

Weil, Gotshal & Manges LLP
MEMORANDUM

June 4, 2008

To: Leon Black

From: Carlyn S. McCaffrey
Elyse G. Kirschner
Karen Sandler Steinert

Re: Your Draft Will and Revocable Trust Agreement

This memorandum explains the principal provisions of the draft Will and Revocable Trust Agreement (the "Trust Agreement") we have prepared for you and the anticipated tax consequences of certain of their provisions.

I. Overview

The Trust Agreement is intended to serve as your primary testamentary document, in place of a comprehensive Will. The Trust Agreement establishes your revocable trust (the "Revocable Trust"). The trustees of the Revocable Trust who are in office after your death will receive all of your assets (including any that they already hold and those that are delivered to them by your executors), pay your estate taxes, and divide the balance among your beneficiaries. The Will serves the limited function of appointing your executors, disposing of your tangible property and real property and directing that all other assets remaining in your name at your death be transferred to the trustees of the Revocable Trust.

We are suggesting that you use a combination of Will and Trust Agreement rather than a stand-alone Will in order to facilitate the administration of your assets after your death and to eliminate, to the extent possible, the supervisory authority of the local Surrogate's Court over the trusts for Debra and your children that would otherwise have been created under your Will.

II. Will Provisions

A. Dispositive Provisions

1. Exercise of Power of Appointment (Article II)

If Debra survives you, you direct that the remainder interest in any grantor retained annuity trust ("GRAT") held under the Judah Investment Trust Agreement that is included in your estate be paid to the trustees of your revocable trust, to hold in a marital trust for Debra's benefit (described in III.A.3, below).

2. *Bequest of Annuity Payments (Article III)*

If Debra survives you, you give any remaining annuity payments payable to you from any GRAT under the Judah Investment Trust Agreement to the trustees of your revocable trust, to hold in a marital trust for Debra's benefit (described in III.A.3, below).

3. *Residuary Estate (Article IV)*

Your residuary estate is your estate reduced by the bequests described above and by the expenses and debts of your estate. You give your residuary estate to the trustees of your revocable trust (described in III, below), to be disposed of under its terms.

B. *Administrative Powers (Article VI)*

Your Will gives your executors broad administrative and investment powers.

C. *Executors and Guardians (Articles IX and XI)*

You designate Debra, Barry Cohen, John Hannan and Richard Ressler as co-executors. If any two of them cannot act, you designate Anthony Ressler as executor in their places.

Debra will not be entitled to compensation for her services as trustee. Each other trustee will be entitled to commissions equal to the lesser of the legally allowable commissions at that time or \$250,000, adjusted for inflation.

You designate Debra as guardian of any of your minor children, to be succeeded by Richard, Anthony and Bruce Ressler, in that order.

III. *Your 2008 Revocable Trust Agreements*

A. *Dispositive Provisions*

1. *During Your Life (Article II)*

We do not anticipate that you will fund your revocable trust during your lifetime. However, if you do, article II of your revocable trust agreement gives you (referred to as the "settlor") complete control over the trust property during your life. You may direct that distributions from your revocable trust be made to or for the benefit of anyone (including yourself) for any reason.

If at any time you are under a disability, (i) the trustees must pay as much of the trust fund to or for the benefit of either you or Debra as they determine is necessary

for your or her health, education, support and maintenance and (ii) the trustees must distribute as much of the trust fund to you, Debra and any of your issue¹ for any reason as the independent trustees determine.

