



**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES..... ii, iii, iv, v

I. INTRODUCTION..... 1

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY ..... 2

III. LEGAL ARGUMENT..... 3

IV. CONCLUSION..... 15

**TABLE OF AUTHORITIES**

<i>Cases</i>	<i>Page</i>
<i>Amie v. Amie</i> ..... 106 Nev. 541, 796 P.2d 233 (1990)	7
<i>Brook, Weiner, Sered, Kreger &amp; Weinberg v. Coreq, Inc.</i> , ..... 53 F.3d 851, 852 (7 <sup>th</sup> Cir. 1995)	5
<i>Brown v. Federal Savings and Loan Insurance Corp.</i> ..... 105 Nev. 409, 777 P.2d 361 (1989)	11
<i>Clack v. Jones</i> ..... 62 Nev. 72, 140 P.2d 580 (1943)	6
<i>Cummings v. Tinkle</i> ..... 91 Nev. 548, 550, 539 P.2d 1213, 1214 (1975)	11
<i>F. James &amp; G. Hazard</i> ..... Civil Procedures 5.5 (2d ed. 1977)	14
<i>Fed. Mining &amp; Engr. Co. v. Pollak</i> ..... 59 Nev. 145, 85 P.2d 1008, 1012 (Nev. 1939)	10
<i>G. &amp; M. Properties v. Second Judicial Dist. Court In &amp; For Washoe Cnty.</i> ..... 95 Nev. 301, 304, 594 P.2d 714, 715-16 (1979)	6
<i>Jakobsen v. Massachusetts Port Authority, supra</i> ..... 520 F.2d at 815	14
<i>Locken v. Locken</i> ..... 98 Nev. 369, 650 P.2d 803 (1982)	11
<i>Marriage of Holtemann</i> ..... 166 Cal. App. 4 <sup>th</sup> 1166, 83 Cal. Rptr. 3d 385 (Cal. App. 4 <sup>th</sup> 2008)	10
<i>Marriage of Lund</i> ..... 174 Cal. App. 4 <sup>th</sup> 40, 94 Cal. Rptr 3d 84 (Cal. App. 4 <sup>th</sup> 2009)	10
<i>MBI Motor Company, Inc. v. Lotus/East, Inc.</i> ..... 	15

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

506 F.2d 709 (6<sup>th</sup> Cir. 1974)

*Pan v. Eight Judicial Dist. Court ex rel. Cnty of Clark*..... 6  
120 Nev. 222, 225, 88 P.3d 840, 841 (2004)

*Parks v. Quintana*..... 15  
86 Nev. 847, 477 P.2d 869 (1970)

*Public Service Comm. V. Court* ..... 6  
61 Nev. 245, 123 P.2d 237 (1942)

*Schmidt v. Horton*..... 10  
52 Nev. 302, 287 P. 274, 280 (Nev. 1930)

*Schwartz v. Schwartz*..... 14  
95 Nev. 202, 591 P.2d 1137, 1140 (1979)

*State ex rel. Milchem Inc. v. Third Judicial Dist. Court In & For Lander Cnty. ....* 7  
84 Nev. 541, 544, 445 P.2d 148, 149 (1968)

*United States v. 47 Bottles, More or Less, Etc.,* ..... 15  
320 F.2d 564 (3d Cir. 1963)

*United Tungsten Corp. v. Corp. Serv., Inc.* ..... 14  
76 Nev. 329, 353 P.2d 452 (1960)

<i>Statutes, Rules and Regulations</i>	<i>Page(s)</i>
NRAP 3A(b) (1) .....	6
NRAP 5(b) .....	21
NRAP 8(a)(2)(E) .....	8
NRAP 28(e)(1) .....	13, 19
NRAP 32(a)(4) .....	19
NRAP 32(a)(5) .....	19
NRAP 32(a)(6) .....	19
NRAP 32(a)(7) .....	19
NRAP 32(a)(7)(C) .....	19
NRCP 1.....	14
NRCP 15(b) .....	14
NRCP 17(a) .....	5
NRCP 25(a) .....	4
NRCP 25(c).....	4, 5
NRCP 25(d)(1).....	4
NRCP 59(e) .....	8, 17
NRS Chapter 12.....	5
NRS Chapter 13.....	5
NRS 166.020 .....	2

1	NRS 166.120 .....	9
2	NRS 166.130 .....	9
3		
4	NRS 163.417 .....	9
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1                   **REPLY TO ANSWER TO PETITION FOR WRIT OF PROHIBITION**

