SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

IN RE THE KOPPELMAN COMMUNITY PROPERTY TRUST	Case No. BP097667 **PROPOSED STATEMENT OF DECISION**
ALYSSE MINKOFF, Petitioner, HILLARI KOPPELMAN, individually, and as Trustee of The Koppelman Survivor's Trust and The Koppelman Marital Trust, and as Sole Owner of the Managing Member of Koppelman Ventures, LLC; KOPPELMAN MANAGEMENT CORPORATION; THEODORE VENNERS; and DOES 1 through 10, inclusive, Respondents.	**Hon. James A. Steele** **Dept. 11** **Trial Commencement Date: 8/6/13** **Trial Completion Date: 7/10/14**

INTRODUCTION TO PROPOSED STATEMENT OF DECISION

Pursuant to California Rules of Court, Rule 3.1590, the court renders its Proposed Statement of Decision. Any party may file and serve a proposal or objection to its contents within the time limits specified by applicable Rule. If no party does so, this document shall, without the necessity of another court Order, automatically become the court's Statement of Decision. Finally, to the extent any of the parties avail themselves of the right to propose or object, the court reminds the parties that a Statement of Decision need not discuss each point listed in a party's request; it need only set forth ultimate facts as opposed to evidentiary facts on the principal controverted issues requested. *Marriage of Garrity & Bishton* (1986) 181 C.A. 3rd 675, 687.

THE TRIAL

Petitioner Alysse Minkoff (sometimes, "Alysse"[1]) was represented at trial by Steven C. Shuman, Richard P. Kinnan, and Andrew Jacobson of Engstrom, Lipscomb & Lack. Respondent Hillari Koppelman (sometimes, "Hillari") and KMC were represented at trial by Vincent W. Davis. Respondent Theodore Venners (sometimes, "Ted") was represented at trial by Lawrence J. Kelly.

Given that the parties have awaited the outcome of this hotly contested matter for many years, and the fact that on the last day of trial Petitioner's counsel raised the specter of a "miscarriage of justice" as Petitioner was allegedly denied an adequate opportunity to present all of the evidence she desired, the court will first comment upon the time afforded Petitioner in presentation of her case. Pursuant to Los Superior Court Rule 4.15, in advance of trial the court obtained written trial estimates from each of the parties. While parties' trial estimates are not expected to be perfectly accurate, they are expected to be at least reasonably so. Subsection (a) of the cited local rule provides as follows: "If the time estimate of either party is exceeded, the court may, in its discretion, deem the case submitted, declare a mistrial, or continue the matter

[1] For convenience, one or more of the parties may hereinafter be referred to by their first names. No disrespect is intended.

to a new trial date." Petitioner estimated 17 hours to present her entire case. Given the issues involved and the fact that the parties' counsel appeared to be cooperating effectively in addressing and reaching various stipulations including as to admissibility of exhibits, Petitioner's estimate as to the presentation of her case appeared reasonable. During the course of the trial it became obvious that through no fault of the other parties, the pace of Petitioner's progress towards completion of the presentation of her case within the estimate provided appeared insufficient. Admittedly, a discovery ruling by the discovery referee, Hon. Aviva Bobb (Ret.), entitled Petitioner to obtain additional documents for discovery purposes. While that did result in some additional time being expended, in the court's view it should not and did not account for any significant increase since these issues arose and were resolved during a hiatus in the trial. Nor did Respondents' counsel engage in the assertion of any extensive or unwarranted objecting to testimony or documentary evidence and in fact, a great many of Petitioner's otherwise potentially objectionable documents were admitted by stipulation. As a result of what appeared to the court to be an unwillingness or inability to present the case in an efficient manner, the court was placed into the position of reminding Petitioner on several occasions to focus upon the relevant issues and to otherwise expedite the presentation of the evidence. As noted below, Petitioner's presentation ultimately resulted in Petitioner almost doubling her initial time estimate.

Petitioner called a total of 13 witnesses including a number of experts. Petitioner herself was the last to testify in her case in chief. In total, Petitioner's case alone encompassed approximately 26 trial session. Of that time, Petitioner's case, including examining and re-examining her own witnesses, consumed more than 80% of the time taken consumed in presenting her case in chief. Rather than declare a mistrial, or arbitrarily deem the case submitted as permitted by Rule 4.15, the court afforded Petitioner approximately double the number of hours beyond her original estimate to present her case. Unfortunately, much of the time expended by Petitioner was not well spent and it seemed that notwithstanding the years which had transpired since the case was first filed and no doubt after a great deal of expense had been incurred by all parties, Petitioner was surprisingly less than fully prepared to

expeditiously present her case. For example, on June 13, 2014, almost 5 years after Mr. Venners was first added as a party to this case, at a time beyond what should have been the conclusion of Petitioner's case, Petitioner sought leave to file a Third Amended Petition. This was intended to include a separate and independent claim for breach of fiduciary duty against Mr. Venners who had, as indicated above, been joined in the action in August 2009. The motion was set by the clerk's office for hearing in August 2014 and was therefore advanced by this court so it might be heard during trial. The parties and this court nevertheless expended time unnecessarily on a motion which, the facts showed, could not and should not properly be granted under the circumstances. By written ruling on June 19, 2014, the motion for leave to file a Third Amended Petition was denied.

As a further example, among the witnesses who testified on Petitioner's behalf was a non-designated expert, Mr. Erik Laykin. Affording Petitioner every opportunity to present her case, Mr. Laykin was permitted to testify subject to a motion to strike. Mr. Laykin's testimony was thereafter stricken by the court for the reasons reflected in the court's written ruling in response to Respondents' oral motion. The court on Respondents' oral motion also struck certain testimony of another Petitioner-designated expert witness, Mr. Joseph Pimbley. Time was also unnecessarily spent on evidence which seemed only minimally, if at all, relevant to the issues to be decided. For example, for reasons the court could not and still fails to comprehend, Petitioner took time presenting evidence including large scale photographs of the exteriors and interiors of various residences of Mr. Venners. Meanwhile, the court waited until the conclusion of the Petitioner's case before first hearing from Petitioner herself.

On July 3, 2014, after Petitioner finally testified and completed her testimony, the court inquired of Petitioner's counsel if Petitioner had then rested. After being advised that Petitioner then desired to re-call Respondent Koppelman to testify yet once again on a subject, specifically the Ayuda loans, about which she had already been previously examined by Petitioner during a trial sessions in August 2013, the court was placed into the uncomfortable position of having to inform Petitioner that she had rested.

Respondents then made an oral Motion for Judgment which was denied by the court, and the trial next resumed on July 9, 2014. At this time Respondents concluded their respective defense cases calling 3 witnesses including one expert. Petitioner then sought to call a total of 5 more witnesses, allegedly in rebuttal. Three of the proposed witnesses had earlier testified (Mr. Martin Reed, Petitioner Alysse Minkoff and Respondent Hillari Koppelman) and 2 more witnesses, an attorney and his legal assistant, were to be called relating to occurrences in the civil action which is discussed below. The record indicates the reasons why the court denied that request. The evidentiary portion of the case was therefore finally completed during the late afternoon of July 9, 2014. Final arguments were scheduled for the following day, July 10, 2014 and those arguments were concluded. The court now rules.

FACTUAL INFORMATION

The parties' initial Joint Statement provided most of the information set forth in the factual scenario that follows. Ed Koppelman (sometimes, "Ed") invented a process to process coal to permit its utilization in a more environmentally acceptable manner. During his early years, Theodore (Ted) Venners owned an interest in a Wyoming coal mine with sub-bituminous coal that could utilize such a process and as such, Ted became interested in promoting the development and marketing of the process. The process has been generally referred to as K-Fuel technology.

Ed Koppelman and Ted Venners entered into a number of agreements. They entered into a Loan Commitment Agreement dated March 29, 1984 under which Ed agreed to loan Ted Venners up to $3,500,000 to capitalize K-Fuel Partnership, an entity that would acquire, develop and commercialize patents, licenses and the process for making K-Fuel. Under ¶2.1 of the Loan Commitment Agreement, Venners had to pay toward the balance on the loan 50% of the Net Proceeds of hypothecations or transfers of any equity interest he owned, or would own in the future, in any "K-Fuel Entity" which was defined as a K-Fuel Partnership or any other entity owning any rights to the K-Fuel technology. In ¶3.1 of the Loan Commitment Agreement, Ted Venners granted to Ed Koppelman a security interest in Mr. Venners'

ownership interest in any K-Fuel Entity, and in all net proceeds Venners received in the future from the sale, pledge, or transfer of Venners' stock or other ownership interest. The security interest attached and was to be perfected immediately. As noted below, it was never perfected. Paragraph 3.3 of the Loan Commitment Agreement gave Ed or his successor the right to have Ted Venners' stock certificates or other certificates of ownership placed into escrow as a means of perfecting the security interest. In addition, for further protection of Ed Koppelman, ¶2.2 provided that Venners held in trust, for the benefit of Ed and his heirs, successors and assigns, a 50% undivided interest in his ownership of any K-Fuel Entity and a 50% undivided interest in the net proceeds of any sale, hypothecation, transfer or assignment of an interest in a K-Fuel Entity.

