Elise Itz transferred to Leo Itz all her interest in their real or personal property. Leo Itz
2 then executed the trust documents, transferred the property to the trust, and in the
3 exchange received certificates of beneficial interest which he distributed among his family
4 members. The grantors of the trust, Leo Itz and Elise Itz, then became its trustees, with
5 sole power of management over the trust corpus. No distributions of trust of income have
6 ever been made to the holders of the beneficial interest certificates; trust funds have been
7 used solely to pay personal upkeep on their residence. After formation of the trust,
8 taxpayers continued to enjoy the full use of trust property, including the real property that
9 is the subject of this lawsuit.”

6 **B. Baseless “Money Laundering” Accusations.**

7 In a bid to obscure the evidentiary void, the USCFL disingenuously asseverates:

8 A: The second scheme Francis *used to launder funds* through plaintiff’s bank account
9 in Bermuda involved direct payments made by Sands to said account, which it
10 deducted on its 2002 tax return as expenses for “consulting services.” [*Id.*, 5:1-3
(emphasis added)];

11 B. Through a series of transfers, Sands and Mantra *have laundered millions* through
12 off-shore entities to establish the Rothwell Morgan Stanley account. [*Id.*, 22:5-6
(emphasis added)].

13 To establish this accusation the government must prove that the monetary transactions at
14 issue instanter involved proceeds derived from illegal activity as specified in 18 U.S.C. §1961.

15 As a matter of law the government’s theory of “tax savings” does not give rise to “proceeds”
16 capable of being laundered in any financial transaction with Plaintiff Rothwell.

17 It is well settled that revenue derived from lawful businesses cannot as a matter of law
18 constitute “proceeds of a specified unlawful activity” pursuant to 18 U.S.C. §§1956, 1957 or
19 1961. *U.S. v. Khanani*, 502 F.3d 1281, 1295-96 (11th Cir. 2007) (“We agree with the district court
20 that ‘it is clear that the term [proceeds] does not contemplate profits or revenue indirectly derived
21 from labor or from the failure to remit taxes.’); *U.S. v. Carucci*, 364 F.3d 339, (1st Cir. 2004) (“the
22 statute requires proof that the property involved in the transaction was actually derived from
23 specified unlawful activity. 18 U.S.C. §1957(a).”); *U.S. v. Lovett*, 964 F.2d 1029, 1041-42 (10th
24 Cir. 1992) (“the elements of the particular ‘specified unlawful activity’ ... are essential elements
25 that the prosecution must prove in order to establish a violation of §1957.”); *U.S. v. Isabel*, 945
26 F.2d 1193, 1202 n. 16 (1st Cir. 1991)(“Section 1956(c)(7) defines ‘specified unlawful activity’ as

1 including, *inter alia*, ‘any act or activity constituting an offense listed in section 1961(1) of this
2 title ...”).

3 *In In re Search of 2847 East Higgins Road, Elk Grove Village, Illinois*, 390 F.3d 964 (7th
4 Cir. 2004), IRS agents executed a warrant to search a warehouse for evidence and fruits of
5 suspected violations of federal tax laws by Michael Wellek, the owner of a string of strip joints.
6 The IRS agents seized more than \$12 million in cash during the search. The Seventh Circuit held
7 that income from a lawful business is not a fruit of a crime, stating in pertinent part:

8 Had Wellek stolen cash from an IRS office, that cash would be a fruit of his crime, and the
9 government could seize it for use in prosecuting him, Fed.R.Crim.P. 41(c)(2), and could
10 also seek its forfeiture in civil or criminal proceedings. 18 U.S.C. §981(a)(1), 982(a)(1);
11 *United States v. Emerson*, 128 F.3d 557, 566 (7th Cir. 1997). If the government deposited
12 the cash in a bank, thus exchanging the cash for a claim against the bank, the money in the
13 account would retain its character as a fruit of crime. *United States v. U.S. Currency*
14 *deposited in Account No. 1115000763247*, 176 F.3d 941, 945-57 (7th Cir. 1999); *United*
15 *States v. Daccarett*, 6 F.3d 37, 54-55 (2nd Cir. 1993). **But the income from a lawful**
16 **business (and, as far as we can judge, Wellek’s tawdry enterprises are legal) is not a**
17 **fruit of crime even if the recipient of the income refuses, in criminal violation of the tax**
18 **laws, to pay the tax owing on the income.** The currency in the warehouse belonged to
19 Wellek, not to the IRS. The fact that he had \$12 million in currency in a warehouse is
20 evidence of a criminal violation of the tax laws, ... but the fact that \$12 million in currency
21 was found in the warehouse is acknowledged.... Wellek’s Rule 41(g) motion should have
22 been granted as soon as the government realized that the currency had no evidentiary value
23 and was not the fruit of a crime (to repeat, the income on which one has refused in
24 criminal violation of federal law to pay income tax is not itself a fruit of that criminal
25 violation). [*Id.*, 390 F.3d at 965-66 (emphasis added)].

18 Notwithstanding the legal conclusion of every court which has considered the issue, the
19 government breathlessly insists that this Court should hold otherwise. The government has no
20 evidence to support nor does it offer any alternative theory to justify its nominee claim. Rothwell
21 understands the government’s outrage that if Rothwell prevails Mr. Francis may ultimately
22 receive a distribution from The Francis Trust of some or all of the funds owned by Rothwell.
23 Rothwell also understands the government’s attempts to prejudice this Court in the same
24 direction. But the law and the facts compel this Court to do its duty impartially. The Supreme
25 Court’s caveat is apropos:

26 Here we are urged to view the Endangered Species Act “reasonably,” and hence shape a
27 remedy “that accords with some modicum of common sense and the public weal.” ... But
28 is that our function? * * * We do not sit as a committee of review, nor are we vested with

1 the power of veto. The lines ascribed to Sir Thomas More by Robert Bolt are not without
2 relevance here:

3 “The law, Roper, the law. I know what’s legal, not what’s right. And I’ll stick to what’s
4 legal. . . . I’m *not* God. The currents and eddies of right and wrong, which you find such
5 plain-sailing, I can’t navigate, I’m no voyager. But in the thickets of the law, oh there I’m
6 a forester. . . . What would you do? Cut a great road through the law to get after the
7 Devil? . . . And when the last law was down, and the Devil turned round on you – where
8 would you hide, Roper, the laws all being flat? . . . This country’s planted thick with laws
9 from coast to coast – Man’s laws, not God’s – and if you cut them down . . . d’you really
10 think you could stand upright in the winds that would blow then? . . . Yes, I’d give the
11 Devil benefit of law, for my own safety’s sake.” R. Bolt, *A Man for All Seasons*, Act I, p.
12 147 (Three Plays, Heinemann ed. 1967).

13 *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-95 (1978)

14 Furthermore, the United States takes the position – and attempts to induce this Court to
15 take the same position – that deductions taken with respect to Asia Pacific Mutual Insurance
16 Company (“APMIC”) and transfers to Rothwell constitute felony tax evasion. However, the
17 United States ignores undisputable facts that: (1) although Francis was charged in an Indictment
18 with tax evasion based in part on the APMIC transaction and deductions taken in connection with
19 transfers to Rothwell -- Francis was not found guilty of felony tax evasion; and, instead, (2) the
20 United States dismissed those charges with prejudice and entered into a plea agreement with
21 Francis for two misdemeanor counts for failing to report the interest earned on Rothwell’s MSSB
22 account based on the controlled foreign corporation rules in the Internal Revenue Code. *See*
23 *Admitted Fact #59*. The United States errs as a matter of law when it relies on an Indictment as
24 evidence to support its position – that Indictment is nothing more than an unproven allegation,
25 particularly where it has been dismissed with prejudice. Whether the challenged deductions are
26 permissible and how much Francis may owe is a civil matter which will be decided by the Tax
27 Court, not by this Court.

28 **C. Unsupported Speculation.**

The United States repeatedly engages in quantum leaps of conclusory allegations proffered
as “facts.” First, the United States asseverates: “All ownership interests held by Rothwell can be
traced back to Francis, Sands and Mantra.” [*Id.*, 19:13-14]. The evidence and admitted facts

1 establish that: (1) Rothwell ownership interests are held by and can be traced back to The Francis
2 Trust; (2) the contributions to the trust can be traced to Sands Media and Mantra Films, U.S.
3 corporations of which Francis is the sole shareholder. The evidence shows that neither Francis,
4 Sands Media nor Mantra Films were insolvent at the times of the transfers nor rendered insolvent
5 as a result of the contributions. Next, the United States asserts that “Rothwell is nothing more
6 than a funnel,” -- suggesting that Rothwell is nothing more than Francis’ “piggy bank.” This
7 “funnel” assertion is nullified by the evidence: (1) \$20 plus million in investments was maintained
8 in Rothwell’s MSSB investment account on November 6, 2009 – the date of the IRS “nominee”
9 levy (Admitted Fact ##61,, 82, 83); (2) in March, 2002, Rothwell provided \$1.030 million dollars
10 for Casa Blanca de Punta Mita, S.A. de C.V. (“Casa Blanca”), a Mexican corporation, to purchase
11 Lot #14 in Mexico (Admitted Fact ##67-68, 72-73, 75-77); (3) in September, 2005, Rothwell
12 provided \$1.023 million dollars to fund Casa Blanca’s purchase of Lot #13B (Admitted Facts
13 ##67- 68, 72, 74,77); and (4) Sands Media and Mantra Films provided \$5.3 million dollars to fund
14 to develop and improve Casa Blanca’s Lot #14 (Admitted Fact #79). Further, Rothwell’s Expert
15 Witness David Connell has opined and will testify that as a matter of Mexican property law,
16 neither Francis, Sands Media, Mantra Films nor Rothwell has any ownership interest in Casa
17 Blanca nor it’s Lot## 13B or Lot 14. In a nutshell, the “funnel” did not flow to Francis, nor – in
18 context – did it flow much at all: of more than \$20 million in liquid assets, only two other
19 investments were ever made, each slightly more than \$1 million for real estate, in 2002 and 2005.

20 Here, there is no evidence that Rothwell or The Francis Trust paid any of Francis’ personal
21 expenses -- unlike all of the wrongful levy cases where the United States has prevailed because of
22 abundant evidence the alleged nominee paid the personal expenses of the delinquent taxpayer.
23 Furthermore, there has been no distribution to any beneficiary of The Francis Trust. Last, but
24 certainly not least, there is not a scintilla of evidence that The Francis Trust, Rothwell or any other
25 entity owned, directly or indirectly, by the trust had any knowledge of or participation in the
26 preparation of Francis’, Sands Media’s or Mantra Films’ tax returns. Mr. Rayment will also
27
28

1 testify that he was never consulted on any of Mr. Francis's nor any of Sands Media's or Mantra
2 Film's tax returns.

3 Without any evidence that Brian Rayment, Esq.: (1) has failed to exercise independent
4 judgment, or (2) engaged in professional misconduct involving dishonesty, fraud, deceit or
5 misrepresentation, the United States' engages in more unsupported speculation -- by piling
6 inference upon inference at 19:19-21:16 -- that Francis controlled Rothwell through Mr. Rayment,
7 culminating with the government's "wish fulfillment" claims:

8 **As serving as the Trust's protector, Rayment can instruct the Trust to carry out**
9 **Francis' wishes, just as he did in the APMIC transaction and the building of the**
10 **Punta Mita property.** [*Id.*, 19:19-21:23 (emphasis added). * * *

11 Through a series of transfers, Sands and Mantra have laundered millions through off-
12 shore entities to establish the Rothwell Morgan Stanley account. By the terms of the
13 Francis Trust and its ownership of the shares of Rothwell, **such money was not accessible**
14 **to Francis, unless and until Rayment, Francis' personal attorney and confidant,**
15 **agreed for such funds to be distributed to the beneficiaries. Such distribution was**
16 **only a matter of when Francis requested Rayment to make such distribution.** [*Id.*,
17 22:5-11].

18 The United States' conclusory quantum leaps are akin to those postulated in *Estate of*
19 *Robert C. Fortunato v. CIR*, T.C. Memo, 2010-105, 2010 WL 1904958 (U.S. Tax Ct. 2010)
20 which were rejected by the Tax Court:

21 Respondent's cavalier assertion that "Bobby would not have spent the rest of his life
22 struggling to grow a business and working to make [the St. George warehouse companies]
23 a success *unless he was an equity owner*" is unsupported speculation on respondent's part,
24 which we reject. [*Id.*, 2010 WL 1904958 *14 (emphasis in the original)].

25 The government's innuendo that Mr. Rayment was at Francis' "beck and call" ignores the
26 fact that Mr. Rayment represents many corporations and individual clients throughout the United
27 States in commercial matters, including Mr. Francis' parents. Mr. Rayment will testify that he: (1)
28 has been a practicing attorney since 1982 specializing in commercial law and commercial
transactions domestically and internationally; and (2) is a partner in the Oklahoma law firm of
Rayment, Kivel and Francis, which has generally been comprised of fifteen (15) lawyers and
seventy (70) employees at all times between 1998 and 2011. During the period when he was
representing Francis from 1998 to 2005, Mr. Rayment was: (1) President of a real estate

1 development company in Tulsa, Oklahoma; (2) one of three managers of an aseptic
2 manufacturing company with plants in Kansas, Connecticut, Mexico and China; (3) a director of a
3 separate Chinese Company, Chao Tai Machinery Company, which sold and serviced restaurant
4 equipment to McDonalds and KFC in mainland China, and (4) US partner representative for this
5 business traveling to China 5 to 7 times per year. After, Mr. Rayment was appointed protector in
6 2005, he did very little work for Mr. Francis and his corporations; Rayment's firm was paid
7 approximately \$50,000 by Francis and his corporations in the past five (5) years.

8 The United States also ignores Mr. Rayment's testimony on February 25, 2011, wherein
9 Rayment testified that he was paid by the entity who retained his services – Francis did not pay
10 Rayment for legal services performed for The Francis Trust, Rothwell or any other corporation
11 owned by the Trust – Rayment was paid for services for which he was retained by the Trustee. *Id.*,
12 RT (2/25/11) 54:15-20.

13 Without any factual basis whatsoever, the United States falsely asserts that Mr. Rayment
14 has served as “the sole attorney for Sands, Mantra, other ‘Girls Gone Wild’ corporate entities.”
15 *Id.*, at 19:23-24. Likewise, with respect to “[a]fter such research Rayment reported his findings
16 regarding the formation of the Trust with Francis,” (*Id.* 20:6-7) Francis and Rayment met with
17 Owen Foley, Esq., and decisions on trust formation, structure and selection of the trustee were
18 based on Mr. Foley's advice.

19 Although the United States admits there are two (2) protectors for The Francis Trust
20 (Admitted Fact #9), it asseverates: “Rayment is *the Protector* of the Francis Trust” *Id.*, at
21 20:9-10 (emphasis added). Moreover, Mr. Rayment became a protector in 2005 – he was not a
22 protector from May 24, 1999 through December, 2004; *See* Rayment deposition (2/25/11) at
23 44:8-10. After Mr. Trowbridge purchased an interest (but not the entirety) in Hallmark (the
24 Trustee of The Francis Trust), Colin Chaffe and Nicola Jordan remained as agents for Hallmark
25 and responsible for Rothwell's financial accounts. Mr. Rayment will testify that Mr. Trowbridge
26 appointed Mr. Rayment as the second protector in January, 2005. The United States also asserts
27
28

1 "and Colin Chaffe is its trustee." *Id.*, at 20:9-10 (*emphasis added*). The evidence – and Admitted
2 Facts -- show that from May 24, 1999 until March 2, 2010, Hallmark Trust, Ltd. was the Trustee;
3 when Hallmark resigned Chaffe was appointed the Trustee. See Admitted Fact ##3,4,7, 16, 31-32.

4 Contrary to the USCFL's assertions at 20:23-21:7, Mr. Rayment was an intermediary
5 between Francis and Crescent and Casa Blanca and Crescent – not Rothwell and Crescent.
6 Rothwell had no dealings with regard to the Mexican property, except to fund Casa Blanca's
7 purchases of the two lots. Furthermore, the evidence will show that: (1) as a matter of Mexican
8 property law Rothwell is not a direct or indirect owner of Casa Blanca nor it's property, and (2)
9 Island Films, Ltd. and Summerland Holdings, Ltd. are Casa Blanca's shareholders, each holding
10 25,000 shares of Casa Blanca.

11 In 2002 Rayment and Francis did meet with APMIC representatives, Morgan Liddell and
12 Cherie Bright, and reviewed the APMIC business interruption insurance contracts; the APMIC
13 representatives advised that the insurance payments were tax deductible and provided one or more
14 opinions purporting to support deductibility. On August 22, 2007, the United States filed a
15 Complaint for Permanent Injunction against Liddell and Bright in the District of Hawaii (Case No.
16 CV07-00442-SPK) to enjoin them from, *inter alia*, advising customers they can claim tax
17 deductions. According to the United States' Complaint Liddell and Bright had been promoting
18 APMIC since 1997, generating millions of dollars in APMIC premiums. On May 19, 2008,
19 Liddell and Bright entered into a Stipulated Final Judgment Of Permanent Injunction in Case No.
20 CV07-00442-SPK.

21 Without a scintilla of evidentiary support, the United States asserts: "Rayment found out
22 about APMIC from Francis" (*Id.*, 21:9-10). In fact, this rank speculation arises from an improper
23 inference based on invocation of the attorney-client privilege:

24 Q [Mr. Thomas]: Are you familiar with a company called Asia Pacific Insurance
25 Company?

26 A[Mr. Rayment]: Yes. I understand it is or was a corporation that was established to
27 provide an insurance product that they were marketing as a tax
28 advantageous insurance product.

1 Q [Mr.Thomas]: How did you become familiar with Asia Pacific Insurance
2 Company?

3 Mr. MacPherson: Object. If it concerns my client communication, I don't know.

4 Mr. Cohan: And I would make the same objection if it came about in terms of
5 seeking legal advice, and it came from either the director of
6 Rothwell or the trustee

7 A[Mr. Rayment]: It would have come through a client communication. [RT (2/25/11)
8 62:7-63:5].

9 It is well settled that no presumptions may arise nor any inferences -- adverse or otherwise
10 -- may be drawn by the exercise of the attorney-client and/or attorney-work product privileges.
11 *Calif. Evid. Code §913, et seq.; Metzger v. Silverman*, 62 Cal.App.3d Supp. 30, 40 , 133 Cal.Rptr.
12 355, 362 (1976); *People v. Doolin*, 45 Cal.4th 390, 441-42, 87 Cal.Rptr.3d 209, 256 (2009);
13 *Home Indemnity Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1327-29 (9th Cir. 1995)
14 (pursuant to Rule 501, F.R.Evid., court must apply state law of privileges); *Knorr-Bremse Systeme*
15 *Fuer Nutzfahrzeuge GMBH v. Dana Corp.*, 383 F.3d 1337, 1344 (Fed.Cir. 2004) (“no adverse
16 inference shall arise from invocation of the attorney client and/or work product privilege”); *In re*
17 *Tuder Associates, Ltd., II*, 20 F.3d 115, 120 (4th Cir. 1994) (“A negative inference should not be
18 drawn from the proper invocation of the attorney-client privilege).

19 Likewise, the United States lacks a scintilla of evidentiary support for it's assertion that:
20 “Mr. Rayment *can instruct the Trust* to carry out Francis' wishes, just as he did in the APMIC
21 *transaction and the building of the Punta Mita property.*” *Id.* 21:22-23 (*emphasis added*); *see*
22 *also*, USCFL at 22:5-14. Neither protector -- Mr. Rayment nor Pittsford Ltd. -- can dictate that
23 distributions be made to Francis or any other beneficiary. Pursuant to the terms of the trust, the
24 Trustee in it's sole discretion can make distributions up to \$10,000 to any beneficiary; the Trustee
25 cannot make distributions to any beneficiary exceeding \$10,000 without the agreement of both
26 protectors, Mr. Rayment and Pittsford Ltd. The contention that Mr. Rayment can dictate
27 distributions to Mr. Francis, or any other beneficiary, is without any basis in fact -- the terms of the
28 trust preclude Mr. Rayment so dictating. Assuming *arguendo* Mr. Rayment attempted such a

1 “dictate” it would necessitate the agreement of both the independent Trustee and co-protector
2 Pittsford, Ltd. That this is nothing more than rank speculation is further established by the fact
3 that no distribution has ever occurred, hence any such “dictate” exists only in the government’s
4 hypothetical World, recalling another civil tax case where an evidentiary void could not be filled
5 by hypothesis:

6 ... All this rather puts one in mind of a supposed dinner table conversation which is said to
7 have ended in the following exasperated exchange: “Does your sister like cheese?” “I
8 don’t have a sister.” “Well, if you did have a sister would she like cheese?” The
9 defendants’ experts could well be likened to experts in gastronomy who postulated a most
10 complicated dietary regimen which would induce the hypothetical sister to like cheese, if
11 she could ever be found.

12 *Philatelic Leasing, Ltd. v. U.S.*, 601 F.Supp. 1554, 1567 n. 13 (S.D.N.Y. 1985).

13 Contrary to USCFL’s assertions at 22:15-26, Rothwell has no interest in the Mexican
14 property as a matter of Mexican law. *Axiomatically*, there were no formalities for Rothwell to
15 follow with regard to Casa Blanca’s properties. Likewise, the United States’ assertion that the
16 Mexican property is “an ‘income-producing’ property for the Trust,” is unfounded. Like
17 Rothwell’s MSSB investment account, Casa Blanca’s properties – lot ## 13B and 14 -- are held as
18 investments -- i.e. “investment property,” not “income-producing” rental property; Lot #14 was
19 purchased in 2002 and has been improved; Lot #13B was purchased in 2005 and is unimproved.

20 And last, the government engages in *ignoratio elenchi* to justify execution of a jeopardy
21 nominee levy on Rothwell’s MSSB account:

22 ... funds held in [Rothwell’s MSSB account] were also determined to be in jeopardy of
23 being moved out of the reach of the Government. Indeed, such movement of funds was
24 contemplated, as subsequent to the jeopardy levy but prior to payment of the levied funds
25 to the IRS, on December 1, 2009, the Morgan Stanley account manager that handled the
26 Rothwell account received request from the then-director of Rothwell, Brian Trowbridge,
27 that he wished to liquidate the Rothwell account at Morgan Stanley. [USCFL at 7:9-15].

28 Morgan Stanley – not Rothwell – provided the impetus for Rothwell moving it’s account.
29 In October, 2008, Morgan Stanley sent a letter to Trowbridge and Rothwell requesting Rothwell’s
30 account be transferred to another financial institution. Admitted Fact #42. Neither the IRS nor
31 Morgan Stanley notified Trowbridge or Rothwell that an IRS levy had been served against

1 Rothwell's account on November 6, 2009. Admitted Fact ##50-54. Trowbridge did not learn that
2 the IRS had levied on Rothwell's account on November 6, 2009, until early 2010. Admitted Fact
3 #62. It is indisputable that Francis learned of his indictment in April of 2007 (see Admitted Fact
4 #41), which specifically alleged false tax deductions purportedly based on transfers of millions of
5 dollars to Rothwell. If Francis controlled Rothwell, it beggars reason to suggest he would wait
6 until after a jeopardy assessment and levy two and one-half years later to attempt to remove what
7 the government refers to as the *corpus delicti*.

8 **D. Francis' Ferocious Campaign To Wrest Control Of The Francis Trust And Rothwell**
9 **From the Trustee And The Protectors.**

10 Beginning on Sunday, February 27, 2011, Francis initiated and continues to date to engage
11 in a ferocious campaign to wrest control over The Francis Trust and its assets -- including
12 Rothwell, Island Films, Summerland Holdings and Casa Blanca -- from Trustee Colin Chaffe and
13 Protectors Brian Rayment and Pittsford, Ltd. Francis initiated this campaign aided by attorney
14 Howard Fischer ("Fischer"), with both of them demanding Rayment's, Chaffe's and Pittsford's
15 resignations, accompanied by baseless and false accusations of wrongdoing, threats of baseless
16 litigation, threats of physical harm, and other harassing and vexing emails and text messages,
17 culminating in the filing of a baseless and groundless suit against Rayment in California state
18 court and retaining a TCI attorney to pursue baseless and groundless legal action(s) against Colin
19 Chaffe and Pittsford, Ltd., and its principal Nicola Jordan in TCI.

20 On March 18, 2011, Attorney Fischer sent an email to Rayment stating, "[i]t appears that it
21 is time for you to assist in the transition of yourself as protector," and demanding Rayment's
22 "commitment today (and then follow-through in the next few days)," to:

- 23 A. You commit to resign as a co-protector in the very near future (see item C).
24 B. Contact Pittsford, and request that they resign as a co-protector immediately. Anything
25 you can do to facilitate their removal as a co-protector is appreciated.
26 C. Select a successor-protector, and appoint them, and you concurrently resign with the
27 acceptance of the new protector. * * *

28 Three days later on March 21, 2011, Fischer sent the following email to Rayment

1 accompanied by a draft complaint, which states in pertinent part:

2 I have been trying to speak with you for several days, but you have not returned my call or
3 emails, other than to send me a long, self-serving and inaccurate email today.

4 So, hopefully the attached draft law suit seeking disgorgement of all legal fees paid to you
5 and your firm will get your attention. And perhaps now you will find the time to call Mac
6 or myself to discuss the current situation.

7 When Rayment refused to acquiesce, on March 28, 2011, Francis, GGW Brands, Inc.,
8 Mantra Films, Inc., and Sands Media, Inc. filed suit in Los Angeles Superior Court against
9 Rayment and his law firm for disgorgement of legal fees (Case No. SC112005). Francis' post
10 February 27, 2011, ferocious campaign – emails, text message and suit against Rayment – are
11 contained in Trial Exhibit 143 (Bates ## FGW00001-FGW00158). Mr. Rayment petitioned the
12 Los Angeles Superior Court Of California, West District, for a Restraining Order against Francis
13 to prevent further harassment of himself and his family (Case No. SS020779). On May 16, 2011,
14 the Superior Court entered a Temporary Restraining Order against Francis to stop the harassment
15 of Rayment and his family (Bates ## FGW000159- FGW000163). On June 6, 2011, following
16 the scheduled hearing, the Superior Court entered a Restraining Order to Stop Harassment (of
17 Rayment and his family) against Francis “based on a credible threat of violence.” (FGW000164-
18 FGW000166).

19 Francis' ferocious campaign to wrest control over The Francis Trust beginning on
20 February 27, 2011, provides affirmative evidence that at the time the levy was served on
21 Rothwell's MSSB account on November 6, 2009, Francis lacked control over the Francis Trust,
22 Rothwell, Island Films, Summerland Holdings and Casa Blanca.

23 RESPECTFULLY SUBMITTED this 7th day of June, 2011.

24 WILLIAM A. COHAN, P.C.
25 By: s/ William A. Cohan
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1 Attorney for Plaintiff Rothwell, Ltd.

2
3 **CERTIFICATE OF SERVICE**

4 I hereby certify that on this 7th day of June, 2011, I did cause the foregoing Rothwell,
5 Ltd.'s Trial Brief to be served via the ECF system on the following:

6 AUSA Valerie Makarewicz, Esq., E-Mail: valerie.makarewicz@usdoj.gov
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By: s/ Alicia Cisneroz
Alicia Cisneroz, Legal Assistant

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

THE HONORABLE R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

ROTHWELL, LTD.,)
))
PLAINTIFF,)
))
VS.) NO. SACV-10-00479-RGK
))
UNITED STATES OF AMERICA,)
))
DEFENDANT.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, JUNE 6, 2011; 10:04 A.M.
PRETRIAL CONFERENCE

MARY RIORDAN RICKEY
OFFICIAL COURT REPORTER
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1 LOS ANGELES, CALIFORNIA; MONDAY, JUNE 6, 2011

2 10:04 A.M.

3 --000--

4 THE CLERK: CALLING ITEM 17, CASE NUMBER,
5 SACV-10-479, ROTHWELL VERSUS UNITED STATES OF AMERICA.
6 COUNSEL, PLEASE COME FORWARD AND STATE YOUR
7 APPEARANCES.

8 MR. COHAN: GOOD MORNING, YOUR HONOR.
9 WILLIAM COHAN ON BEHALF OF ROTHWELL, LIMITED, AND WITH ME IS
10 GABRIEL COHAN, WHOSE ADMISSION IN THIS COURT IS PENDING.
11 I'LL LET HIM EXPLAIN THAT IF YOU WOULD LIKE.

12 THE COURT: THAT'S OKAY. AS LONG AS HE'S ADMITTED
13 BY THE TIME OF TRIAL, NO PROBLEM.

14 MR. GABRIEL COHAN: THANK YOU, YOUR HONOR. GOOD
15 MORNING.

16 THE COURT: GOOD MORNING.

17 THERE WON'T BE A NEED TO SIT DOWN. WE'RE NOT
18 GOING TO BE HERE VERY LONG.

19 MR. THOMAS: GOOD MORNING, YOUR HONOR. ASSISTANT
20 UNITED STATES ATTORNEY DARWIN THOMAS ON BEHALF OF DEFENDANT
21 UNITED STATES OF AMERICA. WITH ME IS ASSISTANT U.S.
22 ATTORNEY VALERIE MAKAREWICZ.

23 THE COURT: OKAY, AND I DON'T WANT TO BE RUDE. IF
24 YOU WANT TO SIT DOWN, YOU CAN, BUT WE'RE NOT GOING TO BE
25 HERE THAT LONG. SO YOU CAN DO IT EITHER WAY. I DON'T

1 PARTICULARLY CARE.

2 IN THIS PARTICULAR MATTER, THIS IS A COURT TRIAL
3 THAT IS SET FOR NEXT TUESDAY, AND WE'LL BE GOING NEXT
4 TUESDAY. WE'LL BE STARTING AT 9:00 O'CLOCK IN THE MORNING
5 ON TUESDAY.

6 I DO WANT TO TALK TO YOU A LITTLE BIT BECAUSE THE
7 COURT DOES IMPOSE TIME LIMITS, AND I DO THAT OFF THE WITNESS
8 LIST. THE COURT HAS REVIEWED THE WITNESS LIST. AND IT'S
9 GOING TO BE MUCH, MUCH, MUCH SHORTER THAN ALL OF YOU HAVE
10 TALKED ABOUT AS FAR AS TIME IS CONCERNED.

11 WE'VE LOOKED AT THE DIFFERENT WITNESSES, WHAT
12 THEY'LL BE TESTIFYING TO. BASICALLY WE HAVE WITNESSES --

13 PLAINTIFF'S FIRST WITNESS IS GOING TO BE
14 TESTIFYING AS FAR AS THE FORMATION OF THE TRUST.

15 WE HAVE PLAINTIFF'S SECOND, THIRD AND FOURTH
16 WITNESSES AND GOVERNMENT'S SECOND, THIRD, FOURTH, AND SIXTH
17 WITNESSES TESTIFYING TO THE CONTROL OF THE TRUST OR LACK OF
18 CONTROL.

19 WE HAVE PLAINTIFF'S FIFTH, SIXTH, SEVENTH AND
20 EIGHTH WITNESSES FROM MORGAN STANLEY. I'M NOT TOO SURE
21 EXACTLY THE RELEVANCY OF WHAT THEY'RE GOING TO BE TESTIFYING
22 TO, OTHER THAN CONTACT BETWEEN FRANCIS AND MORGAN STANLEY.

23 KEEP IN MIND WHAT WE'RE TALKING ABOUT IS TRUST AND
24 CONTROL. IF FRANCIS DOES NOT HAVE CONTROL OVER THAT TRUST,
25 THEN, YOU KNOW, THE GOVERNMENT'S IN TROUBLE. AND IF HE DOES

1 HAVE CONTROL OF THE TRUST, THEN ROTHWELL'S IN TROUBLE. SO
2 IT'S A VERY SIMPLE ISSUE.

3 WE ALSO HAVE EXPERT WITNESSES TESTIFYING AS TO
4 LAW, ON NUMBER ONE, NINE, AND TEN OF THE PLAINTIFF'S
5 WITNESSES.

6 I CAN TELL YOU RIGHT NOW NOBODY TESTIFIES AS AN
7 EXPERT AS TO THE LAW. THERE'S ONLY ONE EXPERT OF THE LAW,
8 AND THAT'S THE JUDGE OF THE COURT HEARING THE CASE.

9 IF YOU WANT TO SUBMIT REQUESTS TO TAKE JUDICIAL
10 NOTICE, I HAVE NO PROBLEM. YOU SHOULD DO THAT BEFORE THE
11 TRIAL. BUT NOBODY COMES IN AND TELLS THE COURT WHAT THE LAW
12 IS. THAT'S SOMETHING THE COURT HAS TO DECIDE.

13 THEN WE HAVE MANY WITNESSES OR SOME WITNESSES --
14 ONE AND SEVEN, I BELIEVE, OF THE GOVERNMENT -- TESTIFYING AS
15 TO THE INVESTIGATION OF THE FRAUD AND ALL. THAT'S NOT
16 BEFORE THE COURT AT THIS TIME.

17 WHAT'S BEFORE THE COURT IS CONTROL OVER THE TRUST.
18 I'M NOT SAYING YOU CAN'T CALL ANY OF THESE WITNESSES. YOU
19 CAN CALL ANY WITNESS YOU WANT, AND THE COURT WILL RULE ON
20 OBJECTIONS ON IT.

21 BUT I GIVE TIME PERIODS FOR THOSE DIFFERENT AREAS.
22 AND IF YOU WANT TO CALL THIRTEEN WITNESSES TO TESTIFY TO ONE
23 AREA, I DON'T CARE. YOU CAN DO IT WITH ONE WITNESS. BUT
24 I'M GIVING YOU TIME LIMITS ON IT, AND LET ME JUST TALK TO
25 YOU AND WAIT UNTIL THE END BEFORE YOU GET TOO UPSET.

1 FORMATION OF THE TRUST. IF YOU CAN'T TELL THE
2 COURT ABOUT THE FORMATION OF THE TRUST IN AN HOUR, YOU'VE
3 GOT PROBLEMS -- IN FACT, IN A HALF HOUR, YOU'VE GOT
4 PROBLEMS.

5 IF YOU CAN'T TELL THE COURT ABOUT CONTROL OF THE
6 TRUST IN A COUPLE OF HOURS, TWO HOURS, YOU'VE GOT PROBLEMS.

7 SO, YOU KNOW, FORMATION AND CONTROL OF THE TRUST,
8 THAT'S MAYBE THREE HOURS. ADD ANOTHER HOUR FOR ALL THESE
9 OTHER EXTEMPORANEOUS THINGS, THAT'S MAYBE FOUR HOURS TO TRY
10 THIS CASE, WHICH WOULD BE TWO HOURS A SIDE.

11 I'M NOT GOING TO DO THAT. I'M GOING TO GIVE YOU
12 FOUR HOURS A SIDE ON IT, WHICH MEANS I'M GIVING YOU MORE
13 THAN ENOUGH TIME TO DO THIS. IN FACT, I'LL TELL YOU WHAT
14 I'M GOING TO DO, I'M GOING TO GIVE YOU FIVE HOURS, WHICH
15 WOULD BE TWO DAYS.

16 EACH SIDE WILL GET FIVE HOURS TO PRESENT THEIR
17 CASE, WHICH THE COURT FEELS IS PROBABLY TWICE AS MUCH AS YOU
18 REALLY NEED ON THE CASE. BUT KEEP IN MIND -- WHEN YOU TRY
19 IT, KEEP IN MIND YOU'RE NOT TRYING IT TO A JURY, YOU'RE
20 TRYING IT TO THE COURT. AND THE SECOND THING TO REMEMBER IS
21 IT'S A VERY LIMITED ISSUE. WE'RE TALKING ABOUT THE TRUST
22 AND CONTROL OF THE TRUST.

23 LIKE I SAID BEFORE, IF THERE'S NOT THE CONTROL OF
24 THE TRUST, THE GOVERNMENT'S GONE. IF THERE IS CONTROL OF
25 THE TRUST, THEN IT'S THE DEFENSE. SO IT'S A VERY SIMPLE

1 ISSUE. OBVIOUSLY, YOU HAVE TO GET INTO THE FORMATION OF IT.

2 TO TRY THESE DIFFERENT THINGS, SOME OF THESE
3 WITNESSES YOU MAY WANT TO TESTIFY TO SOME THINGS. FOR
4 INSTANCE, THE BUILDING OF THE HOUSE DOWN IN MEXICO, THAT
5 WOULD GO TOWARDS THE CONTROL OF THE TRUST. I MEAN, THAT'S
6 NOT A SEPARATE ISSUE. THAT GOES TOWARD CONTROL OF THE
7 TRUST.

8 SO WHAT I WANT TO TELL YOU IS THAT HOW YOU PUT
9 YOUR CASE ON AND THE WAY YOU PRESENT THE CASE, I PRETTY MUCH
10 LEAVE TO YOU. I'M NOT GOING TO BE GETTING INTO IT VERY MUCH
11 UNLESS THERE'S OBJECTION FROM THE OTHER SIDE.

12 IF YOU WANT TO SPEND 99 PERCENT OF YOUR TIME ON
13 ONE ISSUE AND 10 PERCENT OF YOUR -- OR 1 PERCENT OF YOUR
14 TIME ON OTHER, I DON'T CARE. YOU'RE THE EXPERT; YOU TRY THE
15 CASE THE WAY YOU THINK IT'S BEST TO TRY THE CASE. I'M NOT
16 GOING TO MEDDLE IN IT TOO MUCH. IF THERE ARE OBJECTIONS,
17 I'LL RESOLVE THOSE OBJECTIONS.

18 ONE OTHER THING I SHOULD REMIND YOU -- AND I DON'T
19 KNOW IF THERE'S COOPERATION IN THIS CASE OR NOT, BUT I CAN
20 TELL YOU THIS -- THE MORE COOPERATION THERE IS WITH THE
21 ATTORNEYS, THE BETTER IT IS FOR YOU.

22 AND THE REASON I SAY THAT IS BECAUSE, IF YOU TWO
23 AGREE ON SOMETHING, YOU KNOW, I PRETTY MUCH GO ALONG WITH
24 WHATEVER YOU GUYS AGREE ON. IF YOU DON'T AGREE ON IT AND
25 YOU LEAVE IT TO THE COURT, I MAKE THE CALL, YOU DON'T HAVE A

1 LOT OF INPUT AS TO HOW THE COURT IS TO DECIDE BECAUSE I'LL
2 JUST DECIDE IT.

3 SO IT'S ALWAYS MUCH BETTER IF YOU COME TO SOME
4 AGREEMENT EVEN THOUGH YOU MIGHT HAVE TO GIVE OR TAKE A
5 LITTLE BIT ON IT BECAUSE THIS COURT WILL PRETTY MUCH, YOU
6 KNOW -- IT'S YOUR CASE. IF THE TWO OF YOU AGREE ON IT, I'LL
7 PRETTY MUCH RIDE WITH WHAT YOU GUYS WANT ON IT.

8 I WOULD SUGGEST THAT YOU PUT ASIDE MONEY SO THAT
9 YOU CAN BUY EACH OTHER COFFEE AND TALK ABOUT SOME OF THESE
10 ISSUES AND RESOLVE THEM OUTSIDE OF HERE. THAT WILL MAKE A
11 BIG DIFFERENCE.

12 WE WILL HAVE DURING THOSE TWO DAYS PRETTY MUCH
13 FULL TIME -- YOU SHOULD GET PROBABLY FIVE HOURS A DAY IN.
14 IF ON WEDNESDAY YOU WANT TO START AT 8:30 RATHER THAN 9:00,
15 I CAN DO THAT ALSO. AGAIN, I'LL LEAVE THAT TO THE TWO OF
16 YOU. IF YOU BOTH WANT TO START AT 8:30, THAT'S FINE. IF
17 YOU DON'T WANT TO START AT 8:30, THE DEFAULT'S BACK AT 9:00.

18 WE'LL BREAK RIGHT AT 4:00 O'CLOCK. SO YOU CAN
19 MAKE PLANS IF YOU HAVE YOUR KIDS OR GRANDKIDS OR LITTLE
20 LEAGUE, OR WHATEVER, I WOULDN'T BE KEEPING YOU HERE. YOU
21 KNOW, SOME COURTS WILL KEEP YOU HERE TILL 7:00 O'CLOCK FOR A
22 COURT TRIAL. I WON'T DO THAT. AT 4:00 O'CLOCK WE'RE OUT OF
23 HERE.

24 OKAY. I'VE GONE THROUGH A LITTLE BIT OF THAT.
25 ANY QUESTIONS YOU HAVE AS FAR AS THAT, BUT IT'S GOING TO BE

1 PRETTY STRAIGHTFORWARD, I THINK.

2 COUNSEL.

3 **MR. COHAN:** YES, YOUR HONOR. I DO HAVE A MEXICAN
4 LAW EXPERT WHO'S ALSO A FACT WITNESS, HAVING DONE A LOT OF
5 RESEARCH ON THE STATE OF TITLE. I THOUGHT THIS CASE WAS
6 GOING TO GO LONGER, AND I'VE SAID TO HIM TO COME IN ON
7 THURSDAY.

8 **THE COURT:** COUNSEL, AS TO AN EXPERT ON MEXICAN
9 LAW, AGAIN, JUDICIAL NOTICE ON MEXICAN LAW. HE CAN'T
10 TESTIFY AS TO WHAT THE LAW IS AS AN EXPERT; BUT HE MAY BE A
11 FACT PERSON, AS YOU SAY, AND YOU MAY WANT TO BRING HIM IN
12 FOR CONTROL OF THE TRUST OR WHATEVER IT IS.

13 **MR. COHAN:** THAT'S REALLY ANOTHER WAY OF PUTTING
14 IT. WHETHER THERE'S ANY EVIDENCE OF ANY CONTROL BY
15 MR. FRANCIS AS TO THE REAL ESTATE, THAT YOU REFERRED TO FEW
16 MOMENTS AGO --

17 **THE COURT:** AND HE CAN'T BE HERE UNTIL THURSDAY
18 MORNING?

19 **MR. COHAN:** WELL, HE'S SCHEDULED TO BE HERE
20 THURSDAY MORNING AND BOUGHT TICKETS AND EVERYTHING ELSE; SO
21 I THINK IT'S GOING TO BE VERY DIFFICULT TO CHANGE THAT AT
22 THIS STAGE.

23 **THE COURT:** SO WHAT YOU'RE SAYING IS, IF YOU
24 FINISH BEFORE THAT, YOU'D LIKE TO HOLD UNTIL THURSDAY
25 MORNING AND HAVE HIS TESTIMONY THURSDAY MORNING?

1 **MR. COHAN:** IF WE COULD, YOUR HONOR, YES, SIR.

2 **THE COURT:** OBJECTION?

3 **MR. THOMAS:** NO OBJECTION.

4 **THE COURT:** YOU CAN DO THAT. I DON'T MIND DOING
5 THAT AS LONG AS WE UNDERSTAND THAT I DON'T WANT YOU TO PUT
6 ON A HALF HOUR AND SAY, "BY THE WAY, THE REST OF OUR NINE
7 HOURS IS GOING TO GO THURSDAY MORNING." SO I'LL ALLOW YOU
8 TO CALL HIM THURSDAY MORNING, BUT BY THURSDAY AT NOONTIME --
9 YOU KNOW, YOU CAN SAVE A COUPLE OF HOURS AND CALL HIM
10 THURSDAY MORNING.

11 **MR. COHAN:** THAT WOULD BE FINE.

12 **THE COURT:** BUT THE CASE IS NOT GOING TO GO PAST
13 THURSDAY. I DON'T WANT TO PUT EVERYTHING OVER TO THURSDAY.
14 WE'LL ACCOMMODATE YOUR WITNESS. THAT'S NOT A PROBLEM.

15 OKAY. SEE WHAT I MEAN ABOUT COOPERATION. IT WILL
16 GO A LOT SMOOTHER IF BOTH SIDES AGREE.

17 **MR. COHAN:** WE'RE GETTING ALONG WONDERFULLY, YOUR
18 HONOR.

19 **THE COURT:** I UNDERSTAND. ANYTHING ELSE FROM YOUR
20 SIDE BEFORE WE GET -- THAT'S OKAY. YOU CAN STAY THERE,
21 COUNSEL. ANYTHING ELSE FROM YOUR SIDE? ANY OTHER
22 QUESTIONS?

23 **MR. COHAN:** ONLY ON THE PENDING MATTERS.

24 OH, I DID WANT TO TENDER OUR MULTI-COLORED
25 PROPOSED FINDING OF FACT TO THE COURT.

1 **THE COURT:** OKAY.

2 **MR. COHAN:** AND ALSO TO THE GOVERNMENT.

3 **THE COURT:** THAT'S OKAY. YOU CAN DO IT AFTER I
4 LEAVE.

5 **MR. COHAN:** OKAY.

6 **THE COURT:** COUNSEL.

7 **MR. THOMAS:** YES, YOUR HONOR, THE ONLY REMAINING
8 ISSUES THAT WE WERE CONCERNED ABOUT WAS WHETHER MR. CHAFFE
9 WOULD BE REQUIRED TO COME AND TESTIFY OR WHETHER HE'S GOING
10 TO BE ALLOWED TO TESTIFY SIMPLY BY PRESENTATION OF HIS
11 DEPOSITION TRANSCRIPT.

12 LIKewise, MR. WELKER. THE PLAINTIFF NOW WANTS TO
13 PRESENT MR. WELKER'S TESTIMONY THROUGH HIS DEPOSITION
14 TRANSCRIPT, AND I DON'T BELIEVE WE EVEN HAVE ANY INDICATION
15 WHETHER THE PLAINTIFF HAS TRIED TO BRING MR. WELKER TO COURT
16 OR NOT.

17 **THE COURT:** OKAY. HAVE THE TWO OF YOU TALKED
18 ABOUT THAT?

19 **MR. THOMAS:** WE HAVE, AND WE'RE IN DISAGREEMENT.

20 **THE COURT:** LET'S TAKE ONE AT A TIME.

21 ON WELKER, YOU WANT TO PRESENT IT BY DEPOSITION
22 TESTIMONY?

23 **MR. COHAN:** I DO, YOUR HONOR. AND WE'VE ACTUALLY
24 BEEN TRYING TO SERVE MR. WELKER. TO GIVE A LITTLE
25 BACKGROUND, HE WAS REPRESENTED BY COUNSEL. I INITIALLY,

1 FIVE OR SIX WEEKS AGO, TRIED TO GET HIS COUNSEL TO AGREE TO
2 ACCEPT SERVICE; HIS COUNSEL SAID WELL, YEAH, MAYBE, HOW
3 ABOUT PAYING FOR HIM TO FLY BACK FROM SOUTH DAKOTA WHERE
4 HE'S PLANNING ON SPENDING THIS WEEK, THE WEEK OF TRIAL.

5 AND I SAID, "I DON'T BELIEVE I'M PERMITTED BY LAW
6 TO PAY A WITNESS TO TESTIFY. HE'S LOCAL."

7 **THE COURT:** YOU'RE SAYING YOU TRIED*TO SERVE HIM?

8 **MR. COHAN:** I HAVE BEEN TRYING TO SERVE HIM THE
9 LAST THREE WEEKS.

10 **THE COURT:** AND, COUNSEL, YOUR OBJECTION IS?

11 **MR. THOMAS:** WELL, WHEN THE DEPOSITION OF
12 MR. WELKER WAS TAKEN, HE UNDERSTOOD WHEN THE TRIAL TIME
13 WOULD BE, AND WE HAD NO INDICATION FROM THE PLAINTIFF THAT
14 THEY'D ACTUALLY TRIED TO SERVE HIM IN ANY WAY. THEY SIMPLY
15 PRESENTED HIS DEPOSITION TESTIMONY TRANSCRIPT AND ASKED US
16 TO AGREE TO SUBMISSION OF THAT.

17 MORE IMPORTANTLY, THOUGH, IS MR. CHAFFE.

18 **THE COURT:** AND AS TO CHAFFE?

19 **MR. THOMAS:** YOUR HONOR, MR. CHAFFE IS THE FACE OF
20 THE PLAINTIFF. HE'S THE ONE AND ONLY HUMAN PERSON BEHIND
21 PLAINTIFF, THE PLAINTIFF WHO AUTHORIZED THE BRINGING OF THIS
22 SUIT, AND NOW APPARENTLY REFUSES TO COME FROM THE TURKS AND
23 CAICOS ISLANDS TO ACTUALLY TESTIFY. HE ACTUALLY IS A PERSON
24 WHO IS VERY MUCH INVOLVED.

25 **THE COURT:** HE'S A PRETTY IMPORTANT PERSON

1 OBVIOUSLY.

2 MR. THOMAS: YES, VERY IMPORTANT.

3 THE COURT: OKAY. COUNSEL.

4 MR. COHAN: WELL, WE TRIED TO AVOID THE NEED TO
5 BRING HIM, YOUR HONOR. THAT'S WHY HE WAS DEPOSED.

6 THE COURT: OKAY.

7 MR. COHAN: YOUR HONOR, WE'D WANT THE COURT'S
8 RULING. WE DON'T THINK IT SHOULD BE NECESSARY BECAUSE HE
9 WAS VIDEOTAPED AND CROSS-EXAMINED, BUT THE COURT'S RULING
10 WILL BE WHAT WE DO. IF THE COURT ORDERS HIM TO BE HERE,
11 HE'LL BE HERE.

12 MR. THOMAS: THE ONE THING I'D LIKE TO SAY IS AS
13 THE INFORMATION IN THE CASE HAS EVOLVED AND THE DISCOVERY'S
14 BEEN DONE AND THE WORK'S DONE TO PREPARE FOR TRIAL, WE HAVE
15 A LOT MORE THAT WE WOULD LIKE TO ASK HIM.

16 THE COURT: LET ME TELL YOU WHAT THE RULING ON
17 THIS IS GOING TO BE. CHAFE IS GOING TO HAVE TO BE HERE; THE
18 OTHER ONE, WELKER, CAN BE BY DEPOSITION.

19 MR. THOMAS: OKAY.

20 THE COURT: REMEMBER ON THE DEPOSITION, THAT TIME
21 IS CONSUMED BY YOU READING THE DEPOSITION INTO THE
22 TESTIMONY. SO, AGAIN, YOU CAN SAVE A LOT OF TIME IF YOU GO
23 OVER WITH EACH OTHER WHAT'S GOING IN AND WHAT'S NOT GOING
24 IN. JUST TRYING TO HELP YOU OUT ON IT.

25 MR. COHAN: ON THAT QUESTION, YOUR HONOR, OF

1 READING THE DEPOSITION, WOULD THE COURT PREFER TO SIMPLY
2 HAVE US READ RATHER THAN HAVE VIDEOTAPE OF THE WITNESS?

3 **THE COURT:** OH, IF YOU HAVE VIDEOTAPE, THAT'S
4 BETTER.

5 **MR. COHAN:** WE DO.

6 **THE COURT:** LET ME ASK YOU ON THE VIDEOTAPE, DO
7 YOU HAVE A TRANSCRIPT OF THE VIDEOTAPE?

8 **MR. COHAN:** WE DO.

9 **THE COURT:** OKAY. I WOULD LIKE THE ATTORNEYS TO
10 GET TOGETHER ON ANY VIDEOTAPE THAT'S COMING IN FROM ANYBODY
11 AND SEE IF YOU CAN AGREE ON STIPULATING THAT THE TRANSCRIPT
12 CAN BE USED AS PART OF THE RECORD BECAUSE OTHERWISE IT'S
13 VERY DIFFICULT FOR THE COURT REPORTER TO TAKE DOWN THE
14 VIDEO.

15 JUST TALK ABOUT IT. IF YOU CAN DO IT, FINE. IF
16 NOT, THE REPORTER HAS TO DO IT.

17 **MR. COHAN:** WE HAVE PROVIDED TRANSCRIPTS.

18 **THE COURT:** YOU TWO TALK ABOUT IT.

19 **MR. THOMAS:** YOUR HONOR, BASED UPON WHAT YOUR
20 HONOR SAID HERE, WE'LL BE SUBMITTING MARKED TRANSCRIPTS IN
21 ACCORDANCE WITH THE LOCAL RULES FOR THREE WITNESSES. ONE IS
22 MR. WELKER, THE OTHER TWO ARE FROM THE TURKS AND CAICOS
23 ISLANDS -- MR. FOLEY AND MR. TROWBRIDGE. THOSE WILL BE
24 MARKED AND SUBMITTED TO THE COURT.

25 **THE COURT:** GOOD. SEE HOW SMOOTH IT IS WHEN THE

1 ATTORNEYS -- IT'S A PLEASURE FOR THE COURT WHEN THE
2 ATTORNEYS CAN WORK TOGETHER LIKE THIS.

3 AND I JUST WANT TO MAKE SURE WE WERE UNDERSTANDING
4 THAT, BECAUSE IT CAN REALLY SAVE THE REPORTER A GREAT DEAL
5 OF TIME, RATHER THAN TRYING TO TRANSCRIBE OFF A VIDEOTAPE.

6 NEXT ISSUE. WELL, QUESTIONS.

7 **MR. COHAN:** WE HAVE PENDING -- LET'S SEE. WE
8 RESOLVED SOME OF THE MOTIONS IN LIMINE.

9 I DON'T KNOW WHETHER YOUR HONOR IS GOING TO RULE
10 ON THESE THINGS TUESDAY OR WHETHER WE SHOULD TALK ABOUT
11 EVERYTHING PENDING NOW.

12 **THE COURT:** I WAS GOING TO DO IT TUESDAY.

13 **MR. COHAN:** OKAY. WE HAVE PENDING DISAGREEMENTS
14 ABOUT WHETHER THE GOVERNMENT'S LATE IDENTIFIED WITNESSES
15 WILL BE PERMITTED TO TESTIFY.

16 I THINK YOU ADDRESSED IT REAL SUMMARILY BY SAYING
17 YOU'D HEAR THE OBJECTIONS. OUR POSITION IS THAT THEY WERE
18 NOT IDENTIFIED IN A TIMELY FASHION, WHICH COULD HAVE BEEN
19 DONE, AND SHOULD NOT BE ALLOWED TO TESTIFY IN THE
20 GOVERNMENT'S CASE-IN-CHIEF.

21 WE UNDERSTAND THAT, IF THEY'RE REALLY GOING TO BE
22 USED TO IMPEACH, THAT'S SOMETHING ELSE. BUT WE HAVE AN
23 INDICATION THAT, REALLY, THE GOVERNMENT IS TRYING TO USE
24 THESE WITNESSES TO MAKE THEIR CASE-IN-CHIEF.

25 **THE COURT:** OKAY. COUNSEL, I'M GOING TO CUT YOU

1 OFF ONLY FOR THIS REASON -- ONE OF THE THINGS I DO, AND
2 EVERY COURT HAS ITS OWN WAY IT DOES THINGS.

3 I REALLY CONCENTRATE ON ANYTHING THAT YOU WISH TO
4 BRING TO THE COURT'S ATTENTION. WHAT YOU'VE DONE IN THIS
5 CASE IS YOU MAKE THE MOTION IN LIMINE, YOU MAKE YOUR
6 OBJECTION. WE DON'T ARGUE A LOT BECAUSE I FIGURE THERE'S
7 NOT A WHOLE LOT -- SOMETIMES I NEED IT, BUT THERE'S NOT A
8 WHOLE LOT THAT YOU CAN'T PUT IN MOVING PAPERS THAT YOU HAVE
9 TO ARGUE LATER.