2                   **I. INTRODUCTION**

3  
4                   Real Parties in Interest, Lynita Nelson (“Lynita”) and the LSN NEVADA  
5 Trust dated May 30, 2001 (“LSN Trust”) (hereinafter collectively referred to as  
6 “Lynita”), plainly ignore the simple issues raised in the Petition for Writ of  
7 Prohibition, which are:  
8

- 9
- 10                   1.       Whether the District Court exceeded its jurisdiction and erred  
11                   as a matter of law by ordering the ELN Trust to transfer certain  
12                   assets to “equalize” and/or “level off” the ELN Trust and LSN  
13                   Trust.
  - 14                   2.       Whether the District Court exceeded its jurisdiction and erred  
15                   as a matter of law by enforcing the purported intent of Eric and  
16                   Lynita to “equalize” the assets owned by the ELN Trust and  
17                   LSN Trust, despite the fact that there is no legally enforceable  
18                   agreement to do so and neither Eric nor Lynita possess a  
19                   community or separate property interest in the assets owned by  
20                   such trusts.
  - 21                   3.       Whether the District Court exceeded its jurisdiction and erred  
22                   as a matter of law by imposing a constructive trust over assets  
23                   owned by the ELN Trust that did not originate from Lynita  
24                   and/or the LSN Trust or the proceeds therefrom.

25                   See Petition for Writ of Prohibition at 14:17-15:4, previously filed on July 9,  
26                   2013. Lynita’s failure to directly respond to the simple issues raised in the  
27                   Petition for Writ results from the fact she is aware that the District Court exceeded  
28                   its jurisdiction by treating the assets owned by the ELN Nevada Trust dated May  
                 30, 2001 (“ELN Trust”) and LSN Trust as if they were community property (even

1 though each trust was funded with the separate property of Eric L.Nelson (“Eric”)  
2 and/or Lynita and none of the trusts’ assets are now Eric or Lynita’s community or  
3 separate property), and proceeded to “equalize” and/or “level off” the trusts.  
4

5 For these reasons, and those raised in the Petition for Writ of Prohibition,  
6 the ELN Trust respectfully requests that this Court prohibit enforcement of  
7 portions of the Divorce Decree that purport to transfer the ELN Trust’s 100%  
8 interest in the Lindell Property, Banone, LLC, and JB Ramos Trust Note  
9 Receivable, and 50% interest in the Russell Road Property, to the LSN Trust.  
10  
11

12 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**  
13

14 Lynita has taken great liberty with what occurred at the trial and the  
15 provisions of the Divorce Decree in an attempt to shift the focus away from the  
16 pertinent question raised in the Petition for Writ of Prohibition. Lynita’s most  
17 egregious misrepresentation is that the District Court referred to the ELN Trust as  
18 a “sham” or “alter ego,” which simply is not true. Indeed, the District Court did  
19 not use the term “sham” or “alter ego” in the Divorce Decree. To the contrary, the  
20 District Court confirmed that both the ELN Trust and LSN Trust were  
21 “established as a self-settled spendthrift trust in accordance with NRS 166.020,”  
22 see 1 Appx., Ex. 1 at 4:25, and that the ELN Trust was funded with assets that  
23 were previously owned by a separate property trust that had been established by  
24 Eric in or around 1993, see *id.* at 4:16-17, and the LSN Trust was funded with  
25  
26  
27  
28



1 assets that were previously owned by a separate property trust that had been  
2 established by Lynita in or around 1993. *See id.* at 5:2-3. Although the District  
3 Court did mistakenly suggest that it could “invalidate” both the ELN Trust and  
4 LSN Trust, *see id.* at 29: 14-18, a finding that the ELN Trust would adamantly  
5 disagree with, the District Court did not do so.  
6  
7

### 8 **III. LEGAL ARGUMENT**

#### 9 **1. Nola Harber, the Successor Distribution Trustee of the ELN Trust has** 10 **standing to maintain the instant Petition for Writ of Prohibition.**