As provided in ¶1.3 of the Loan Commitment Agreement, Ted Venners executed a Secured Promissory Note which bears a March 29, 1984 date. The Secured Promissory Note ("the Note") called for an initial advance of $500,000 and allows for subsequent advances, with interest on all advances at prime plus 2%. The language of the Note required that Ted Venners pay toward the debt 50% of any Net Proceeds from a Transfer by Ted Venners of any ownership interest in a K-Fuel Entity, but otherwise exonerates him from any personal liability to repay. The terms "Net Proceeds" and "Transfer" are defined in the Note. The Note also contains an acceleration clause.

In 1992, Ed entered into a Royalty Agreement and an Amendment to the Royalty Agreement. There were other modifications of the Royalty Agreement over the years placing a cap of $75 million on the royalty payments. These documents created an obligation for payment of licensing fees for the technology based on a certain level of plant capacity of demonstration projects and a royalty based on tonnage of K-Fuel produced. One-half of any license fees or royalties were payable to Ed or his assignee, and the other half to Ted Venners.

On or about May 1, 1995, Ed Koppelman and Ted Venners executed a Declaration and Amendment (Trial Exhibit 200) confirming that Venners had borrowed $3.5 million to capitalize "K-Fuel partnership." In October 1996, the parties signed a Declaration and Amendment to the parties' Commission Agreement. That document states that "on December

29, 1992, the Promissory Note was superseded and replaced by a Royalty Agreement between KFx and Koppelman, among others" (Trial Exhibit 312). Trial Exhibit 23, a 1996 document, confirmed that the then current balance owed, including accumulated interest, was $9,969,758.36, and that there were borrowings of $3,489,466.87.

On or about October 2, 1996, Ed Koppelman and Ted Venners also signed a letter in which Ed acknowledged transactions exempt from Ted Venners' obligation to pay Net Proceeds. Ed Koppelman died on October 3, 1997. His wife, Nettie Koppelman predeceased him. Before he died, Ed created Koppelman Ventures, LLC ("KVLLC") and its corporate manager, Koppelman Management Corporation ("KMC"). Ed and Nettie had a trust, the Koppelman Community Property Trust, originally dated February 15, 1985 (the Third Amendment of which is dated January 8, 1997). When Nettie died, two subtrusts came into existence, the Koppelman Marital Trust and the Koppelman Survivor's Trust. It has been alleged that through a series of transactions, the subtrusts transferred the Note to KVLLC and that the Koppelman Marital Trust owns 98% of the membership of KVLLC and that KMC owns 1%, and Respondent Hillari Koppelman owns 1%. The original beneficiaries of the Koppelman Marital Trust are Hillari Koppelman, one of Ed's daughters; Donna Minkoff, Ed's other daughter who passed away in 1998; Donna's daughters Debbie Miller and Petitioner Alysse Minkoff; Anne Flayer, a cousin for whom Ed and his wife acted as guardians and who was, according to testimony, was looked upon as the "third daughter" of the Koppelmans; and Anne Flayer's daughters, Melissa and Amanda Flayer. All beneficiaries are adults.

Upon Donna Minkoff's passing, Alysse and her sister Debbie each then owned a little over 20% of the total beneficial interest in the Koppelman Marital Trust. Hillari Koppelman had an approximately 42% interest, and the Flayers the remainder. At all times, Hillari has been the Trustee of that Trust, serving without bond. When Donna Minkoff died, Hillari Koppelman became the sole Trustee. Hillari also is the sole owner, director, officer, employee, agent and operator of KMC. Thus, since at least 1998 Hillari has been the owner and operator of the corporate manager of KVLLC and a 1% owner, and has been the sole Trustee of the 98% member of KVLLC.

It had been alleged that Hillari executed an Assignment purporting to transfer the 98% interest in KVLLC to the Trust beneficiaries individually. The KVLLC Operating Agreement requires that substitute members sign on to the Operating Agreement, however none of the Trust beneficiaries have done so. It has been alleged that the attempted assignment of membership was never accomplished. Nevertheless, KVLLC has been issuing K-1's to the Trust beneficiaries since 2005 and made a distribution of money to those beneficiaries in 2005. The parties agreed that the Trust beneficiaries have an economic interest in KVLLC without voting rights, arguably leaving the Trust with the 98% membership interest to the present day. Hillari claims to have terminated the Trust at the end of 2004. Hillari provided one accounting in 2005, and Petitioner has objected to it.

In 1992, a roll-up transaction occurred in which K-Fuel Partners and other entities with rights in K-Fuel were folded into a public company called KFx, Inc. which later became Evergreen Energy Corporation. Ted Venners was an officer of the corporation until approximately 2009. The rights to the K-Fuel technology passed to that corporation, and the parties have agreed that Evergreen is a "K-Fuel Entity" as that term is used in the Note and Loan Commitment Agreement. Evergreen's stock price peaked at $22.16 per share on or about February 27, 2006. Since then, the stock price declined and Evergreen is now in bankruptcy.

On or about December 20, 2006, KVLLC and Venners entered into a Substitution of Collateral and Note Modification Agreement, with an accompanying Assignment of Royalty Interest (the "Substitution Agreement"). Under this document, KVLLC gave up its security interest in Ted Venners' Evergreen stock and accepted as replacement security a 60% interest in Ted Venners' one-half of the royalty stream. At the time, the stock was worth approximately $9.00 or so per share. The Substitution Agreement also changes the Note so as to make this new security the sole source of collection under the Note.

Petitioner, Alysse Minkoff, contends that Ted Venners made sales and hypothecations of his stock in Evergreen that triggered a payment obligation under the Note; that Hillari Koppelman breached her fiduciary duties by not collecting on the Note and by entering the

Substitution Agreement, and that Ted Venners aided and abetted in or conspired to commit that breach.

This action was originally deemed filed when Petitioner prevailed in an action for a declaration that the mere filing of the Petition would not, in and of itself, be deemed a contest of the Trust[1]. By agreement, the parties dismissed the case pending the appeal of that declaratory judgment. On August 24, 2009, after the Court of Appeal affirmed the judgment, this action was re-filed. Ted Venners was added as a Respondent on August 24, 2009, although he was previously sued in the United States District Court for the Central District of California on a claim arising from substantially the same facts on February 11, 2008.

The court now renders its decision on the case presented.

THE COURT FINDS NO ACTIONABLE BREACH OF FIDUCUIARY DUTY ON RESPONDENT HILLARI KOPPELMAN'S PART AND EVEN IF IT HAD, THE COURT FINDS SHE ACTED REASONABLY AND IN GOOD FAITH UNDER THE CIRCUMSTANCES. EQUITY THEREFORE DICTATES A FINDING IN HER FAVOR.

Probate Code § 16440 provides as follows:

> (a) If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances:
>
> (1) Any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest.
>
> (2) Any profit made by the trustee through the breach of trust, with interest.
>
> (3) Any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust.
>
> (b) If the trustee has acted reasonably and in good faith under the circumstances as known to the trustee, the court, in its discretion, may excuse the trustee in whole or in part from liability under subdivision (a) if it would be equitable to do so.

[1] Such rulings apply only to the filing of such Petitions, not to their prosecution and as such, the court may, if called upon to do so, make a determination in that regard at a later date. The court reserves jurisdiction to do so.

As discussed below, the court finds that even if it had found, which it does not, that Respondent Hillari Koppelman committed one or more actionable breaches of trust, she acted reasonably and in good faith under the circumstances then known to her. The court therefore exercises its discretion and excuses Respondent from any liability which she might have otherwise had for any purported breaches of fiduciary duty as doing so is equitably dictated under the facts and circumstances presented. However, as noted below, the court's exercise of its discretion in this regard is by no means an unqualified endorsement of all of Hillari Koppelman's actions.

