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EXHIBIT A
November 12, 2013 Hearing Transcript

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DISTRICT COURT

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CLARK COUNTY, NEVADA

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In the matter of the Trust of:)

CASE NO. P-09-066425

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The W.N. Connell and Marjorie)

DEPT. NO. XXVI

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T. Connell Living Trust, dated)

Transcript of Proceedings

May 18, 1972)

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BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

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14

**HEARING ON PETITION FOR DECLARATORY JUDGMENT REGARDING
LIMITED INTEREST OF TRUST ASSETS PURSUANT TO NRS 30.040,
NRS 153.031(1)(E), AND NRS 164.033(1)(A)**

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TUESDAY, NOVEMBER 12, 2013

17

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APPEARANCES:

19

For the Petitioner,

Eleanor Ahern:

JOHN MUGAN, ESQ.

20

MICHAEL LUM, ESQ.

21

For Jaqueline Montoya:

JOSEPH POWELL, ESQ.

22

RECORDED BY:

KERRY ESPARZA, COURT RECORDER

23

TRANSCRIBED BY:

KRISTEN LUNKWITZ

24

25

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

1 TUESDAY, NOVEMBER 12, 2013 9:54 A.M.

2

3 THE COURT: Connell Living Trust, P066425. All
4 right. Will everybody make their appearances?

5 MR. MUGAN: Good morning, Your Honor, John Mugan,
6 10690, for Eleanor Connell Ahern.

7 MR. LUM: Good morning, Your Honor, Michael Lum,
8 bar number 12997, co-counsel with Mr. Mugan.

9 MR. POWELL: Good morning, Your Honor, Joey Powell
10 appearing on behalf of Jacqueline Montoya.

11 THE COURT: Okay. All right. So this is a
12 petition for declaratory judgment regarding limited
13 interest of the trust assets and then there was -- I'm not
14 sure if it was technically noticed for today, but we see on
15 here that there is something filed with respect to
16 referring this back to the Commissioner, but I didn't know
17 if it was opposed, I didn't know if there was anything else
18 filed on that one because --

19 MR. POWELL: Yeah, we filed --

20 THE COURT: -- that was kind of confusing.

21 MR. POWELL: -- a response to that.

22 MR. MUGAN: I believe there -- I believe you filed
23 a response Thursday and then we filed a reply yesterday in
24 a moment of brilliance. I didn't realize yesterday was
25 Veteran's Day when we got it Thursday and we filed it

1 electronically yesterday. I don't know if our runner put
2 one in your drop box or not.

3 THE COURT: Yeah and it hasn't shown up yet in --

4 MR. MUGAN: I --that's my fault. I apologize. I
5 --

6 THE COURT: Oh I see, yeah.

7 MR. MUGAN: Our office was open yesterday --

8 THE COURT: Right.

9 MR. MUGAN: -- and it didn't dawn on me that it
10 was Veteran's Day.

11 THE COURT: Yeah, exactly. Exactly. I remember
12 those days. Now that I'm a government employee, it's a
13 little different.

14 So, with respect to that issue of referring it
15 back to the Commissioner --

16 MR. MUGAN: I -- if I may, Your Honor? I think --

17 THE COURT: If it's --

18 MR. MUGAN: You know, I think it's a relatively
19 simple issue. I think it needs to be handled first before
20 we start getting into the substantive issues. We didn't
21 address the substantive issues because we filed this motion
22 and, quite frankly, after this motion, we're going to be
23 filing a motion to dismiss on issue preclusion and some
24 other facts, but on this motion, and looking at it, I think
25 the saving grace is twofold.

1 Number one, I don't see any *Landreth* II problems.
2 I don't think we need a super judge. So I don't think we
3 have *Landreth* problems and I think the issue is solely in
4 your discretion. I mean, you can do whatever you want.

5 Our whole point is -- and I practiced law back in
6 the Midwest for 33 years and then came out here because all
7 of our children and grandchildren are here and I've
8 practiced here for 7 years and I never quite understood how
9 Probate Court worked even though I appear there all the
10 time and this luckily has hopefully clarified some of it.

11 If you look at the law -- the Rule 4.16 of the
12 local rules, it basically says that you, as Probate Judge,
13 may hear whatever contested matters you select and you also
14 may refer any contested matters on the probate calendar to
15 a Master appointed by you for hearing and report. And
16 Nevada Rule of Civil Procedure 53 always gives the Court,
17 you know, the power to appoint a Master in any case.

18 And then, granted it's not a rule, it's a proposed
19 rule on the new rules that have been redone and proposed
20 and they're a long way from being adopted, but Rule 4.08
21 basically is a rule of the longstanding practice in Probate
22 Court. If the Probate Commissioner hears something and you
23 don't request that it go to the Probate Judge, then you
24 live with the Probate Commissioner otherwise you're going
25 to be doing forum shopping or the minute you get a bad

1 ruling, you want the Probate Judge and I know that's not
2 the rule, but that's the practice as I understand it.

3 And in this situation, back in 2009, exact same
4 case, case number, exact same trust, there was a petition
5 brought in part to construe and reform the trust. Sat down
6 for a hearing, and notice given, hearing date comes, an
7 order entered, notice of entry sent out, and that was it
8 and part of the order construed and reformed the trust.

9 Now we have 2013, one of the interested parties
10 comes back and basically says that her mother is only
11 entitled to 35 percent of the income from certain assets
12 and we believe that even though we have no problem with you
13 as a Judge, I've appeared before you a number of times, we
14 believe that the Probate Commissioner is the one that's
15 most familiar with it, has construed this and reformed it
16 previously. We think it should go before him, that he
17 should keep it. It would be just easier and simpler.

18 In the response Mr. Powell said it's not a -- it
19 was not a contested matter. We searched and searched in
20 Nevada law, there is no definition of a contested matter.
21 I note -- like I said previously, this was all done on
22 notice, etcetera, etcetera. The order wasn't stipulated
23 to. There was another interested party: Shriners
24 Hospital, and they were sent notice of the hearing. They
25 were sent notice of the notice of entry. They never

1 stipulated. They never consented. There's an email
2 attached to Mr. Powell's response, Exhibit A, where the
3 attorney, Mr. Steadman, says that there is an interested
4 party, Shriners, they have the right to object, etcetera,
5 etcetera. They got notice of the hearing and also the
6 notice of the entry.

7 So we believe it was a contested matter that was
8 handled by the Probate Commissioner and now we're coming
9 back four years later, same case, same trust, and we're
10 asking for a declare -- a declaration that my client's only
11 entitled to 35 percent of the income and we believe that
12 there is a substantive and direct connection between the
13 two matters and if you look at the pleadings in the 2009
14 case, you look at the consent of the party in this case,
15 Mr. Powell's client, there are allegations and consents
16 that basically say trust number two has these assets and
17 our client is a lifetime beneficiary.

18 And so, there is a direct connection, direct
19 connection, and we believe that there may be issues of
20 reforming and construing the trust because we believe if
21 you look at the trust language and the facts and
22 circumstances, it was obviously the intent of the decedent,
23 W. N. Connell, that my client, his only child, be entitled
24 to income from these Texas assets which were his sole and
25 separate property that he brought into the marriage and he

1 wanted to make sure that she receive the income for as long
2 as she lived and any alleged power of appointment that Mr.
3 Powell's client is claiming that the second wife had was
4 specifically subject to that life estate.

5 So I think there's reformation issues. There's
6 construction issues. Like I said, you know, regardless of
7 how you rule, we're going to be filing a motion to dismiss
8 on issue preclusion, etcetera, but we believe that since
9 the Probate Commissioner handled it previously, the
10 longstanding practice, regardless of the proposed rules,
11 you as Probate Judge, have the right at any time to refer
12 the matter to a Master including the Probate Commissioner.

13 We just think under the circumstances it would be
14 better if the Probate Commissioner handled it because he's
15 familiar. I know you've got plenty of things to do. If
16 you want the case, that's fine, too. We don't have any
17 problem with it; we just think under this circumstance it
18 would be better if the Probate Commissioner handled it.

19 THE COURT: Okay. So, I guess just trying to
20 figure out procedurally where we are here, that motion is
21 technically not on calendar. I guess it's been fully
22 briefed although the only thing that shows up in Odyssey is
23 the motion which, you know, we didn't see noticed. It
24 didn't show up at least on our calendar from Master
25 Calendar and an errata and I don't -- didn't see an

1 opposition or a reply. So, just, you know, for the record,
2 I don't know -- Mr. Powell, do you want to be heard on the
3 issue of whether this is really appropriately before this
4 Court --

5 MR. POWELL: Yeah and --

6 THE COURT: -- and why you -- I guess, because --
7 it's here because you requested that it be here. So, --

8 MR. POWELL: Yeah. In terms of the motion, their
9 motion, you know, it's up to you. We've already briefed
10 it. We've filed our response. Even though it had the
11 heading of motion to reference back, it had substantive
12 arguments. So I took it as though that was an objection to
13 our petition. It was basically pleading in the alternative
14 of here's our argument that we -- you know, we don't want --
15 -- we want this to go back to the Commissioner to hear these
16 arguments.

17 THE COURT: And so then that really I guess gets
18 us really to the issue here which is --

19 MR. POWELL: Yeah.

20 THE COURT: -- and I think that's what Mr. Mugan
21 was --

22 MR. POWELL: Yeah.

23 THE COURT: -- referencing that in 2009, a certain
24 action was taken, --

25 MR. POWELL: Yeah.

1 THE COURT: -- and now in 2013 there was a
2 petition for declaratory relief.

3 MR. POWELL: Yeah.

4 THE COURT: So --

5 MR. POWELL: We have that petition because 33
6 years of precedent and status quo is now being changed and
7 that's the issue before us is there's -- there was --
8 again, 33 years of a 65/35 split of the income from oil,
9 gas, and mineral rights in Texas and suddenly in basically
10 June/July, Ms. Ahern decides: No, I'm entitled to 100
11 percent. That 65/35 that I've been living with for 33
12 years, I don't want to abide by that anymore. No logic, no
13 reason, nothing, just I'm keeping 100 percent now. Okay?
14 Well, that changes the status quo and --

15 THE COURT: Okay. So the issue is -- because I
16 think kind of the argument they were arguing here is that
17 if --

18 MR. POWELL: Yeah.

19 THE COURT: -- you're going to oppose this order
20 reforming the trust back in 2009, --

21 MR. POWELL: Yeah.

22 THE COURT: -- the process should have been
23 followed in 2009 to do that; there was no such process.
24 But the point is she didn't do anything until 2013.

25 MR. POWELL: Well, no, actually the 2009 had no

1 effect on the 65/35 split.

2 THE COURT: Okay.

3 MR. POWELL: That -- the whole point of what '09
4 did was to add provisions and that was the key. It added
5 provisions to the trust to basically say: These are the
6 remainder beneficiaries after Ms. Ahern's death which
7 wasn't first spelled out. It was easily inferred that it
8 would go to her issue, it was just spelled out because it
9 wasn't addressed. So that was the point of the reformation
10 was to say we need to -- we should probably just handle
11 this now so that there's no issues that arise later.

12 THE COURT: So -- and so there's nothing that
13 happened in 2009 that would have prompted any kind of an
14 appeal? You're not like --

15 MR. POWELL: No.

16 THE COURT: -- it's not like [indiscernible] --

17 MR. POWELL: There was nothing wrong with it.

18 THE COURT: -- to do a late appeal of that earlier
19 --

20 MR. POWELL: Exactly. None of that is being
21 appealed at all and that's why a consent was signed to say:
22 We're fine with it, spelling out the fact that my sister
23 and I are the remainder beneficiaries of trust number two.
24 No problem.

25 I mean, that -- it basically was to their benefit

1 to have that go into effect because basically it's spelled
2 out.

3 Not -- again, it was -- if you read the trust, the
4 language clearly inferred that that was the normal way that
5 it would go, it just -- it didn't expressly state it and
6 that was the issue of the reformation.

7 THE COURT: If there -- Mr. Mugan's point that
8 traditionally if a matter starts out with the Probate
9 Commissioner, it stays with the Probate Commissioner unless
10 you think some sort of -- you know, he has no authority to
11 hear a jury trial for example. So that's -- it's got to
12 come up here. And the way it's always been handled, as he
13 pointed out, you know, it hasn't ever been really clear how
14 we're going to handle probate. It's just sort of been
15 grafted on as a --

16 MR. POWELL: Yeah.

17 THE COURT: -- you know, to a highbred of what
18 part of District Court it was going to be and no real clear
19 rule.

20 So I guess the point is what you're seeking now is
21 instead of filing a new action, there's -- you don't file a
22 new action, it stays under the old action, --

23 MR. POWELL: Yeah.

24 THE COURT: -- which -- like probate cases never
25 close.

1 MR. POWELL: Right.

2 THE COURT: They are never --

3 MR. POWELL: Not --

4 THE COURT: -- over.

5 MR. POWELL: -- in a trust situation unless you

6 affirmatively --

7 THE COURT: Right.

8 MR. POWELL: -- request that jurisdiction be taken

9 off and then, in that case, you've got to get jurisdiction

10 back. But, absent that, yeah, it just continues forever

11 until --

12 THE COURT: We've got a case from --

13 MR. POWELL: -- somebody --

14 THE COURT: -- 1972.

15 MR. POWELL: Yeah.

16 THE COURT: So, I mean, --

17 MR. POWELL: Yeah.

18 THE COURT: -- I -- it -- they just never end.

19 MR. POWELL: They never end unless you do

20 something affirmative --

21 THE COURT: Right.

22 MR. POWELL: -- to get rid of jurisdiction.

23 THE COURT: Right. So you had to file under the

24 old case number because that jurisdiction --

25 MR. POWELL: That --

1 THE COURT: The Court's got jurisdiction there.
2 So fine.

3 MR. POWELL: Jurisdiction still exists. Yep.

4 THE COURT: Okay.

5 MR. POWELL: Yep.

6 THE COURT: So, now it gets to the next point --

7 MR. POWELL: Yep.

8 THE COURT: -- which is who is really the most
9 appropriate person to hear the case?

10 MR. POWELL: Right and --

11 THE COURT: I mean, because that really seemed
12 like that was --

13 MR. POWELL: -- basically it's not a knock on
14 Commissioner Yamashita, it's really a situation of it's an
15 urgent, pressing matter that we get a determination now and
16 it's something that we feel that you're clearly capable of
17 handling. There's not -- there's no special expertise
18 which, you know, obviously you have -- you can do as you
19 choose, but there's no special expertise that's required
20 that Commissioner Yamashita would bring to this that you
21 otherwise don't possess.

22 So, really, it's a matter of efficiency and
23 urgency because we need an order, not just a report and
24 recommendation, as soon as possible because we've got big
25 money at stake here, we have reliance on these

1 distributions, and as Mr. Goodsell pointed out with his
2 case, it's a situation that you can be a war of attrition
3 because these monies are being choked off that they have
4 been relying on, my client and her sister, basically for
5 the last four years when they stepped into the shoes then
6 of their grandmother, Marjorie, who had for the previous 29
7 years been receiving 65 percent of oil, mineral, and gas
8 income.

9 So, --

10 THE COURT: Okay. So that --

11 MR. POWELL: -- the whole point is --

12 THE COURT: The question is --

13 MR. POWELL: Yeah.

14 THE COURT: -- you know, is this -- I can't think
15 of any other way to frame it and I don't know if Mr. Mugan
16 necessarily accused you of this, but is this forum
17 shopping? Because that's what I want to make real clear.

18 MR. POWELL: Yeah.

19 THE COURT: You're not seeking to --

20 MR. POWELL: Not -- no.

21 THE COURT: -- reform anything that Commissioner
22 Yamashita has previously done?

23 MR. POWELL: No.

24 THE COURT: It's just a question: Who is more
25 perfect to hear this? So what are you looking for because

1 --

2 MR. POWELL: We're looking for --

3 THE COURT: -- if you're looking for it to be
4 decided on just, you know, the pleadings or is this
5 something where you need some discovery and an evidentiary
6 hearing?