10 SO I PRETTY MUCH READ THOROUGHLY THE MOVING
11 PAPERS, THE OBJECTIONS, AND MAKE THE RULINGS ON IT.

12 YEAH, SO WHEN WE COME IN TUESDAY, DON'T EXPECT
13 THAT WE'RE GOING TO TAKE A BUNCH OF TIME ON THE MOTIONS IN
14 LIMINE. I'M JUST GOING TO GIVE YOU THE RULINGS ON THEM
15 BECAUSE I HAD THE OBJECTIONS AND THE ARGUMENTS.

16 ANYTHING ELSE? ANY OTHER QUESTIONS WE HAVE?

17 **MR. THOMAS:** NO, YOUR HONOR.

18 I THINK THE PRETRIAL ORDER IS READY FOR SIGNATURE.
19 WE'RE IN AGREEMENT ON THAT.

20 **THE COURT:** OKAY. WELL, WE WILL SEE YOU BACK HERE
21 ON TUESDAY AT 9:00 O'CLOCK, AND I THINK YOU BOTH HAVE A
22 PRETTY GOOD HANDLE ON IT AND YOU'RE WORKING WELL WITH EACH
23 OTHER. I THINK HOPEFULLY IT WILL BE A VERY SMOOTH TRIAL.

24 IT REALLY IS -- I'M SAYING FOR YOUR BENEFIT
25 TIME-WISE BUT ALSO JUST FOR THE TRIAL -- IT REALLY IS

1 IMPORTANT TO CONCENTRATE ON WHAT THE ISSUE IS SO THAT WE
2 DON'T CHASE RED HERRINGS AND WASTE TIME DOING THINGS THAT
3 AREN'T IMPORTANT TO THE SIGNIFICANCE OF THE FORMATION OF THE
4 TRUST AND THE CONTROL OF THE TRUST.

5 I MEAN, THAT'S WHAT IT COMES DOWN TO. WE HAVE THE
6 CONTROL OF THE TRUST, YOU HAVE TO DEAL WITH THE TRUSTEE AND
7 THE PROTECTOR AND ALL THAT -- YOU KNOW, WE'LL FIND OUT WHERE
8 WE GO.

9 OKAY. COUNSEL, THANK YOU VERY MUCH FOR BEING
10 HERE. IF THERE'S NO OTHER QUESTIONS, WE'LL SEE YOU BACK AT
11 9:00 O'CLOCK.

12 **MR. THOMAS:** THANK YOU, YOUR HONOR.

13 **MR. COHAN:** THANK YOU, YOUR HONOR. SEE YOU AT
14 9:00 O'CLOCK.

15 (PROCEEDINGS CONCLUDED.)

16 --OOO--
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CERTIFICATE

I HEREBY CERTIFY THAT PURSUANT TO SECTION 753,
TITLE 28, UNITED STATES CODE, THE FOREGOING IS A TRUE AND
CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED
PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE
TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE
REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

DATED THIS 2ND DAY OF SEPTEMBER, 2011.

/S/ MARY RIORDAN RICKEY
MARY RIORDAN RICKEY
OFFICIAL COURT REPORTER

7

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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 WESTERN DIVISION

12 ROTHWELL, LTD., a Cayman Islands) No. CV 10-479 RGK (FFMx)
Corporation,)

13 Plaintiff,)

) NOTICE OF LODGING

14 vs.)

15 UNITED STATES,)

16 Defendant.)

17 _____)
18
19 The UNITED STATES OF AMERICA hereby gives notice of its
20 lodging of a proposed Findings of Fact and Conclusions of Law,
21 filed concurrently herein.

22 Respectfully submitted,
ANDRÉ BIROTTE JR.
United States Attorney
23 SANDRA R. BROWN
Assistant United States Attorney
24 Chief, Tax Division

25 DATED: 5/24/11

26 
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10 UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 12 WESTERN DIVISION
 13

14 ROTHWELL, LTD., a Cayman
 Islands Corporation,
 15 Plaintiff,
 16 v.
 17 UNITED STATES OF AMERICA,
 18 Defendant.
 19
 20

) Case No. CV 10-479-RGK(FFMx)
) [PROPOSED] FINDINGS OF FACT
) AND CONCLUSIONS OF LAW BY
) UNITED STATES OF AMERICA
) Pretrial Conference:
) Date: June 6, 2011
) Time: 9:00 a.m.
) Ctrm: 850
) Roybal U.S. Courthouse
) 255 East Temple St.
) Los Angeles, CA 90012

21
 22 In accordance with applicable local rules and the Order of the Court of
 23 September 20, 2010, the United States of America submits its proposed findings of
 24 fact and conclusions of law.

25 **FINDINGS OF FACT**

- 26 1. Joseph Francis (“taxpayer” or “Francis”) is the founder of Girls Gone
 27 Wild entertainment business.
 28 2. Francis is the sole shareholder of two U.S. corporations, Sands Media,

1 Inc. ("Sands"), and Mantra Films, Inc. ("Mantra"), which are engaged in
2 producing, promoting, marketing and distributing DVDs, infomercials, magazines,
3 apparel and other items.

4 3. For each of the calendar years 2002 and 2003, Sands filed a U.S.
5 Income Tax Return for an S-Corporation, Form 1120-S, with the IRS reporting its
6 income for each respective year.

7 4. Sands was incorporated in Nevada in 2001.

8 5. For each of the calendar years 2002 and 2003, Mantra filed a U.S.
9 Income Tax Return for an S-Corporation, Form 1120-S, with the IRS reporting its
10 income for each respective year.

11 6. Mantra was incorporated in Oklahoma in 1998.

12 7. During 2002 and 2003, Mantra and Sands were wholly owned by
13 Francis.

14 8. As the owner of Mantra and Sands, Francis reported the profits or
15 losses from said corporations directly on his U.S. Individual Income Tax Returns
16 for 2002 and 2003.

17 **Francis Trust**

18 9. The Francis Trust ("Francis Trust" or "Trust") was settled on May 24,
19 1999, by and between Joseph Raymond Francis, Settlor, and Hallmark Trust Ltd.,
20 Trustee.

21 10. The Francis Trust beneficiaries are Joseph Francis, his parents and
22 children and Oklahoma Film Holding Corporation, a non-profit corporation owned
23 by Joseph R. Francis.

24 11. Neither party knows if Francis has any children.

25 12. The Francis Trust was drafted by Owen Foley, Attorney at Law and
26 partner in the law firm of Misick & Stanbrook, Richmond House, P.O. Box 127,
27

1 Providenciales, Turks & Caicos Islands, B.W.I.

2 13. Hallmark Trust, Ltd., located in Providenciales, Turks & Caicos
3 Islands, B.W.I., was selected to provide Trustee services for The Francis Trust.

4 14. In 1991, Colin R. Chaffe ("Chaffe") and Nicola S. Jordan ("Jordan")
5 incorporated Hallmark Trust, Ltd., in the Turks & Caicos Islands.

6 15. Mr. Chaffe and Ms. Jordan are British citizens and are residents of the
7 Turks & Caicos Islands.

8 16. The Francis Trust provides for the naming of a trustee, as well as a
9 "protector" of the Trust.

10 17. The Francis Trust has had two protectors: (1) Brian Rayment, Esq., an
11 attorney licensed to practice in Oklahoma, and legal counsel to Francis, Sands,
12 Mantra, Rothwell, the Francis Trust, and other related entities; and (2) Pittsford,
13 Ltd., a British Virgin Islands Company.

14 18. Colin Chaffe is the trustee of the Francis Trust.

15 19. Rayment was involved in the review and selection of the trustee of the
16 Francis Trust, Hallmark Limited and Colin Chaffe.

17 20. After such research regarding the review and selection of the trustee of
18 the Francis Trust, Rayment reported his findings regarding the formation of the
19 Trust with Francis.

20 21. Many day-to-day decisions of the Trust can be handled by the trustee.

21 22. Trust provisions require that when the Trust needs to act and decide
22 certain specified activities, the trustee must acquire the permission of the protector
23 to carry out that business.

24 23. The Francis Trust trustee needs to have the permission of the protector
25 to exercise powers of appointment and advancement of the trust, pay any portion of
26 the capital of the trust fund to any of the beneficiaries, exclude or include any
27

28

1 beneficiary of the trust, and ignore any interest of any beneficiary.

2 24. If the trustee makes any decision without the protector where the
3 protector's permission is needed, such action is null and void.

4 25. Decision for the advancement of the Francis Trust needs the approval
5 of Rayment or Pittsford Ltd..

6 **Rothwell Limited**

7 26. On June 9, 2000, Chaffe incorporated Rothwell Limited ("Rothwell"
8 or "plaintiff") in the Cayman Islands.

9 27. One hundred percent of Rothwell's shares are held by Inceptre
10 Holdings, Ltd., in trust for The Francis Trust.

11 28. Thus, all of the shares of Rothwell are owned by the Francis Trust.

12 29. Inceptre Holdings is Hallmark Trust, Ltd.'s nominee company.

13 30. Inceptre Holdings, Ltd., was incorporated in the Turks & Caicos
14 Islands on March 5, 1992.

15 31. The sole shareholders of Inceptre Holdings were and are Chaffe and
16 Jordan.

17 32. Inceptre Holdings acted as director of Rothwell until 2003, when
18 Hallmark Trust Ltd. became the director of Rothwell.

19 33. In 2005, Chaffe and Jordan sold their interests in Hallmark Trust, Ltd.
20 to Brian Trowbridge.

21 34. In 2005, Brian Trowbridge changed the name of Hallmark Trust, Ltd.
22 to Hallmark Bank and Trust, Ltd. ("Hallmark").

23 35. In 2005, under its new name, Hallmark became director of Rothwell
24 and continued as director until 2010.

25 36. In 2010, Colin Chaffe personally became trustee of the Francis Trust
26 and director of Rothwell, Ltd. when Hallmark resigned as trustee and director of
27

1 Rothwell, Ltd.

2 **Rothwell's Accounts**

3 37. In 2001, Chaffe and Jordan opened a bank account for Rothwell at the
4 Bermuda Commercial Bank in Hamilton, Bermuda.

5 38. Records of Bermuda Commercial Bank show that Chaffe admitted that
6 Francis was the beneficial owner of Rothwell.

7 39. On or about June 2, 2001, Chaffe and Jordan opened a Morgan
8 Stanley investment account for Rothwell in Irvine, California.

9 40. Chaffe and Jordan were signatories to Rothwell's Morgan Stanley
10 account until late 2005.

11 41. When Trowbridge took over Hallmark in 2005, he then became the
12 signatory on Rothwell's Morgan Stanley account.

13 42. From July 2001 through October 2008, John Welker was the broker
14 responsible for Rothwell's Morgan Stanley account.

15 43. Brian Stewart became the Morgan Stanley broker on the Rothwell
16 account in 2009.

17 44. Stewart was the broker for other Morgan Stanley accounts for Joseph
18 Francis and his related entities.

19 45. Funds were transferred from Rothwell's Bermuda bank account by
20 wire to Rothwell's Morgan Stanley account.

21 46. Trowbridge sent a facsimile on December 1, 2009, and an email on
22 December 21, 2009, to representatives at Morgan Stanley, advising that he would
23 be liquidating the account after the start of the new year.

24 47. Following the levy, Stewart spoke to Francis several times, alone and
25 with Francis' lawyer.

26 48. On November 16, 2009, Stewart faxed a copy of the IRS levy on
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1 Rothwell's account to Francis.

2 **Casa Blanca de Punta Mita, S.A. de C.V.**

3 49. In 2002, Rothwell purchased land in Punta Mita, Puerto Vallarta,
4 Mexico through a Mexican corporation indirectly owned by Rothwell.

5 50. The Francis Trust protector, Rayment, brought the investment
6 opportunity to Chaffe.

7 51. In 2002, Colin Chaffe retained Rayment to arrange for the
8 establishment of a Mexican corporation, Casa Blanca de Punta Mita, S.A. de C.V.
9 ("Casa Blanca"), which would make the actual purchase of Lot 14.

10 52. In 2005, acting in the same capacities, Chaffe engaged Rayment to
11 purchase Lot 13B for Casa Blanca.

12 53. The shares of Casa Blanca are owned by Island Films, Ltd. and
13 Summerland Holdings, Ltd.

14 54. Island Films, Ltd. and Summerland Holdings, Ltd. are Turks and
15 Caicos Islands corporations, the shares of which are owned 100% by the Francis
16 Trust.

17 55. All of the shares of Island Films were once owned by Joseph Francis,
18 until he assigned them to Hallmark.

19 56. Crescent Capital, Ltd. is owned by Mohamed A. Hadid.

20 57. Through Hadid's Mexican corporation, Hadid sold Lot 14 to Casa
21 Blanca.

22 58. Escrow on Lot 14 closed on or about April 10, 2002.

23 59. The purchase price for Lot 14 was \$1,054,980.

24 60. \$1,030,000 of the purchase price of Lot 14 was paid by Rothwell and
25 \$24,980 was paid by Hallmark Trust Limited.

26 61. Rothwell got the money to purchase Lot 14 from either transfers made
27
28

1 from an insurance transaction with Asia Pacific Mutual Insurance Company, which
2 was paid by Sands and Mantra, or direct transfers from Sands, both transferred to
3 Rothwell's Bermuda account.

4 62. Rothwell paid no consideration to Sands or Mantra in exchange for the
5 funds to purchase Lot 14.

6 63. After Rothwell bought Lot 14 through its Mexican corporation, Casa
7 Blanca, Rothwell did not transfer the land to Sands or Mantra.

8 64. Chaffe, on behalf of Rothwell, contracted with Hadid to build a 35,000
9 square foot residence upon Lot 14.

10 65. Francis directed and controlled the design and construction of the
11 premises and improvements made on Casa Blanca's Lot 14 ("Punta Mita
12 residence").

13 66. On or about February 3, 2002, Francis provided Crescent Capital Ltd.
14 with a personal check for \$100,000 as a security deposit in connection with the
15 purchase of Lot 14 at the Punta Mita development in Mexico.

16 67. Francis, Sands and Mantra use the Punta Mita residence.

17 68. Francis uses the Punta Mita residence for personal purposes.

18 69. Francis has identified the Punta Mita residence as "his" property on
19 various national television shows.

20 70. Correspondence between Francis, Rayment and Hadid show that the
21 purchase of the land and the building of the Punta Mita residence were undertaken
22 at Francis' request and under his specific direction.

23 71. To date, Francis still enjoys the use of the Punta Mita residence for his
24 personal benefit.

25 72. Rothwell admits that Francis uses the Punta Mita residence.

26 73. Rothwell alleges that the Punta Mita residence is an asset ultimately
27

1 owned by Francis Trust and anyone who wants to use the property needs to have
2 permission of the trustee to do so.

3 74. Rothwell admits that Francis directed and controlled the design and
4 construction of the Punta Mita residence.

5 75. Rothwell admits that it contributed no funds for the purpose of
6 building the Punta Mita residence.

7 76. Rothwell admits that although Francis, Sands, and Mantra use the
8 Punta Mita residence, no rent has ever been collected from Francis or his entities
9 for such use and there is no written rental agreement between Rothwell, the Trust,
10 Francis, Sands and/or Mantra for the use of the property.

11 77. Rothwell does not pay the utilities, maintenance, insurance, or other
12 expenses for the Punta Mita residence.

13 78. Francis and his businesses pay the utilities, maintenance, insurance,
14 and other expenses for the Punta Mita residence.

15 79. Between December 13, 2002 and November 12, 2003, Sands made the
16 following payments to Crescent Capital:

Date	Amount
12/13/2002	\$ 400,000
01/28/2003	\$ 400,000
02/25/2003	\$ 400,000
03/25/2003	\$ 400,000
04/17/2003	\$ 400,000
04/17/2003	\$ 50,000
05/19/2003	\$ 75,000
05/28/2003	\$ 400,000
06/19/2003	\$ 50,000
06/27/2003	\$ 200,000

1	07/07/2003	\$ 50,000
2	07/14/2003	\$ 50,000
3	07/21/2003	\$ 50,000
4	07/28/2003	\$ 50,000
5	08/04/2003	\$ 50,000
6	08/14/2003	\$ 100,000
7	08/20/2003	\$ 100,000
8	10/01/2003	\$ 200,000
9	10/22/2003	\$ 200,000
10	11/12/2003	\$ 100,000
11	11/21/2003	\$ 59,290
	Total	\$ 3,784,290

12 80. Sands accrued the \$3,784,290 of payments it made to Crescent Capital
13 between December 13, 2002 and November 21, 2003, and claimed the expenditures
14 as "consulting" expenses on its 2002 U.S. Income Tax Return for an S Corporation.

15 81. Between December 4, 2002 and April 23, 2003, Sands made the
16 following wire transfers directly to Rothwell's account number 068 00 040655 at
17 Bermuda Commercial Bank:

18 ///

19 ///

20 ///

Date	Amount
12/04/2002	\$ 500,000
12/13/2002	\$ 750,000
12/20/2002	\$ 700,000
01/31/2003	\$ 750,000
02/06/2003	\$ 750,000
02/07/2003	\$ 500,000
04/01/2003	\$ 750,000
04/04/2003	\$ 250,000
04/23/2003	\$ 5,461,020
Total	\$10,411,020

82. During March and July 2002, Mantra made the following payments by check to Crescent Capital which Mantra accrued in its records as expenses for "professional services" and deducted on its 2002 U.S. Income Tax Return for an S Corporation:

Date	Check No.	Amount
03/11/2002	4427	\$ 10,000
03/15/2002	4425	\$ 100,000
03/15/2002	4428	\$ 400,000
07/12/2002	4832	\$ 50,000
	Total	\$ 560,000

83. In 2002, Mantra made three payments to Casa Blanca, including two payments by check in the amounts of \$150,000 and \$250,000, and one wire transfer in the amount of \$43,141.50, which Mantra accrued in its records as expenses for "footage."

84. On or about September 13, 2005, Casa Blanca purchased adjoining Lot 13B at the Punta Mita development.

85. The cost to purchase Lot 13B at the Punta Mita development was

1 \$1,023,023.65, which was paid by two wire transfers from Rothwell's account with
2 Morgan Stanley in the amounts of \$323,023.65 on September 8, 2005, and
3 \$700,000 on September 12, 2005.

4 86. The second lot purchased by Rothwell, Lot No. 13B, was funded by a
5 \$1.023 million transfer from Rothwell's Morgan Stanley account to the seller.

6 87. The funds in Rothwell's Morgan Stanley account that were used to
7 purchase Lot 13B were there by virtue of the transfers from Asia Mutual Pacific
8 Insurance Company insurance premiums, or direct transfers from Sands, which
9 eventually were transferred from Rothwell's Bermuda account to its Morgan
10 Stanley account.

11 88. Rothwell did not compensate Sands, or any other Francis-owned
12 entity, for the funds Sands gave it to purchase Lot No. 13B.

13 89. Rothwell did not transfer title of the property to Rothwell once the
14 purchase of Lot No. 13B was completed.

15 **Asia Pacific Mutual Insurance Company**

16 90. In November 2002, with the assistance of its counsel, Rayment, Sands
17 entered into an agreement with Asia Pacific Mutual Insurance Company
18 ("APMIC") which states that APMIC would provide Sands with certain insurance
19 coverage for the period from November 16, 2002 to November 15, 2003, and
20 references "Policy Number S288628864046M."

21 91. At or near the end of 2002, APMIC issued a Premium Invoice in the
22 amount of \$3,000,000 to "Sands Media, Inc., Joseph Francis" to be paid in
23 "Installments - \$250,000 per week beginning December 24, 2002," referencing
24 "Policy Number S288628864046M."

25 92. During the year 2003, between the dates of January 28, 2003 and June
26 20, 2003, Sands made twelve \$250,000 payments, for a total of \$3,000,000 to
27

1 APMIC's Bank of Hawaii account, number 0080-467036.

2 93. On its 2003 U.S. Income Tax Return for an S Corporation, Sands
3 deducted ten monthly accruals of \$250,000 each for the months ended January 31,
4 2003 through October 31, 2003, for a total of \$2,500,000, for insurance expenses
5 for the APMIC policy.

6 94. In or about November 2002, with the assistance of its counsel,
7 Rayment, Mantra entered into an agreement with APMIC which states that APMIC
8 would provide Mantra with certain insurance coverage for the period from
9 November 16, 2002 to November 15, 2003, and references "Policy Number
10 M28862886893F.

11 95. At or near the end of 2002, APMIC issued a Premium Invoice in the
12 amount of \$2,000,000 to "Mantra Films, Inc., Joseph Francis" to be paid in
13 "Installments - \$250,000 per week beginning December 24, 2002," referencing
14 "Policy Number M28862886893F.

15 96. During the year 2003, between the dates of January 28, 2003 and April
16 21, 2003, Mantra made eight \$250,000 payments, for a total of \$2,000,000 to
17 APMIC's Bank of Hawaii account, number 0080-367036.

18 97. On its 2003 U.S. Income Tax Return for an S Corporation, Mantra
19 deducted ten monthly accruals of \$166,666.67 each for the months ended January
20 31, 2003 through October 31, 2003, for a total of \$1,666,667, as insurance
21 expenses for the APMIC policy.

22 98. During the period from January 30, 2003 to July 25, 2003, APMIC
23 made eleven transfers totaling \$4,746,386 from its account at the Bank of Hawaii,
24 number 0080-367036, to an Abbey National Bank account, number 0550722, for
25 credit to Schedule Company.

26 99. Schedule Company is a nominee company used by Chaffe and
27

1 Hallmark in carrying on the business activities of Hallmark.

2 100. In August and September 2003, APMIC made two transfers totaling
3 \$166,201 from its account at the Bank of Hawaii, number 0080-367036, to a
4 Bermuda Commercial Bank account, number 0011067329, for credit to Schedule
5 Company.

6 101. Between February 18, 2003 and August 4, 2003, eight fund transfers
7 totaling \$4,489,050 were made from Schedule Company into plaintiff's account
8 number 068 00 040655 at Bermuda Commercial Bank in Hamilton, Bermuda.

9 **Rothwell's Bermuda Commercial Bank and Morgan Stanley accounts**

10 102. Sands deducted the nine wire transfers on its 2002 tax return as
11 "consulting fees."

12 103. Though millions of dollars were transferred to Rothwell from Sands
13 and Mantra, Rothwell provided no services or consideration to Sands and Mantra
14 in exchange.

15 104. Evidence of the lack of consideration between Sands and Rothwell
16 includes the nine wire transfers which occurred in December 2002 and January,
17 February and April 2003, ranging in amounts as small as \$250,000 and as large as
18 \$5,461,020, which were deposited from Sands' Wells Fargo account in California
19 directly into Rothwell's Bermuda Commercial account.

20 105. Rothwell has no evidence showing that any services or goods were
21 provided to Sands in exchange for these payments.

22 106. Neither Chaffe and Jordan claim that they provided services to Sands
23 on behalf of Rothwell during 2002 and 2003.

24 107. Francis' large cash transfers to Rothwell were part of a scheme to
25 significantly reduce Francis' and Sands' tax liability.

26 108. During the period from May 10, 2002, to August 11, 2003, the
27

1 following eighteen wire transfers were made from Rothwell's Bermuda
 2 Commercial Bank account into Rothwell's Morgan Stanley account, except that the
 3 transfer on May 10, 2002 was made from another unidentified Bermuda
 4 Commercial Bank account in the Cayman Islands, and the transfer on October 30,
 5 2002, was made from an account of Island Films, Ltd.

Date	Amount
05/10/2002	\$ 500,000
10/30/2002	\$ 299,980
10/31/2002	\$ 350,000
12/12/2002	\$ 499,980
12/19/2002	\$ 499,980
12/24/2002	\$ 499,980
02/04/2003	\$ 749,980
02/10/2003	\$ 749,980
02/12/2003	\$ 724,880
02/19/2003	\$ 887,220
03/10/2003	\$ 487,370
04/02/2003	\$ 674,970
04/22/2003	\$ 1,449,830
04/29/2003	\$ 5,000,000
05/06/2003	\$ 500,000
06/05/2003	\$ 449,810
07/21/2003	\$ 899,910
08/11/2003	\$ 224,910
Total	\$15,448,780

24 **Brian Rayment**

25 109. There was a strong and close relationship between Francis and
 26 Rothwell through Francis' long-time personal attorney, Rayment.

1 110. Rayment and Francis met through Rayment's relationship with
2 Francis' parents, and have continued a relationship for about 20 years.

3 111. Though licensed to practice in Oklahoma, Rayment has served as
4 Francis' personal attorney, the attorney for Sands, Mantra, other "Girls Gone Wild"
5 corporate entities, and the attorney for Rothwell, The Francis Trust, Island Films
6 Ltd., Summerland Holding Ltd., and Casa Blanca.

7 112. Rayment assisted with incorporating Sands and Mantra.

8 113. Rayment appeared at depositions in this case as counsel for Rothwell,
9 the Francis Trust and its related entities, as well as appearing as the protector of the
10 Francis Trust.

11 114. When Brian Trowbridge was named as trustee of the Francis Trust,
12 according to Trowbridge, Rayment presented himself to Trowbridge not as the
13 protector of the Trust, but rather, as a representative of Francis.

14 115. Rayment was also the intermediary between Francis, Rothwell, and
15 Crescent Capital/Hadid for the purchase of the land in Punta Mita and the
16 improvement on the land.

17 116. Rayment brought the investment in Mexican property to the Trust after
18 visiting the area on a trip with Francis.

19 117. Rayment suggested to Chaffe that buying the land in Mexico would be
20 a good investment for the Trust.

21 118. Rayment, along with the assistance of a Mexican attorney, established
22 the corporation, Casablanca de Punta Mita, S.A. de C.V., which owns the land on
23 behalf of the Trust.

24 119. Rayment discussed setting up the Mexican corporation with Francis.

25 120. During the time the residence was being built, Rayment would
26 communicate Francis' wishes regarding the building of the home to the builder,
27

1 mitigate disputes between Francis and the builder, and assist in arranging for
2 payment, either from Sands or Mantra.

3 121. Rayment was consulted regarding the execution of the contract
4 between Sands, Mantra and APMIC.

5 122. Rayment found out about APMIC from Francis, when Francis asked
6 Rayment to review the insurance policies.

7 123. Rayment and Francis met with the insurance representatives in Hawaii
8 to review the insurance contracts and discussed the tax deductibility of the
9 premium payments.

10 124. When Francis was arrested in Florida on a criminal matter, Rayment
11 was the attorney who went to Florida to assist him and arrange for his bail.

12 125. When Francis was sued for a bad debt by the Wynn Casino in Nevada
13 in 2008, Rayment spoke with Francis' attorneys in Nevada and inquired as to the
14 status of the case.

15 126. Rayment has given sworn testimony when Francis and Crescent
16 Capital/Hadid filed suits against each other.

17 **Francis' legal trouble**

18 127. Francis has been involved in many civil and criminal legal actions.

19 128. Francis was and is involved in several civil lawsuits that either
20 resulted in judgments against him or where judgments are still being sought.

21 129. In August 2008, a judgment against Francis was entered for
22 \$2,838,356.00, in favor of Wynn Las Vegas, LLC.

23 130. Francis has been the subject of several criminal cases, from
24 racketeering, drug trafficking, and child pornography charges in Florida, to
25 gambling debt charges in Nevada, to federal tax evasion and bribery offenses.

26 131. Mantra has also been subject to civil and criminal prosecution.
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1 132. In December 2006, Mantra was sentenced in the Northern District of
2 Florida to a fine of \$1.6 million, and Francis, as Mantra's Chief Executive Officer,
3 was sentenced to serve 32 hours of community service for a term of 30 consecutive
4 months, stemming from criminal violations of 18 U.S.C. § 2257. United States v.
5 Mantra Films, Inc., 5:06-cr-78-RS (N.D. Fla.).

6 133. In this Court, Mantra has been permanently enjoined from certain
7 business activities under the Federal Trade Commission Act and the Electronic
8 Fund Transfer Act, and a judgement in the amount of \$1,089,627 has been entered
9 against it in the matter of United States v. Mantra Films, Inc., et al., CV 03-9184
10 RSWL (MANx).

11 134. On April 11, 2007, a federal grand jury in the District of Nevada
12 indicted Francis on two counts of tax evasion in violation of 26 U.S.C. § 7201 for
13 taxable years 2002 and 2003.

14 135. On September 23, 2009, in the case of United States v. Joseph R.
15 Francis, CR 08-494-SJO (U.S.D.C., C.D. Ca.), Francis pled guilty to a three-count
16 Information.

17 136. Francis admitted to two violations of 26 U.S.C. § 7207 with respect to
18 the 2003 tax year, admitting that he willfully filed his 2003 U.S. Individual Income
19 Tax Return and his 2003 Amended U.S. Individual Income Tax Return knowing
20 that the returns were false as to a material matter in that they omitted interest
21 income earned on the Rothwell Morgan Stanley account.

22 137. On November 6, 2009, the Court sentenced Francis for his violations
23 of 26 U.S.C. § 7207.

24 **IRS Levy**

25 138. On November 6, 2009, the IRS notified Francis that a determination
26 had been made that jeopardy existed with respect to the ability of the IRS to collect
27

1 his 2001, 2002, and 2003 income tax liabilities.

2 139. On the same day, the IRS levied the accounts of Francis and Rothwell
3 at Morgan Stanley, as the IRS claimed that Rothwell was a nominee of Francis and
4 that such funds held in both accounts were in jeopardy of being moved out of the
5 reach of the Government.

6 140. On December 31, 2009, in compliance with the IRS nominee levy on
7 Rothwell's account, Morgan Stanley liquidated Rothwell's Morgan Stanley
8 investment account and surrendered the funds to the United States, as follows: (1)
9 December 31, 2009, Check #27603880 in the amount of \$19,412,427.21; (2)
10 January 4, 2010, Check #27603884 in the amount of \$690,571.21; and (3) January
11 5, 2010, Check #27603887 in the amount of \$301,639.79.

12 141. The money seized in Rothwell's Morgan Stanley brokerage account by
13 the IRS was there by virtue of a series of deposits totaling over \$10 million made
14 by Sands and the \$5 million APMIC insurance premiums made by Sands and
15 Mantra

16 142. Any conclusion of law deemed more appropriately designated as a
17 finding of fact is incorporated here as a finding of fact.

18 **CONCLUSIONS OF LAW**

19 143. 26 U.S.C. § 7426 allows a third party (a party other than the
20 delinquent taxpayer), to challenge an IRS levy as "wrongful."

21 144. A levy is "wrongful" if it is upon property in which the taxpayer has
22 no interest at the time the lien arose or thereafter. Treas. Reg. § 301.7426-1(b);
23 *Sessler v. United States*, 7 F.3d 1449, 1451 (9th Cir. 1993).

24 145. When a taxpayer fails to pay an assessed tax liability after receiving
25 notice of the assessment and demand for payment, a lien for the unpaid tax
26 automatically arises in favor of the United States upon all property and rights to
27

1 property belonging to the taxpayer. 26 U.S.C. § 6321.

2 146. Under certain circumstances, the United States may levy upon
3 property held by a third party, such as when a third party trust is the nominee of a
4 taxpayer who is indebted to the United States, or when a trust is a “sham.” *911*
5 *Management, LLC v. United States*, 657 F.Supp.2d 1186, 1191 (D. Or. 2009); *Juris*
6 *Trust Co. Ltd. v. United States*, 78 A.F.T.R.2d 96-6548 (E.D. Cal. 1996); *United*
7 *States v. Geissler*, 73 A.F.T.R.2d 94-459 (D. Id. 1993).

8 147. It is settled law that the federal tax lien attaches to property held by a
9 taxpayer’s nominee or alter ego, and that such property is subject to the collection
10 of the taxpayer’s tax liability. See *G.M. Leasing Corp. v. United States*, 429 U.S.
11 338, 350–51, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977) (the IRS “could properly regard
12 petitioner’s assets as [taxpayer’s] property subject to the lien under § 6321”); *Wolfe*
13 *v. United States*, 798 F.2d 1241, 1244 n.3, amended 806 F.2d 1410 (9th Cir. 1986);
14 *Holman v. United States*, 505 F.3d 1060, 1065 (10th Cir. 2007); *Scoville v. United*
15 *States*, 250 F.3d 1198, 1202–03 (8th Cir. 2001); *Oxford Capital Corp. v. United*
16 *States*, 211 F.3d 280, 284 (5th Cir. 2000); *LiButti v. United States*, 107 F.3d 110,
17 120, 125 (2d Cir. 1997); *Shades Ridge Holding Corp. v. United States*, 888 F.2d
18 725, 728–29 (11th Cir. 1989); *Towe Antique Ford Found. v. IRS*, 791 F. Supp.
19 1450, 1454 (D. Mont. 1992), *aff’d*, 999 F.2d 1387 (9th Cir. 1993).

20 148. In bringing an action under 26 U.S.C. § 7426, plaintiff bears the initial
21 burden of proving title to the levied property. *911 Management v. United States*,
22 *supra*; *Tri-State Equipment v. United States*, 79 A.F.T.R.2d 97-2502, 9 (E.D. Cal.
23 1997).

24 149. If the plaintiff is able to establish title to the property, the burden of
25 persuasion shifts to the United States to show that there exists a nexus between the
26 taxpayer and the levied property. *911 Management LLC, supra*; *Tri-State*
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1 *Equipment, supra.*

2 150. The United States may establish the required nexus by showing that a
3 third party entity is actually the nominee of the delinquent taxpayer. *911*

4 *Management LLC, supra; Tri-State Equipment, supra.*

5 151. However, the plaintiff bears the ultimate burden of proving to the
6 district court that the property which appears to belong to the taxpayer actually is
7 plaintiff's property and does not belong to the delinquent taxpayer. *911*

8 *Management LLC, supra; Tri-State Equipment, supra.*

9 152. Property is held by a nominee when someone other than the taxpayer
10 has legal title but, in substance, the taxpayer enjoys the benefits of ownership.

11 *Oxford Capital Corp.*, 211 F.3d at 284.

12 153. A third party is the taxpayer's nominee where "the taxpayer has
13 engaged in a legal fiction by placing legal title to property in the hands of a third
14 party while actually retaining some or all of the benefits of true ownership."

15 *Holman*, 505 F.3d at 1065; *see also United States v. Miller Bros. Constr. Co.*, 505
16 F.2d 1031, 1036 (10th Cir. 1974).

17 154. "[T]he nominee theory stems from equitable principles. Focusing on
18 the relationship between the taxpayer and the property, the theory attempts to
19 discern whether a taxpayer has engaged in a sort of legal fiction, for federal tax
20 purposes, by placing legal title to property in the hands of another while, in
21 actuality, retaining all or some of the benefits of being the true owner." *In re*
22 *Richards*, 231 B.R. 571, 578 (E.D. Pa. 1999). *See also, Black's Law Dictionary*
23 1072 (7th ed. 1999) (defining nominee as "[a] party who holds bare legal title for
24 the benefit of others").

25 155. California law recognizes a nominee theory of ownership.

26 156. Two recent decisions by the district court for the Southern District of
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1 California cite and discuss many of the state court cases that have addressed the
2 theory. *Fourth Investment LP v. United States*, 2010 WL 3069685, at *5 (S.D. Cal.
3 2010); *Leeds LP v. United States*, 2010 WL 3070349, at *4 (S.D. Cal. 2010).
4 Among the cases cited in those opinions is *McColgan v. Walter Magee, Inc.*, 172
5 Cal. 182, 190 (1916), where the California Supreme Court held that “[p]ublic
6 policy does not permit [a debtor] to put [his property] beyond reach of his creditors
7 while he has the beneficial use of it himself.”

8 157. The State’s highest court has thus confirmed that equitable creditor’s
9 remedies can override a legal fiction.

10 158. Other California cases relied upon by those two Southern District
11 decisions include *Lewis v. Hankins*, 262 Cal. Rptr. 532 (Cal. Ct. App. 1989)
12 (affirming trial court’s decision allowing creditor to levy and sell property owned
13 by debtor’s nominees because debtor was beneficial owner); *Parkmerced Co. v.*
14 *City and County of San Francisco*, 149 Cal. App.3d 1091, 1095 (1985) (noting that
15 one general partner held real property as nominee for partnership); *Baldassari v.*
16 *United States*, 144 Cal. Rptr. 741, 744 (1978) (“[t]he validity of the tax liens
17 depends upon whether plaintiffs are the bona fide owners of the properties or are
18 only nominees”); *In re Camm’s Estate*, 76 Cal. App.2d 104, 112 (Cal. Ct. App.
19 1946) (relying on “the rule that a person cannot place his property or the income
20 thereof beyond the reach of his creditors so long as he himself retains the right to
21 receive it and use it”); *Bauman v. Harrison*, 115 P.2d 530 (Cal. Ct. App. 1941)
22 (stating that “appellant took title as the nominee of [another party] but did not
23 assume or agree to pay the indebtedness secured by the deed of trust”). *See also,*
24 *United States v. Dubey*, 1998 WL 835000, at *98-7055 (E.D. Cal. 1998).

25 159. Although California law recognizes the theory of nominee ownership,
26 it appears that no California state court has identified the factors involved in a
27

1 nominee analysis. *See Fourth Investment, LP*, 2010 WL 3069685, at *4; *Leeds*,
2 2010 WL 3070349, at *4.

3 160. The district court in *Fourth Investment* observed that, in the absence of
4 state-law guidelines, the federal courts in California have used the guidelines of
5 federal common law, citing *United States v. Beretta*, 2008 WL 4862509, at *7
6 (N.D. Cal. 2008); *United States v. Lang*, 2008 WL 2899819, at *5 (C.D. Cal.
7 2008); and *Sequoia Prop. & Equip. Ltd. P'ship v. United States*, 2002 WL
8 31409620, at *12 (E.D. Cal. 2002). Under Ninth Circuit decisions, it was entirely
9 appropriate for the district courts in California to consider federal common law
10 guidelines in resolving nominee cases.

11 161. The Ninth Circuit has repeatedly held that where the state's highest
12 court has not decided an issue (here, what factors are to be considered in
13 determining nominee ownership), "the task of the federal courts is to predict how
14 the state high court would resolve it." *Giles v. GMAC*, 494 F.3d 865, 872 (9th Cir.
15 2007), quoting *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986).

16 162. And in making this prediction, the federal courts may look "for
17 guidance to decisions by intermediate appellate courts of the state *and by courts in*
18 *other jurisdictions.*" *Giles*, 494 F.3d at 872 (emphasis added). *See also*,
19 *Burlington Ins. Co. v. Oceanic Design & Constr., Inc.*, 383 F.3d 940, 944 (9th Cir.
20 2004) ("a federal court may be aided by looking to well-reasoned decisions from
21 other jurisdictions"); *Eichacker v. Paul Revere Life Ins. Co.*, 354 F.3d 1142, 1145
22 (9th Cir. 2004) (prediction may be based upon "intermediate appellate court
23 decisions, decisions from other jurisdictions, statutes, treatises, and restatements");
24 *Walker v. City of Lakewood*, 272 F.3d 1114, 1125 (9th Cir. 2001) (same).

25 163. Moreover, the Ninth Circuit has said that it will give deference "to the
26 district court's construction of the law of the state in which the district court sits."
27

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1 *Takahashi v. Loomis Armored Car Serv.*, 625 F.2d 314, 316 (9th Cir. 1980). *Cf.*
2 *United States v. Durham Lumber Co.*, 363 U.S. 522, 525, 80 S.Ct. 1282, 4 L.Ed.2d
3 1371 (1960) (“in dealing with issues of state law that enter into judgments of
4 federal courts, we are hesitant to overrule decisions by federal courts skilled in the
5 law of particular states unless their conclusions are shown to be unreasonable”).

6 164. Although none of the federal district courts in California ostensibly
7 purported to predict what factors the California Supreme Court would adopt for
8 determining nominee status, those courts have uniformly applied the same factors.

9 165. And the factors routinely applied by the district courts in California
10 are similar (and in many instances identical) to those applied by courts in other
11 jurisdictions.

12 166. In *United States v. Bell*, 27 F. Supp. 2d 1191, 1195 (E.D. Cal. 1998),
13 for example, the district court held that nominee status “is determined by the degree
14 to which a party exercises control over an entity and its assets.”

15 167. In support of this statement of the law, the district court relied upon
16 decisions of the Second Circuit (*LiButti*, 107 F.3d at 119), and the Eleventh Circuit
17 (*Shades Ridge Holding Co.*, 888 F.2d at 729).

18 168. The district court in *Bell* then listed the following six factors that
19 courts have considered to be relevant in determining nominee status:

- 20 (1) No consideration or inadequate consideration paid by the nominee;
- 21 (2) Property placed in the name of the nominee in anticipation of a suit or
22 occurrence of liabilities while the debtor continues to exercise control
23 over the property;
- 24 (3) Close relationship between the debtor and the nominee;
- 25 (4) Failure to record a conveyance;
- 26 (5) Retention of possession by the debtor; and

1 (6) Continued enjoyment by the debtor of benefits of the property.

2 169. Indeed, reliance upon these six factors is widespread. As the district
3 court stated in *United States v. Secapure*, 2008 WL 820719, at *7 (N.D. Cal. 2008),
4 “[c]ourts throughout the Ninth Circuit rely on [these] six factors to determine
5 nominee status.” *See also*, *Cal Fruit Int’l v. Spaich*, 2006 WL 27116644, at *5
6 (E.D. Cal. 2006); *Tri-State Equipment v. United States*, 1997 WL 375264, at *11
7 (E.D. Cal. 1997).

8 170. In support of its own reliance on these factors, the district court in *Bell*
9 cited *Towe Antique Ford, supra*, a case that involved Montana law and that was
10 affirmed by the Ninth Circuit (999 F.2d 1387), and the Tenth Circuit’s decision in
11 *United States v. Miller Bros. Constr. Co., supra*. Other federal courts of appeals
12 have relied upon the same, or nearly the same, factors. *Oxford Capital*, 211 F.3d at
13 284 n.1; *Scoville*, 250 F.3d at 1202.

14 171. The courts, however, do not necessarily require that each of these
15 factors be present in every case. As the Second Circuit explained in *LiButti*,
16 107 F.3d at 119, courts should avoid an “over-rigid preoccupation with questions
17 of structure, * * * and apply the preexisting and overarching principle that liability
18 is imposed to reach an equitable result.” *See generally*, W. Elliott, *Federal Tax*
19 *Collections, Liens, and Levies*, ¶ 9.10, p. 9-95 (2d ed. 2003) (“There are no
20 particular elements whose presence the courts always insist on to determine that
21 property that is being held in the name of a nominee is in fact the property of
22 another,” and then listing eight factors, including the six listed above). *LiButti*
23 itself discusses both nominee and alter ego doctrine, and, indeed, some courts have
24 recognized that there is an overlap between the two doctrines. *E.g.*, *911 Mgmt.*
25 *LLC v. United States*, 657 F. Supp. 2d 1186, 1195, 1214 (D. Ore. 2009) (“[m]any of
26 the factors overlap with the nominee analysis” and “the presence of absence of a
27

1 particular factor is not dispositive”); *In re Callahan*, 419 B.R. 109, 128 (Bankr.
2 Mass. 2009), *remanded on other grounds*, 2010 WL 1170112 (D. Mass. 2010)
3 (“alter ego theory is similar in some respects to a nominee theory”).

4 172. This makes sense because the nominee and alter ego doctrines are
5 closely related equitable creditor’s remedies that focus on control – in one, a
6 debtor’s control over an entity, and in the other, a debtor’s control over a willing
7 nominee with respect to a specific asset.

8 173. Indeed, nominee cases may be viewed as single-asset alter ego cases;
9 although one individual cannot be the alter ego of another for all purposes, he may
10 serve in that role with respect to holding a specific piece of property.¹

11 174. In any event, that federal courts across the nation have routinely relied
12 upon the six factors listed above is not surprising. As the Eleventh Circuit
13 explained in *Shades Ridge Holding Co.*, 888 F.2d at 728, the standards for
14 establishing nominee status under state and federal law “are so similar that the
15 distinction is of little moment,” because “[t]he [nominee] issue under either state or
16 federal law depends upon who has ‘active’ or ‘substantial’ control.”

17 175. In view of the widespread reliance by the courts upon the six factors
18 listed above, this Court should be able to predict with confidence that the
19 California Supreme Court would also adopt them (or something very similar to
20 them) to determine nominee status.

21 176. Indeed, California’s intermediate appellate courts, although not
22

23 ¹ The California Supreme Court would thus likely also consider its alter ego
24 decisions when considering what factors to adopt in nominee cases. And in
25 California, alter ego doctrine is not as rigid as in some states. *E.g.*, *Gordon v.*
26 *Aztec Brewing Co.*, 33 Cal.2d 514, 523, 203 P.2d 522, 527 (Cal. 1949) (“[i]t is not
27 necessary that the plaintiff prove actual fraud. It is enough if the recognition of
the two entities as separate would result in an injustice”); *Paul v. Palm Springs*
Homes, Inc., 192 Cal. App.2d 858, 862, 13 Cal. Rptr. 860, 862 (Cal. App. 1961)
28 (“[t]he conditions under which a corporate entity may be disregarded vary
according to the circumstances in each case”).

1 adopting a discrete list of factors, have applied such factors in their nominee
2 determinations. For example, in *Baumann v. Harrison*, 46 Cal. App.2d at 91-92,
3 the court relied upon the facts that the nominee “did not assume or agree to pay the
4 indebtedness secured by the deed of trust” (factor # 1), and that the principals “had
5 at all times been in control and possession of the premises” and had been receiving
6 all rents from the property (factors # 5 & 6).

7 177. Moreover, it is apparent that the nominee issue presented here arises
8 more often in the federal tax-collection context than in other areas of the law.

9 178. That this is so is evident from the numerous tax cases arising in recent
10 years in the federal district courts in California alone, and the comparatively small
11 number of nominee cases in the California state courts. Because of the prevalence
12 of the issue in federal tax cases, it is reasonable to conclude that the California
13 Supreme Court, if and when presented with the issue, would give deference to the
14 many federal court decisions that have arisen, and would adopt the same factors
15 that have routinely been applied in those cases. The California Supreme Court’s
16 adoption of those factors would go a long way toward promoting uniformity in the
17 law.

18 179. Based on the evidence of the Government as applied to the six
19 nominee factors enumerated above in *Bell*, plaintiff is the nominee of Francis.

20 180. Though millions of dollars were transferred to Rothwell from Sands
21 and Mantra, Rothwell provided no services or consideration to Sands and Mantra
22 in exchange.

23 181. Rothwell paid no consideration to Sands or Mantra in exchange for the
24 funds to purchase Lots 14 or 13B.

25 182. The facts show that in transferring assets of Sands and Mantra
26 offshore, Francis sought to defeat his creditors, including the IRS, and acting in
27

1 anticipation of possible litigation.

2 183. All ownership interests held by Rothwell can be traced back to
3 Francis, Sands and Mantra.

4 184. The funds from which Rothwell purchased Lots Nos. 14 and 13B, as
5 well as the funds which comprise Rothwell's Morgan Stanley account, can be
6 directly traced back to payments by Sands and Mantra, which those companies
7 fraudulently claimed as tax deductions.

8 185. The evidence shows that Rothwell is nothing more than a funnel
9 through which money passed to accounts and property with a close relationship
10 with Francis.

11 186. As serving as the Trust's protector, Rayment can instruct the Trust to
12 carry out Francis' wishes, just as he did in the APMIC transaction and the building
13 of the Punta Mita property.

14 187. The millions of dollars transferred from Sands and Mantra are assets
15 that constructively remain in the possession of Francis, and the benefits of which
16 are enjoyed by Francis.

17 188. It was not until the IRS levied the funds in November 2009 that
18 Francis ceased "enjoyment" of the Rothwell Morgan Stanley account.

19 189. Through a series of transfers, Sands and Mantra have laundered
20 millions of dollars through off-shore entities to establish the Rothwell Morgan
21 Stanley account.

22 190. All of the funds that Sands and Mantra transferred off-shore and
23 deducted as business expenses on the corporations' income tax returns directly
24 benefitted Francis, as such were taken as false business expenses that reduced
25 corporate net income that flowed through to Francis' personal tax return.

26 191. To date, Francis still enjoys the use of the Punta Mita property for his
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1 personal benefit.

2 192. The close coordination of these activities surrounding the purchase of
3 the lots and the building of the Punta Mita residence underscores the control
4 exerted by Francis over the use of assets placed in plaintiff's name.

5 193. As for the 35,000 square-foot Punta Mita residence, it was built from
6 untaxed funds transferred directly from Sands and Mantra to the builder and
7 deducted on Mantra's and Sands' tax returns as false business expenses, again,
8 reducing the corporations' income and, in turn, reducing Francis' taxable income
9 and tax.

10 194. Rothwell and Francis have blurred the line as to the ownership of the
11 35,000 square foot Punta Mita residence built upon the lots.

12 195. Neither Rothwell, the Trust, Francis, Sands nor Mantra have adhered
13 to the formalities expected of them in managing the Mexican property, an "income-
14 producing" property for the Trust.

15 196. The lack of record keeping regarding the ownership rights and
16 responsibilities for the Punta Mita property shows the lack of separation between
17 Rothwell and Francis, Sands and Mantra.

18 197. The evidence shows that 1) Rothwell paid no consideration to Francis,
19 Sands, and/or Mantra for the millions of dollars transferred to Rothwell from those
20 entities; 2) transfers of cash to Rothwell were made in anticipation of the tax
21 liabilities of Francis, 3) Rothwell and Francis, Sands, and Mantra have a close
22 relationship, through their own actions and through the actions taken on behalf of
23 these entities by Rayment, 4) Rothwell maintains no records regarding the "rental"
24 of the Mexican property to Francis, Sands, and Mantra, 5) Francis retains
25 significant control over property in the name of Rothwell, and 6) Francis, Sands,
26 and Mantra continued to enjoy the benefit of the property of Rothwell and held
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1 themselves out to be the owners of such property.

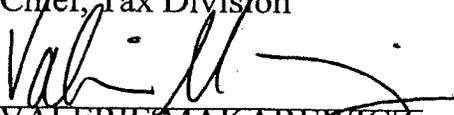
2 198. Francis had an interest in the property of Rothwell and its Morgan
3 Stanley account at the time the tax levy against Francis arose for his 2001, 2002
4 and 2003 income tax liabilities.

5 199. As Rothwell is the nominee of Francis, Sands and/or Mantra, the levy
6 made by the IRS on November 6, 2009 that seized the funds in Rothwell's Morgan
7 Stanley account was not wrongful under 26 U.S.C. § 7426 .

8 **IT IS SO ORDERED.**

9
10 R. GARY KLAUSNER
United States District Judge

11 Submitted by,
12 ANDRE BIROTTE JR.
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13 SANDRA R. BROWN
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Chief, Tax Division

14  5/24/11
15 VALERIE MAKAREWICZ
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 ROTHWELL, LTD.

7
 8 UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 9 WESTERN DIVISION

10 ROTHWELL, Ltd., a Cayman Islands Corporation,	)	CASE NO. CV-10-479-RGK (FFMx)
)	
12 Plaintiff,	)	<u>NOTICE OF LODGMENT</u>
13 v.	)	PLAINTIFF ROTHWELL, LTD.'S PROPOSED
	)	FINDINGS OF FACT AND CONCLUSIONS
14 UNITED STATES OF AMERICA,	)	OF LAW
)	
15 Defendant.)	
)	

17
 18 PLEASE TAKE NOTICE that Plaintiff Rothwell, Ltd. has lodged the following
 19 document:

- 20 1. Plaintiff Rothwell, Ltd.'s Proposed Findings of Fact and Conclusions of Law,
 21 pursuant to this Court's September 20, 2010, Scheduling Order (CR #16), which
 22 is attached hereto.

23 RESPECTFULLY SUBMITTED this 23rd day of May, 2011.

24 WILLIAM A. COHAN, P.C.

25 By: *s/ William A. Cohan*
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Attorney for Plaintiff Rothwell, Ltd.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2011, I did cause the foregoing Notice of Lodgment and attached: (1) Plaintiff Rothwell, Ltd.'s Proposed Findings of Fact and Conclusions of Law to be served via the ECF system on the following:

AUSA Valerie Makarewicz, Esq., E-Mail: valerie.makarewicz@usdoj.gov
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 5
 Attorney for Plaintiff
 6 ROTHWELL, LTD.

7
 8 UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 9 WESTERN DIVISION

10	ROTHWELL, Ltd., a Cayman Islands	)	CASE NO. CV-10-479-RGK (FFMx)
11	Corporation,)	
12	Plaintiff,	)	PLAINTIFF ROTHWELL, LTD.'S PROPOSED
13	v.	)	FINDINGS OF FACT AND CONCLUSIONS
14	UNITED STATES OF AMERICA,	)	OF LAW
15	Defendant.	)	DUE DATE: Tuesday, May 24, 2011
16		)	CTRM: Room 850, United States Courthouse
17		)	255 E. Temple Street
		)	Los Angeles, CA
		))	[Hon. R. Gary Klausner]

18 Plaintiff Rothwell, Ltd., by and through counsel undersigned, respectfully submits its
 19 Proposed Findings of Fact and Conclusions of Law pursuant to this Court's September 20, 2010,
 20 Scheduling Order (CR #16).

21 **I. PROPOSED FINDINGS OF FACT.**

22 1. The Francis Trust indenture was drafted and created by Owen Foley ("Foley"),
 23 Attorney at Law and partner in the law firm of Misick & Stanbrook, Richmond House, P.O. Box
 24 127, Providenciales, Turks & Caicos Islands, B.W.I.; <http://www.misickstanbrook.tc>, pursuant to
 25 the laws of the Turks & Caicos Islands ("TCI") and TCI trust laws in particular.

26 2. Owen Foley, Esq. graduated from the University College of Dublin, Ireland with
 27 a degree of bachelor of civil law in 1978 and after that educated at the Law School of the

1 Incorporated Law Society of Ireland in Dublin, where he was admitted a solicitor of the High
2 Court of Ireland in 1982, which is the highest court in Ireland. Foley has been practicing and
3 licensed to practice law in TCI since April, 1988. Mr. Foley considers himself to be an expert in
4 TCI trust law.

5 3. Hallmark Trust, Ltd., Prestige Place, Grace Bay Road, P.O. Box 656,
6 Providenciales, TC, was selected to provide Trustee services for The Francis Trust.

7 4. The Francis Trust was settled on May 24, 1999, by and between Joseph Raymond
8 Francis, Settlor ("Francis"), and Hallmark Trust, Ltd., Trustee.

9 5. Pursuant to the terms of The Francis Trust, TCI is the trust's place of
10 administration and its provisions are construed by the laws of TCI.

11 6. Pursuant to the provisions of The Francis Trust all power and discretion, including
12 decisions concerning investments and/or disbursements, is determined at the sole discretion of
13 the Trustee, with the exception of specified powers noted within the Schedules of the Trust
14 which need the permission of the protector.

15 7. The Francis Trust is an irrevocable discretionary trust.

16 8. On May 2, 1999 and May 24, 1999, Francis provided a "Letter of Wishes" to the
17 Trustee. Pursuant to TCI law, a "letter of wishes" has no legal effect whatsoever and a trustee
18 has no obligation to pay any attention to a "letter of wishes."