As above mentioned, Ed Koppelman was the initial Trustor, patriarch of the Koppelman family and inventor of the technology which constituted the basis for the Note constituting the largest single asset in the Trust. Ed and his daughter Hillari were obviously very close and he selected Hillari to ensure that his vision would be achieved, not only for the development and commercialization of the K-Fuel process, but also towards that end, in managing the Trust's and the family's relationship with Ted Venners and his role in that process as well[1]. Considering all of the evidence, the relationship between Ted Venners and Ed Koppelman was one not only based upon mutual trust and respect, but also one of great mutual, personal affection. Mr. Venners and Ed Koppelman saw each other frequently, and Ed Koppelman spoke to Mr. Venners on multiple occasions every day. The testimony of Ted Venners, as well as that of Hillari Koppelman and the other Koppelman family members who testified on Hillari Koppelman's behalf, Ms. Flayer and Ms. Miller, Ted Venners was viewed in many respects as the son Ed Koppelman never had. Similarly, Ted Venners testified that in many respects, he also saw Ed Koppelman as the father he never had.

[1] While Hillari Koppelman and Donna Minkoff were both initially designated as co-trustees, the Trust was structured in such a way that upon Donna's passing, Hillari would serve as sole Trustee and she did so. The initial co-trusteeship does not in any way affect the court's findings as to the reasons why Hillari was selected.

The intent of the Trustors, and especially that of Ed Koppelman, is of great importance in analyzing this case and in the court's view, there are at least 3 documents which are critical to understanding Ed's, and Nettie's, intent. To begin with, Trial Exhibit 178, dated November 11, 1993, states, in relevant part, as follows:

> "I, Edward Koppelman, hereby appoint Hillari Koppelman as the sole party responsible for handling any and all matters relating to KFx, Inc. and/or Theodore (Ted) Venners in the event it is determined I am no longer able to responsibly manage my business and/or personal affairs, I become incapacitated, or upon my death. Hillari Koppelman is hereby authorized to act on my behalf and/or on behalf of my estate when handling any and all matters concerning the above or related entities. Any and all decisions regarding KFx, Inc. and/or Theodore (Ted) Venners which are made by Hillari Koppelman are to be accepted as if they were made by me personally."

As such, Trial Exhibit 178 essentially says that Hilliari shall be deemed Ed for all purposes. This is consistent with Exhibit 1, the 1997 Operating Agreement for KVLLC which states, in somewhat unusual manner, at Section 5.7, that: "Neither KMC nor HILLARY KOPPELMAN may at any time be removed by the Members from its or her position as Manager of the Company." In fact, there are numerous provisions of the Operating Agreement which make it abundantly obvious that it was Ed Koppelman's desire and intent that Hillari Koppelman be the person charged with the responsibility of being Ed Koppelman in his stead with respect to KVLLC. He also clearly wanted her to remain in that position.

Additionally, Trial Exhibit179, the Memorandum of Understanding, is also extremely important in understanding the Trustors' intent. This document essentially provides that regardless of the precise manner in which any K-Fuels assets or technology might be held, whether by partnership or otherwise, those assets would be held in equal proportions as between Ed and his wife Nettie on the one hand, and Ted Venners on the other hand. The document further provides that in the event of Trustors' deaths, Ted Venners "will have the exclusive right to manage the assets jointly owned". The court finds that based upon all of the

evidence, including but not limited to the testimony of Hillari Koppelman and Ted Venners, which the court found credible and persuasive in this regard, that it was the intent of the parties, most notably that of both Ed and his wife Nettie who were the Trustors and initial Trustees of the Trust, that the subject of the Memorandum of Understanding consisted of and covered all existing and after-acquired assets involving or related in any way to K-Fuels technology owned by Ed and Nettie whether in their individual and/or representative capacities. The court makes this finding despite the absence of a schedule of assets being attached to the Memorandum of Understanding. Whether this was due to convenience or oversight is of little practical consequence when evaluating the parties' intent. The evidence and the subject transactions in their totality support the court's findings in this regard. Among the factors this court considered on this issue was the fact that Ed Koppelman, described as a brilliant businessperson, appeared to this court from the testimony to be not unlike many accomplished businesspeople of his era, in having little regard for ensuring the crossing of "t's" and dotting of "i's" to ensure the technical accuracy of their written agreements. In other words, the handshake, not the paper, evidenced the binding agreement.

The court's conclusions in this regard are supported by a number of items of evidence, just some of which will be mentioned. For example, Trial Exhibit 22, the Loan Commitment Agreement, which, according to its written terms was supposedly executed by the parties at Gillette, Wyoming on March 29, 1984, was not. The Loan Commitment Agreement, which incidentally is yet another document which refers to a "partnership", was the vehicle by which the subject March 29, 1984 Promissory Note was created (Trial Exhibit 21). Nevertheless, the "1984" document refers to certain Amended and Restated Notes of the San Francisco Group (consisting of KGM Associates, etc.), dated September 1, 1991. Based on the testimony, there can be no doubt that the referenced KGM transactions did in fact occur no earlier than in or about 1991. Therefore, even the subject Promissory Note having such prominence in this

litigation, the document which was central to Petitioner's entire case, allegedly made and entered into in 1984, was undoubtedly not made or entered into on the date indicated. These irregularities or inconsistencies between the written documents and what appeared to be the parties' agreements was not confined to just this one document central to the case, but was reflected in numerous agreements and other documents governing the parties' relationships.

As a further example, the court refers to the Commission Agreement, Trial Exhibit 238, dated November 13, 1989. This agreement was allegedly entered into after both the Note and the Loan Commitment Agreement and includes an Integration clause which provides that it constitutes the "entire agreement" between the parties and that there are no other agreements or understandings binding upon them. This document also refers to a "note". Ted Venners testified there was only one such note ever executed by him and there was no evidence contradicting that testimony. Given that Ed Koppelman went to the trouble of apparently back-dating the Promissory Note to a date earlier than the Commission Agreement, it would not be unreasonable to assume that Ed Koppelman may have intended to replace or dispense with the Promissory Note by virtue of the Commission Agreement. In fact, the Amendment to the Commission Agreement (Trial Exhibit 312) indicates the March 1984 Promissory Note was superseded and replaced by a royalty agreement.

Whether or not Ed Koppelman intended to create such confusion, the facts, including the inconsistent documentation, would certainly complicate any effort to enforce the Promissory Note. It is not surprising that Ed Koppelman never sought to enforce, or even perfect (e.g., by filing a financing statement or taking possession or control of the shares, or otherwise) the "Secured" Promissory Note. This is true although the evidence showed he clearly had plenty of opportunity to do so and as such, the court is of the belief that the Note was not intended by the parties as it might appear from its face.

In any event, the essence of the Petitioner's claims against Respondent Hillari Koppelman, and thereby against Respondent Venners, since his liability is dependent upon hers, is two-fold. Firstly, by failing to enforce the above-mentioned Promissory Note in accordance with Petitioner's interpretation of its terms, Hillari allegedly breached her fiduciary obligations owing to Petitioner as well as to the remaining beneficiaries[1]. Secondly, it has been argued by Petitioner that by entering into the Substitution of Collateral Agreement, Trial Exhibit 31, Hillari Koppelman violated the Uniform Prudent Investor Act found at Probate Code §§ 16045-16054. The court finds no valid basis to find liability against Respondents on either of these bases.

With respect to the alleged failure to enforce, or secure, the Promissory Note, aside from the Note's obvious and problematic irregularities and inconsistencies mentioned above, the court finds that Hillari Koppelman, in exercising her discretion as a fiduciary, acted in this regard just as her father did and would have under the same circumstances. The law provides that the basic inquiry whenever the exercise of a fiduciary's discretion, absolute or otherwise, is challenged, is always a question of whether or not the fiduciary, for example a trustee, acted in the state of mind contemplated by the trustor. See, Restatement of Trusts, § 187, Comment; Scott, Trusts, § 187, *Estate of Canfield* 80 Cal.App.2d 443 at 450. Not surprisingly, the Trust itself (at section B. "General Trust Powers", Trial Exhibit 196B-48) includes a provision requiring a Trustee, when exercising general trust powers, to exercise the care, skill, prudence and diligence under the prevailing circumstances a prudent person "acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust...". The court finds that Ed Koppelman's intent for the trust purpose was to ensure that to the greatest degree possible, his K-Fuels

[1] It is worthy at this juncture to note that none of the remaining beneficiaries, including Ms. Flayer and Ms. Miller who themselves are and/or represent the entirety of the beneficiary class, joined Petitioner in this or any related action. Nor were any of the beneficiaries or family members even called as witnesses on Petitioner's behalf.

technology would be commercially developed for the benefit of all of the Trust's beneficiaries. It was also his stated purpose in ensuring that K-Fuels technology was exploited for commercial purposes to the greatest possible degree, that the vehicle to accomplish that result was to in turn, permit latitude to the greatest degree possible to both his daughter Hillari and his protégé, Ted Venners. Therefore, to the extent Hillari Koppelman was granted discretion and exercised it as a fiduciary, she acted consistently with the requirements of Probate Code § 16080 in that her actions were reasonable and not arbitrary.