11  
12 Lynita spends the bulk of her 30 page Answer making a technical argument  
13 that Nola Harber, the current Distribution Trustee of the ELN Trust, lacks  
14 standing to maintain the instant Petition, and as such, the Petition should be  
15 denied. Lana Martin, the prior Distribution Trustee of the ELN Trust, resigned on  
16 or around June 10, 2013. *See* Notice of Substitution of Distribution Trustee,  
17 attached as Exhibit 2 to the 2 Appendix. Pursuant to the Change of Trusteeship  
18 for the ELN Trust dated June 8, 2011, Jeffrey Burr, Esq. appointed Ms. Harber to  
19 serve as the Successor Distribution Trustee of the ELN Trust in the event that Ms.  
20 Martin became “deceased, unable or unwilling to serve as the current Distribution  
21 Trustee.” *See id.* Ms. Harber accepted the appointment of Distribution Trustee,  
22 and Eric, the Investment Trustee of the ELN Trustee, authorized and delegated  
23 Ms. Harber to defend, maintain and pursue any and all actions on behalf of the  
24  
25  
26  
27  
28

1 ELN Trust.<sup>1</sup> *See id.* A Notice of Substitution of Distribution Trustee was filed  
2 with the District Court on July 16, 2013. *See id.* Since Ms. Martin resigned as  
3 Distribution Trustee, Ms. Harber is the only one authorized to bring the Petition  
4 for Writ of Prohibition as she is the real party in interest.  
5

6  
7 Contrary to Lynita's contention, a motion for substitution pursuant to  
8 NRCPC 25(c) is unnecessary in the context of a trust because there has been no  
9 "transfer of interest" as the Distribution Trustee of the ELN Trust, is still the party  
10 to the litigation, albeit the person serving in the capacity of Distribution Trustee  
11 has changed. The resignation of Ms. Martin is akin to when a public officer "dies,  
12 resigns, or otherwise ceases to hold office," *see* NRCPC 25(d)(1), at which time the  
13 "officer's successor is automatically substituted as a party." (Emphasis Added).  
14 No motion is required. Although "[a]n order of substitution may be entered at any  
15 time, [] the omission to enter such an order shall not affect the substitution." *See*  
16 *id.* Lynita's contention that the resignation of Ms. Martin's resignation is more  
17 akin to the death and substitution of a personal representative for the deceased  
18 party shows a lack of basic understanding of not only NRCPC 25(a), but also NRS  
19  
20  
21  
22  
23

24  
25 <sup>1</sup> Although this argument was previously rejected by the District Court,  
26 Lynita once again contends that the Investment Trustee is the only one is  
27 authorized under the terms of the ELN Trust to maintain proceedings on behalf of  
28 the ELN Trust. *See, e.g.,* Notice of Entry of Order, attached as Exhibit 1 to  
Appendix 2.

1 Chapters 12 and 13, which require a personal representative to be substituted in  
2 the stead of a deceased litigant.  
3

4 The fact that Ms. Harber has substituted as Distribution Trustee is of no  
5 consequence to any of the Parties in the litigation because “[a] successor takes  
6 over without any other change in the status of the case.” *Brook, Weiner, Sered,*  
7 *Kreger & Weinberg v. Coreq, Inc.*, 53 F.3d 851, 852 (7th Cir. 1995). Indeed, Ms.  
8 Harber’s status in the litigation, tracks the positions of Ms. Martin. Consequently,  
9  
10 Lynita’s contention that she will somehow be forced to chase a moving target is a  
11 red herring.  
12  
13

14 Notwithstanding the foregoing, and the fact that the ELN Trust believes it is  
15 unnecessary to do so, the ELN Trust will file a motion to substitute pursuant to  
16 NRCPC 25(c) in the District Court.<sup>2</sup> The Petition for Writ of Prohibition should not  
17 be dismissed because the motion to substitute was not previously filed as NRCPC  
18 17(a) specifically provides:  
19  
20

21 No action shall be dismissed on the ground that it is not prosecuted in  
22 the name of the real party in interest until a reasonable time has been  
23 allowed after objection for ratification of commencement of the action  
24 by, or joinder or substitution of, the real party in interest; and such  
25 ratification, joinder, or substitution shall have the same effect as if the  
26 action had been commenced in the name of the real party in interest.  
27

28 <sup>2</sup> For these reasons it is unnecessary to respond to the cases cited by Lynita as  
the motion to substitute will resolve her stated concerns.