2. After Death of Settlor

The initial trust will terminate at your death. At that time, assets passing under your Will will be paid to the trustees of your revocable trust for distribution in accordance with the terms of your revocable trust agreement. The dispositive provisions are as follows:

a. **Tangible Personal Property (Article III).** Any tangible property held in or added to your revocable trust at your death will be paid as follows:

If Debra survives you, the trustees will hold your works of art, your collection of first edition books and your cane collection in a marital trust for Debra's benefit (described in III.A.3, below). If Debra does not survive you, the trustees will sell such portion of this property as they deem appropriate, and will dispose of the sale proceeds pursuant to the remaining provisions of your revocable trust agreement. The trustees will divide any unsold property among (i) your children who survive you and (ii) the issue who survive you of any child of yours who does not survive you in shares of substantially equal value as the independent trustees determine, taking into account your stated preferences as to the distribution of such items. Such property will be held in a separate trust under article IV of the Black 2006 Family Trust Agreement (the "2006 Trust Agreement") for each of your children and more remote issue. You signed the 2006 Trust Agreement in December 2006. The independent trustees under the 2006 Trust Agreement will be amending and restating it immediately prior to executing your Will and revocable trust agreement.

The trustees will distribute the balance of your tangible personal property to Debra, outright, if she survives you, or if she does not, in shares of substantially equal value among those of your children who survive you as your independent executors determine, taking into account your children's preferences.

b. **Residential Property (Articles IV).** Any residential property held in or added to your revocable trust at your death will be distributed to Debra, outright, if Debra survives you. If Debra does not survive you, the trustees may sell or retain such property.

c. **Cash Gift to Debra (Article V(A)(1)).** If Debra survives you, you give Debra, outright, and not in trust, the difference between \$25 million and the proceeds of any life insurance policies she receives as a result of your death.

¹ For all purposes of your trust agreement, your children are deemed to be Benjamin, Joshua, Alexander, Victoria and all children subsequently born to or adopted by you. Your issue are defined as your children and their descendants.

d. **Gift to Judy Black (Article V(A)(2)).** If your sister Judy survives you, the trustees will hold \$5 million in a separate trust for Judy's benefit (described in III.A.4, below).

e. **Gift of Generation-Skipping Tax Exempt Amount (Article V(B)).** If Debra survives you, the trustees of your revocable trust will hold an amount equal to your remaining generation-skipping transfer ("GST") tax exemption² (referred to in the trust agreement as the "Generation-Skipping Tax Exempt Amount") in a separate marital trust for Debra's benefit (described in III.A.3, below).

If Debra does not survive you, you give the Generation-Skipping Tax Exempt Amount to your issue who survive you,³ in a separate lifetime trust for each of them under article III of the 2006 Trust Agreement.

f. **Gift of Equalizing Amount (Article V(D)).** If Debra does not survive you and any child of yours does not survive you but has issue who survive you, the trustees of your revocable trust will distribute an amount equal to the amount passing to each surviving child of yours at your death under (i) the Black 1997 Family Trust, (ii) the Black 2006 Family Trust and (iii) the Black 2007 Family Trust to the issue of such predeceased child, 75% in a separate lifetime trust for each of them under article III of the 2006 Trust Agreement and 25% in a separate lifetime trust for each of them under article IV of the 2006 Trust Agreement.

g. **Balance of Trust Fund (Article VI).** If Debra survives you, the trustees will hold the balance of the trust fund of your revocable trust (*i.e.*, the assets remaining after the gifts described above are paid and after the payment of all debts, administration expenses and death taxes) in a marital trust for Debra's benefit (described in III.A.3, below).

If Debra does not survive you, the trustees will pay the balance of the trust fund to your issue, 75% in a separate lifetime trust for each of them under article III of the 2006 Trust Agreement and 25% in a separate lifetime trust for each of them under article IV of the 2006 Trust Agreement.

² The GST exemption is currently \$2 million and is scheduled to increase incrementally to \$3,500,000 by 2009. It protects bequests and trust distributions to your grandchildren from the GST tax. In 2010, the GST tax is scheduled to be repealed; however, the GST tax and the GST exemption will be reinstated in their existing forms (with a \$1 million exemption, indexed for inflation) in 2011, unless Congress votes to extend the current law.

³ Except as otherwise provided, whenever property is payable under your revocable trust to an individual's issue, it will be distributed in equal shares to such individual's children who are then living. If a child of such individual is not then living, such child's share of such property will be paid to his or her children then living, in equal shares.