As mentioned earlier, Ed Koppelman never perfected the "secured" Note despite the language in the document requiring same and having ample opportunity to do so. There was absolutely no indication from the evidence that Ed Koppelman's failure to so perfect the Note was in any way inadvertent. Not having secured the Note within the requisite period, any security interest in the shares of stock may have been lost. Furthermore, given the unusual non-recourse provisions in the Note, this also raises serious questions about Mr. Venners' potential personal liability as to proceeds from the sale of stock. In addition and very significantly, Ed Koppelman also specifically waived from the Note's provisions a myriad of very sizeable transactions which, according to Petitioner's interpretation of the Note, should have triggered the Promissory Note's payment provisions. For example, Trial Exhibit 19, the October 2, 1996 so-called "Waiver Letter" or "Acknowledgment", exempted transactions involving over 1,600,000 shares of stock held in Ted Venners' name. This included the pledge of 500,000 shares to Kennecott pursuant to a prior guaranty; 220,000 shares pledged to Prudential Securities for a line of credit (which was thereupon paid one-half to Ed Koppelman which partition of funds would seem to be consistent with the unwritten partnership Mr. Venners contends he shared with Ed Koppelman); 235,000 shares transferred to various parties in settlement of a number of existing debts relating to or arising out of the K-Fuels business; 600,000 shares pledged as collateral for a $2 million line of credit; and even 51,800 shares

transferred by Ted Venners to Ed Koppelman's doctor and his doctor's nurse, apparently to ensure Ed Koppelman would receive the medical care he desired but might have otherwise been denied. The court found Mr. Venners' testimony that many of the stock sales, pledges or other disposition transactions occurring thereafter, which Petitioner alleged should have triggered the payment obligation under the Note, either arose from refinancing to cover accruing interest on the initial debt obligations exempted by the Waiver Letter, or arose from debt acquired, or other dispositions primarily made, for the purpose of further development and exploitation of K-Fuels technology. The court is persuaded that, for the most part, these transactions were intended to ultimately accrue to the benefit of all concerned, including Petitioner. To the extent that additional funds were obtained and were used to repay Mr. Venners for some portion of the millions of dollars he personally invested in development of K-Fuels technology, this would be consistent with the arrangement he testified to that he had with Ed Koppelman. The court therefore found unconvincing the assertion that Ms. Koppelman had permitted, or Mr. Venners had otherwise obtained, any significant personal benefit given the many millions of dollars, and years of his life, Mr. Venners personally devoted and invested in his efforts to pursue K-Fuels technology as Ed Koppelman and he had agreed Mr. Venners would do even after Mr. Koppelman's passing.

On the other hand, it is true that Petitioner, as well as Respondents, would have been far better off had some of KFx, Inc. (Evergreen) stock held by Ted Venners been liquidated, either through payment under the Note or otherwise. Petitioner claims she was damaged in an amount of up to approximately $7 million. Quite frankly, the court remains very skeptical of Petitioner's theories as to the basis for the damages she claims. For example, to put Petitioner's purported $7 million in damages in perspective, it must be remembered that this is essentially based upon her ±20% share arising out of her grandfather's $3.5 million loan to the parties' venture while Mr. Venners has invested, aside from the years he has devoted and continues to

devote to the effort even to this day, many millions of dollars of his own money. Viewed another way, given Hillari Koppelman's far greater equity interest Ms. Koppelman would have suffered a much greater loss, likely exceeding $15 million, however Petitioner would seeks another $7 million from Ms. Koppelman.

The fact is that the Koppelman family continues to have an expectancy interest in future royalties, enhanced by Mr. Venners continued efforts towards that end. Irrespective of the foregoing, Petitioner's 20/20 hindsight ("Monday morning quarterbacking" in Mr. Ostrove's terms) is not the basis upon which the conduct of a fiduciary, especially a non-professional fiduciary, and even more so a family member of a Trustor, is to be judged. This issue is more fully addressed below in the context of the second, somewhat related, basis for Respondents' liability: Respondent Hillari Koppelman's alleged violation of the Prudent Investor Rules relating to her agreement to enter into the Substitution of Collateral Agreement (Trial Exhibit 31).

On or about December 20, 2006, KVLLC, by Hillari Koppelman, and Mr. Venners, entered into a Substitution of Collateral Agreement and Note Modification Agreement, with an accompanying Assignment of Royalty Interest. Through this transaction, KVLLC gave up its security interest in Mr. Venners' KFx (Evergreen) stock and accepted a 60% interest in Mr. Venners' one-half entitlement to any royalty stream pertaining to development and exploitation of K-Fuels technology. Petitioner argues that this was essentially an investment of trust funds in a speculative investment and therefore Ms. Koppelman violated the Uniform Prudent Investor Act (Probate Code §§ 16045-16054). Petitioner's reliance on this theory is, in the court's view, misplaced. This case is clearly not one in which a trust corpus was to be invested in one or more of a host of possible investment vehicles from which a trustee was to determine which might best provide the most appropriate combination of income, capital preservation and/or growth characteristics.

Firstly, Hillari Koppelman's disposition of the Note asset was expressly permitted under the terms of the Trust. Pursuant to the Trust (Trial Exhibit 196B), Hillari was provided with the discretion: "to acquire or dispose of an asset... or by exchange... change the character of... a trust asset". When a trustee is permitted such discretion, the trustee is required to act in accordance with fiduciary principles and not in bad faith or in disregard of the purposes of the trust." Probate Code § 16081(a). The court finds that in this regard, Respondent acted, as required by law, in accordance with fiduciary principles, and neither in bad faith nor in disregard of the purposes of the trust.

In a similar vein, as for the standard of care specifically applicable to the investment function of her trusteeship, Hillari Koppelman as Trustee would be required to invest and manage the trust assets (i.e., the Note, etc.) considering the purposes of the Trust, including Ed Koppelman's desires as to development and exploitation of K-Fuels technology. Among the circumstances Hillari Koppelman was obligated by law to consider would be the "asset's special relationship or special value to the purposes of the trust or to one or more of the beneficiaries" (Probate Code § 16047(c)(8)). Here, there can be no question in the court's mind that Hillari Koppelman did just that, albeit inartfully or clumsily at times. Stock prices fluctuate and although Petitioner may have been correct that in this case KFx (Evergreen) stock had declined very substantially from its one-time high, the court finds Mr. Venners is still, to this day, actively pursuing exploitation of the technology Ed Koppelman first invented. Mr. Venners testified to the fact that he left after his testimony had been completed in order to attend meetings in China in for the purpose of commercially exploiting K-Fuel technology in that country.

While it might have proven more profitable for the Trust, and if so, certainly to Hillari Koppelman personally, not to have substituted collateral and to have immediately possessed and sold KFx shares, or found some other means to liquidate the trust's position entirely for

whatever financial gain might have been garnered at that time, such actions would have been entirely inconsistent with the specific reasons why Ed Koppelman constructed the relationships, both contractual and otherwise. This included specifically selecting his daughter Hillari to serve as a Trustee and as the Manager of KVLLC.

Furthermore, to place the substitution of collateral in context as Hillari understood it at the time, royalties, which would be capped at $75 million, had in fact totaled over $2.2 million to such date according to Trial Exhibit 215.1. Hillari Koppelman therefore did have a reasonable basis to believe these royalty rights, especially a significantly increased share in those rights as had been so acquired by virtue of the substitution agreement, had some value.

Petitioner, no doubt infuriated by Hillari's failure to keep Petitioner abreast of trust decisions as discussed below, has lost sight of the fact that Hillari Koppelman, a non-professional family member, selected by her father to so serve, is not to be judged by what a professional fiduciary might have done if given trust monies or other assets to invest. Hillari Koppelman was not a lawyer or a CPA. Nor was there any evidence whatsoever that Hillari Koppelman was selected as Trustee or Manager based on any investment or similar expertise on her part. She is to be judged as a lay person accordingly. In stark contrast to the instant circumstances involving Hillari Koppelman, a non-professional, layperson, family member specifically selected by the Trustor to occupy the position of Trustee, Trust Law provides that if a trustee has made representations that the trustee possesses special skills, the trustee will be held to the standard of the skills so represented. Thus an "expert" trustee will be held to the standard of care of other experts (See, *Estate of Beach* (1975) 15 Cal. 3d 623, 635; *Estate of Collins* (1977) 72 Cal. App. 3d 663, 673; *Coberly v. Superior Court* (1965) 231 Cal. App. 2d 685, 689. Therefore, Ms. Koppelman is not to be held to the standard of an expert.