19 9. Pursuant to the terms of The Francis Trust, once property is transferred, the trustee
20 holds legal title for the benefit of the beneficiaries and the Settlor Joseph Francis cannot revoke
21 the transfer.

22 10. Pursuant to the terms of The Francis Trust fourth schedule "Excluded Persons,"
23 and TCI ordinance Section 61, if a Settlor transfers assets to a TCI trust and the Settlor was not
24 insolvent at the time of transfer the trust cannot be set aside at the instance of a creditor.

25 11. Pursuant to the terms of The Francis Trust beneficiaries have no vested interest in
26 the trust and, thus, a creditor, even if the creditor had a judgment, could not attach any interest of
27

1 any beneficiary -- the creditor is in no better position to make a claim than the beneficiary who
2 owes the debt.

3 12. Trustees are entitled to reimbursement in accordance with the terms and
4 conditions of The Francis Trust. Trustees are paid for their services from the trust fund, not the
5 Settlor.

6 13. The Francis Trust has two protectors: (1) Brian Rayment, Esq., an attorney
7 licensed to practice in Oklahoma ("Rayment"); and (2) Pittsford, Ltd., a British Virgin Islands
8 Company.

9 14. Pursuant to the terms of The Francis Trust the protector does not have authority to
10 direct the activities of the Trustee with respect to the management of the trust.

11 15. Pursuant to the terms of The Francis Trust, any disposition of funds is subject to
12 approval of The Francis Trust protector if the disposition exceeds \$10,000.

13 16. Pursuant to the terms of The Francis Trust, the Trustee needs the protector's
14 permission to pay any distribution to a beneficiary.

15 17. Pursuant to the terms of The Francis Trust a beneficiary has no guaranteed right
16 that the Trustees will exercise their discretion in his or her favor and therefore a beneficiary may
17 receive nothing.

18 18. The Francis Trust beneficiaries are Joseph Francis ("Francis"), his parents and
19 children and Oklahoma Film Holding Corporation, a non-profit corporation owned by Joseph
20 Francis.

21 19. The parties are unaware whether Francis presently has any children.

22 20. As protector of The Francis Trust Rayment has never directed the Trustee with
23 respect to any investments by the Trust or by entities in which the trust has an interest.

24 21. In 1991, Colin R. Chaffe ("Chaffe") and Nicola S. Jordan ("Jordan") incorporated
25 Hallmark Trust, Ltd., in TCI.

26 22. Mr. Chaffe and Ms. Jordan are British citizens and residents of TCI.

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1 23. Francis has never owned or controlled, directly or indirectly, any interest in
2 Hallmark Trust, Ltd.

3 24. From May 24, 1999, the Trustee, Hallmark Trust, Ltd. ("Hallmark"), directed and
4 controlled the operations, finances, assets and investment decisions of The Francis Trust, until
5 Hallmark resigned in 2010.

6 25. Colin Chaffe became trustee of The Francis Trust and director of Rothwell, Ltd.,
7 personally in 2010 when Hallmark Trust resigned as trustee and director of Rothwell, Ltd.

8 26. On June 9, 2000, Chaffe incorporated Rothwell Limited aka Rothwell, Ltd.
9 ("Rothwell") in the Cayman Islands. One hundred percent (100%) of Rothwell shares are held by
10 Inceptre Holdings, Ltd. ("Inceptre"), in trust for The Francis Trust.

11 27. Pursuant to Rothwell's Memorandum of Association, Articles of Association and
12 Minute Book, all discretion, power and control is vested in the members and directors of the
13 Rothwell corporation.

14 28. Rothwell's shares are assets of The Francis Trust, but Rothwell's assets do not
15 belong to The Francis Trust. Rothwell has full discretion over its own assets.

16 29. From June 9, 2000, to November 29, 2005, Chaffe and Jordan controlled, directed
17 and managed the operations, finances, assets and investment decisions of Rothwell, Ltd.

18 30. Inceptre Holdings, Ltd., was incorporated in TCI on March 5, 1992. The sole
19 shareholders were and are Colin R. Chaffe (50 shares) and Nicola S. Jordan (50 shares).

20 31. Francis has never owned or controlled, directly or indirectly, any interest in
21 Inceptre Holdings.

22 32. Inceptre Holdings acted as director of Rothwell., until 2003 when Hallmark
23 became the director of Rothwell.

24 33. According to Mr. Chaffe and Mr. Francis, neither has ever met the other.

25 34. Beginning in 2001, Rothwell entered into various distribution and licensing
26 contracts with West Direct.

1 35. In 2001, Chaffe and Jordan opened a bank account for Rothwell at the Bermuda
2 Commercial Bank in Hamilton, Bermuda.

3 36. Francis was not a signatory on Rothwell's Bermuda Commercial Bank account.

4 37. Hallmark's officers and directors, Chaffe, Jordan, Brian Trowbridge, Gregory
5 Hurd and Colin Whittingham, were signatories on Rothwell's Bermuda Commercial Bank
6 account.

7 38. On or about June 2, 2001, Chaffe and Jordan opened an investment account for
8 Rothwell at Morgan Stanley Smith Barney ("MSSB") in Irvine, California.

9 39. Chaffe and Jordan were signatories on Rothwell's MSSB account until late 2005.

10 40. Francis did not have signatory authority on Rothwell's MSSB account.

11 41. During 2002 Sands Media, Inc. ("Sands Media"), a U.S. corporation all shares of
12 which were owned by Joseph Francis, wired \$1,950,000 to Rothwell's Bermuda bank account.

13 42. During 2003 Sands Media wired \$8,461,020. to Rothwell's Bermuda bank
14 account.

15 43. None of Francis' personal funds were wired to Rothwell's Bermuda bank account.

16 44. Funds were transferred from Rothwell's Bermuda bank account by wire to
17 Rothwell's MSSB account.

18 45. None of Francis' personal funds were wired to or otherwise deposited in
19 Rothwell's MSSB account.

20 46. Francis never exercised control over Rothwell's Bermuda bank or MSSB
21 accounts.

22 47. None of The Francis Trust's nor Rothwell's funds or assets were used to pay any
23 of Francis' nor any other beneficiary's personal expenses or obligations.

24 48. Chaffe and Jordan sold 100% of their interests in Hallmark to Brian Trowbridge,
25 a Canadian citizen, attorney and resident of TCI, who changed the name to Hallmark Bank and
26 Trust, Ltd. ("Hallmark").

1 49. On November 29, 2005, Hallmark Bank and Trust, Ltd., P.O. Box 656, Tropicana
2 Plaza, Providenciales, TCI, became Director of Rothwell and continued to do so until March,
3 2010, when Hallmark Bank and Trust, Ltd., resigned and Colin Chaffe was appointed Trustee of
4 The Francis Trust and Director of Rothwell, Ltd.

5 50. According to Brian Trowbrige, Brian Trowbridge never met Francis nor spoke to
6 him.

7 51. Trowbridge and Hallmark Bank and Trust, Ltd. directors and officers were
8 signatories on Rothwell's MSSB account.

9 52. From July 2001, through October 2008, John Welker was the broker responsible
10 for Rothwell's MSSB account.

11 53. Welker does not recall that Chaffe told Welker that he has spoken with Francis or
12 anybody acting on Francis' behalf.

13 54. Welker never discussed the Rothwell MSSB account with Francis.

14 55. In connection with the IRS's criminal investigation of Francis, IRS Special Agent
15 Mark Jensen issued IRS summonses to MSSB for information concerning Rothwell's account in
16 May and July, 2006.

17 56. Brian Trowbridge stated that he was not advised of the summonses by either the
18 IRS or MSSB.

19 57. IRS Special Agent Mark Jensen interviewed John Welker on August 17, 2006,
20 concerning Rothwell's MSSB account and whether Francis was involved with and/or controlled
21 the Rothwell MSSB account.

22 58. On April 11, 2007, Francis was indicted inter alia on two counts of tax evasion
23 (26 U.S.C. §7201) for 2002 and 2003 tax years.

24 59. On September 2, 2008, Michael Nahass, Complex Branch Manager for MSSB,
25 sent a letter to Brian Trowbridge and Rothwell, Ltd., requesting that Rothwell's MSSB account
26 be transferred to another financial institution no later than October 6, 2008, and further stated
27

1 that no further deposits would be accepted into the account.

2 60. Nahass's September 2, 2008, letter did not inform Rothwell that its account had
3 been "red flagged" aka "frozen;" to Nahass "red flagged" meant "no money in, no money out."

4 61. According to Nahass, Rothwell's account had been "frozen" by MSSB's legal
5 department prior to the time Nahass was installed as Welker's supervisor in June, 2008.

6 62. Other than the September 2, 2008, letter, Mr. Nahass did not recall ever having
7 any communications with Mr. Trowbridge.

8 63. On February 19, 2009, and on August 14, 2009, IRS Special Agent Mark Jensen
9 served subpoenas on MSSB for production of records on Rothwell's MSSB account. Neither the
10 IRS nor MSSB gave notice of the 2009 IRS subpoenas to Rothwell.

11 64. Brian Stewart became the MSSB broker on the Rothwell account in 2009.

12 65. Stewart testified that Rothwell's account had been "red flagged," which meant to
13 Stewart that no money could be paid out of the account and MSSB could only take liquidating
14 orders.

15 66. Stewart testified that he did not know whether MSSB had given notice to
16 Trowbridge or anyone else on Rothwell's behalf that the account had been "red-flagged."
17 Stewart does not recall any communications notifying Rothwell that there would be no
18 disbursements from the account.

19 67. Stewart spoke 2 to 3 times on the telephone and via email with Brian Trowbridge;
20 he recalled talking to Mr. Trowbridge, who requested an updated statement.

21 68. On September 23, 2009, Francis agreed to plead guilty in his criminal matter
22 (Case No. 2:08-cr-00494-SJO), to two misdemeanor counts of filing a personal income tax return
23 and an amended personal income tax return for 2003 that were false as to a material matter in
24 that both omitted from the Schedule B the interest income earned on Rothwell's MSSB account.

25 69. On November 6, 2009, Judge Otero of this Court accepted Francis' guilty plea to
26 inter alia two misdemeanor counts of filing false tax returns and sentenced Francis according to
27

1 the binding Plea Agreement (CR #465). On or before that date, Francis paid in full all
2 restitution, fines and assessments required by the plea agreement.

3 70. A few hours later on November 6, 2009, IRS Revenue Officer Farrell Stevens
4 served Notice of Levy on MSSB for the tax liabilities owed by Francis, on the grounds that
5 Rothwell is Francis' "nominee."

6 71. Initially, neither Hallmark Bank and Trust, Ltd., Rothwell, nor Trowbridge were
7 advised that a levy had been served on Rothwell's MSSB account. Trowbridge says he learned
8 about the levy in early 2010.

9 72. Trowbridge sent a facsimile on December 1, 2009, and an email on December 21,
10 2009, to representatives at MSSB, advising that he would be liquidating the account after the
11 start of the new year.

12 73. Brian Stewart did not discuss the IRS's levy on Rothwell's account with
13 Trowbridge.

14 74. Stewart assumed that MSSB's legal department was handling notification of the
15 IRS levy to Trowbridge.

16 75. Stewart was involved with other MSSB accounts for Joseph Francis.

17 76. According to Stewart, Stewart never had any discussion with Francis concerning
18 the Rothwell MSSB account before the "nominee" levy on November 6, 2009, on Rothwell's
19 account.

20 77. Following the levy, Stewart spoke to Francis several times, along with Francis'
21 lawyer, who requested information about "time stamps" and a copy of the levy. According to
22 Stewart, Francis did not ask what Rothwell's account balance was or for Rothwell's accounting
23 statements.

24 78. On November 16, 2009, Stewart faxed a copy of the IRS levy on Rothwell's
25 MSSB account to Francis.

26 79. Francis is the founder of *Girls Gone Wild* entertainment business and the sole
27

1 shareholder of two U.S. corporations, Sands Media, Inc. and Mantra Films, Inc., which are
2 engaged in producing, promoting, marketing and distributing DVDs, infomercials, magazines,
3 apparel and other items.

4 80. On November 5, 2002, Blue Horse Trading, LLC purchased Joe Francis' Los
5 Angeles residence. The initial deposits for the purchase of the property were made by Joseph
6 Francis, but the final purchase amount of \$5,450,000 was paid by Blue Horse Trading from a
7 transfer it received from Joseph Francis' personal account with MSSB.

8 81. Since Blue Horse Trading, LLC is a separate legal entity from Joseph Francis, the
9 property would not be immediately, or possibly ever, subject to an IRS lien.

10 82. On March 3, 2008, Joseph Francis obtained a \$5 million dollar loan from
11 Washington Mutual Bank, by using Francis' personal Los Angeles residence owned by Blue
12 Horse Trading, LLC, as collateral.

13 83. Rothwell's Bermuda bank and MSSB accounts records establish that Francis
14 never exercised control over Rothwell's accounts and that no disbursements were made by
15 Rothwell to Francis.

16 84. On March 13, 2002, a \$1.030 million dollar payment was made from Rothwell's
17 Bermuda Commercial Bank account to fund the purchase of Lot #14; and (2) on September 5,
18 2005 and September 12, 2005, the total of a \$1.023 million dollar payment was made from
19 Rothwell's MSSB account to fund the purchase of Lot #13B, both of which are located in
20 "Ranchos Punta Mita," in the Municipality of Bahia de Banderas, State of Nayarit, Mexico.

21 85. Chaffe made the decision to purchase the property in Mexico and set up the
22 Mexican corporation in consultation with the protector of The Francis Trust, Brian Rayment.
23 The Francis Trust protector, Rayment, brought the investment opportunity to Chaffe.

24 86. In 2002, Colin Chaffe, a principal of Hallmark Trust, Ltd., the Trustee of The
25 Francis Trust, retained Brian Rayment, Esq., to arrange for the establishment of a Mexican
26 corporation, Casa Blanca de Punta Mita, S.A. de C.V. ("Casa Blanca"), and the purchase of Lot
27

1 #14; in 2005, acting in the same capacities, Mr. Chaffe engaged Mr. Rayment to purchase Lot
2 #13B for the Mexican Corporation.

3 87. Island Films, Ltd. ("Islands Films") and Summerland Holdings, Ltd.
4 ("Summerland Holdings") are TCI corporations, the shares of which are owned 100% by The
5 Francis Trust, but Island Films was once owned by Joseph Francis.

6 88. Island Films and Summerland Holdings are Casa Blanca's shareholders, each
7 holding 25,000 shares constituting a 50% ownership interest for each. Under Mexican law,
8 Casa Blanca is an entity distinct and independent from its shareholders.

9 89. Settlement of The Francis Trust, incorporation of Rothwell, Ltd., incorporation of
10 Casa Blanca, purchases of the Mexico property and completion of the improvements to the
11 Mexico property all occurred from May 24, 1999, through September, 2005, prior to the
12 commencement of the IRS investigation of Francis, which began in 2006.

13 90. MSSB's monthly and annual statements for Rothwell's account reflect that the
14 only two disbursements from the MSSB account, from July, 2001, to the date of the IRS levy
15 (November 6, 2009) were the two disbursements totaling \$1.023 million dollars on September 5,
16 2005, and September 12, 2005.

17 91. The \$1.023 million dollars was sent by two wire transfers on September 5, 2005
18 and September 12, 2005, to purchase Lot #13B for Casa Blanca de Punta Mita, S.A. de C.V.

19 92. Casa Blanca is the owner and deed holder of Lot #13B.

20 93. Casa Blanca entered into a private purchase agreement to, and did purchase, Lot
21 #14, from Cantiles de Mita, S.A. de C.V., a Mexican corporation.

22 94. The foregoing acquisition of Lot #14 by Casa Blanca was conducted through
23 Stewart Title escrow and Stewart Title issued title insurance on Lot #14. Stewart Title
24 International provided title insurance to Casa Blanca on both Lots ##13B and 14.

25 95. Although the transaction was conducted through Stewart Title escrow and Stewart
26 Title issued title insurance on Lot #14, a defect exists in Casa Blanca's title to Lot #14 because a
27

1 Deed to Casa Blanca was not recorded. Accordingly, Club de Yates Costa Bandera, S.A. de C.V.
2 is identified as holder of title to Lot #14 in Mexican real property records. The defect in Casa
3 Blanca's title to Lot #14 cannot be resolved without further legal action.

4 96. Francis directed and controlled the design and construction of the premises and
5 improvements made on Casa Blanca's Lot #14.

6 97. Mantra Films, Inc., a U.S. corporation all shares of which are owned by Francis,
7 and Sands Media provided the funds to pay the contractor to design, develop and improve Casa
8 Blanca's Lot #14 as follows: (1) during 2002 Mantra Films paid \$1,002,141.50; (2) during 2002
9 Sands Media paid \$400,000.00; (3) during 2003 Mantra films paid \$850,000.00; and (4) during
10 2003 Sands Media paid \$3,076,070.02. None of Francis' personal funds were used to improve
11 Casa Blanca's Lots ##13B or 14.

12 98. Francis, Sands Media and Mantra Films have used and continue to use Casa
13 Blanca's property.

14 99. Francis', Sands Media's and Mantra Films' use of Casa Blanca's property is at the
15 sole and absolute discretion of the Trustee as provided by ¶9 of "The First Schedule," in The
16 Francis Trust, which states:

17 **Power To Permit Occupation Of Property By Beneficiaries & Enjoyment of**
18 **Chattels**

19 9. **THE** Trustees shall have power to permit any Beneficiary to reside in any
20 dwelling-house, occupy any land or have the custody and use of any chattels
21 which may for the time being be subject to the trusts hereof upon such conditions
as to payment of rent rates, taxes and other expenses and outgoings and as to
insurance, repair, decoration and for such period and generally upon such terms as
the Trustees in their *absolute discretion* shall think fit. [Emphasis added].

22 That permission, however, can be withdrawn at any time in the Trustee's absolute
23 discretion.

24 100. Rothwell provided a little over \$2 million dollars for Casa Blanca to purchase the
25 two lots in Mexico. Mantra Films and Sands Media provided \$5.3 million dollars to improve
26 Casa Blanca's Lot #14. Chaffe believed that Francis contributed to the improvement of Casa
27

1 Blanca's property because it would inure to the benefit of The Francis Trust.

2 101. On December 31, 2009, in compliance with the IRS nominee levy on Rothwell's
3 account, MSSB liquidated Rothwell's MSSB investment account and surrendered the funds to
4 the United States, as follows: (1) December 31, 2009, Check #27603880 in the sum of nineteen
5 million four hundred twelve thousand four hundred twenty-seven dollars and twenty-one cents
6 (\$19,412,427.21); (2) January 4, 2010, Check #27603884 in the sum of six hundred ninety
7 thousand five hundred seventy one dollars and twenty-one cents (\$690,571.21); and (3) January
8 5, 2010, Check #276703887 in the sum of three hundred one thousand six hundred thirty-nine
9 dollars and seventy-nine cents (\$301,639.79; total amount of the MSSB account proceeds paid to
10 the United States is \$20,404,629.21.

11 102. On January 8, 2010, IRS District Counsel sent an e-mail to MSSB's counsel
12 confirming receipt of \$19,412,427.21 on January 5, 2010, \$690,571.21 on January 5, 2010, and
13 \$301,630.79 on January 6, 2010.

14 103. Beginning on Sunday, February 27, 2011, Francis initiated and continues to date
15 to engage in a ferocious campaign to wrest control over The Francis Trust and it's assets --
16 including Rothwell, Island Films, Summerland Holdings and Casa Blanca -- from Trustee Colin
17 Chaffe and Protectors Brian Rayment and Pittsford, Ltd. Francis initiated this campaign aided by
18 attorney Howard Fischer ("Fischer"), with both of them demanding Rayment's, Chaffe's and
19 Pittsford's resignations, accompanied by baseless and false accusations of wrongdoing, threats of
20 baseless litigation, threats of physical harm, and other harassing and vexing emails and text
21 messages, culminating in the filing of a baseless and groundless suit against Rayment in
22 California state court and retaining a TCI attorney to pursue baseless and groundless legal
23 action(s) against Colin Chaffe and Pittsford, Ltd., and it's principal Nicola Jordan in TCI.

24 104. On March 18, 2011, Attorney Fischer sent an email to Rayment stating, "[i]t
25 appears that it is time for you to assist in the transition of yourself as protector," and demanding
26 Rayment's "commitment today (and then follow-through in the next few days)," to:

27
28

- 1 A. You commit to resign as a co-protector in the very near future (see item C).
- 2 B. Contact Pittsford, and request that they resign as a co-protector immediately.
3 Anything you can do to facilitate their removal as a co-protector is appreciated.
- 4 C. Select a successor-protector, and appoint them, and you concurrently resign with the
5 acceptance of the new protector. * * *

6 105. Three days later on March 21, 2011, Fischer sent the following email to Rayment
7 accompanied by a draft complaint, which states in pertinent part:

8 I have been trying to speak with you for several days, but you have not returned my call or
9 emails, other than to send me a long, self-serving and inaccurate email today.

10 So, hopefully the attached draft law suit seeking disgorgement of all legal fees paid to you
11 and your firm will get your attention. And perhaps now you will find the time to call Mac
12 or myself to discuss the current situation.

13 106. When Rayment refused to acquiesce, on March 28, 2011, Francis, GW Brands,
14 Inc., Mantra Films, Inc., and Sands Media, Inc. filed suit in Los Angeles Superior Court against
15 Rayment and his law firm for disgorgement of legal fees (Case No. SC112005).

16 **II. PROPOSED CONCLUSIONS OF LAW.**

17 This is a Wrongful Levy action brought by Plaintiff Rothwell pursuant to 26 U.S.C.
18 §7426 to recover proceeds from (1) a seizure based on an IRS levy served on Morgan Stanley
19 Smith Barney on November 6, 2009, directed at Rothwell's account as "nominee" of Joseph R.
20 Francis to collect Francis' alleged outstanding tax liabilities; (2) the subsequent liquidation of
21 Rothwell's investment account; and (3) surrender of the proceeds of the liquidation by MSSB to
22 the United States. A levy is wrongful if it is placed upon property in which the delinquent
23 taxpayer has no interest. *Sessler v. U.S.*, 7 F.3d 1449, 1451 (9th Cir. 1993); *911 Management,*
24 *LLC v. U.S.*, 657 F.Supp.2d 1186, 1191 (D. OR 2009).

25 The Defendant United States has the burden of proving by substantial evidence either that
26 (1) Rothwell, Ltd. is Francis' nominee; or (2) Rothwell, Ltd. held it's MSSB investment account
27 as nominee for Francis on November 6, 2009. *Flores v. U.S.*, 551 F.2d 1169, 1175 (9th Cir.
28 1977); *Oxford Capital Corp. v. U.S.*, 211 F.3d 280, 283 (5th Cir. 2000); *Cheung, Inv. v. U.S.*, No.
04-2050, 2006 WL 2473487, at *5 (W.D. Wash. Aug. 28, 2006); *Sequoia Prop. & Equip. Ltd. v.*

1 U.S., No. 97-5044, 2002 WL 31409620, at *12 (E.D. Cal. Sept. 19, 2002). Nominee status is
2 determined by the degree to which a delinquent taxpayer – here Joseph R. Francis – exercises
3 control over an entity and its assets. *Oxford Capital Corp. v. U.S.*, *supra*, 211 F.3d at 284, *LiButti*
4 *v. U.S.*, 107 F.3d 110, 119 (2nd Cir. 1997), *Shades Ridge Holding Co., Inc. v. U.S.*, 888 F.2d 725,
5 729 (11th Cir. 1989, *cert. denied*, 494 U.S. 1027 (1990); *U.S. v. Bell*, 27 F.Supp.2d 1191, 1195
6 (E.D. CA 1998). Where, as here, the focus is on the relationship between the parties, the validity
7 of the nominee theory rests on the relationship between the taxpayer (here, Francis) and a
8 particular piece of property (here, Rothwell’s MSSB investment account). *Holman v. U.S.*, 505
9 F.3d 1060, 1065 (10th Cir. 2007); *Sequoia Prop. & Equip. Ltd. P’ship v. U.S.*, No. 97-5044, 2002
10 WL 31409620 (E.D. Cal. Sept. 19, 2002). Axiomatically, under the nominee analysis, the issue
11 is: whether Rothwell held the MSSB account for Francis while Francis actually exercised control
12 over Rothwell and/or Rothwell’s MSSB account. *Oxford Capital Corp. v. U.S.*, *supra*, 211 F.3d
13 at 284.

14 Whether Francis committed tax crimes falsely claiming that transfers to Rothwell were
15 deductible expenses and the amount of taxes Francis owes to the United States are not relevant
16 to the issue of whether Francis controlled Rothwell. *See* 26 U.S.C. §7426(c) (“For purposes of an
17 adjudication under [§7426(a)], the assessment of tax upon which the interest or lien of the United
18 States is based shall be conclusively presumed to be valid.”), *accord*, *First Am. Title Ins. Co. v.*
19 *U.S.*, 520 F.3d 1051, 1053 (9th Cir. 2008) (“[T]here can no longer be a good argument for
20 allowing a third-party challenge to an assessment, barred by §7426.”). Evidence that Francis
21 controlled the funds before he caused their transfer to Rothwell does not constitute evidence that
22 Francis retained control over the funds nor controlled Rothwell or Rothwell’s MSSB account
23 after the transfer was complete. Likewise, that the source of those funds – U.S. Corporations
24 wholly owned by Francis – falsely claimed tax deductions based on transfers of those funds, does
25 not constitute evidence that Francis exercised control over Rothwell and/or Rothwell’s MSSB
26 account. That logic compels the foregoing conclusions is conclusively established by the fact

1 that even assuming *ad arguendo* Francis (1) had never claimed the false deductions or (2) he
2 could lawfully claim them, neither fact would rebut actual evidence that Francis controlled
3 Rothwell or Rothwell's MSSB account.

4 **A. FRANCIS HAS NO PROPERTY NOR RIGHTS TO PROPERTY IN THE
5 FRANCIS TRUST, ROTHWELL, LTD. NOR THEIR ASSETS.**

6 In order to prevail in a wrongful levy action a plaintiff must demonstrate (1) that it has an
7 interest in the property at issue, and (2) that the levy was wrongful, i.e. that the property was not
8 the delinquent taxpayer's. *Flores v. U.S.*, 551 F.2d 1169, 1171 (1977). "The wrongful levy
9 standard requires the Court to consider property rights as of the date of the levy." *Craig v. U.S.*,
10 89 F.Supp.2d 858, 863 (S.D. TX 1999). The court initially looks to state law to determine what
11 rights the taxpayer has in the property the government seeks to reach. *Drye v. U.S.*, 528 U.S. 49,
12 58 (1999). "With respect to the State law question, recent cases have clarified the centrality of
13 finding a State law interest as a condition precedent." *Dalton v. CIR*, 135 T.C. No. 20, 2010 WL
14 3719274 *9 (U.S. Tax Ct. 2010), citing, *inter alia*, *Holman v. U.S.*, 505 F.3d 1060, 1067, 1070
15 (10th Cir. 2007) (vacating and remanding a case seeking to enforce a nominee tax lien for the IRS
16 first to establish that the person held a beneficial interest in the property under State law); *Spotts*
17 *v. U.S.*, 429 F.3d 248, 251, 253-254 (6th Cir. 2005) (vacating and remanding a grant of summary
18 judgment for the IRS in a case seeking removal of a nominee lien because the lower court did not
19 first consider whether the person had a beneficial interest under State law).

20 When levying funds, "the tax collector not only steps into the taxpayer's shoes but must
21 go barefoot if the shoes wear out." *Gardner v. U.S.*, 34 F.3d 985, 985, 988 (10th Cir. 1994);
22 *Vardanega v. IRS*, 170 F.3d 1184, 1187 (9th Cir. 1999); *Derrington v. U.S.*, 302 B.R. 104, 108
23 (W.D. WA 2003). Thus, the ultimate issue is: did Francis have a property right in Rothwell's
24 MSSB account at the time of the levy, since "the rights of the government vis-a-vis the garnishee
25 bank can rise no higher than those of the taxpayer." *Pittsburgh National Bank v. U.S.*, 498
26 F.Supp. 101, 103 (W.D. PA 1980), citing, *St. Louis Trust Co. v. U.S.*, 617 F.2d 1293 (8th Cir.
27 1980); *Wagner v. U.S.*, 573 F.2d 447 (7th Cir. 1978); *Aquilino v. U.S.*, 363 U.S. 509 (1960).

1 **(1) Pursuant to TCI laws Francis has no property or rights to property.**

2 In the instant case foreign, not state, law determines what property rights Joseph R.
3 Francis has in The Francis Trust, Rothwell, Ltd. and Rothwell's Assets. Under TCI laws,
4 Francis does not own any interest in The Francis Trust, Rothwell, Ltd. or Rothwell's MSSB
5 account and, thus, Francis has no property or rights to property in The Francis Trust, Rothwell,
6 Ltd. nor Rothwell's MSSB account. Instead, 100% of Rothwell's shares are owned by The
7 Francis Trust, which was created on May 24, 1999, under TCI laws. Rothwell is a separate and
8 distinct legal Cayman corporation which is the sole owner of it's assets.

9 Pursuant to the terms of The Francis Trust it is a discretionary trust. Pursuant to Turks &
10 Caicos law, as a beneficiary of the discretionary trust Francis has no vested interest in The
11 Francis Trust nor any of it's assets. Likewise, "[a] universal canon of Anglo-American trust law
12 proclaims that when the trustee's powers of distribution are wholly discretionary, the beneficiary
13 has no ownership interest in the trust or its assets until the trustee exercises discretion by electing
14 to make a distribution to the beneficiary." *In re Bass*, 171 F.3d 1016, 1028 (5th Cir. 1999); *See*
15 *also*, AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS §155 at 152
16 (4th ed. 1987) (A discretionary trust is one "[w]here by the terms of the trust a beneficiary is
17 entitled only to so much of the income or principal as the trustee in his uncontrolled discretion
18 shall see fit to give him, [and] he (the beneficiary) cannot compel the trustee to pay him or to
19 apply for his use any part of the trust property."); *Wilson v. U.S.*, 140 B.R. 400, 404 (N.D. TX
20 1992) (holding that there was no property to which an IRS lien may attach, beneficiary did not
21 have either property interest or rights to property in the discretionary trust and IRS could not
22 compel trustee to disburse funds to debtor beneficiary); *Young v. McCoy*, 147 Cal.App.4th 1078
23 (2007) (under California law trustees of discretionary trusts cannot be compelled to pay a
24 beneficiary's creditors); *U.S. v. Delano*, 182 F.Supp.2d 1020, 1022 (D. Colo. 2001) (beneficiary
25 of discretionary trust has mere expectancy rather than a property interest in trust). Here, no
26 distributions have been made to Francis nor any other beneficiary by the Trustees of The Francis
27

1 Trust, nor the directors of Rothwell, Ltd.

2 **(2) Francis Never Exercised Control Over Rothwell's Bermuda Commercial Bank Nor**
3 **MSSB Accounts.**

4 Although the sources of the funds were U.S. corporations of which Francis was the sole
5 shareholder, none of Francis' personal funds were transferred to Rothwell's Bermuda
6 Commercial Bank nor MSSB accounts. The evidence obtained from the IRS criminal
7 investigation of Francis and discovery instanter establishes that Joseph Francis never controlled
8 The Francis Trust, Rothwell, Ltd. nor Rothwell's MSSB account. Instead, all dominion and
9 control was exercised by the Trustee and directors of Rothwell.

10 IRS Revenue Agent Beas testified that the "control [Francis] had is that he made
11 payments [that were] transferred to the Rothwell [Bermuda bank] account, and those payments
12 came back to the Rothwell Morgan Stanley account." However, once the Sands Media and
13 Mantra Films funds were placed in Rothwell's Bermuda Commercial Bank account with no
14 strings attached the money belonged to Rothwell. *Arth v. U.S.*, 735 F.2d 1190, 1193 (9th Cir.
15 1984). Once funds were deposited into Rothwell's Bermuda bank account Rothwell had
16 complete dominion and control over the account and was free to invest the whole amount
17 however it saw fit. *In re Amdura Corp.*, 75 F.3d 1447, 1452 (10th Cir. 1996) (holding that
18 because parent corporation exercised complete control, all funds deposited in the parent
19 corporation's account belonged to the parent corporation, not the subsidiary). Here, Rothwell
20 exercised complete dominion and control by transferring funds from the Bermuda bank account
21 to Rothwell's MSSB account and by controlling the investments of those funds. See *Carl v.*
22 *Republic Security Bank*, 282 F.Supp.2d 1358, 1366 (S.D. FL 2003) (because third party failed to
23 retain an interest in the funds wired into a customer's account the bank could use those funds to
24 off set the customer's debt, e.g. an overdraft, owed by the customer to the bank).

25 Furthermore, Rothwell's directors and officers were the only authorized signatories on
26 and the only ones who ever exercised control over Rothwell's Bermuda bank account and MSSB
27 account. Francis had no signatory authority over Rothwell's accounts. Since a levy only applies

1 to such property or property rights as actually exist at the time the levy is made, as a matter of
2 state and TCI law Francis had no property rights in Rothwell's MSSB account because under
3 state and TCI law Francis could not compel MSSB to do anything, viz. to liquidate assets and
4 distribute proceeds to him or anyone else. *Craig v. U.S.*, 89 F.Supp.2d 858, 868-69 (S.C. TX
5 1999). This case is unlike *National Bank of Commerce* because Francis did not have the
6 "unrestricted right to withdraw," nor was the account accessible to him. *Cf. U.S. v. National*
7 *Bank of Commerce*, 472 U.S. 713, 724 (1985).

8 Moreover, Francis' ferocious campaign to wrest control over The Francis Trust beginning
9 on February 27, 2011, provides affirmative evidence that at the time the levy was served on
10 Rothwell's MSSB account on November 6, 2009, Francis lacked control over the Francis Trust,
11 Rothwell, Island Films, Summerland Holdings and Casa Blanca.

12 **C. THE UNITED STATES FAILED TO ESTABLISH THE ESSENTIAL ELEMENT**
13 **OF CONTROL ON WHICH IT HAS THE BURDEN OF PROOF.**

14 Nominee status is determined by the degree to which a person exercises control over an
15 entity and its assets. *LiButti v. U.S.*, *supra*, at 119; *Shades Ridge Holding Co., Inc. v. U.S.*,
16 *supra*, at 729; *U.S. v. Bell*, *supra*, at 1195. Thus, the issue is whether the United States
17 established by substantial evidence that Rothwell held the MSSB account for Francis while
18 Francis actually exercised control over Rothwell and/or Rothwell's MSSB account. *See Oxford*
19 *Capital Corp. v. U.S.*, *supra*, 211 F.3d at 284.

20 Factors relevant to whether a business entity is the nominee of an individual are:
21 (1) Whether the nominee paid no consideration or inadequate consideration for the
22 property and/or whether the taxpayer expended personal funds for the nominee's
23 acquisition; (2) whether property was placed in the nominee's name in anticipation of a
24 suit or the occurrence of liabilities; (3) whether a close personal or family relationship
25 existed between the taxpayer and the nominee; (4) whether the conveyance of the
26 property was recorded; (5) whether the taxpayer retained possession of, continued to
27 enjoy the benefits of, and/or otherwise treated as his or her own the transferred property;
28 (6) whether the taxpayer after the transfer paid costs related to maintenance of the
property (such as insurance, tax, or mortgage payments); (7) whether, in the case of a
trust, there were sufficient internal controls in place with respect to the management of
the trust; and (8) whether, in the case of a trust, trust assets were used to pay the
taxpayer's personal expenses.

1 *Dalton v. CIR, supra*, at 2010 WL 3719274 at *9; *See also, Towe Antique Ford Foundation v.*
2 *I.R.S.*, 791 F.Supp. 1450, 1454 (D. Mont. 1992); *U.S. v. Bell, supra*, at 1194. “The court should
3 consider the totality of the circumstances rather than single out the presence or absence of one
4 particular factor.” *911 Management, LLC v. U.S.*, 657 F.Supp.2d 1186, (D. OR 2009), quoting,
5 *Turk v. IRS*, 127 F.Supp.2d 1165, 1167, 1195 (D. Mont. 2000) (“No factor can dispose of the
6 issue itself, and no factor is necessarily required in order to find nominee status.”).

7 **(1) Whether nominee paid no consideration or inadequate consideration for the**
8 **property.**

9 A trust will be considered the nominee of a taxpayer when the taxpayer “maintain[s] an
10 absolute position of authority over the affairs of the trust ... [and there is no] need to
11 consult anyone else in making decisions for the trust....” *United States v. Geissler*, 1993
12 WL 625535 (D. Idaho at *8. * * * “[I]f an entity is devoid of any economic substance, the
13 property of that entity is being held nominally for the individuals who created the entity.”
Id. At *7. Four factors are used in determining whether a trust lacks economic substance:
1) the taxpayer’s relationship to the property did not differ materially before and after the
creation of the trust; 2) there was no independent trustee; 3) no economic interest passed
to other family beneficiaries of the trust; and 4) the trust imposed no substantial
restrictions on the trustee’s use of the trust property.

14 *Colby B. Foundation v. U.S.*, ___ F.Supp. ___, 1997 WL 1046002 **20-21 (D. OR 1997);
15 *Hanson v. CIR*, T.C. Memo. 1981-675, *aff’d. per curiam*, 696 F.2d 1232 (9th Cir. 1983).

16 Here under TCI laws The Francis Trust is a valid irrevocable discretionary trust. Under
17 the provisions of The Francis Trust, the Trustee – not Francis -- maintained an absolute position
18 of authority over the affairs of the trust and it’s assets; Francis lacked any authority over the
19 affairs of the trust. Under TCI law once transfers were made to fund the trust and it’s assets
20 Francis could not revoke the trust, all of Francis’ legal interest in the money transferred was
21 extinguished and he had no guarantee that the Trustees would exercise their discretion in his or
22 any of the other beneficiaries’ favor. The Francis Trust had and still has independent trustees
23 who exercised complete dominion and control over The Francis Trust and it’s assets, including
24 shares owned by the trust directly and indirectly, viz. Rothwell, Island Films, Summerland
25 Holdings and Casa Blanca, respectively. As the United States admitted, the Trustee of The
26 Francis Trust and directors of Rothwell exercised complete dominion and control over
27
28

1 Rothwell's management, investments and financial accounts. Admitted Fact ##18, 20, 21, 25, 27,
2 29, 30, 32, 34-38.

3 The lack of consideration is immaterial because the wire transfers were completed gifts
4 under California law:

5 In the creation of trusts where a gift is involved or a chose in action is the subject-matter,
6 the transfer of possession to the trustee may therefore be a condition precedent to the
7 beginning of the trust, not because a trust always requires original and continued
8 possession in the trustee, but because the particular kind of a conveyance which is used in
9 this type of trust creation has as one of its elements a change in possession

10 1 Scott on Trusts (3d ed.) Section 32.2, page 268, relates:

11 We think the rule is well settled that a voluntary trust is an equitable gift, and like a legal
12 gift inter vivos must be complete. Since delivery is essential to the consummation of a
13 gift, it follows that, whenever the donor undertakes to divest himself of the entire
14 ownership, either by direct transfer to the donee or conveyance to the trustees to hold for
15 the donee's benefit, the transaction will not be complete unless there is actual delivery of
16 the thing given or of the instrument by which the donor signifies his intention to part with
17 the control of it.

18 The scholarly premises are in accord with California decisional law....

19 *Kohler v. Kintz*, 84 Cal.App.3d 928, 944, 149 Cal.Rptr. 65, 75 (Calif. Court of App. 4th Dist.,
20 Div. 1, 1978); *see also*, *Dalton v. CIR, supra*, at *12 (holding it did not matter whether
21 consideration was given, the conveyance was a gift to the trust under state law).

22 After the monetary transfers were made to Rothwell Francis had neither the ability nor
23 authority to exercise control and he did not exercise control over Rothwell's Bermuda
24 Commercial Bank and MSSB accounts as established by Bermuda Commercial Bank's and
25 MSSB's records. Admitted Fact ##18-21, 25, 27, 28, 34-38. The wire transfers "are not merely
26 evidence of a gift or other grant, they are the gift itself, and ipso facto operate[] to transfer or
27 convey the title of the property described to the grantee." *Hamilton v. Hubbard*, 134 Cal. 603,
28 605, 65 P.321, 322 (Calif.S.Ct. 1901).

A gift has been judicially defined as a voluntary transfer of property by one to another
without any consideration or compensation therefor. It has sometimes been defined by
statute as a transfer of personal property made voluntarily and without consideration, and
also, generally, as that which is given, anything given or bestowed, or any piece of
property voluntarily transferred by one person to another. Hence, it is apparently well
established at law that to constitute a valid gift a transfer must be voluntary, absolute, and

1 without consideration. * * *[W]here a trustor created an irrevocable, present trust (as
2 distinguished from one conveying a future interest), not subject to modification, the
corpus of the trust conveyed to the trustee constitute[s] a present gift to the trust.....

3 *Gregory v. State*, 77 Ca.App.2d 26, 30-31, 174 P.2d 863, 866 (Calif. Dist. Ct. of App., 4th Dist.,
4 1946).

5 Thus, this factor weighs in favor of Plaintiff.

6 **(2) Whether property was placed in the name of the nominee in anticipation of a suit**
7 **or occurrence of liabilities while the transferor continues to exercise control over the**
8 **property.**

9 “The UFTA permits defrauded creditors to reach property in the hands of a transferee.”
10 *Mejia v. Reed*, 31 Cal.4th 657, 663, 3 Cal.Rptr.3d 390 [] (2003). “Under the UFTA, a
11 transfer is fraudulent, both as to present and future creditors, if it is made with the actual
12 intent to hinder, delay, or defraud any creditor of the debtor. Even without actual
13 fraudulent intent, a transfer may be fraudulent as to present creditors if the debtor did not
14 receive a reasonably equivalent value in exchange for the transfer *and the debtor became*
insolvent as a result of the transfer or obligation.” *Id.* At 664, 3 Cal.Rptr.3d 390 (citing
§3439.04-05).... Section 3439.04 also lists a number of factors to consider in determining
actual intent, including: whether the debtor retained possession or control of the property
after the transfer; whether the value of the consideration received by the debtor was
reasonably equivalent to the value of the property transferred; and whether the transfer
occurred shortly before or shortly after a substantial debt was incurred.

15 *U.S. v. Carter*, 2010 WL 2179725 , 105 A.F.T.R. 2d 2010-2634 *2 (S.D. CA 2010).

16 Unlike in *Carter*, Francis gave up possession of and responsibility over the transferred
17 funds. Furthermore, The Francis Trust was established on May 24, 1999, more than a decade
18 before the nominee lien arose instanter. The Trustee at its sole discretion directed and controlled
19 the operations, finances, assets and investment decisions of The Francis Trust. Admitted Fact
20 #18. The Trustee of The Francis Trust incorporated Rothwell, Ltd. in June, 2000, and controlled,
21 directed and managed at its sole discretion all operations, finances, assets and investment
22 decisions of Rothwell. Admitted Facts ## 11, 18; *Cf. 911 Management, supra*, at 1198 (“911
23 Management was created eleven days after Tom Weathers was sentenced [on tax evasion
24 charges].”).

25 Francis never exercised control over the funds after Mantra Films and Sands Media made
26 the transfers to Rothwell. Admitted Fact #18. Following the establishment of the trust and
27 transfers Francis exercised no control over the assets, nor did he have a legal right to do so as the
28

1 transfers were not revocable as a matter of TCI law. *Cf. U.S. v. Carter, supra at *3*. The Trustee
2 of the Francis Trust and officers and directors of Rothwell were not mere “figure-heads.” *Cf. U.S.*
3 *v. Lena*, __ F.Supp.2d ___, 2008 WL 2774375 *7 (S.D.Fla) (unreported).

4 With respect to Casa Blanca de Punta Mita, S.A. de C.V., it is a distinct legal entity in
5 which Francis has no legal or beneficial interest as a matter of Mexican law. Casa Blanca was
6 incorporated at the behest of the Trustee of the Francis Trust. The Francis Trust -- through
7 ownership of the shares of two corporations which own all the shares of Casa Blanca --
8 indirectly owns the shares of Casa Blanca. The decision to purchase the property in Mexico was
9 solely the decision of the Trustee. Admitted Fact #68. Rothwell provided a little over \$2 million
10 dollars for the Mexican corporation to purchase the two lots in Mexico as an investment for the
11 benefit of The Francis Trust. Admitted Fact #81.

12 Francis directed and controlled the design, construction and improvements on Casa
13 Blanca’s property, but did not use his personal funds. Admitted Fact ##78,79. Mantra Films,
14 Inc. and Sands Media, Inc. paid approximately \$5.3 million in 2002 and 2003 to fund the design
15 and construction of improvements on Casa Blanca’s Lot #14. Admitted Fact ## 78,79. Francis,
16 Sands Media and Mantra Films use the Casa Blanca property at the sole discretion of and
17 pursuant to the powers invested in the Trustee under provisions of ¶9 of The First Schedule of
18 The Francis Trust.

19 Here, the funds provided by Sands Media and Mantra Films in 2002 and 2003 to improve
20 Lot #14 added value to Casa Blanca’s Lots #13B and 14 of approximately \$5.3 million dollars.
21 Admitted Fact ## 79, 81. The United States’ entire case rests on piling inference on inference,
22 notwithstanding lack of any logical nexus, viz. evidence that Francis received a benefit from the
23 trust of which he is a beneficiary does not equal evidence of control. In 2002 and 2005 Rothwell
24 invested approximately ten percent (10%) of its MSSB account to purchase realty for a
25 corporation owned by two corporations owned by the trust, which thereby acquired realty into
26 which Francis invested more than \$5.3 million from his wholly owned S-corporations to pay for
27

1 design and construction of a luxury residence. Francis and his wholly owned corporations have
2 used the residence since its completion. Francis has orally referred to the residence as “his.” The
3 trust notes that it obtained a \$5.3 million dollar contribution in the form of the residence
4 constructed on property it purchased for investment at a cost to the trust of about \$2.1 million. In
5 other words, the value of the trust’s real estate investment was more than trebled, i.e. \$2.1
6 million plus improvements costing \$5.3 million equals \$7.4 million. The trust conferring a
7 benefit on Francis does not constitute evidence Francis controlled the trust because the trust at
8 the behest of the Trustee as approved by the protector can independently confer benefits on any
9 one, some or all of the beneficiaries. On the other hand the benefit conferred on the trust, i.e. a
10 \$5.3 million addition to the value of the trust’s property in which the trust invested \$2.1 million
11 clearly exceeds the benefit of month-to-month occupancy by Francis for the last eight (8) years.
12 Even at a guaranteed benefit of 10% annual tax free income for its \$2.1 million investment, it
13 would take more than twenty (20) years for the trust to receive such a benefit, hence it would
14 have been unreasonable for the trust to refuse to take advantage of Francis’ offer to build and pay
15 all expenses of maintaining the Mexican property, from which the trust can remove Francis at
16 any time with reasonable notice under Mexican law – which may occur in the near future
17 depending on the outcome of the criminal prosecution currently pending against Francis in Clark
18 County, Nevada.

19 The United States has neither direct nor circumstantial evidence that Francis controlled
20 The Francis Trust, nor any of the corporations all shares of which are owned by the trust,
21 including Plaintiff Rothwell, Ltd., Summerland Holdings, Ltd., and Island Films, Ltd. and Casa
22 Blanca de Punta Mita, S.A. de C.V., the Mexican corporation which owns the real estate paid for
23 by funds from Rothwell; all shares of Casa Blanca are owned 50% by Island Films, Ltd and the
24 other 50% by Summerland Holdings, Ltd. As the Tax Court held in *Dalton v. Cir, supra at *15*:

25 Petitioners’ oral arrangement to live in the residence, which began in 1997, subjects them
26 to rental payments to the owners of the beneficial interest. However, the oral agreement
27 does not create in petitioners an express or implied beneficial interest in the Trust.
Whether the act of living on the trust property may appear to create a form of beneficial

1 interest, we conclude that it did not create such an interest since petitioners paid rent in
2 the form of payments for mortgage debt service, property taxes, maintenance, and costs of
3 occupancy and also cared for Mr. and Mrs. Dalton Sr. Additionally, the appointment of
4 Mr. Dalton Jr. as trustee does not create property or a right to property to which the
5 section 6331 levy could attach. On the basis of the record, we conclude that petitioners
6 do not have a beneficial interest in the Poland property held in trust.

7 Furthermore, settlement of The Francis Trust, incorporation of Rothwell, Ltd. and Casa
8 Blanca, purchases of the Mexico property and completion of the improvements to the Mexico
9 property all occurred from May 24, 1999 through September, 2005 -- all prior to the
10 commencement of the IRS investigation of Francis which began in 2006. Admitted Fact ##4, 15,
11 67, 72, 79.

12 The United States breathlessly exhorts the Court to find that Rothwell is Joe Francis'
13 nominee because Francis: (1) placed property "in the name of [Rothwell] in anticipation of a suit
14 or occurrence of liabilities while the debtor continues to exercise control over the property..."
15 (USA's Memo Contentions of Fact and Law (CR #47) at 18:2-3); and (2) "... has been involved
16 with a myriad of legal actions, both civil and criminal ... [f]or example in August 2008, a
17 judgment against plaintiff was entered for \$2,838,356.00 in favor of Wynn Las Vegas, LLC." *Id.*,
18 18:7-8 (emphasis supplied). The United States' zeal to retain Rothwell's property has overcome
19 its reason: in addition to the Freudian slip emphasized above,¹ i.e. the judgment Wynn obtained
20 in 2008 against Francis is not a judgment against Rothwell, the plaintiff in this case – Francis'
21 transfers to Rothwell, which were completed in 2002 and 2003 could not have been for the
22 purpose of evading a liability incurred in 2008, more than five (5) years after all the transfers.

23 Furthermore, the United States conceded that on that on or before November 6, 2009,
24 Francis "paid in full all restitution, fines and assessments required by the plea agreement in his
25 criminal matter" (Admitted Fact #60) – more than \$259,000. In addition, the United States

26 ¹ "In his essay on 'Slips of the Tongue,' republished in 1965 by W.W. Norton in a volume
27 entitled *The Psychopathology of Everyday Life*, Sigmund Freud observed (at p. 64): It is a
28 frequent occurrence for the idea one wants to withhold to be precisely the one which forces its
way through in the form of a slip of the tongue." *U.S. v. Philatelic Leasing, Ltd.*, 601 F.Supp,
1554, 1559 n. 4 (S.D.N.Y. 1985), *aff'd*, 794 F.2d 781 (2nd Cir. 1986).

1 adduced no evidence that Francis controlled Rothwell or any of Rothwell's assets, including
2 some \$20,000,000. seized pursuant to the levy instanter, none of which was ever controlled by
3 nor disbursed for the benefit of Mr. Francis.

4 The United States continues its exhortations: "Mantra has also been subject to civil and
5 criminal prosecution. In December 2006, Manta was sentenced ... to a fine of \$1.6 million...."
6 CR # 47 at 18:20-22. Conspicuous by its absence from the United States' contentions is any
7 evidence that Francis or Mantra failed to pay any debts when due, or that Rothwell ever
8 contributed to any payments of any debts of Francis, Sands or Mantra. The United States'
9 extensive investigation of Mr. Francis has produced a comprehensive picture of his finances from
10 1999 to the instant levy on November 6, 2009, yet the United States offers no evidence that
11 Francis, Mantra, Sands or any other entity controlled by Francis was unable tp pay his or its debts
12 at any time during that decade. This invokes the principles stated in another civil tax case:

13 Two interrelated legal principles govern the conclusions to which the foregoing findings
14 lead us. The first of these, which Wigmore has described as "one of the simplest in
15 human experience" is that when a litigating party resorts to "falsehood or other fraud" in
16 trying to establish a position, the court may conclude the position to be without merit and
17 that the relevant facts are contrary to those asserted by the party.... The second is that
18 where a party withholds (or seeks to suppress) relevant evidence within its control, the
19 court may conclude that such evidence would be harmful to the party's cause.... The
20 rationale underlying these principles is that a litigating party must – of all persons – be
21 knowledgeable of the facts supporting its own position, and if it falsifies – or seeks to
22 suppress – relevant evidence, such conduct may be taken as an admission that the true
23 facts would defeat the position the party is seeking to maintain.

19 *U.S. v. Philatelic Leasing, Ltd., supra*, 601 F.Supp. at 1565-66 (footnotes omitted).

20 Accordingly, the United States' claims that "moving millions offshore with the help of
21 Rothwell was beneficial to Francis, Mantra and Sands, as it kept assets out of the hands of
22 potential creditors, but was utilized, controlled and accessed by Francis for his benefit" are
23 doubly defective: (1) the funds transferred to Rothwell were in no way "beneficial to Francis,
24 Mantra and Sands" because those transfers did not deprive any creditors of any assets; and (2)
25 none of the funds were ever "utilized, controlled or accessed by Francis for his benefit." *Id.* (CR
26 #47) at 19:5-8.

1 Based on the record Francis was not insolvent at the time of the transfers nor rendered
2 insolvent as a result of the transfers to Rothwell in 2002 and 2003. Admitted Fact ##55, 60, 63,
3 64, 65, 66, 79 and 81. *Dalton v. CIR, supra*, at p. 34 (concluding that on the basis of the record
4 that the transfers were not made with fraudulent intent but were instead gifts, and at the time of
5 the transfers petitioners were not rendered insolvent, *albeit* petitioners some years after became
6 insolvent); *Cf. Cody v. U.S.*, 348 F.Supp.2d 682, 684 (E.D. VA 2004) (taxpayer's relatives put a
7 house in trust for taxpayers to avoid seizure due to prior tax bill); *U.S. v. Kattar*, 81 F.Supp.2d
8 262, 263-265 (D.N.H 1999) (taxpayer transferred substantially all of his assets to trusts upon
9 notice of investigation for tax evasion); *Towe Antique Ford Found. v. IRS*, 791 F.Supp. 1450,
10 1457 (D.Mont. 1992) (taxpayer fraudulently conveyed assets to charitable foundation in
11 anticipation of the occurrence of federal tax liabilities), *aff'd*, 999 F.2d 1387 (9th Cir. 1993).

12 As a matter of federal, state and TCI law, this factor favors Plaintiff.

13 **(3) Whether close relationship existed between transferor and the nominee.**

14 With respect to The Francis Trust: (1) Francis had the capacity to create the trust, (2)
15 Francis indicated his intention to create the trust by executing the indenture on May 24, 1999,
16 and by funding the trust corpus; (3) The Francis Trust has several beneficiaries; (4) the
17 independent, unrelated Trustee has duties to perform; and (5) the same person is not the sole
18 trustee and sole beneficiary. *Dalton v. CIR, supra*, at 2010 WL 3719274 at *14. At all relevant
19 times the Trustee of The Francis Trust was Hallmark Trust, Ltd. and/or Hallmark Bank and
20 Trust, Ltd., a TCI corporation in which Francis had no ownership interest nor control, directly or
21 indirectly. According to Chaffe and Trowbridge, the owners, officers and directors of Hallmark
22 never met Francis. Admitted Fact ## 19, 33. The Trustee exercised sole discretion and never
23 took any direction from Francis or anyone else with respect to the management, control and
24 investment decisions for The Francis Trust or Rothwell. Admitted Fact #18. *Cf. 911*
25 *Management, supra*, at 1200 (the Weathers (the delinquent taxpayers) and all limited partners
26 controlled by the Weathers and a close personal friend and god-father of the Weathers' children
27

1 were the members of 911 Management).