7 MR. POWELL: I think we're good with the pleadings
8 because --

9 THE COURT: Because it's a petition for
10 declaratory relief.

11 MR. POWELL: I think we're good with the
12 pleadings. We can't -- we -- there's nothing further that
13 I can submit to you in terms of testimony or anything else
14 other than to -- and I don't think this is being contested
15 and if it is, then I'm super surprised because we have tax
16 returns all the way up through 2012 showing a 65/35 split.
17 It's been that way for the last 33 years; only over the
18 summer has this now changed. So, the issue is pretty black
19 and white there.

20 The other thing is on the one tax return we have
21 which we can't locate the Form 706. The IRS has been
22 asked. They don't have a copy of it. It was prepared
23 here. The preparer doesn't have a copy of it and, I mean,
24 how can you really expect it? It was a -- from '79/'80.
25 So, I mean, that's going back a long time to try to get

1 form way back before we had electronic -- saving documents
2 through electronic means. So, we just don't have it.

3 But going back to that return that was filed, it
4 shows a 65/35 split. That's the way, again, it's gone
5 since 1980 when Mr. Mugan's client became a co-trustee of
6 the trust. So we've got the precedent. There's nothing
7 more than we can declare.

8 THE COURT: What was going on in Texas? That was
9 another point where I wasn't quite clear if --

10 MR. POWELL: There was a -- oh --

11 THE COURT: -- there was maybe a -- and, like I
12 said, I don't want to accuse anybody of forum shopping, --

13 MR. POWELL: Sure. Sure.

14 THE COURT: -- but it seemed like there was a
15 concern about that that might be some forum shopping.

16 MR. POWELL: Yeah, I don't know if you could call
17 it forum shopping. The issue there was the fact that there
18 -- it was Texas property and it's --

19 THE COURT: Right.

20 MR. POWELL: -- related to Texas real estate.

21 THE COURT: Right.

22 MR. POWELL: So I think that was the issue there
23 is covering all bases because I -- it's basically a
24 situation where, again, you have 33 years of the status quo
25 and then all of a sudden the plug is pulled and then the

1 question is: Wait a second, how do we put the plug back
2 in? And so, that was part of it was basically I think just
3 simply getting a declaratory ruling there on the issue.

4 There's -- the accusations, you know, -- and it
5 upsets me when there's not full disclosure given. There
6 was a mistake made in the Texas filings and immediately
7 upon the Texas attorney realizing the mistake, it was --
8 there was a phone call made, it was corrected.

9 So it's a half-truth to say: Well, you tried --
10 in bad faith, you tried to avert this and done this.
11 Nobody has ever made any assertion that Ms. Ahern is not
12 the adopted daughter of Marjorie Connell, not -- that's not
13 even an issue. They spent time briefing the issue somehow
14 trying to establish that. It's not a -- it's a nonissue.

15 The Texas return -- the Texas filing was simply a
16 mistake. Texas counsel didn't realize it. Upon being
17 notified he made a mistake called opposing counsel and said
18 I made a mistake. You know, your client is clearly this.
19 That was my error as the drafting attorney and that's it.
20 It wasn't in bad faith. Nobody is looking to hoodwink
21 anybody or do anything like that.

22 The situation that we have here is we need an
23 order and so --

24 THE COURT: Well but I guess my question --

25 MR. POWELL: -- going back to --

1 THE COURT: -- is it you're --

2 MR. POWELL: Yeah.

3 THE COURT: -- trying to get a different order
4 here from --

5 MR. POWELL: No.

6 THE COURT: -- what you're getting out of Texas --

7 MR. POWELL: No.

8 THE COURT: -- because what is the Texas --

9 MR. POWELL: Yeah.

10 THE COURT: -- going to be asked to do?

11 MR. POWELL: Yeah. No, I'm glad to kind of bring
12 you up to speed on that.

13 Basically, the Texas proceeding has essentially
14 been simply stayed. Ms. Ahern has Texas counsel. They had
15 a mediation there. It was unsuccessful. The last report I
16 got is basically Texas is just kicking the can down
17 basically saying: No, really, Nevada should probably be
18 deciding this because that's where the trust has
19 jurisdiction.

20 So, my understanding is that whole proceeding is
21 just simply stayed pending this outcome.

22 THE COURT: Okay. So, I guess then what are you
23 looking for? Are you looking --

24 MR. POWELL: We're looking for a declaratory --

25 THE COURT: I guess --

1 MR. POWELL: Yeah.

2 THE COURT: -- my question is: What's the
3 procedure that you think would be followed and who is more
4 appropriately, I guess, set up to hear that? If it's a
5 matter of having a hearing and putting this evidence on,
6 because, I mean, when you're seeking declaratory relief, it
7 seems to me that -- I mean, you can get a declaratory
8 judgment basically on the pleadings, but I think that
9 they've got -- you know, their initial response was: We
10 think this has to go back to the Commissioner because there
11 is -- this has already been determined and I understand
12 your position is that that order didn't really determine
13 anything that effects --

14 MR. POWELL: Yeah.

15 THE COURT: -- this issue that you've got going on
16 right now, --

17 MR. POWELL: Yeah.

18 THE COURT: -- but they've indicated that their
19 next step is they want to file a motion to dismiss this
20 because they think that it does. So, --

21 MR. POWELL: Which I think is something --

22 THE COURT: -- logistically, what's the schedule?

23 MR. POWELL: Which I think is something that you
24 can basically handle right now just by looking at the
25 pleading that the petition that was filed, nowhere in that

1 petition is there any declaration of basically asking for -
2 - them, in their prayer, asking for declaration that Ms.
3 Ahern has 100 percent interest in that income. It's solely
4 a reformation petition saying: We want to add provisions
5 so that it's clear who the remainder beneficiaries of trust
6 number two are and that's another key function.

7 The whole thing was -- this was -- and it gets a
8 little confusing because they use the term trust one, trust
9 two, trust three. Trust one was essentially just when both
10 of the settlers were living, they refer to that as trust
11 one, basically an undivided trust. Then at the first
12 death, which was Mr. Connell, they did a division of the
13 trust number two, trust number three. Trust number three
14 was the survivor's trust along with a marital trust because
15 back at that time there was no such thing as what we do now
16 with the martial trust as being the third sub trust. So,
17 it basically -- whatever was determined to me the marital
18 monies for purposes of tax deferment went into the
19 survivor's trust. Trust number two was essentially the
20 decedent's trust.

21 So, when they were reforming the trust, the
22 provisions that they were adding to were dealing with trust
23 number two. That's another issue as well and what they did
24 is basically -- and, again, I'm not saying anything that's
25 not in the pleadings and then in the accompanying order.

1 All they sought was to act -- basically what I would say
2 clarification provisions saying: At the death of Ms. Ahern
3 that Jacqueline Montoya and her sister, Kathryn, would be
4 the residuary beneficiaries of that trust. It also
5 basically prescribed the way that that trust would be
6 administered for Jacqueline and Kathryn, and then it also
7 prescribed as well that -- who would be the successor
8 trustees of trust number two upon Ms. Ahern's death.

9 Currently Ms. Ahern is the only trustee of trust
10 number two. So, that's what that '09 petition did. It had
11 nothing to do with a declaration of rights saying: Ms.
12 Ahern now owns 100 percent of the income. My client and
13 her sister would have never agreed to that. That wasn't
14 even remotely in the mindset of why they would agree to
15 that. It wasn't even -- it wasn't being asked.

16 And so, in my response to their motion, again,
17 relying entirely on a consent? You're consenting to the
18 prayer. The prayer is the substance of the petition. Any
19 other facts that get thrown in are irrelevant. You're --
20 again, the substance of the petition is the prayer. We all
21 know that. The only thing that can be in the order is
22 what's asked for in the relief, in the prayer.

23 So, they had no reason to object to that. That's
24 why they signed consents. Yeah, fine, add in the
25 clarifying language. We want it. It's not detrimental to

1 them.

2 And to the assertion, again, that contested, we're
3 on two different wavelengths then in terms of what
4 contested means because the whole point of the approved
5 list in Probate Court is there is not an objection filed,
6 therefore -- meaning there is no contest to what's being
7 asked for and the fact that you have to give notice and a
8 notice of a hearing, well, you have to do that for every
9 petition, and the fact that you don't necessarily secure
10 consents from anybody, that doesn't defer it from being put
11 on the approved list, which this was. There was no oral
12 argument at this hearing. It was -- the order got rubber
13 stamped. So, that's --

14 THE COURT: Well I --

15 MR. POWELL: -- my point is this is not a --

16 THE COURT: But I guess the --

17 MR. POWELL: -- contested matter.

18 THE COURT: -- point, as I understood it, the
19 point that was being made about shouldn't this be heard by
20 the Commissioner is isn't he the more perfect person to
21 make that determination of when I entered that order in
22 2009 granting this reforming of the trust it was or was not
23 addressing an ultimate issue here and I understand your
24 point that you don't want to go through that process and
25 then have to object to that report and recommendation and

1 then come up here, but it seems like that's kind of the
2 suggested method --

3 MR. POWELL: Well, --

4 THE COURT: -- that Mr. Mugan is --

5 MR. POWELL: Yeah, and I'm not sure why.

6 THE COURT: -- seeking.

7 MR. POWELL: I don't really understand. They are
8 two separate things. It's apples and oranges what's going
9 on here and so I don't think there's any need to clarify
10 because the order itself doesn't reference any declaration.
11 If you read the order, it doesn't reference any declaration
12 about: Oh Ms. Ahern is 100 percent -- has 100 percent
13 interest in these oil, mineral, and gas rights. It doesn't
14 say that. The only thing it says -- and that's, again, if
15 the Commissioner looks at the order, there's --

16 THE COURT: And certainly it --

17 MR. POWELL: -- nothing you can ever infer from
18 that.

19 THE COURT: -- would seem that if she had thought
20 that it did, she would have taken that action in 2009.

21 MR. POWELL: Exactly. Exactly.

22 MR. MUGAN: Your Honor, if it --

23 THE COURT: That's a good point. Thanks.

24 MR. MUGAN: I don't mean to interrupt Mr. Powell,
25 but --

1 MR. POWELL: But so --

2 MR. MUGAN: This is a really important issue,
3 really important.

4 THE COURT: Okay.

5 MR. MUGAN: And you look at the petition that was
6 filed in 2009 and here's what it says in part:

7 Trust number two owned land and oil and gas shares
8 in reserve and income located in Upton County, excuse
9 me, Texas.

10 That's what we're talking about in this
11 declaration, petition today, and paragraph 19 of that
12 petition in 2009 says:

13 Pursuant to Article 4th, and they're referring to
14 Article 4th of the Trust Agreement, which article
15 governs the administration of trust number two, all
16 income from the oil assets is to be paid to the
17 petitioner, and the petitioner is my client, as the
18 residual beneficiary during her lifetime.

19 I agree it's black and white. It's already been
20 decided and that was stated in the 2009 petition and Mr.
21 Powell and his clients say: Doesn't have anything to do
22 with it. Doesn't have anything to do with it. It's got
23 everything to do with it.

24 And you look at their consent that his client
25 signed, she not only consents to it, she makes an

1 affirmative statement and says:

2 I am a contingent income beneficiary of the trust.
3 I have read the petition and believe it to be true and
4 correct to the best of my knowledge. I hereby consent
5 to the petition and request that the Court enter an
6 order approving the petition in its entirety.

7 I don't know how the two of them aren't related.
8 That's what we're arguing about in his declaratory
9 petition. My client's not entitled to all of the income.
10 The order that was entered in 2009, it's based on the
11 petition with affirmative allegations which his client
12 consented to and she even admits she's the contingent
13 income beneficiary.

14 So, how you can say they're completely separate
15 and distinct and how this shouldn't be handled by the
16 Probate Commissioner, at least the motion to dismiss since
17 he's the one who handled the previous matter, I -- in my
18 limited intellect, I don't see it. I think they're
19 intricately -- there's a substantive, intricate
20 relationship between that action and what was done and pled
21 in there and what they're asking for now.

22 And, you know, I don't want to get into
23 substantive matters because basically we're just asking for
24 a motion here. We really didn't address the substantive
25 matters --

1 THE COURT: Well but see [indiscernible] me. The
2 motion that you filed isn't technically on my calendar
3 today.

4 MR. MUGAN: Right. Right. And I think he said
5 that it was all right and we can go ahead with it unless I
6 misunderstood him.

7 MR. POWELL: No, let's do it. Let's do it. It's
8 fine. I briefed it. I'm --

9 THE COURT: Okay.

10 MR. POWELL: -- fine with it. So let's go.

11 THE COURT: Okay. But I haven't seen your brief.

12 MR. POWELL: My response?

13 THE COURT: Yeah. Haven't seen it.

14 MR. POWELL: Okay.

15 THE COURT: So, you know, that's my problem is
16 that --

17 MR. POWELL: Yeah.

18 THE COURT: -- we've got this fugitive motion out
19 there that was filed and not calendared, but if the parties
20 feel that it's appropriate to address it, then I guess we
21 can address it and -- because then I think we get down then
22 to the next point which is it sounds to me that even if
23 this Court keeps jurisdiction, that Mr. Mugan wishes to
24 file his motion to dismiss, that -- and it seems to me that
25 the declaratory judgment action then -- it's kind of a

1 countermotion almost to it that you're seeking -- your
2 petitioner seeks declaratory judgment and their opposition
3 is: No, we oppose that and our countermotion is that there
4 is -- there's already been a ruling on this essentially by
5 the Commissioner, despite the fact that she didn't act on
6 it for four years, there's a ruling from the Commissioner
7 in 2009 that governs this, that she's acting under the
8 authority of. So, this should have already been decided.

9 MR. POWELL: Which I would have no problem with
10 except let's read the order.

11 THE COURT: Right. Okay.

12 MR. POWELL: The order doesn't correct any of
13 that.

14 THE COURT: I'm not --

15 MR. POWELL: Yeah.

16 THE COURT: I don't really want to get to the
17 merits, but I'm trying to figure out the procedure what we
18 are trying --

19 MR. POWELL: Yeah.

20 THE COURT: -- to do here today.

21 MR. MUGAN: Excuse me, Your Honor, but maybe the
22 answer is to kick it out two weeks, give the Court an
23 opportunity to read the pleadings and then we come back and
24 try and answer whatever questions you have. If that -- if
25 that's agreeable to Mr. Powell and you, I'm willing to do

1 whatever the Court wants to do.

2 THE COURT: Okay. Well because see -- and I agree
3 that with the -- the first thing to be decided is who's
4 going to hear it. Is this something that's more
5 appropriate for this Court to hear? Is it more appropriate
6 for this to be referred to the Commissioner to hear and
7 then seek this -- you know, appeal any report and
8 recommendations?

9 Mr. Powell's clients are -- you know, position is:
10 We want this to go faster. We don't want the additional
11 built-in delay of getting a report and recommendation and
12 then doing an appeal on that.

13 MR. POWELL: Yes.

14 THE COURT: We want this all decided now. We
15 think the Court can hear all of it. Both the question of
16 was this in fact previously ruled on by the Commissioner,
17 that's -- basically, that's the opposition to the petition
18 of declaratory relief is: No, you can't have this ruling
19 that you're seeking because it's already ruled on by the
20 Commissioner and you've lost it or you consented to the
21 action that she's taking now, whatever the opposition is.
22 It sort of seems to me that procedurally that's where we
23 are with it that --

24 MR. MUGAN: Well, yeah, I didn't intend to do
25 that. What I intended to do is take it one step at a time.

1 I think the first question is who is this matter
2 going to be heard by: Your Honor or the Probate
3 Commissioner? And so that's the issue that I was trying to
4 get decided and then whoever it is going to be, whether
5 it's you or Commissioner Yamashita, then we're going to
6 file our motion to dismiss based on issue preclusion.