Hillari Koppelman made decisions which she in good faith believed to be in the best interests of all of the beneficiaries, including herself. While it may be easy to second-guess

Ms. Koppelman's decision making after the fact given the decline in the value of KFx (Evergreen) stock, that is not the standard by which she is to be properly held under the law. The court also places great weight in reaching its finding as to the lack of any basis to find Respondent Hillari Koppelman in breach, is that in making her decision to substitute collateral Hillari Koppelman did not acquire any personal interest or advantage adverse to the other beneficiaries. Nor did she use her position in any way to gain any advantage over the other beneficiaries or to make any special profit. Quite frankly, given the absence of any proof of theft or misappropriation, this case would seem to stand in sharp contrast to the vast majority of surcharge and removal actions of family member fiduciaries which this court has heard in trust and probate litigation over the years.

The court also finds that notwithstanding Probate Code § 16010, which would require a trustee to enforce claims, Hillari Koppelman also cannot be held liable for failing to initiate and pursue legal action against Ted Venners for collection of amounts which Petitioner, under her construction of the relevant documents, believed were or are due. The court is also not of the opinion that Hillari Koppelman was obligated to pursue Mr. Venners on the Note given that she had a reasonable basis upon which to believe that Alysse Minkoff's interpretation of the Note was inconsistent with what Hillari Koppelman understood of the contracting parties' intent. While Hillari Koppelman after becoming aware of a complaining beneficiary's dissatisfactions may be faulted for having failed to bring the issue to the attention of the court, perhaps by way of a Petition for Instructions pursuant to Probate Code § 17200 or otherwise, the court does not find her failure to do so was in any way fatal to her defense under the court's Probate Code § 16440(b) analysis.

Aside from likely forever alienating Ted Venners, in whom Ed Koppelman entrusted the ultimate success of K-Fuels and whose continued cooperation would be necessary to fulfill that objective, there is, in the court's mind, very grave doubts as to the likely success of any

such action. KVLLC would have had to overcome foreseeable challenges to its standing as well as a claim that any such action might be barred by the applicable statutes of limitation. KVLLC would also have had to deal with the highly questionable circumstances surrounding the initial preparation of the documents themselves. Although Petitioner had taken issue with any attempt by Respondents to characterize the Note as being unusual or atypical, it is unusual in many respects. The Note is also non-recourse as against Mr. Venners personally, except for Net Proceeds. Mr. Venners' testimony about what the parties intended by that term, that is that it was to be net of repayment of investment that each of the parties had put into the business, does not seem unreasonable under the particular circumstances in this case. The court also wonders whether, given the unusual recourse provisions of the Note to have been secured by stock, which was never perfected as required by the terms of the Note, could nevertheless sue the original maker personally for proceeds on sale of the unsecured collateral. Aside from all of these issues, it must not be forgotten that the Note is to be construed in accordance with Wyoming law raising still more questions about its enforceability and Petitioner did little to persuade this court that it was enforceable in accordance with Petitioner's interpretation under Wyoming law.

In summary, the Note and related agreements which Petitioner would have had Ms. Koppelman sue Mr. Venners upon are not nearly as clear-cut, unambiguous and necessarily enforceable as Petitioner would suggest. Even without all of these ambiguities but recognizing that the court found there were many facets of the arrangements between Ed Koppelman and Ted Venners not necessarily reflected in the written documents, reference to Wyoming law would be required. Mr. Venners' counsel pointed out that Wyoming courts construe contract language "...in the context in which they were written, looking to the surrounding circumstances, the subject matter, and the purpose of the agreements to ascertain the intent of the parties at the time the agreements were made", citing *Stone v. Devon Energy Prod. Co.,*

L.P., 2008 WY 49, ¶ 18, 181 P.3d 936, 942 (Wyo.2008). In this regard, Mr. Venners testified with conviction that when he was asked to sign the Promissory Note, he was assured by Ed Koppelman, pointing to the language of the Note, that it was "non-recourse" and that the parties would remain "partners." Whether or not that the events occurred precisely as Mr. Venners testified, there is little, if any, doubt in the court's mind that Mr. Venners certainly believed those events occurred in that manner. No doubt had the matter been litigated, or even negotiated by counsel as between the Trust and Mr. Venners, Ms. Koppelman would have been called upon to support Mr. Venners' understanding in that regard as well. Even assuming somehow that California law might apply, the California Supreme Court's decision in *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association*, 55 Cal.4th 1169 would demonstrate the formidable obstacles to the documents' enforcement. As stated in *Riverisland* at 1174-1175:

> [Civil Code] Section 1856, subdivision (f) establishes a broad exception to the operation of the parol evidence rule: "Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue." This provision rests on the principle that the parol evidence rule, intended to protect the terms of a valid written contract, should not bar evidence challenging the validity of the agreement itself. "Evidence to prove that the instrument is void or voidable for mistake, fraud, duress, undue influence, illegality, alteration, lack of consideration, or another invalidating cause is admissible. This evidence does not contradict the terms of an effective integration, because it shows that the purported instrument has no legal effect." (2 Witkin, Cal. Evidence (5th ed. 2012) Documentary Evidence, § 97, p. 242; see also *Id.*, §§ 66 & 72, pp. 206 & 211.)

Riverisland is not a significant departure from then-existing authority which provided that parol evidence could be considered on the issue of the enforceability of financial instruments in circumstances involving fraud or lack of consideration, etc. Finally, aside from all of these and other obstacles which would have been involved in any attempt to litigate such a dispute, there was no evidence whatsoever indicating there were any funds available to the

Trust, or otherwise, to wage litigation against Mr. Venners. Therefore, Hillari Koppelman, as a fiduciary, whether as trustee or managing member, cannot be faulted for failing to initiate an action against Ted Venners. Nor can Ms. Koppelman be faulted under general principles of fiduciary duty for having entered into the substitution of collateral transaction under the circumstances then existing and known to her.

The court therefore finds the absence of any actionable breach of fiduciary duty on Ms. Koppelman's part based on the events and circumstances described above. Likewise, Respondent Ted Venners, who has been sued for having allegedly aided and abetted Respondent Hillari Koppelman, is likewise found not liable. Furthermore, even had the court found such a breach on Ms. Koppelman's part, the court finds an equitable basis upon which to exercise its discretion under Probate Code § 16440(b) to excuse same in full as previously noted. The court would have likewise absolved Ted Venners on the facts as well. Because the court has made these findings, it does not address in any detail the other obstacles Petitioner faces to her action, including but not limited to the statute of limitations. Placing under serious question Petitioner's timeliness in bringing her action, is Exhibit 181, Mr. Reed's April 15, 1998 letter to, among others, Petitioner as well as her mother who was then a co-trustee. That correspondence refers, not only to the necessary commercialization of K-Fuel technology in order to provide for the Koppelman family inheritance, but also to the Venners' Note as constituting a major asset of the Trust. Since the applicable statute of limitations would be 3 years under the Probate Code, a credible argument exists that Petitioner's claims may not have been timely asserted. Mr. Stern confirmed that there was ample publicly-available information concerning Mr. Venners' transactions going back to 1997 with respect to Mr. Venners' KFx (Evergreen) stock and Petitioner demonstrated her facility for obtaining, at the very least, publicly-available information. However, since the court has applied the provisions of Probate

Code § 16440(b) to exonerate the trustee, there is no need to further analyze or comment upon the statute of limitations or other such defenses.