1 For these reasons, this Court should rule on the ELN Trust's Petition for Writ of  
2 Prohibition based on its merits and not Lynita's technical argument that Ms.  
3 Harber, the current Distribution Trustee, somehow lacks standing.  
4

5 **2. This ELN Trust satisfied the requirements for issuance of the Petition**  
6 **for Writ of Prohibition.**

7 Lynita erroneously contends that the ELN Trust has not satisfied the  
8 requirements for issuance of a writ because the ELN Trust has a plain, speedy and  
9 adequate remedy in the ordinary course of law: an appeal. The fact that an appeal  
10 will eventually be available from the final judgment does not preclude issuance of  
11 the writ,<sup>3</sup> particularly in circumstances where the court has exceeded its  
12 jurisdiction and the challenged order is not appealable.<sup>4</sup> The cases cited by  
13 Respondents stand for the proposition that a right to appeal "is generally an  
14 adequate legal remedy that precludes writ relief" because the parties could  
15 currently file an appeal or do so within a relatively short time-frame;<sup>5</sup> however,  
16  
17  
18  
19  
20

21 <sup>3</sup> *G. & M. Properties v. Second Judicial Dist. Court In & For Washoe Cnty.*,  
22 95 Nev. 301, 304, 594 P.2d 714, 715-16 (1979) citing *Public Service Comm. v.*  
23 *Court*, 61 Nev. 245, 123 P.2d 237 (1942) (writ issued because right to appeal was  
24 not speedy nor adequate),

25 <sup>4</sup> *Id.* citing NRAP 3A(b); *Clack v. Jones*, 62 Nev. 72, 140 P.2d 580 (1943).

26 <sup>5</sup> *Pan v. Eight Judicial Dist. Court ex rel. Cnty. of Clark*, 120 Nev. 222, 225,  
27 88 P.3d 840, 841 (2004) ("Because this petition challenges a district court order  
28 that dismissed petitioners complaint, which is a final, appealable judgment under  
NRAP 3A(b)(1), writ relief is inappropriate").

1 the facts in this matter establish that an appeal is not either a plain, speedy or  
2 adequate remedy.

3  
4 As stated in the ELN Trust's Request for Ruling previously filed on July  
5 29, 2013, and acknowledged by Lynita in her Answer, the District Court exceeded  
6 its jurisdiction on July 22, 2013, by stating it would treat Wyoming Downs under  
7 *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990) as an undisclosed asset, despite  
8 the fact that Wyoming Downs is not an undisclosed asset, as evidence was  
9 introduced regarding Wyoming Downs at trial and the Divorce Decree specifically  
10 references such asset. In so doing, the District Court reopened discovery and  
11 schedule an evidentiary hearing for December 11, 2013. Consequently, contrary  
12 to Lynita's contention, the ELN Trust is unable to file an appeal until at least  
13 December 11, 2013.<sup>6</sup>

14  
15 If the Petition for Writ of Prohibition is denied the ELN Trust will not have  
16 an adequate remedy at law because Respondents can enter into leases, encumber,  
17 modify existing leases and/or sell the real property before Petitioner even has the  
18 ability to file an appeal.<sup>7</sup> As such, Petitioner would be unable to recoup the real  
19

20  
21  
22  
23  
24  
25 <sup>6</sup> The fact that the Divorce Decree is not a final judgment also seems to have  
26 been recognized by this Court in its July 10, 2013, Order Directing Supplement to  
27 Petition and Directing Answer.

28 <sup>7</sup> For these reasons, this case is analogous to *State ex rel. Milchem Inc. v. Third Judicial Dist. Court In & For Lander Cnty.*, 84 Nev. 541, 544, 445 P.2d 148,

1 property, or the diminution of rights associated with that real property, if  
2 successful on appeal.<sup>8</sup> Upon information and belief, this is the result that Lynita  
3 seeks and is the reason why she filed a NRCP 59(e) motion seeking to reopen  
4 discovery and conduct an additional evidentiary hearing on Wyoming Downs, an  
5 asset that is owned 100% by the ELN Trust.  
6  
7

8 Because Lynita undoubtedly realizes that the ELN Trust has no plain,  
9 speedy and adequate remedy in the ordinary course of law she contends that writ  
10 relief should not issue because the arguments raised “are not ones of whether the  
11 District Court exceeded its jurisdiction, but are more properly categorized as  
12 argument that the District Court erred in its application of law. Nonsense. The  
13 District Court blatantly ignored Nevada law to get the result that it wanted: a  
14 leveling off of the ELN Trust and LSN Trust, which it cannot do for the reasons  
15 set forth in the Petition for Writ of Prohibition. It is quite telling that Lynita failed  
16  
17  
18  
19

20  
21 149 (1968), wherein this Court issued a writ of prohibition based upon its belief  
22 that the value of property could be destroyed pending an appeal.