7 I think the first step is to decide whether this
8 Court or the Probate Commissioner is going to handle this
9 matter and then the next step is for me to either file the
10 motion to dismiss or an opposition.

11 THE COURT: Okay. All right. Well, so then if
12 you're prepared to have this unfiled motion -- or unnoticed
13 motion ruled on now, I appreciate the point, Mr. Mugan,
14 that practice has been that if the Commissioner hears
15 something, then it's going to -- he's going to continue the
16 hearing. You know, whether he actually took action on
17 this, he signed an order on something that was unopposed
18 and consented to. I think ultimately whatever he would rule
19 on issue preclusion would be appealed up here anyway. The
20 request has been made by these petitioners that we skip
21 that step and just come here. So I'll grant the
22 petitioner's request and I'll hear the -- I'll keep
23 jurisdiction over this and we'll keep this motion here.
24 So, respectfully, deny the motion to remand back to the
25 Commissioner.

1 Now we have this question of this petition for
2 declaratory relief --

3 MR. MUGAN: If I may --

4 THE COURT: Yeah.

5 MR. MUGAN: Pardon me, Your Honor, if I may say
6 one thing?

7 THE COURT: Okay.

8 MR. MUGAN: I just want to clarify the record. If
9 part of your ruling is based on the fact that it was on the
10 approved list and rubber stamped, I don't think there's
11 ever been any showing of that. In fact, I don't think that
12 was an allegation in his response on that. This, today, is
13 the first time I've heard that. So, I just --

14 MR. POWELL: It was --

15 MR. MUGAN: -- want to clarify the record.

16 MR. POWELL: It was addressed. I can't say with
17 100 percent certainty because I haven't located a
18 transcript of that, but I can say with nearly 99.99 percent
19 certainty it would have been on the approved list and there
20 would not have been additional oral argument and that
21 implication is addressed in my response. So it's not the
22 first time I'm raising it here.

23 MR. MUGAN: I just wanted the record to reflect
24 that, Your Honor.

25 THE COURT: It's likely that it wasn't because

1 there's no minutes.

2 THE CLERK: There are minutes. If you go ahead
3 and click on it, it's just it is so old, it didn't locate
4 it.

5 THE COURT: I didn't see minutes.

6 THE CLERK: Here's the -- you're clicking too far.

7 THE COURT: Oh.

8 THE CLERK: They just didn't go over because --

9 THE CLERK: Yeah, it says: Matter being on the
10 approved list there being no objection.

11 MR. POWELL: Yeah.

12 THE COURT: So it was on the approved list.

13 MR. POWELL: It was on the approved list, yeah.

14 THE COURT: Okay.

15 MR. MUGAN: Very good.

16 THE COURT: All right. So, anyway I don't see any
17 reason to send it back to him and then -- because the
18 request is of the petitioner's that it be heard here and we
19 skip that step. Okay, fine.

20 So having -- moving on then, I think though, Mr.
21 Powell, that the point is, and I don't know, Mr. Mugan,
22 what -- I appreciate your position being that we have to
23 take this step by step. First you have to see, you know,
24 our -- we have the right to oppose this and our opposition
25 is going to be that this has already been decided. So

1 however you want to present that because the -- otherwise
2 it's a petition for declaratory relief which is you need to
3 oppose it or file some -- whatever -- and I guess my
4 question is: Do you view this as something that requires -
5 - that can all be done on affidavits because it's strictly
6 a legal issue? Do you need testimony?

7 MR. MUGAN: No, I think it's going to need
8 testimony if we -- you know, if we get to that point. I
9 really think there's going to need to be some evidence.
10 There's two sides --

11 THE COURT: Okay.

12 MR. MUGAN: -- to every story and you need to hear
13 her side of the story.

14 THE COURT: Okay.

15 MR. MUGAN: My client's side.

16 THE COURT: All right. So, is it something that
17 requires any kind of -- is it more like a preliminary
18 matter like an injunction hearing where you don't need
19 discovery first or are you going to need discovery? This
20 is just what --

21 MR. MUGAN: Oh I --

22 THE COURT: -- I'm trying to just figure out is
23 how we schedule this and set this up procedurally to go
24 forward.

25 MR. MUGAN: I think we're going to need some

1 discovery.

2 THE COURT: Okay. Mr. Powell.

3 MR. POWELL: No. I don't need any. I mean, it --
4 Mr. Mugan was just saying a moment ago that it's black and
5 white, it's already been decided, and now we're saying it's
6 not. So, --

7 THE COURT: Right.

8 MR. POWELL: -- I think --

9 THE COURT: So I guess the --

10 MR. POWELL: We don't need discovery on our end.
11 There's nothing more we can offer to establish that 33
12 years of precedent has been established. There's nothing
13 more that we can go by.

14 If that's what we're intending to raise that issue
15 that it was done improperly back then, I don't know what
16 more we can go to than saying that this is the way that
17 it's been done and, really, at the basis of what we're
18 asking for is if they want to now dispute that 65/35, let -
19 - what we would ask is put -- let's go back to the status
20 quo and then we'll haggle it out from there, but it's not
21 fair to have my clients, my client choked off from
22 receiving what they've been -- what she's been getting for
23 the last four years, her grandmother has been getting for
24 the previous 29 years and that's the issue.

25 I'm not sure how the delay benefits anybody. To

1 me, this is something you want declared now. Both sides
2 apparently feel it's black and white. So let's go. I
3 mean, again, there's nothing more we can offer than what
4 we've already established. I can give -- we can provide
5 tax returns. Those are just pleadings. There's no
6 testimony that can be offered in that regard.

7 It's precedent. It's been 33 years of this split.
8 If that's -- if that issue -- I don't think that issue is
9 in dispute. If the issue in dispute is: Well, it
10 shouldn't have been that way, okay, fine. Then that's up
11 to them now to change what's been, but you can't just,
12 again, pull the plug and then go: No, I'm not putting it
13 back in. It doesn't work that way and --

14 THE COURT: Okay. So you're seeking some sort of
15 --

16 MR. MUGAN: Your Honor, --

17 MR. POWELL: That's why I'm seeking the
18 declaratory --

19 THE COURT: -- preliminary --

20 MR. POWELL: -- judgment is so that we can go back
21 to the trustee -- trustee, again, not beneficiary, the
22 trustee and say: This must be honored. It's a 65/35
23 split. What --

24 THE COURT: Okay.

25 MR. MUGAN: The --

1 THE COURT: So you're looking for a preliminary
2 relief which is to maintain the status quo --

3 MR. POWELL: Exactly.

4 THE COURT: -- pending a determination on the
5 underlying issue?

6 MR. POWELL: Exactly. Exactly.

7 THE COURT: Okay. Got it. Thanks.

8 MR. MUGAN: Your Honor, it's black and white I
9 think in my motion to dismiss, that issue preclusion.
10 That's what I mean when it's black and white. If they get
11 over that hurdle, then I think there's evidentiary issues.

12 You know, he keeps talking about urgency and
13 returning to the status quo, his client -- and if you look
14 at their petition, they state that my client is entitled to
15 at least 35 percent, at least 35 percent -- no argument
16 about that.

17 MR. POWELL: No argument about that.

18 MR. MUGAN: No argument.

19 MR. POWELL: Nope. No.

20 THE COURT: Yeah.

21 MR. MUGAN: Her Texas attorney sends a letter to
22 all of the oil companies --

23 THE COURT: When you say her in Texas, you mean
24 the petitioners?

25 MR. MUGAN: She had -- the petitioner. Not Mr.

1 Powell, but her Texas attorney sends a letter to all of the
2 oil companies paying the royalties, encloses copies of the
3 petition up here, and doesn't say: There's 65 percent in
4 dispute, we want you to hold the 65 percent. No. The
5 letter says: There's a dispute, we want you to hold it
6 all. You know, even though there's no dispute about my
7 client getting 35 percent, we want you to hold it all. And
8 what did the oil companies do? They hold until we show
9 them the petition and try and convince them and the biggest
10 one is Apache, the one who really pays the money and we
11 haven't convinced them yet that they should release the 35
12 percent.

13 So this urgency and return to the status quo, it's
14 a little fuzzy, a little fuzzy because they claim they want
15 it but yet they tie us up.

16 MR. POWELL: Let's go back to 65/35 and we're
17 done.

18 MR. MUGAN: No.

19 MR. POWELL: And then we can go --

20 MR. MUGAN: That's not going to happen because
21 it's --

22 MR. POWELL: Oh, so give us our money but you keep
23 yours.

24 THE COURT: One at a time.

25 MR. POWELL: Okay.

1 THE COURT: So, Mr. Mugan, I guess my problem -- I
2 guess it's -- I'm just trying to understand --

3 MR. MUGAN: Right.

4 THE COURT: -- procedurally how we're going to go
5 forward. The petition for declaratory relief doesn't seek
6 an emergency finding. It is emergency relief saying, you
7 know, at least maintain the status quo pending a
8 resolution.

9 MR. MUGAN: No.

10 THE COURT: But it sounds to me like that might be
11 a perfectly reasonable option to order -- enter a
12 preliminary order saying: Let's maintain the status quo
13 and we'll make a determination as to who is correct.

14 MR. MUGAN: Well, I think if you want to go that -
15 - down that line, down that path, and there's no argument
16 that my client's entitled to 35 percent. There's a dispute
17 over the 65 percent and whose it's going to go to. The oil
18 company holds 65 percent until the dispute is determined.
19 That would seem to be more logical to me than to kind of
20 make a predetermination and then say: Well, we're going to
21 give them 65 percent.

22 There's reasons for what happened in the past, the
23 33 years, and I'll be glad to get into them if you want me
24 to but then we're starting to get into substantive issues
25 and stuff, but there's reasons, there's explanations,

1 there's reasons why it changed. There's Nevada statutes
2 that we can cite, etcetera, but I don't want to get into
3 the substantive issues.

4 But addressing your point, what's in dispute is
5 the 65 percent. If anything, I would think you just hold
6 that -- hold the 65 percent and that doesn't go to anybody
7 --

8 THE COURT: Well, here's my question and this is
9 why I asked earlier, is there some forum shopping going on
10 here because what's happening in Texas? Is this Texas
11 attorney just takes it on himself to send an order -- to
12 send around a petition that hasn't even got an order
13 attached to it and oil companies act on that?

14 MR. POWELL: There's an obligation because they
15 don't want to payout to anybody anytime there's a dispute
16 and that's the whole thing is -- it's -- if they don't,
17 there's issues there with them not having notified that
18 there's a dispute as to these.

19 The oil companies, like anything else, it's almost
20 kind of like an interpleader. They want to be informed:
21 Wait a second. Okay. There's disputes here, you better
22 notify us.

23 And I -- if -- and I could be mistaken and so
24 please don't hold me to this, but I believe there's some
25 boiler plate in there -- in these contracts that are

1 voluminous basically saying if there's any other claims
2 going on here, you better notify us immediately. That's my
3 understanding of the way it's done. I'm not a Texas
4 authority. I don't know --

5 THE COURT: I don't think any of us would hold
6 ourselves out to be authority for --

7 MR. POWELL: Yeah, and the whole --

8 THE COURT: -- Texas oil and gas law.

9 MR. POWELL: -- oil and gas -- and, I mean, that's
10 really almost a Texas-based --

11 THE COURT: Yeah.

12 MR. POWELL: I mean, that's -- Texas is oil
13 country.

14 THE COURT: It is its own thing.

15 MR. POWELL: Yeah. It's its own entity.

16 So the -- it's not an issue of simply retaliating
17 or anything like that. It's basically giving notice to
18 this third party to say: I'm putting you on notice, you
19 know, and basically there's a dispute. We have a dispute
20 here from the way it was being originally anticipated and
21 going.

22 So, I mean, --

23 MR. MUGAN: I've been through those leases and
24 I've been through those addendums and they're about that
25 thick and, again, don't hold me to it, but I sure don't

1 remember any provision like that and this attorney is
2 representing Ms. Montoya down there in Texas and I presume
3 he wouldn't be doing anything without her direction and
4 consent.

5 THE COURT: Okay. But here's my question is
6 procedurally, how do we go forward? If there's been some
7 action taken, and it sounds to me like Texas Court doesn't
8 -- Probate Court doesn't want to take jurisdiction over
9 this, they will honor any order entered if that's what the
10 point is. Then the question is: At this point in time, is
11 there any proper order? Because is what they're -- is what
12 the oil and gas companies are doing in reaction to this
13 premature? There has been no finding that anybody is
14 entitled to any of this money other than I think it says
15 pretty clearly that everybody agrees that 35 percent goes
16 to Eleanor. Nobody disputes the 35 percent to Eleanor.

17 So, Mr. Powell's suggestion is let's just go back
18 to the status quo and I understand, Mr. Mugan, your
19 opposition to that is the undisputed portions should be
20 distributed but if you distribute the disputed portion,
21 there's no way for your client to get it back if ultimately
22 it's determined it is hers.

23 MR. MUGAN: Well, I don't think that was
24 requested.

25 THE COURT: Okay.

1 MR. MUGAN: You know, I think we're going way
2 beyond what we were here today for, number one.

3 Number two, Texas --

4 THE COURT: What we are here today for technically
5 is an unopposed motion for declaratory relief.

6 MR. MUGAN: Well, I am appearing personally to
7 oppose it.

8 THE COURT: Okay.

9 MR. MUGAN: Texas has not turned down
10 jurisdiction, Your Honor.

11 THE COURT: Okay.

12 MR. MUGAN: What happened was that petition was
13 filed. My client was never given any notice of it. The
14 will was admitted to probate and the -- Ms. Montoya was
15 appointed personal representative down there.

16 THE COURT: Why would the will be admitted to
17 probate in Texas? I mean, nobody lived in Texas, did they?

18 MR. POWELL: I think those rights -- dealing with
19 the rights --

20 THE COURT: Right, but nobody lived in Texas?

21 MR. MUGAN: I don't understand that either, Your
22 Honor.

23 MR. POWELL: Well it was just --

24 MR. MUGAN: Died a Nevada --

25 MR. POWELL: It was --

1 MR. MUGAN: -- resident.

2 MR. POWELL: Yeah.

3 THE COURT: I was going to say she's a Nevada
4 resident.

5 MR. POWELL: I -- yeah, I think it's like anything
6 else. It's an ancillary proceeding dealing with property
7 rights or something there. You know, obviously, same thing
8 here, if somebody owns a house -- mineral rights in Las
9 Vegas or water rights, I guess would be more appropriate
10 out here --

11 MR. MUGAN: But property rights were owned by the
12 trust. There's no dispute about that. You know, why you
13 would go to Texas and then have a false or incorrect
14 allegation in there and get yourself appointed down there
15 and try and get the will admitted to probate down there
16 without noticing my client and the will is the document
17 that they claim exercised this power of appointment where
18 my client, you know, doesn't get all the rights -- all of
19 the money and as soon as my client finds out about it, they
20 file a -- they intervene and file a motion basically to set
21 it aside, etcetera, and the matter was scheduled for
22 hearing and, as I understand it, an expert witness was
23 supposed to testify, had serious health problems, is
24 hospitalized, and so they continued the hearing
25 indefinitely until the expert witness who is hopefully

1 available to testify. Texas has never said -- turned down
2 jurisdiction; has never said we'll do whatever Nevada
3 tells. That is just not correct.

4 MR. POWELL: Well, one is a probate matter and one
5 is not a probate matter. The trust matter is this matter;
6 the probate matter for Marjorie Connell is a Texas matter.
7 I don't think there's -- I think it's clear they are two
8 separate things. So I'm not sure -- I am not even sure
9 what the relevance of Texas as opposed to what we're asking
10 for here even comes into play.