All of the foregoing does not preclude a discussion of the manner in which Ms. Koppelman actively hindered Petitioner's access to information and documents concerning the Trust's affairs. Probate Code § 16060 requires a trustee to keep beneficiaries reasonably informed of the trust and its administration. It is without any substantial controversy that Hillari Koppelman failed to keep Alysse Minkoff, a beneficiary, fully informed of what was happening relative to the Note and the Substitution of Collateral. In fact, Ms. Koppelman not only failed to keep Ms. Minkoff informed, she went out of her way not to share certain information with her. In or about March 2005 Ms. Minkoff retained the services of Ellis Stern, Esq. of Stern & Goldberg for purposes of obtaining information from Ms. Koppelman. On March 4, 2005, Mr. Stern corresponded with Ms. Koppelman regarding Ms. Minkoff's desire for information to which she was entitled (Trial Exhibit 63). Mr. Stern's letter, although acknowledging Ms. Minkoff was then in possession of the Trust documents, as well as the April 15, 1998 comprehensive letter from attorney Martin Reed reciting the details of the trust and its assets (Trial Exhibit 181) , as well as copies of various Estate and Fiduciary Income Tax Returns, requested other information from Ms. Koppelman as well. This included accountings and related documents for the Trust during the entirety of Ms. Koppelman's tenure, financial statements concerning KVLLC as well as the Venners Promissory Note and information concerning all payments made thereunder. Mr. Stern's letter cannot under any circumstances be deemed hostile or accusatory. To the contrary, Ms. Stern correspondence was cordial, professional and to the point. Upon initially hearing Mr. Stern's testimony and reviewing that initial item of correspondence in light of relevant law on the duty of fiduciaries to keep beneficiaries reasonably informed, the court was keenly interested in what possible explanation might be offered to justify any non-compliance on Ms. Koppelman's part to the request. As it

turned out, pursuant to interim correspondence, as reflected in Mr. Stern's April 19, 2005 letter (Trial Exhibit 65), Petitioner's counsel ultimately received a number of documents from Ms. Koppelman including KVLLC Tax Returns, its Operating Agreement, and various other agreements between Ed Koppelman and KFx and between Mr. Venners and KFx. Conspicuously absent from the material provided was the Venners Promissory Note or any payment information thereon. Mr. Stern then reiterated his prior requests. In response, on May 5, 2005 (Trial Exhibit 66), Ms. Koppelman provided additional documents including various tax returns as well as what she refers to as an "accounting" for the checking accounts. Ms. Koppelman indicates in this correspondence that as to the remaining questions, she would need to consult with counsel and possibly others. Apparently, an informal accounting had been provided by Ms. Koppelman. At this time, Mr. Stern had still not been provided, among other things, either the Promissory Note or any payment schedules (or a statement that no payments had been made). Thereafter, as evidenced by Trial Exhibits 68 and 69, there was further communication between the parties' respective counsel and shortly thereafter, Mr. Stern was afforded the opportunity to personally view, but not obtain a copy of, the Promissory Note.

As of March 2006, Mr. Stern no longer represented Ms. Koppelman and as of that time, despite his best efforts, he was still unable to obtain from Ms. Koppelman or her counsel either the formal accountings he had requested or a copy of, or other information pertaining to, the Note. However, given the unusual facts and circumstances then known to Ms. Koppelman as she reasonably believed them to exist, the court does not find this conduct constituted an actionable breach of trust on Ms. Koppelman's part.

Among the issues to be considered in this regard is the fact that there was and is an absence of any causation between the failure to keep Ms. Minkoff reasonably informed and the damages she claims to have suffered. For example, Petitioner argued in closing that Ms. Koppelman could have, in response to Mr. Stern's suggestion, merely had Mr. Venners' shares

escrowed. Such a request would seem reasonable given the state of affairs as of that date. However, that still would not however have mitigated Ms. Minkoff's purported losses as the shares, escrowed or not, would still have declined in value. Furthermore, at least as importantly, the court finds that Hillari Koppelman's intense distrust of her niece was, at least in so far as the court can determine, well-founded and as such, Respondent's counsel's closing argument suggesting that Ms. Koppelman would have been damned in any event, regardless what she did relative to the stock, does not appear at all far-fetched. For example, had Ms. Koppelman obtained possession of the KFx stock and then promptly sold it to pay the Koppelman family as Petitioner would have expected, and thereafter had the stock price increased, a claim by Ms. Minkoff that Ms. Koppelman had sold the shares prematurely would not seem the least bit inconsistent with Ms. Minkoff's modus operandi (see for example, the court's discussion below regarding Trial Exhibit 901 wherein Ms. Minkoff asserts various complaints upon learning from Ms. Koppelman that a substantial distribution will soon be made to her). On the other hand, had Ms. Koppelman escrowed the shares and not sold them, she would be subject to the same criticism, notwithstanding the fact that Ms. Minkoff testified that she still holds the KFx (Evergreen) shares she obtained by way of a distribution in or about 2002.

Of greatest relevance is that Ms. Koppelman held the belief that providing certain information to Ms. Minkoff would have been detrimental to the Trust, to its beneficiaries, as well as to KVLLC and its members. It should be noted at this point that it was never established during trial that disclosure of the Promissory Note itself or its terms would necessarily constitute or evidence any violation of any securities or similar regulations. However, the court found credible the testimony of both Hillari Koppelman and Ted Venners that they were concerned that Alysse Minkoff posed a potential threat to KFx (Evergreen), a publicly traded company, and that if she possessed the Note and certain other information, she

would use it to, among other things, leverage that information for her personal benefit, even to the detriment of the Koppelman family as a whole, in a manner inconsistent with Ms. Koppelman's understanding as to what her father had intended. Among the factors Ms. Koppelman considered was, as admitted in Ms. Minkoff's Petition and in her testimony, that Ms. Minkoff refused to sign a confidentiality agreement in order to obtain the Note. Admittedly, the court was surprised when it first learned such an agreement had even been demanded before the Note would be provided. As it turned out however, there was a plausible explanation for that course, which this court ultimately found persuasive.

To begin with, there is, and likely has been for a number of years even long before institution of this case, little affection between Alysse Minkoff and her aunt, Hillari Koppelman. Various family members have testified to Ms. Minkoff being, in one witnesses' words, "a drama queen". More importantly, in the eyes of all of the Koppelman family members who testified, Ms. Minkoff was perceived as being dishonest and untrustworthy. As a result, all of the family member beneficiaries have, for a number of years, apparently avoided dealings with Ms. Minkoff. In closing argument Petitioner pointed out that the opinions as to Ms. Minkoff's trustworthiness, etc. were based on events occurring well before the period during which the current dispute arose. While that may be some truth to that contention, it does place Ms. Koppelman's state of mind at the relevant time in context which is relevant on the issue of whether or not, in the words of Probate Code § 16040(b): "trustee has acted reasonably and in good faith *under the circumstances as known to the trustee.*" [emphasis added].

Another apparent basis for Ms. Koppelman's distrust was Ms. Minkoff employment for a period of time as a reporter in the celebrity journalism field. The court believes Ms. Minkoff referred to herself as having been a "gossip columnist" or equivalent. Ms. Koppelman, being somewhat suspicious of someone who had the personal qualities mentioned above, and who

was also drawn to this particular kind of work, especially given the sensitive nature of certain circumstances discussed below regarding KFx (Evergreen), combined with Ms. Minkoff's initial refusal to consider signing a confidentiality agreement, would lend credence to Ms. Koppelman's concerns.

Putting this further in context, Mr. Venners testified to the fact that KFx (Evergreen) was subject to a particularly vicious short selling campaign orchestrated by someone named Incencio. Mr. Incencio was disseminating false information concerning the company and apparently even photoshopped and distributed to the public a deceptive picture of one or more of the company's facilities. KFx (Evergreen) ultimately retained Gibson, Dunn's New York office and assisted others within the business community in having Mr. Incencio's brokerage license revoked. Although Petitioner's expert, Mr. Brandon, testified to various possible methods, most notably the utilization of variable prepaid forwards by which Mr. Venners supposedly could have avoided outright selling of his KFx (Evergreen) shares, thereby avoiding the appearance of insider selling which would have fueled short-selling of the company's stock, there was no evidence that Mr. Venners ever knew of these methods. The court also found unconvincing Mr. Brandon's conclusion that there would likely be no negative impact upon a company, or its stock, if it became known that a corporate insider had utilized one or more of the subject stock disposition strategies. Mr. Brandon indicated this negative impact would likely occur only if the company were also announcing news which might be negatively perceived by the market. Mr. Brandon did not take into account the possibility the company might have been the subject of, as KFx was, a short selling campaign.

In any event, despite the unusual lengths to which Hillari Koppelman avoided providing a copy of the Note or other documents to Ms. Minkoff or her counsel, given all of the circumstances as she believed them to exist, combined with the lack of causation as between that act and any damage to Ms. Minkoff, Ms. Koppelman's actions did not amount to an

actionable breach of fiduciary duty. Similarly, the court finds that institution of the Wyoming action, which appears to have initially been brought, at least in large part, to defeat Ms. Minkoff's claims in this case, was, despite the questions regarding the propriety of doing so, also insufficient to support a finding of any actionable breach of fiduciary duty given the circumstances then existing as known to Ms. Koppelman.