23 <sup>8</sup> Lynita’s contention that a stay absent a supersedeas bond is improper  
24 contradicts her acknowledgement that a supersedeas bond is not required pending  
25 the resolution of petition for writ. *See, e.g.*, NRAP (8)(a)(2)(E) (“The Court may  
26 condition relief on a party’s filing a bond or other appropriate security in the  
27 district court.”). (Emphasis Added). The ELN Trust submits that a bond is  
28 unnecessary as it has sufficient assets to pay damages if unsuccessful in the instant  
writ proceedings. Alternatively, if this Court is inclined to impose a bond it  
should be minimal.

1 to respond to any of the Nevada statutes cited in the Petition for Writ of  
2 Prohibition, including, but not limited to NRS 166.120, NRS 166.130, NRS  
3 163.417, all of which prohibit the District Court from “leveling off” the ELN and  
4 LSN Trusts. Lynita’s failure to do so comes as no surprise as said statutes clearly  
5 establish that the District Court exceeded its jurisdiction.  
6  
7

8 Lynita would also have this Court believe that the ELN Trust is not entitled  
9 to any protection under Nevada’s self-settled spendthrift trust statutes because  
10 “the District Court conclud[ed] that the ELN Trust is a sham trust.” This  
11 contention is not true and unsupported by the record. First, as indicated *supra*, the  
12 District Court never found that the ELN Trust was a “sham trust” in the 50 page  
13 Divorce Decree. More importantly, however, is the fact that the District Court did  
14 not invalidate the ELN Trust or LSN Trust because: “invalidation of the Trusts  
15 could have serious implications for both parties in that it could expose the assets  
16 to the claims of creditors, thereby, defeating the intent of the parties to  
17 “supercharge” the protection of the assets from creditors.” See 1 Appx., Ex. 1 at  
18 29:15-18. Simply put, the District Court wanted to protect the ELN Trust and  
19 LSN Trust, for reasons, including, but not limited to, protecting trust assets from  
20 the claims of creditors.  
21  
22  
23  
24  
25  
26  
27  
28

1 As recognized in numerous Nevada cases,<sup>9</sup> and *Marriage of Holtemann*,  
2 166 Cal. App. 4<sup>th</sup> 1166, 83 Cal. Rptr. 3d 385 (Cal. App. 4<sup>th</sup> 2008) and *Marriage of*  
3 *Lund*, 174 Cal. App. 4<sup>th</sup> 40, 94 Cal. Rptr. 3d 84 (Cal. App. 4<sup>th</sup> 2009),<sup>10</sup> the District  
4 Court cannot enforce the ELN Trust for some purposes (claims of creditors) and  
5 then repudiate said trust for other purposes (level off the trusts). Lynita discounts  
6 *Holtemann* and *Lund* because such cases were decided by California courts and do  
7 not establish precedence in this Court; however, such rulings are persuasive  
8 authority as they are analogous to the facts of this case in that a husband and wife  
9 may not transmute their separate property for conditional or limited purposes.  
10  
11  
12  
13  
14  
15

---

16 <sup>9</sup> *Fed. Mining & Engr. Co. v. Pollak*, 59 Nev. 145, 85 P.2d 1008, 1012 (Nev.  
17 1939) (“as a general rule, if a corporation, with knowledge of the facts, accepts or  
18 retains the benefit of an unauthorized contract or other transaction by its officers or  
19 agents, as where it receives and uses or retains money or property paid by the other  
20 party, or accepts the benefits of services, etc., it thereby ratified the contract or  
21 other transaction, or will be estopped to deny ratification.”) (citations omitted).  
22 *See also Schmidt v. Horton*, 52 Nev. 302, 287 P. 274, 280 (Nev. 1930).

23 <sup>10</sup> Lynita’s attempts to distinguish this case from *Holtemann* and *Lund* by  
24 misrepresenting the evidence and testimony presented at trial regarding the full  
25 legal effects of the creation of the ELN and LSN Trusts. Indeed, Jeffrey Burr,  
26 Esq. unequivocally testified during trial that he advised Lynita on more than one  
27 occasion of the legal effect of the creation and implementation of the LSN Trust  
28 prior to Lynita executing the same. This was confirmed by Lynita herself in the  
execution of the LSN SSST and correspondence dated May 30, 2001 (which  
explained the ramifications of the LSN SSST), wherein she acknowledged that she  
“hereby understand[s] and acknowledge[s] receipt of this letter. . .” *See* Burr’s  
Correspondence to Lynita dated May 30, 2001, admitted as Intervenor’s Trial  
Exhibit No. 27 on July 18, 2012, attached as Exhibit 2 to Appendix 2.