3. *The Marital Trusts (Article VIII)*

There will be at least two marital trusts – one that is protected from the GST tax and one or more that are not GST protected. If Debra survives you, one or more marital trusts will be created on your death for her benefit. All of the income of each trust must be paid to Debra. The trustees must distribute as much of the principal Debra as they determine is necessary for her health, education, support and maintenance and as the independent trustees determine for any reason.

If the trust holds any of your works of art, you direct the trustees to hold such property and to pay the expenses thereon, unless Debra exercises her right to make the property in the trust productive.

Each marital trust will end on Debra's death, at which time any remaining property will be paid as follows:

- Your art held in the trust will be paid to your issue who survive Debra, in shares of substantially equal value as the independent trustees determine, in a separate trust for each of them under article IV of the 2006 Trust Agreement. You request the trustees to take into account your stated preferences for their division among your issue.
- If any child of yours does not survive Debra but has issue who survive Debra, the trustees of the marital trusts will distribute an amount equal (in the aggregate) to the amount passing to each surviving child of yours at Debra's death under (i) the Black 1997 Family Trust, (ii) the Black 2006 Family Trust and (iii) the Black 2007 Family Trust to the issue of such predeceased child, 75% in a separate lifetime trust for each of them under article III of the 2006 Trust Agreement and 25% in a separate lifetime trust for each of them under article IV of the 2006 Trust Agreement.
- The balance of any GST-protected trust will be paid to your issue who survive Debra, in a separate trust for each of them under article III of the 2006 Trust Agreement.
- The balance of any non-GST-protected trust will be paid to your issue who survive Debra, 75% in a separate trust for each of them under article III of the 2006 Trust Agreement and 25% in a separate trust for each of them under article IV of the 2006 Trust Agreement.

4. *Trust for Judy (Article IX)*

If Judy survives you, a trust will be held for her benefit under Article IX of your revocable trust agreement. The trust provides that the trustees must distribute all of the trust's income to Judy and as much of the principal as the trustees determine is

necessary for Judy's health, education, support and maintenance and as the independent trustees determine for any reason.

The trust will terminate on Judy's death, at which point any remaining trust property be paid to Judy's issue, or if she has none, to your issue. If none of Judy's issue or your issue is then living, such property will be paid in equal shares to Debra's brothers, Bruce, John, Richard and Anthony, or to the issue of any of them who does not survive Judy. If any property is payable to your issue, 75% of it will be held in a separate trust for each of them under article III of the 2006 Trust Agreement and 25% of it will be held in a separate trust for each of them under article IV of the 2006 Trust Agreement.

5. Remote Takers (Article XI(E))

In the unlikely event that a trust ends when none of your issue is living, the trust property will be paid as follows:

- \$50 million to Judy, if she is then living;
- \$20 million to John Ressler, if he is then living;
- \$20 million in equal shares to those of Ira and Dorothy Ressler who are then living;
- \$10 million to each of Samantha Ressler, Jillian Ressler, Andrew Ressler, Rebecca Ressler, Matthew Ressler, Michael Ressler, Oliver Ressler, Nickolas Ressler and Jonathan Levine;
- \$5 million to Marilyn Stewart; and

The balance of such property will be paid to the Leon Black Family Foundation, with the request that the directors of the Foundation use 25% of such property to promote medical research, 25% of such property to promote Judaica, 25% of such property to promote art and culture, and 25% of such property to promote education.

B. Administrative Powers and Power to Revoke (Articles XII and XIV)

The trustees are given broad administrative and investment powers. You have the power to modify or revoke your revocable trust at any time.

C. Trustees (Article XVI)

You are the initial trustee of your revocable trust. You may designate additional and/or successor trustees and remove trustees. If you cease to act as trustee and have not otherwise designated successor trustees, you designate Debra, Barry Cohen, John Hannan and Richard Ressler as co-trustees in your place.

If you are deceased or under a disability, Debra may designate additional and/or successor trustees and may remove trustees of all trusts, provided that if Debra

removes an independent trustee she must concurrently designate a new independent trustee. After the death or disability of both of you, the trustees may designate additional and/or successor trustees. You should give some consideration as to the extent it would be appropriate to have the trustees other than Debra participate in the appointment of successor and additional trustees and the removal of trustees. In addition, you may want to require the appointment of an institutional co-trustee to serve with the designated individuals after your death or incapacity, as you require for a portion of your children's trust assets.