In further placing all of the foregoing in context, the court found Ms. Minkoff's activities, both on and off the witness stand, troubling. On the stand, Ms. Minkoff was, at least on cross-examination, more than just a bit uncooperative. Ms. Minkoff deflected questions by, for example, responding to different questions than were being posed to her or by avoiding responding entirely[1]. On other occasions, when asked direct questions, Ms. Minkoff would ask questions in response (e.g., when asked if Mr. Reed suggested to her that she might want to monitor KFx (Evergreen) stock, Ms. Minkoff, apparently to avoid answering the question, instead responded by asking something to the effect of: "Why would he do that?"). On other occasions, Ms. Minkoff pretended not to understand the questions being asked of her, for example, those regarding her having "intercepted" emails, discussed below. At one point Ms. Minkoff, after this court ruled that it would not constitute a violation of the confidentiality provision in the settlement to permit some questioning on the topic, almost immediately thereafter included in her answer to a question on the subject something to the effect of: "You mean the confidentiality of the settlement agreement which is now being violated?" On other occasions Ms. Minkoff asserted her own objections including, for example, "calls for speculation" and "asked and answered". The court found it curious that after having essentially monopolized almost the entirety of the first 25 or 26 trial sessions, and heard this court

[1] For example, when initially being asked about whether or not she had requested an accounting in or about 2001, she responded concerning distributions. In another instance when asked if the thought had crossed her mind on a certain occasion as to whether Mr. Venners had been engaging in certain transactions since 1997, rather than answer the question she referred to her being well represented. Thereafter, even after the court struck the response, Ms. Minkoff still failed to properly respond. At one point, the court was compelled to advise Ms. Minkoff only to respond to the questions asked of her, as opposed to other questions not being asked of her.

repeatedly comment upon how much of the time was being devoted solely to the presentation of Petitioner's case, to the possible detriment of Respondents' cases, that Ms. Minkoff would be so openly uncooperative, if not outright evasive, when being respectfully cross-examined by Respondents' counsel.

Although the claims of "computer hacking" or similar activity, and Ms. Minkoff's substantial settlement to resolve those claims, did not play a role in the ultimate outcome arrived at by this court, the court did find relevant the fact that the *Koppelman v. Minkoff* civil case had been intentionally interjected into this case by Petitioner herself. Ms. Minkoff had alleged in this trust litigation, incident to her claims of Ms. Koppelman's breaches of fiduciary duty, Ms. Koppelman's presumably meritless prosecution of the civil case against Ms. Minkoff. In *Koppelman v. Minkoff*, Ms. Minkoff was sued by Ms. Koppelman, and possibly others, for privacy right violations pertaining to Ms. Minkoff improperly accessing, without permission, the computers and/or email accounts of others. This included the email account of her sister Debbi Miller. By doing so, even by Alysse Minkoff's belated admission in this court, she obtained access to her sister's private and confidential emails which not only permitted her to read her sister's emails, but those sent by third parties to her sister as well. During the course of this trial and without having informed this court, Ms. Minkoff's counsel made a request for an ex parte in limine order from the judge in the since-closed *Koppelman vs. Minkoff* civil case. By doing so, Petitioner, whether by trial counsel in this case or otherwise, sought to preclude any reference in these proceedings to the civil case settlement. Thereafter, this court was advised that the civil judge suggested that the parties bring the matter to the attention of this court given there was an on-going trial in which these issues pertained.

Although the civil case was settled, the confidentiality language of the settlement agreement did not, by its terms, preclude reference to any of the facts from the civil action in the instant trust litigation. Rather, it essentially provided that those same claims could not be

re-asserted (i.e., re-litigated) in this litigation. The civil action and terms of settlement, by which Alysse Minkoff apparently paid a substantial sum to Petitioner (characterized as a "modest" amount by her counsel), was also offered in this matter, not to establish liability but to establish that Petitioner was untruthful in her testimony in this action regarding certain documents. Alysse Minkoff herein testified concerning one or more documents which she apparently improperly obtained, including those which she pilfered from her sister's email account, and for which she had been sued in the civil case. Furthermore, since Mr. Venners was not a party to the civil litigation, there was nothing to prevent his counsel from referring to the civil litigation either. Finally in this regard, having specifically placed the filing of the civil case at issue by Hillari Koppelman in the within trust litigation by her own pleadings, Ms. Minkoff could not expect to prevent its discussion in this case.

In any event, after the civil case became known in this case, Ms. Minkoff explained that she had figured out her sister Debbi's account password using Debbi's pet duck's name as a password. Having viewed Ms. Minkoff testify regarding this and this court's resulting skepticism as to the truthfulness of Ms. Minkoff's testimony in this regard, it was not at all surprising to this court when Debbi Miller later testified that she never used the names of any of her pet ducks in formulating any of her passwords. The court finds Ms. Minkoff's sworn testimony in this regard, as others, was knowingly false.

Although there was also a serious question raised as to whether Ms. Minkoff also gave false testimony regarding how she initially came to possess Trial Exhibit 44, the court will instead focus upon another item of correspondence from Ms. Minkoff relating to Trial Exhibit 44, which, in the court's opinion, is far more revealing of Ms. Minkoff's thought process and the dilemma in which Ms. Koppelman found herself on the issue of to what extent Respondent should share certain information with Petitioner. In Trial Exhibit 44, the December 21, 2004 email from Hillari Koppelman sent to Debbi Miller, Ms. Miller was advised by Petitioner of the

anticipated receipt of certain funds in 2005. Ms. Minkoff claimed she received the same information 10 days later, on December 31, 2004. After reading Ms. Minkoff's written reaction to being provided what one would expect to have been incredibly good news of the possibility of a very substantial payment (Trial Exhibit 901), the court better appreciates Ms. Koppelman's wariness of her niece at or about this period. It is not surprising that at one point during these proceedings Ms. Koppelman said, of her feelings about her niece as of this period: "she scared me".

Ms. Minkoff's email, Trial Exhibit 901, evidences Petitioner's inexplicable reaction to being advised on December 31, 2004 of payment, to be received within 45 or 50 days, of between $131,000 and $280,000 as her share of certain royalty payments. It should be noted that ¶12 of the operative Second Amended Petition, Ms. Minkoff and her sister, Debbi Miller, would be entitled to equal distributions and as such, the sum anticipated to be received by Alysse Minkoff would be fairly substantial. Firstly, notwithstanding Ms. Minkoff's questionable testimony that she did not see that email addressed to her sister (Trial Exhibit 44) until in or about June 2010, Ms. Minkoff's email of February 18, 2005 (Trial Exhibit 901), sent some 3 months later, reflected the precise date of the earlier email from Ms. Koppelman to Ms. Miller. In any event, in response to what one would expect to be received as incredibly good news of a possible substantial payment, Ms. Minkoff's email first complained about her allegedly finding out about the money 10 days after her sister first found out about it. Ms. Minkoff then complained that the money to be received in 2005 would somehow adversely affect her 2004 capital gains income, grousing about the "surprise" given that Ms. Minkoff's 2004, as opposed to her relevant 2005 income, was already so high. Ms. Minkoff's email goes on to make equally strange statements about Ms. Minkoff now having to "write checks to the government instead of to charity" apparently intending to create the impression that Ms. Minkoff was actually disinterested in the money to be received by way of the distribution in

any event. This statement is belied by the fact that this same email begins with the statement that "Where money is involved and my financial future – I do not relax". Given what this court observed of Ms. Minkoff on the stand including her statements regarding her desire to put her aunt, Petitioner, and Ted Venners "out on the street", the fact that she complained to the Securities and Exchange Commission about these matters[1], viewing her correspondence including most notably Trial Exhibit 901, and hearing how the other Koppelman family members perceived her to be untruthful and untrustworthy, the court finds Hillari Koppelman had legitimate, good faith concerns about whether Ms. Minkoff could be trusted and what she was and is capable of doing.