1 **3. The District Court exceeded its jurisdiction by imposing a constructive**  
2 **trust.**

3 Lynita failed to respond to the arguments regarding a constructive trust  
4 raised in the Petition for Writ of Prohibition and seeks to turn the doctrine of  
5 constructive trusts “on its ear.” As stated in the Petition for Writ of Prohibition,  
6 the Divorce Decree purported imposition of a constructive trust is inconsistent  
7 with what it really did. Page 15 of the Divorce Decree states that the District  
8 Court is imposing a constructive trust on the Russell Road Property and Lindell  
9 Property, *see* Appx. Ex. 15: 10-13; however, page 44 specifically states that the  
10 District Court is merely going to “transfer[] assets between the Trusts to level off  
11 the Trusts.” Appx. Ex. 1 at 44:13-17.

12  
13 Further, Lynita’s contention that Nevada does not require evidence of an  
14 identifiable fund traceable to any wrongful conduct before the imposition of a  
15 constructive trust is just plain wrong.<sup>11</sup> Indeed, even in *Locken v. Locken*, 98 Nev.  
16 369, 650 P.2d 803 (1982), the case most heavily relied upon by Lynita, a  
17  
18  
19  
20  
21

22  
23 <sup>11</sup> *See, e.g., Cummings v. Tinkle*, 91 Nev. 548, 550, 539 P.2d 1213, 1214  
24 (1975) (Supreme Court held resulting trust was proper where plaintiff furnished all  
25 but a de minimus amount of the consideration for the conveyance which was to  
26 compensate the parties for services rendered and that under circumstances it was  
27 proper to impose a resulting trust in plaintiff’s favor for the entire interest in land);  
28 *Brown v. Federal Savings and Loan Insurance Corp.*, 105 Nev. 409, 777 P.2d 361  
(1989) (district court imposed constructive trust over \$1,300,000.00 which could  
be traced over improper transaction).

1 constructive trust was imposed over certain land that the defendant had promised  
2 to convey to the plaintiff if the plaintiff made certain improvements on the land.  
3

4 Here, the District Court exceeded its jurisdiction by imposing a constructive  
5 trust (if it in fact did so as opposed to merely leveling off the ELN and LSN  
6 Trusts) over assets owned by the ELN Trust that did not originate with the LSN  
7 Trust. As stated in the Petition for Writ of Prohibition, the ELN Trust obtained its  
8 66.67% ownership interest in the Russell Road property with its own assets in  
9 2010, over 5 years after the LSN Trust lost its interest. This was confirmed by the  
10 court-appointed Special Master, Larry Bertsch, who found that the ELN Trust  
11 paid nearly \$4,000,000.00 for its interest in the Russell Road Property:  
12  
13  
14

15	Pay down of Bank Loan	\$300,000.00
16	Pay off of personal residence of Cal Nelson	400,000.00
17	Credit to Cal Nelson for prior payments	522,138.45
18	Amount to pay Bank Note from Sugar Daddy's	1,520,597.88
19	Amount to pay Bank Loan from Line of Credit	<u>1,257,263.67</u>
		\$4,000,000.00 <sup>12</sup>

20 Since the ELN Trust's interest in the Russell Road Property was paid for by with  
21 own assets and proceeds, as opposed to Lynita or the LSN Trust, the District  
22  
23  
24  
25  
26  
27

28 <sup>12</sup> See Notice of Filing Asset Schedule and Notes to Asset Schedule at 5,  
attached as Exhibit 12 to the Appendix.

1 Court exceeded its jurisdiction by imposing a constructive trust over such  
2 property.<sup>13</sup>  
3

4 **4. The District Court exceeded its jurisdiction by awarding property to**  
5 **the LSN Trust under the theory of unjust enrichment because it**  
6 **previously dismissed Lynita’s unjust enrichment claim.**

7 Despite the fact that the District Court dismissed Lynita’s unjust enrichment  
8 claim months before trial and specifically stated that it would not exercise its  
9 disputed jurisdiction over such claim, Lynita, without citation to the trial  
10 transcript,<sup>14</sup> contends that her unjust enrichment claim was tried by express or  
11 implied consent of the parties because her Counsel purportedly referred to unjust  
12  
13  
14  
15  
16  
17