2 This factor favors Plaintiff.

3 **(4) Whether the conveyance of the property was recorded.**

4 All monetary transactions were accomplished by traceable wire transfers. Francis never
5 transferred real property to The Francis Trust or corporate entities created by the Trustee.

6 This factor does not favor either party.

7 **(5) Whether the taxpayer retained possession of, continued to enjoy the benefits of,
8 and/or otherwise treated as his or her own the transferred property.**

9 No distributions were ever made to nor for the benefit of Francis or any other beneficiary.
10 Admitted Fact ##63-65, 67-77, 81. Francis, Sands Media and Mantra films have used the Casa
11 Blanca property at the sole discretion of the Trustee. As a matter of Mexican law, neither The
12 Francis Trust, Rothwell, Francis, Sands Media nor Mantra films have a legal or beneficial
13 interest in Casa Blanca or its property. Consequently, Francis's use of the Casa Blanca property
14 does not constitute nor create property or a right to property to which the levy against Rothwell's
15 MSSB account could attach. *Dalton v. CIR, supra*, 135 T.C. No. 20, at *15.

16 None of The Francis Trust's nor Rothwell's funds were used to pay any of Francis' nor
17 any other beneficiary's personal expenses or obligations. *Cf. 911 Management, supra*, at 1203
18 (“[B]y paying the personal obligations of the Weatherses, 911 Management ceases to be a
19 separate entity....”).

20 This factor favors Plaintiff.

21 **(6) Whether the taxpayer after the transfer paid costs related to maintenance of the
22 property (such as insurance, tax, or mortgage payments).**

23 No transfer of real property was made by Francis to The Francis Trust or to Rothwell.
24 Francis caused improvements to Casa Blanca's property which benefitted Casa Blanca and,
25 consequently The Francis Trust, by adding an asset worth approximately \$5.3 million dollars.
26 Admitted Fact #81. Under Mexican law neither Francis, Sands Media nor Mantra films have a
27 legal nor vested interest in the property, notwithstanding contributions to improve Casa Blanca's

1 property. *See also, Dalton, supra*, at *15 (“payments for mortgage debt service, property taxes,
2 maintenance and costs of occupancy ... do not create property or a right to property to which the
3 section 6331 levy could attach.”); *Hill v. U.S.*, 844 F.Supp. 263 (W.D.N.C. 1993) (concluding
4 that taxpayer’s payment of all real estate taxes, utilities and insurance amounted to rent and that
5 taxpayer had no interest in the property at issue).

6 Even assuming, *ad arguendo*, that this factor favors defendant with respect to the
7 Mexican property, it does not favor defendant with respect to Rothwell’s MSSB account. The
8 United States has not levied upon Casa Blanca’s property, it levied upon Rothwell’s MSSB
9 account. The issue is whether Francis exercised control over or had property rights in
10 Rothwell’s MSSB account.

11 This factor does not favor Defendant United States.

12 **(7) Whether, in the case of a trust, there were sufficient internal controls in place**
13 **with respect to the management of the trust and its assets.**

14 The Francis Trust is a discretionary trust and pursuant to the provisions of the trust all
15 control is vested in the Trustee. Francis never exercised any discretion or control over The
16 Francis Trust nor Rothwell nor their assets. Instead, all discretion, control and management was
17 exercised by the Trustee and the directors and officers of Rothwell. Admitted Fact ##4-11, 15-28,
18 32-38.

19 **(8) Whether, in the case of a trust, trust assets were used to pay the taxpayer’s**
20 **personal expenses.**

21 None of The Francis Trust’s assets nor Rothwell’s assets were ever used to pay any of
22 Francis’ personal expenses or obligations. Instead, Francis owned thriving businesses, paid his
23 own personal expenses, used his own funds to purchase a residence in Los Angeles and in 2008,
24 obtained a \$5 million loan from Washington Mutual Bank to pay personal expenses. Admitted
25 Fact ##63-65. *Cf. 911 Management, supra*, at 1212 (paid all of Kathy Weathers’s expenses).

26 This factor favors Plaintiff.

27 Defendant United States failed to carry the burden of proving by substantial evidence
28

1 either that (1) Rothwell was Francis' nominee; or (2) Rothwell held the MSSB account as
2 nominee for Francis. *Flores v. U.S., supra*, 551 F.2d at 1175, *Oxford Capital Corp. v. U.S.,*
3 *supra*, at 283.

4 **C. THE LEVY WAS WRONGFUL.**

5 At the time of levy the IRS knew that: (1) Francis was not and had never been an
6 authorized signatory on Rothwell's MSSB account; (2) Rothwell was a separate and distinct legal
7 Cayman Islands corporation formed in 2000; (3) Francis had not made any withdrawals from nor
8 any deposits to Rothwell's MSSB account; (4) it had no evidence that Francis controlled
9 Rothwell's MSSB account nor the signatories (*see Steven N.S. Cheung, Inc. v. U.S.,* ___
10 F.Supp.2d ___, 2006 WL 3042938 (W.D. Wash. 10/24/2006) (unreported) finding the
11 government failed to establish a "nexus" between the delinquent taxpayer and the levied upon
12 accounts and awarding judgment in favor of the corporation); (5) Francis had pled guilty to two
13 misdemeanor counts of filing personal income tax returns which omitted interest income earned
14 on the Rothwell MSSB account; and (6) Francis had paid all restitution, fines and assessments in
15 full as required.

16 The United States acted based on an unsupported assumption -- piling inference upon
17 inference -- that Francis controlled Rothwell. *See Steven N.S. Cheung, Inc. v. U.S.,* ___
18 F.Supp.2d ___, 2007 WL 174042 *4 (W.D. WA 2007) (unreported) ("[T]he Court noted that
19 '[a]t all points in time' defendant had acted based on an unsupported assumption that Dr. Cheung
20 controlled plaintiff"); *see also, Marzullo v. CIR*, T.C. Memo 1997-261, 1997 WL 311838 at *8
21 (U.S. Tax Ct. 1997) (The government cannot satisfy its burden of proof by piling inference upon
22 inference). Although unreported, *Steven N.S. Cheung, Inc. v. U.S., supra*, (hereinafter "*Cheung,*
23 *Inc.*") is instructive. In *Cheung, Inc.*, the United States issued a jeopardy assessment against Dr.
24 Cheung for his 1993 tax liabilities and levied upon Cheung, Inc.'s financial accounts on the
25 grounds that Cheung, Inc. was the alter ego/nominee of Dr. Cheung and that Dr. Cheung was the
26 beneficial owner of Cheung, Inc. *See Cheung, Inc., supra*, ___ F.Supp.2d ___, 2005 WL
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1 1529695 (W.D. WA 2005) (unreported) and 2006 WL 2473487 (W.D. WA 2006) (unreported).
2 Dr. Cheung initially owned all 100 shares of Cheung, Inc. stock. In 1994 and 1995 Dr. Cheung
3 transferred 98% of his shares in equal portions to his wife, son and daughter for \$10 per share.
4 Dr. Cheung continued to retain two shares of Cheung, Inc. stock. The United States contended
5 that Dr. Cheung transferred the shares in anticipation of incurring tax liabilities for the 1993 tax
6 year. The district court noted however that the investigation of Dr. Cheung's 1993 tax deficiency
7 did not begin until "well after Dr. Cheung transferred his shares. Defendant has not rebutted that
8 evidence. Accordingly, the Court finds defendant has failed to demonstrate that Dr. Cheung
9 transferred his ownership in plaintiff to avoid his 1993 tax liability." *Id.*, at 2006 WL 2473487
10 *6. After considering that Dr. Cheung's immediate family members received the transfers of
11 stock and became Cheung, Inc.'s board of directors, the district court found: (1) there was no
12 conclusive evidence that Dr. Cheung influenced the decisions of the shareholders/board
13 members; (2) Dr. Cheung was not the signatory on Cheung, Inc.'s bank account; and (3) the
14 United States provided no evidence that Dr. Cheung controlled Cheung, Inc.'s Smith Barney
15 accounts. *Id.*, 2006 WL 2473487 *6. The district court denied the United States' motion for
16 summary judgment. *Id.*, 2006 WL 2473487 *7 (W.D. WA 2006) (unreported). Following trial
17 the district court entered judgment in favor of Cheung, Inc. on October 24, 2006 (*Id.*, 2006 WL
18 3042938 (W.D. 2006)(unreported).

19 The United States did not appeal the judgment in favor of Cheung, Inc. on the merits of
20 the wrongful nominee levy, but did appeal the rate of interest awarded. *See* 2007 WL 174042
21 (W.D. WA 2007) and *Steven N.S. Cheung, Inc. v. U.S.*, 545 F.3d 695 (9th Cir. 2008).

22 Although the technical provisions of "Controlled Foreign Corporations" rules (aka
23 "Subpart F"), 26 U.S.C. §951 *et seq.*, treat Francis as the "owner" of Rothwell for tax purposes
24 and require Francis to report the interest earned on Rothwell's MSSB account on his personal
25 returns, the Internal Revenue Code cannot change the ownership of Rothwell from The Francis
26 Trust to Francis, nor render him a "nominee" of Rothwell. Neither The Francis Trust nor
27
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1 Rothwell are nominees under the Federal factors analysis. Francis does not and did not have
2 property rights in Rothwell's MSSB account to which the levy could attach under TCI or
3 California law or a Federal factors analysis. Since the levy was placed upon Rothwell's MSSB
4 account in which Francis had no interest, the levy was wrongful. *Sessler v. U.S., supra*, at 1451.

5 **CONCLUSION**

6 Based on the material facts set forth herein above and the laws of the Turks & Caicos
7 Islands, Cayman Islands, State of California and the United States: (1) Rothwell Ltd. is the sole
8 owner of it's MSSB account; (2) Joseph Francis has no ownership or property interest or rights
9 to property in Rothwell's MSSB account; and (3) Joseph Francis exercised no control over
10 Rothwell, Ltd. nor Rothwell's MSSB account.

11 Consequently, the liquidation of Rothwell's investments and surrender of the liquidated
12 proceeds by MSSB to the Internal Revenue Service pursuant to the "nominee" levy was wrongful
13 and Rothwell, Ltd. is entitled to judgment for \$20,404,629.21 received by the United States
14 from the sale of the securities and other investments in Rothwell's MSSB account pursuant to 26
15 U.S.C. §7426(b)(2)(C)(i), plus interest as provided by law.

16 RESPECTFULLY SUBMITTED this 23rd day of May, 2011.

17 WILLIAM A. COHAN, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2011, I did cause the foregoing Proposed Findings of Fact and Conclusions of Law to be served via the ECF system on the following:

AUSA Valerie Makarewicz, Esq., E-Mail: valerie.makarewicz@usdoj.gov
AUSA Darwin Thomas, Esq., E-Mail: darwin.thomas@usdoj.gov

I further certify that pursuant to the Court's Case Management Order #16, I caused three (3) copies to be served on above named opposing counsel via next day Federal Express at the following address:

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By: s/ Alicia Cisneroz
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7
8 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION

10	ROTHWELL, Ltd., a Cayman Islands	)	CASE NO. CV-10-479-RGK (FFMx)
11	Corporation,)	
12	Plaintiff,	)	PLAINTIFF ROTHWELL, LTD.'S
13	v.	)	MEMORANDUM OF CONTENTIONS OF
14	UNITED STATES OF AMERICA,	)	FACT AND LAW
15	Defendant.	)	DUE DATE: Monday, May 16, 2011
16		)	CTRM: Room 850, United States Courthouse
17		)	255 E. Temple Street
		)	Los Angeles, CA
		)	[Hon. R. Gary Klausner]

18 Plaintiff Rothwell, Ltd., by and through undersigned counsel, respectfully submits the
19 following Memorandum of Contentions of Fact and Law in Compliance with this Court's Order
20 filed September 20, 2010, at page 3, lines 18 and 19 (CR #16).

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20	(4) Whether the conveyance of the property was recorded	20
21	(5) Whether the taxpayer retained possession of, continued to enjoy the	
22	benefits of, and/or otherwise treated as his or her own the transferred	
23	property	21
24	(6) Whether the taxpayer after the transfer paid costs related to maintenance	
25	of the property (such as insurance, tax, or mortgage payments).....	21
26	(7) Whether, in the case of a trust, there were sufficient internal controls	
27	in place with respect to the management of the trust and its assets	21
28	(8) Whether, in the case of a trust, trust assets were used to pay the	
	taxpayer’s personal expenses	21
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2 *Spotts v. United States,*
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4 *Steven N.S. Cheung, Inc. v. United States,*
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6 *Steven N.S. Cheung, Inc. v. United States,*
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7

8 *Steven N.S. Cheung, Inc. v. United States,*
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9

10 *Steven N.S. Cheung, Inc. v. United States,*
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11

12 *Steven N.S. Cheung, Inc. v. United States,*
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22 *United States v. Lena,*
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1 **I. CONTENTIONS OF FACT.**

2 1. The Francis Trust indenture was drafted and created by Owen Foley (“Foley”),
3 Attorney at Law, of the law firm of Misick & Stanbrook, Richmond House, P.O. Box 127,
4 Providenciales, Turks & Caicos Islands, B.W.I.; <http://www.misickstanbrook.tc>, pursuant to the
5 laws of the Turks & Caicos Islands (“TCI”) and TCI trust laws in particular. Tr Exhibit 149, RT
6 Foley (11/18/10) 27:1-25, 53:3-61:18; see also Tr Exhibit 161, TCI Trust Ordinance TC00480-
7 515.

8 2. Settlement of the trust was completed on May 24, 1999, by and between Joseph
9 Raymond Francis (“Francis”), Settlor, and Hallmark Trust Ltd., Trustee. Tr Exhibit 101,
10 FT00001-21; Tr Exhibit 149, Foley at 25:18, 27:1-25. 38:10-15.

11 3. As set forth in the indenture creating it, the provisions of The Francis Trust are
12 subject to the jurisdiction of, and construed and controlled by the laws of TCI. Tr Exhibit 101,
13 at FT00004 at ¶2(a) and (b); See also Tr Exhibit 149, Foley at 36:7-20, 38:18-39:18.

14 4. Owen Foley, Esq. graduated from the University College of Dublin, Ireland with
15 a degree of bachelor of civil law in 1978 and after that educated at the Law School of the
16 Incorporated Law Society of Ireland in Dublin, where he was admitted a solicitor of the High
17 Court of Ireland in 1982, which is the highest court in Ireland. Tr Exhibit 149, Foley at 7:14-
18 8:22. In 1985 Mr. Foley was admitted to practice law in the State of Victoria in Australia. Tr
19 Exhibit 149, Foley at 9:8-10:17. Foley has been practicing and licensed to practice law in TCI
20 since April, 1988. Tr Exhibit 149, Foley at 12:15-15:25. In November, 1998, Foley became and
21 continues to be a partner in the law firm of Misick & Stanbrook Tr Exhibit 149, Foley at 17:2-
22 20:18.

23 5. Foley considers himself to be an expert in TCI trust law. Tr Exhibit 149, Foley at
24 41:21-43:10, 44:25-45:7, 45:18-23, 46:2-6, 46:18-47:12

25 6. The Francis Trust is an irrevocable discretionary trust, whereby all power and
26 discretion, including decisions concerning investments and/or disbursements, is vested in the
27

1 Trustee(s), viz. any and all disbursement(s) to any beneficiary is determined at the sole discretion
2 of the Trustee(s) and no beneficiary has any right to demand nor any legal means to force the
3 Trustee(s) to make any distribution during the Trust Period. *See* Tr Exhibit 101, at FT00003 at
4 ¶¶(I)(i)-(iv) and (m)(i)-(ii), at FT00004-05 at ¶¶2.(c)(i), 4.(a)-(e), at FT00005-06 at ¶¶5(b)-(e), at
5 FT00008 at ¶¶13(a) and (b), and at FT00013-19 (Trustee's powers set forth in detail in "The First
6 Schedule"); *See also*, Tr Exhibit 149, Foley at 59:19-60:11, 60:15-61:6, 65:9-23, 66:4-13, 72:16-
7 73:3, 73:13-17, 73:19-74:25.

8 7. Francis is the Settlor of The Francis Trust and the Trustee designated in the
9 irrevocable settlement is Hallmark Trust Ltd. ("Hallmark"). Tr Exhibit 101, at FT00002; Tr
10 Exhibit 149, Foley at 31:2-11; Tr Exhibit 148, RT Colin Chaffe (11/17/10) 40:22-41:22.
11 Hallmark is a trust company with which Foley had done business prior to May 24, 1999. Tr
12 Exhibit 149, Foley at 31:18-20.

13 8. Pursuant to the terms of The Francis Trust, once property is transferred, the trustee
14 holds legal title for the benefit of the beneficiaries and the Settlor Joseph Francis cannot revoke
15 the transfer. Tr Exhibit 149, Foley at 39:19-41:15.

16 9. Trustees are paid for their services from the trust fund, not the Settlor. The funds
17 in the trust do not belong to the Settlor once those funds are transferred to the trust. Trustees are
18 entitled to reimbursement in accordance with the Trust company's published terms and
19 conditions for the trust business in force. Trustees cannot simply appropriate whatever amount
20 of the trust assets he or she wishes for services performed. Tr Exhibit 149, Foley at 78:12-21,
21 86:25-87:8, 87:25-88:17; Tr Exhibit 157, RT Trowbridge (11/19/10) 111:11-19.

22 10. The Francis Trust has two protectors: (1) Brian Rayment, Esq., an attorney
23 licensed to practice in Oklahoma; and (2) Pittsford, Ltd., a British Virgin Islands Company. Tr
24 Exhibit 149, Foley at 105:10-16, 108:18-109:11, 110:7-25, 111:1-8; Tr Exhibit 154, RT Brian
25 Rayment (2/25/11) 44:8-20.

26 11. Distributions are subject to approval of The Francis Trust protector if the
27
28

1 distributions exceed \$10,000. Tr Exhibit 149, Foley at 99:7-16; TR Exhibit 154, Rayment at
2 44:21-45:2.

3 12. The Francis Trust protector does not have authority to direct the activities of the
4 Trustee with respect to the management of the trust. Tr Exhibit 154, Rayment at 45:3-6. As
5 protector of The Francis Trust Rayment has never directed the Trustee with respect to any
6 investments by the Trust or by entities in which the trust has an interest. Tr Exhibit 154, Rayment
7 at 45:7-12.

8 13. Distribution to a beneficiary by the Trustee is null and void unless done with the
9 consent of the protector. Tr Exhibit 149, Foley at 100:17-101:8, 102:6-12, 116:3-20.

10 14. The Francis Trust cannot be invalidated *ex post facto* by wrongdoing. If the
11 Trustee does something contrary to the terms of the trust, it doesn't invalidate the trust, but any
12 such act(s) would constitute a breach of the trust. Tr Exhibit 149, Foley at 117:18-118:4.

13 15. The Francis Trust beneficiaries are Francis, his parents and children and
14 Oklahoma Film Holding Corporation. Tr Exhibit 101, at FT00020 at "The Third Schedule;" Tr
15 Exhibit 149, Foley at 51:19-52:18. Pursuant to the terms of The Francis Trust a beneficiary has
16 no guaranteed right that the Trustees will exercise their discretion in his or her favor and
17 therefore a beneficiary may receive nothing. Tr Exhibit 149, Foley at 80:12-82:23; Tr Exhibit
18 157, Trowbridge at 114:9-16.

19 16. Pursuant to the terms of The Francis Trust fourth schedule "Excluded Persons,"
20 and TCI ordinance Section 61, if a Settlor transfers assets to a TCI trust and the Settlor was not
21 insolvent at the time of transfer the trust cannot be set aside at the instance of a creditor. Tr
22 Exhibit 161, at TC00513; Tr Exhibit 149, Foley at 53:3-55:8, 56:12-57:16, 57:20-58:5, 59:3-6.

23 17. As a matter of TCI law, The Francis Trust beneficiaries have no vested interest in
24 the trust and, thus, a creditor, even if the creditor had a judgment, could not attach any interest of
25 any beneficiary -- the creditor has no better position to make a claim than the beneficiary who
26 owes the debt. Tr Exhibit 149, Foley at 61:8-18, 64:20-65:1.

1 18. Foley recommended several TCI trust companies to provide the services of
2 Trustee for The Francis Trust. Hallmark Trust, Ltd., Prestige Place, Grace Bay Road, P.O. Box
3 656, Providenciales, TCI., was selected to provide Trustee services for The Francis Trust. Tr
4 Exhibit 149, Foley at 31:8-33:6, 35:14-25, 36:2-6, 37:9-15, 38:3-5; Tr Exhibit 148, Chaffe at
5 43:2-44:7; see also Tr Exhibit 101, at FT00001-00002.

6 19. On May 24, 1999, Francis provided a "Letter of Wishes" to the Trustee. Tr
7 Exhibit 102, OF00096-97; Tr Exhibit 149, Foley at 144:17-145:1, 146:10-24. A trustee has no
8 obligation to pay any attention to a "Letter of Wishes;" it has no legal effect whatsoever. Tr
9 Exhibit 149, Foley at 147:7-148:6; Tr Exhibit 148, Chaffe at 255:1-257:23.

10 20. In 1991, Colin R. Chaffe ("Chaffe") and Nicola S. Jordan ("Jordan") incorporated
11 Hallmark Trust, Ltd., in TCI to provide statutory Trustee services for trusts established in TCI. Tr
12 Exhibit 148, Chaffe at 14:4-25, 15:20-16:24, 17:1-25, 18:16-23, 19:9-25, 20:2-25, 22:3-25; Tr
13 Exhibit 149, Foley at 32:9-20, 32:14-33:6. Francis has never owned or controlled, directly or
14 indirectly, any interest in Hallmark Trust, Ltd. Tr Exhibit 148, Chaffe at 22:1-7.

15 21. Chaffe and Ms. Jordan are British citizens and residents of TCI. Tr Exhibit 148,
16 Chaffe at 7:8-10, 19:14-20:1

17 22. At all relevant times, the Trustee, Hallmark Trust, directed and controlled the
18 operations, finances, assets and investment decisions of The Francis Trust. Tr Exhibit 148,
19 Chaffe at 20:5-21:21; 231:1-7; Tr Exhibit 157, Trowbridge at 24:20-26:14, 29:16, 50:15-22.

20 23. Chaffe never met Francis. Tr Exhibit 148, Chaffe at 42:23-43:6.

21 24. On June 9, 2000, Chaffe incorporated Rothwell Limited ("Rothwell") in the
22 Cayman Islands. Tr Exhibit 104, RL 00001-00080. One hundred percent (100%) of Rothwell
23 shares are held by Inceptre Holdings, Ltd. ("Inceptre"), in trust for The Francis Trust. Inceptre
24 Holdings, a TCI corporation, is Hallmark's nominee company. Tr Exhibit 148, Chaffe at 29:4-
25 20, 62:3-17, 79:13-80:15, 122:5-23, 129:6-14, 130:9-131:21.

26 25. Inceptre, was incorporated in TCI on March 5, 1992. The sole shareholders are
27
28

1 Chaffe (50 shares) and Jordan (50 shares). Tr Exhibit 107, IH 00001-27; Tr Exhibit 148, Chaffe
2 at 125:12-127:5.

3 26. Inceptre acted as director of Rothwell, Ltd., until 2003 when Hallmark Trust Ltd.
4 became the director. Tr Exhibit 148, Chaffe at 127:14-131:4, 132:1-18, 133:1-13. Francis has
5 never owned or controlled, directly or indirectly, any interest in Inceptre Holdings, Ltd. Tr
6 Exhibit 148, Chaffe at 125:11-128:5.

7 27. Francis never owned or controlled, directly or indirectly, any interest in Rothwell.
8 All discretion, power and control is vested in the members and directors of Rothwell, Ltd. Tr
9 Exhibit 104, RL00001-80; Tr Exhibit 148, Chaffe at 67:18-70:15.

10 28. Rothwell's shares are assets of The Francis Trust, but Rothwell's assets do not
11 belong to The Francis Trust. Rothwell has full discretion over its own assets. Tr Exhibit 149,
12 Foley at 119:2-124:21; Tr Exhibit 148, Chaffe at 66:8-23, 67:1-8, 68:7-25, 71:3-14, 71:22-72:10,
13 76:6-22, 77:4-13.

14 29. Francis never controlled, directed nor managed any of Rothwell's corporate or
15 financial affairs. Instead, from June 9, 2000, to November 29, 2005, Chaffe and Jordan
16 controlled, directed and managed at their sole discretion all operations, finances, assets and
17 investment decisions of Rothwell. Tr Exhibit 148, Chaffe at 84:3-11, 85:17-87:17, 90:17, 90:9-
18 92:22, 109:10-111:13, 141:20-142:11, 144:3-9, 148:18-149:10, 150:22-151:8, 164:1-19, 166:16-
19 168:25.

20 30. In 2001 Chaffe and Jordan opened a bank account for Rothwell at the Bermuda
21 Commercial Bank in Hamilton, Bermuda. Francis never had signatory authority on this bank
22 account. TR Exhibits 231-233, at US002598-002619 and at US002620-2737; Tr Exhibit 148,
23 Chaffe at 144:24-145:2, 149:16-150:9, 161:8-164:4.

24 31. Beginning in 2001, Rothwell entered into various distribution and licensing
25 contracts with West Direct. Tr Exhibit 148, Chaffe at 99:9-21, 101:6-102:7, 103:3-104:24,
26 105:2-106:2.

1 32. On or about July 2, 2001, Chaffe and Jordan opened Rothwell's Morgan Stanley
2 Smith Barney ("MSSB") account in Irvine, California. Tr Exhibits 108-110, MSSB 003229-
3 3253; Tr Exhibit 148, Chaffe at 85:23-87:17, 88:5-12, 168:3-15.

4 33. None of Francis' personal funds were transferred to nor deposited in either
5 Rothwell's Bermuda Commercial Bank account nor Rothwell's MSSB account.
6 All funds deposited in Rothwell's Bermuda bank account and Rothwell's MSSB account came
7 from other U.S. and foreign corporate sources; e.g., during 2002 Sands Media, Inc., a U.S.
8 corporation, wired \$1,950,000. to Rothwell's Bermuda bank account and during 2003 Sands
9 Media, Inc. wired \$8,461,020.00 to Rothwell's Bermuda bank account. Tr Exhibit 129, at CR
10 #277-5, *U.S. v. Joseph R. Francis, Case No. 2:08-cr-00494-SJO* (C.D. CA).

11 34. Chaffe and/or Jordan transferred funds from Rothwell's Bermuda bank account by
12 wire to Rothwell's MSSB account. Tr Exhibit 148, Chaffe at 109:10-111:13, 166:21-168:25; see
13 also Tr Exhibit 129, at CR# 277-9.

14 35. Chaffe and Jordan controlled Rothwell's MSSB account until late 2005. Tr
15 Exhibit 148, Chaffe at 88:23-89:19, 168:1-25, 195:14-25, 247:18-248:11. Chaffe and Jordan did
16 not receive directions from anyone on how to operate Rothwell's Bermuda bank and MSSB
17 accounts. Tr Exhibit 148, Chaffe at 168:23-169:5.

18 36. Chaffe and Jordan sold 100% of their interests in Hallmark to Brian Trowbridge, a
19 Canadian citizen, attorney and TCI resident, who changed the name to Hallmark Bank and Trust,
20 Ltd.. Tr Exhibit 148, Chaffe at 22:10-23:7, 24:22-27:10; Tr Exhibit 157, Trowbridge at 14:20-23,
21 15:4-6.

22 37. On November 29, 2005, Hallmark Bank and Trust, Ltd., assumed control of
23 Rothwell's financial affairs and continued to do so until March, 2010, when Hallmark Bank and
24 Trust, Ltd. resigned and Chaffe was appointed Trustee of The Francis Trust and Director of
25 Rothwell. Tr Exhibit 148, Chaffe at 27:7-21, 43:13-44:12, 47:22-48:9, 50:21-51:14, 54:12,
26 97:15-98:13; Tr Exhibit 157, Trowbridge at 19:6-21:3, 96:18-99:14, 106:2-20.

1 38. Francis never owned or controlled, directly or indirectly, any interest in Hallmark
2 Bank and Trust, Ltd., whose directors and officers are Brian Trowbridge, Gregory Hurd and
3 Colin Whittingham. Tr Exhibit 157, Trowbridge at 19:6-21:3, 42:9-43:8, 43:22-44:3.

4 39. Trowbridge never met Francis or spoke to him. No disbursements were ever
5 made to Francis or any other beneficiary. Tr Exhibit 157, Trowbridge at 26:15-27:3, 11:8-112:5,
6 114:9-16. Hallmark Bank and Trust, Ltd.'s directors and officers took control of Rothwell's
7 Bermuda bank and MSSB accounts and took no directions from anyone. Tr Exhibit 157,
8 Trowbridge at 23:2-10, 25:2-17, 34:1-25, 35:7-36:14, 47:17-48:17, 50:10-22, 51:22-52:18, 71:3-
9 9, 77:3-25, 81:11-23, 83:17-84:25, 133:8-21.

10 40. From July, 2001, through October, 2008, John Welker was the broker responsible
11 for Rothwell's Morgan Stanley account. Tr Exhibit 158, RT Welker (2/23/11) 12:8-16, 18:3-13,
12 90:9-91:3; Tr Exhibit 148, Chaffe at 89:13-19. Welker testified that all investment decisions
13 for Rothwell's MSSB account were made by either Chaffe, Jordan, Trowbridge, or Hurd. See Tr
14 Exhibit 113, MSSB 003580-3583; Tr Exhibit 158, Welker at 26:18-25, 27:11-28:7, 28:18-21,
15 28:24-29:25, 30:12-31:2, 31:11-13, 35:13-24, 36:2-7, 37:9-22, 38:24-39:2, 41:25-42:1, 43:2-3,
16 47:3-48:5, 50:19-51:2, 51:5-7, 61:22-24, 64:24-65:8, 65:11-16, 66:14-21, 67:1-6, 68:8-24, 69:1-
17 12, 71:21-72:7.

18 41. Welker did not have any discretion in managing Rothwell's account, Chaffe
19 made the decisions and controlled the account. Tr Exhibit 158, Welker at 33:13-18, 35:13-24,
20 36:2-7, 42:19-43:3, 47:25-48:5. Chaffe never said that he had spoken with Francis or anybody
21 acting on Francis' behalf. Tr Exhibit 158, Welker at 43:4-7.

22 42. Trowbridge was an authorized signer on the Morgan Stanley account. Tr Exhibit
23 158, Welker at 61:22-24, 64:24-65:8, 68:14-24; Tr Exhibit 114, MSSB 003466-3480.

24 43. Welker never discussed Rothwell's account with Francis. Tr Exhibit 158, Welker
25 at 111:12-19, 144:14-16; Tr Exhibit 113 MSSB 003580-3583. Welker never discussed
26 Rothwell's account with Rayment. Tr Exhibit 158, Welker at 144:2-13, 144:17-24, 150:21-24.

1 44. Francis was not authorized to be involved in Rothwell's MSSB account. Tr
2 Exhibits 109, at MSSB 003229-3253; and 115 at MSSB 003934-3937.

3 45. In connection with the IRS's criminal investigation of Francis, I.R.S. Special
4 Agent Mark Jensen issued IRS summonses to Morgan Stanley for information concerning
5 Rothwell's account in 2006. Rothwell was not notified of the summonses. Tr Exhibit 158,
6 Welker at 117:6-11; Tr Exhibit 157, Trowbridge at 58:14-59:23, 65:14-66:6.

7 46. Special Agent Jensen interviewed Welker on August 17, 2006 and again after
8 October, 2008, concerning Rothwell's MSSB account and Francis' involvement and control *vel*
9 *non*. Tr Exhibit 158, Welker at 96:8-97:25, 99:20-25, 100:1-20, 104:23-25, 107:12-25, 108:2-3,
10 109:2-12, 109:16-17, 110:14-20, 111:1-19, 112:3-23, 112:25-114:6.

11 47. On April 11, 2007, Francis was indicted on two counts of tax evasion (26 U.S.C.
12 §7201) for 2002 and 2003 tax years.

13 48. On September 2, 2008, MSSB sent a letter to Rothwell requesting that
14 Rothwell's account be transferred to another financial institution no later than October 6, 2008.
15 Tr Exhibit 121, MSSB 003547; Tr Exhibit 153, RT Michael Nahass (2/24/11) 10:7-21, 20:7-21:9
16 No explanation was provided for MSSB's request to transfer the account. Tr Exhibit 157,
17 Trowbridge at 103:3-17.

18 49. The 9/2/08 letter did not inform Rothwell that it's account had been "red flagged"
19 aka "frozen," which meant "no money in, no money out." Tr Exhibit 153, Nahass at 18:22-19:8;
20 Tr Exhibit 156, RT Brian Stewart (2/23/11) 17:16-25, 19:5-20:24. Rothwell's account was
21 "frozen" by MSSB prior to the 9/2/08 letter to Rothwell. Tr Exhibit 153, Nahass at 19:1-15.
22 Other than the 9/2/08 letter, Nahass did not have communications with Trowbridge. Tr Exhibit
23 153, Nahass at 22:5-8.

24 50. On February 19, 2009, and on August 14, 2009, Special Agent Jensen served
25 subpoenas on MSSB for production of Rothwell's MSSB account records. Neither the IRS nor
26 MSSB gave notice of the subpoenas to Rothwell.

1 51. Brian Stewart became Rothwell's MSSB broker in 2009. Tr Exhibit 156, RT
2 Stewart 14:10-20. Stewart never saw any communications to Rothwell that the account was
3 frozen and there would be no disbursements from the account. Tr Exhibit 156, Stewart at 21:1-
4 11, 22:17-21.

5 52. Stewart did not discuss the IRS's levy on Rothwell's account with Trowbridge; he
6 assumed MSSB's legal department had handled notification. Tr Exhibit 156, Stewart at 16:8-12,
7 17:13-14, 34:20-24, 35:5-10.

8 53. Trowbridge sent a fax to MSSB, on December 1, 2009, and an email on
9 December 21, 2009, advising that he would be liquidating and transferring the account in 2010.
10 Tr Exhibits 122 & 123, MS0001-00004.

11 54. Stewart was involved with other Morgan Stanley accounts for Francis, but never
12 had any discussion with Francis concerning the Rothwell account before the "nominee" levy on
13 November 6, 2009. Tr Exhibit 156, Stewart at 29:2-15, 35:11-39:24, 41:20-22.

14 55. Following the levy, Stewart spoke to Francis and his lawyer, who requested
15 information about "time and stamp dates" and a copy of the levy. Francis did not ask what
16 Rothwell's account balance was or for Rothwell's accounting statements. Tr Exhibit 156,
17 Stewart at 38:10-42:9, 43:4-6.

18 56. On November 16, 2009, Stewart faxed a copy of the IRS levy on Rothwell's
19 account to Francis. Tr Exhibit 125, MSSB 003390-3392; Tr Exhibit 156, Stewart at 38:20-25.

20 57. On September 23, 2009, Francis agreed to plead guilty in his criminal matter
21 (Case No. 2:08-cr-00494-SJO), to two misdemeanor counts of filing a personal income tax return
22 and an amended personal income tax return for 2003 that were false as to a material matter in
23 that both omitted from the Schedule B interest income earned on the Rothwell's MSSB account.
24 See Tr Exhibit 130, Plea Agreement, CR #465. On November 6, 2009, Francis was sentenced
25 according to the binding Plea Agreement (CR#465), and paid in full all restitution, fines and
26 assessments as required.

1 58. A few hours later, IRS Revenue Officer Farrell Stevens served the Notice of Levy
2 on MSSB, for the tax liabilities allegedly owed by Francis, on the grounds that Rothwell is
3 Francis' "nominee." Tr Exhibit 124, MSSB003380-3389.

4 59. Rothwell was not advised that the nominee levy had been served on its account.
5 Trowbridge learned about the levy in early 2010. Tr Exhibit 157, Trowbridge at 30:23-31:6,
6 120:17-23, 122:7-25, 123:2-6, 126:7-127:10.

7 60. Francis is the founder of *Girls Gone Wild* entertainment business and the sole
8 shareholder of U.S. corporations, Sands Media, Inc. and Mantra Films, Inc., which are engaged
9 in producing, promoting, marketing and distributing DVDs, infomercials, magazines, apparel
10 and other items. Tr Exhibit 129, CR#277-2 through 277-10.

11 61. On March 3, 2008, Francis obtained a \$5 million dollar loan from Washington
12 Mutual Bank. Francis' Los Angeles residence was used as collateral. Tr Exhibit 145, Declaration
13 of IRS Revenue Agent Beas filed on 1/08/2010 in *Francis v. U.S.*, Case No. 2:09-cv-09449-
14 RGK-FFM, CR #31 at ¶15; Tr Exhibit 144, Declaration of Joseph Francis filed on 1/12/10 in in
15 *Francis v. U.S., supra*, CR #37 at ¶4.

16 62. Beas was the government's case agent and expert summary witness in *U.S. v.*
17 *Francis, supra*. Tr Exhibit 147, RT Beas (2/22/11)106:2-23.

18 63. Records obtained by the IRS confirmed that Francis transferred \$5,450,000 to
19 Blue Horse Trading from his personal MSSB account to purchase his personal Los Angeles
20 residence. Tr Exhibit 145, Beas Declaration at ¶14; Tr Exhibit 155, RT Ferrell Stevens (2/22/11)
21 46:8-47:3,

22 64. Rothwell's Bermuda bank and MSSB accounts records establish that Francis
23 never exercised control over Rothwell's accounts and that no distributions were made by
24 Rothwell to Francis. Tr Exhibit 157, Trowbridge at 111:8-112:5, 114:9-16. On March 13, 2002,
25 a \$1.030 million dollar disbursement was made from Rothwell's Bermuda Commercial Bank
26 account to fund the purchase of Lot #14; and in September, 2005, a \$1.023 million dollar
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1 distribution was made from Rothwell's MSSB account to fund the purchase of Lot #13B, both of
2 which are located in the "Ranchos Punta Mita," in the Municipality of Bahia de Banderas, State
3 of Nayarit, Mexico. Tr Exhibit 129, at CR #277-6; Tr Exhibit 147, Beas at 63:12-64:25; Tr
4 Exhibit 148, Chaffe at 88:23-89:4, 89:23-91:21, 249:4-24.

5 65. Chaffe made the decision to purchase the property in Mexico and set up the
6 Mexican corporation. The Francis Trust protector, Rayment, brought the investment opportunity
7 to Chaffe. Tr Exhibit 148, Chaffe at 90:9-92:22, 141:8-142:11, 147:21-149:10, 247:21-248:11;
8 Tr Exhibit 154, Rayment at 47:15-18, 48:25-49:19, 85:6-21.

9 66. Rothwell's MSSB account statements establish and verify that the only
10 disbursements from the account were transfers of \$700,000. and \$323,000. totalling \$1.023
11 million dollars in September, 2005, for the purchase of Lot #13B in Mexico. Tr Exhibit 264; Tr
12 Exhibit 147, Beas at 42:3-15; Tr Exhibit 158, Welker at 112:3-23, 112:25-114:6.

13 67. Chaffe, principal of Hallmark Trust, acting as the Trustee of The Francis Trust,
14 retained Rayment to arrange for the establishment of a Mexican corporation and purchases of
15 Lots ## 13B and 14. Tr Exhibit 148, Chaffe at 143:8-22; Tr Exhibit 154, Rayment at 46:1-55:7,
16 56:6-57:9, 77:10-78:1.

17 68. Rayment caused the creation of Casa Blanca de Punta Mita, S.A. de C.V. ("Casa
18 Blanca"), which was registered in the public commercial registry of Guadalajara Jalisco on May
19 15, 2002, under commercial file 14393-1. Tr Exhibit 159, David Connell, Esq. Expert Witness
20 Report at p. 4.

21 69. Island Films, Ltd. and Summerland Holdings, Ltd. are Casa Blanca's
22 shareholders, each holding 25,000 shares. Tr Exhibit 159, Connell Report at p. 8; Tr Exhibit 148,
23 Chaffe at 93:17-27. Island Films and Summerland Holdings are TCI corporations, the shares of
24 which are owned by The Francis Trust. Tr Exhibit 132, IF00001-44 and Tr Exhibit 133,
25 SH00001-54; Tr Exhibit 149, Foley at 126:10-25, 127:4-130:23; Tr Exhibit 148, Chaffe at 29:21-
26 30:5, 31:21-32:23.

1 70. Under Mexican law, Casa Blanca is an entity distinct and independent from its
2 shareholders. Tr Exhibit 159, Connell Report at p. 5. Casa Blanca is the owner and deed holder
3 of Lot #13B. *Id.*, Connell Report at p. 6.

4 71. Casa Blanca entered into a private purchase agreement to, and did purchase, Lot
5 #14, from Cantiles de Mita, S.A. de C.V., a Mexico corporation which had merged with Club de
6 Yates Costa Bandera, S.A. de C.V. and Puerto Mita, S.A. de C.V., which assigned the interests
7 of Club de Yates Costa Bandera, S.A. de C.V. to Casa Blanca. Tr Exhibit 139, CB00470-487.

8 72. Although the transaction was conducted through Stewart Title escrow and Stewart
9 Title issued title insurance on Lot #14, a defect exists in Casa Blanca's title to Lot #14 because a
10 Deed to Casa Blanca was not recorded. Tr Exhibit 137, CB00463-469 and CB00488 -510.
11 Accordingly, Club de Yates Costa Bandera, S.A. de C.V. is identified as holder of title to Lot #14
12 in Mexican real property records. The defect in Casa Blanca's title to Lot #14 cannot be resolved
13 without further legal action. Tr Exhibit 159, Connell's Report at pp.6-8 and11.

14 73. Stewart Title International provided title insurance to Casa Blanca on both Lots
15 13B and 14. Tr Exhibit 141, US003029-3093.

16 74. Francis directed and controlled the design and construction of the premises and
17 improvements on Lot #14. Tr Exhibit 154, Rayment at 36:23-37:4, 78:15-80:21, 83:21-84:23,
18 91:18-93:25. None of Francis' personal funds were used to improve Casa Blanca's Lots ##13B
19 or 14. Instead, Mantra Films, Inc. and Sands Media, Inc. provided the funds to develop and
20 improve Casa Blanca's Lot #14: (1) during 2002 Mantra Films paid \$1,002,141.50; (2) during
21 2002 Sands Media paid \$400,000.00; (3) during 2003 Mantra Films paid \$850,000.00; and (4)
22 during 2003 Sands Media paid \$3,076,070.02. Tr Exhibit 129, at CR #277-7; Tr Exhibit 147,
23 Beas at 42:1-43:6; 43:9-22; 44:1-9.

24 75. Francis, Sands Media and Mantra Films use Casa Blanca's property. Their use of
25 the property is at the discretion of the Trustee. There is no lease from Casa Blanca on its
26 property nor from the Francis Trust nor any of the corporations owned by the Francis Trust to
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1 anyone. Tr Exhibit 148, Chaffe at 92:23-95:15. Chaffe believed that Francis contributed to the
2 improvement of Casa Blanca's property because it would inure to the benefit of The Francis
3 Trust. Tr Exhibit 148, Chaffe at 248:18-249:2; Tr Exhibit 154, Rayment at 81:7-23.

4 76. As a matter of Mexican law Rothwell, The Francis Trust, Sands Media, Mantra
5 Films and Francis have no legal or beneficial interest in Casa Blanca, Lots ## 13B and 14, nor in
6 the improvements constructed on Lot #14. Tr Exhibit 159, Connell Report at pp. 9-11.

7 77. Agent Beas verified the accuracy of Exhibit 25(CR## 277-2 through 277-10) filed
8 in *U.S. v. Francis, supra*. Tr Exhibit 147, Beas at 30:3-18; 31:5-25; 32:1-21; 33:2-33:18; 39:6-
9 40:4.

10 78. Beas filed a Declaration in Francis' Jeopardy Assessment case (*Francis v. U.S.*,
11 Case No. 2:09-cv-09449-RGK-FFMx) in which he testified *inter alia* in ¶4, that Francis
12 "admitted he is the beneficial owner of that account when he pled guilty." Tr Exhibit 145, CR
13 #31. In his 2/22/11 deposition Beas conceded that Francis did not admit that he was the
14 beneficial owner of Rothwell's MSSB account. Tr Exhibit 147, Beas at 98:1-100:5.

15 79. During his 2/22/11 deposition Beas testified Francis controlled Rothwell because:
16 (1) funds were transferred to Rothwell's bank account; (2) then transferred to Rothwell's MSSB
17 account; and (3) "it was his money." Tr Exhibit 147, Beas at 77:23-79:3. However, Beas
18 admitted that he had not seen any evidence that Francis could access any of Rothwell's financial
19 accounts or controlled Chaffe. Tr Exhibit 147, Beas at 59:22-25; 60:1-61:7-22.

20 80. IRS Revenue Officer Farrell Stevens served the "nominee" levy on Rothwell's
21 MSSB account. Tr Exhibit 124, MSSB003380-3389; Tr Exhibit 155, Stevens at 14:17-25.
22 Stevens had no role in determining whether Rothwell was a nominee for Francis. Tr Exhibit 155,
23 Stevens at 18:15-19:3.

24 81. Stevens filed a Declaration in *Francis v. U.S., supra*, stating in ¶3: "Since Blue
25 Horse Trading, LLC is a separate legal entity from [Joseph Francis], *the property would not be*
26 *immediately (or possibly ever) subject to an IRS lien.*" Tr Exhibit 146, *Francis v. U.S., supra*,
27
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1 CR# 31. At his deposition Stevens reaffirmed his averment emphasized above. Tr Exhibit 155,
2 Stevens at 32:7-17; 33:2-15. Stevens did not know that the "Ltd." in Rothwell, Ltd. meant that
3 Rothwell was a legal corporation separate from Francis. Tr Exhibit 155, Stevens at 34:6-35:5.

4 82. MSSB liquidated Rothwell's account and surrendered the funds to the United
5 States: (1) December 31, 2009, Check #27603880 in the sum of \$19,412,427.21; (2) January 4,
6 2010, Check #27603884 in the sum of \$690,571.21; and (3) January 5, 2010, Check #27603887
7 in the sum of \$301,639.79. Tr Exhibits 126 (MSSB 003378-79) and 127, MSSB 003393-3398.
8 On January 8, 2010, the IRS confirmed receipt of the liquidation proceeds. Tr Exhibit 128,
9 MSSB 003369-3371; Tr Exhibit 155, Stevens at 24:19 and 25:3-10. 28:4-23, 29:7-30:23, and
10 31:5-8.

11 **II. CONTENTIONS OF LAW.**

12 **A. WRONGFUL LEVY STANDARDS.**

13 This is a Wrongful Levy action brought pursuant to 26 U.S.C. §7426 by Rothwell, Ltd.
14 ("Rothwell") to recover proceeds from (1) a seizure based on an IRS levy served on MSSB on
15 November 6, 2009, directed at Rothwell's account as "nominee" of Joseph R. Francis to collect
16 Mr. Francis' outstanding tax liabilities; (2) the subsequent liquidation of Rothwell's investment
17 account; and (3) surrender of the proceeds of the liquidation by MSSB to the United States. A
18 levy is wrongful if it is placed upon property in which the delinquent taxpayer has no interest.
19 *911 Management, LLC v. U.S.*, 657 F.Supp.2d 1186, 1191 (D. OR 2009); *Sessler v. U.S.*, 7 F.3d
20 1449, 1451 (9th Cir. 1993).

21 **B. FRANCIS HAS NO PROPERTY NOR RIGHTS TO PROPERTY IN THE 22 FRANCIS TRUST, ROTHWELL, LTD. NOR THEIR ASSETS.**

23 In order to prevail in a wrongful levy action a plaintiff must demonstrate (1) that it has an
24 interest in the property at issue, and (2) that the levy was wrongful, i.e. that the property was not
25 the delinquent taxpayer's. *Flores v. U.S.*, 51 F.2d 1169, 1171 (1977). The court initially looks to
26 state law to determine what rights the taxpayer has in the property the government seeks to reach.
27 *Drye v. U.S.*, 528 U.S. 49, 58 (1999). "With respect to the State law question, recent cases have
28

1 clarified the centrality of finding a State law interest as a condition precedent.” *Dalton v. CIR*,
2 135 T.C. No. 20, 2010 WL 3719274 *9 (U.S.Tax Ct. 2010), citing, *inter alia*, *Holman v. U.S.*,
3 505 F.3d 1060, 1067, 1070 (10th Cir. 2007) (vacating and remanding a case seeking to enforce a
4 nominee tax lien for the IRS first to establish that the person held a beneficial interest in the
5 property under State law); *Spotts v. U.S.*, 429 F.3d 248, 251, 253-254 (6th Cir. 2005) (vacating
6 and remanding a grant of summary judgment for the IRS in a case seeking removal of a nominee
7 lien because the lower court did not first consider whether the person had a beneficial interest
8 under State law). In the instant case foreign, not state, law determines what property rights
9 Joseph R. Francis has in The Francis Trust, Rothwell, Ltd. and Rothwell’s Assets.

10 Under TCI laws, Francis does not own any interest in The Francis Trust, Rothwell, Ltd.
11 or Rothwell’s MSSB account and, thus, Francis has no property or rights to property in The
12 Francis Trust, Rothwell, Ltd. nor Rothwell’s MSSB account. Instead, 100% of Rothwell’s shares
13 are owned by The Francis Trust, a discretionary trust created on May 24, 1999, under TCI laws.
14 Rothwell is a separate and distinct legal Cayman corporation which is the sole owner of it’s
15 assets. Contentions of Fact (“COF”) ¶¶ 1-29.

16 Pursuant to Turks & Caicos law, as a beneficiary of the discretionary trust Francis has no
17 vested interest in The Francis Trust nor any of it’s assets. COF ¶¶6-8, 10-15. Likewise, “[a]
18 universal canon of Anglo-American trust law proclaims that when the trustee’s powers of
19 distribution are wholly discretionary, the beneficiary has no ownership interest in the trust or its
20 assets until the trustee exercises discretion by electing to make a distribution to the beneficiary.”
21 *In re Bass*, 171 F.3d 1016, 1028 (5th Cir. 1999); *See also*, AUSTIN W. SCOTT & WILLIAM F.
22 FRATCHER, THE LAW OF TRUSTS §155 at 152 (4th ed. 1987) (A discretionary trust is one
23 “[w]here by the terms of the trust a beneficiary is entitled only to so much of the income or
24 principal as the trustee in his uncontrolled discretion shall see fit to give him, [and] he (the
25 beneficiary) cannot compel the trustee to pay him or to apply for his use any part of the trust
26 property.”); *Wilson v. U.S.*, 140 B.R. 400, 404 (N.D. TX 1992) (holding that there was no
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1 property to which an IRS lien may attach, beneficiary did not have either property interest or
2 rights to property in the discretionary trust and IRS could not compel trustee to disburse funds to
3 debtor beneficiary); *Young v. McCoy*, 147 Cal.App.4th 1078 (2007) (under California law
4 trustees of discretionary trusts cannot be compelled to pay a beneficiary's creditors); *U.S. v.*
5 *Delano*, 182 F.Supp.2d 1020, 1022 (D. Colo. 2001) (beneficiary of discretionary trust has mere
6 expectancy rather than a property interest in trust). Here, no distributions have been made to
7 Francis nor any other beneficiary by the Trustees of The Francis Trust, nor the directors of
8 Rothwell, Ltd. COF ¶¶39, 61, 63, 64.

9 **(1) Francis Never Exercised Control Over Rothwell's Bermuda Commercial Bank Nor**
10 **MSSB Accounts.**

11 Although the sources of mody of the funds were U.S. corporations of which Francis was
12 the sole shareholder, none of Francis' personal funds were transferred to Rothwell's Bermuda
13 Commercial Bank nor MSSB accounts. COF ¶¶ 33, 39. The evidence obtained from the IRS
14 criminal investigation of Francis and discovery instanter establishes that Joseph Francis never
15 controlled The Francis Trust, Rothwell, Ltd. nor Rothwell's MSSB account. COF ¶¶20-32, 34-
16 44.

17 IRS Revenue Agent Beas testified that the "control [Francis] had is that he made
18 payments [that were] transferred to the Rothwell [Bermuda bank] account, and those payments
19 came back to the Rothwell Morgan Stanley account." COF ¶79. However, once the Sands Media
20 and Mantra Films funds were placed in Rothwell's Bermuda Commercial Bank account the
21 money belonged to Rothwell. *Arth v. U.S.*, 735 F.2d 1190, 1193 (9th Cir. 1984). Once funds
22 were deposited into Rothwell's Bermuda bank account Rothwell had complete dominion and
23 control over the account and was free to invest the whole amount however it saw fit. *In re*
24 *Amdura Corp.*, 75 F.3d 1447, 1452 (10th Cir. 1996) (holding that because parent corporation
25 exercised complete control, all funds deposited in the parent corporation's account belonged to
26 the parent corporation, not the subsidiary). Here, Rothwell exercised complete dominion and
27 control by transferring funds from the Bermuda bank account to Rothwell's MSSB account and
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1 by controlling the investments of those funds. COF ¶¶ 30-35, 37-42. See *Carl v. Republic*
2 *Security Bank*, 282 F.Supp.2d 1358, 1366 (S.D. FL 2003) (because third party failed to retain an
3 interest in the funds wired into a customer's account the bank could use those funds to off set the
4 customer's debt, e.g. an overdraft, owed by the customer to the bank). See COF ¶30, and Tr
5 Exhibit 231-233, at US002643-2650 at §A1,1.1 *et seq.*; §A2,2.1; §A3, 3.1(c); §A4, 4.1-4.3; §A6,
6 6.4; §B1, 1.1-1.2; §B4, 4.1-4.2; §B7, 7.1-7.5; §C1, 1.1; and §C4, 4.1-42; and at US002620-2642
7 and US002651-2664, which establish that Rothwell's directors and officers were the only
8 authorized signatories on and the only ones who ever exercised control over Rothwell's Bermuda
9 bank account.

10 **C. THE UNITED STATES CANNOT ESTABLISH THE ESSENTIAL ELEMENT**
11 **OF CONTROL ON WHICH IT HAS THE BURDEN OF PROOF.**

12 Defendant United States has the burden of proving by substantial evidence either that (1)
13 Rothwell was Francis' nominee; or (2) Rothwell held the MSSB account as nominee for Francis.
14 *Flores v. U.S.*, *supra*, 551 F.2d at 1175, *Oxford Capital Corp. v. U.S.*, 211 F.3d 280, 283 (5th Cir.
15 2000) (citing *Flores*). Nominee status is determined by the degree to which a person exercises
16 control over an entity and its assets. *Oxford Capital Corp. v. U.S.*, *supra*, 211 F.3d at 284, *LiButti*
17 *v. U.S.*, 107 F.3d 110, 119 (2nd Cir. 1997), *Shades Ridge Holding Co., Inc. v. U.S.*, 888 F.2d 725,
18 729 (11th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990), *U.S. v. Bell*, 27 F.Supp.2d 1191, 1195
19 (E.D. CA 1998). Thus, the issue is whether Rothwell held the MSSB account for Francis while
20 Francis actually exercised control over Rothwell and/or Rothwell's MSSB account. See *Oxford*
21 *Capital Corp. v. U.S.*, *supra*, 211 F.3d at 284.