On the issue of when and how Ms. Minkoff first saw Trial Exhibit 44, the testimony was inconclusive as to whether or not she obtained it by, for example, "hacking" her sister Debbi Miller's emails during that period. On the other hand, Ms. Minkoff first testified she first saw the document during her aunt's deposition but later, after the existence of the civil case became known to this court, she changed her answer to having seen the document in the context of a motion in the civil case. Ms. Minkoff did however admit to improperly obtaining her sister's emails out of "desperation", although she claimed not to have done so until sometime in or about 2006. On the stand Ms. Minkoff repeatedly claimed that she had made a mistake, that she was sorry and had freely admitted to doing so, however in the court's view she did not seem the least bit genuinely contrite and the court is of the belief that she was likely more regretful at having been caught than having engaged in the offending conduct. The court bases this belief on the fact that Ms. Minkoff repeatedly used the apology in what appeared to be an effort to consciously avoid answering direct questions. For example, Ms. Minkoff denied

[1] The court notes in this regard that although Ms. Minkoff first denied she had made a "complaint" to the SEC, even though the import of what she was being asked was abundantly clear, she chose to interpret that question to mean had she filed a "written" complaint to the SEC. Thereafter, to make matters worse, Ms. Minkoff, in what the court finds to be another example of her lack of truthfulness, claimed that all she was really doing when she contacted the SEC was trying to obtain information because she "wondered" if there might have been regulatory violations.

understanding the word "intercepting" in this context despite the fact that this is the precise word used in her own verified Petition[1]. Having personally witnessed Ms. Minkoff's emotional involvement in this case, there is little question in the court's mind that she was intimately involved in drafting, or at least reviewing, the pleadings including the subject Petition and as such, the use of the word "intercepting" in this context should not have been a surprise to her. Even if that were not true, Ms. Minkoff, who had been employed in the journalist field and is neither lacking in intelligence nor knowledge of the English language, was being disingenuous in failing to respond to questions utilizing that word. In similar fashion, Ms. Minkoff also claimed to be unable to even estimate the number of emails she intercepted from Ms. Miller and repeatedly avoided responding to the question whether it was "less or more than 100." Ms. Minkoff, after claiming several times not to understand the question, thereafter stated that a "couple" of times in her earlier response did not mean twice but meant several times, which meant "a handful." Presumably, unless she was referring to what can be picked up in one hand, for example a ream of 500 sheets of paper, the correct response, if a handful would be intended to refer to several since that is the impression she apparently tried to make, would have been to say "less than 10 or more than 10, or less or more than 100" as asked of her. To the extent Ms. Minkoff intended for this court to believe that she accessed relatively few of her sister's emails, her efforts were entirely unsuccessful.

Ms. Minkoff at one point proudly referred to her talents of "gumshoe investigative journalism." During the course of the trial it became evident Ms. Minkoff was savvy in acquiring public information including but not limited to her use of PACER and other means. However, her talent in somehow obtaining even non-public information was truly extraordinary. Ms. Minkoff testified to obtaining from American Airlines the airline travel

[1] Ms. Minkoff verified the Petition during trial under threat by this court of having it stricken pursuant to Probate Code § 1020. It should be noted she had earlier testified that Mr. Berke had forwarded pleadings to her and as such, the court was confident she was familiar with its terms.

itinerary, and from a major hotel chain, hotel information, pertaining to a trip taken by Ms. Koppelman to Washington D.C. Ms. Minkoff had submitted such information to Judge Levanas in this case in order to demonstrate to him that Ms. Koppelman was being untruthful regarding Ms. Koppelman's apparent representations concerning her health problems and her need for some kind of continuance. Be that as it may, the court finds from watching Ms. Minkoff testify on this issue on the stand that her account as to how she acquired this airline and hotel information, including a copy of the closing bill, to have been, like other aspects of her testimony, knowingly false. Whether she obtained this particular information from Mr. Wiseman, the private investigator she testified was hired in or about this period, or whether she obtained this information in some other manner, the court is as certain as it can be that she did not obtain the information in the manner she testified to on the witness stand. Furthermore, to put this entire event in context, it should be emphasized that this exercise was undertaken in what proved to be an unsuccessful effort to convince Judge Levanas that some continuance sought by Ms. Koppelman on the basis of a health problem, should not be granted. The fact that such so much effort would be undertaken on such a collateral matter raises questions in the court's mind as to Petitioner's motivations, if not what would appear to be a warped sense of perspective when it came to matters concerning her aunt.

Ms. Koppelman and Mr. Venners also referred to their dealings with the litigation counsel Ms. Minkoff employed, attorney David Berke. Some might say that Ms. Minkoff's selection of David Berke as her initial litigation counsel was revealing as to her own thought process. The court was left with the impression that it might have been Ms. Minkoff who set the tone for Mr. Berke's tactics. For example, Mr. Berke denied that his penchant for including mention of the SEC and/or the IRS in his correspondence in this matter was in any way intended to be threatening. At one point in his testimony, Mr. Berke flatly stated, "I don't threaten." While in a very technical sense Ms. Berke might have been accurate in that regard, a

review of his written correspondence would certainly give pause as to whether or not his statements regarding the SEC, etc., if not technically violative of the letter of Rules of Professional Conduct Rule 5-100, nonetheless violated its spirit. For example in this regard, the parties are referred to Trial Exhibit 107, fn. 3 regarding the SEC and Exhibit 145 in which Mr. Berke stated to Mr. Reed, after referring to "...supposed chuckles and guffaws around the water cooler", and in the context of his allegedly "cowering in the shadow of [Mr. Reed's] probate expertise", the following: "I wonder whether the IRS will share your humor[1]. Actually, I will not have to 'wonder' long, we are just going to go and find out"). The evidence indicated that Mr. Berke and Ms. Minkoff both shared the same kind of apparent "wonderment" with regard to potential regulatory violations on Ms. Koppelman's and Mr. Venners' part. The court also recalls Ms. Minkoff's testimony regarding the conference call in which she and her consultant Bruce Alexander participated in with Mr. Venners immediately prior to the filing of the Declaratory Relief Petition. In that conversation Mr. Venners was advised that if he failed to dispose of the KFx stock and pay the Koppelman family, that after granting of the Declaratory Relief Petition he would be sued. All of these threats form just a portion of the backdrop through which the relationship of Alysse Minkoff and the other parties must be viewed.

In summary, in reference to Hillari Koppelman's decision not to freely share information and documents with Ms. Minkoff, a beneficiary, it would certainly have been preferable for Hillari Koppelman to have sought guidance from the court with respect to the unusual circumstances presented, perhaps pursuant to a Probate Code § 17200 Petition. However, since doing so would likely have forced her to make the same disclosures to her

[1] Even far more troubling is what may have been Mr. Berke's apparent knowing involvement in the use of emails knowingly improperly obtained by his client (see, e.g., Trial Exhibit 145 which states, in relevant part, as to the "bait" correspondence regarding a fictitious $85,000 payment to Debbi Miller to determine if Ms. Minkoff was intercepting emails: "... Alysse is owed... $85,000... [d]o not ask me how if (sic) know, so I do not have to tell you it's none of your business."

niece, which she felt she could not, her failure to do so is understandable. Similarly, although Ms. Koppelman could have conceivably resigned her trusteeship, as well as her position as managing member of KVLLC, in order to remove herself from this dilemma, given that her father had specifically designated her to occupy those positions and even structured the LLC so she could not be removed, her failure to undertake that route is equally understandable. Unusual as it may be for a trustee or other fiduciary to deny a beneficiary access to information and documents, the court finds that under the very unique circumstances of this particular case, as such circumstances existed at the time as known by Ms. Koppelman, her decision to do so was not unreasonable.

THE ACCOUNTING

According to ¶72 of Petitioner's operative pleading, the Second Amended Petition, she complains of the Accounting as follows:

(a) KVLLC is grossly undervalued because the Venners Note is grossly undervalued,

(b) The Royalty Agreement is likewise undervalued, and

(c) It appears that Mr Venners and Ms Koppelman are the only persons to have profited from this estate.

Petitioner employed Karen Balmer as her expert in this regard. Ms. Balmer was a clearly proficient forensic accountant. There can also be no question that what Ms. Koppelman failed to provide an account each year as required of her and what she ultimately provided was not perfect. However, it must be remembered that there is a strong public policy which minimizes unnecessary judicial intervention in the administration of trusts (see, for example, Probate Code § 17209). However, given that Ms. Koppelman did consult with an accountant, is herself a layperson family member fiduciary who did not herself personally profit from

usurping any opportunities to the detriment of the other beneficiaries or otherwise, the court finds the accounting was sufficient. The objections in this regard are therefore **OVERRULED**.

RULINGS & ORDERS

The court **DENIES** the Petition of Alysse Minkoff and finds in favor of Respondent Hillari Koppelman. The court finds that even if it had found, which it does not, that Respondent Hillari Koppelman committed one or more breaches of trust, she acted reasonably and in good faith given the circumstances then known to her. Respondent Hillari Koppelman would therefore be excused from any liability which she might have otherwise had for any purported breaches of fiduciary duty as doing so is equitable under the facts and circumstances presented pursuant to Probate Code § 16440(b).

The court also **DENIES** the Petition of Alysse Minkoff and finds in favor of Respondent Theodore Venners as his liability would be derivative of Ms. Koppelman's and she has not committed any breach of fiduciary duty.

The court **OVERRULES** the objections to the Accounting.

The court reserves jurisdiction to decide issues, if any, regarding application of any no-contest provision(s) and regarding any award of attorneys' fees.

Dated: July 15, 2014 By:

Hon. James A. Steele
Judge of the Superior Court for the State of California,
County of Los Angeles