Debra will not be entitled to compensation for serving as a trustee. Each other trustee will be entitled to annual compensation at the lesser of the amount allowed to him, her or it under New York law or \$250,000 per year, adjusted for inflation.

IV. Tax Considerations

A. Estate Tax

If Debra survives you, the marital deduction and the Estate Tax Credit⁴ should protect most of your estate from the federal and New York estate tax. If Debra does not survive you, your estate will be subject to federal estate tax to the extent not shielded by your remaining Estate Tax Credit and to New York estate tax to the extent it exceeds New York's estate tax exempt amount (currently \$1 million).

B. Gift Tax

Transfers to your revocable trust are not considered completed gifts and are not subject to the gift tax. Nonetheless, you should report the contributions you make to your revocable trust on a timely-filed gift tax return.⁵ For contributions made in 2008, a gift tax return will be due on April 15, 2009.

C. Generation-Skipping Transfer Tax

The GST tax generally is imposed, in addition to any gift or estate tax, on transfers to grandchildren and more remote descendants at the highest estate and gift tax rate, currently 45%. Each individual currently may transfer up to \$2,000,000 to such persons without incurring a GST tax by allocations of his or her GST tax exemption (see footnote 2). To the extent GST exemption is not allocated to transfers made by you during your lifetime, it is anticipated that your executors will allocate your GST exemption to your gift of the Generation-Skipping Tax Exempt Amount. This allocation

⁴ The estate tax credit currently protects \$2 million from estate tax. This amount is scheduled to increase gradually to \$3,500,000 by 2009. It is reduced by lifetime taxable gifts made by you up to \$1 million and by bequests made in your Will and revocable trust agreement to persons other than Debra and charity. In 2010 the estate tax is scheduled to be repealed but it will be reinstated in 2011 (with a \$1 million credit), unless Congress votes to extend the current law.

⁵ See Treas. Regs. § 25.6019-3(a).

will not save estate tax at your death, but will protect the assets from the GST tax when they eventually pass to your grandchildren or more remote descendants.

D. Income Tax

During your lifetime, your revocable trust will be a so-called “grantor trust” for income tax purposes. As a result, as long as you are alive, the trust will not be required to pay income tax on trust income. Instead, you will take into account all of the trust's income, deductions, and credits when you file your income tax returns. If the trustees use your social security number as the trust's taxpayer identification number, the trust will have no income tax filing requirements or reporting obligations so long as the trustees provide your name (in addition to the trust's name and address) to banks, brokers and other payors through which the trust holds assets or from which the trust derives income. Nevertheless, trust assets should always be held in the name of the trust (or its trustees), even when your name is provided to banks, brokers and other payors.

After your death, each trust set up under your revocable trust agreement will be a separate taxpayer for income tax purposes and will be required to file annual federal income tax returns and may be required to file state income tax returns.⁶ Each trust will pay income tax on its income except to the extent distributed to a beneficiary. Each beneficiary will pay income tax on distributions received from each trust to the extent of his or her share of the distributed income.

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As part of its effort to curb tax shelters, the Internal Revenue Service recently issued regulations that impose sanctions on attorneys who provide informal written tax advice without prominently disclosing that the advice cannot be relied upon by the taxpayer for the purpose of avoiding penalties. Because this memorandum contains a discussion of tax issues that we do not believe warrant the significant additional time or expense that would be involved in the preparation of a formal opinion that complies with the IRS rules, we include the relevant IRS disclosure, below. If you would like us to prepare a formal tax opinion on which you may rely for penalty relief, please let us know, and we can discuss the cost of preparing one.

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IRS Circular 230 Notice: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. For more information about this notice, see [REDACTED]

⁶ Under current law, it may be possible to avoid New York income tax if a trust has no trustees that are New York residents and no New York property or income.

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