22 Factors relevant to whether a business entity is the nominee of an individual are:

23 (1) Whether the nominee paid no consideration or inadequate consideration for the
24 property and/or whether the taxpayer expended personal funds for the nominee's
25 acquisition; (2) whether property was placed in the nominee's name in anticipation of a
26 suit or the occurrence of liabilities; (3) whether a close personal or family relationship
27 existed between the taxpayer and the nominee; (4) whether the conveyance of the
28 property was recorded; (5) whether the taxpayer retained possession of, continued to
enjoy the benefits of, and/or otherwise treated as his or her own the transferred property;
(6) whether the taxpayer after the transfer paid costs related to maintenance of the
property (such as insurance, tax, or mortgage payments); (7) whether, in the case of a

1 trust, there were sufficient internal controls in place with respect to the management of
2 the trust; and (8) whether, in the case of a trust, trust assets were used to pay the
taxpayer's personal expenses.

3 *Dalton v. CIR, supra*, at 2010 WL 3719274 at *9; *See also, Towe Antique Ford Foundation v.*
4 *I.R.S.*, 791 F.Supp. 1450, 1454 (D. Mont. 1992); *U.S. v. Bell, supra*, at 1194. "The court should
5 consider the totality of the circumstances rather than single out the presence or absence of one
6 particular factor." *911 Management, LLC v. U.S.*, 657 F.Supp.2d 1186, (D. OR 2009), quoting,
7 *Turk v. IRS*, 127 F.Supp.2d 1165, 1167, 1195 (D. Mont. 2000) ("No factor can dispose of the
8 issue itself, and no factor is necessarily required in order to find nominee status.").

9 **(1) Whether nominee paid no consideration or inadequate consideration for the**
10 **property.**

11 Francis is the Settlor of The Francis Trust, which is an irrevocable discretionary trust,
12 and once transfers were made to fund the trust and its assets Francis could not revoke the trust,
13 all of Francis' legal interest in the monetary transfers was extinguished and he had no guarantee
14 that the Trustees would exercise their discretion in his or any other beneficiary's favor. COF ¶¶6-
15 9, 11-17, 19.

16 **(2) Whether property was placed in the name of the nominee in anticipation of a suit**
17 **or occurrence of liabilities while the transferor continues to exercise control over the**
18 **property.**

19 The Francis Trust was established on May 24, 1999, more than a decade before the
20 nominee lien arose instanter. COF ¶¶2, 45-46. The Trustee at its sole discretion directed and
21 controlled the operations, finances, assets and investment decisions of The Francis Trust. COF
22 ¶¶8-9, 20-23. The Trustee of The Francis Trust incorporated Rothwell, Ltd. in June, 2000, and
23 controlled, directed and managed at its sole discretion all operations, finances, assets and
24 investment decisions of Rothwell. COF ¶¶24-44. *Cf. 911 Management, supra*, at 1198 ("911
25 Management was created eleven days after Tom Weathers was sentenced [on tax evasion
26 charges].").

27 Francis never exercised control over the funds after Mantra Films and Sands Media made
28 the transfers to Rothwell. COF ¶¶46, 48, 61, 63-64 Neither Francis nor his U.S. corporations,

1 Sands Media and Mantra Films, were insolvent at the time of the transfers nor following the
2 monetary transfers to Rothwell in 2002 and 2003. COF ¶¶60-61, 63. Following the
3 establishment of the trust and transfers Francis exercised no control over the assets, nor did he
4 have a legal right to do so as the transfers were not revocable as a matter of foreign law. COF
5 ¶¶2-44, 51-55. The Trustee of the Francis Trust and officers and directors of Rothwell were not
6 mere “figure-heads.” *Cf. U.S. v. Lena*, __ F.Supp.2d ___, 2008 WL 2774375 *7 (S.D.Fla)
7 (unreported).

8 With respect to Casa Blanca de Punta Mita, S.A. de C.V., (“Casa Blanca”) it is a distinct
9 legal entity in which Francis has no legal or beneficial interest as a matter of Mexico law. COF
10 ¶¶67-71,76. Casa Blanca was incorporated at the behest of the Trustee of the Francis Trust. COF
11 ¶¶67-69. The Francis Trust -- through ownership of the shares of two corporations which own
12 all the shares of Casa Blanca -- indirectly owns the shares of Casa Blanca. COF ¶69. The
13 decision to purchase the property in Mexico was solely the decision of the Trustee. COF ¶65.
14 Rothwell provided a little over \$2 million dollars for the Mexican corporation to purchase the
15 two lots in Mexico as an investment for the benefit of The Francis Trust. COF ¶¶66-67, 71-73.

16 Francis directed and controlled the design, construction and improvements on Casa
17 Blanca’s property, but did not use his personal funds. Mantra Films, Inc. and Sands Media, Inc.
18 paid approximately \$5.3 million in 2002 and 2003 to fund the design and construction of
19 improvements on Casa Blanca’s Lot #14. COF ¶74. Joseph Francis, Sands Media and Mantra
20 Films use the Casa Blanca property at the sole discretion of the Trustee of The Francis Trust.
21 COF ¶75. The funds provided by Sands Media and Mantra Films in 2002 and 2003 to improve
22 Lot 14 added value to Casa Blanca’s Lots #13B and 14 of approximately \$5.3 million dollars.
23 COF ¶¶64-66, 71,74-75.

24 Settlement of The Francis Trust, incorporation of Rothwell, Ltd., incorporation of Casa
25 Blanca, purchases of the Mexico property and completion of the improvements to the Mexico
26 property all occurred from May 24, 1999 through September, 2005 – prior to the
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1 commencement of the IRS investigation of Francis which began in 2006. COF ¶¶2, 24, 30-32,
2 33-37, 40, 45, 64-74. *Cf. Cody v. U.S.*, 348 F.Supp.2d 682, 684 (E.D. VA 2004) (taxpayer's
3 relatives put a house in trust for taxpayers to avoid seizure due to prior tax bill); *U.S. v. Kattar*,
4 81 F.Supp.2d 262, 263-265 (D.N.H 1999) (taxpayer transferred substantially all of his assets to
5 trusts upon notice of investigation for tax evasion); *Towe Antique Ford Found. v. IRS*, 791
6 F.Supp. 1450, 1457 (D.Mont. 1992) (taxpayer fraudulently conveyed assets to charitable
7 foundation in anticipation of the occurrence of federal tax liabilities), *aff'd*, 999 F.2d 1387 (9th
8 Cir. 1993).

9 **(3) Whether close relationship existed between transferor and the nominee.**

10 With respect to The Francis Trust: (1) Francis had the capacity to create the trust, (2)
11 Francis indicated his intention to create the trust by executing the indenture on May 24, 1999,
12 and by funding the trust corpus; (3) The Francis Trust has several beneficiaries; (4) the
13 independent, unrelated Trustee has duties to perform; and (5) the same person is not the sole
14 trustee and sole beneficiary. COF ¶¶2, 6-15, 18, 20-32, 34-44, 51-56, 64-69; *Dalton v. CIR*,
15 *supra*, at 2010 WL 3719274 at *14. At all relevant times the Trustee of The Francis Trust was
16 Hallmark Trust, Ltd. and/or Hallmark Bank and Trust, Ltd., a TCI corporation in which Francis
17 had no ownership interest nor control, directly or indirectly. COF ¶¶7, 18, 20-23, 36-39. The
18 owners, officers and directors of Hallmark never met Francis. COF ¶¶23, 39. The Trustee
19 exercised sole discretion – never took any direction from Francis or anyone else with respect to
20 the management, control and investment decisions for The Francis Trust or Rothwell. COF
21 ¶¶12, 29, 35, 39. *Cf. 911 Management, supra*, at 1200 (the Weathers (the delinquent taxpayers)
22 and all limited partners controlled by the Weathers and a close personal friend and god-father of
23 the Weathers' children were the members of 911 Management).

24 **(4) Whether the conveyance of the property was recorded.**

25 All monetary transactions were accomplished by traceable wire transfers. COF ¶¶33.
26 Francis never transferred real property to The Francis Trust or corporate entities created by the
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1 Trustee.

2 **(5) Whether the taxpayer retained possession of, continued to enjoy the benefits of,**
3 **and/or otherwise treated as his or her own the transferred property.**

4 No distributions were ever made to nor for the benefit of Francis or any other beneficiary.
5 COF ¶¶39, 64, 74. Francis, Sands Media and Mantra films have used the Casa Blanca property at
6 the sole discretion of the Trustee. COF ¶75. As a matter of Mexican law, neither The Francis
7 Trust, Rothwell, Francis, Sands Media nor Mantra films have a legal or beneficial interest in
8 Casa Blanca or its property. COF ¶76. Consequently, Francis's use of the Casa Blanca property
9 does not constitute nor create property or a right to property to which the levy against Rothwell's
10 MSSB account could attach. *Dalton v. CIR, supra*, 135 T.C. No. 20, at *15.

11 None of The Francis Trust's nor Rothwell's funds were used to pay any of Francis' nor
12 any other beneficiary's personal expenses or obligations. *Cf. 911 Management, supra*, at 1203
13 (“[B]y paying the personal obligations of the Weatherses, 911 Management ceases to be a
14 separate entity....”).

15 **(6) Whether the taxpayer after the transfer paid costs related to maintenance of the**
16 **property (such as insurance, tax, or mortgage payments).**

17 No transfer of real property was made by Francis to The Francis Trust or to Rothwell

18 **(7) Whether, in the case of a trust, there were sufficient internal controls in place**
19 **with respect to the management of the trust and its assets.**

20 Francis never exercised any discretion or control over The Francis Trust nor Rothwell nor
21 their assets. Instead, all discretion, control and management was exercised by the Trustee and the
22 directors and officers of Rothwell. COF ¶¶6-17, 20-44, 51, 54.

23 **(8) Whether, in the case of a trust, trust assets were used to pay the taxpayer's**
24 **personal expenses.**

25 None of The Francis Trust's assets nor Rothwell's assets were ever used to pay any of
26 Francis' personal expenses or obligations. Instead, Francis used his own funds to purchase a
27 residence in Los Angeles and in 2008, Francis obtained a \$5 million loan from Washington
28 Mutual Bank to pay personal expenses. COF ¶¶61, 63; Tr Exhibit 144. *Cf. 911 Management,*

1 *supra*, at 1212 (paid all of Kathy Weathers's expenses).

2 **D. THE LEVY WAS WRONGFUL.**

3 At the time of levy the IRS knew that: (1) Francis was not and had never been an
4 authorized signatory on Rothwell's MSSB account; and (2) Rothwell was a separate and distinct
5 legal Cayman Islands corporation formed in 2000. COF ¶¶45-47, 50. The IRS knew that Francis
6 had not made any withdrawals from nor any deposits to Rothwell's MSSB account. COF ¶¶45-
7 46; Tr Exhibit 264. The IRS had no evidence that Francis controlled Rothwell's MSSB account
8 nor the signatories. COF ¶¶45, 50 64, 77, 78, 79. *See Steven N.S. Cheung, Inc. v. U.S.*, ___
9 F.Supp.2d ___, 2006 WL 3042938 (W.D. Wash. 10/24/2006) (unreported) (finding the
10 government failed to establish a "nexus" between the delinquent taxpayer and the levied upon
11 accounts and awarding judgment in favor of the corporation).

12 The IRS knew Francis had: (1) pled guilty to two misdemeanor counts of filing personal
13 income tax returns which omitted interest income earned on the Rothwell MSSB account; and
14 (2) paid all restitution, fines and assessments in full as required. COF ¶57. The United States
15 acted based on an unsupported assumption -- piling inference upon inference -- that Francis
16 controlled Rothwell. COF ¶¶78-80. *See Steven N.S. Cheung, Inc. v. U.S.*, ___ F.Supp.2d ___,
17 2007 WL 174042 *4 (W.D. WA 2007) (unreported) ("[T]he Court noted that '[a]t all points in
18 time' defendant had acted based on an unsupported assumption that Dr. Cheung controlled
19 plaintiff"); *see also, Marzullo v. CIR*, T.C. Memo 1997-261, 1997 WL 311838 at *8 (U.S. Tax
20 Ct. 1997) (The government cannot satisfy its burden of proof by piling inference upon inference).

21 Although unreported, *Steven N.S. Cheung, Inc. v. U.S.*, *supra*, (hereinafter "*Cheung,*
22 *Inc.*") is instructive. In *Cheung, Inc.*, the United States issued a jeopardy assessment against Dr.
23 Cheung for his 1993 tax liabilities and levied upon Cheung, Inc.'s financial accounts on the
24 grounds that Cheung, Inc. was the alter ego/nominee of Dr. Cheung and that Dr. Cheung was the
25 beneficial owner of Cheung, Inc. *See Cheung, Inc., supra*, ___ F.Supp.2d ___, 2005 WL
26 1529695 (W.D. WA 2005) (unreported) and 2006 WL 2473487 (W.D. WA 2006) (unreported).

1 Dr. Cheung initially owned all 100 shares of Cheung, Inc. stock. In 1994 and 1995 Dr. Cheung
2 transferred 98% of his shares in equal portions to his wife, son and daughter for \$10 per share.
3 Dr. Cheung continued to retain two shares of Cheung, Inc stock. The United States contended
4 that Dr. Cheung transferred the shares in anticipation of incurring tax liabilities for the 1993 tax
5 year. The district court noted however that the investigation of Dr. Cheung's 1993 tax deficiency
6 did not begin until "well after Dr. Cheung transferred his shares. Defendant has not rebutted that
7 evidence. Accordingly, the Court finds defendant has failed to demonstrate that Dr. Cheung
8 transferred his ownership in plaintiff to avoid his 1993 tax liability." *Id.*, at 2006 WL 2473487
9 *6. After considering that Dr. Cheung's immediate family members received the transfers of
10 stock and became Cheung, Inc.'s board of directors, the district court found: (1) there was no
11 conclusive evidence that Dr. Cheung influenced the decisions of the shareholders/board
12 members; (2) Dr. Cheung was not the signatory on Cheung, Inc's bank account; and (3) the
13 United States provided no evidence that Dr. Cheung controlled Cheung, Inc.'s Smith Barney
14 accounts. *Id.*, 2006 WL 2473487 *6. The district court denied the United States' motion for
15 summary judgment. *Id.*, 2006 WL 2473487 *7 (W.D. WA 2006) (unreported). Following trial
16 the district court entered judgment in favor of Cheung, Inc. on October 24, 2006 (*Id.*, 2006 WL
17 3042938 (W.D. 2006)(unreported).

18 The United States did not appeal the judgment in favor of Cheung, Inc. on the merits of
19 the wrongful nominee levy, but did appeal the rate of interest awarded. *See* 2007 WL 174042
20 (W.D. WA 2007) and *Steven N.S. Cheung, Inc. v. U.S.*, 545 F.3d 695 (9th Cir. 2008).

21 Although the technical provisions of "Controlled Foreign Corporations" rules (aka
22 "Subpart F"), 26 U.S.C. §951 *et seq.*, treat Francis as the "owner" of Rothwell for tax purposes
23 and require Francis to report the interest earned on Rothwell's MSSB account on his personal
24 returns, the Internal Revenue Code cannot change the ownership of Rothwell from The Francis
25 Trust to Francis, nor render him a "nominee" of Rothwell. Rothwell respectfully requests the
26 Court take judicial notice of the pertinent facts and governing law pursuant to F.R.Evid 201 and
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1 the pertinent portions of the Internal Revenue Code set forth in the Expert Report of Michael C.
2 Durney, Esq.,¹ Tr Exhibit 160 at ¶¶4-7, 9-10 and 13-15.

3 **CONCLUSION**

4 Based on the undisputed material facts set forth in Plaintiff’s Motion and the laws of the
5 Turks & Caicos Islands, Cayman Islands and the United States: (1) Rothwell Ltd. is the sole
6 owner of it’s MSSB account; (2) Joseph Francis has no ownership or property interest or rights
7 to property in Rothwell’s MSSB account; and (3) Joseph Francis exercised no control over
8 Rothwell, Ltd. nor Rothwell’s MSSB account.

9 Consequently, the liquidation of Rothwell’s investments and surrender of the liquidated
10 proceeds by MSSB to the Internal Revenue Service pursuant to the “nominee” levy was wrongful
11 and Rothwell, Ltd. is entitled to judgment in the amount received by the United States from the
12 sale of the securities and other investments in Rothwell’s MSSB account pursuant to 26 U.S.C.
13 §7426(b)(2)(C)(i), plus interest as provided by law.

14 RESPECTFULLY SUBMITTED this 16th day of May, 2011.

15 WILLIAM A. COHAN, P.C.

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25 ¹ Mr. Durney is licensed to practice law in the District of Columbia and the State of
26 California. Durney received his JD Degree from the University of California Hastings College of
27 Law in 1968. From 1968 to 1972, Durney served as a Trial Attorney with the Tax Division of
28 the Department of Justice (“DOJ”). From 1986 to 1988, Durney served as Principal Deputy
Assistant Attorney General and Acting Assistant Attorney General for the Tax Division of the
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specializing in federal tax practice, with particular emphasis on the representation of taxpayers
before the IRS and the DOJ in civil and criminal tax matters. *Id.* at ¶17.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2011, I did cause the foregoing Memorandum of Contentions of Fact and Law to be served via the ECF system on the following:

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10 UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 12 WESTERN DIVISION
 13

14 ROTHWELL, LTD., a Cayman
Islands Corporation,

15 Plaintiff,

16 v.

17 UNITED STATES OF AMERICA,

18 Defendant.

) Case No. CV 10-479-RGK(FFMx)

) UNITED STATES OF AMERICA'S
) MEMORANDUM OF
) CONTENTIONS OF FACT AND
) LAW

) Pretrial Conference:

) Date: June 6, 2011

) Time: 9:00 a.m.

) Ctrm: 850

) Roybal U.S. Courthouse

) 255 East Temple St.

) Los Angeles, CA 90012

22 In accordance with applicable local rules, the United States of America
23 submits its contentions of fact and law.

24 The instant case is a wrongful levy action in which plaintiff Rothwell, Ltd.,
25 seeks the return of funds that were levied from its securities account at Morgan
26 Stanley to pay taxes assessed against Joseph R. Francis. The account was seized by
27 the IRS based on its determination that plaintiff was holding the account as a
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1 nominee for Francis. Plaintiff disputes that it was the nominee for Francis with
2 respect to the account.

3 26 U.S.C. § 7426 allows a third party (a party other than the delinquent
4 taxpayer), to challenge an IRS levy as “wrongful.” A levy is “wrongful” if it is
5 upon property in which the taxpayer has no interest at the time the lien arose or
6 thereafter. Treas. Reg. § 301.7426-1(b); *Sessler v. United States*, 7 F.3d 1449,
7 1451 (9th Cir. 1993). Under certain circumstances, the United States may levy
8 upon property held by a third party, such as when a third party trust is the nominee
9 of a taxpayer who is indebted to the United States, or when a trust is a “sham.” *911*
10 *Management, LLC v. United States*, 657 F.Supp.2d 1186, 1191 (D. Or. 2009); *Juris*
11 *Trust Co. Ltd. v. United States*, 78 A.F.T.R.2d 96-6548 (E.D. Cal. 1996); *United*
12 *States v. Geissler*, 73 A.F.T.R.2d 94-459 (D. Id. 1993).

13 The claim of the United States of America is that plaintiff, Rothwell, is the
14 nominee of Francis, Sands Media, Inc., and Mantra Films, Inc., and the levy served
15 by the IRS on November 6, 2009 that seized the funds in Rothwell’s Morgan
16 Stanley account was not wrongful.

17 CONTENTIONS OF FACT

18 Joseph R. Francis was, at all times pertinent to this lawsuit, the sole owner of
19 two U.S. companies, Mantra Films, Inc. (“Mantra”), and Sands Media, Inc.
20 (“Sands”). Mantra was incorporated in Oklahoma in 1998 and Sands was
21 incorporated in Nevada in 2001. Both companies are “S Corporations” for U.S.
22 income tax purposes, and as such, the profits from these companies were required
23 to be reported by Francis on his U.S. individual income tax returns. Sands and
24 Mantra are the companies, in part, that produce and market the “Girls Gone Wild”
25 videos, clothing, magazines, and pay-per-view programs.

26 In 1999, Francis created the Francis Trust (“Francis Trust” or “Trust”) in the
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1 Turks & Caicos Islands, from which he is a beneficiary. In doing so, he relied
2 upon the services of his personal attorney, Brian Rayment, who handled the details
3 of establishing the Trust, and who also serves as a “protector” of the trust.
4 Beginning in 1992, Brian Rayment has been involved in some capacity as Francis’
5 legal counsel, as well as counsel for Rothwell, The Francis Trust, Sands, Mantra,
6 and a myriad of other entities owned directly or indirectly by Francis. At least
7 three corporations were formed in connection with the Trust. These three
8 corporations, which are owned by the Trust, are Island Films, a Turks & Caicos
9 corporation, Summerland Holdings, also a Turks & Caicos corporation, and the
10 plaintiff Rothwell, Ltd., a Cayman Islands corporation. The trustee of the Trust
11 was originally Hallmark Trust Ltd., a Turks & Caicos company, which at the time
12 was owned and operated by Colin Chaffe and Nicola Jordan.¹

13 Rothwell was incorporated in the Cayman Islands in June 2000 by Colin
14 Chaffe, and shortly thereafter, Chaffe opened a bank account for Rothwell with the
15 Bermuda Commercial Bank in Hamilton, Bermuda, and a brokerage account with
16 Morgan Stanley at a branch office in Irvine, California. Records of Bermuda
17 Commercial Bank show Chaffe admitted that Francis was the beneficial owner of
18 Rothwell. All of the shares of Rothwell are owned by the Francis Trust.

19 Rothwell’s bank and brokerage accounts were used by Francis to perpetuate
20 several difference tax schemes. Each scheme had in common the following: 1)
21 transferring funds tax-free to offshore entities; 2) causing false entries on the
22 corporate books and records of Sands and Mantra to conceal the transfers as
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24
25 ¹ Hallmark was later sold to another party, Trowbridge, but sometime
26 around the end of 2009 the administration of the trust was returned to Colin
27 Chaffe, who is now the trustee. While the levy on plaintiff’s securities account at
28 Morgan Stanley occurred after Hallmark had been sold to Trowbridge, all other
events pertinent to this lawsuit occurred while Hallmark was owned and operated
by Colin Chaffe.

1 legitimate business expenses; and 3) falsely deducting the transfers on the Mantra
2 and Sands corporate tax returns, resulting in 4) a falsely reduced corporate net
3 income that flowed through to Francis' personal tax return, which accordingly,
4 reported less income and tax due and owing from Francis.

5 From the start, Francis used Rothwell to hoard cash generated by claiming
6 false business deductions on the tax returns of Mantra and Sands. One scheme
7 involved false claims by both Mantra and Sands for insurance expenses. In about
8 November 2002, with the assistance of their counsel, Brian Rayment, both
9 companies entered into agreements with Asia Pacific Mutual Insurance Company
10 ("APMIC") supposedly for insurance coverage for the period from November 16,
11 2002 to November 15, 2003, with the premium for Sands policy being \$3,000,000
12 and the premium for Mantra's policy being \$2,000,000. Between January 28, 2003
13 and June 20, 2003, Mantra and Sands made payments to APMIC's Bank of Hawaii
14 account totaling \$5,000,000. On its 2003 U.S. Income Tax Return for an S-
15 Corporation, Sands accrued and deducted \$2,500,000 of the payments it made to
16 APMIC, and Mantra accrued and deducted \$1,666,667 of the payments it made to
17 APMIC. However, between January and August 2003, APMIC made eleven
18 transfers totaling \$4,746,386 from its Bank of Hawaii account to an Abbey
19 National Bank account for Schedule Company, and two transfers totaling \$166,201
20 to a Bermuda Commercial Bank account located in Hamilton, Bermuda, for
21 Schedule Company. Colin Chaffe owns Schedule Company. Simultaneously,
22 February 18, 2003, and August 4, 2003, Schedule Company made eight fund
23 transfers totaling \$4,489,050 into the account plaintiff maintained at Bermuda
24 Commercial Bank. Thus, \$4,489,050 of the \$5,000,000 that was allegedly paid for
25 insurance premiums ended up, within a short period of time, in a Bermuda bank
26 account held by the plaintiff.

1 The second scheme Francis used to launder funds through plaintiff's bank
2 account in Bermuda involved direct payments made by Sands to said account,
3 which it deducted on its 2002 tax return as expenses for "consulting services."
4 Between December 4, 2002 and April 23, 2003, Sands made nine wire transfers
5 totaling \$10,411,020 directly to plaintiff's Bermuda bank account and deducted the
6 payments on its tax return as "consulting fees." Notably, during this same time
7 frame when \$10,411,020 was paid directly to plaintiff's Bermuda bank account,
8 and \$4,489,050 of the alleged "insurance" payments ended up in plaintiff's
9 Bermuda bank account, \$15,448,780 was wired from that account in Bermuda to
10 plaintiff's account at Morgan Stanley, which was accomplished with 18 wire
11 transfers occurring between May 10, 2002, and August 11, 2003.

12 The third scheme Francis used to divert income from Mantra and Sands to
13 Francis' personal use involved payments made to Crescent Capital for the purpose
14 of constructing a 35,000 square foot personal residence for Francis in Punta Mita,
15 Puerto Vallarta, Mexico. Francis' personal attorney, Brian Rayment, facilitated the
16 purchase of the lots upon which the personal residence was built.

17 Between December 13, 2002, and November 12, 2003, Sands made 21
18 payments totaling \$3,784,290 to Crescent Capital, which Sands deducted on its
19 2002 tax return as "consulting" expenses. During March and July 2002, Mantra
20 made four payments to Crescent Capital by check, totaling \$560,000, which Mantra
21 accrued and deducted as expenses for "professional services" on its 2002 income
22 tax return.

23 In fact, all of the payments to Crescent Capital were for the construction of
24 the home in Mexico. Francis himself had commenced the process of acquiring the
25 land and building the residence in Mexico on February 3, 2002, by giving Crescent
26 Capital his personal check for \$100,000 as a security deposit in connection with the
27

1 purchase of Lot 14 at Punta Mita, the development in Mexico where his residence
2 was later constructed. Ultimately, Lot 14 at Punta Mita was purchased for
3 \$1,054,980 in April 2002, with \$1,030,000 of the purchase price paid by plaintiff
4 and \$24,980 paid by Hallmark. The property was purchased in the name of a new
5 Mexican corporation, Casa Blanca de Punta Mita S.A. de C.V., which is owned by
6 Island Films (the shares of which are owned by Rothwell) and Summerland
7 Holdings, and legally represented by Brian Rayment. Later, in 2005, adjoining Lot
8 13B was also purchased by the Mexican corporation for \$1,023,023, with the
9 assistance of Brian Rayment, with Rothwell again providing the purchase money,
10 which was wired directly from plaintiff's Morgan Stanley account to Mexico.
11 Further, in 2002, Mantra made three other payments directly to Casablanca de
12 Punta Mita S.A. de C.V., totaling \$443,141, which it accrued as "footage" expenses
13 on its books and records. Additional funds for constructing the residence in
14 Mexico were paid directly by Francis to the builder. Francis has identified the
15 residence in Mexico as "his" residence on several national television shows. The
16 residence was neither listed on Sands, Mantra, or Rothwell's books as an asset, nor
17 depreciated on the corporate tax returns. No rent payments were made to Rothwell
18 when Francis used the residence. Simply put, the payments were merely a way for
19 Francis to transfer funds to himself tax-free in order to build a personal vacation
20 home.

21 On April 11, 2007, a federal grand jury in the District of Nevada indicted
22 Francis on two counts of tax evasion in violation of 26 U.S.C. § 7201 for taxable
23 years 2002 and 2003. On September 23, 2009, in the case entitled United States v.
24 Joseph R. Francis, CR 08-494-SJO (C.D. CA.), plaintiff pled guilty to a three-count
25 Information. Plaintiff admitted to two violations of 26 U.S.C. § 7207 with respect
26 to the 2003 tax year, admitting that he willfully filed his 2003 U.S. Personal
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1 Income Tax Return and his Amended 2003 U.S. Personal Income Tax Return
2 knowing that the returns were false as to a material matter in that they omitted
3 interest income earned on the Rothwell Morgan Stanley account. On November 6,
4 2009, the Court sentenced plaintiff.

5 On November 6, 2009, the IRS notified Francis that a determination had
6 been made that jeopardy existed with respect to the ability of the IRS to collect his
7 2001, 2002, and 2003 income tax liabilities. On the same day, the IRS levied the
8 accounts of Francis and Rothwell at Morgan Stanley, as it determined that
9 Rothwell was a nominee of Francis and such funds held in both accounts were also
10 determined to be in jeopardy of being moved out of the reach of the Government.
11 Indeed, such movement of funds was contemplated, as subsequent to the jeopardy
12 levy but prior to payment of the levied funds to the IRS, on December 1, 2010, the
13 Morgan Stanley account manager that handled the Rothwell account received
14 request from the then-director of Rothwell, Brian Trowbridge, that he wished to
15 liquidate the Rothwell account at Morgan Stanley.

16 The key evidence the Government relies upon in support of its claim that the
17 subject levy was not "wrongful" pursuant to 26 U.S.C. § 7426 include, but are not
18 limited to, 1) bank records of Sands, Mantra, Rothwell, APMIC, Bank of Hawaii,
19 Bermuda Commercial Bank, and Morgan Stanley, 2) business records regularly
20 kept in the course of business of the aforementioned entities, as well as business
21 records of the Internal Revenue Service, (tax returns), Stewart Title Information
22 International, Inc., (escrow files), Crescent Capital, Ltd. and Hadid Interiors
23 (contracts), Casa Blanca de Punta Mita, S.A. de C.V. (contracts), 3) public records
24 of the Secretaries of State of Oklahoma and Nevada, and civil complaints filed by
25 Francis in this court.

26 There are evidentiary problems that the Government anticipates. The
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1 Government objects to the admission of deposition transcripts and videos of
2 witnesses because the witnesses are available to testify at trial. The Government
3 objects to the admission of “opinion” testimony of Mr. Foley and the expert reports
4 of Mr. Connell and Mr. Durney, on the grounds that the opinions offered in these
5 exhibits are legal in nature and are not expert opinions. Finally, if plaintiff objects
6 to the admissions of bank records and business records of Wells Fargo Bank,
7 Bermuda Commercial Bank, Morgan Stanley, Bank of Hawaii, custodians from
8 these financial institutions will only be called, if necessary, to authenticate bank
9 records in this case.

10 CONTENTIONS OF LAW

11 **a. The federal tax lien attaches to property titled in the name of a**
12 **taxpayer’s nominee**

13 26 U.S.C. § 7426 allows a third party (a party other than the delinquent
14 taxpayer), to challenge an IRS levy as “wrongful.” A levy is “wrongful” if it is
15 upon property in which the taxpayer has no interest at the time the lien arose or
16 thereafter. Treas. Reg. § 301.7426-1(b); *Sessler v. United States*, 7 F.3d 1449,
17 1451 (9th Cir. 1993).

18 When a taxpayer fails to pay an assessed tax liability after receiving notice of
19 the assessment and demand for payment, a lien for the unpaid tax automatically
20 arises in favor of the United States upon all property and rights to property
21 belonging to the taxpayer. 26 U.S.C. § 6321. Under certain circumstances, the
22 United States may levy upon property held by a third party, such as when a third
23 party trust is the nominee of a taxpayer who is indebted to the United States, or
24 when a trust is a “sham.” *911 Management, LLC v. United States*, 657 F.Supp.2d
25 1186, 1191 (D. Or. 2009); *Juris Trust Co. Ltd. v. United States*, 78 A.F.T.R.2d 96-
26 6548 (E.D. Cal. 1996); *United States v. Geissler*, 73 A.F.T.R.2d 94-459 (D. Id.

1 1993).

2 It is settled law that the federal tax lien attaches to property held by a
3 taxpayer's nominee or alter ego, and that such property is subject to the collection
4 of the taxpayer's tax liability. See *G.M. Leasing Corp. v. United States*, 429 U.S.
5 338, 350–51, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977) (the IRS “could properly regard
6 petitioner's assets as [taxpayer's] property subject to the lien under § 6321”); *Wolfe*
7 *v. United States*, 798 F.2d 1241, 1244 n.3, amended 806 F.2d 1410 (9th Cir. 1986);
8 *Holman v. United States*, 505 F.3d 1060, 1065 (10th Cir. 2007); *Scoville v. United*
9 *States*, 250 F.3d 1198, 1202–03 (8th Cir. 2001); *Oxford Capital Corp. v. United*
10 *States*, 211 F.3d 280, 284 (5th Cir. 2000); *LiButti v. United States*, 107 F.3d 110,
11 120, 125 (2d Cir. 1997); *Shades Ridge Holding Corp. v. United States*, 888 F.2d
12 725, 728–29 (11th Cir. 1989); *Towe Antique Ford Found. v. IRS*, 791 F. Supp.
13 1450, 1454 (D. Mont. 1992), *aff'd*, 999 F.2d 1387 (9th Cir. 1993).

14 In bringing an action under 26 U.S.C. § 7426, plaintiff bears the initial
15 burden of proving title to the levied property. *911 Management v. United States*,
16 *supra*; *Tri-State Equipment v. United States*, 79 A.F.T.R.2d 97-2502, 9 (E.D. Cal.
17 1997). If the plaintiff is able to establish title to the property, the burden of
18 persuasion shifts to the United States to show that there exists a nexus between the
19 taxpayer and the levied property. *911 Management LLC, supra*; *Tri-State*
20 *Equipment, supra*. The United States may establish the required nexus by showing
21 that a third party entity is actually the nominee of the delinquent taxpayer. *911*
22 *Management LLC, supra*; *Tri-State Equipment, supra*. However, the plaintiff bears
23 the ultimate burden of proving to the district court that the property which appears
24 to belong to the taxpayer actually is plaintiff's property and does not belong to the
25 delinquent taxpayer. *911 Management LLC, supra*; *Tri-State Equipment, supra*.

26 Property is held by a nominee when someone other than the taxpayer has
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1 legal title but, in substance, the taxpayer enjoys the benefits of ownership. *Oxford*
2 *Capital Corp.*, 211 F.3d at 284. A third party is the taxpayer's nominee where "the
3 taxpayer has engaged in a legal fiction by placing legal title to property in the
4 hands of a third party while actually retaining some or all of the benefits of true
5 ownership." *Holman*, 505 F.3d at 1065; *see also United States v. Miller Bros.*
6 *Constr. Co.*, 505 F.2d 1031, 1036 (10th Cir. 1974). "[T]he nominee theory stems
7 from equitable principles. Focusing on the relationship between the taxpayer and
8 the property, the theory attempts to discern whether a taxpayer has engaged in a
9 sort of legal fiction, for federal tax purposes, by placing legal title to property in the
10 hands of another while, in actuality, retaining all or some of the benefits of being
11 the true owner." *In re Richards*, 231 B.R. 571, 578 (E.D. Pa. 1999). *See also,*
12 *Black's Law Dictionary* 1072 (7th ed. 1999) (defining nominee as "[a] party who
13 holds bare legal title for the benefit of others").

14 **b. California law recognizes nominee ownership**

15 California law recognizes a nominee theory of ownership. Two recent
16 decisions by the district court for the Southern District of California cite and
17 discuss many of the state court cases that have addressed the theory. *Fourth*
18 *Investment LP v. United States*, 2010 WL 3069685, at *5 (S.D. Cal. 2010); *Leeds*
19 *LP v. United States*, 2010 WL 3070349, at *4 (S.D. Cal. 2010). Among the cases
20 cited in those opinions is *McColgan v. Walter Magee, Inc.*, 172 Cal. 182, 190
21 (1916), where the California Supreme Court held that "[p]ublic policy does not
22 permit [a debtor] to put [his property] beyond reach of his creditors while he has
23 the beneficial use of it himself." The State's highest court has thus confirmed that
24 equitable creditor's remedies can override a legal fiction. Other California cases
25 relied upon by those two Southern District decisions include *Lewis v. Hankins*, 262
26 Cal. Rptr. 532 (Cal. Ct. App. 1989) (affirming trial court's decision allowing
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1 creditor to levy and sell property owned by debtor's nominees because debtor was
2 beneficial owner); *Parkmerced Co. v. City and County of San Francisco*, 149 Cal.
3 App.3d 1091, 1095 (1985) (noting that one general partner held real property as
4 nominee for partnership); *Baldassari v. United States*, 144 Cal. Rptr. 741, 744
5 (1978) (“[t]he validity of the tax liens depends upon whether plaintiffs are the bona
6 fide owners of the properties or are only nominees”); *In re Camm's Estate*, 76 Cal.
7 App.2d 104, 112 (Cal. Ct. App. 1946) (relying on “the rule that a person cannot
8 place his property or the income thereof beyond the reach of his creditors so long
9 as he himself retains the right to receive it and use it”); *Bauman v. Harrison*, 115
10 P.2d 530 (Cal. Ct. App. 1941) (stating that “appellant took title as the nominee of
11 [another party] but did not assume or agree to pay the indebtedness secured by the
12 deed of trust”). *See also, United States v. Dubey*, 1998 WL 835000, at *98-7055
13 (E.D. Cal. 1998).

14 **c. The California Supreme Court would likely adopt the familiar**
15 **factors relied upon by many other courts in determining nominee**
16 **ownership**

17 Although California law recognizes the theory of nominee ownership, it
18 appears that no California state court has identified the factors involved in a
19 nominee analysis. *See Fourth Investment, LP*, 2010 WL 3069685, at *4; *Leeds*,
20 2010 WL 3070349, at *4. The district court in *Fourth Investment* observed that, in
21 the absence of state-law guidelines, the federal courts in California have used the
22 guidelines of federal common law, citing *United States v. Beretta*, 2008 WL
23 4862509, at *7 (N.D. Cal. 2008); *United States v. Lang*, 2008 WL 2899819, at *5
24 (C.D. Cal. 2008); and *Sequoia Prop. & Equip. Ltd. P'ship v. United States*, 2002
25 WL 31409620, at *12 (E.D. Cal. 2002). Under Ninth Circuit decisions, it was
26 entirely appropriate for the district courts in California to consider federal common
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1 law guidelines in resolving nominee cases.

2 The Ninth Circuit has repeatedly held that where the state's highest court has
3 not decided an issue (here, what factors are to be considered in determining
4 nominee ownership), "the task of the federal courts is to predict how the state high
5 court would resolve it." *Giles v. GMAC*, 494 F.3d 865, 872 (9th Cir. 2007),
6 quoting *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986). And
7 in making this prediction, the federal courts may look "for guidance to decisions by
8 intermediate appellate courts of the state *and by courts in other jurisdictions.*"
9 *Giles*, 494 F.3d at 872 (emphasis added). See also, *Burlington Ins. Co. v. Oceanic*
10 *Design & Constr., Inc.*, 383 F.3d 940, 944 (9th Cir. 2004) ("a federal court may be
11 aided by looking to well-reasoned decisions from other jurisdictions"); *Eichacker*
12 *v. Paul Revere Life Ins. Co.*, 354 F.3d 1142, 1145 (9th Cir. 2004) (prediction may
13 be based upon "intermediate appellate court decisions, decisions from other
14 jurisdictions, statutes, treatises, and restatements"); *Walker v. City of Lakewood*,
15 272 F.3d 1114, 1125 (9th Cir. 2001) (same). Moreover, the Ninth Circuit has said
16 that it will give deference "to the district court's construction of the law of the state
17 in which the district court sits." *Takahashi v. Loomis Armored Car Serv.*, 625 F.2d
18 314, 316 (9th Cir. 1980). Cf. *United States v. Durham Lumber Co.*, 363 U.S. 522,
19 525, 80 S.Ct. 1282, 4 L.Ed.2d 1371 (1960) ("in dealing with issues of state law that
20 enter into judgments of federal courts, we are hesitant to overrule decisions by
21 federal courts skilled in the law of particular states unless their conclusions are
22 shown to be unreasonable").

23 Although none of the federal district courts in California ostensibly
24 purported to predict what factors the California Supreme Court would adopt for
25 determining nominee status, those courts have uniformly applied the same factors.
26 And the factors routinely applied by the district courts in California are similar (and
27

1 it many instances identical) to those applied by courts in other jurisdictions.

2 In *United States v. Bell*, 27 F. Supp. 2d 1191, 1195 (E.D. Cal. 1998), for
3 example, the district court held that nominee status “is determined by the degree to
4 which a party exercises control over an entity and its assets.” In support of this
5 statement of the law, the district court relied upon decisions of the Second Circuit
6 (*LiButti*, 107 F.3d at 119), and the Eleventh Circuit (*Shades Ridge Holding Co.*,
7 888 F.2d at 729). The district court in *Bell* then listed the following six factors that
8 courts have considered to be relevant in determining nominee status:²

- 9 (1) No consideration or inadequate consideration paid by the nominee;
- 10 (2) Property placed in the name of the nominee in anticipation of a suit or
11 occurrence of liabilities while the debtor continues to exercise control
12 over the property;
- 13 (3) Close relationship between the debtor and the nominee;
- 14 (4) Failure to record a conveyance;
- 15 (5) Retention of possession by the debtor; and
- 16 (6) Continued enjoyment by the debtor of benefits of the property.

17 Indeed, reliance upon these six factors is widespread. As the district court
18 stated in *United States v. Secapure*, 2008 WL 820719, at *7 (N.D. Cal. 2008),
19

20
21 ² Although most of the courts relying on these factors have referred to the
22 true owner of the property as the “transferor,” we refer in this list to the “debtor.”
23 We do so because recent appellate decisions have confirmed that a transfer of the
24 property is not a prerequisite to the application of the nominee doctrine. See
25 *Holman*, 505 F.3d at 1065 (recognizing that although the nominee doctrine applies
26 when a debtor has directly transferred property to his nominee, it also applies
27 when a debtor “who has never held legal title to a piece of property but who
28 transfers money to a third party and directs the third party to purchase property
and place legal title in the third party’s name,” nevertheless retains all the benefits
of ownership); *LiButti*, 107 F.3d at 125 (“[i]t is not necessary, therefore, to find
that [the property] was transferred from [the debtor] to [his nominee]; it is
sufficient for nominee and constructive trust purposes if it is found * * * that [the
debtor] transferred his money to [his nominee] for the purchase of [the property],
consistent with his obvious desire to secrete his assets”).

1 “[c]ourts throughout the Ninth Circuit rely on [these] six factors to determine
2 nominee status.” *See also, Cal Fruit Int’l v. Spaich*, 2006 WL 27116644, at *5
3 (E.D. Cal. 2006); *Tri-State Equipment v. United States*, 1997 WL 375264, at *11
4 (E.D. Cal. 1997). In support of its own reliance on these factors, the district court
5 in *Bell* cited *Towe Antique Ford, supra*, a case that involved Montana law and that
6 was affirmed by the Ninth Circuit (999 F.2d 1387), and the Tenth Circuit’s
7 decision in *United States v. Miller Bros. Constr. Co., supra*. Other federal courts
8 of appeals have relied upon the same, or nearly the same, factors. *Oxford Capital*,
9 211 F.3d at 284 n.1; *Scoville*, 250 F.3d at 1202.

10 The courts, however, do not necessarily require that each of these factors be
11 present in every case. As the Second Circuit explained in *LiButti*, 107 F.3d at 119,
12 courts should avoid an “over-rigid preoccupation with questions of structure, * * *
13 and apply the preexisting and overarching principle that liability is imposed to
14 reach an equitable result.” *See generally*, W. Elliott, *Federal Tax Collections*,
15 *Liens, and Levies*, ¶ 9.10, p. 9-95 (2d ed. 2003) (“There are no particular elements
16 whose presence the courts always insist on to determine that property that is being
17 held in the name of a nominee is in fact the property of another,” and then listing
18 eight factors, including the six listed above). *LiButti* itself discusses both nominee
19 and alter ego doctrine, and, indeed, some courts have recognized that there is an
20 overlap between the two doctrines. *E.g., 911 Mgmt. LLC v. United States*, 657 F.
21 Supp. 2d 1186, 1195, 1214 (D. Ore. 2009) (“[m]any of the factors overlap with the
22 nominee analysis” and “the presence of absence of a particular factor is not
23 dispositive”); *In re Callahan*, 419 B.R. 109, 128 (Bankr. Mass. 2009), *remanded*
24 *on other grounds*, 2010 WL 1170112 (D. Mass. 2010) (“alter ego theory is similar
25 in some respects to a nominee theory”). This makes sense because the nominee
26 and alter ego doctrines are closely related equitable creditor’s remedies that focus
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28

1 on control – in one, a debtor’s control over an entity, and in the other, a debtor’s
2 control over a willing nominee with respect to a specific asset. Indeed, nominee
3 cases may be viewed as single-asset alter ego cases; although one individual cannot
4 be the alter ego of another for all purposes, he may serve in that role with respect to
5 holding a specific piece of property.³

6 In any event, that federal courts across the nation have routinely relied upon
7 the six factors listed above is not surprising. As the Eleventh Circuit explained in
8 *Shades Ridge Holding Co.*, 888 F.2d at 728, the standards for establishing nominee
9 status under state and federal law “are so similar that the distinction is of little
10 moment,” because “[t]he [nominee] issue under either state or federal law depends
11 upon who has ‘active’ or ‘substantial’ control.”

12 In view of the widespread reliance by the courts upon the six factors listed
13 above, this Court should be able to predict with confidence that the California
14 Supreme Court would also adopt them (or something very similar to them) to
15 determine nominee status. Indeed, California’s intermediate appellate courts,
16 although not adopting a discrete list of factors, have applied such factors in their
17 nominee determinations. For example, in *Baumann v. Harrison*, 46 Cal. App.2d at
18 91-92, the court relied upon the facts that the nominee “did not assume or agree to
19 pay the indebtedness secured by the deed of trust” (factor # 1), and that the
20 principals “had at all times been in control and possession of the premises” and had
21 been receiving all rents from the property (factors # 5 & 6).

22
23 ³ The California Supreme Court would thus likely also consider its alter ego
24 decisions when considering what factors to adopt in nominee cases. And in
25 California, alter ego doctrine is not as rigid as in some states. *E.g.*, *Gordon v.*
26 *Aztec Brewing Co.*, 33 Cal.2d 514, 523, 203 P.2d 522, 527 (Cal. 1949) (“[i]t is not
27 necessary that the plaintiff prove actual fraud. It is enough if the recognition of
the two entities as separate would result in an injustice”); *Paul v. Palm Springs*
Homes, Inc., 192 Cal. App.2d 858, 862, 13 Cal. Rptr. 860, 862 (Cal. App. 1961)
 (“[t]he conditions under which a corporate entity may be disregarded vary
according to the circumstances in each case”).

1 Moreover, it is apparent that the nominee issue presented here arises more
2 often in the federal tax-collection context than in other areas of the law. That this
3 is so is evident from the numerous tax cases arising in recent years in the federal
4 district courts in California alone, and the comparatively small number of nominee
5 cases in the California state courts. Because of the prevalence of the issue in
6 federal tax cases, it is reasonable to conclude that the California Supreme Court, if
7 and when presented with the issue, would give deference to the many federal court
8 decisions that have arisen, and would adopt the same factors that have routinely
9 been applied in those cases. The California Supreme Court's adoption of those
10 factors would go a long way toward promoting uniformity in the law.

11 **d. Rothwell is the nominee of Joseph Francis**

12 Based on the evidence of the Government as applied to the six nominee
13 factors enumerated above, plaintiff is the nominee of Francis.

14 1) No consideration or inadequate consideration paid by the
15 nominee

16 The money seized in Rothwell's Morgan Stanley brokerage account by the
17 IRS was there by virtue of a series of deposits totaling over \$10 million made by
18 Sands and the \$5 million AMPIC insurance premiums made by Sands and Mantra.
19 Though millions of dollars were transferred to Rothwell from Sands and Mantra,
20 Rothwell provided no services or consideration to Sands and Mantra in exchange.

21 The most compelling evidence of the lack of consideration between Sands
22 and Rothwell are the nine wire transfers which occurred in December 2002 and
23 January, February and April 2003, ranging in amounts as small as \$250,000 and as
24 large as \$5,461,020, which were deposited from Sands' Wells Fargo account in
25 California directly into Rothwell's Bermuda Commercial account. The
26 "consideration" given from Rothwell to Sands was an illegal one: for tax purposes,
27 the nine transfers were booked on the general ledger of Sands as "accrued expenses

1 for Casablanca” or “consulting services” and in turn, deducted on Sands’ Income
2 Tax return as a business expense deduction of over \$10 million.

3 Rothwell has to affirmatively show that it gave consideration to Sands for
4 the money Sands gave to it. However, Rothwell has no evidence showing that any
5 services or goods were provided to Sands in exchange for these payments; during
6 the period in question, the only employees of Rothwell were Colin Chaffe and
7 Nicola Jordan, and neither claim that they provided services to Sands on behalf of
8 Rothwell. Put simply, Francis’ large cash transfers to Rothwell were part of a
9 scheme to significantly reduce Francis’ and Sands’ tax liability.

10 As to the Punta Mita residence, in 2002, \$1.03 million was transferred from
11 Rothwell’s Bermuda account to pay for the first lot, No. 14. Rothwell got the
12 money to purchase this lot from either transfers made from the insurance
13 transaction with AMPIC, which was paid by Sands and Mantra, or direct transfers
14 from Sands, both transferred to Rothwell’s Bermuda account. Rothwell paid no
15 consideration to Sands or Mantra in exchange for the funds to purchase the lot.
16 After Rothwell bought the lot through its Mexican corporation, Casablanca de
17 Punta Mita S.A. de C.V., Rothwell did not transfer the land to Sands or Mantra.
18 The second lot purchased by Rothwell, Lot No. 13B, was funded by a \$1.023
19 million transfer from Rothwell’s Morgan Stanley account to the seller. Again,
20 Rothwell’s Morgan Stanley account was there by virtue of the transfers from
21 AMPIC insurance premiums, or direct transfers from Sands, which eventually were
22 transferred from Rothwell’s Bermuda account. Again, Rothwell did not
23 compensate Sands, or any other Francis-owned entity, for the funds it needed to
24 purchase Lot No. 13B, and it did not transfer title of the property to Rothwell once
25 the purchase of Lot No. 13B was completed.

26 For these reasons, this factor of nominee status weighs in favor of the
27
28

1 Government.

2 2) Property put in the name of a nominee in anticipation of a suit
3 or occurrence of liabilities while the debtor continues to
4 exercise control over the property.

5 Francis has been involved with a myriad of legal actions, both civil and
6 criminal in nature. Francis was/is involved in several civil lawsuits that either
7 resulted in judgments against him or where judgments are still being sought. For
8 example, in August 2008, a judgment against plaintiff was entered for
9 \$2,838,356.00, in favor of Wynn Las Vegas, LLC.

10 Francis has been the subject of several criminal cases, from racketeering,
11 drug trafficking, and child pornography charges in Florida, to gambling debt
12 charges in Nevada, to the tax evasion and bribery offenses for which he pled guilty
13 to in this Court. The basis for the tax evasion convictions was Francis' failure to
14 report interest income generated upon Rothwell's Morgan Stanley account on his
15 tax returns. The cash transfers made to Rothwell were part of an overarching
16 scheme on the part of Francis to reduce his claimed tax liability. The vast majority
17 of the cash was subsequently transferred back to the United States where it
18 generated thousands of dollars of interest, none of which was claimed on Francis'
19 returns. The transfers were thus undertaken with the specific purpose of avoiding
20 Francis' federal income taxes for 2002 and 2003.

21 Mantra has also been subject to civil and criminal prosecution. In December
22 2006, Mantra was sentenced in the Northern District of Florida to a fine of \$1.6
23 million, and Francis, as Mantra's Chief Executive Officer, was sentenced to serve
24 32 hours of community service for a term of 30 consecutive months, stemming
25 from criminal violations of 18 U.S.C. § 2257. United States v. Mantra Films, Inc.,
26 5:06-cr-78-RS (N.D. Fla.). In this Court, Mantra has been permanently enjoined
27 from certain business activities under the Federal Trade Commission Act and the
28

1 Electronic Fund Transfer Act, and a judgement in the amount of \$1,089,627 has
2 been entered against it in the matter of United States v. Mantra Films, Inc., et al.,
3 CV 03-9184 RSWL (MANx).

4 The aforementioned cases serve as examples of on-going matters that put
5 Francis, Mantra, and/or Sands at risk, in personam or in rem. Moving millions off-
6 shore with the help of Rothwell was beneficial to Francis, Mantra and Sands, as it
7 kept assets out of the hands of potential creditors, but was still utilized, controlled,
8 and accessed by Francis for his benefit.

9 Thus, this factor on nominee status of Rothwell weighs in favor of the
10 Government. It is clear that Sands and Mantra acted in anticipation of litigation or
11 an anticipated liability of the IRS or any creditor of Francis, Sands or Mantra.

12 3) Close relationship between the debtor and the nominee

13 All ownership interests held by Rothwell can be traced back to Francis,
14 Sands and Mantra. The funds from which Rothwell purchased Lots Nos. 14 and
15 13B, as well as the funds which comprise Rothwell's Morgan Stanley account, can
16 be directly traced back to Sands and Mantra. The evidence shows that Rothwell is
17 nothing more than a funnel through which money passes to accounts and property
18 with a close relationship with Francis, Sands and Mantra.

19 There is also a strong and close relationship between Francis and Rothwell
20 through Francis' long-time personal attorney, Brian Rayment. Rayment and
21 Francis met through Rayment's relationship with Francis' parents, and have
22 continued a relationship for 20 years. Though licensed to practice in Oklahoma,
23 Rayment has served as Francis' personal attorney, the sole attorney for Sands,
24 Mantra, other "Girls Gone Wild" corporate entities, and the attorney for Rothwell,
25 The Francis Trust, Island Films, Summerland Holding, Casa Blanca de Punta Mita
26 S.A. de C.V. Rayment assisted with incorporating Sands and Mantra. Rayment
27
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1 appeared at depositions in this case as counsel for Rothwell, the Francis Trust and
2 its related entities, as well as appearing as the protector of the Francis Trust.

3 With respect to the Francis Trust in 1999, Rayment contacted Owen Foley,
4 an attorney in the Turks and Caicos Islands, for assistance in establishing the
5 Francis Trust. Rayment was involved in the review and selection of the trustee of
6 the Francis Trust, Hallmark Limited and Colin Chaffe. After such research,
7 Rayment reported his findings regarding the formation of the Trust with Francis.