11 THE COURT: But see this is my problem, I'm not --
12 I'm trying to figure out what exactly it is you're asking
13 for this Court to do and what the best process is --

14 MR. POWELL: Yeah.

15 THE COURT: -- to get to a hearing on that.

16 MR. POWELL: We're asking for the status quo to go
17 back which was the whole point of the declaratory judgment
18 was to say: It's 65/35 like it's been --

19 THE COURT: Well --

20 MR. POWELL: -- for 33 years.

21 THE COURT: But it didn't say status quo, it said
22 we want --

23 MR. POWELL: Well, not in those terms, but, I
24 mean, we asked for the declaration that it's 65 percent
25 interest, 35 percent interest. So, --

1 THE COURT: Okay.

2 MR. POWELL: Yeah, I mean, I'm kind of just
3 informalizing the relief, but if you see what we're praying
4 for it's the declaration that it's the 35/65 split.

5 THE COURT: But I -- but that to me, the
6 declaratory relief is seeking a conclusive and permanent
7 determination of that --

8 MR. POWELL: Right.

9 THE COURT: -- as opposed to maintaining the
10 status quo which is a little bit different --

11 MR. POWELL: Right.

12 THE COURT: -- which is that pending the outcome
13 of these various motions, we're going to --

14 MR. POWELL: Yeah.

15 THE COURT: -- return to that.

16 MR. POWELL: And I -- and the only thing I can
17 offer is I guess, you know, we pray in general, too, for
18 any other relief the Court may grant and so, to me, it goes
19 hand-in-hand with -- you know, basically, the whole point
20 is to get the determination done with and that sets the
21 record straight.

22 There has been no declaration despite what Mr.
23 Mugan says. Show me any order, order -- I want to see the
24 order that says that Ms. Ahern is entitled to 100 percent.
25 There was just simply statements in a petition as to that.

1 There's no prayer seeking to confirm that. And, again, as
2 Your Honor recognizes, if that was what -- if that was the
3 point of what you were going for and you then continued
4 four years of distributions and some of which were \$500,000
5 plus, where's the gift tax returns? Were those gifts? If
6 you had your declaration, those must be gifts. You don't
7 have --

8 THE COURT: Well but -- that -- and that gets us
9 to the how procedurally do we get there --

10 MR. POWELL: Yeah.

11 THE COURT: -- because I'm trying to figure out
12 what -- how this thing should go forward.

13 MR. POWELL: Yeah.

14 THE COURT: I mean, it -- are you just looking for
15 right now a temporary determination to let the oil and gas
16 companies in Texas know the Court's assuming jurisdiction
17 over this, we're going to have a hearing to determine who's
18 ultimately entitled to this money, until then, continue
19 with the distributions as you were previously making them,
20 35 percent to Eleanor, 65 percent to the granddaughters,
21 and we'll let you know once we've determined --

22 MR. POWELL: That there's an ultimate --

23 THE COURT: -- who in fact is entitled permanently
24 --

25 MR. POWELL: That's fine.

1 THE COURT: -- to this money?

2 MR. POWELL: That's fine with us.

3 THE COURT: Because --

4 MR. POWELL: Yeah.

5 THE COURT: -- it may be that it's 100 percent, it
6 may be that it remains 65/35.

7 MR. POWELL: Right.

8 THE COURT: We don't know yet. That remains to be
9 determined.

10 MR. POWELL: And what I will tell you, though, is
11 when Ms. Ahern decided I'm entitled to 100 percent, she was
12 taking 100 percent. That's the issue is it was previously
13 taking 35 percent, 65 percent going to Jacqueline and her
14 sister, then the plug was pulled, and then from essentially
15 June, she --

16 THE COURT: You see, I'm not understanding the
17 logistics of this. Is it the --

18 MR. POWELL: Okay.

19 THE COURT: -- oil and gas companies that you
20 notify to stop this or is it a trustee that gets notified?

21 MR. POWELL: Well, that's the whole thing. The
22 petition is based on a declaratory ruling that the trustee
23 must then honor.

24 Again, we have this weird situation where we've
25 had 65/35 for 33 years including the last four and then all

1 of a sudden, the trustee determines: No, -- the trustee
2 and the beneficiary being the same person --

3 THE COURT: Okay.

4 MR. POWELL: -- no, I'm entitled to 100 percent,
5 I'm not giving you that 65 anymore. I've turned off the
6 spigot. It's done. You're not getting it.

7 So that puts my client in the precarious position
8 of: Under what authority are you acting with that?

9 THE COURT: That's --

10 MR. POWELL: Yeah.

11 THE COURT: There you go. That's my question is -
12 -

13 MR. POWELL: Yeah.

14 THE COURT: -- how do we ultimately get to that
15 question?

16 MR. POWELL: Yeah.

17 THE COURT: It seems to me that that's an
18 evidentiary hearing.

19 MR. POWELL: I guess. I mean, --

20 MR. MUGAN: I agree.

21 MR. POWELL: I -- the thing is we can go into an
22 evidentiary hearing, I'm -- your question though is, you
23 know, basically are you -- do you need discovery? Do you
24 need any more evidence? There's nothing --

25 THE COURT: Well --

1 MR. POWELL: -- more we can offer other than what
2 we've -- what we already have.

3 THE COURT: Okay. Thank you.

4 MR. POWELL: Tax returns, and all that, yeah.

5 THE COURT: So then, Mr. Mugan, I understand that
6 the procedurally you have a motion you want to file, but as
7 to the status quo, you're -- let's just say we'll be
8 returning to the status quo. Your position is, at most,
9 the undisputed portions should be distributed and I don't
10 understand if it's the oil and gas companies that aren't
11 honoring it or if it's your client as the role of trustee.

12 MR. MUGAN: Yeah. And I apologize if I haven't
13 made myself clear.

14 Number one, I'm opposed to returning to the
15 alleged status quo.

16 THE COURT: Right.

17 MR. MUGAN: There was no request for that. There
18 was a request for a final determination. He can certainly
19 file and request a temporary order, injunction, whatever,
20 you know, but that was never prayed for and I think we're
21 going beyond the bounds of the pleadings, number one.

22 Number two, if the Court in its discretion thinks
23 there should be some type of order entered at this point in
24 time, the 65 percent should not go to his clients because
25 that's in dispute. The 65 percent should just be held or

1 tied up or put in trusts or whatever until there's a final
2 determination and my client, there's no dispute that she's
3 entitled to the 35 percent.

4 And my understanding is that the companies are the
5 ones, you know, who -- they're the ones who issue the
6 checks, etcetera. They're the ones that have to be
7 notified, not the trustee.

8 THE COURT: Okay. Well, here's my concern here is
9 that I have before me this petition and yes, it does -- I
10 viewed it as seeking an ultimate ruling. I don't think
11 we're at the point where we can make an ultimate ruling,
12 however, you know, the concern I have is that these Courts
13 in Texas are taking action based on just getting a letter
14 from an attorney that -- and there's -- I have this whole
15 question of whether the Texas Court is doing anything with
16 respect to this, but my point is that who would be ordered
17 to -- is it an order saying: Resume your distributions,
18 the trustee's ordered to impound the 65 percent and not
19 make any distributions of the 65 percent, she's entitled to
20 her 35 percent as the beneficiary?

21 Because the whole point is I understand your
22 concern is that if the granddaughters aren't entitled to
23 it, how do you claw it back, but if it's -- but their
24 concern is: Wait a minute, we don't want to go back to the
25 -- to her getting 100 percent because we think 65 percent

1 of that is ours and how do we claw it back?

2 MR. POWELL: How about a bond?

3 THE COURT: Pardon?

4 MR. POWELL: How about a bond? I mean, if the
5 assertion is essentially we can't give it to you because we
6 think you're going to go and take it and then we can't ever
7 get it back from you, how about a bond? I mean, that seems
8 to me to be --

9 THE COURT: Well -- and so that's, I guess, a
10 point is at some point in time is this something that can
11 be ruled on in this point in time or do we need to have a
12 separate motion on it? It seems to me that I can go
13 forward and say that it's undisputed that 35 percent of
14 this money should be going to Eleanor and she is that
15 beneficiary, but to the extent that the -- my concern is
16 just that there's oil and companies that are out there who
17 are responding to letters from attorneys. I've never seen
18 any company respond to a letter from an attorney.

19 MR. POWELL: Yes.

20 THE COURT: I'm shocked that they did, but
21 apparently oil and gas law in Texas is unique --

22 MR. POWELL: Yeah.

23 THE COURT: -- and they actually are responsive to
24 claims for their --

25 MR. MUGAN: Well, --

1 THE COURT: -- oil rights because they don't want
2 to end up paying them twice.

3 MR. POWELL: Right.

4 THE COURT: So if there's some direction to say:
5 Go ahead and make the distributions to the trustee and the
6 trustee is directed because I -- she is a Nevada resident
7 and we certainly have jurisdiction over her. The trustee,
8 in her capacity as trustee of this trust, is directed that
9 she can distribute the undisputed portion of the funds to
10 herself but the 65 percent needs to be held until further
11 order and then --

12 MR. POWELL: I --

13 THE COURT: -- we have to figure out how we're
14 going to go about getting to how we determine who's got the
15 --

16 MR. POWELL: And --

17 THE COURT: -- entitlement to that 65 percent?
18 What's --

19 MR. POWELL: -- I guess -- yeah.

20 THE COURT: -- the process?

21 MR. POWELL: You direct us because I think that's
22 where it's ultimately going to come down to is how we do
23 this. If you want me to come back and seek an injunction,
24 I -- what I was trying to do with this declaratory ruling
25 is skip all the steps, go right to the heart of the issue,

1 and set forth to you we've had 33 years of precedent --

2 THE COURT: I understand but --

3 MR. POWELL: That's only changed --

4 THE COURT: I don't know that we can do --

5 MR. POWELL: Yeah.

6 THE COURT: I appreciate the interest in the
7 judicial economy, --

8 MR. POWELL: Yeah.

9 THE COURT: -- however, I'm not sure we can get
10 there --

11 MR. POWELL: Okay.

12 THE COURT: -- in one big leap because I do think
13 that it requires steps --

14 MR. POWELL: Yeah.

15 THE COURT: -- and it's because I've got these
16 other parties involved here and --

17 MR. POWELL: Yeah.

18 THE COURT: -- I -- this Court -- if you're
19 saying: Will this Court today enter an order directing
20 these oil and gas companies in Texas to resume their
21 distributions, which I guess means it goes to the trustee
22 and the trustee has been ordered to do the 65/35? Yeah, I
23 have no problem in saying: Oil and gas companies in Texas,
24 go ahead, we've taken this under consideration. We will
25 deal with this at the trust level. It's not a problem for

1 you, oil and gas company. Pay your royalties the way
2 you're supposed to be, make those distributions. I'm going
3 to direct the trustee what to do because I control that
4 trustee.

5 MR. POWELL: Yeah. And I don't have a problem
6 with that. That's --

7 THE COURT: Okay.

8 MR. POWELL: -- totally fine.

9 THE COURT: And my ruling to that trustee is
10 you're entitled to 35 percent and nobody says you're not.

11 MR. POWELL: Yeah. The only thing I would ask
12 though just to keep fairness is for the last distributions
13 that have gone back, I think starting in June, it was less
14 than 65/35, is require the trustee -- again, if we're
15 keeping it all fair here is to go back, put that money back
16 in that same 65 percent category that's in dispute. She
17 can have 35 percent of June, July, August, September,
18 October. Take the 35, but that other 65, put that back in
19 the pot, too.

20 THE COURT: You know, I have no idea how much
21 money this is involved here --

22 MR. POWELL: It's a lot.

23 MR. MUGAN: That --

24 THE COURT: No, but my point is, --

25 MR. POWELL: Yeah.

1 THE COURT: -- I don't know how much -- at what
2 point did these oil and gas companies stop distributing any
3 money. All I'm saying is my only point of what I want to
4 do here is to tell these oil and gas companies stop
5 responding to letters from attorneys. An

6 MR. MUGAN: Your Honor, --

7 THE COURT: -- attorney can't tell an oil and gas
8 company what to do.

9 MR. POWELL: Sure.

10 THE COURT: Make your distributions. The trustee
11 is going to do the following.

12 MR. MUGAN: But, Your Honor, we've gotten several
13 of them straightened out. Basically -- my client, of
14 course, has Texas counsel, too, and we've gotten several of
15 them straightened out. Apache just happened, just
16 happened. I think the letter was dated November or October
17 29th or something and we're just getting it straightened out
18 with them.

19 Again, I think we're going way past what was asked
20 here and, you know, if you want to do it on a separate
21 motion, that's fine. In the interim, we may get the spigot
22 turned back on. You know, I mean, we just keep moving down
23 the road, you know, and kind of making predeterminations
24 that I just don't think are proper.

25 THE COURT: What's wrong with what I suggested

1 that we go to -- we tell these oil and gas companies that
2 you don't have to honor this letter from this attorney,
3 start making distributions to this trustee, the trustee is
4 directed she has to in her role as a beneficiary is
5 entitled to 35 percent. She's got to hold 65 percent.
6 What's wrong with that?

7 MR. MUGAN: There's nothing wrong with it except
8 that it does prejudice my client. It wasn't -- he never
9 asked for that in his petition. He had the right to ask
10 for that, for a temporary injunction, a restraining order,
11 etcetera. It was never requested. I mean, all of a sudden
12 we have to address it right now and I, you know, that's
13 fine. That's fine. But I just -- again, I think we're
14 going down the road in making some predeterminations that
15 were never requested, you know, and it's just, you know,
16 return to the status quo, well then go back three months,
17 go back --

18 THE COURT: I never said I was willing to go back
19 --

20 MR. MUGAN: I know, but that's where we're going.
21 We're just going --

22 THE COURT: I appreciate that. I never said I'm
23 willing to go back any period of time. All I'm saying is
24 that as of today's date when I have what's before me what
25 technically is an unopposed motion for declaratory relief

1 that my only -- the only thing I'm willing to do is to say
2 to these Texas oil and gas companies, whoever they may be,
3 you do not have to honor that letter from counsel. I am
4 telling you that 35 percent of this is the undisputed
5 property of this beneficiary, pay your distributions to the
6 trust, and I'm ordering the trustee to hold 65 percent of
7 it, to not make a distribution as to 65 percent of it.

8 MR. MUGAN: That's fine.

9 THE COURT: And then we -- we're going to set this
10 out for a hearing at some point in the future because I
11 think, as you've said, your opposition -- your first thing
12 is we have this opposition that it shouldn't even be --
13 that there's nothing to be heard because it's already been
14 ruled on. You've got your right to do the motion to
15 dismiss. Mr. Powell's got the right to oppose it and then
16 we wanted to get there much faster than this, but
17 procedurally I just think you can't. I think you have to
18 follow the procedural steps. So we have to follow the
19 procedural steps.

20 I think ultimately this petition for declaratory
21 relief may not be whether it requires a lot of discovery,
22 but I think that there's still going to have to be
23 documents produced and you need to come in for a hearing.
24 So we need to probably put it out 60 or 90 days and have a
25 hearing. And, in the interim, if you've got a motion to

1 file, you can file your motion and we can rule on that, but
2 I think it's got to be out at least 60 days for the hearing
3 on the declaratory relief and I think that there needs to
4 be testimony.

5 MR. POWELL: And would that be -- that would be a
6 final determination at that point? That won't just be --

7 THE COURT: That's the petition for --

8 MR. POWELL: Okay. That will be hearing the
9 petition on the merits?

10 THE COURT: On the merits.

11 MR. POWELL: Okay.

12 THE COURT: Right.

13 MR. MUGAN: Yeah. I -- 60 days, to me, is a
14 little short especially with the holiday season.

15 THE COURT: Okay.

16 MR. MUGAN: You know, I think we should be out at
17 least 90 days.

18 THE COURT: Okay.

19 MR. MUGAN: We are going to have to do some
20 discovery. You know, we have people down in Texas,
21 etcetera. So I would ask at least 90 days.