---

18 <sup>13</sup> Even if the Russell Road Property or Lindell Property were purchased with  
19 assets from the LSN Trust, the District Court still exceeded its jurisdiction by  
20 holding the ELN Trust liable for acts that Eric purportedly took in his individual  
21 capacity, or as the *de facto* Investment Trustee of the LSN Trust. Without  
22 reference to any legal citation, Lynita seems to argue that it is improper because  
23 she may be unable to collect a judgment against Eric. This is obviously  
24 inconsistent with the position that Lynita has taken in her moving papers in  
25 Nevada Supreme Court Case No. 63432.<sup>13</sup> For these reasons alone, the District  
26 Court exceeded its jurisdiction by imposing a constructive trust over the ELN  
27 Trust’s interest in the Russell Road Property.

28 <sup>14</sup> See, e.g., NRAP 28(e)(1) (“ . . . A party referring to evidence whose  
admissibility is in controversy must cite the pages of the appendix of in the  
transcript at which the evidence was identified, offered, and received or  
rejected.”).

1 enrichment being a potential avenue for relief during its opening statement to the  
2 District Court on July 16, 2012.<sup>15</sup>

3  
4 In support of her contention, Lynita relies upon *United Tungsten Corp. v.*  
5 *Corp. Serv., Inc.*, 76 Nev. 329, 353 P.2d 452 (1960); however, in that case there  
6 was indisputable evidence that both the plaintiff and defendant conceded that the  
7 only issue in the case was the matter of compensation to be received for services.  
8 Consequently, it was proper to treat the issue as though the pleadings were  
9 amended to conform to evidence. The remainder of cases relied upon by Lynita  
10 were actually copied, verbatim, without citation or quotation, from *Schwartz v.*  
11 *Schwartz*, 95 Nev. 202, 591 P.2d 1137, 1140 (1979), a case in which this Court  
12 declined to conform the pleadings to the evidence:  
13

14  
15  
16  
17 As the court said in *Jakobsen v. Massachusetts Port Authority, supra*,  
18 520 F.2d at 815, “(w)hile the Federal Rules reflect a universal trend  
19 away from stereotyped pleading, they do not presage abandonment of  
20 the requirements that parties be given reasonable advance notice of  
21 the major issues to be raised.” See F. James & G. Hazard, Civil  
22 Procedures 5.5 (2d ed. 1977). The concomitant of such a requirement,  
23 and of the mandate of N.R.C.P. 1, that the rules be interpreted so as to  
24 provide for a just determination of every action, is the requirement  
25 that the party surprised by such a development be given a reasonable

26  
27  
28  
<sup>15</sup> In order to remedy this gross error Lynita contends that she is going to file a  
NRC P 15(b) motion with the District Court, which she still has not done,  
requesting to amend the pleadings to include the previously dismissed unjust  
enrichment claims. Lynita’s position defies logic. Indeed, on one hand Lynita  
contends that the Divorce Decree is a final judgment and on the other hand  
contends that she can *ex post facto* amend her pleadings so that the pleadings  
comport with the Divorce Decree.

1 opportunity to respond. See *Parks v. Quintana*, 86 Nev. 847, 477 P.2d  
2 869 (1970). See also *MBI Motor Company, Inc. v. Lotus/East, Inc.*,  
3 506 F.2d 709 (6th Cir. 1974); *United States v. 47 Bottles, More or*  
4 *Less, Etc.*, 320 F.2d 564 (3d Cir. 1963). In this case, appellant was  
5 provided with neither reasonable notice of the issue nor an  
opportunity to respond. (Emphasis Added).

6 Since the District Court declined to exercise its jurisdiction over the unjust  
7 enrichment claim and recommended that it be brought in another tribunal,  
8  
9 Petitioners were not provided with notice that the District Court would entertain  
10 an unjust enrichment claim (assuming that Lynita even raised the issue at trial as  
11 she so claims). Consequently, the District Court erred as a matter of law and  
12 exceeded its jurisdiction by awarding certain property to the LSN Trust under the  
13 doctrine of unjust enrichment.  
14

15  
16 **VI. CONCLUSION**

17 For these reasons, Petitioner respectfully requests that this Court prohibit  
18 enforcement of portions of the Divorce Decree that purport to transfer the ELN  
19

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 Trust's 100% interest in the Lindell Property, Banone, LLC, and JB Ramos Trust  
2 Note Receivable, and 50% interest in the Russell Road Property, to the LSN Trust  
3