8 The Francis Trust provides for the naming of a trustee, as well as a
9 “protector” of the Trust. Rayment is the protector of the Francis Trust, and Colin
10 Chaffe is its trustee. Many day-to-day decisions of the Trust can be handled by the
11 trustee, but the Trust provisions require that when the Trust needs to act and decide
12 certain specified activities, the trustee must acquire the permission of the protector
13 to carry out that business. For example, the Francis Trust trustee needs to have the
14 permission of the protector to exercise powers of appointment and advancement of
15 the trust, pay any portion of the capital of the trust fund to any of the beneficiaries,
16 exclude or include any beneficiary of the trust, and ignore any interest of any
17 beneficiary. If the trustee makes any decision without the protector where the
18 protector’s permission is needed, such action is null and void. In short, any vital
19 decision for the advancement of the Francis Trust needs Rayment’s approval.

20 When Brian Trowbridge was named as trustee of the Francis Trust,
21 according to Trowbridge, Rayment presented himself to Trowbridge not as the
22 protector of the Trust, but rather, as a representative of Francis.

23 Rayment was also the intermediary between Francis, Rothwell, and Crescent
24 Capital for the purchase of the land in Punta Mita and the improvement on the land.
25 Rayment brought the investment in Mexican property to the Trust after visiting the
26 area on a trip with Francis. Rayment suggested to Chaffe that buying the land in
27

1 Mexico would be a good investment for the Trust. Rayment, along with the
2 assistance of a Mexican attorney, established the corporation, Casablanca de Punta
3 Mita, S.A. de C.V., which owns the land on behalf of the Trust. Rayment
4 discussed setting up the Mexican corporation with Francis. During the time the
5 residence was being built, Rayment would communicate Francis' wishes regarding
6 the building of the home to the builder, mitigate disputes between Francis and the
7 builder, and assist in arranging for payment, either from Sands or Mantra.

8 Rayment was consulted regarding the execution of the contract between
9 Sands, Mantra and APMIC. Rayment found out about AMPIC from Francis, when
10 Francis asked Rayment to review the insurance policies. Rayment and Francis met
11 with the insurance representatives in Hawaii to review the contract and discussed
12 the tax deductibility of the premium payments.

13 When Francis was arrested in Florida, Rayment was the attorney who went
14 to Florida to assist him and arrange for his bail. Rayment spoke with Francis'
15 attorneys in Nevada regarding the case involving the Wynn Casino. Rayment has
16 given sworn testimony when Francis and Crescent Capital filed suit against each
17 other.

18 For all of these reasons, there exists a close relationship between Francis and
19 Rothwell, and the ability to do such is facilitated through Rayment. Rayment has
20 either established and/or legally represented all of the entities involved with
21 Rothwell. Rayment has an established relationship with Francis. As serving as the
22 Trust's protector, Rayment can instruct the Trust to carry out Francis' wishes, just
23 as he did in the AMPIC transaction and the building of the Punta Mita property.

24 This factor of nominee status weighs heavily in favor of the Government.

- 25 4) Retention of possession by the debtor; and
26 5) Continued enjoyment by the debtor of benefits of the property.

27 The millions transferred from Sands and Mantra established assets that

1 remain in the possession of Francis, and which benefits are enjoyed by Francis. It
2 was only until the IRS levied the funds in November 2009 that Francis ceased
3 “enjoyment” of the Rothwell Morgan Stanley account. Francis still “enjoys” the
4 benefit of the Punta Mita property.

5 Through a series of transfers, Sands and Mantra have laundered millions
6 through off-shore entities to establish the Rothwell Morgan Stanley account. By
7 the terms of the Francis Trust and its ownership of the shares of Rothwell, such
8 money was not accessible to Francis, unless and until Rayment, Francis’ personal
9 attorney and confidant, agreed for such funds to be distributed to the beneficiaries.
10 Such distribution was only matter of when Francis requested Rayment to make
11 such distribution. All of the funds that Sands and Mantra transferred off-shore and
12 deducted business expenses on the corporations’ income tax return also directly
13 benefitted Francis, as such were taken as false business expenses that reduced
14 corporate net income that flowed through to Francis’ personal tax return.

15 To date, Francis still enjoys the use of the Punta Mita property for his
16 personal benefit. Rothwell freely admits that Francis uses the property.
17 Correspondence between Francis, Rayment and Crescent Capital show that the
18 purchase of the land and the building of the estate were undertaken at Francis’
19 request and under his specific direction. The close coordination of these activities
20 underscores the control exerted by Francis over the use of plaintiff’s assets. The
21 land upon which the property sits was purchased with, again, funds from Sands and
22 Mantra that was transferred to Rothwell’s Bermuda bank account or Morgan
23 Stanley account. As for the 35,000 square-foot residence, such was built from tax-
24 free funds transferred directly from Sands and Mantra to the builder and deducted
25 from Mantra and Sands returns as false business expenses, again, reducing the
26 corporations’ income and, in turn, reducing Francis’ income and tax due and
27

1 owing.

2 For these reasons, this nominee factor weighs in favor of the Government.

3 6) Whether the parties to the transfer failed to record the
4 conveyance.

5 There is no question regarding the ownership of Lots No. 14 and 13B in
6 Punta Mita; title to such has been recorded in the name of Casablanca de Punta
7 Mita S.A. de C.V. , the ownership of the shares of the Mexican corporation can be
8 traced back to Rothwell.

9 Yet, Rothwell and Francis have blurred the line as to the ownership of the
10 35,000 square foot residence built upon the lots. Rayment brought the idea of
11 investing in the property to Chaffe as an investment for the Trust. Chaffe, on
12 behalf of Rothwell and Casablanca de Punta Mita S.A. de C.V., entered into the
13 contract with the builder in 2002. Rothwell alleges that the entire property is an
14 asset ultimately owned by Francis Trust and anyone who wants to use the property
15 needs to have permission of the trustee to do so.

16 However, Rothwell admits that Francis directed and controlled the design
17 and construction of the Mexican residence. Rothwell admits that it contributed to
18 no funds for the purpose of building the residence. Rothwell admits that Francis,
19 Sands, and Mantra use the property, but no rent has ever been collected from
20 Francis or his entities for such use. In fact, Rothwell admits that there is no written
21 rental agreement between Rothwell, the Trust, Francis, Sands or Mantra for the use
22 of the property. Rothwell does not pay the utilities, maintenance, insurance, or
23 other expenses for the Mexican property; such are paid by Francis and his entities.

24 In sum, neither Rothwell, the Trust, Francis, Sands nor Mantra have adhered
25 to the formalities one would expect them to adhere to in managing the Mexican
26 property, an "income-producing" property for the Trust. The lack of record
27 keeping regarding the ownership rights and responsibilities to the property raises

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1 serious questions about the lack of separation between Rothwell and Francis, Sands
2 and Mantra.

3 For these reasons, this factor of nominee status weighs in favor of the
4 Government.

5 **e) Conclusion**

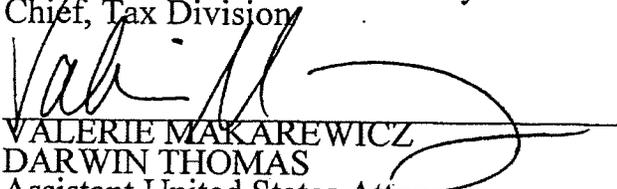
6 The evidence shows that 1) Rothwell paid no consideration to Francis,
7 Sands, and/or Mantra for the millions transferred to Rothwell from those entities;
8 2) transfers of cash to Rothwell was done in anticipation of liabilities of Francis,
9 Sands, and/or Mantra, 3) Rothwell and Francis, Sands, and Mantra have a close
10 relationship, either through their own actions or through those taken on behalf of
11 these entities by Rayment, 4) Rothwell maintains no records regarding the "rental"
12 of the Mexican property to Francis, Sands, and Mantra, 5) Francis, Sands, and
13 Mantra retain significant control over property of Sands and Mantra, and 5)
14 Francis, Sands, and Mantra continued to enjoy the benefit of the property of
15 Rothwell and held themselves out to be the owners of such property.

16 For these reasons, Rothwell is the nominee of Francis, Sands, and Mantra,
17 and the levy served by the IRS on November 6, 2009 that seized the funds in
18 Rothwell's Morgan Stanley account was not wrongful.

19
20 Respectfully submitted,

21 ANDRÉ BIROTTE JR.
22 United States Attorney
23 SANDRA R. BROWN
24 Assistant United States Attorney
25 Chief, Tax Division

26 DATED: 5/16/11

27 
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10 UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 12 WESTERN DIVISION
 13

14 ROTHWELL, LTD., a Cayman
Islands Corporation,

15 Plaintiff,

16 v.

17 UNITED STATES OF AMERICA,

18 Defendant.

) Case No. CV 10-479-RGK(FFMx)

) JOINT STATEMENT OF
) UNDISPUTED AND DISPUTED
) FACTS

) Pretrial Conference:

) Date: June 6, 2011

) Time: 9:00 a.m.

) Ctrm: 850

) Roybal U.S. Courthouse

) 255 East Temple St.

) Los Angeles, CA 90012

21
22 Pursuant to the Court's order, the parties submit the following Statement of
23 Undisputed and Disputed Facts.

24
25 Undisputed Facts

26 The following facts are undisputed and require no proof:

- 27 1. The Francis Trust indenture was drafted and created by Owen Foley, Attorney
 28 at Law and partner in the law firm of Misick & Stanbrook, Richmond House,

1 P.O. Box 127, Providenciales, Turks & Caicos Islands, B.W.I.;
2 <http://www.misickstanbrook.tc>.

3 2. Owen Foley, Esq. graduated from the University College of Dublin, Ireland,
4 with a degree of bachelor of civil law in 1978 and after that was educated at the
5 Law School of the Incorporated Law Society of Ireland in Dublin, where he
6 was admitted a solicitor of the High Court of Ireland in 1982, which is the
7 highest court in Ireland. Mr. Foley has been practicing and licensed to practice
8 law in the Turks and Caicos Islands, B.W.I. since April, 1988. Mr. Foley
9 considers himself to be an expert in Turks & Caicos trust law.

10 3. Hallmark Trust, Ltd., Prestige Place, Grace Bay Road, P.O. Box 656,
11 Providenciales, Turks & Caicos Islands, B.W.I., was selected to provide
12 Trustee services for The Francis Trust.

13 4. The Francis Trust was settled on May 24, 1999, by and between Joseph
14 Raymond Francis, Settlor, and Hallmark Trust Ltd., Trustee.

15 5. Pursuant to the terms of The Francis Trust, the Turks & Caicos Islands is the
16 trust's place of administration and its provisions are construed by the laws of
17 the Turks & Caicos Islands.

18 6. Pursuant to the provisions of The Francis Trust all power and discretion,
19 including decisions concerning investments and/or disbursements, is
20 determined at the sole discretion of the Trustee, with the exception of specified
21 powers noted within the Schedules of the Trust which need the permission of
22 the protector.

23 7. At its inception, Joseph Francis was the Settlor of The Francis Trust and the
24 designated Trustee was Hallmark Trust Limited. Hallmark Trust Limited is a
25 trust company with which Mr. Foley had done business prior to May 24, 1999.

26 8. Trustees are entitled to reimbursement in accordance with the terms and
27 conditions of The Francis Trust.

28 //

- 1 9. The Francis Trust has had two protectors: (1) Brian Rayment, Esq., an attorney
2 licensed to practice in Oklahoma; and (2) Pittsford, Ltd., a British Virgin
3 Islands Company.
- 4 10. Pursuant to the terms of the Francis Trust, the trustee needs the protector's
5 permission to pay any distribution to a beneficiary.
- 6 11. Pursuant to the terms of The Francis Trust, any disposition of funds is subject
7 to approval of The Francis Trust protector if the disposition exceeds \$10,000.
- 8 12. On May 2, 1999 and May 24, 1999, Settlor Joseph Francis provided a "Letter
9 of Wishes" to the Trustee, Hallmark Trust, Ltd.
- 10 13. The Francis Trust beneficiaries are Joseph Francis, his parents and children and
11 Oklahoma Film Holding Corporation, a non-profit corporation owned by
12 Joseph R. Francis.
- 13 14. The parties are unaware whether Joseph R. Francis presently has any children.
- 14 15. In 1991, Colin R. Chaffe ("Chaffe") and Nicola S. Jordan ("Jordan")
15 incorporated Hallmark Trust, Ltd., in the Turks & Caicos Islands.
- 16 16. Colin Chaffe became trustee of the trust and director of Rothwell, Ltd.
17 personally in 2010 when Hallmark Trust resigned as trustee and director of
18 Rothwell, Ltd.
- 19 17. Mr. Chaffe and Ms. Jordan are British citizens and are residents of the Turks
20 & Caicos Islands.
- 21 18. From June 9, 2000, to November 29, 2005, Chaffe and Jordan controlled,
22 directed and managed the operations, finances, assets and investment decisions
23 of Rothwell, Ltd.
- 24 19. According to Mr. Chaffe and Mr. Francis, neither has ever met the other.
- 25 20. On June 9, 2000, Colin Chaffe incorporated Rothwell Limited in the Cayman
26 Islands. One hundred percent (100%) of Rothwell, Ltd.'s shares are held by
27 Inceptre Holdings, Ltd., in trust for The Francis Trust.

28 //

- 1 21. On or about June 2, 2001, Chaffe and Jordan opened a Morgan Stanley (fka
2 Dean Witter) investment account for Rothwell, Ltd. in Irvine, California.
- 3 22. Inceptre Holdings, a Turks & Caicos Islands corporation, is Hallmark Trust,
4 Ltd.'s nominee company.
- 5 23. Inceptre Holdings, Ltd., was incorporated in the Turks & Caicos Islands on
6 March 5, 1992. The sole shareholders were and are Colin R. Chaffe (50
7 shares) and Nicola S. Jordan (50 shares).
- 8 24. Inceptre Holdings acted as director of Rothwell, Ltd., until 2003 when
9 Hallmark Trust Ltd. became the director of Rothwell, Ltd.
- 10 25. In 2001, Chaffe and Jordan opened a bank account for Rothwell, Ltd. at the
11 Bermuda Commercial Bank in Hamilton, Bermuda.
- 12 26. Beginning in 2001, Rothwell entered into various distribution and licensing
13 contracts with West Direct.
- 14 27. Funds were transferred from Rothwell's Bermuda bank account by wire to
15 Rothwell's Morgan Stanley account.
- 16 28. Chaffe and Jordan were signatories to Rothwell's Morgan Stanley account until
17 late 2005.
- 18 29. During 2002 Sands Media, Inc., a U.S. corporation all shares of which were
19 owned by Joseph Francis, wired \$1,950,000 to Rothwell's Bermuda bank
20 account.
- 21 30. During 2003 Sands Media, Inc., a U.S. Corporation all shares of which were
22 owned by Joseph Francis, wired \$8,461,020.00 to Rothwell's Bermuda bank
23 account.
- 24 31. Chaffe and Jordan sold 100% of their interests in Hallmark Trust, Ltd. to Brian
25 Trowbridge, a Canadian citizen, attorney and resident of the Turks & Caicos
26 Islands, B.W.I., who changed the name to Hallmark Bank and Trust, Ltd.
- 27 32. On November 29, 2005, Hallmark Bank and Trust, Ltd., P.O. Box 656,
28 Tropicana Plaza, Providenciales, Turks & Caicos Islands, B.W.I., became

1 director of Rothwell and continued to do so until March, 2010, when Hallmark
2 Bank and Trust, Ltd. resigned and Colin Chaffe was appointed Trustee of The
3 Francis Trust and Director of Rothwell, Ltd.

4 33. According to Brian Trowbridge, Brian Trowbridge never met Joseph Francis
5 nor spoke to him.

6 34. Trowbridge and Hallmark Bank and Trust, Ltd. directors and officers were
7 signatories on Rothwell's Morgan Stanley account.

8 35. From July 2001, through October 2008, John Welker was the broker
9 responsible for Rothwell's Morgan Stanley account.

10 36. Welker does not recall that Chaffe told Welker that he had spoken with Joseph
11 Francis or anybody acting on Joseph Francis' behalf.

12 37. Welker never discussed the Rothwell Morgan Stanley account with Joseph
13 Francis.

14 38. Joseph Francis did not have signatory authority on Rothwell, Ltd.'s Morgan
15 Stanley account.

16 39. In connection with the Internal Revenue Service's criminal investigation of
17 Joseph Francis, I.R.S. Special Agent Mark Jensen issued IRS summonses to
18 Morgan Stanley for information concerning Rothwell, Ltd.'s account in May
19 and July, 2006.

20 40. Brian Trowbridge stated that he was not advised of the summonses by either
21 the IRS or Morgan Stanley.

22 41. On April 11, 2007, Joseph Francis was indicted inter alia on two counts of tax
23 evasion (26 U.S.C. §7201) for 2002 and 2003 tax years.

24 42. On September 2, 2008, Michael Nahass, Complex Branch Manager for Morgan
25 Stanley, sent a letter to Brian Trowbridge and Rothwell, Ltd., requesting that
26 Rothwell, Ltd.'s account be transferred to another financial institution no later
27 than October 6, 2008, and further stated that no further deposits would be
28 accepted into the account.

1 43. IRS Special Agent Mark Jensen interviewed John Welker on August 17, 2006
2 concerning Rothwell's Morgan Stanley account and whether Joseph Francis was
3 involved with and/or controlled the Rothwell Morgan Stanley account.

4 44. According to Nahass, Morgan Stanley's September 2, 2008, letter did not
5 inform Rothwell that its account had been "red flagged" aka "frozen," which
6 meant to him "no money in, no money out."

7 45. According to Michael Nahass, Rothwell's account had been "frozen" by
8 Morgan Stanley's legal department prior to the time he began as Welker's
9 supervisor in June 2008.

10 46. On February 19, 2009, and on August 14, 2009, IRS Special Agent Mark Jensen
11 served subpoenas on Morgan Stanley for production of records on Rothwell's
12 Morgan Stanley account. Neither the IRS nor Morgan Stanley gave notice of
13 the 2009 IRS subpoenas to Rothwell, Ltd.

14 47. Other than the September 2, 2008, letter, Mr. Nahass did not recall ever having
15 any communications with Mr. Trowbridge.

16 48. Brian Stewart became the Morgan Stanley broker on the Rothwell account in
17 2009.

18 49. Stewart testified that Rothwell's account had been "red flagged," which meant
19 that no money could be paid out of the account, they could only take liquidating
20 orders.

21 50. Stewart testified that he did not know whether Morgan Stanley had given notice
22 to Trowbridge or anyone else on Rothwell's behalf that the account had been
23 red-flagged. Stewart does not recall any communications notifying Rothwell
24 that there would be no disbursements from the account.

25 51. Brian Stewart spoke 2 to 3 times on the telephone and via email with Brian
26 Trowbridge; he recalled talking to Mr. Trowbridge, who requested an updated
27 statement.

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1 52. Trowbridge sent a facsimile on December 1, 2009, and an email on December
2 21, 2009, to representatives at Morgan Stanley, advising that he would be
3 liquidating the account after the start of the new year.

4 53. Stewart did not discuss the IRS's levy on Rothwell's account with Trowbridge.

5 54. Stewart assumed that Morgan Stanley's legal department was handling
6 notification of the IRS levy to Trowbridge.

7 55. Stewart was involved with other Morgan Stanley accounts for Joseph Francis.

8 56. According to Stewart, Stewart never had any discussion with Joseph Francis
9 concerning the Rothwell account before the "nominee" levy on November 6,
10 2009, on Rothwell's account.

11 57. Following the levy, Stewart spoke to Joseph Francis several times, alone and
12 with his lawyer, who requested information about "time stamps" and a copy of
13 the levy. According to Stewart, Joseph Francis did not ask what Rothwell's
14 account balance was or for Rothwell's accounting statements.

15 58. On November 16, 2009, Stewart faxed a copy of the IRS levy on Rothwell,
16 Ltd.'s account to Joseph Francis.

17 59. On September 23, 2009, Joseph Francis agreed to plead guilty in his criminal
18 matter (Case No. 2:08-cr-00494-SJO), to two misdemeanor counts of filing a
19 personal income tax return and an amended personal income tax return for 2003
20 that were false as to a material matter in that both omitted from the Schedule B
21 the interest income earned on Rothwell, Ltd.'s Morgan Stanley account.

22 60. On November 6, 2009, Judge Otero of this Court accepted Joseph Francis'
23 guilty plea to inter alia two misdemeanor counts of filing false tax returns and
24 sentenced Joseph Francis according to the binding Plea Agreement (CR#465).
25 On or before that date, Francis paid in full all restitution, fines and assessments
26 required by the plea agreement.

27 61. A few hours later on November 6, 2009, IRS Revenue Officer Farrell Stevens
28 served a Notice of Levy on Morgan Stanley, for the tax liabilities owed by

1 Joseph R. Francis, on the grounds that Rothwell, Ltd. is Joseph R. Francis's
2 "nominee."

3 62. Initially, neither Hallmark Bank and Trust, Ltd., Rothwell, Ltd. nor Trowbridge
4 were advised that a levy had been served on Rothwell's Morgan Stanley
5 account. Trowbridge says he learned about the levy in early 2010.

6 63. Joseph Francis is the founder of Girls Gone Wild entertainment business and
7 the sole shareholder of two U.S. corporations, Sands Media, Inc. and Mantra
8 Films, Inc., which are engaged in producing, promoting, marketing and
9 distributing DVDs, infomercials, magazines, apparel and other items.

10 64. On March 3, 2008, Joseph Francis obtained a \$5 million dollar loan from
11 Washington Mutual Bank, by using Joseph Francis' personal Los Angeles
12 residence owned by Blue Horse Trading, LLC, as collateral.

13 65. On November 5, 2002, Blue Horse Trading, LLC purchased Joe Francis' Los
14 Angeles residence. The initial deposits for the purchase of the property were
15 made by Joseph Francis, but the final purchase amount of \$5,450,000 was paid
16 by Blue Horse Trading from a transfer it received from Joseph Francis' personal
17 account with Morgan Stanley.

18 66. Since Blue Horse Trading, LLC is a separate legal entity from Joseph Francis,
19 the property would not be immediately, or possibly ever, subject to an IRS lien.

20 67. On March 13, 2002, a \$1.030 million dollar payment was made from Rothwell's
21 Bermuda Commercial Bank account to fund the purchase of Lot #14; and (2)
22 on September 5, 2005 and September 12, 2005, the total of a \$1.023 million
23 dollar payment was made from Rothwell's Morgan Stanley account to fund the
24 purchase of Lot #13B, both of which are located in "Ranchos Punta Mita," in
25 the Municipality of Bahia de Banderas, State of Nayarit, Mexico.

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1 68. Chaffe made the decision to purchase the property in Mexico and set up the
2 Mexican corporation in consultation with the Protector of the Trust, Brian
3 Rayment. The Francis Trust protector, Brian Rayment, brought the investment
4 opportunity to Chaffe.

5 69. Morgan Stanley monthly and annual statements for Rothwell, Ltd.'s account
6 state that the only two disbursements from the Morgan Stanley account, from
7 July, 2001, to the date of the IRS levy (11/6/09) were the two disbursement
8 totaling \$1.023 million dollars on September 5, 2005 and September 12, 2005.

9 70. The \$1.023 million dollars involved two wire transfers on September 5, 2005
10 and September 12, 2005, to purchase Lot # 13B for Casa Blanca de Punta Mita,
11 S.A. de C.V.

12 71. Two disbursements were made from the Morgan Stanley account, which
13 occurred in 2005 for the purchase of Lot 13B in Mexico.

14 72. In 2002, Colin Chaffe, a principal of Hallmark Trust, Ltd., the Trustee of The
15 Francis Trust, retained Brian Rayment, Esq., to arrange for the establishment of
16 a Mexican corporation and the purchase of Lot #14; in 2005, acting in the same
17 capacities, Mr. Chaffe engaged Mr. Rayment to purchase Lot #13B for the
18 Mexican Corporation.

19 73. Island Films, Ltd. and Summerland Holdings, Ltd. are Turks and Caicos Islands
20 corporations, the shares of which are owned 100% by The Francis Trust, but
21 Island Films was once owned by Joseph Francis.

22 74. Casa Blanca is the owner and deed holder of Lot #13B.

23 75. Casa Blanca entered into a private purchase agreement to, and did purchase, Lot
24 #14, from Cantiles de Mita, S.A. de C.V., a Mexican corporation.

25 76. The foregoing acquisition of Lot 14 by Casa Blanca was conducted through
26 Stewart Title escrow and Stewart Title issued title insurance on Lot #14.

27 77. Stewart Title International provided title insurance to Casa Blanca on both Lots
28 13B and 14.

1 78. Joseph Francis directed and controlled the design and construction of the
2 premises and improvements made on Casa Blanca's Lot #14.

3 79. Mantra Films, Inc. and Sands Media, Inc. provided the funds to develop and
4 improve Casa Blanca's Lot #14 as follows: (1) during 2002 Mantra Films paid
5 \$1,002,141.50; (2) during 2002 Sands Media paid \$400,000.00; (3) during 2003
6 Mantra Films paid \$850,000.00; and (4) during 2003 Sands Media paid
7 \$3,076,070.02.

8 80. Joseph Francis, Sands Media, Inc. and Mantra Films, Inc. use Casa Blanca's
9 property.

10 81. Rothwell, Ltd. provided a little over \$2 million dollars for Casa Blanca to
11 purchase the two lots in Mexico. Mantra Films, Inc. and Sands Media, Inc.
12 provided \$5.3 million dollars to improve Casa Blanca's Lot #14.

13 82. On December 31, 2009, in compliance with the IRS nominee levy on Rothwell's
14 account, Morgan Stanley liquidated Rothwell's Morgan Stanley investment
15 account and surrendered the funds to the United States, as follows: (1)
16 December 31, 2009, Check #27603880 in the sum of nineteen million four
17 hundred twelve thousand four hundred twenty-seven dollars and twenty-one
18 cents (\$19,412,427.21); (2) January 4, 2010, Check #27603884 in the sum of
19 six hundred ninety thousand five hundred seventy one and twenty-one cents
20 (\$690,571.21); and (3) January 5, 2010, Check #27603887 in the sum of three
21 hundred one thousand six hundred thirty-nine dollars and seventy-nine cents
22 (\$301,639.79). Exhibit 11, MSSB 003393-3398.

23 83. On January 8, 2010, IRS District Counsel sent an e-mail to Morgan Stanley's
24 counsel confirming receipt of \$19,412,427.21 on January 5, 2010, \$690,571.21
25 on January 5, 2010 and \$301,630.79 on January 6, 2010.

26 84. For each of the calendar years 2002 and 2003 Sands Media, Inc., (Sands"), filed
27 a U.S. Income Tax Return for an S-Corporation, Form 1120-S, with the IRS
28 reporting its income for each respective year.

- 1 85. For each of the calendar years 2002 and 2003 Mantra Films, Inc. (“Mantra”),
2 filed a U.S. Income Tax Return for an S-Corporation, Form 1120-S, with the
3 IRS reporting its income for each respective year.
- 4 86. During 2002 and 2003 Mantra and Sands were wholly owned by Joseph Francis
5 (“taxpayer”).
- 6 87. As the owner of Mantra and Sands, the taxpayer reported the profits or losses
7 from the corporations directly on his U.S. Individual Income Tax Returns for
8 2002 and 2003.
- 9 88. In or about November 2002 Sands entered into an agreement with Asia Pacific
10 Mutual Insurance Company (“APMIC”) which states that APMIC would
11 provide Sands with certain insurance coverage for the period from November
12 16, 2002 to November 15, 2003, and references “Policy Number
13 S288628864046M.”
- 14 89. At or near the end of 2002 APMIC issued a Premium Invoice in the amount of
15 \$3,000,000 to “Sands Media, Inc., Joseph Francis” to be paid in “Installments -
16 \$250,000 per week beginning December 24, 2002,” referencing “Policy
17 Number S288628864046M.”
- 18 90. During the year 2003, between the dates of January 28, 2003 and June 20, 2003,
19 Sands made twelve \$250,000 payments, for a total of \$3,000,000 to APMIC’s
20 Bank of Hawaii account, number 0080-467036.
- 21 91. On its 2003 U.S. Income Tax Return for an S-Corporation Sands deducted ten
22 monthly accruals of \$250,000 each for the months ended January 31, 2003
23 through October 31, 2003, for a total of \$2,500,000, for insurance expenses for
24 the APMIC policy.
- 25 //
26 //
27 //
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1 92. In or about November 2002 Mantra entered into an agreement with Asia Pacific
2 Mutual Insurance Company ("APMIC") which states that APMIC would
3 provide Mantra with certain insurance coverage for the period from November
4 16, 2002 to November 15, 2003, and references "Policy Number
5 M28862886893F.

6 93. At or near the end of 2002 APMIC issued a Premium Invoice in the amount of
7 \$2,000,000 to "Mantra Films, Inc., Joseph Francis" to be paid in "Installments -
8 \$250,000 per week beginning December 24, 2002," referencing "Policy
9 Number M28862886893F.

10 94. During the year 2003, between the dates of January 28, 2003 and April 21,
11 2003, Mantra made eight \$250,000 payments, for a total of \$2,000,000 to
12 APMIC.'s Bank of Hawaii account, number 0080-367036.

13 95. On its 2003 U.S. Income Tax Return for an S-Corporation Mantra deducted ten
14 monthly accruals of \$166,666.67 each for the months ended January 31, 2003
15 through October 31, 2003, for a total of \$1,666,667, as insurance expenses for
16 the APMIC policy.

17 96. During the period from January 30, 2003 to July 25, 2003, APMIC made eleven
18 transfers totaling \$4,746,386 from its account at the Bank of Hawaii, number
19 0080-367036, to an Abbey National Bank account, number 0550722, for credit
20 to Schedule Company.

21 97. Schedule Company was a nominee company used by Colin Chaffe and
22 Hallmark Trust, Ltd., in carrying on the business activities of Hallmark Trust,
23 Ltd.

24 98. In August and September 2003, APMIC made two transfers totaling \$166,201
25 from its account at the Bank of Hawaii, number 0080-367036, to a Bermuda
26 Commercial Bank account, number 0011067329, for credit to Schedule
27 Company.

28 //

1 99. Between February 18, 2003 and August 4, 2003, eight fund transfers totaling
2 \$4,489,050 were made from Schedule Company into plaintiff's account number
3 068 00 040655 at Bermuda Commercial Bank in Hamilton, Bermuda.

4 100. Between December 4, 2002 and April 23, 2003, Sands made the following wire
5 transfers to plaintiff's account number 068 00 040655 at Bermuda Commercial
6 Bank:

Date	Amount
12/04/2002	\$ 500,000
12/13/2002	\$ 750,000
12/20/2002	\$ 700,000
01/31/2003	\$ 750,000
02/06/2003	\$ 750,000
02/07/2003	\$ 500,000
04/01/2003	\$ 750,000
04/04/2003	\$ 250,000
04/23/2003	\$ 5,461,020
Total	\$10,411,020

17 101. Between December 13, 2002 and November 12, 2003, Sands made the
18 following payments to Crescent Capital:

Date	Amount
12/13/2002	\$ 400,000
01/28/2003	\$ 400,000
02/25/2003	\$ 400,000
03/25/2003	\$ 400,000
04/17/2003	\$ 400,000
04/17/2003	\$ 50,000
05/19/2003	\$ 75,000
05/28/2003	\$ 400,000
06/19/2003	\$ 50,000

1	06/27/2003	\$ 200,000
2	07/07/2003	\$ 50,000
3	07/14/2003	\$ 50,000
4	07/21/2003	\$ 50,000
5	07/28/2003	\$ 50,000
6	08/04/2003	\$ 50,000
7	08/14/2003	\$ 100,000
8	08/20/2003	\$ 100,000
9	10/01/2003	\$ 200,000
10	10/22/2003	\$ 200,000
11	11/12/2003	\$ 100,000
12	11/21/2003	\$ 59,290
	Total	\$ 3,784,290

13 102. Sands accrued the payments of \$10,411,020 it made to plaintiff's Bermuda
 14 Commercial Bank account between December 4, 2002 and April 23, 2003, and
 15 \$3,784,290 of payments it made to Crescent Capital between December 13,
 16 2002 and November 21, 2003, as set forth in the two immediately preceding
 17 subparagraphs, and claimed the total of those expenditures, \$14,195,310, as
 18 "consulting" expenses on its 2002 U.S. Income Tax Return for an S
 19 Corporation.

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1 103. During March and July 2002 Mantra made the following payments by check to
 2 Crescent Capital which Mantra accrued in its records as expenses for
 3 professional services and deducted on its 2002 U.S. Income Tax Return for an
 4 S Corporation:

Date	Check No.	Amount
03/11/2002	4427	\$ 10,000
03/15/2002	4425	\$ 100,000
03/15/2002	4428	\$ 400,000
07/12/2002	4832	\$ 50,000
	Total	\$ 560,000

10 104. In 2002 Mantra made three payments to Casablanca de Punta Mita S.A. de C.V.,
 11 including two payments by check in the amounts of \$150,000 and \$250,000,
 12 and one wire transfer in the amount of \$43,141.50, which Mantra accrued in its
 13 records as expenses for "footage."
 14

15 105. On or about February 3, 2002, Joseph Francis provided Crescent Capital with
 16 a personal check for \$100,000 as a security deposit in connection with the
 17 purchase of Lot 14 at the Punta Mita development in Mexico.

18 106. Through an escrow that closed on or about April 10, 2002, Casa Blanca de
 19 Punta Mita S.A. de C.V. purchased Lot 14 at the Punta Mita development.

20 107. The purchase price for Lot 14 at the Punta Mita development was \$1,054,980,
 21 with \$1,030,000 of that amount paid by plaintiff and \$24,980 paid by Hallmark
 22 Trust Limited.

23 108. On or about September 13, 2005, Casa Blanca de Punta Mita S.A. de C.V.
 24 purchased Lot 13B at the Punta Mita development.

25 109. The cost to purchase Lot 13B at the Punta Mita development was
 26 \$1,023,023.65, which was paid by two wire transfers from plaintiff's account
 27 with Morgan Stanley in the amounts of \$323,023.65 on September 8, 2005, and
 28 \$700,000 on September 12, 2005.

1 110. During the period from May 10, 2002, to August 11, 2003, the following
 2 eighteen wire transfers were made from plaintiff's Bermuda Commercial Bank
 3 account into plaintiff's Morgan Stanley account, except that the transfer on
 4 October 30, 2002, was made from an account of Island Films, Ltd.

Date	Amount
05/10/2002	\$ 500,000
10/30/2002	\$ 299,980
10/31/2002	\$ 350,000
12/12/2002	\$ 499,980
12/19/2002	\$ 499,980
12/24/2002	\$ 499,980
02/04/2003	\$ 749,980
02/10/2003	\$ 749,980
02/12/2003	\$ 724,880
02/19/2003	\$ 887,220
03/10/2003	\$ 487,370
04/02/2003	\$ 674,970
04/22/2003	\$ 1,449,830
04/29/2003	\$ 5,000,000
05/06/2003	\$ 500,000
06/05/2003	\$ 449,810
07/21/2003	\$ 899,910
08/11/2003	\$ 224,910
Total	\$15,448,780

23 111. On April 11, 2007, a federal grand jury in the District of Nevada indicted
 24 Francis on two counts of tax evasion in violation of 26 U.S.C. § 7201 for
 25 taxable years 2002 and 2003. On September 23, 2009, in the case entitled
 26 United States v. Joseph R. Francis, CR 08-494-SJO (U.S.D.C., C.D. Ca.),
 27 plaintiff pled guilty to a three-count Information. Plaintiff admitted to two
 28 violations of 26 U.S.C. § 7207 with respect to the 2003 tax year, admitting that

1 he willfully filed his 2003 U.S. Individual Income Tax Return and his 2003
2 Amended U.S. Individual Income Tax Return knowing that the returns were
3 false as to a material matter in that they omitted interest income earned on the
4 Rothwell Limited Morgan Stanley account. On November 6, 2009, the Court
5 sentenced plaintiff.

6 112. On November 6, 2009, the IRS notified Francis that a determination had been
7 made that jeopardy existed with respect to the ability of the IRS to collect his
8 2001, 2002, and 2003 income tax liabilities. On the same day, the IRS levied
9 the accounts of Francis and Rothwell at Morgan Stanley, as the IRS claimed
10 that Rothwell was a nominee of Francis and that such funds held in both
11 accounts were in jeopardy of being moved out of the reach of the Government.
12

13 Disputed Facts

14 The following facts have been submitted by plaintiff and are disputed by
15 defendant:

16 113. Pursuant to the terms of The Francis Trust, once property is transferred to the
17 trust: (1), the trustee holds legal title of that property for the benefit of the
18 beneficiaries, (2) the Settlor (Joseph Francis) and/or other transferor(s) cannot
19 revoke the transfer(s), and (3) the property in the trust does not belong to the
20 Settlor and/or other transferor(s) once the property is transferred to the trust.

21 114. Pursuant to the terms of The Francis Trust the protector does not have authority
22 to direct the activities of the Trustee with respect to the management of the
23 trust.

24 115. As protector of The Francis Trust Mr. Rayment has never directed the Trustee
25 with respect to any investments by the Trust or by entities for which the trust
26 has an interest.

27 //

28 //

1 116. The Francis Trust cannot be invalidated *ex post facto* by wrongdoing. If the
2 Trustee does something contrary to the terms of the trust, it doesn't invalidate
3 the trust, but any such act(s) would constitute a breach of the trust.

4 117. Pursuant to the terms of The Francis Trust a beneficiary has no guaranteed right
5 that the Trustees will exercise their discretion in his or her favor and therefore
6 a beneficiary may receive nothing.

7 118. Pursuant to the terms of The Francis Trust fourth schedule "Excluded Persons,"
8 and Turks & Caicos Islands ("TCI") ordinance, including Section 61, if a
9 Settlor and/or other transferor transfers assets to a TCI trust and the Settlor
10 and/or other transferor was not insolvent at the time of transfer the trust cannot
11 be set aside at the instance of a creditor.

12 119. Joseph Francis has never owned or controlled, directly or indirectly, any interest
13 in Hallmark Trust, Ltd.

14 120. Joseph Francis has never owned or controlled, directly or indirectly, any interest
15 in Inceptre Holdings, Ltd.

16 121. Pursuant to Rothwell, Ltd.'s Memorandum of Association, Articles of
17 Association, and Minute Book, all discretion, power and control is vested in the
18 members and directors of the Rothwell corporation.

19 122. Rothwell, Ltd.'s shares are assets of The Francis Trust, but Rothwell's assets
20 do not belong to The Francis Trust. Rothwell has full discretion over its own
21 assets.

22 123. Joseph Francis never controlled, directed nor managed any of Rothwell's
23 corporate or financial affairs.

24 124. Joseph Francis never had signatory authority on Rothwell, Ltd.'s Bermuda
25 Commercial Bank account.

26 125. None of Joseph R. Francis's personal funds were ever transferred to nor
27 deposited in either Rothwell's Bermuda Commercial Bank account nor
28 Rothwell's Morgan Stanley account.

1 126. All funds deposited in Rothwell Ltd.'s Bermuda Commercial Bank account and
2 thereafter transferred to Rothwell's Morgan Stanley account came from other
3 U.S. and foreign corporate sources.

4 127. Neither Francis, Sands Media, Inc. nor Mantra Films, Inc. were insolvent at the
5 time of nor following monetary transfers to Rothwell, Ltd. and to contractors
6 to improve the property owned by Casa Blanca de Punta Mita, S.A. de C.V.

7 128. Chaffe and Jordan were not receiving directions from anyone on how to operate
8 the Bermuda Commercial Bank and Morgan Stanley accounts.

9 129. Joseph Francis never owned or controlled, directly or indirectly, any interest in
10 Hallmark Bank and Trust, Ltd., whose directors and officers were Brian
11 Trowbridge, Gregory Hurd and Colin Whittingham.

12 130. Welker testified that all investment decisions for Rothwell's Morgan Stanley
13 account were made by either Chaffe, Jordan, Trowbridge, or Hurd.

14 131. Welker did not have any discretion in managing Rothwell's account; Chaffe
15 made the decisions and controlled the account.

16 132. Welker never discussed the Rothwell Morgan Stanley account with Joseph
17 Francis.

18 133. Welker never discussed the Rothwell Morgan Stanley account with Brian
19 Rayment.

20 134. No explanation was provided in the letter for Morgan Stanley's request to
21 transfer the account.

22 135. Revenue Officer Stevens had no role in determining whether to allege that
23 Rothwell, Ltd. was or was not a nominee for Joseph Francis.

24 136. IRS Revenue Officer Ferrell Stevens reviewed records which confirm that
25 \$5,450,000 was transferred from Joseph Francis' personal Morgan Stanley
26 account to Blue Horse Trading, LLC to purchase Joseph Francis' personal Los
27 Angeles residence.

28 //

- 1 137. Joseph Francis never exercised control over Rothwell, Ltd.'s Morgan Stanley
2 account.
- 3 138. No distributions have been made by The Francis Trust, nor by any corporation
4 the shares of which are owned by The Francis Trust, including Rothwell, Ltd.,
5 to Joseph Francis or any other beneficiary of The Francis Trust.
- 6 139. Mr. Rayment caused the creation of Casa Blanca de Punta Mita, S.A. de C.V.
7 ("Casa Blanca"), a Mexican corporation, which was registered in the public
8 commercial registry of Guadalajara Jalisco on May 15, 2002, under commercial
9 file 14393-1.
- 10 140. Island Films, Ltd. and Summerland Holdings, Ltd. are Casa Blanca's
11 shareholders, each holding 25,000 shares of Casa Blanca.
- 12 141. Under Mexican law, Casa Blanca is an entity distinct and independent from its
13 shareholders.
- 14 142. None of Joseph Francis' personal funds were expended to develop and improve
15 Casa Blanca's Lots ##13B or 14.
- 16 143. Chaffe believed that Joseph Francis contributed to the improvement of the Casa
17 Blanca property because it would inure to the benefit of The Francis Trust.
- 18 144. As a matter of Mexican law Rothwell, Ltd., The Francis Trust, Sands Media,
19 Inc., Mantra Films, Inc. and Joseph Francis have no legal or beneficial interest
20 in Casa Blanca, Lots ## 13B and 14, nor in the improvements constructed on
21 Lot #14.
- 22 145. None of The Francis Trust's nor Rothwell's funds or assets were used to pay
23 any of Joseph Francis' nor any other beneficiary's personal expenses or
24 obligations.
- 25 //
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- 28 //

- 1 146. Settlement of The Francis Trust, incorporation of Rothwell, Ltd., incorporation
2 of Casa Blanca, purchases of the Mexico property and completion of the
3 improvements to the Mexico property all occurred from May 24, 1999, through
4 September, 2005, prior to the commencement of the IRS investigation of Joseph
5 Francis, which began in 2006.
- 6 147. Under oath on February 22, 2011, IRS Revenue Agent George Beas verified the
7 accuracy of Government Exhibits CR## 277-2 through 277-10 filed on July 24,
8 2009, in *United States v. Francis*, Case No. 2:08-cr-00494-SJO; CR ##277-2
9 through 277-10 summarize transfers of funds from Sands Media, Inc. and
10 Mantra Films, Inc. to various entities, including Rothwell, Ltd.
- 11 148. In his deposition taken in the case at bar on February 22, 2011, IRS Revenue
12 Agent Beas conceded that Joseph Francis did not admit that he was the
13 beneficial owner of Rothwell's Morgan Stanley account in the plea agreement,
14 contrary to Beas' earlier claim.
- 15 149. Under oath on February 22, 2011, IRS Revenue Agent Beas admitted that he
16 had not seen anything indicating that Joe Francis could access any of
17 Rothwell's financial accounts.
- 18 150. Under oath on February 22, 2011, IRS Revenue Agent Beas admitted that he
19 had not seen any evidence that supports the conclusion that Joseph Francis
20 controlled Mr. Chaffe.
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1 151. Revenue Agent Stevens admitted under oath on February 22, 2011, he did not
2 know that the "Ltd." in Rothwell, Ltd. meant that Rothwell was a corporation
3 and a legal entity separate from Joseph Francis.
4

5
6 Respectfully submitted,

7 ANDRÉ BIROTTE JR.
8 United States Attorney
9 SANDRA R. BROWN
10 Assistant United States Attorney
11 Chief, Tax Division

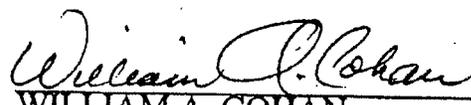
11 DATED: 5/10/11

12 
13 VALERIE MAKAREWICZ
14 DARWIN THOMAS
15 Assistant United States Attorneys

16 Attorneys for defendant
17 United States of America

18 WILLIAM A. COHAN, P.C.

19 DATED: May 13, 2011

20 By: 
21 WILLIAM A. COHAN

22 Attorney for plaintiff
23 Rothwell, Ltd.
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1 undersigned's staff would have prepared a "tickler" so that the Rule would not have been
2 overlooked, but my staff members have been scrambling to assist me and one has been coping
3 with the anxiety of a very ill spouse and, because the spouse is unable to drive, taking the spouse
4 to necessary medical appointments and treatments, in addition to assisting me. When my office
5 received Assistant U.S. Attorney ("AUSA") Darwin Thomas' e-mail on April 5, 2011, referenced
6 in the United States' ex-parte motion, I had just boarded a plane in Houston, Texas, to return to
7 San Diego for the Settlement Conference scheduled for the instant matter the following day, on
8 April 6, 2011. I immediately contacted AUSA Thomas but the conversation was necessarily
9 brief as the plane was preparing for departure.

10 Your undersigned has scheduled a "meet and confer" session with AUSA Darwin
11 Thomas at 10 A.M., April 11, 2011, by telephone. If such conference yields results warranting
12 any change(s) in the contents of the motion, supporting memorandum, accompanying statement
13 of undisputed material facts and/or evidence submitted in support of the motion, you undersigned
14 will move this Court for leave to file an amended motion, supporting memorandum, statement of
15 undisputed material facts and/or evidence – *mutatis mutandis*.. Counsel for the United States has
16 already stated the government will oppose any such motion.

17 If no change in the motion, etc. is warranted by the April 11, 2011, conference – which
18 was your undersigned's subconscious reason for failing to recall and comply with my obligations
19 imposed by L.R. 7-3 – Plaintiff will request that the Court excuse its untimely compliance with
20 L.R. 7-3 and require the United States to file a response identifying any and all evidence
21 purportedly creating a dispute of material fact, rather than waiting until the May 16, 2011,
22 deadline to serve its Memorandum of Facts and Law required by the Scheduling Order.

23 RESPECTFULLY SUBMITTED this 7th day of April, 2011.

24 WILLIAM A. COHAN, P.C.

25 By: s/ William A. Cohan

26 WILLIAM A. COHAN

27 Colo. Bar No. 7426; Calif. Bar No. 141804

28 P.O. Box 3448

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Rancho Santa Fe, CA 92067
(858) 832-1632; (858) 832-1845
Email: bill@williamacohan.com

Attorney for Plaintiff Rothwell, Ltd.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2011, I did cause the foregoing Rothwell, Ltd.' Opposition to Ex-Parte Application by Defendant United States of America to Strike Plaintiff's Motion for Summary Judgment to be served via the ECF system on the following:

AUSA Valerie Makarewicz, Esq., E-Mail: valerie.makarewicz@usdoj.gov

AUSA Darwin Thomas, Esq., E-Mail: darwin.thomas@usdoj.gov

By: s/ Alicia Cisneroz
Alicia Cisneroz, Legal Assistant

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(858) 832-1632; (858) 832-1845
Email: bill@williamacohan.com

Attorney for Plaintiff Rothwell, Ltd.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2011, I did cause the foregoing Amended Notice of Lodgment and attached: (1) Plaintiff Rothwell, Ltd.'s Amended Proposed Judgment on Rothwell, Ltd.'s Amended Motion for Summary Judgment; and (2) Plaintiff Rothwell, Ltd.'s Amended Proposed Statement of Uncontroverted Facts and Conclusions of Law to be served via the ECF system on the following:

AUSA Valerie Makarewicz, Esq., E-Mail: valerie.makarewicz@usdoj.gov
AUSA Darwin Thomas, Esq., E-Mail: darwin.thomas@usdoj.gov

By: *s/ Alicia Cisneroz*
Alicia Cisneroz, Legal Assistant

1 Plaintiff Rothwell, Ltd., filed it's Complaint on April 19, 2010 (CR #1). Discovery
2 closed on March 23, 2011. On April 5, 2011, Rothwell, Ltd. filed a Notice of Motion and
3 Motion For Summary Judgment along with supporting memorandum of points and authorities
4 and exhibits. Hearing was held on Monday, May 9, 2011, on Rothwell, Ltd.'s Notice of Motion
5 and Motion For Summary Judgment

6 The Court having considered Rothwell, Ltd.'s Notice of Motion, Memorandum of Points
7 and Authorities in Support of Motion for Summary Judgment, attached Exhibits, including
8 deposition testimony of witnesses Colin Chaffe, Owen Foley, Esq., Brian Trowbridge, Esq.,
9 Brian Rayment, Esq., I.R.S. Revenue Agent George Beas, I.R.S. Revenue Officer Ferrell
10 Stevens, current and former Morgan Stanley employees John Welker, Brian Stewart, and Michael
11 Nahass, and expert reports of Michael C. Durney, Esq., and David W. Connell, Esq., United
12 States' Opposition to Motion for Summary Judgment and arguments by the parties, the Court
13 hereby finds that there is no genuine issue as to any material fact and that Rothwell, Ltd. is
14 entitled to judgment as a matter of law. It is therefore,

15 ORDERED, that Summary Judgment in favor of Plaintiff Rothwell, Ltd. and against
16 Defendant United States is hereby GRANTED;

17 IT IS FURTHER ORDERED that judgment is awarded to Rothwell, Ltd. in the amount
18 of Twenty Million Four Hundred Four Thousand Six Hundred Twenty Nine Dollars and Twenty
19 One Cents (\$20,404,629.21) pursuant to 26 U.S.C. §7426(b)(2)(C)(i), plus interest as provided
20 by 26 U.S.C. §7426(g).

21 DATED: _____

BY THE COURT:

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23 _____
R. Gary Klausner
United States District Judge
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RESPECTFULLY SUBMITTED this 7th day of April, 2011.

WILLIAM A. COHAN, P.C.

By: *s/ William A. Cohan*
WILLIAM A. COHAN
Colo. Bar No. 7426; Calif. Bar No. 141804
P.O. Box 3448
Rancho Santa Fe, CA 92067
(858) 832-1632; (858) 832-1845
Email: bill@williamacohan.com

Attorney for Plaintiff Rothwell, Ltd.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2011, I did cause the foregoing Rothwell, Ltd.'s AMENDED Proposed Judgment on Rothwell, Ltd.'s AMENDED Motion for Summary Judgment to be served via the ECF system on the following:

AUSA Valerie Makarewicz, Esq., E-Mail: valerie.makarewicz@usdoj.gov
AUSA Darwin Thomas, Esq., E-Mail: darwin.thomas@usdoj.gov

By: *s/ Alicia Cisneroz*
Alicia Cisneroz, Legal Assistant

1 WILLIAM A. COHAN
WILLIAM A. COHAN, P.C.
2 California Bar No. 141804
Colorado Bar No. 7426
3 P.O. Box 3448
Rancho Santa Fe, CA 92067
4 (858) 832-1632; 832-1845 (FAX)
E-mail: bill@williamacohan.com

5 Attorney for Plaintiff
6 ROTHWELL, LTD.

7
8 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION

10 ROTHWELL, Ltd., a Cayman Islands
11 Corporation,

12 Plaintiff,

13 v.

14 UNITED STATES OF AMERICA,

15 Defendant.
16

) CASE NO. CV-10-479-RGK (FFMx)
)
) PLAINTIFF ROTHWELL, LTD.'S AMENDED
) PROPOSED STATEMENT OF
) UNCONTROVERTED FACTS AND
) CONCLUSIONS OF LAW
)
) DATE: Monday, May 23, 2011
) TIME: 9:00 A.M.
) CTRM: Room 850, United States Courthouse
) 255 E. Temple Street
) Los Angeles, CA
) [Hon. R. Gary Klausner]

17 Rothwell, Ltd., by and through counsel undersigned, respectfully submits it's Amended
18 Proposed Statement of Uncontroverted Facts and Conclusions of law:

19 UNCONTROVERTED FACTS

20 1. The Francis Trust indenture was drafted and created by Owen Foley, Attorney at
21 Law, of the law firm of Misick & Stanbrook, Richmond House, P.O. Box 127, Providenciales,
22 Turks & Caicos Islands, B.W.I.; <http://www.misickstanbrook.tc>, pursuant to the laws of the
23 Turks & Caicos Islands and Turks & Caicos Islands trust laws in particular. Exhibit 34, RT Foley
24 (11/18/10) 27:1-25, 53:3-61:18;¹ see also Exhibit 21, TCI Trust Ordinance TC00480-515.
25

26 ¹ See Exhibits attached to Rothwell, Ltd.'s Amended: (1) Notice of Motion and Motion
27 for Summary Judgment and (2) Memorandum in Support of Summary Judgment.

1 2. Settlement of the trust was completed on May 24, 1999, by and between Joseph
2 Raymond Francis, Settlor, and Hallmark Trust Ltd., Trustee. Exhibit 3, FT00001-21; Exhibit 34,
3 Foley at 25:18, 27:1-25. 38:10-15.

4 3. As set forth in the indenture creating it, the provisions of The Francis Trust are
5 construed and controlled by the laws of the Turks & Caicos Islands:

6 **PROPER LAW FORUM AND PLACE OF ADMINISTRATION**

7 2. (a) The proper law of this Settlement shall be that of the Turks & Caicos Islands and
8 all rights under this Settlement and its construction and effect shall be subject to
9 the jurisdiction of and construed according to the laws of the Turks & Caicos
10 Islands

11 (b) The courts of the Turks & Caicos Islands shall be the forum for the administration
12 of the trusts hereof

13 Exhibit 3, at FT00004; See also Exhibit 34, Foley at 36:7-20, 38:18-39:18.

14 4. Owen Foley, Esq. graduated from the University College of Dublin, Ireland with
15 a degree of bachelor of civil law in 1978 and after that educated at the Law School of the
16 Incorporated Law Society of Ireland in Dublin, where he was admitted a solicitor of the High
17 Court of Ireland in 1982, which is the highest court in Ireland. Exhibit 34, Foley at 7:14-8:22. In
18 1985 Mr. Foley was admitted to practice law in the State of Victoria in Australia. Exhibit 34,
19 Foley at 9:8-10:17. Mr. Foley has been practicing and licensed to practice law in the Turks and
20 Caicos Islands, B.W.I. since April, 1988. Exhibit 34, Foley at 12:15-15:25. In November, 1998,
21 Mr. Foley became and continues to be a partner in the law firm of Misick & Stanbrook Exhibit
22 34, Foley at 17:2-20:18.

23 5. Mr. Foley considers himself to be an expert in Turks & Caicos trust law. Exhibit
24 34, Foley at 41:21-43:10, 44:25-45:7, 45:18-23, 46:2-6, 46:18-47:12

25 6. The Francis Trust was drafted for the purpose of creating and did create an
26 irrevocable discretionary trust, whereby all power and discretion, including *inter alia* decisions
27 concerning investments and/or disbursements, is vested in the Trustee(s), viz. any and all
28 disbursement(s) to any beneficiary is determined at the sole discretion of the Trustee(s) and no

1 beneficiary has any right to demand nor any legal means to force the Trustee(s) to make any
2 distribution during the Trust Period. *See* Exhibit 3, at FT00003 at ¶¶(I)(i)-(iv) and (m)(i)-(ii), at
3 FT00004-05 at ¶¶2.(c)(i), 4.(a)-(e), at FT00005-06 at ¶¶5(b)-(e), at FT00008 at ¶¶13(a) and (b),
4 and at FT00013-19 (Trustee’s powers set forth in detail in “The First Schedule”); Exhibit 34,
5 Foley at 59:19-60:11, 60:15-61:6, 65:9-23, 66:4-13, 72:16-73:3, 73:13-17, 73:19-74:25.