22 THE COURT: All right.

23 MR. POWELL: Just to clarify for the Court, too,
24 though, this was already -- this was filed in September.
25 So there's already been almost a month and a half here to

1 do a lot of fact gathering and fact finding.

2 THE COURT: Yeah, and that's --

3 MR. POWELL: So to just -- and, again, it -- and I
4 don't have a problem with what you're --

5 THE COURT: Well --

6 MR. POWELL: -- saying is --

7 THE COURT: -- I think Mr. Mugan was only recently
8 retained though because I think there was this whole
9 problem about --

10 MR. POWELL: No, he was retained --

11 THE COURT: October.

12 MR. POWELL: -- pretty quickly on. In fact, I
13 even gave him a continuance --

14 THE COURT: In October?

15 MR. POWELL: Yeah. And so, I -- you know, again,
16 we have the whole thing of who is really being choked off
17 here and, again, there's not a problem with what you were
18 suggesting which is go back to oil and gas say: 65/35,
19 keep it coming; 65 stays in trust until the determination,
20 35 goes out to Ms. Ahern. That's not a problem.

21 The only thing I would suggest though is, again,
22 my clients, who rely on this for their living expenses,
23 this is -- my client, just so you're aware, and this will
24 be raised further, my client quit her job on reliance --

25 THE COURT: Okay.

1 MR. POWELL: -- on this. So, it's a situation
2 where -- and, again, I just want to be forthcoming so -- to
3 which sets up my next question which is in the meantime, is
4 there -- is it problematic for me, and, again, I don't want
5 to do anything that upsets you, can I come in for
6 injunctive relief to have the 65 continue to flow with
7 something like a bond?

8 THE COURT: That would be -- yeah, that's a
9 different issue.

10 MR. POWELL: Okay.

11 THE COURT: That's a different issue and --

12 MR. POWELL: Because that's -- I'll tell you right
13 now, I'm going to come back in as soon as possible then on
14 that --

15 THE COURT: Okay.

16 MR. POWELL: -- just -- yeah.

17 THE COURT: That's what I'm saying is I'm not
18 going to rule on anything other than --

19 MR. POWELL: Sure.

20 THE COURT: -- I just want the oil --

21 MR. POWELL: Understood.

22 THE COURT: -- and gas companies to start sending
23 the money to the trust --

24 MR. POWELL: Understood.

25 THE COURT: -- and the trust can deal with it in

1 accordance --

2 MR. POWELL: Understood. Yeah. Understood.

3 THE COURT: It can be held and I have --

4 MR. POWELL: Yeah.

5 THE COURT: -- no reason that it wouldn't be.

6 MR. POWELL: Okay.

7 THE COURT: So that's my only -- the only thing
8 I'm prepared to do today is --

9 MR. POWELL: Okay.

10 THE COURT: -- I'm denying the request to remand
11 this back to the Commissioner. I --

12 MR. POWELL: Okay.

13 THE COURT: -- think it's ultimately going to have
14 to be heard here anyway.

15 MR. POWELL: Okay.

16 THE COURT: Step number two, set this out. Let's
17 go 90 days.

18 MR. POWELL: Okay.

19 THE COURT: And that gives everybody time to file
20 these interim motions that they wish to feel.

21 MR. POWELL: Okay.

22 THE COURT: Mr. Mugan's going to want to file his
23 motion to dismiss this thing in its entirety.

24 MR. POWELL: Sure.

25 THE COURT: Your clients may wish to seek some

1 distributions.

2 MR. POWELL: Yes.

3 THE COURT: I just -- my only point right now is
4 just if these oil and gas companies are holding onto this
5 money for no reason other than an attorney sent them a
6 demand letter which I just find --

7 MR. POWELL: I don't think it was a demand letter.

8 THE COURT: -- mind boggling.

9 MR. POWELL: I think it was just -- I don't think
10 it was a demand letter, I think it was just a notification
11 letter of just so you are aware, this is what's pending.

12 THE COURT: Okay.

13 MR. POWELL: And from what I understand, that's
14 the way it's done there. I don't think there's --

15 THE COURT: Like I said, --

16 MR. POWELL: I don't --

17 THE COURT: -- maybe. I don't think any of us
18 presumes to represent --

19 MR. POWELL: Yeah. Out here, I know it's a shock
20 --

21 THE COURT: -- to know anything about --

22 MR. POWELL: -- that you can send a letter to
23 anybody and they'll do anything. So --

24 MR. MUGAN: I can read the letter to you and it's
25 a demand letter.

1 MR. POWELL: Okay.

2 THE COURT: Yeah. Okay. So here's my point. At
3 this juncture, this is the procedure and I don't know what
4 it would take in an order that would satisfy these oil and
5 gas companies that they can begin distributions. It may be
6 all it needs to say is the Court is assuming jurisdiction
7 for this petition for declaratory relief. It appears
8 undisputed that the 35 percent -- so that the Court makes a
9 finding that as to the 35 percent, Ms. Ahern's entitled to
10 that. The 65 percent should be held by the trust.

11 Hopefully that will satisfy the oil and gas
12 companies that they're off the hook and that it's going to
13 be litigation involving the trust and it doesn't involve
14 the oil and gas companies.

15 MR. MUGAN: Maybe the best thing would be for Mr.
16 Powell and I, you know, to contact our respective co-Texas
17 counsel and they can -- they know more about oil and gas
18 companies than I think both of us would ever know and make
19 sure that that's the way to do it and that the oil
20 companies will do what they're told that way and then we'll
21 just prepare an order for you.

22 THE COURT: Right because --

23 MR. POWELL: Yeah.

24 THE COURT: -- if Mr. Powell wants to see his
25 clients get some money in the interim, there's no point in

1 asking for that if the oil and gas companies aren't sending
2 it.

3 MR. POWELL: Right.

4 THE COURT: So we need the oil and gas companies
5 to send the money.

6 MR. POWELL: Yeah. And that makes --

7 THE COURT: So --

8 MR. POWELL: -- logical sense. We'll figure out
9 what they need to do that but then we're, just for the
10 record, we're preserving that we will have you sign an
11 order to that effect basically saying you're hereby
12 demanded to continue the 65 -- well, pay 100 percent of the
13 proceeds, 65 must be held by the trustee and --

14 THE COURT: Correct.

15 MR. POWELL: -- 35 to Ms. Ahern.

16 THE COURT: Correct.

17 MR. POWELL: So, yeah.

18 THE COURT: But the -- it's strictly an issue as -
19 -

20 MR. POWELL: Sure.

21 THE COURT: -- as under the trust, shouldn't --
22 that these third parties don't need to be involved in it
23 any further. It's litigation with the trust. This Court's
24 got the jurisdiction. This Court will make that finding
25 and, you know, proceed accordingly.

1 MR. MUGAN: And --

2 THE COURT: And that's -- if we put it out 90
3 days, you can file your respective motions and we can maybe
4 get all this stuff resolved in the interim, but at the
5 earliest the declaratory relief would be heard would be,
6 you know, 90 days in the future which would be -- and we
7 might need to --

8 MR. MUGAN: Maybe a status check, I don't know.

9 THE COURT: I was going to say we might need to
10 put it actually on a stack to actually give you like a date
11 for an evidentiary hearing, but -- so it would probably be
12 better to let you know what our stack looks like in
13 February. Would it be February?

14 THE CLERK: Yeah, February 17th. We have one med-
15 mal that starts on the 10th.

16 THE COURT: Okay.

17 THE CLERK: That was before we changed our --

18 THE COURT: Okay. So February 17th is --

19 THE CLERK: We have a preferential --

20 THE COURT: -- probate.

21 THE CLERK: -- [indiscernible].

22 THE COURT: Okay. So it will be a status check to
23 give you a hearing date for your --

24 MR. POWELL: On the 17th will be a status check?

25 THE COURT: Correct, for your actual --

1 MR. POWELL: Okay.

2 THE COURT: It's not going to be the actual
3 evidentiary hearing, but we'll hopefully have enough
4 information that we can give you a date that day.

5 MR. POWELL: Okay.

6 MR. MUGAN: I just --

7 THE CLERK: The 17th in our department is on
8 calendar call --

9 THE COURT: What's calendar call?

10 THE CLERK: The 24th of January. That's the trial
11 stack [indiscernible].

12 MR. MUGAN: I --

13 THE COURT: Okay. So -- okay. I guess it might
14 be -- yeah, we might be better off then seeing you at the
15 calendar calls for that stack which is Friday, the 24th, and
16 we'll be able to tell you if there's any time on that stack
17 that we can go because we do have one med-mal and one --

18 MR. MUGAN: That's February 24th, Your Honor?

19 THE COURT: No, January 24th.

20 MR. POWELL: January.

21 THE COURT: And it's the calendar calls that
22 correspond to that stack that starts February --

23 THE CLERK: 17th through March 14th.

24 THE COURT: Yeah.

25 MR. MUGAN: And by way of full disclosure, Your

1 Honor, and I don't know if it will affect the thinking at
2 all, and we can deal with it later if we have to, if in
3 fact this ends up going to an evidentiary hearing and our
4 motion to dismiss is not successful, there are going to be
5 some counterclaims made by my client in this matter --

6 THE COURT: Okay.

7 MR. MUGAN: -- that are --

8 THE COURT: And I think --

9 MR. MUGAN: -- going to involve some things.

10 THE COURT: -- at that point in time, on the 24th
11 if it's not going to be ready to go, if we ruled on all
12 those other motions in the interim, then it may or may not
13 be ready to go. It's a calendar call just to see if we can
14 get you on that stack, but I -- because until we actually
15 see what the pleadings are, you know, who knows. I just
16 want to make sure that we've got this calendar and the
17 declaratory relief petition is calendared. If it has to be
18 continued, it has to be continued, but we've got a date for
19 it which will be on that stack, that February 17th and I
20 think the first day of that stack might be a holiday. So,
21 you know, just keeping in mind that --

22 MR. POWELL: Okay.

23 THE COURT: -- if the first day of the stack is a
24 holiday, then it won't go -- obviously it won't go -- just
25 like yesterday was a holiday for us, the -- you know,

1 that's just the first day. It doesn't necessarily mean it
2 can go on that day because of the holiday and whatever else
3 we can figure out with respect to anybody who has a
4 preference on it.

5 MR. POWELL: Okay. What time is your calendar on
6 the 24th?

7 THE COURT: On January 24th?

8 MR. POWELL: Yeah.

9 THE CLERK: The calendar calls are --

10 THE COURT: 9 a.m.?

11 THE CLERK: No. They're late. I'll have to get
12 that to him.

13 MR. MUGAN: Aren't they at 11?

14 THE COURT: That's right.

15 THE CLERK: 11 is [indiscernible].

16 THE COURT: Yeah. They're 11 because we have them
17 after regular motions.

18 MR. POWELL: 11.

19 MR. MUGAN: Yeah, I was thinking it was 11 but I
20 might be wrong.

21 THE CLERK: It's 11.

22 THE COURT: Okay. Sorry about that. 11 a.m.

23 MR. POWELL: 11 a.m.

24 And, Judge, just lastly, I know you want to move
25 on with your day, but just for the record again, we have in

1 -- our declaratory judgment petition asked for the fees,
2 costs, and damages. So we just wanted to preserve that
3 that we have requested it --

4 THE COURT: Right.

5 MR. POWELL: -- and everything related. So, --

6 THE COURT: Yeah, exactly. That's why I said I'm
7 not making any rulings on any other request for relief.

8 MR. POWELL: Sure.

9 THE COURT: The petition itself is set to be heard
10 on that --

11 MR. POWELL: Yeah.

12 THE COURT: -- date. This is just a preliminary
13 ruling --

14 MR. POWELL: Yeah.

15 THE COURT: -- and the only reason is I'm just
16 concerned about, you know, these -- a foreign state that
17 they're somehow holding up -- I mean, the whole thing's
18 moot if they're not going to distribute any money.

19 MR. POWELL: Right. And just, again, foreshadow,
20 we will be coming back in shortly --

21 THE COURT: Sure.

22 MR. POWELL: -- on a petition, too.

23 THE COURT: I'll expect to see that and I'll
24 expect to see the motion to dismiss in its entirety.

25 MR. POWELL: Yep. Exactly.

1 THE COURT: Okay. Without prejudice, I'm not
2 making any findings or any rulings --

3 MR. POWELL: Right.

4 THE COURT: -- on anything. It's all going to be
5 argued unfortunately [indiscernible] the interest and let's
6 get right to the point, but I don't see any way to do it
7 other than a set time.

8 MR. POWELL: Okay.

9 THE COURT: Okay. So --

10 MR. MUGAN: Thank you, Your Honor.

11 THE COURT: -- all right.

12 MR. POWELL: Thank you, Your Honor.

13 THE COURT: Thanks.

14 MR. POWELL: Appreciate the time.

15

16 PROCEEDING CONCLUDED AT 11:04 A.M.

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CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.

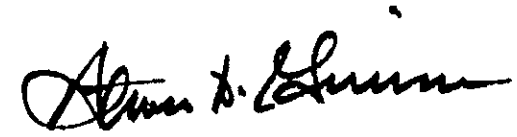


KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER

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EXHIBIT B
February 12, 2014 Pretrial Hearing Transcript

RTRAN


CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

MATTER OF THE TRUST OF W.N.
CONNELL AND MARJORIE T. CONNELL
LIVING TRUST DATED 5/18/71

CASE NO. P-066425

DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

WEDNESDAY, FEBRUARY 12, 2014

**RECORDER'S TRANSCRIPT
PRETRIAL CONFERENCE**

APPEARANCES:

For the Plaintiff:	JOHN. R. MUGAN, ESQ. MICHAEL D. LUM, ESQ. Jeffrey Burr
For the Defendant:	JOSEPH POWELL, ESQ. The Rushforth Firm PLLC

RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 WEDNESDAY, FEBRUARY 12, 2014, 10:57 A.M.

2 THE COURT: P09-066425 for a pretrial conference.

3 MR. POWELL: Ready to go?

4 THE COURT: Okay.

5 MR. POWELL: Joey Powell appearing on behalf of
6 Jacqueline Montoya, the Petitioner.

7 THE COURT: Okay.

8 MR. MUGAN: Good morning, Your Honor, John Mugan, 10690
9 appearing for trustee Marjorie, excuse me, I'm sorry. Eleanor
10 Ahern.

11 THE COURT: All right.

12 MR. LUM: Good morning, Your Honor, Michael Lum, bar
13 number 12997, on behalf of Eleanor Ahern.

14 THE COURT: Okay. All right. So we're scheduled for a
15 bench trial on February 18th, that's Tuesday. Monday is a
16 holiday. So the 18th and that would be -- it's 9:00 a.m.?
17 9:00 a.m. So we can start at 9:00 a.m. Is that agreeable?
18 Do you want to start at 10:00? Whatever is good for you guys.

19 MR. MUGAN: Whatever the Court's pleasure.

20 MR. POWELL: Yeah, whatever works.

21 THE COURT: All right. And then on Wednesday, we would
22 have a half a day because we've got hearings in the morning.
23 So 1:30. Do you think you'll need Thursday which again would
24 be a full day, 9:00 a.m.?