4 Respectfully submitted this 12<sup>th</sup> day of August, 2013.  
5

6   
7

8 MARK A. SOLOMON, ESQ., NSB 0418

9 E-mail: [msolomon@sdfnvlaw.com](mailto:msolomon@sdfnvlaw.com)

10 JEFFREY P. LUSZECK, ESQ., NSB 9619

11 E-mail: [jluszeck@sdfnvlaw.com](mailto:jluszeck@sdfnvlaw.com)

12 **SOLOMON DWIGGINS & FREER, LTD.**

13 9060 W. Cheyenne Avenue

14 Las Vegas, Nevada 89129

15 Telephone: (702) 853-5483

16 Attorneys for Petitioner, Nola Harber as

17 Distribution Trustee of the ELN Nevada Trust  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**VERIFICATION BY AFFIDAVIT**

STATE OF NEVADA     )  
                                       ) SS:  
COUNTY OF CLARK    )

Mark A. Solomon, Esq. hereby deposes and states under penalty of perjury:

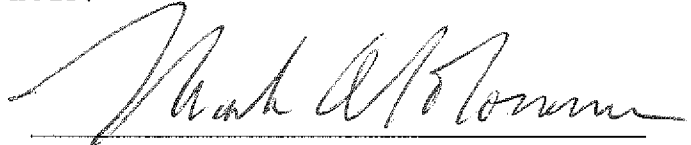
1. I am a partner at the law firm of Solomon Dwiggin & Freer, Ltd.,  
Counsel for Petitioner. I am over the age of 18 years and have personal  
knowledge of the facts stated herein, except for those stated upon information and  
belief, and as to those facts, I believe them to be true.

2. This Petition for Writ of Prohibition addresses the issue of whether  
the District Court erred as a matter of law and exceeded its jurisdiction by  
ordering the ELN Trust to pay Eric's spousal support obligation and child support  
arrearages based upon statutes from other jurisdictions and in contravention of  
Nevada law.

3. Since there is a NRCP 59(e) motion pending, an appeal is premature  
thereby leaving no other plain, adequate, and speedy remedy available to  
Petitioner.

1           4.     I certify and affirm that this Petition for Writ of Prohibition is made  
2 in good faith and not for purposes of delay.  
3

4           Dated this 12<sup>th</sup> day of August, 2013.

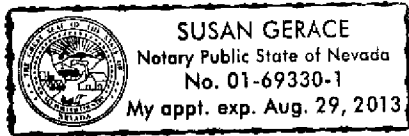
5 

6 \_\_\_\_\_  
7 Mark A. Solomon, Esq.

8  
9 SUBSCRIBED and SWORN to before me  
10 this 12<sup>th</sup> day of August, 2013.

11 

12 NOTARY PUBLIC in and for said County  
13 and State





1                   **CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)**

2                   1.     I hereby certify that this brief complies with the formatting  
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and  
4 the type style requirements of NRAP 32(a)(6) because this brief has been prepared  
5 in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point  
6 Times New Roman type style.  
7

8  
9                   2.     I further certify that this brief complies with the page or type-volume  
10 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted  
11 by NRAP 32(a)(7)(C), it is not proportionately spaced, has a typeface of 14 points,  
12 and contains 4,329 words.  
13  
14

15                  3.     Finally, I hereby certify that I have read this Petition for Writ of  
16 Prohibition, and to the best of my knowledge, information and belief, it is not  
17 frivolous or interposed for any improper purpose. I further certify that this  
18 Petition for Writ of Prohibition complies with all applicable Nevada Rules of  
19 Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion  
20 in the brief regarding matters in the record to be supported by appropriate  
21 references to page and volume number, if any, of the transcript or appendix where  
22 the matter relied on is to be found. I understand that I may be subject to sanctions  
23  
24  
25  
26  
27  
28

1 in the event that the accompanying brief is not in conformity with the  
2 requirements of the Nevada Rules of Appellate Procedure.  
3

4 Dated this 12<sup>th</sup> day of August, 2013.



5  
6 **MARK A. SOLOMON, ESQ., NSB 0418**  
7 **JEFFREY P. LUSZECK, ESQ., NSB 9619**  
8 **SOLOMON DWIGGINS & FREER, LTD.**  
9 9060 W. Cheyenne Avenue  
10 Las Vegas, Nevada 89129  
11 Telephone: (702) 853-5483  
12 Attorneys for Petitioner, Nola Harber as  
13 Distribution Trustee of the ELN Nevada Trust  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