6 7. Joseph Francis is the Settlor of The Francis Trust and the Trustee designated in
7 the irrevocable settlement is Hallmark Trust Limited. Exhibit 3, at FT00002; Exhibit 34, Foley at
8 31:2-11; Exhibit 33, RT Colin Chaffe (11/17/10) 40:22-41:22. Hallmark Trust Limited is a trust
9 company with which Mr. Foley had done business prior to May 24, 1999. Exhibit 34, Foley at
10 31:18-20.

11 8. Pursuant to the terms of The Francis Trust, once property is transferred, the trustee
12 holds legal title for the benefit of the beneficiaries and the Settlor (Joseph Francis) cannot revoke
13 the transfer. Exhibit 34, Foley at 39:19-41:15.

14 9. Trustees are paid for their services from the trust fund, not the Settlor. The funds
15 in the trust do not belong to the Settlor once those funds are transferred to the trust. Exhibit 34,
16 Foley at 78:12-21. Trustees are entitled to reimbursement in accordance with the Trust
17 company’s published terms and conditions for the trust business in force. Trustees cannot simply
18 appropriate whatever amount of the trust assets he or she wishes for services performed. Exhibit
19 34, Foley at 86:25-87:8, 87:25-88:17; Exhibit 39, RT Trowbridge (11/19/10) 111:11-19.

20 10. The Francis Trust has two protectors: (1) Brian Rayment, Esq., an attorney
21 licensed to practice in Oklahoma; and (2) Pittsford, Ltd., a British Virgin Islands Company.
22 Exhibit 34, Foley at 105:10-16, 108:18-109:11, 110:7-25, 111:1-8; Exhibit 36, RT Brian
23 Rayment (2/25/11) 44:8-20.

24 11. Distributions are subject to approval of The Francis Trust protector if the
25 distributions exceed \$10,000. Exhibit 34, Foley at 99:7-16; Exhibit 36, Rayment at 44:21-45:2.

26 12. The Francis Trust protector does not have authority to direct the activities of the
27

1 Trustee with respect to the management of the trust. Exhibit 36, Rayment at 45:3-6.

2 13. As protector of The Francis Trust Mr. Rayment has never directed the Trustee
3 with respect to any investments by the Trust or by entities in which the trust has an interest.
4 Exhibit 36, Rayment at 45:7-12.

5 14. Distribution to a beneficiary by the Trustee is null and void unless done with the
6 consent of the protector. Exhibit 34, Foley at 100:17-101:8, 102:6-12, 116:3-20.

7 15. The Francis Trust cannot be invalidated *ex post facto* by wrongdoing. If the
8 Trustee does something contrary to the terms of the trust, it doesn't invalidate the trust, but any
9 such act(s) would constitute a breach of the trust. Exhibit 34, Foley at 117:18-118:4.

10 16. The Francis Trust beneficiaries are Joseph Francis ("Francis"), his parents and
11 children and Oklahoma Film Holding Corporation. Exhibit 3, at FT00020 at "The Third
12 Schedule;" Exhibit 34, Foley at 51:19-52:18.

13 17. Pursuant to the terms of The Francis Trust a beneficiary has no guaranteed right
14 that the Trustees will exercise their discretion in his or her favor and therefore a beneficiary may
15 receive nothing. Exhibit 34, Foley at 80:12-82:23; Exhibit 39, Trowbridge at 114:9-16.

16 18. Pursuant to the terms of The Francis Trust fourth schedule "Excluded Persons,"
17 and Turks & Caicos Islands ("TCI") ordinance Section 61, if a Settlor transfers assets to a TCI
18 trust and the Settlor was not insolvent at the time of transfer the trust cannot be set aside at the
19 instance of a creditor. Exhibit 21, at TC00513; Exhibit 34, Foley at 53:3-55:8, 56:12-57:16,
20 57:20-58:5, 59:3-6.

21 19. As a matter of Turks & Caicos law, The Francis Trust beneficiaries, including
22 Joseph Francis, have no vested interest in the trust and, thus, a creditor, even if the creditor had a
23 judgment, could not attach any interest of any beneficiary -- the creditor has no better position to
24 make a claim than the beneficiary who owes the debt. Exhibit 34, Foley at 61:8-18, 64:20-65:1.

25 20. Owen Foley recommended several Turks & Caicos trust companies to provide the
26 services of Trustee for The Francis Trust. Hallmark Trust, Ltd., Prestige Place, Grace Bay Road,
27

1 P.O. Box 656, Providenciales, Turks & Caicos Islands, B.W.I., was selected to provide Trustee
2 services for The Francis Trust. Exhibit 34, Foley at 31:8-33:6, 35:14-25, 36:2-6, 37:9-15, 38:3-5;
3 Exhibit 33, Chaffe at 43:2-44:7; see also Exhibit 3, at FT00001-00002.

4 21. On May 24, 1999, Settlor Joseph Francis provided a "Letter of Wishes" to the
5 Trustee, Hallmark Trust, Ltd. Exhibit 18, OF00096-97; Exhibit 34, Foley at 144:17-145:1,
6 146:10-24. With respect to the "Letter of Wishes," Mr. Foley testified:

7 FOLEY: When someone establishes a discretionary trust of this type, as I mentioned
8 earlier, there is a leap of faith for them because they're giving material
9 assets to a trustee, who has very broad powers and discretions. And they
10 often like some comfort, as to how the trustee, when exercising powers
11 and discretions, they have a material manner in which they can limit the
12 powers or discretions by appointing a protector. They themselves cannot
13 limit [the Trustee], And the letter of wishes is intended as something
14 else to give a Settlor comfort. Now the trustee has no obligation to pay
15 any attention to the letter of wishes. It has no legal effect whatsoever. It's
16 not legally binding. All it is, is an earnest wish addressed to a trustee as to
17 how he might exercise his discretions. And that's always made clear to
18 the client. So it is what it is.

19 Exhibit 34, Foley at 147:7-148:6; see also Exhibit 33, Chaffe at 255:1-257:23.

20 22. In 1991, pursuant to the laws of the Turks & Caicos Islands, Colin R. Chaffe
21 ("Chaffe") and Nicola S. Jordan ("Jordan") incorporated Hallmark Trust, Ltd., in the Turks &
22 Caicos Islands to provide statutory Trustee services for trusts established in the Turks & Caicos
23 Islands. Exhibit 33, Chaffe at 14:4-25, 15:20-16:24, 17:1-25, 18:16-23, 19:9-25, 20:2-25, 22:3-
24 25; Exhibit 34, Foley at 32:9-20, 32:14-33:6.

25 23. Mr. Chaffe and Ms. Jordan are British citizens and residents of the Turks &
26 Caicos Islands. Exhibit 33, Chaffe at 7:8-10, 19:14-20:1

27 24. At all relevant times, the Trustee, Hallmark Trust, Ltd., a Turks & Caicos Islands
28 corporation, through its directors and officers directed and controlled the operations, finances,
assets and investment decisions of The Francis Trust. Exhibit 33, Chaffe at 20:5-21:21; 231:1-7;
Exhibit 39, Trowbridge at 24:20-26:14, 29:16, 50:15-22.

25 25. Joseph Francis has never owned or controlled, directly or indirectly, any interest
26 in Hallmark Trust, Ltd. Exhibit 33, Chaffe at 22:1-7.

1 26. Mr. Chaffe never met Mr. Francis. Exhibit 33, Chaffe at 42:23-43:6.

2 27. On June 9, 2000, Colin Chaffe incorporated Rothwell Limited ("Rothwell") in
3 the Cayman Islands. Exhibit 19, RL 00001-00080. One hundred percent (100%) of Rothwell
4 shares are held by Inceptre Holdings, Ltd., in trust for The Francis Trust. Inceptre Holdings, a
5 Turks & Caicos Islands corporation, is Hallmark Trust, Ltd.'s nominee company. Exhibit 33,
6 Chaffe at 29:4-20, 62:3-17, 79:13-80:15, 122:5-23, 129:6-14, 130:9-131:21.

7 28. Inceptre Holdings, Ltd., was incorporated in the Turks & Caicos Islands on March
8 5, 1992. The sole shareholders were and are Colin R. Chaffe (50 shares) and Nicola S. Jordan
9 (50 shares). Exhibit 5, IH 00001-27; Exhibit 33, Chaffe at 125:12-127:5.

10 29. Inceptre Holdings is Rothwell's corporate director; Chaffe and Jordan are the
11 owners, directors and officers of Inceptre Holdings. Exhibit 23, US002669-2670.

12 30. Joseph Francis has never owned or controlled, directly or indirectly, any interest
13 in Inceptre Holdings, Ltd. Exhibit 33, Chaffe at 125:11-128:5.

14 31. Inceptre Holdings acted as director of Rothwell, Ltd., until 2003 when Hallmark
15 Trust Ltd. became the director. Exhibit 33, Chaffe at 127:14-131:4, 132:1-18, 133:1-13.

16 32. Joseph Francis never owned or controlled, directly or indirectly, any interest in
17 Rothwell, Ltd. *See* Rothwell, Ltd.'s Memorandum of Association, Articles of Association, and
18 Minute Book which show that Mr. Francis does not own nor control, nor did he have the
19 authority to control, any aspect of Rothwell, Ltd. Instead, all discretion, power and control is
20 vested in the members and directors of the Rothwell corporation. Exhibit 19, RL00001-80;
21 Exhibit 33, Chaffe at 67:18-70:15.

22 33. Rothwell, Ltd.'s shares are assets of The Francis Trust, but Rothwell's assets do
23 not belong to The Francis Trust. Rothwell has full discretion over its own assets. Exhibit 34,
24 Foley at 119:2-124:21; Exhibit 33, Chaffe at 66:8-23, 67:1-8, 68:7-25, 71:3-14, 71:22-72:10,
25 76:6-22, 77:4-13.

26 34. Joseph Francis never controlled, directed nor managed any of Rothwell's
27
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1 corporate or financial affairs. Instead, from June 9, 2000, to November 29, 2005, Chaffe and
2 Jordan controlled, directed and managed at their sole discretion all operations, finances, assets
3 and investment decisions of Rothwell, Ltd. Exhibit 33, Chaffe at 84:3-11, 85:17-87:17, 90:17,
4 90:9-92:22, 109:10-111:13, 141:20-142:11, 144:3-9, 148:18-149:10, 150:22-151:8, 164:1-19,
5 166:16-168:25.

6 35. In 2001 Chaffe and Jordan opened a bank account for Rothwell, Ltd. at the
7 Bermuda Commercial Bank in Hamilton, Bermuda. Joseph Francis never had signatory authority
8 on this bank account. Exhibit 22 , at US002598-002619 and Exhibit 23, at US002620-2737;
9 Exhibit 33, Chaffe at 144:24-145:2, 149:16-150:9, 161:8-164:4.

10 36. Beginning in 2001, Rothwell entered into various distribution and licensing
11 contracts with West Direct. Exhibit 33, Chaffe at 99:9-21, 101:6-102:7, 103:3-104:24, 105:2-
12 106:2.

13 37. On or about July 2, 2001, Chaffe and Jordan opened a Morgan Stanley account in
14 Irvine, California. Exhibit 7, MSSB 003229-3253; Exhibit 33, Chaffe at 85:23-87:17, 88:5-12,
15 168:3-15.

16 38. None of Joseph R. Francis' personal funds were ever transferred to nor deposited
17 in either Rothwell's Bermuda Commercial Bank account nor Rothwell's Morgan Stanley
18 account.

19 39. All funds deposited in Rothwell Ltd.'s Bermuda Commercial Bank account and
20 Rothwell's Morgan Stanley account came from other U.S. and foreign corporate sources. For
21 example, during 2002 Sands Media, Inc., a U.S. corporation, wired \$1,950,000. to Rothwell's
22 Bermuda bank account and during 2003 Sands Media, Inc. wired \$8,461,020.00 to Rothwell's
23 Bermuda bank account. Exhibit 29, at CR #277-5, *U.S. v. Joseph R. Francis, Case No. 2:08-cr-*
24 *00494-SJO* (C.D. CA).

25 40. At the direction of Chaffe and/or Jordan funds were transferred from Rothwell's
26 Bermuda bank account by wire to Rothwell's Morgan Stanley account. Exhibit 33, Chaffe at
27

1 109:10-111:13, 166:21-168:25; see also Exhibit 25, at CR# 277-9.

2 41. Chaffe and Jordan controlled Rothwell's Morgan Stanley account until late 2005.
3 Exhibit 33, Chaffe at 88:23-89:19, 168:1-25, 195:14-25, 247:18-248:11.

4 42. Chaffe and Jordan were not receiving directions from anyone on how to operate
5 the Bermuda Commercial Bank and Morgan Stanley (fka Dean Whitter) accounts. Exhibit 33,
6 Chaffe at 168:23-169:5.

7 43. Chaffe and Jordan sold 100% of their interests in Hallmark Trust, Ltd. to Brian
8 Trowbridge, a Canadian citizen, attorney and resident of the Turks & Caicos Islands, B.W.I.,
9 who changed the name to Hallmark Bank and Trust, Ltd.. Exhibit 33, Chaffe at 22:10-23:7,
10 24:22-27:10; Exhibit 39, Trowbridge at 14:20-23, 15:4-6.

11 44. On November 29, 2005, Hallmark Bank and Trust, Ltd., P.O. Box 656, Tropicana
12 Plaza, Providenciales, Turks & Caicos Islands, B.W.I., assumed control of Rothwell's financial
13 affairs and continued to do so until March, 2010, when Hallmark Bank and Trust, Ltd. resigned
14 and Colin Chaffe was appointed Trustee of The Francis Trust and Director of Rothwell, Ltd.
15 Exhibit 33, Chaffe at 27:7-21, 43:13-44:12, 47:22-48:9, 50:21-51:14, 54:12, 97:15-98:13;
16 Exhibit 39, Trowbridge at 19:6-21:3, 96:18-99:14, 106:2-20.

17 45. Joseph Francis never owned or controlled, directly or indirectly, any interest in
18 Hallmark Bank and Trust, Ltd., whose directors and officers were Brian Trowbridge, Gregory
19 Hurd and Colin Whittingham. Exhibit 39, Trowbridge at 19:6-21:3, 42:9-43:8, 43:22-44:3.

20 46. Brian Trowbridge never met Joseph Francis nor spoke to him. Exhibit 39,
21 Trowbridge at 26:15-27:3.

22 47. Trowbridge and Hallmark Bank and Trust, Ltd. directors and officers took control
23 of Rothwell's Bermuda Commercial Bank account and the Morgan Stanley account and took no
24 directions with respect to the accounts from anyone. Exhibit 39, Trowbridge at 23:2-10, 25:2-17,
25 34:1-25, 35:7-36:14, 47:17-48:17, 50:10-22, 51:22-52:18, 71:3-9, 77:3-25, 81:11-23, 83:17-
26 84:25, 133:8-21.

1 48. From July, 2001, through October, 2008, John Welker (“Welker”) was the broker
2 responsible for Rothwell’s Morgan Stanley account. Exhibit 40, John Welker (2/23/11) 12:8-16,
3 18:3-13, 90:9-91:3; Exhibit 33, Chaffe at 89:13-19.

4 49. Welker testified that all investment decisions for Rothwell’s Morgan Stanley
5 account were made by either Chaffe, Jordan, Trowbridge, or Hurd. See Welker’s notes Exhibit
6 16, MSSB 003580-3583; Exhibit 40, Welker at 26:18-25, 27:11-28:7, 28:18-21, 28:24-29:25,
7 30:12-31:2, 31:11-13, 35:13-24, 36:2-7, 37:9-22, 38:24-39:2, 41:25-42:1, 43:2-3, 47:3-48:5,
8 50:19-51:2, 51:5-7, 61:22-24, 64:24-65:8, 65:11-16, 66:14-21, 67:1-6, 68:8-24, 69:1-12, 71:21-
9 72:7.

10 50. Welker testified that he did not have any discretion in managing Rothwell’s
11 account and that Chaffe was making the decisions and controlled the account. Exhibit 40, Welker
12 at 33:13-18, 35:13-24, 36:2-7, 42:19-43:3, 47:25-48:5.

13 51. Chaffe never said that he had spoken with Joseph Francis or anybody acting on
14 Joseph Francis’ behalf. Exhibit 40, Welker at 43:4-7.

15 52. Welker recalled that Brian Trowbridge was an authorized signer on the account
16 and that he was one of the new people authorized on the account. Exhibit 40, Welker at 61:22-
17 24, 64:24-65:8, 68:14-24; see also Exhibit 13, MSSB 003466-3480.

18 53. Welker never discussed the Rothwell Morgan Stanley account with Joseph
19 Francis. Exhibit 40, Welker at 111:12-19, 144:14-16; see also Welker’s notes Exhibit 16,
20 MSSB 003580-3583.

21 54. Welker never discussed the Rothwell Morgan Stanley account with Brian
22 Rayment. Exhibit 40, Welker at 144:2-13, 144:17-24, 150:21-24.

23 55. Joseph Francis was not authorized to have any involvement in Rothwell’s Morgan
24 Stanley account. Exhibit 7, at MSSB 003229-3253; and Exhibit 17, MSSB 003934-3937.

25 56. In connection with the Internal Revenue Service’s criminal investigation of
26 Joseph Francis, I.R.S. Special Agent Mark Jensen issued IRS summonses to Morgan Stanley for
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1 information concerning Rothwell, Ltd.'s account in February, May and June, 2006. Neither
2 Rothwell, Ltd., Hallmark Bank & Trust, Ltd., nor Brian Trowbridge were advised of the
3 summonses by either the IRS or Morgan Stanley. Exhibit 40, Welker at 117:6-11; Exhibit 39,
4 Trowbridge at 58:14-59:23, 65:14-66:6.

5 57. IRS Special Agent Mark Jensen interviewed John Welker on August 17, 2006 and
6 again after October, 2008, concerning Rothwell's Morgan Stanley account and Joseph Francis'
7 involvement and control *vel non*. Exhibit 40, Welker at 96:8-97:25, 99:20-25, 100:1-20, 104:23-
8 25, 107:12-25, 108:2-3, 109:2-12, 109:16-17, 110:14-20, 111:1-19, 112:3-23, 112:25-114:6;
9 Exhibit 15, MSSB 003548 and Exhibit 12, MSSB 003410.

10 58. On April 11, 2007, Joseph Francis was indicted on two counts of tax evasion (26
11 U.S.C. §7201) for 2002 and 2003 tax years.

12 59. On September 2, 2008, Michael Nahass, Complex Branch Manager for Morgan
13 Stanley sent a letter to Brian Trowbridge and Rothwell, Ltd., requesting that Rothwell, Ltd.'s
14 account be transferred to another financial institution no later than October 6, 2008. The letter
15 further stated:

16 As of this time and going forward until your account transfers out of Morgan Stanley,
17 Morgan Stanley will accept no further deposits into your account.

18 Exhibit 14, MSSB 003547; Exhibit 35, RT Michael Nahass (2/24/11) 10:7-21, 20:7-21:9

19 60. No explanation was provided for Morgan Stanley's request to transfer the
20 account. Exhibit 39, Trowbridge at 103:3-17.

21 61. Morgan Stanley's September 2, 2008, letter did not inform Rothwell that it's
22 account had been "Red Flagged" aka "frozen," which meant "no money in, no money out."
23 Exhibit 35, Nahass at 18:22-19:8.

24 62. According to Michael Nahass, Rothwell's account had been "frozen" by Morgan
25 Stanley's legal department prior to the September 2, 2008, letter to Rothwell, Ltd. Exhibit 35,
26 Nahass at 19:1-15.

1 63. Other than the September 2, 2008, letter, Mr. Nahass did not recall ever having
2 any communications with Mr. Trowbridge. Exhibit 35, Nahass at 22:5-8.

3 64. On February 19, 2009, and on August 14, 2009, IRS Special Agent Mark Jensen
4 served subpoenas on Morgan Stanley for production of records on Rothwell's Morgan Stanley
5 account. As with the 2006 IRS summonses neither the IRS nor Morgan Stanley gave notice of
6 the subpoenas to Rothwell, Ltd.

7 65. Brian Stewart became the Morgan Stanley broker on the Rothwell account in
8 2009. Exhibit 38, RT Brian Stewart (2/23/11) 14:10-20.

9 66. Stewart testified that Rothwell's account had been "red flagged," which meant
10 that no money could be paid out of the account, they could only take liquidating orders. Exhibit
11 38, Stewart at 17:16-25, 19:5-20:24. Stewart was unaware whether Morgan Stanley had given
12 notice to Trowbridge or anyone else on Rothwell's behalf that the account had been red-flagged.
13 Exhibit 38 Stewart at 21:1-11. Stewart never saw any communications notifying Rothwell that
14 there would be no disbursements from the account. Exhibit 38, Stewart at 22:17-21.

15 67. Brian Stewart had limited contact with Brian Trowbridge; he recalled talking to
16 Mr. Trowbridge, who requested an updated statement. Exhibit 38, Stewart at 16:8-12.

17 68. Trowbridge sent two emails to Morgan Stanley, on December 1, 2009, and on
18 December 21, 2009, advising that he would be liquidating and transferring the account in 2010.
19 Exhibit 6, MS0001-00004.

20 69. Stewart did not recall discussing the IRS's levy on Rothwell's account with
21 Trowbridge. Exhibit 38, Stewart at 17:13-14, 34:20-24. Stewart assumed that Morgan Stanley's
22 legal department was handling notification of the IRS Levy to Trowbridge. Exhibit 38, Stewart at
23 35:5-10.

24 70. Stewart was involved with other Morgan Stanley accounts for Joseph Francis.
25 Exhibit 38, Stewart at 37:24-38:9.

26 71. Stewart never had any discussion with Joseph Francis concerning the Rothwell
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1 account before the “nominee” levy on November 6, 2009, on Rothwell’s account. Exhibit 38,
2 Stewart at 29:2-15, 35:11-37:16, 38:10-39:24, 41:20-22.

3 72. Following the levy, Stewart spoke to Joseph Francis and his lawyer, who
4 requested information about “time and stamp dates” and a copy of the levy. Exhibit 38, Stewart
5 at 38:10-42:9. Joseph Francis did not ask what Rothwell’s account balance was or for
6 Rothwell’s accounting statements. Exhibit 38, Stewart at 43:4-6.

7 73. On November 16, 2009, Stewart faxed a copy of the IRS levy on Rothwell’s
8 account to Joseph Francis. Exhibit 10, MSSB 003390-3392; Exhibit 38, Stewart at 38:20-25.

9 74. On September 23, 2009, Joseph R. Francis agreed to plead guilty in his criminal
10 matter (Case No. 2:08-cr-00494-SJO), to two misdemeanor counts of filing a personal income
11 tax return and an amended personal income tax return for 2003 that were false as to a material
12 matter in that both omitted from the Schedule B interest income earned on the Rothwell Morgan
13 Stanley account. See Exhibit 26, Plea Agreement, CR #465.

14 75. On November 6, 2009, Judge Otero of this Court accepted Mr. Francis’ plea to the
15 two misdemeanor counts of filing a false tax return and sentenced him according to the binding
16 Plea Agreement (CR#465). On or before that date, Francis paid in full all restitution, fines and
17 assessments required by the plea agreement.

18 76. A few hours later on November 6, 2009, IRS Revenue Officer Ferrell Stevens
19 served a Notice of Levy on Morgan Stanley, for the tax liabilities allegedly owed by Joseph R.
20 Francis, on the grounds that Rothwell, Ltd. is Joseph R. Francis’ “nominee.” Exhibit 9,
21 MSSB003380-3389.

22 77. Neither Hallmark Bank and Trust, Ltd., Rothwell, Ltd. nor Trowbridge were
23 advised that a levy had been served on Rothwell’s Morgan Stanley account. Trowbridge learned
24 about the levy in early 2010. Exhibit 39, Trowbridge at 30:23-31:6, 120:17-23, 122:7-25, 123:2-
25 6, 126:7-127:10.

26 78. The IRS’s criminal investigation established that Joseph Francis is the founder of
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1 *Girls Gone Wild* entertainment business and was the sole shareholder of two successful high
2 income producing U.S. corporations, Sands Media, Inc. and Mantra Films, Inc., which are
3 engaged in producing, promoting, marketing and distributing DVDs, infomercials, magazines,
4 apparel and other items. See, e.g. Exhibit 25, (Government Exhibits) CR#277-2 through 277-10
5 (*U.S. v. Francis*, Case No. 2:08-cr-00494-SJO).

6 79. On March 3, 2008, while Joseph Francis was in jail pending trial on the
7 Indictment (2:08-cr-00494-SJO) and needed funds to post a bond and pay legal fees, a \$5 million
8 dollar loan was obtained from Washington Mutual Bank. Joseph Francis' Los Angeles residence
9 was used as collateral. See attached hereto Exhibit 27, Declaration of IRS Revenue Agent George
10 Beas filed on 1/08/2010 in *Francis v. U.S.*, Case No. 2:09-cv-09449-RGK-FFM (jeopardy
11 assessment action), CR #31 at ¶15 which states:

12 On March 3, 2008, pursuant to a Grant Deed where no transfer tax was paid, Blue Horse
13 Trading granted title to his personal residence to plaintiff. On the same day, with title for
14 the personal residence in his name, plaintiff and Washington Mutual Bank recorded a
15 Deed of Trust for a promissory note, wherein plaintiff borrowed \$5 million and used the
16 personal residence as collateral for the loan. Attached hereto and marked Exhibit A is a
17 redacted copy of the Deed of Trust....

18 80. Beas was the government's case agent and expert summary witness in *U.S. v.*
19 *Francis*, Case No. 2:08-cr-00494-SJO (C.D. CA). Exhibit 32, RT Beas (2/22/11)106:2-23.

20 81. With respect to the \$5 million dollar loan, Joseph Francis declared under penalty
21 of perjury at ¶4 in pertinent part:

22 ... The property transfer which occurred in March 2008 was done while I was incarcerated
23 and was handled by my lawyers. It was done for the purposes of posting a bond in my
24 criminal case and to pay attorneys representing me in ongoing litigation and handling the
25 defense of my criminal case. The property was transferred from Blue Horse Trading,
26 LLC ("Blue Horse") to me in order to meet lender requirements.

27 Exhibit 29, Declaration of Joseph R. Francis filed on 1/12/10 in *Francis v. U.S.*, *supra*, CR #37.

28 82. With respect to Joseph Francis' personal residence, Beas declared at ¶14:

On November 5, 2002, Blue Horse Trading purchased plaintiff's personal residence in
Los Angeles. The initial deposits for the purchase of the property were made by plaintiff
[Joseph Francis], but the final purchase amount of \$5,450,000 was paid by Blue Horse
Trading from a transfer it received from [Joseph Francis's] personal account with Morgan

1 Stanley.

2 Exhibit 27.

3 83. IRS Revenue Officer Ferrell Stevens testified that he reviewed records which
4 confirm that \$5,450,000 was transferred from Joseph Francis' personal account at Morgan
5 Stanley to Blue Horse Trading, LLC to purchase the residence. Exhibit 37, RT Ferrell Stevens
6 (2/22/11) 46:8-47:3,

7 84. The IRS's criminal investigation of Joseph Francis and Rothwell's Bermuda
8 Commercial Bank and Morgan Stanley accounts established that Joseph Francis never exercised
9 control over Rothwell, Ltd.'s Morgan Stanley account.

10 85. The IRS's criminal investigation established that no distributions were made by
11 Rothwell, Ltd. to Joseph Francis.

12 86. No distributions were ever made to Joseph Francis nor any other beneficiary of
13 The Francis Trust; all were and are merely "discretionary beneficiaries" who may never benefit
14 from The Francis Trust. Exhibit 39, Trowbridge at 111:8-112:5, 114:9-16.

15 87. The IRS' criminal investigation established that: (1) on March 13, 2002, a \$1.030
16 million dollar distribution was made from Rothwell's Bermuda Commercial Bank account to
17 fund the purchase of Lot #14; and (2) on September 5, 2005 a \$1.023 million dollar distribution
18 was made from Rothwell's Morgan Stanley account to fund the purchase of Lot #13B, both of
19 which are located in the "Ranchos Punta Mita," in the Municipality of Bahia de Banderas, State
20 of Nayarit, Mexico. See Exhibit 25, at CR #277-6; Exhibit 32, Beas at 63:12-64:25; Exhibit 33,
21 Chaffe at 88:23-89:4, 89:23-91:21, 249:4-24.

22 88. Chaffe made the decision to purchase the property in Mexico and set up the
23 Mexican corporation. The Francis Trust protector, Brian Rayment, brought the investment
24 opportunity to Chaffe. Exhibit 33, Chaffe at 90:9-92:22, 141:8-142:11, 147:21-149:10, 247:21-
25 248:11; Exhibit 36, Rayment at 47:15-18, 48:25-49:19, 85:6-21.

26 89. Morgan Stanley monthly statements for Rothwell, Ltd.'s account establish and
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1 verify that the only distribution from the Morgan Stanley account, from July, 2001 to November
2 6, 2009 – the day IRS’ levy was served -- was the distribution of \$1.023 million dollars on
3 September 5, 2005. See Exhibit 32, Beas at 42:3-15 confirming that before November 6, 2009,
4 only one withdrawal was made from the Morgan Stanley account -- in 2005 -- for the purchase of
5 a lot in Mexico; Exhibit 40, Welker at 112:3-23, 112:25-114:6.

6 90. Colin Chaffe, a principal of Hallmark Trust, Ltd. acting as the Trustee of The
7 Francis Trust, retained Brian Rayment, Esq., to arrange for the establishment of a Mexican
8 corporation and the purchases of Lot ## 13 B and 14. Exhibit 33, Chaffe at 143:8-22; Exhibit 36,
9 Rayment at 46:1-55:7, 56:6-57:9, 77:10-78:1.

10 91. Mr. Rayment caused the creation of Casa Blanca de Punta Mita, S.A. de C.V.
11 (“Casa Blanca”), which was registered in the public commercial registry of Guadalajara Jalisco
12 on May 15, 2002, under commercial file 14393-1. See Exhibit 30, David Connell, Esq. Expert
13 Witness Report at p. 4.

14 92. Island Films, Ltd. and Summerland Holdings, Ltd. are Casa Blanca’s
15 shareholders, each holding 25,000 shares. Exhibit 30, Connell Report at p. 8; Exhibit 33, Chaffe
16 at 93:17-27.

17 93. Island Films, Ltd. and Summerland Holdings, Ltd. are Turks and Caicos Islands
18 corporations, the shares of which are owned 100% by The Francis Trust. See Exhibit 4, IF00001-
19 44 and Exhibit 20, SH00001-54; see also Exhibit 34, Foley at 126:10-25, 127:4-130:23; Exhibit
20 33, Chaffe at 29:21-30:5, 31:21-32:23.

21 94. Under Mexican law, Casa Blanca is an entity distinct and independent from its
22 shareholders. Exhibit 30, Connell Report at p. 5.

23 95. Casa Blanca is the owner and deed holder of Lot #13B. Exhibit 30, Connell
24 Report at p. 6.

25 96. Casa Blanca entered into a private purchase agreement to, and did purchase, Lot
26 #14, from Cantiles de Mita, S.A. de C.V., a Mexico corporation which had merged with Club de
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1 Yates Costa Bandera, S.A. de C.V. and Puerto Mita, S.A. de C.V., which assigned the interests
2 of Club de Yates Costa Bandera, S.A. de C.V. to Casa Blanca. See Exhibit 2, CB00470-487.

3 97. Although the foregoing transaction was conducted through Stewart Title escrow
4 and Stewart Title issued title insurance on Lot #14, a defect exists in Casa Blanca's title to Lot
5 #14 because a Deed to Casa Blanca was not recorded. See Exhibit 1, CB00463-469 and
6 CB00488 -510. According to the laws of Mexico, Club de Yates Costa Bandera, S.A. de C.V. is
7 the owner of Lot #14. The defect in Casa Blanca's title to Lot #14 cannot be resolved without
8 further legal action. See Exhibit 30, Connell's Report at pp.6-8 and 11.

9 98. The IRS' criminal investigation established that Stewart Title International
10 provided title insurance to Casa Blanca on both Lots 13B and 14. Exhibit 24, US003029-3093.

11 99. Joseph Francis directed and controlled the design and construction of the premises
12 and improvements on Casa Blanca's Lot #14. Exhibit 36, Rayment at 36:23-37:4, 78:15-80:21,
13 83:21-84:23, 91:18-93:25.

14 100. The IRS criminal investigation established that none of Joseph Francis' personal
15 funds were expended to develop and improve Casa Blanca's Lots ##13B or 14. Instead, The IRS
16 criminal investigation established that Mantra Films, Inc. and Sands Media, Inc. provided the
17 funds to develop and improve Casa Blanca's Lot #14: (1) during 2002 Mantra Films paid
18 \$1,002,141.50; (2) during 2002 Sands Media paid \$400,000.00; (3) during 2003 Mantra Films
19 paid \$850,000.00; and (4) during 2003 Sands Media paid \$3,076,070.02. See Exhibit 25, at CR
20 #277-7; See also Exhibit 32, Beas at 42:1-43:6; 43:9-22; 44:1-9.

21 101. Joseph Francis, Sands Media, Inc. and Mantra Films, Inc. use Casa Blanca's
22 property. Their use of the property is at the discretion of the Trustee. There is no lease from
23 Casa Blanca on its property, nor from the Francis Trust nor any of the corporations owned by the
24 Francis Trust to anyone. Exhibit 33, Chaffe at 92:23-95:15.

25 102. Chaffe believed that Joseph Francis contributed to the improvement of the Casa
26 Blanca property because it would inure to the benefit of The Francis Trust. Exhibit 33, Chaffe at
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1 248:18-249:2; Exhibit 36, Rayment at 81:7-23.

2 103. As a matter of Mexican law Rothwell, Ltd., The Francis Trust, Sands Media, Inc.,
3 Mantra Films, Inc. and Joseph Francis have no legal or beneficial interest in Casa Blanca, Lots
4 ## 13B and 14, nor in the improvements constructed on Lot #14. Exhibit 30, Connell Report at
5 pp. 9-11.

6 104. Agent Beas verified the accuracy of Government Exhibits CR## 277-2 through
7 277-10 filed on July 24, 2009, in *U.S. v. Francis, supra*. Exhibit 32, Beas at 30:3-18; 31:5-25;
8 32:1-21; 33:2-33:18; 39:6-40:4.

9 105. Agent Beas filed a Declaration in Joseph Francis' Jeopardy Assessment matter in
10 this Court (*Francis v. U.S.*, Case No. 2:09-cv-09449-RGK-FFMx) on January 8, 2010, in which
11 he testified in pertinent part at ¶4:

12 Although the account at Morgan Stanley is held in the name of Rothwell Limited,
13 plaintiff [Joseph Francis] *admitted that he is the beneficial owner of that account when he*
14 *pled guilty to two criminal counts that charged plaintiff with fraudulently omitting*
interest income from the Rothwell Limited account on his original and amended tax
returns for 2003....

15 See Exhibit 27, Beas Declaration, CR #31 (emphasis added).

16 106. In his deposition taken in the case at bar on February 22, 2011, IRS Revenue
17 Agent Beas conceded that Joseph Francis did not admit that he was the beneficial owner of
18 Rothwell's Morgan Stanley account in the plea agreement. Exhibit 32, Beas at 98:1-100:5.

19 107. IRS Revenue Agent Beas admitted that he had not seen anything indicating that
20 Joe Francis could access any of Rothwell's financial accounts. Exhibit 32, Beas at 59:22-25;
21 60:1-61:7.

22 108. IRS Revenue Agent Beas admitted that he had not seen any evidence that supports
23 the conclusion that Joseph Francis controlled Mr. Chaffe. Exhibit 32, Beas at 61:16-22.

24 109. During Mr. Beas' 2/22/11 deposition (Exhibit 32) the following colloquy
25 occurred at 77:23-79:3:

26 MR. COHAN: What is the evidence that you have seen to support your conclusion
27 that Joe Francis controlled Rothwell?
28

1 MR. BEAS: The control that he had is that he made payments. They were
2 transferred to the Rothwell account, and those payments came back
3 to the Rothwell Morgan Stanley account. There was no – these
payments were taken as a deduction on his income tax return, and
ended up back in the Morgan Stanley account.²

4 MR. COHAN. Right. But I'm asking you what evidence there is that Mr. Francis
5 controlled that Morgan Stanley account. You just described the
6 flow of funds from the S Corporation to a different entity. And I'm
7 asking you the question: What evidence do you have that once they
were received by this other entity, Mr. Francis controlled those
funds?

8 MR. BEAS: Because there were checks that he made out that were wired for
9 those payments, and those payments came back, and those monies
10 that he – that were in the Morgan Stanley account was his money.

11 MR. COHAN: That's just saying that it's his because it's his. What's the
12 evidence that it's his, referring to Mr. Francis?

13 MR. THOMAS: I'm going to object, and I'm going to direct him not to answer this
14 any further. He's described the evidence this afternoon.

15 110. On November 6, 2009, IRS Revenue Officer Ferrell Stevens served the "nominee"
16 levy on Rothwell's account at Morgan Stanley. Exhibit 9, MSSB003380-3389; Exhibit 37,
17 Stevens at 14:17-25.

18 111. Revenue Officer Stevens had no role in determining whether Rothwell was or was
19 not a nominee for Joseph Francis. Exhibit 37, Stevens at 18:15-19:3.

20 112. Revenue Officer Stevens filed a Declaration in Mr. Francis' Jeopardy Assessment
21 matter in this Court on January 8, 2010, which states in ¶3:

22 I checked real property records and found no matching records that [Joseph Francis]
23 owned any real property. I checked real property records using addresses known to be
24 associated with [Joseph Francis], and found that these properties were either no longer
owned by [Joseph Francis], or in the instance of [Joseph Francis'] personal residence, had
been transferred to Blue Horse Trading, LLC, and had a substantial \$5 million mortgage,
leaving the property with minimal or no equity. **Since Blue Horse Trading, LLC is a
separate legal entity from [Joseph Francis], the property would not be immediately (or**

25 ² Although the sources of the payments to Rothwell were Sands Media, Inc. and Mantra
26 films Inc., they are Subchapter S Corporations. As Beas explained, for tax purposes, an S
27 Corporation is a corporation that is a "flow-through entity" such that the profits and losses of that
28 S Corporation are reported on the shareholder's individual return. Exhibit 32, Beas (2/22/11)
50:4-12.

1 *possibly ever) subject to an IRS lien.*

2 See Exhibit 28, *Francis v. U.S.*, Case No. 2:09-cv-09449-RGK-FFM, CR# 31. At his deposition
3 February 22, 2011, in the instant case, Mr. Stevens reaffirmed his averment emphasized above.
4 Exhibit 37, Stevens at 32:7-17; 33:2-15.

5 113. Revenue Agent Stevens testified that he did not know that the “Ltd.” in Rothwell,
6 Ltd. meant that Rothwell was a corporation and a legal entity separate from Joseph Francis.
7 Exhibit 37, Stevens at 34:6-35:5.

8 114. On December 31, 2009, in compliance with the IRS nominee levy on Rothwell’s
9 account Morgan Stanley liquidated Rothwell’s Morgan Stanley investment account and
10 surrendered the funds to the United States, as follows: (1) December 31, 2009, Check
11 #27603880 in the sum of nineteen million four hundred twelve thousand four hundred twenty-
12 seven dollars and twenty-one cents (\$19,412,427.21); (2) January 4, 2010, Check #27603884 in
13 the sum of six hundred ninety thousand five hundred seventy one and twenty-one cents
14 (\$690,571.21); and (3) January 5, 2010, Check #27603887 in the sum of three hundred one
15 thousand six hundred thirty-nine dollars and seventy-nine cents (\$301,639.79). Exhibit 11,
16 MSSB 003393-3398.

17 115. On January 8, 2010, IRS District Counsel sent an e-mail to Morgan Stanley’s
18 counsel confirming receipt of \$19,412,427.21 on January 5, 2010, \$690,571.21 on January 5,
19 2010 and \$301,630.79 on 1/6/2010. Exhibit 8, MSSB 003369-3371; Exhibit 37, Stevens at
20 24:19 and 25:3-10. 28:4-23, 29:7-30:23, and 31:5-8 (verifying receipt of Rothwell’s funds
21 pursuant to the nominee levy).

22 WHEREFORE, Plaintiff Rothwell, Ltd. prays for entry of an order granting summary
23 judgment in favor of Plaintiff Rothwell, Ltd., for the wrongful nominee levy served on
24 Rothwell’s Morgan Stanley account and awarding Plaintiff Rothwell, Ltd. judgment in the
25 amount of \$20,404,629.21 plus interest as provided by law.

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1 **CONCLUSIONS OF LAW**

2 Plaintiff Rothwell has demonstrated that as a matter of Turks and Caicos law it is the sole
3 legal and equitable owner of the investment account maintained at securities broker Morgan
4 Stanley upon which the Internal Revenue Service (“IRS”) served a levy on November 6, 2009, to
5 collect the alleged tax liabilities of Joseph Francis on the basis that Rothwell is a “nominee” of
6 Joseph Francis. *Flores v. U.S.*, 51 F.2d 1169, 171 (1977); *Dalton v. CIR*, 135 T.C. No. 20, 2010
7 WL 3719274 (U.S. Tax Ct. 2010). Rothwell has further demonstrated that under the laws of the
8 Turks & Caicos Islands and Cayman Islands, B.W.I. Joseph Francis does not own any interest in
9 The Francis Trust, Rothwell, Ltd. or Rothwell’s Morgan Stanley account and, thus, has no
10 property or rights to property in The Francis Trust, Rothwell, Ltd. nor Rothwell’s Morgan
11 Stanley account. *Dalton v. CIR, supra; In re Bass*, 171 F.3d 1016, 1028 (5th Cir. 1999); *Wilson v.*
12 *U.S.*, 140 B.R. 400, 404 (N.D. TX 1992).

13 The uncontroverted facts establish that Joseph Francis did not exercise control over The
14 Francis Trust, Rothwell, Ltd. or Rothwell’s Morgan Stanley account. Consequently, the United
15 States cannot establish the essential element of control, i.e. that Rothwell, Ltd. was Joseph
16 Francis’ nominee nor that Rothwell, Ltd. held the Morgan Stanley investment account as
17 nominee for Joseph Francis. *Flores v. U.S., supra* 551 F.2d at 1175; *Oxford Capital Corp. v.*
18 *U.S.*, 211 F.3d 280, 283-84 (5th Cir. 2000); *Dalton v. CIR, supra*, at 2010 WL 3719274 at *9.

19 At the time of the IRS levy on Morgan Stanley and subsequent transfer to the IRS of the
20 liquidated proceeds, the IRS knew that: (1) Francis was not and had never been an authorized
21 signatory on Rothwell’s Morgan Stanley account; and (2) Rothwell, Ltd. was a separate and
22 distinct legal Cayman Islands corporation formed in 2000. Likewise, at the time of the levy on
23 Morgan Stanley the IRS had no evidence that Francis controlled the Morgan Stanley account nor
24 the signatories on the Morgan Stanley account. The IRS also knew that although Francis is taxed
25 on the interest income from Rothwell’s Morgan Stanley account pursuant to the Controlled
26 Foreign Corporations rules set out at Section 951 *et seq.* of the Internal Revenue Code, the

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2011, I did cause the foregoing Rothwell, Ltd.' AMENDED Proposed Statement of Uncontroverted Facts and Conclusions of Law to be served via the ECF system on the following:

AUSA Valerie Makarewicz, Esq., E-Mail: valerie.makarewicz@usdoj.gov
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By: s/ Alicia Cisneroz
Alicia Cisneroz, Legal Assistant

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 5
 6 Attorney for Plaintiff
 ROTHWELL, LTD.

7
 8 UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 9 WESTERN DIVISION

10	ROTHWELL, Ltd., a Cayman Islands	)	CASE NO. CV-10-479-RGK (FFMx)
11	Corporation,)	
12	Plaintiff,	)	PLAINTIFF ROTHWELL, LTD.'S <u>AMENDED</u>
13	v.	)	NOTICE OF MOTION AND MOTION
14	UNITED STATES OF AMERICA,	)	FOR SUMMARY JUDGMENT
15	Defendant.	)	DATE: Monday, May 23, 2011
16		)	TIME: 9:00 A.M.
		)	CTRM: Room 850, United States Courthouse
		)	255 E. Temple Street
		)	Los Angeles, CA
		)	[Hon. R. Gary Klausner]

17 **PLEASE TAKE NOTICE** that on Monday, May 23, 2011 at 9:00 A.M. or as soon
 18 thereafter as this matter may be heard in the Courtroom of the Honorable R. Gary Klausner,
 19 United States District Judge, Courtroom 850, United States Courthouse, 255 East Temple Street,
 20 Los Angeles, California, Plaintiff Rothwell, Ltd., by and through undersigned counsel, will and
 21 does hereby move the Court for summary judgment in favor of Plaintiff and against the
 22 Defendant United States pursuant to Rule 56(a) and (c)(2), F.R.Civ.P., on the issue of the Internal
 23 Revenue Service's ("IRS") wrongful levy as nominee for Joseph R. Francis served on November
 24 6, 2009, on Plaintiff's account maintained at the office of securities broker Morgan Stanley, 8001
 25 Irvine Center Drive, 8th Floor, Irvine, CA 92618, and the IRS's demand for and subsequent
 26 liquidation and surrender by Morgan Stanley of the liquidation proceeds to the United States in
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1 the sum of \$20,404,629.21 pursuant to that levy. Plaintiff seeks judgment in the amount of
2 \$20,404,629.21 plus interest as provided by law.

3 This Motion is not made following the conference of counsel pursuant to L.R. 7-3 due to
4 the inadvertent error of undersigned counsel, who has scheduled a “meet and confer” session
5 with opposing counsel Assistant U.S. Attorney Darwin Thomas to begin at 10 A.M. April 11,
6 2011, by telephone. If such conference yields results warranting any change(s) in the contents of
7 the motion, supporting memorandum, accompanying statement of undisputed material facts
8 and/or evidence submitted in support of the motion, your undersigned will move this Court for
9 leave to file an amended motion, supporting memorandum, proposed statement of
10 uncontroverted facts and conclusions of law and proposed judgment – *mutatis mutandis*.
11 Counsel for the United States has already stated the government will oppose any such motion.

12 If no change in the motion, etc. is warranted by the conference April 1, 2011 – which was
13 your undersigned’s subconscious reason for failing to recall and comply with the obligations
14 imposed by L.R. 7-3 – Plaintiff will request that the Court excuse its untimely compliance with
15 L.R. 7-3 and require the United States to file a response identifying any and all evidence
16 purportedly creating a dispute of material fact, rather than waiting until the May 16, 2011,
17 deadline to serve its Memorandum of Facts and Law required by the Scheduling Order.

18 This Motion is based upon Rule 56, F.R.Civ.P. and the: (1) Amended Memorandum of
19 Points and Authorities filed herewith; (2) all pleadings on file in this case; (3) all exhibits filed
20 herewith, including deposition testimony of Colin Chaffe, Brian Trowbridge, Esq., Brian
21 Rayment, Esq., I.R.S. Revenue Agent George Beas, I.R.S. Revenue Officer Ferrell Stevens, John
22 Welker, Brian Stewart, Michael Nahass, Tony Maddelina, and Joseph R. Francis; (4) Expert
23 Reports of Michael C. Durney, Esq., David W. Connell, Esq., and deposition testimony of fact
24 and expert witness Owen Foley, Esq. -- all of which show that there is no genuine issue as to any
25 material fact and that Rothwell, Ltd. is entitled to judgment as a matter of law:

26 WHEREFORE, Plaintiff Rothwell, Ltd. prays for entry of an order granting summary
27

1 judgment in favor of Plaintiff Rothwell, Ltd., for the wrongful nominee levy served on
2 Rothwell's Morgan Stanley account and awarding Plaintiff Rothwell, Ltd. judgment in the
3 amount of \$20,404,629.21 plus interest as provided by law.

4 RESPECTFULLY SUBMITTED this 7th day of April, 2011.

5 WILLIAM A. COHAN, P.C.

6 By: *s/ William A. Cohan*

7 WILLIAM A. COHAN

8 Colo. Bar No. 7426; Calif. Bar No. 141804

9 P.O. Box 3448

10 Rancho Santa Fe, CA 92067

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12 Email: bill@williamacohan.com

13 Attorney for Plaintiff Rothwell, Ltd.
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2011, I did cause the foregoing Amended Notice of Motion and Motion for Summary Judgment, attached Exhibits and accompanying Amended Memorandum of Points and Authorities in Support of Summary Judgment to be served via the ECF system on the following:

AUSA Valerie Makarewicz, Esq., E-Mail: valerie.makarewicz@usdoj.gov
AUSA Darwin Thomas, Esq., E-Mail: darwin.thomas@usdoj.gov

By: s/ Alicia Cisneroz
Alicia Cisneroz, Legal Assistant

1 WILLIAM A. COHAN
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3 P.O. Box 3448
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E-mail: bill@williamacohan.com

5 Attorney for Plaintiff
6 ROTHWELL, LTD.

7
8 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION

10 ROTHWELL, Ltd., a Cayman Islands
11 Corporation,

12 Plaintiff,

13 v.

14 UNITED STATES OF AMERICA,

15 Defendant.
16
17

) CASE NO. CV-10-479-RGK (FFMx)
)
) **PLAINTIFF ROTHWELL, LTD.'S AMENDED**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **ROTHWELL'S MOTION FOR SUMMARY**
) **JUDGMENT**
)
) DATE: Monday, May 23, 2011
) TIME 9:00 A.M.
) CTRM: Room 850, United States Courthouse
) 255 E. Temple Street
) Los Angeles, CA
) [Hon. R. Gary Klausner]

18 Plaintiff Rothwell, Ltd., by and through undersigned counsel, respectfully submits the
19 following Memorandum of Points and Authorities in Support of its Motion for Summary
20 Judgment.

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(1) Whether nominee paid no consideration or inadequate consideration for the Property 19

(2) Whether property was placed in the name of the nominee in anticipation of a suit or occurrence of liabilities while the transferor continues to exercise control over the property 19

(3) Whether a close relationship existed between transferor and the nominee. . . 21

(4) Whether the conveyance of the property was recorded. 21

(5) Whether the taxpayer retained possession of, continued to enjoy the benefits of, and/or otherwise treated as his or her own the transferred property 22

(6) Whether the taxpayer after the transfer paid costs related to maintenance of the property (such as insurance, tax, or mortgage payments) 22

(7) Whether, in the case of a trust, there were sufficient internal controls in place with respect to the management of the trust and its assets 22

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1 **I. STATEMENT OF UNDISPUTED MATERIAL FACTS.**

2 1. The Francis Trust indenture was drafted and created by Owen Foley, Attorney at
3 Law, of the law firm of Misick & Stanbrook, Richmond House, P.O. Box 127, Providenciales,
4 Turks & Caicos Islands, B.W.I.; <http://www.misickstanbrook.tc>, pursuant to the laws of the
5 Turks & Caicos Islands and Turks & Caicos Islands trust laws in particular. Exhibit 34, RT Foley
6 (11/18/10) 27:1-25, 53:3-61:18; see also Exhibit 21, TCI Trust Ordinance TC00480-515.

7 2. Settlement of the trust was completed on May 24, 1999, by and between Joseph
8 Raymond Francis, Settlor, and Hallmark Trust Ltd., Trustee. Exhibit 3, FT00001-21; Exhibit 34,
9 Foley at 25:18, 27:1-25. 38:10-15.

10 3. As set forth in the indenture creating it, the provisions of The Francis Trust are
11 subject to the jurisdiction of, and construed and controlled by the laws of the Turks & Caicos
12 Islands. See, Exhibit 3, at FT00004 at ¶2(a) and (b); See also Exhibit 34, Foley at 36:7-20,
13 38:18-39:18.

14 4. Owen Foley, Esq. graduated from the University College of Dublin, Ireland with
15 a degree of bachelor of civil law in 1978 and after that educated at the Law School of the
16 Incorporated Law Society of Ireland in Dublin, where he was admitted a solicitor of the High
17 Court of Ireland in 1982, which is the highest court in Ireland. Exhibit 34, Foley at 7:14-8:22. In
18 1985 Mr. Foley was admitted to practice law in the State of Victoria in Australia. Exhibit 34,
19 Foley at 9:8-10:17. Foley has been practicing and licensed to practice law in the Turks & Caicos
20 Islands since April, 1988. Exhibit 34, Foley at 12:15-15:25. In November, 1998, Foley became
21 and continues to be a partner in the law firm of Misick & Stanbrook Exhibit 34, Foley at 17:2-
22 20:18.

23 5. Foley considers himself to be an expert in Turks & Caicos trust law. Exhibit 34,
24 Foley at 41:21-43:10, 44:25-45:7, 45:18-23, 46:2-6, 46:18-47:12

25 6. The Francis Trust was drafted for the purpose of creating and did create an
26 irrevocable discretionary trust, whereby all power and discretion, including *inter alia* decisions
27

1 concerning investments and/or disbursements, is vested in the Trustee(s), viz. any and all
2 disbursement(s) to any beneficiary is determined at the sole discretion of the Trustee(s) and no
3 beneficiary has any right to demand nor any legal means to force the Trustee(s) to make any
4 distribution during the Trust Period. See Exhibit 3, at FT00003 at ¶¶(I)(i)-(iv) and (m)(i)-(ii), at
5 FT00004-05 at ¶¶2.(c)(i), 4.(a)-(e), at FT00005-06 at ¶¶5(b)-(e), at FT00008 at ¶¶13(a) and (b),
6 and at FT00013-19 (Trustee's powers set forth in detail in "The First Schedule"); Exhibit 34,
7 Foley at 59:19-60:11, 60:15-61:6, 65:9-23, 66:4-13, 72:16-73:3, 73:13-17, 73:19-74:25.

8 7. Francis is the Settlor of The Francis Trust and the Trustee designated in the
9 irrevocable settlement is Hallmark Trust Ltd. ("Hallmark") Exhibit 3, at FT00002; Exhibit 34,
10 Foley at 31:2-11; Exhibit 33, RT Colin Chaffe (11/17/10) 40:22-41:22. Hallmark is a trust
11 company with which Foley had done business prior to May 24, 1999. Exhibit 34, Foley at 31:18-
12 20.

13 8. Pursuant to the terms of The Francis Trust, once property is transferred, the trustee
14 holds legal title for the benefit of the beneficiaries and the Settlor Joseph Francis cannot revoke
15 the transfer. Exhibit 34, Foley at 39:19-41:15.