25 MR. POWELL: I personally don't think so. But opposing

1 counsel --

2 MR. MUGAN: I hope not. Our goal is not to but it just
3 kind of depends how it goes.

4 THE COURT: All right. And you know, it's really the
5 same story, if you know you need only half that day and you
6 want to come in at 1:30 again, you know, whatever works for
7 you guys. But we do have a full day for the first day.
8 Whether you want to start at 9:00 or 10:00, whatever works for
9 you. We can -- we'll have a full day that day to get most of
10 it done. So prefer to start at 9:00, just to get in and get
11 started on it earlier or --

12 MR. POWELL: That's fine.

13 THE COURT: Or depends whether you want time to go to
14 your office first or whatever?

15 MR. POWELL: Yeah, that's fine. The only issue I was
16 going to raise is our --

17 THE COURT: Is anybody coming from out of town?

18 MR. MUGAN: Yes.

19 MR. POWELL: Not -- on our side, we only have one
20 witness.

21 MR. MUGAN: We have several witnesses from out of town.

22 THE COURT: So I guess that's something we have to deal
23 with, the question is is there anything we need to do about
24 getting people out of town that may affect them?

25 MR. MUGAN: I think Michael's talked to Mr. Powell about

1 we may have to call someone out of order.

2 THE COURT: Okay.

3 MR. MUGAN: And I think Mr. Powell has been gracious
4 enough to say that's fine.

5 MR. POWELL: Yeah, that's certainly fine. The lone
6 witness that we have is scheduled for an MRI in the morning.

7 THE COURT: Okay.

8 MR. POWELL: He's informed me he's been told it could be
9 anywhere -- it's supposed to start at 8:00. But as we know,
10 doctors' appointments, good luck with actually getting seen on
11 time. So he said the MRI is supposed to last anywhere from an
12 hour and a half to two hours. So we may have the same
13 situation as well where we may have to potentially call him
14 out of order.

15 THE COURT: Sure.

16 MR. POWELL: So again on the start time, I'm flexible.
17 So whatever -- technically again if his MRI does start at
18 8:00, then he'd be done by 9:30 or 10:00 and we start at
19 10:00, I wouldn't expect --

20 THE COURT: You may have -- you're probably going to want
21 to make some sort of opening.

22 MR. POWELL: Yeah, that's what I was going to clarify.
23 What I was anticipating is I would make our opening argument,
24 they would -- and then present basically our information. Let
25 them and I don't know, do we want to switch back and forth

1 then or? What's the preference? How do you prefer that we --

2 THE COURT: Well you know, typically we run it like you
3 run any other kind of a trial where the Plaintiff puts on
4 their case.

5 MR. POWELL: Okay.

6 THE COURT: After they rest, the Defendant can do a
7 motion, then we proceed, whichever -- they moot the rule.
8 It's 50(a) or (c) or one of those. You can make your motions.
9 Then if there's a Defense case, we can hear the Defense
10 evidence. They rest and you know if there's rebuttal, we hear
11 the rebuttal.

12 MR. POWELL: Okay.

13 THE COURT: But because it's a bench trial and you know
14 we accommodate the scheduling issues much better than in a
15 jury --

16 MR. POWELL: Right, in a jury.

17 THE COURT: -- you know, when you've got a jury. So --

18 MR. POWELL: Yeah.

19 THE COURT: I can keep track if we're switching back and
20 forth.

21 MR. POWELL: Okay.

22 THE COURT: So you know, whatever you need to do to --

23 MR. POWELL: Then I guess well having that said, just so
24 there's at least a seamless flow of being able to present the
25 Petitioner's full case with the testimony, I'm getting and if

1 it's agreeable to counsel, maybe 10:00 is probably a better
2 start time.

3 THE COURT: 10:00 be better? Okay.

4 MR. POWELL: Just so we have a better chance --

5 MR. MUGAN: Whatever works for Mr. Powell is fine with
6 us.

7 THE COURT: Okay. We'll start at 10:00 a.m.

8 MR. POWELL: Okay.

9 THE COURT: And take an hour and a half break for lunch.

10 MR. POWELL: Okay.

11 THE COURT: So if you want to start your -- then what is
12 coming up in the afternoon. But if you need to, you know, if
13 there's going to be a problem with scheduling, you know, we
14 can just adjust our time so that it's -- we can allow that
15 much time just when it works for you guys. It doesn't have to
16 --

17 MR. POWELL: Sure.

18 THE COURT: I have to allow them their breaks.

19 MR. POWELL: Sure.

20 THE COURT: But as we can make them whenever necessary.

21 MR. MUGAN: Well we don't want a wage and hour claim
22 here.

23 THE COURT: No exactly.

24 MR. POWELL: Yeah.

25 MR. MUGAN: I don't know if this time to bring it up.

1 Our client has some health issues. She's an elderly woman.
2 She has irritable bowel syndrome.

3 THE COURT: Uh-huh.

4 MR. MUGAN: And so she may have to suddenly get up and
5 move. She also has a dog aide, although the dog has been to
6 our office a number of times and you don't even know he's
7 there.

8 THE COURT: Okay. So Mr. Lee, in order to bring a dog -
9 does she have -- does the dog have like a vest or something
10 that it wears?

11 MR. MUGAN: It's got a little blue vest.

12 THE COURT: Marks it as a service dog.

13 MR. LUM: Service dog.

14 MR. MUGAN: It's a service dog. That's the term I was
15 looking for.

16 THE COURT: Will through the gate downstairs, will they
17 -- because I can send a note to the person in administration
18 who handles Americans with Disabilities Act accommodations and
19 tell her that we're going to have a party in a case who's
20 bringing in a service dog on Tuesday and they need to notify
21 the front gate to make sure she's --

22 MR. MUGAN: Yeah, it's a German Shepherd I know that.

23 THE MARSHAL: Yes, Judge, the dog -- the marshal, they
24 get those types of dogs all the time.

25 THE COURT: Okay. I'll just make sure that we --

1 THE MARSHAL: There's no real problem.

2 THE COURT: -- confirm it.

3 MR. MUGAN: All right. Thank you.

4 THE COURT: Thanks. We'll send a note to the
5 administrator that we're going to have a service dog coming in
6 with a party.

7 THE MARSHAL: Just long as they had this pick a --

8 THE COURT: Right, he said that the dog wears a vest.

9 THE MARSHAL: Right.

10 THE COURT: It says service dog.

11 THE MARSHAL: Okay.

12 MR. MUGAN: I don't know. The other thing she is almost
13 completely deaf in one ear. It's her left ear.

14 THE COURT: We do have these. I don't --

15 MR. MUGAN: Okay.

16 THE COURT: Now --

17 MR. MUGAN: Yeah, I just, you know, want to make sure
18 those were available if she needs them.

19 THE COURT: Right.

20 MR. MUGAN: Thank you.

21 THE COURT: I don't need -- they used to have the big
22 ones but you know these are supposedly better ones.

23 THE CLERK: These are the replacements, Judge.

24 THE COURT: Yeah, so these are --

25 THE CLERK: Smaller ones.

1 THE COURT: Yeah, they're a little bit easier to use than
2 the big headphones before you used to have put on. So we can
3 provide that and they're always here. So we've got those.

4 MR. MUGAN: Okay, thank you.

5 THE COURT: We also always have our ELMO and our TV are
6 permanently in the courtroom. I don't know what else you
7 might need. I mean you can plug in your computers through the
8 attachments there.

9 MR. MUGAN: I'm sorry, Michael keeps giving me her
10 medical history here. She also has diabetes.

11 THE COURT: Sure. And she may need to take a break.

12 MR. MUGAN: And she has told us that doctor's orders, she
13 is supposed to eat every hour and a half or two hours.

14 THE COURT: Uh-huh.

15 MR. MUGAN: You know and --

16 THE COURT: Sure.

17 MR. MUGAN: -- so I just want counsel and the Court to be
18 aware of that.

19 THE COURT: And we can -- if she needs to step out in our
20 little --

21 MR. POWELL: Absolutely, yeah.

22 THE COURT: -- out to our anteroom there, she can --

23 MR. POWELL: Absolutely, whatever accommodation she's
24 going to need to keep comfortable is certainly fine. No
25 problem there at all.

1 MR. MUGAN: Thank you.

2 THE COURT: Okay.

3 MR. POWELL: The only thing I was just going to suggest
4 is I don't know how you typically prefer, but in terms of
5 questioning her, I'm just thinking maybe it's better to maybe
6 get closer to her so she can maybe read lips easier or
7 something like that. I don't know if that's any type of a
8 problem.

9 THE COURT: Yeah.

10 MR. MUGAN: I don't believe she reads lips.

11 MR. POWELL: Okay.

12 MR. MUGAN: Is our understanding.

13 THE COURT: It's a relatively small footprint in the
14 courtroom so unfortunately the podium is -- that podium with
15 the mic is permanently fixed.

16 MR. POWELL: Okay.

17 THE COURT: But the little stand if you need to move a
18 little closer to her, she can't hear, it's -- the courtroom's
19 mic'd, you know, see all the mics along the jury box.

20 MR. POWELL: Yeah.

21 THE COURT: Picks up pretty well and people with the
22 assisted device.

23 MR. POWELL: So that should feed to her pretty well then.

24 THE COURT: But yeah -- so but if you have to move closer
25 to her in order to be heard, you can stand at the little, more

1 the music stand looking one. That unfortunately the big one,
2 it's permanently -- it's where it is.

3 MR. POWELL: Okay.

4 THE COURT: It's not moveable. Okay. So we can
5 accommodate that as we see how things are going.

6 MR. POWELL: Okay.

7 THE COURT: Okay. Anything else we should know about we
8 need to accommodate Ms. Ahern.

9 MR. MUGAN: No, Your Honor.

10 THE COURT: Okay. All right. Well we'll make sure that
11 they know about a dog. And we'll take breaks as needed.
12 We've got the headphones for her. All right.

13 So then we start at 10:00. So Mr. Powell's witness
14 hopefully will be here when you're ready for him.

15 MR. POWELL: Okay.

16 THE COURT: Okay So we'll start at 10:00?

17 MR. POWELL: Yeah, the other thing, too, just to based on
18 the outline sheet just to make you aware of is we do -- we are
19 intending to prepare basically a printed PowerPoint
20 presentation. So just basically on a handout, not necessarily
21 needing to use the television monitor.

22 THE COURT: Right. And they do -- we make them Court's
23 exhibits so there's a record because there was a decision that
24 came down in November on the use of PowerPoints in criminal
25 cases.

1 MR. POWELL: Okay.

2 THE COURT: It's a case called State of Nevada versus
3 Watters, W-A-T-T-E-R-S.

4 MR. POWELL: Okay.

5 THE COURT: In which they said it wasn't appropriate to
6 take somebody's booking shot and write the word guilty over
7 it. But generally the PowerPoints are otherwise perfectly
8 usable.

9 MR. POWELL: Okay.

10 THE COURT: They kind of though basically made it clear
11 that you need to make sure that there's -- that they have a
12 copy of it so they can see it in the record.

13 MR. MUGAN: Yeah, we haven't seen any PowerPoint
14 presentation. I mean I think they're considered exhibits and
15 so I mean needless to say we want to see that ahead of time.

16 MR. POWELL: Well and I can -- I haven't yet finalized
17 preparing it. There shouldn't be anything in there that's not
18 otherwise already addressed. Mainly just more of an outline.

19 THE COURT: Okay.

20 MR. POWELL: But I'll certainly --

21 THE COURT: Would you have it done by the close of
22 business Friday, do you think, or are you going to be working
23 over the weekend?

24 MR. POWELL: Yes, for sure. Absolutely for sure.

25 THE COURT: Okay. Well if you can make sure they've got

1 it by the close of business on Friday.

2 MR. POWELL: Sure and if they have problems with it based
3 on that, that's certainly fine.

4 THE COURT: Then there's a chance for us to address it
5 Monday.

6 MR. POWELL: Yeah. And the question I was going to --

7 THE COURT: Tuesday, rather. Tuesday.

8 MR. POWELL: Tuesday yeah. The question I meant to ask
9 you as well is in terms of the exhibits, we're prepared
10 obviously our binders. Opposing counsel had I think if I'm
11 not mistaken I've already stipulated to all of their exhibits.
12 Do we want to go through our exhibits, Petitioner's exhibits
13 now or do we want to reserve that for when we actually start
14 on Tuesday and we're actually offering them?

15 THE COURT: Yeah, I don't actually make any rulings on
16 exhibits. Just exchange them.

17 MR. POWELL: Okay.

18 THE COURT: And if there are any that are stipulated to,
19 the clerk, it's just so the clerk can premark them.

20 MR. POWELL: Okay.

21 THE COURT: So we're ready so we can start on Tuesday
22 with everything marked or labeled as part of a labeling block.
23 And we can move through them.

24 MR. MUGAN: If I may, I believe we've mutually stipulated
25 to a lot of the exhibits. There's one or two that I think Mr.

1 Powell wants to see in their entirety. I think we got an
2 email about just as we were walking out the door with about
3 two more exhibits.

4 MR. POWELL: Two more each.

5 THE COURT: We really haven't looked at them.

6 MR. POWELL: Sure.

7 MR. MUGAN: We have a little more work to do on those.

8 MR. POWELL: Sure.

9 THE COURT: But we can -- do you -- other than having
10 whether you agree or disagree on them, are they otherwise, do
11 you have all of them? It's not a question of your finding
12 more exhibits?

13 MR. POWELL: Correct, we are -- we're done as of the last
14 two, I emailed this morning. One of which was already
15 actually an objection that they had filed. So they have
16 obviously seen that.

17 THE COURT: All right.

18 MR. MUGAN: We have one additional email, I mean
19 potential exhibit that we received as we're driving here and
20 we can print that out and get it to Mr. Powell immediately.
21 That I think is the only additional one that we may have. And
22 I apologize for that. That's our fault. We thought we had
23 them all yesterday.

24 THE COURT: Okay.

25 MR. POWELL: Just to let you know as well and I didn't

1 inform opposing counsel of this yet, but I think if I'm not
2 mistaken we have agreed in terms of joint exhibits. I think
3 we have three. What we've actually done is print out those
4 three. So I don't know if you guys did as well. So we may
5 have --

6 MR. MUGAN: Yeah.

7 MR. POWELL: -- multiple sets. So --

8 THE COURT: You know, wherever possible it's good that
9 we're getting like you agree on which ones you're going to
10 actually use. Because that way whatever formally is admitted
11 --

12 MR. POWELL: Yeah.

13 THE COURT: -- that has to go in the vault --

14 MR. POWELL: Uh-huh.

15 THE COURT: -- you know we're not admitting the
16 Defendant's version or the Plaintiff's version.

17 MR. POWELL: Right.

18 THE COURT: Or Petitioner's version and Respondent's
19 version of the exact same 2000 pages.

20 MR. POWELL: Yeah.

21 THE COURT: So instead we're putting thousands and
22 thousands of pages in the vault any longer.

23 MR. POWELL: And we'd use their Bates stamps just so
24 there's clarification on that. And that what we also did as
25 well, just mainly so it's -- there's a flow is actually marked

1 our exhibits, Petitioner's exhibits differently but then
2 filled in again using the same Bates stamps and then just
3 putting in blank pages to where those are joint. So hopefully
4 that'd be easy to then flip to whatever the joint book that we
5 admit.

6 THE COURT: Okay. All right. So you've actually got
7 your exhibits and you can turn them over to the clerk and she
8 can mark them?

9 MR. MUGAN: Yeah, but I think we've got duplicative.

10 MR. POWELL: Yeah, so whoever --

11 MR. MUGAN: The ones we've agreed on.

12 MR. POWELL: -- yeah, I mean we've got ours and it
13 doesn't matter. They're the same three documents I believe
14 so.

15 THE COURT: Okay. All right. And then you're going to
16 give me proposed findings of fact, conclusions of law and
17 trial briefs?

18 MR. MUGAN: Our trial brief was filed yesterday, Your
19 Honor.

20 MR. POWELL: We filed ours just this morning.

21 THE COURT: Okay.

22 MR. POWELL: It's in the queue right now. I have a
23 confirmation printout that it's in the queue. And I brought
24 the disk as well with the 14 point type.