16 9. Trustees are paid for their services from the trust fund, not the Settlor. The funds
17 in the trust do not belong to the Settlor once those funds are transferred to the trust. Trustees are
18 entitled to reimbursement in accordance with the Trust company's published terms and
19 conditions for the trust business in force. Trustees cannot simply appropriate whatever amount
20 of the trust assets he or she wishes for services performed. Exhibit 34, Foley at 78:12-21, 86:25-
21 87:8, 87:25-88:17; Exhibit 39, RT Trowbridge (11/19/10) 111:11-19.

22 10. The Francis Trust has two protectors: (1) Brian Rayment, Esq., an attorney
23 licensed to practice in Oklahoma; and (2) Pittsford, Ltd., a British Virgin Islands Company.
24 Exhibit 34, Foley at 105:10-16, 108:18-109:11, 110:7-25, 111:1-8; Exhibit 36, RT Brian
25 Rayment (2/25/11) 44:8-20.

26 11. Distributions are subject to approval of The Francis Trust protector if the
27
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1 distributions exceed \$10,000. Exhibit 34, Foley at 99:7-16; Exhibit 36, Rayment at 44:21-45:2.

2 12. The Francis Trust protector does not have authority to direct the activities of the
3 Trustee with respect to the management of the trust. Exhibit 36, Rayment at 45:3-6.

4 13. As protector of The Francis Trust Rayment has never directed the Trustee with
5 respect to any investments by the Trust or by entities for which the trust has an interest. Exhibit
6 36, Rayment at 45:7-12.

7 14. Distribution to a beneficiary by the Trustee is null and void unless done with the
8 consent of the protector. Exhibit 34, Foley at 100:17-101:8, 102:6-12, 116:3-20.

9 15. The Francis Trust cannot be invalidated *ex post facto* by wrongdoing. If the
10 Trustee does something contrary to the terms of the trust, it doesn't invalidate the trust, but any
11 such act(s) would constitute a breach of the trust. Exhibit 34, Foley at 117:18-118:4.

12 16. The Francis Trust beneficiaries are Francis, his parents and children and
13 Oklahoma Film Holding Corporation. Exhibit 3, at FT00020 at "The Third Schedule;" Exhibit
14 34, Foley at 51:19-52:18.

15 17. Pursuant to the terms of The Francis Trust a beneficiary has no guaranteed right
16 that the Trustees will exercise their discretion in his or her favor and therefore a beneficiary may
17 receive nothing. Exhibit 34, Foley at 80:12-82:23; Exhibit 39, Trowbridge at 114:9-16.

18 18. Pursuant to the terms of The Francis Trust fourth schedule "Excluded Persons,"
19 and Turks & Caicos Islands ("TCI") ordinance Section 61, if a Settlor transfers assets to a TCI
20 trust and the Settlor was not insolvent at the time of transfer the trust cannot be set aside at the
21 instance of a creditor. Exhibit 21, at TC00513; Exhibit 34, Foley at 53:3-55:8, 56:12-57:16,
22 57:20-58:5, 59:3-6.

23 19. As a matter of Turks & Caicos law, The Francis Trust beneficiaries have no
24 vested interest in the trust and, thus, a creditor, even if the creditor had a judgment, could not
25 attach any interest of any beneficiary -- the creditor has no better position to make a claim than
26 the beneficiary who owes the debt. Exhibit 34, Foley at 61:8-18, 64:20-65:1.

1 20. Foley recommended several Turks & Caicos trust companies to provide the
2 services of Trustee for The Francis Trust. Hallmark Trust, Ltd., Prestige Place, Grace Bay Road,
3 P.O. Box 656, Providenciales, Turks & Caicos Islands, B.W.I., was selected to provide Trustee
4 services for The Francis Trust. Exhibit 34, Foley at 31:8-33:6, 35:14-25, 36:2-6, 37:9-15, 38:3-5;
5 Exhibit 33, Chaffe at 43:2-44:7; see also Exhibit 3, at FT00001-00002.

6 21. On May 24, 1999, Francis provided a "Letter of Wishes" to the Trustee. Exhibit
7 18, OF00096-97; Exhibit 34, Foley at 144:17-145:1, 146:10-24. A trustee has no obligation to
8 pay any attention to a "Letter of Wishes," it has no legal effect whatsoever. Exhibit 34, Foley at
9 147:7-148:6; see also Exhibit 33, Chaffe at 255:1-257:23.

10 22. In 1991, pursuant to the laws of the Turks & Caicos Islands, Colin R. Chaffe and
11 Nicola S. Jordan incorporated Hallmark Trust, Ltd., to provide statutory Trustee services for
12 trusts established in the Turks & Caicos Islands. Exhibit 33, Chaffe at 14:4-25, 15:20-16:24,
13 17:1-25, 18:16-23, 19:9-25, 20:2-25, 22:3-25; Exhibit 34, Foley at 32:9-20, 32:14-33:6.

14 23. Chaffe and Ms. Jordan are British citizens and residents of the Turks & Caicos
15 Islands. Exhibit 33, Chaffe at 7:8-10, 19:14-20:1

16 24. At all relevant times, the Trustee, Hallmark Trust, directed and controlled the
17 operations, finances, assets and investment decisions of The Francis Trust. Exhibit 33, Chaffe at
18 20:5-21:21; 231:1-7; Exhibit 39, Trowbridge at 24:20-26:14, 29:16, 50:15-22.

19 25. Francis has never owned or controlled, directly or indirectly, any interest in
20 Hallmark Trust, Ltd. Exhibit 33, Chaffe at 22:1-7.

21 26. Chaffe never met Francis. Exhibit 33, Chaffe at 42:23-43:6.

22 27. On June 9, 2000, Chaffe incorporated Rothwell Limited ("Rothwell") in the
23 Cayman Islands. Exhibit 19, RL 00001-00080. One hundred percent (100%) of Rothwell shares
24 are held by Inceptre Holdings, Ltd., in trust for The Francis Trust. Inceptre Holdings, a Turks &
25 Caicos Islands corporation, is Hallmark's nominee company. Exhibit 33, Chaffe at 29:4-20,
26 62:3-17, 79:13-80:15, 122:5-23, 129:6-14, 130:9-131:21.

1 28. Inceptre Holdings, was incorporated in the Turks & Caicos on March 5, 1992.
2 The sole shareholders were and are Chaffe (50 shares) and Jordan (50 shares). Exhibit 5, IH
3 00001-27; Exhibit 33, Chaffe at 125:12-127:5.

4 29. Inceptre Holdings is Rothwell's corporate director; Chaffe and Jordan are the
5 owners, directors and officers of Inceptre Holdings. Exhibit 23, US002669-2670.

6 30. Francis has never owned or controlled, directly or indirectly, any interest in
7 Inceptre Holdings, Ltd. Exhibit 33, Chaffe at 125:11-128:5.

8 31. Inceptre Holdings acted as director of Rothwell, Ltd., until 2003 when Hallmark
9 Trust Ltd. became the director. Exhibit 33, Chaffe at 127:14-131:4, 132:1-18, 133:1-13.

10 32. Francis never owned or controlled, directly or indirectly, any interest in Rothwell.
11 Instead, all discretion, power and control is vested in the members and directors of Rothwell,
12 Ltd. Exhibit 19, RL00001-80; Exhibit 33, Chaffe at 67:18-70:15.

13 33. Rothwell's shares are assets of The Francis Trust, but Rothwell's assets do not
14 belong to The Francis Trust. Rothwell has full discretion over it's own assets. Exhibit 34, Foley
15 at 119:2-124:21; Exhibit 33, Chaffe at 66:8-23, 67:1-8, 68:7-25, 71:3-14, 71:22-72:10, 76:6-22,
16 77:4-13.

17 34. Francis never controlled, directed nor managed any of Rothwell's corporate or
18 financial affairs. Instead, from June 9, 2000, to November 29, 2005, Chaffe and Jordan
19 controlled, directed and managed at their sole discretion all operations, finances, assets and
20 investment decisions of Rothwell. Exhibit 33, Chaffe at 84:3-11, 85:17-87:17, 90:17, 90:9-
21 92:22, 109:10-111:13, 141:20-142:11, 144:3-9, 148:18-149:10, 150:22-151:8, 164:1-19, 166:16-
22 168:25.

23 35. In 2001 Chaffe and Jordan opened a bank account for Rothwell at the Bermuda
24 Commercial Bank in Hamilton, Bermuda. Francis never had signatory authority on this bank
25 account. Exhibit 22 , at US002598-002619 and Exhibit 23, at US002620-2737; Exhibit 33,
26 Chaffe at 144:24-145:2, 149:16-150:9, 161:8-164:4.

1 36. Beginning in 2001, Rothwell entered into various distribution and licensing
2 contracts with West Direct. Exhibit 33, Chaffe at 99:9-21, 101:6-102:7, 103:3-104:24, 105:2-
3 106:2.

4 37. On or about July 2, 2001, Chaffe and Jordan opened Rothwell's Morgan Stanley
5 account in Irvine, California. Exhibit 7, MSSB 003229-3253; Exhibit 33, Chaffe at 85:23-87:17,
6 88:5-12, 168:3-15.

7 38. None of Francis' personal funds were transferred to nor deposited in either
8 Rothwell's Bermuda Commercial Bank account nor Rothwell's Morgan Stanley account.

9 39. All funds deposited in Rothwell Bermuda bank account and Rothwell's Morgan
10 Stanley account came from other U.S. and foreign corporate sources. For example, during 2002
11 Sands Media, Inc., a U.S. corporation, wired \$1,950,000. to Rothwell's Bermuda bank account
12 and during 2003 Sands Media, Inc. wired \$8,461,020.00 to Rothwell's Bermuda bank account.
13 Exhibit 29, at CR #277-5, *U.S. v. Joseph R. Francis, Case No. 2:08-cr-00494-SJO* (C.D. CA).

14 40. Chaffe and/or Jordan transferred funds from Rothwell's Bermuda bank account by
15 wire to Rothwell's Morgan Stanley account. Exhibit 33, Chaffe at 109:10-111:13, 166:21-
16 168:25; see also Exhibit 25, at CR# 277-9.

17 41. Chaffe and Jordan controlled Rothwell's Morgan Stanley account until late 2005.
18 Exhibit 33, Chaffe at 88:23-89:19, 168:1-25, 195:14-25, 247:18-248:11.

19 42. Chaffe and Jordan did not receive directions from anyone on how to operate
20 Rothwell's Bermuda bank and Morgan Stanley (fka Dean Whitter) accounts. Exhibit 33, Chaffe
21 at 168:23-169:5.

22 43. Chaffe and Jordan sold 100% of their interests in Hallmark to Brian Trowbridge, a
23 Canadian citizen, attorney and resident of Turks & Caicos, who changed the name to Hallmark
24 Bank and Trust, Ltd.. Exhibit 33, Chaffe at 22:10-23:7, 24:22-27:10; Exhibit 39, Trowbridge at
25 14:20-23, 15:4-6.

26 44. On November 29, 2005, Hallmark Bank and Trust, Ltd., assumed control of
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1 Rothwell's financial affairs and continued to do so until March, 2010, when Hallmark Bank and
2 Trust, Ltd. resigned and Chaffe was appointed Trustee of The Francis Trust and Director of
3 Rothwell. Exhibit 33, Chaffe at 27:7-21, 43:13-44:12, 47:22-48:9, 50:21-51:14, 54:12, 97:15-
4 98:13; Exhibit 39, Trowbridge at 19:6-21:3, 96:18-99:14, 106:2-20.

5 45. Francis never owned or controlled, directly or indirectly, any interest in Hallmark
6 Bank and Trust, Ltd., whose directors and officers are Brian Trowbridge, Gregory Hurd and
7 Colin Whittingham. Exhibit 39, Trowbridge at 19:6-21:3, 42:9-43:8, 43:22-44:3.

8 46. Trowbridge never met Francis or spoke to him. No distributions were ever made
9 to Francis or any other beneficiary. Exhibit 39, Trowbridge at 26:15-27:3, 11:8-112:5, 114:9-16.

10 47. Hallmark Bank and Trust, Ltd.'s directors and officers took control of Rothwell's
11 Bermuda bank and Morgan Stanley accounts and took no directions from anyone. Exhibit 39,
12 Trowbridge at 23:2-10, 25:2-17, 34:1-25, 35:7-36:14, 47:17-48:17, 50:10-22, 51:22-52:18, 71:3-
13 9, 77:3-25, 81:11-23, 83:17-84:25, 133:8-21.

14 48. From July, 2001, through October, 2008, John Welker was the broker responsible
15 for Rothwell's Morgan Stanley account. Exhibit 40, RT Welker (2/23/11) 12:8-16, 18:3-13, 90:9-
16 91:3; Exhibit 33, Chaffe at 89:13-19.

17 49. Welker testified that all investment decisions for Rothwell's Morgan Stanley
18 account were made by either Chaffe, Jordan, Trowbridge, or Hurd. See Exhibit 16, MSSB
19 003580-3583; Exhibit 40, Welker at 26:18-25, 27:11-28:7, 28:18-21, 28:24-29:25, 30:12-31:2,
20 31:11-13, 35:13-24, 36:2-7, 37:9-22, 38:24-39:2, 41:25-42:1, 43:2-3, 47:3-48:5, 50:19-51:2,
21 51:5-7, 61:22-24, 64:24-65:8, 65:11-16, 66:14-21, 67:1-6, 68:8-24, 69:1-12, 71:21-72:7.

22 50. Welker did not have any discretion in managing Rothwell's account, Chaffe
23 made the decisions and controlled the account. Exhibit 40, Welker at 33:13-18, 35:13-24, 36:2-7,
24 42:19-43:3, 47:25-48:5.

25 51. Chaffe never said that he had spoken with Francis or anybody acting on Francis'
26 behalf. Exhibit 40, Welker at 43:4-7.

1 52. Trowbridge was an authorized signer on the Morgan Stanley account. Exhibit 40,
2 Welker at 61:22-24, 64:24-65:8, 68:14-24; see also Exhibit 13, MSSB 003466-3480.

3 53. Welker never discussed Rothwell's account with Francis. Exhibit 40, Welker at
4 111:12-19, 144:14-16; see also Exhibit 16, MSSB 003580-3583.

5 54. Welker never discussed Rothwell's account with Rayment. Exhibit 40, Welker at
6 144:2-13, 144:17-24, 150:21-24.

7 55. Francis was not authorized to be involved in Rothwell's Morgan Stanley account.
8 Exhibit 7, at MSSB 003229-3253; and Exhibit 17, MSSB 003934-3937.

9 56. In connection with the IRS's criminal investigation of Francis, I.R.S. Special
10 Agent Mark Jensen issued IRS summonses to Morgan Stanley for information concerning
11 Rothwell's account in February, May and June, 2006. Rothwell was not notified of the
12 summonses. Exhibit 40, Welker at 117:6-11; Exhibit 39, Trowbridge at 58:14-59:23, 65:14-66:6.

13 57. Special Agent Jensen interviewed Welker on August 17, 2006 and again after
14 October, 2008, concerning Rothwell's Morgan Stanley account and Francis' involvement and
15 control *vel non*. Exhibit 40, Welker at 96:8-97:25, 99:20-25, 100:1-20, 104:23-25, 107:12-25,
16 108:2-3, 109:2-12, 109:16-17, 110:14-20, 111:1-19, 112:3-23, 112:25-114:6; Exhibit 15, MSSB
17 003548 and Exhibit 12, MSSB 003410.

18 58. On April 11, 2007, Francis was indicted on two counts of tax evasion (26 U.S.C.
19 §7201) for 2002 and 2003 tax years.

20 59. On September 2, 2008, Morgan Stanley sent a letter to Rothwell requesting that
21 Rothwell's account be transferred to another financial institution no later than October 6, 2008.
22 Exhibit 14, MSSB 003547; Exhibit 35, RT Michael Nahass (2/24/11) 10:7-21, 20:7-21:9 No
23 explanation was provided for Morgan Stanley's request to transfer the account. Exhibit 39,
24 Trowbridge at 103:3-17.

25 60. The 9/2/08 letter did not inform Rothwell that it's account had been "Red
26 Flagged" aka "frozen," which meant "no money in, no money out." Exhibit 35, Nahass at 18:22-
27

1 19:8; Exhibit 38, RT Brian Stewart (2/23/11) 17:16-25, 19:5-20:24. Rothwell's account was
2 "frozen" by Morgan Stanley prior to the 9/2/08 letter to Rothwell. Exhibit 35, Nahass at 19:1-15.

3 61. Other than the 9/2/08 letter, Nahass did not have communications with
4 Trowbridge. Exhibit 35, Nahass at 22:5-8.

5 62. On February 19, 2009, and on August 14, 2009, Special Agent Jensen served
6 subpoenas on Morgan Stanley for production of Rothwell Morgan Stanley account records.
7 Neither the IRS nor Morgan Stanley gave notice of the subpoenas to Rothwell.

8 63. Brian Stewart became Rothwell's Morgan Stanley broker in 2009. Exhibit 38, RT
9 Stewart 14:10-20. Stewart never saw any communications to Rothwell that the account was
10 frozen and there would be no disbursements from the account. Exhibit 38, Stewart at 21:1-11,
11 22:17-21.

12 64. Stewart did not discuss the IRS's levy on Rothwell's account with Trowbridge; he
13 assumed Morgan Stanley's legal department had handled notification. Exhibit 38, Stewart at
14 16:8-12, 17:13-14, 34:20-24, 35:5-10..

15 65. Trowbridge sent two emails to Morgan Stanley, on December 1, 2009, and on
16 December 21, 2009, advising that he would be liquidating and transferring the account in 2010.
17 Exhibit 6, MS0001-00004.

18 66. Stewart was involved with other Morgan Stanley accounts for Francis, but never
19 had any discussion with Francis concerning the Rothwell account before the "nominee" levy on
20 November 6, 2009. Exhibit 38, Stewart at 29:2-15, 35:11-39:24, 41:20-22.

21 67. Following the levy, Stewart spoke to Francis and his lawyer, who requested
22 information about "time and stamp dates" and a copy of the levy. Francis did not ask what
23 Rothwell's account balance was or for Rothwell's accounting statements. Exhibit 38, Stewart at
24 38:10-42:9, 43:4-6.

25 68. On November 16, 2009, Stewart faxed a copy of the IRS levy on Rothwell's
26 account to Francis. Exhibit 10, MSSB 003390-3392; Exhibit 38, Stewart at 38:20-25.

1 69. On September 23, 2009, Francis agreed to plead guilty in his criminal matter
2 (Case No. 2:08-cr-00494-SJO), to two misdemeanor counts of filing a personal income tax return
3 and an amended personal income tax return for 2003 that were false as to a material matter in
4 that both omitted from the Schedule B interest income earned on the Rothwell Morgan Stanley
5 account. See Exhibit 26, Plea Agreement, CR #465.

6 70. On November 6, 2009, Francis was sentenced according to the binding Plea
7 Agreement (CR#465), and paid in full all restitution, fines and assessments as required.

8 71. A few hours later, IRS Revenue Officer Ferrell Stevens served the Notice of Levy
9 on Morgan Stanley, for the tax liabilities allegedly owed by Francis, on the grounds that Rothwell
10 is Francis' "nominee." Exhibit 9, MSSB003380-3389.

11 72. Rothwell was not advised that the nominee levy had been served on its account.
12 Trowbridge learned about the levy in early 2010. Exhibit 39, Trowbridge at 30:23-31:6, 120:17-
13 23, 122:7-25, 123:2-6, 126:7-127:10.

14 73. The IRS's criminal investigation established that Francis is the founder of *Girls*
15 *Gone Wild* entertainment business and the sole shareholder of two high income producing U.S.
16 corporations, Sands Media, Inc. and Mantra Films, Inc., which are engaged in producing,
17 promoting, marketing and distributing DVDs, infomercials, magazines, apparel and other items.
18 Exhibit 25, CR#277-2 through 277-10.

19 74. On March 3, 2008, while Francis was in jail pending trial on the Indictment (2:08-
20 cr-00494-SJO) and needed funds to post a bond and pay legal fees, a \$5 million dollar loan was
21 obtained from Washington Mutual Bank. Francis' Los Angeles residence was used as collateral.
22 See Exhibit 27, Declaration of IRS Revenue Agent Beas filed on 1/08/2010 in *Francis v. U.S.*,
23 Case No. 2:09-cv-09449-RGK-FFM, CR #31 at ¶15; Exhibit 29, Declaration of Joseph Francis
24 filed on 1/12/10 in *Francis v. U.S., supra*, CR #37 at ¶4.

25 75. Beas was the government's case agent and expert summary witness in *U.S. v.*
26 *Francis, supra*. Exhibit 32, RT Beas (2/22/11)106:2-23.

1 76. Records obtained by the IRS confirmed that Francis transferred \$5,450,000 to
2 Blue Horse Trading from his personal Morgan Stanley account to purchase his personal Los
3 Angeles residence. Exhibit 27, Beas Declaration at ¶14; Exhibit 37, RT Ferrell Stevens (2/22/11)
4 46:8-47:3,

5 77. The IRS's criminal investigation of Francis and Rothwell's Bermuda bank and
6 Morgan Stanley accounts established that Francis never exercised control over Rothwell's
7 Morgan Stanley account and that no distributions were made by Rothwell to Francis. *See also*,
8 Exhibit 39, Trowbridge at 111:8-112:5, 114:9-16.

9 78. The IRS' investigation established that: (1) on March 13, 2002, a \$1.030 million
10 dollar distribution was made from Rothwell's Bermuda Commercial Bank account to fund the
11 purchase of Lot #14; and (2) on September 5, 2005 a \$1.023 million dollar distribution was made
12 from Rothwell's Morgan Stanley account to fund the purchase of Lot #13B, both of which are
13 located in the "Ranchos Punta Mita," in the Municipality of Bahia de Banderas, State of Nayarit,
14 Mexico. See Exhibit 25, at CR #277-6; Exhibit 32, Beas at 63:12-64:25; Exhibit 33, Chaffe at
15 88:23-89:4, 89:23-91:21, 249:4-24.

16 79. Chaffe made the decision to purchase the property in Mexico and set up the
17 Mexican corporation. The Francis Trust protector, Rayment, brought the investment opportunity
18 to Chaffe. Exhibit 33, Chaffe at 90:9-92:22, 141:8-142:11, 147:21-149:10, 247:21-248:11;
19 Exhibit 36, Rayment at 47:15-18, 48:25-49:19, 85:6-21.

20 80. Rothwell's Morgan Stanley account statements establish and verify that the only
21 distribution from the account, was the distribution of \$1.023 million dollars on September 5,
22 2005, for the purchase of Lot #13B in Mexico.¹ Exhibit 32, Beas at 42:3-15; Exhibit 40,
23 Welker at 112:3-23, 112:25-114:6.

24 81. Chaffe, principal of Hallmark Trust, acting as the Trustee of The Francis Trust,
25

26 ¹ The Morgan Stanley statements are so voluminous that Plaintiff will not attach them to
27 this motion. If the United States disputes this fact Plaintiff reserves the right to supplement the
28 factual record to prove this fact.

1 retained Rayment to arrange for the establishment of a Mexican corporation and purchases of Lot
2 ## 13B and 14. Exhibit 33, Chaffe at 143:8-22; Exhibit 36, Rayment at 46:1-55:7, 56:6-57:9,
3 77:10-78:1.

4 82. Rayment caused the creation of Casa Blanca de Punta Mita, S.A. de C.V. ("Casa
5 Blanca"), which was registered in the public commercial registry of Guadalajara Jalisco on May
6 15, 2002, under commercial file 14393-1. See Exhibit 30, David Connell, Esq. Expert Witness
7 Report at p. 4.

8 83. Island Films, Ltd. and Summerland Holdings, Ltd. are Casa Blanca's
9 shareholders, each holding 25,000 shares. Exhibit 30, Connell Report at p. 8; Exhibit 33, Chaffe
10 at 93:17-27. Island Films and Summerland Holdings are Turks and Caicos corporations, the
11 shares of which are owned by The Francis Trust. See Exhibit 4, IF00001-44 and Exhibit 20,
12 SH00001-54; see also Exhibit 34, Foley at 126:10-25, 127:4-130:23; Exhibit 33, Chaffe at 29:21-
13 30:5, 31:21-32:23.

14 84. Under Mexican law, Casa Blanca is an entity distinct and independent from its
15 shareholders. Exhibit 30, Connell Report at p. 5.

16 85. Casa Blanca is the owner and deed holder of Lot #13B. Exhibit 30, Connell
17 Report at p. 6.

18 86. Casa Blanca entered into a private purchase agreement to, and did purchase, Lot
19 #14, from Cantiles de Mita, S.A. de C.V., a Mexico corporation which had merged with Club de
20 Yates Costa Bandera, S.A. de C.V. and Puerto Mita, S.A. de C.V., which assigned the interests
21 of Club de Yates Costa Bandera, S.A. de C.V. to Casa Blanca. See Exhibit 2, CB00470-487.

22 87. Although the transaction was conducted through Stewart Title escrow and Stewart
23 Title issued title insurance on Lot #14, a defect exists in Casa Blanca's title to Lot #14 because a
24 Deed to Casa Blanca was not recorded. See Exhibit 1, CB00463-469 and CB00488 -510.
25 Accordingly, Club de Yates Costa Bandera, S.A. de C.V. is the owner of Lot #14. The defect in
26 Casa Blanca's title to Lot #14 cannot be resolved without further legal action. See Exhibit 30,
27

1 Connell's Report at pp.6-8 and 11.

2 88. The IRS' criminal investigation established that Stewart Title International
3 provided title insurance to Casa Blanca on both Lots 13B and 14. Exhibit 24, US003029-3093.

4 89. Francis directed and controlled the design and construction of the premises and
5 improvements on Lot #14. Exhibit 36, Rayment at 36:23-37:4, 78:15-80:21, 83:21-84:23, 91:18-
6 93:25.

7 90. The IRS investigation established that none of Francis' personal funds were used
8 to improve Casa Blanca's Lots ##13B or 14. Instead, Mantra Films, Inc. and Sands Media, Inc.
9 provided the funds to develop and improve Casa Blanca's Lot #14: (1) during 2002 Mantra Films
10 paid \$1,002,141.50; (2) during 2002 Sands Media paid \$400,000.00; (3) during 2003 Mantra
11 Films paid \$850,000.00; and (4) during 2003 Sands Media paid \$3,076,070.02. See Exhibit 25,
12 at CR #277-7; See also Exhibit 32, Beas at 42:1-43:6; 43:9-22; 44:1-9.

13 91. Francis, Sands Media and Mantra Films use Casa Blanca's property. Their use of
14 the property is at the discretion of the Trustee. There is no lease from Casa Blanca on its
15 property nor from the Francis Trust nor any of the corporations owned by the Francis Trust to
16 anyone. Exhibit 33, Chaffe at 92:23-95:15.

17 92. Chaffe believed that Francis contributed to the improvement of Casa Blanca's
18 property because it would inure to the benefit of The Francis Trust. Exhibit 33, Chaffe at 248:18-
19 249:2; Exhibit 36, Rayment at 81:7-23.

20 93. As a matter of Mexican law Rothwell, The Francis Trust, Sands Media, Mantra
21 Films and Francis have no legal or beneficial interest in Casa Blanca, Lots ## 13B and 14, nor in
22 the improvements constructed on Lot #14. Exhibit 30, Connell Report at pp. 9-11.

23 94. Agent Beas verified the accuracy of Exhibit 25(CR## 277-2 through 277-10) filed
24 in *U.S. v. Francis, supra*. Exhibit 32, Beas at 30:3-18; 31:5-25; 32:1-21; 33:2-33:18; 39:6-40:4.

25 95. Beas filed a Declaration in Francis' Jeopardy Assessment case (*Francis v. U.S.*,
26 Case No. 2:09-cv-09449-RGK-FFMx) in which he testified *inter alia* in ¶4, that Francis
27
28

1 “admitted he is the beneficial owner of that account when he pled guilty.” See Exhibit 27, CR
2 #31. In his 2/22/11 deposition Beas conceded that Francis did not admit that he was the
3 beneficial owner of Rothwell’s Morgan Stanley account. Exhibit 32, Beas at 98:1-100:5.

4 96. Beas admitted that he had not seen any evidence that Francis could access any of
5 Rothwell’s financial accounts or controlled Chaffe. Exhibit 32, Beas at 59:22-25; 60:1-61:7-22.

6 97. During his 2/22/11 deposition Beas testified Francis controlled Rothwell because:
7 (1) funds were transferred to Rothwell’s bank account; (2) then transferred to Rothwell’s Morgan
8 Stanley account; and (3) “it was his money.” Exhibit 32, Beas at 77:23-79:3.

9 98. IRS Revenue Officer Ferrell Stevens served the “nominee” levy on Rothwell’s
10 Morgan Stanley account. Exhibit 9, MSSB003380-3389; Exhibit 37, Stevens at 14:17-25.
11 Stevens had no role in determining whether Rothwell was or was not a nominee for Francis.
12 Exhibit 37, Stevens at 18:15-19:3.

13 99. Stevens filed a Declaration in *Francis v. U.S., supra*, stating in ¶3: “Since Blue
14 Horse Trading, LLC is a separate legal entity from [Joseph Francis], *the property would not be*
15 *immediately (or possibly ever) subject to an IRS lien.*” Exhibit 28, *Francis v. U.S., supra*, CR#
16 31. At his deposition Stevens reaffirmed his averment emphasized above. Exhibit 37, Stevens at
17 32:7-17; 33:2-15. Stevens did not know that the “Ltd.” in Rothwell, Ltd. meant that Rothwell
18 was a legal corporation separate from Francis. Exhibit 37, Stevens at 34:6-35:5.

19 100. Morgan Stanley liquidated Rothwell’s account and surrendered the funds to the
20 United States: (1) December 31, 2009, Check #27603880 in the sum of \$19,412,427.21; (2)
21 January 4, 2010, Check #27603884 in the sum of \$690,571.21; and (3) January 5, 2010, Check
22 #27603887 in the sum of \$301,639.79. Exhibit 11, MSSB 003393-3398.

23 101. On January 8, 2010, the IRS confirmed receipt of the liquidation proceeds.
24 Exhibit 8, MSSB 003369-3371; Exhibit 37, Stevens at 24:19 and 25:3-10. 28:4-23, 29:7-30:23,
25 and 31:5-8.

26 **II. STANDARDS FOR SUMMARY JUDGMENT.**

1 Summary Judgment should be granted if there is no genuine issue as to any material fact
2 and the moving party is entitled to judgment as a matter of law. Rule 56(c)(2), F.R.Civ.P. If the
3 moving party shows that there are no genuine issues of material fact, the non-moving party must
4 set forth specific facts showing there is a genuine issue for trial. Rule 56(e), F.R.Civ.P.; *Celotex*
5 *Corp. v. Catrett*, 744 U.S. 317, 322-23 (1986). A scintilla of evidence or evidence that is merely
6 colorable or not significantly probative does not present a genuine issue of material fact. *United*
7 *Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989). The
8 underlying substantive law governing the claims determines whether or not it is material. *Price v.*
9 *Taco Bell Corp.*, 934 F.Supp. 1193, 1196 (D.Or. 1996). Rule 56(c) mandates entry of summary
10 judgment against a party who fails to make a showing sufficient to establish the existence of an
11 element essential to that party's case. *Celotex Corp. v. Catrett, supra*, 477 U.S. at 322-24
12 (internal quotations omitted).

13 **III. WRONGFUL LEVY STANDARDS.**

14 This is a Wrongful Levy action under 26 U.S.C. §7426 brought by Rothwell, Ltd.
15 ("Rothwell") based on an IRS levy served on Morgan Stanley on November 6, 2009, against
16 Rothwell's account as "nominee" of Joseph R. Francis to collect Mr. Francis' outstanding tax
17 liabilities, the subsequent liquidation of Rothwell's investment account and surrender of the
18 proceeds of the liquidation by Morgan Stanley to the United States. A levy is wrongful if it is
19 placed upon property in which the delinquent taxpayer has no interest. *911 Management, LLC v.*
20 *U.S.*, 657 F.Supp.2d 1186, 1191 (D. OR 2009); *Sessler v. U.S.*, 7 F.3d 1449, 1451 (9th Cir. 1993).

21 **IV. FRANCIS HAS NO PROPERTY NOR RIGHTS TO PROPERTY IN THE**
22 **FRANCIS TRUST, ROTHWELL, LTD. NOR THEIR ASSETS.**

23 In order to prevail in a wrongful levy action a plaintiff must demonstrate (1) that it has an
24 interest in the property at issue, and (2) that the levy was wrongful, i.e. that the property was not
25 the delinquent taxpayer's. *Flores v. U.S.*, 51 F.2d 1169, 1171 (1977). The court initially looks to
26 state law to determine what rights the taxpayer has in the property the government seeks to reach.
27 *Drye v. U.S.*, 528 U.S. 49, 58 (1999). "With respect to the State law question, recent cases have

1 clarified the centrality of finding a State law interest as a condition precedent.” *Dalton v. CIR*,
2 135 T.C. No. 20, 2010 WL 3719274 *9 (U.S. Tax Ct. 2010), citing, *inter alia*, *Holman v. U.S.*,
3 505 F.3d 1060, 1067, 1070 (10th Cir. 2007) (vacating and remanding a case seeking to enforce a
4 nominee tax lien for the IRS first to establish that the person held a beneficial interest in the
5 property under State law); *Spotts v. U.S.*, 429 F.3d 248, 251, 253-254 (6th Cir. 2005) (vacating
6 and remanding a grant of summary judgment for the IRS in a case seeking removal of a nominee
7 lien because the lower court did not first consider whether the person had a beneficial interest
8 under State law). In the instant case foreign, not state, law determines what property rights
9 Joseph R. Francis has in The Francis Trust, Rothwell, Ltd. and Rothwell’s Assets.

10 Under the laws of the Turks & Caicos Islands, B.W.I. and the Cayman Islands, B.W.I.,
11 Francis does not own any interest in The Francis Trust, Rothwell, Ltd. or Rothwell’s Morgan
12 Stanley account and, thus, has no property or rights to property in The Francis Trust, Rothwell,
13 Ltd. nor Rothwell’s Morgan Stanley account. Instead, 100% of Rothwell’s shares are owned by
14 The Francis Trust, a discretionary trust created on May 24, 1999, under the laws of the Turks &
15 Caicos Islands. Rothwell is a separate and distinct legal Cayman corporation which is the sole
16 owner of it’s assets. Statement of Undisputed Material Facts (“SUMF”) ¶¶ 1-19, 27, 32-42.

17 Under Turks & Caicos law, as a beneficiary of the discretionary trust Francis has no
18 vested interest in The Francis Trust nor any of it’s assets. SUMF ¶¶ 6-9, 17, 19. Likewise, “[a]
19 universal canon of Anglo-American trust law proclaims that when the trustee’s powers of
20 distribution are wholly discretionary, the beneficiary has no ownership interest in the trust or its
21 assets until the trustee exercises discretion by electing to make a distribution to the beneficiary.”
22 *In re Bass*, 171 F.3d 1016, 1028 (5th Cir. 1999); *See also*, AUSTIN W. SCOTT & WILLIAM F.
23 FRATCHER, THE LAW OF TRUSTS §155 at 152 (4th ed. 1987) (A discretionary trust is one
24 “[w]here by the terms of the trust a beneficiary is entitled only to so much of the income or
25 principal as the trustee in his uncontrolled discretion shall see fit to give him, [and] he (the
26 beneficiary) cannot compel the trustee to pay him or to apply for his use any part of the trust
27

1 property.”); *Wilson v. U.S.*, 140 B.R. 400, 404 (N.D. TX 1992) (holding that there was no
2 property to which an IRS lien may attach, beneficiary did not have either property interest or
3 rights to property in the discretionary trust and IRS could not compel trustee to disburse funds to
4 debtor beneficiary); *Young v. McCoy*, 147 Cal.App.4th 1078 (2007) (under California law
5 trustees of discretionary trusts cannot be compelled to pay a beneficiary’s creditors); *U.S. v.*
6 *Delano*, 182 F.Supp.2d 1020, 1022 (D. Colo. 2001) (beneficiary of discretionary trust has mere
7 expectancy rather than a property interest in trust). Here, no distributions have been made to
8 Francis nor any other beneficiary by the Trustees of The Francis Trust, nor the directors of
9 Rothwell, Ltd. SUMF ¶¶74, 76, 77, 78, 80.

10 **(A) Francis Never Exercised Control Over Rothwell’s Bermuda Commercial Bank Nor**
11 **Morgan Stanley Accounts.**

12 Although the source of some of the funds came from U.S. corporations of which Mr.
13 Francis (“Francis”) was the sole shareholder, none of Francis’ personal funds were transferred to
14 Rothwell’s Bermuda Commercial Bank nor Morgan Stanley accounts. SUMF ¶¶ 38, 39. The
15 evidence obtained from the IRS criminal investigation of Francis and discovery instant
16 establishes that Joseph Francis never controlled The Francis Trust, Rothwell, Ltd. nor Rothwell’s
17 Morgan Stanley account. SUMF ¶¶24-32, 34, 40-55.

18 IRS Revenue Agent Beas testified that the “control [Francis] had is that he made
19 payments [that were] transferred to the Rothwell [Bermuda bank] account, and those payments
20 came back to the Rothwell Morgan Stanley account.” SUMF ¶97. However, once the Sands
21 Media and Mantra Films funds were placed in Rothwell’s Bermuda Commercial Bank account
22 the money belonged to Rothwell. *Arth v. U.S.*, 735 F.2d 1190, 1193 (9th Cir. 1984). Once funds
23 were deposited into Rothwell’s Bermuda bank account Rothwell had complete dominion and
24 control over the account and was free to invest the whole amount however it saw fit. *In re*
25 *Amdura Corp.*, 75 F.3d 1447, 1452 (10th Cir. 1996) (holding that because parent corporation
26 exercised complete control, all funds deposited in the parent corporation’s account belonged to
27 the parent corporation, not the subsidiary). Here, Rothwell exercised complete dominion and
28

1 control by transferring funds from the Bermuda bank account to the Morgan Stanley account and
2 controlling the investments of those funds. SUMF ¶¶ 34, 35, 37, 40-42, 44, 47-55. See *Carl v.*
3 *Republic Security Bank*, 282 F.Supp.2d 1358, 1366 (S.D. FL 2003) (because third party failed to
4 retain an interest in the funds wired into a customer's account the bank could use those funds to
5 off set the customer's debt, e.g. an overdraft, owed by the customer to the bank). See SUMF ¶35,
6 and Exhibit 23, at US002643-2650 at §A1,1.1 *et seq.*; §A2,2.1; §A3, 3.1(c); §A4, 4.1-4.3; §A6,
7 6.4; §B1, 1.1-1.2; §B4, 4.1-4.2; §B7, 7.1-7.5; §C1, 1.1; and §C4, 4.1-42; and at US002620-2642
8 and US002651-2664, which establish that Rothwell's directors and officers were the only
9 authorized signatories on and the only ones who ever exercised control over Rothwell' Bermuda
10 bank account.

11 **V. THE UNITED STATES CANNOT ESTABLISH THE ESSENTIAL ELEMENT**
12 **OF CONTROL ON WHICH IT HAS THE BURDEN OF PROOF.**

13 Defendant United States has the burden of proving by substantial evidence either that (1)
14 Rothwell was Francis' nominee; or (2) Rothwell held the Morgan Stanley account as nominee for
15 Francis. *Flores v. U.S.*, *supra*, 551 F.2d at 1175, *Oxford Capital Corp. v. U.S.*, 211 F.3d 280, 283
16 (5th Cir. 2000) (citing *Flores*). Nominee status is determined by the degree to which a person
17 exercises control over an entity and its assets. *Oxford Capital Corp. v. U.S.*, *supra*, 211 F.3d at
18 284, *LiButti v. U.S.*, 107 F.3d 110, 119 (2nd Cir. 1997), *Shades Ridge Holding Co., Inc. v. U.S.*,
19 888 F.2d 725, 729 (11th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990), *U.S. v. Bell*, 27 F.Supp.2d
20 1191, 1195 (E.D. CA 1998). Thus, the issue is whether Rothwell held the Morgan Stanley
21 account for Francis while Francis actually exercised control over Rothwell and/or Rothwell's
22 Morgan Stanley account. See *Oxford Capital Corp. v. U.S.*, *supra*, 211 F.3d at 284.

23 Factors relevant to whether a business entity is the nominee of an individual are:

24 (1) Whether the nominee paid no consideration or inadequate consideration for the
25 property and/or whether the taxpayer expended personal funds for the nominee's
26 acquisition; (2) whether property was placed in the nominee's name in anticipation of a
27 suit or the occurrence of liabilities; (3) whether a close personal or family relationship
28 existed between the taxpayer and the nominee; (4) whether the conveyance of the
property was recorded; (5) whether the taxpayer retained possession of, continued to
enjoy the benefits of, and/or otherwise treated as his or her own the transferred property;

1 (6) whether the taxpayer after the transfer paid costs related to maintenance of the
2 property (such as insurance, tax, or mortgage payments); (7) whether, in the case of a
3 trust, there were sufficient internal controls in place with respect to the management of
the trust; and (8) whether, in the case of a trust, trust assets were used to pay the
taxpayer's personal expenses.

4 *Dalton v. CIR*, *supra*, at 2010 WL 3719274 at *9; *See also, Towe Antique Ford Foundation v.*
5 *I.R.S.*, 791 F.Supp. 1450, 1454 (D. Mont. 1992); *U.S. v. Bell*, *supra*, at 1194. "The court should
6 consider the totality of the circumstances rather than single out the presence or absence of one
7 particular factor." *911 Management, LLC v. U.S.*, 657 F.Supp.2d 1186, (D. OR 2009), quoting,
8 *Turk v. IRS*, 127 F.Supp.2d 1165, 1167, 1195 (D. Mont. 2000) ("No factor can dispose of the
9 issue itself, and no factor is necessarily required in order to find nominee status.").

10 **(1) Whether nominee paid no consideration or inadequate consideration for the**
11 **property.**

12 Francis is the Settlor of The Francis Trust, which is an irrevocable discretionary trust,
13 and once transfers were made to fund the trust and its assets Francis could not revoke the trust,
14 all of Francis' legal interest in the monetary transfers was extinguished and he had no guarantee
15 that the Trustees would exercise their discretion in his or any other beneficiary's favor. SUMF
16 ¶¶6-9, 16, 17, 19.

17 **(2) Whether property was placed in the name of the nominee in anticipation of a suit**
18 **or occurrence of liabilities while the transferor continues to exercise control over the**
19 **property.**

20 The Francis Trust was established on May 24, 1999, more than a decade before the
21 nominee lien arose instanter. SUMF ¶2. The Trustee at its sole discretion directed and controlled
22 the operations, finances, assets and investment decisions of The Francis Trust. SUMF ¶¶24, 25.
23 The Trustee of The Francis Trust incorporated Rothwell, Ltd. in June, 2000, and controlled,
24 directed and managed at its sole discretion all operations, finances, assets and investment
25 decisions of Rothwell. SUMF ¶¶27-35, 37, 39-55. *Cf. 911 Management, supra*, at 1198 ("911
26 Management was created eleven days after Tom Weathers was sentenced [on tax evasion
27 charges].").

28 Francis never exercised control after Mantra Films and Sands Media made the transfers

1 in 2002. Neither Francis nor his U.S. corporations, Sands Media and Mantra Films, were
2 insolvent at the time of the transfers nor following the monetary transfers to Rothwell in 2002
3 and 2003. SUMF ¶¶73-76, 90. Following the establishment of the trust and transfers Francis
4 exercised no control over the assets, nor did he have a legal right to do so as the transfers were
5 not revocable as a matter of foreign law. SUMF ¶¶1-55. The Trustee of the Francis Trust and
6 officers and directors of Rothwell were not mere “figure-heads.” *Cf. U.S. v. Lena*, ___ F.Supp.2d
7 ___, 2008 WL 2774375 *7 (S.D.Fla) (unreported).

8 With respect to Casa Blanca de Punta Mita, S.A. de C.V., (“Casa Blanca”) it is a distinct
9 legal entity in which Francis has no legal or beneficial interest as a matter of Mexico law. SUMF
10 ¶¶82-84, 93. Casa Blanca was incorporated at the behest of the Trustee of the Francis Trust.
11 SUMF ¶¶81-83. The Francis Trust -- through ownership of the shares of two corporations which
12 own all the shares of Casa Blanca -- indirectly owns the shares of Casa Blanca. SUMF ¶¶83.
13 The decision to purchase the property in Mexico was solely the decision of the Trustee. SUMF
14 ¶¶79. Rothwell provided a little over \$2 million dollars for the Mexican corporation to purchase
15 the two lots in Mexico as an investment for the benefit of The Francis Trust. SUMF ¶¶78-80.

16 Francis directed and controlled the design, construction and improvements on Casa
17 Blanca’s property, but did not use his personal funds. Mantra Films, Inc. and Sands Media, Inc.
18 paid approximately \$5.3 million in 2002 and 2003 to fund the construction and improvements on
19 Casa Blanca’s Lot #14. SUMF ¶¶89-90. Joseph Francis, Sands Media and Mantra Films use the
20 Casa Blanca property at the sole discretion of the Trustee of The Francis Trust. SUMF ¶¶91-92.
21 The funds provided by Sands Media and Mantra Films in 2002 and 2003 to improve Lot 14
22 added value to Casa Blanca’s Lots #13B and 14 of approximately \$5.3 million dollars. SUMF
23 ¶90.

24 Settlement of The Francis Trust, incorporation of Rothwell, Ltd., incorporation of Casa
25 Blanca, purchases of the Mexico property and completion of the improvements to the Mexico
26 property all occurred from May 24, 1999 through September, 2005 – prior to the
27
28

1 commencement of the IRS investigation of Francis which began in 2006. SUMF ¶¶2, 27-34, 56-
2 57, 78-82, 90. *Cf. Cody v. U.S.*, 348 F.Supp.2d 682, 684 (E.D. VA 2004) (taxpayer's relatives
3 put a house in trust for taxpayers to avoid seizure due to prior tax bill); *U.S. v. Kattar*, 81
4 F.Supp.2d 262, 263-265 (D.N.H 1999) (taxpayer transferred substantially all of his assets to
5 trusts upon notice of investigation for tax evasion); *Towe Antique Ford Found. v. IRS*, 791
6 F.Supp. 1450, 1457 (D.Mont. 1992) (taxpayer fraudulently conveyed assets to charitable
7 foundation in anticipation of the occurrence of federal tax liabilities), *aff'd*, 999 F.2d 1387 (9th
8 Cir. 1993).

9 **(3) Whether close relationship existed between transferor and the nominee.**

10 With respect to The Francis Trust: (1) Francis had the capacity to create the trust, (2)
11 Francis indicated his intention to create the trust by executing the indenture on May 24, 1999,
12 and by funding the trust corpus; (3) The Francis Trust has several beneficiaries; (4) the
13 independent, unrelated Trustee has duties to perform; and (5) the same person is not the sole
14 trustee and sole beneficiary. SUMF ¶¶2, 6-25; *Dalton v. CIR, supra*, at 2010 WL 3719274 at
15 *14. At all relevant times the Trustee of The Francis Trust was Hallmark Trust, Ltd. and/or
16 Hallmark Bank and Trust, Ltd., a Turks & Caicos corporation in which Francis had no ownership
17 interest nor control, directly or indirectly. SUMF ¶¶22-25, 43-46. The owners, officers and
18 directors of Hallmark never met Francis. SUMF ¶¶26, 46. The Trustee exercised sole discretion
19 – never took any direction from Francis or anyone else with respect to the management, control
20 and investment decisions for The Francis Trust or Rothwell. ¶¶32, 34-37, 40-42, 44-46. *Cf. 911*
21 *Management, supra*, at 1200 (the Weathers (the delinquent taxpayers) and all limited partners
22 controlled by the Weathers and a close personal friend and god-father of the Weathers' children
23 were the members of 911 Management).

24 **(4) Whether the conveyance of the property was recorded.**

25 All monetary transactions were accomplished by traceable wire transfers. SUMF ¶¶39-40.
26 Francis never transferred real property to The Francis Trust or corporate entities created by the
27

1 Trustee.

2 **(5) Whether the taxpayer retained possession of, continued to enjoy the benefits of,**
3 **and/or otherwise treated as his or her own the transferred property.**

4 No distributions were ever made to nor for the benefit of Francis or any other beneficiary.
5 SUMF ¶46. Francis, Sands Media and Mantra films have used the Casa Blanca property at the
6 sole discretion of the Trustee. SUMF ¶91. As a matter of Mexico law, however, neither The
7 Francis Trust, Rothwell, Francis, Sands Media nor Mantra films have a legal or beneficial
8 interest in Casa Blanca or its property. SUMF ¶93. Consequently, Francis's use of the Casa
9 Blanca property does not constitute nor create property or a right to property to which the levy
10 against Rothwell's Morgan Stanley account could attach. *Dalton v. CIR, supra*, 135 T.C. No. 20,
11 at *15.

12 None of The Francis Trust's nor Rothwell's funds were used to pay any of Francis' nor
13 any other beneficiary's personal expenses or obligations. *Cf. 911 Management, supra*, at 1203
14 (“[B]y paying the personal obligations of the Weatherses, 911 Management ceases to be a
15 separate entity....”).

16 **(6) Whether the taxpayer after the transfer paid costs related to maintenance of the**
17 **property (such as insurance, tax, or mortgage payments).**

18 No transfer of real property was made by Francis to The Francis Trust or to Rothwell

19 **(7) Whether, in the case of a trust, there were sufficient internal controls in place**
20 **with respect to the management of the trust and its assets.**

21 Francis never exercised any discretion or control over The Francis Trust nor Rothwell nor
22 their assets. Instead, all discretion, control and management was exercised by the Trustee and the
23 directors and officers of Rothwell. SUMF ¶¶6-15, 17-19, 22-55.

24 **(8) Whether, in the case of a trust, trust assets were used to pay the taxpayer's**
25 **personal expenses.**

26 None of The Francis Trust's assets nor Rothwell's assets were ever used to pay any of
27 Francis' personal expenses or obligations. Instead, in 2008 when he needed funds to pay his
28 legal expenses, Francis obtained a \$5 million loan from Washington Mutual Bank. SUMF ¶¶73-

1 77. *Cf. 911 Management, supra*, at 1212 (paid all of Kathy Weathers's expenses).

2 **VI. THE LEVY WAS WRONGFUL.**

3 At the time of levy the IRS knew that: (1) Francis was not and had never been an
4 authorized signatory on Rothwell's Morgan Stanley account; and (2) Rothwell was a separate and
5 distinct legal Cayman Islands corporation formed in 2000. SUMF ¶¶73-77. The IRS knew that
6 Francis had not made any withdrawals from nor any deposits to the Morgan Stanley account.
7 SUMF ¶¶56-57, 62, 77, 94, 96, 99. The IRS had no evidence that Francis controlled Rothwell's
8 Morgan Stanley account nor the signatories. SUMF ¶¶75, 94, 96. *See Steven N.S. Cheung, Inc. v.*
9 *U.S.*, ___ F.Supp.2d ___, 2006 WL 3042938 (W.D. Wash. 10/24/2006) (unreported) (finding the
10 government failed to establish a "nexus" between the delinquent taxpayer and the levied upon
11 accounts and awarding judgment in favor of the corporation).

12 The IRS knew Francis had: (1) pled guilty to two misdemeanor counts of filing personal
13 income tax returns which omitted interest income earned on the Rothwell Morgan Stanley
14 account; and (2) paid all restitution, fines and assessments in full as required. SUMF ¶¶57, 69,
15 95. The United States acted based on an unsupported assumption -- piling inference upon
16 inference -- that Francis controlled Rothwell. SUMF ¶¶95-99. *See Steven N.S. Cheung, Inc. v.*
17 *U.S.*, ___ F.Supp.2d ___, 2007 WL 174042 *4 (W.D. WA 2007) (unreported) ("[T]he Court
18 noted that '[a]t all points in time' defendant had acted based on an unsupported assumption that
19 Dr. Cheung controlled plaintiff"); *see also, Marzullo v. CIR*, T.C. Memo 1997-261, 1997 WL
20 311838 at *8 (U.S. Tax Ct. 1997) (The government cannot satisfy its burden of proof by piling
21 inference upon inference).

22 Although unreported, *Steven N.S. Cheung, Inc. v. U.S., supra*, (hereinafter "*Cheung,*
23 *Inc.*") is instructive. In *Cheung, Inc.*, the United States issued a jeopardy assessment against Dr.
24 Cheung for his 1993 tax liabilities and levied upon Cheung, Inc.'s financial accounts on the
25 grounds that Cheung, Inc. was the alter ego/nominee of Dr. Cheung and that Dr. Cheung was the
26 beneficial owner of Cheung, Inc. *See Cheung, Inc., supra*, ___ F.Supp.2d ___, 2005 WL
27
28

1 1529695 (W.D. WA 2005) (unreported) and 2006 WL 2473487 (W.D. WA 2006) (unreported).
2 Dr. Cheung initially owned all 100 shares of Cheung, Inc. stock. In 1994 and 1995 Dr. Cheung
3 transferred 98% of his shares in equal portions to his wife, son and daughter for \$10 per share.
4 Dr. Cheung continued to retain two shares of Cheung, Inc stock. The United States contended
5 that Dr. Cheung transferred the shares in anticipation of incurring tax liabilities for the 1993 tax
6 year. The district court noted however that the investigation of Dr. Cheung's 1993 tax deficiency
7 did not begin until "well after Dr. Cheung transferred his shares. Defendant has not rebutted that
8 evidence. Accordingly, the Court finds defendant has failed to demonstrate that Dr. Cheung
9 transferred his ownership in plaintiff to avoid his 1993 tax liability." *Id.*, at 2006 WL 2473487
10 *6. After considering that Dr. Cheung's immediate family members received the transfers of
11 stock and became Cheung, Inc.'s board of directors, the district court found: (1) there was no
12 conclusive evidence that Dr. Cheung influenced the decisions of the shareholders/board
13 members; (2) Dr. Cheung was not the signatory on Cheung, Inc's bank account; and (3) the
14 United States provided no evidence that Dr. Cheung controlled Cheung, Inc.'s Smith Barney
15 accounts. *Id.*, 2006 WL 2473487 *6. The district court denied the United States' motion for
16 summary judgment. *Id.*, 2006 WL 2473487 *7 (W.D. WA 2006) (unreported). Following trial
17 the district court entered judgment in favor of Cheung, Inc. on October 24, 2006 (*Id.*, 2006 WL
18 3042938 (W.D. 2006)(unreported).

19 The United States did not appeal the judgment in favor of Cheung, Inc. on the merits of
20 the wrongful nominee levy, but did appeal the rate of interest awarded. *See* 2007 WL 174042
21 (W.D. WA 2007) and *Steven N.S. Cheung, Inc. v. U.S.*, 545 F.3d 695 (9th Cir. 2008).

22 Although the technical provisions of "Controlled Foreign Corporations" rules (aka
23 "Subpart F"), 26 U.S.C. §951 *et seq.*, treat Francis as the "owner" of Rothwell for tax purposes
24 and require Francis to report the interest earned on Rothwell's Morgan Stanley account on his
25 personal returns, the Internal Revenue Code cannot change the ownership of Rothwell from The
26 Francis Trust to Francis, nor render him a "nominee" of Rothwell. *See*, Exhibit 31, Expert Report
27