25 MR. MUGAN: Yeah we have that.

1 MR. POWELL: And also I have printouts as well in both 12
2 and 14 type. Don't know what's preferred.

3 THE COURT: Okay. So any questions you guys have for us?

4 MR. MUGAN: I would just note to the Court on our
5 proposed findings of fact and conclusions of law and we have a
6 number of theories on Defense and so we just threw them all in
7 there. So I presume that's why you want the disk is pick and
8 choose or ignore.

9 THE COURT: Right.

10 MR. MUGAN: We first started to break them out separately
11 and then we thought well, we'll just put them all in one
12 kettle and I hope that's acceptable to the Court.

13 MR. POWELL: What -- you did trigger something for me,
14 Your Honor. In taking a quick look at their brief, they have
15 asked for what I would call I guess additional relief that
16 really hasn't been briefed before.

17 THE COURT: Uh-huh.

18 MR. POWELL: In the aspect of they've asked for the
19 enforcement of no contest clause --

20 THE COURT: Uh-huh.

21 MR. POWELL: -- in the event that the Petitioner is
22 unsuccessful, they've also asked for as well as a finding that
23 there's been tortious interference with contract, if I'm not
24 mistaken, as well. Those are issues that haven't been briefed
25 prior. These are essentially new allegations and new

1 assertions in which they're seeking a judgment on and in my
2 understanding would be this -- that would be way beyond the
3 scope of what this trial is to cover which is Petitioner's
4 initial petition seeking a declaratory judgment on the rights.
5 So --

6 THE COURT: Well, you know, like I said, you know, you
7 can make an appropriate motion at the close of their case or
8 whatever. I think it's 58 or whatever.

9 MR. POWELL: Okay.

10 THE COURT: That you know something's outside the scope
11 of what they originally plead.

12 MR. POWELL: Okay.

13 THE COURT: You've already done your trial brief. If you
14 wish to submit anything further on it, you can certainly
15 supplement that if you wish as well.

16 MR. POWELL: Okay. I'm just curious I guess more than
17 anything just to limit the scope of what we're actually, the
18 determinations of what we're -- what we're seeing here.
19 Because again it's Petitioner's as far as I'm understanding
20 it, it's Petitioner's petition --

21 THE COURT: Uh-huh.

22 MR. POWELL: -- that's the sole case here that's for
23 determination.

24 THE COURT: Okay. So and your view is that they had made
25 I guess a counter --

1 MR. POWELL: It almost seems like it's a counter within
2 their brief of asking for enforcement of no contest clause and
3 again finding of tortious interference with contract. But
4 those issues have never been briefed in standalone petitions.

5 THE COURT: Okay. Mr. Mugan.

6 MR. MUGAN: Yeah, you just -- I mean you'll get into the
7 issue of whether you have mandatory counterclaims or
8 permissive counterclaims and of course we've been through
9 claim preclusion and issue preclusion and so you know we want
10 to protect ourselves in that respect.

11 THE COURT: Okay.

12 MR. MUGAN: You of course can make the appropriate
13 rulings at the appropriate time.

14 THE COURT: Okay. So well if you want to raise that in
15 supplemental briefing, Mr. Powell, then just get it on file.
16 If you feel that they've gone beyond the scope of what we're
17 actually supposed to be hearing is -- we've got the petition
18 just to the jurisdiction. The petition for declaratory
19 judgment regarding limited interest of trust assets?

20 MR. POWELL: Yes, Your Honor.

21 THE COURT: Because you were here on.

22 MR. POWELL: Yes.

23 THE COURT: Okay. And they have a -- they've got a
24 bunchy of motions. I'm trying to see if there's -- is there a
25 response to that petition, Mr. Mugan, other than just in the -

1 -

2 MR. MUGAN: There should be an answer and affirmative
3 defenses and some counterclaims. I think it was filed
4 relatively recently.

5 THE COURT: Okay, here's a response. We've got some --

6 MR. POWELL: I received the answer yesterday. So is that
7 different from your trial brief? Is there two different --

8 THE COURT: Yeah, here's the answer.

9 MR. MUGAN: Yeah.

10 MR. POWELL: Oh, okay.

11 MR. MUGAN: Yeah.

12 MR. POWELL: That's my confusion then.

13 THE COURT: Okay. So yeah, so that's the answer filed
14 yesterday at 2:10 of the trustee.

15 MR. POWELL: I've only seen the answer then. I haven't
16 seen their brief yet.

17 THE COURT: Okay

18 MR. POWELL: So I thought they were maybe talking about
19 the one in the same document. Okay.

20 MR. MUGAN: No.

21 THE COURT: All right. Yes, and so that's all that shows
22 up. If there are -- I don't see -- I just see an answer --

23 MR. POWELL: yeah.

24 THE COURT: Something about deposition transcript or
25 taking depositions. So motion practice. Okay, yeah so I

1 don't see a different brief. I just -- it may be in the cue.
2 It just hasn't popped up yet. But I do see the answer.

3 MR. POWELL: Yeah. And that's the only thing we
4 received. So I'm guessing theirs is in the cue, ours is -- we
5 just filed ours this morning. So it's in the cue.

6 THE COURT: Okay.

7 MR. MUGAN: And we filed ours yesterday afternoon.

8 MR. POWELL: Okay.

9 THE COURT: Yeah. So I'm sure they're just showing up.
10 It's, you know, this is the Family Court module, it's not our
11 module. So I don't know how fast they -- things move. How
12 fast they populate once they get things approved at that
13 clerk's office. I don't know -- that's -- I don't see
14 anything else. You want to send them down with runners or
15 something then that's fine. But you know because right now I
16 can see it's not showing up as scanned. It'll be here I'm
17 sure eventually.

18 MR. MUGAN: You won't be here Monday will you?

19 THE COURT: We will not be here on Monday.

20 MR. MUGAN: Okay.

21 THE COURT: I keep saying Monday, but we aren't.

22 MR. MUGAN: Well I meant for delivery of something.

23 THE COURT: No. It's not -- the courthouse is closed.
24 So anything else? Are we ready to go 10:00 a.m. on -- because
25 we need it Tuesday and Thursday, 1:30 on Wednesday just for

1 scheduling purposes. Do you want to schedule it, that's like
2 general on the schedule? Take like I said about an hour and a
3 half break in your day?

4 MR. POWELL: Okay.

5 THE COURT: And wrap up between 4:30 and 4:45 so we don't
6 go overtime.

7 MR. POWELL: Okay.

8 THE CLERK: They also have a pretrial memo --

9 THE COURT: Yeah, and that's I guess a good question. I
10 mean if you filed any kind of pretrial memos or briefs or
11 anything like that, because you're -- it's a little debate
12 about whether the typical rules exceed when all those things
13 apply in probate as they do in regular civil litigation.

14 MR. POWELL: Right.

15 THE COURT: Sure that, you know, you file your pretrial
16 memos and list all your witnesses and everything and do we --
17 exactly what have you -- what did you file? Are they more
18 just like trial briefs?

19 MR. POWELL: Yeah, we filed essentially a trial brief
20 listing -- including our one witness. Because of the fact
21 that it's in well at least our claim is not really per se like
22 a tort where there's elements and all this. Didn't really
23 break it down. It's like a civil styled kind of a pleading.
24 Just because I think it's hard -- it's basically again just
25 seeking a declaratory judgment.

1 THE COURT: Uh-huh.

2 MR. POWELL: It's not really elements per se. It's just
3 a determination of rights under a trust. So it kind of fits
4 more of that probate style. So that's what we tried to do and
5 then what we've done is we just referenced our exhibits that
6 we raised in the brief but then have to start standalone
7 exhibits, not knowing necessarily if we're going to be able to
8 use all of them or not.

9 THE COURT: Okay.

10 MR. POWELL: So --

11 MR. MUGAN: Our brief is basically what I call a pretrial
12 brief trying to lay out a map, you know, for the Court.

13 THE COURT: Okay. That's civil --

14 MR. MUGAN: We didn't really reference exhibits. Ii
15 believe Michael and Mr. Powell, you advised him of our
16 witnesses a couple weeks ago. And I think that's it from our
17 perspective.

18 THE COURT: Okay. So then we just want to leave the sets
19 of exhibits that you got here so the clerk can get to work
20 marking them?

21 MR. POWELL: Sure.

22 THE COURT: Because that's -- we got to address --

23 MR. POWELL: Did you want anything more than just one
24 copy of the unfiled brief? And I wasn't sure and do you
25 prefer if it's 12 point font or the 14?

1 THE COURT: That's fine, whatever, sure. Whatever.

2 MR. POWELL: Whatever. Okay.

3 THE COURT: Whatever you filed it in. And then I guess
4 the only other question is deposition transcripts, I don't
5 think I never got those I'm thinking.

6 MR. POWELL: No, no depositions were taken so.

7 MR. MUGAN: We thought we were going to take depositions
8 and we didn't.

9 THE COURT: Okay. All right.

10 MR. POWELL: I guess there's one clarifying question for
11 you in terms of just a preference. In terms of -- because you
12 are the Trier of fact and obviously it's different than a jury
13 potentially hearing information that it technically shouldn't
14 and you can ferret through what's relevant and what's not.
15 What is your kind of I guess preference in terms of any sort
16 of objections to testimony, questions, anything like that? Do
17 you prefer that again since you're the Trier of fact, you're
18 basically going to sift through knowing what's relevant
19 information?

20 THE COURT: Well you know I think you have to make your
21 record. If you think there's something that is improper just
22 as you mentioned, you think that they raised issues in their
23 answer that you know are outside the scope of the pleading,
24 you know, we have to make that determination and we'll make it
25 on Monday or Tuesday.

1 MR. POWELL: Sure.

2 THE COURT: Before we get started. And if they're
3 introducing evidence that's outside the scope and you can
4 certainly raise your objection so you made your record.

5 MR. POWELL: Okay. Okay. But in terms of testimony I
6 guess and per se objections to certain questions or anything
7 like that, do you -- your preference I take it would just be
8 it's okay, counsel, interject, make your objection for the
9 record and then you'll go with it from there?

10 THE COURT: Sure.

11 MR. POWELL: Okay.

12 THE COURT: Yeah, usually don't make, you know, we don't
13 need to have big speaking objections.

14 MR. POWELL: Yeah, well that's what I -- that's what I
15 mean. I'm hoping we're not -- I think between both sides I
16 think we don't anticipate that. But I know some of these
17 trials just get really off the tracks where every question is
18 objected to and rephrase it and this and that and it just
19 kills the entire flow of the testimony.

20 THE COURT: Exactly.

21 MR. MUGAN: I just want to make sure we've got everything
22 we need for the Court. We checked and we thought we did.
23 We've got two binder sets of our exhibits. We have two copies
24 of the proposed findings of fact, conclusions of law in a 14
25 point font. Then we have the disk. And then we have two

1 copies of our pretrial memorandum that was filed yesterday.

2 THE COURT: Okay. Great. Perfect. That's fine.

3 MR. MUGAN: Is that -- anything else that we forgot?

4 THE COURT: That's great. That's what we need. Perfect.

5 MR. POWELL: Do you want two copies or just one? I have
6 got the disk and I've got multiple copies.

7 THE COURT: That's fine. A disk and one, however you
8 want -- whatever you've got for us. Do you prefer to get two
9 copies?

10 THE CLERK: I can just --

11 MR. POWELL: I got an extra copy. I'll just give you
12 both what I brought.

13 MR. MUGAN: We also have our exhibits loose, you know,
14 and you know these are all hole punched and everything.

15 THE COURT: Right.

16 MR. MUGAN: So we got the exhibits all loose, too, with
17 the exhibit stickers. And I didn't know if that's what you --

18 THE COURT: Yeah, we prefer the binder.

19 MR. MUGAN: Okay. All right. Whatever is easiest.

20 MR. POWELL: Do we want to use ours, do you want to use
21 your binder? We've -- if you want to take a look at ours and
22 see if you want --

23 MR. MUGAN: Might want to use ours because we have more
24 exhibits. And yours are --

25 MR. POWELL: Well, in terms of --

1 MR. MUGAN: And the ones we agreed are in --

2 MR. POWELL: -- the joint ones, that's what I'm --
3 there's just three in there.

4 THE COURT: Okay. Well I'll let you guys look at that
5 and make your determination as to what you can agree on.

6 MR. POWELL: Okay.

7 THE COURT: And you then leave it with the clerk for
8 marking.

9 MR. POWELL: Okay.

10 THE COURT: Anything else?

11 MR. POWELL: Thank you, Your Honor.

12 MR. MUGAN: Thank you, Your Honor.

13 THE COURT: Then we'll see you on Tuesday morning, 10:00
14 a.m.

15 MR. MUGAN: 10:00 a.m. sharp, yes. Thank you.

16 MR. POWELL: All right. Thank you.

17 THE COURT: Thank you. We'll see you then. Enjoy the
18 holiday.

19 MR. POWELL: Thank you, you, too.

20 [Proceedings Concluded at 11:24 a.m.]

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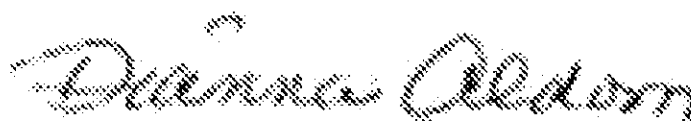
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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above entitled case to the best of my ability.



Dianna Aldom, CET**236, Transcriber

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EXHIBIT C
Affidavit of attorney John R. Mugan

AFFD

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Attorneys for Trustee ELEANOR CONNELL HARTMAN AHERN

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of

THE W. N. CONNELL AND MARJORIE T. CONNELL

LIVING TRUST,

Dated May 18, 1972

Case No. P-09-066425-T

Dept. No. XXVI (26)

An Inter Vivos Irrevocable Trust.

AFFIDAVIT OF JOHN R. MUGAN, ESQUIRE

STATE OF NEVADA }

ss

COUNTY OF CLARK }

The undersigned, JOHN R. MUGAN, Esquire, being first duly sworn on oath, deposes and states as follows:

1. I have practiced law for over forty (40) years and I am licensed to practice law in the following states: Iowa-1973; Nebraska-1983; South Dakota-2006, and Nevada-2007. I am admitted to appear before the U.S. Supreme Court and U.S. Tax Court, and I have appeared in state and federal courts and in U.S District Court and U.S. Bankruptcy Court.

2. My Martindale-Hubbell rating is AV Preeminent, and has been for many years.

1 3. I am currently the head of the Estate and Trust Litigation Department and of the Trust
2 Administration Department of the law office of JEFFREY BURR, LTD. ELEANOR C. AHERN,
3 a/k/a ELEANOR CONNELL HARTMAN AHERN, as Trustee of THE W. N. CONNELL AND
4 MARJORIE T. CONNELL LIVING TRUST dated May 18, 1972 ("ELEANOR"), is represented by
5 the law firm of JEFFREY BURR, LTD. in this matter.

6 4. I have never been sanctioned, censured or disciplined by any state bar association.

7 5. On February 18, 2014, I was accused in open Court by the Honorable Gloria Sturman of
8 intentionally filing the Answer, Affirmative Defenses And Counterclaims of ELEANOR shortly
9 before trial as a strategic maneuver in order to obtain a delay and continuance of the trial of this
10 matter scheduled to commence on February 18, 2014. The Answer, Affirmative Defenses And
11 Counterclaims was filed herein on February 10, 2014.

12 6. I have never been accused of such or similar behavior by any Court or opposing counsel.
13 This accusation is specifically denied by the undersigned, and the thought of having the trial
14 delayed as a result of the timing of the filing of the Answer, Affirmative Defenses And
15 Counterclaims was never considered, discussed or anticipated. In fact, the undersigned (and
16 associate attorney MICHAEL D. LUM and support staff) had spent many hours preparing for the
17 February 18, 2014 trial, reviewing exhibits and meeting with witnesses, and in fact had two (2)
18 witnesses from Texas and a local CPA rebuttal expert witness present on February 18 in the
19 courtroom to testify, and fully expected to proceed with the trial. Based on the exhibits and the fact
20 that opposing counsel represented that he planned on calling only one (1) witness, the last thing the
21 undersigned wanted or sought was a continuance of the February 18, 2014 trial.
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1 7. The timing of the filing of the Answer, Affirmative Defenses And Counterclaims was a
2 result of NRCPP Rule 12(b). A Motion To Dismiss Petition For Declaratory Judgment Regarding
3 Limited Interest Of Trust Assets Pursuant To NRS 30.040, NRS 153.031(1)(e), And NRS
4 164.033(1)(a) For Failure To State A Claim Upon Which Relief Can Be Granted Per NRCPP
5 12(b)(5) (the "Motion To Dismiss") was filed herein on behalf of ELEANOR. NRCPP Rule 12(b)
6 specifically provides:

7 **"(b) How Presented.** Every defense, in law or fact, to a claim for relief in
8 any pleading, whether a claim, counterclaim, cross-claim, or third-party
9 claim, shall be asserted in the responsive pleading thereto if one is required,
10 *except that the following defenses may at the option of the pleader be made*
11 *by motion:* (1) lack of jurisdiction over the subject matter, (2) lack of
12 jurisdiction over the person, (3) insufficiency of process, (4) insufficiency of
13 service of process, (5) failure to state a claim upon which relief can be
14 granted, (6) failure to join a party under Rule 19. ***A motion making any of***
15 ***these defenses shall be made before pleading if a further pleading is***
16 ***permitted.*** No defense or objection is waived by being joined with one or
17 more other defenses or objections in a responsive pleading or motion. If a
18 pleading sets forth a claim for relief to which the adverse party is not required
19 to serve a responsive pleading, the adverse party may assert at the trial any
20 defense in law or fact to that claim for relief. If, on a motion asserting the
21 defense numbered (5) to dismiss for failure of the pleading to state a claim
22 upon which relief can be granted, matters outside the pleading are presented
23 to and not excluded by the court, the motion shall be treated as one for
24 summary judgment and disposed of as provided in Rule 56, and all parties
25 shall be given reasonable opportunity to present all material made pertinent to
26 such a motion by Rule 56." (Emphasis added)

21 Thus, according to NRCPP Rule 12(b), a motion asserting a defense based on
22 the failure of an adverse party to state a claim upon which relief can be granted must
23 be made first before any further pleading. In this case, ELEANOR's Motion To
24 Dismiss sought to dismiss this case for the Petitioner JACQUELINE M.
25 MONTROYA's failure to state a claim upon which relief can be granted and was
26 captioned as a Rule 12(b)(5) motion. Accordingly, it was required to be filed and
27 decided upon before any other responsive pleading to the Petition could be filed by
28

1 ELEANOR. The Motion was denied by the Court without prejudice on January 14,
2 2014. A proposed Order was prepared by the undersigned and sent to opposing
3 counsel, and as of the date of this Affidavit, opposing counsel has not yet agreed to
4 the language of such Order. Nonetheless, the Answer, Affirmative Defenses And
5 Counterclaims was filed even though no Order denying the Rule 12(b)(5) Motion
6 had been entered by the Court.
7

8 8. Other pleadings were in fact filed herein on behalf of ELEANOR, but they
9 were Motions or responses to Motions of opposing counsel.

10 9. Opposing counsel and the Court had been advised of the counterclaims long
11 before the filing of the Answer, Affirmative Defenses And Counterclaims. In
12 particular, at the November 12, 2013 hearing, the very first hearing in this matter,
13 the undersigned disclosed to the Court and opposing counsel that ELEANOR would
14 be filing a motion to dismiss and if the motion was denied, ELEANOR would be
15 filing counterclaims if this case proceeded to an evidentiary hearing. The transcript
16 for the November 12, 2013 hearing contains the following dialogue:
17

18 “MR. MUGAN: And by way of full disclosure, Your Honor, and I don’t
19 know if it will affect the thinking at all, and we can deal with it later if we
20 have to, **if in fact this ends up going to an evidentiary hearing and our**
21 **motion to dismiss is not successful, *there are going to be some***
22 ***counterclaims made by my client in this matter –***
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1 THE COURT: *Okay.*

2 MR. MUGAN: that are –

3 THE COURT: And I think –

4 MR. MUGAN: -- going to involve some things.

5 ...

6 MR. POWELL: *Okay.*” (emphasis added)

7 *See* Hearing Transcr. 65:1; 66:1-22 (November 12, 2013).

8 10. Furthermore, in the Objection Of Trustee Eleanor C. Ahern To Jacqueline M. Montoya’s
9 Petition To Compel Trustee To Distribute Accrued Income And Future Income Received From Oil,
10 Gas, And Mineral Leases And Declaration Of The Applicability Of The Doctrine Of Laches filed
11 on **January 3, 2014**, it was stated in exact specificity that “[t]his action (the sending of demand
12 letters by JACQUELINE M. MONTOYA and her Texas counsel to the surface tenant and mineral
13 interest lessees demanding them to cease all payment to the TRUST) on the part of Petitioner
14 JACQUELINE M. MONTOYA gives rise to action against her by ELEANOR for *intentional*
15 *interference with contractual relations, punitive damages, and enforcement of the no contest*
16 *clause.*” (emphasis added).

17 11. Additionally, at the Pretrial Conference on February 12, 2014 counsel for ELEANOR again
18 made clear to the Court and to counsel for Petitioner JACQUELINE M. MONTOYA that
19 ELEANOR asserted counterclaims, including enforcement of the no contest clause and intentional
20 inference with contractual relations, in her Answer filed on February 10, 2014. In fact, the Court
21 and counsel for both parties engaged in a fairly extensive discussion regarding these counterclaims.
22 In particular the discussion proceeded as follows:

23 “MR. MUGAN: I would just note to the Court on our proposed findings of fact and
24 conclusions of law and *we have a number of theories on Defense* and so we just threw them
25 all in there. So I presume that’s why you want the disk is pick and choose or ignore.

26 THE COURT: Right.

27 ...

28 MR. POWELL: What – you did trigger something for me, Your Honor. In taking a quick
look at their brief, they have asked for what I would call I guess additional relief that really
hasn’t been briefed before.

1 THE COURT: Uh-huh.

2 MR. POWELL: In the aspect of *they've asked for the enforcement of no contest clause.*

3 THE COURT: *Uh-huh.*

4 MR. POWELL: -- in the event that the Petitioner is unsuccessful, *they've also asked for as*
5 *well as a finding that there's been tortuous interference with contract*, if I'm not mistaken,
6 as well. Those are issues that haven't been briefed prior. *These are essentially new*
7 *allegations and new assertions* in which they're seeking a judgment on an in my
8 understanding would be this – *that would be way beyond the scope of what this trial is to*
9 *cover* which is Petitioner's initial petition seeking a declaratory judgment on the rights. So –

10 THE COURT: Well, you know, *like I said*, you know, *you can make an appropriate*
11 *motion at the close of their case* or whatever, I think it's 58 or whatever.

12 MR. POWELL: Okay.

13 THE COURT: You've already done your trial brief. *If you wish to submit anything*
14 *further on it, you can certainly supplement that if you wish as well.*

15 MR. POWELL: Okay. I'm just curious I guess more than anything just to limit the scope of
16 what we're actually, the determinations of what we're – what we're seeing here. Because
17 again it's Petitioner's as far as I'm understanding it, it's Petitioner's petition.

18 THE COURT: Uh-huh.

19 MR. POWELL: -- that's the sole case here that's for determination.

20 THE COURT: Okay. *So and your view is that they had made I guess a counter.*

21 MR. POWELL: *It almost seems like it's a counter within their brief of asking for*
22 *enforcement of no contest clause and again finding of tortuous interference with contract.*

23 But those issues have never been briefed in standalone petitions.

24 THE COURT: Okay. Mr. Mugan.

25 MR. MUGAN: Yeah, you just – I mean *you'll get into the issue of whether you have*
26 *mandatory counterclaims or permissive counterclaims* and of course we've been through
27 claim preclusion and issue preclusion and so you know *we want to protect ourselves in that*
28 *respect.*

THE COURT: *Okay.*

MR. MUGAN: You of course can make the appropriate rulings at the appropriate time.

1 THE COURT: Okay. *So well if you want to raise that in supplemental briefing, Mr.*
2 *Powell, then just get it on file.* If you feel that they've gone beyond the scope of what we're
3 actually supposed to be hearing is – we've got the petition just to the jurisdiction. The
4 petition for declaratory judgment regarding limited interest of trust assets?

5 MR. POWELL: Yes, Your Honor.

6 THE COURT: Because you were here on.

7 MR. POWELL: Yes.

8 THE COURT: Okay. And they have a – they've got a bunchy (sic) of motions. I'm trying
9 to see if there's – is there a response to that petition, Mr. Mugan, other than just in the –

10 MR. MUGAN: *There should be an answer and affirmative defenses and some*
11 *counterclaims. I think it was filed relatively recently.*

12 THE COURT: *Okay, here's a response.* We've got some –

13 MR. POWELL: *I received the answer yesterday.* So is that different from your trial brief?
14 Is there two difference –

15 THE COURT: *Yeah, here's the answer.*

16 ...

17 THE COURT: Okay. So yeah, *so that's the answer filed yesterday at 2:10 of the trustee.*

18 ...

19 THE COURT: All right. Yes, and so that's all that shows up. If there are – I don't see – *I*
20 *just see an answer.*

21 ...

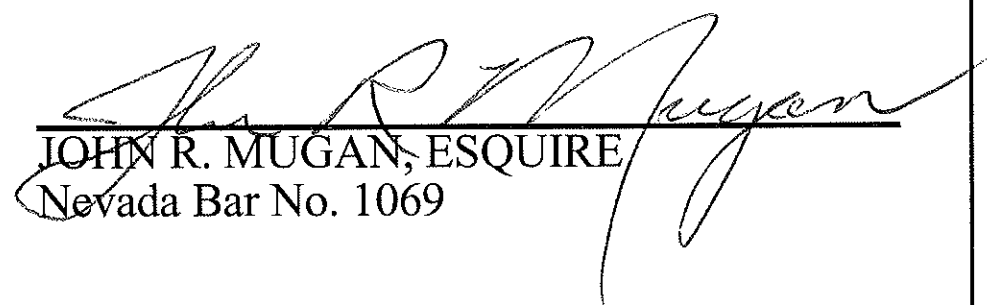
22 THE COURT: Something about deposition transcript or taking depositions. So motion
23 practice. Okay, yeah so I don't see a different brief. I just – it may be in the cue. It just
24 hasn't popped up yet. *But I do see the answer.*" (emphasis added)

25 See Pretrial Hearing Transcr. 17:4 – 21:2 (February 12, 2014).

1 12. Accordingly, the Court and opposing counsel were aware of the existence of the
2 counterclaims long before the actual filing of the Answer, Affirmative Defenses And Counterclaims
3 on February 10, 2014, to-wit: (1) since the initial hearing on November 12, 2013 when the same
4 was disclosed in open court by the undersigned, and (2) again on January 3, 2014 when *intentional*
5 *interference with contractual relations, punitive damages, and enforcement of the no contest clause*
6 was specifically noted in the Objection Of Trustee Eleanor C. Ahern To Jacqueline M. Montoya's
7 Petition To Compel Trustee To Distribute Accrued Income And Future Income Received From Oil,
8 Gas, And Mineral Leases And Declaration Of The Applicability Of The Doctrine Of Laches.

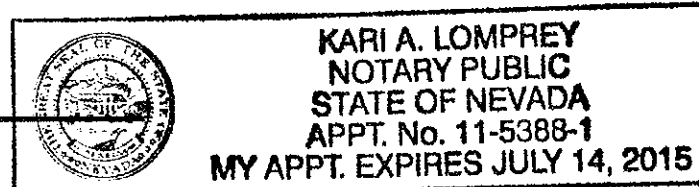
9 13. Furthermore, as noted above the Court and opposing counsel discussed in some detail the
10 Answer, Affirmative Defenses And Counterclaims at the Pretrial Conference on February 12, 2014,
11 and the Court advised opposing counsel that he could supplement his trial brief or supplemental
12 briefing regarding the same and even advised opposing counsel that he could "[m]ake an
13 appropriate motion at the close of their case or whatever, I think it's 58 or whatever."

14 14. The timing of the filing of the Answer, Affirmative Defenses And Counterclaims was based
15 on NRCP 12(b)(5), and was not an attempt by the undersigned to obtain a delay and continuance of
16 the February 18, 2014 trial.

17 
18 JOHN R. MUGAN, ESQUIRE
Nevada Bar No. 1069

19 SUBSCRIBED and SWORN to before me
20 this 12 day of March, 2014.

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22 NOTARY PUBLIC



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EXHIBIT D
The MTC LIVING TRUST dated December 6, 1995 as restated
January 7, 2008

**THE MTC LIVING TRUST
DATED DECEMBER 6, 1995**

Restatement dated January 7, 2008

LAW OFFICES
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A PROFESSIONAL CORPORATION
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LAS VEGAS, NEVADA 89106
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The MTC LIVING TRUST

Article One Establishing My Trust

On December 6, 1995, I established the MTC LIVING TRUST, wherein I reserved the right to amend the trust agreement, in whole or in part in Article Four, Section 1(d). On this day, January 7, 2008, I now exercise my power to amend that agreement, in its entirety, so that after amendment, the MTC LIVING TRUST states as follows:

The parties to this restated agreement are MARJORIE T. CONNELL, also known as MARJORIE THRASH CONNELL, (the "Trustmaker") and MARJORIE T. CONNELL (my "Trustee").

Section 1.01 Identifying My Trust

My trust may be referred to as "MARJORIE T. CONNELL, Sole Trustee, or her successors in trust under the MTC LIVING TRUST dated December 6, 1995, and any amendments thereto."

For the purpose of transferring property to my trust, or identifying my trust in any beneficiary or pay-on-death designation, any description referring to my trust shall be effective if it reasonably identifies my trust and indicates that the trust property is held in a fiduciary capacity.

Section 1.02 Reliance by Third Parties on Affidavit or Certification of Trust

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

A third party may rely upon an affidavit or certification of trust that is signed by my Trustee with respect to the representations contained in the affidavit or certification of trust. A third party relying upon an affidavit or certification of trust shall be exonerated from any liability for actions the third party takes or fails to take in reliance upon the representations contained in the affidavit or certification of trust. A third party dealing with my Trustee shall not be required to inquire into the terms of this agreement or the authority of my Trustee, or to see to the application that my Trustee makes of funds or other property received by my Trustee.

Section 1.03 Transferring Property to My Trust

Any person or entity may transfer property of any kind, nature and description to my trust in any manner authorized by law.

(a) Funding of My Trust

By execution of this agreement, I transfer, convey and assign to my Trustee and my Trustee accepts and agrees to hold, the property described in Schedule A, annexed hereto, together with all my right, title and interest in and to all of my property that may by law be held in trust and that may, by this assignment, be transferred to my trust. In addition, any assets already in the name of my trust shall be controlled by this agreement. This assignment shall include, without limitation, all real and personal, tangible and intangible property, located in the United States, whether separate or community, whether acquired before or after the execution of this agreement except for the following assets that are expressly not transferred to my trust by this assignment:

Life insurance policies, unless the ownership of a policy is transferred to my trust by a separate instrument that specifically refers to such policy;

Corporate and self-employed ("Keogh") pension, profit sharing and stock bonus plans;

Qualified retirement plans;

Commercial annuities;

Any property, the transfer of which would result in the immediate recognition of income subject to income or other taxes or the transfer of which would result in the loss of a homestead exemption or violate a restriction on transfer agreement.

(b) Acceptance by My Trustee

By execution of this agreement, my Trustee accepts and agrees to hold the trust property described on Schedule A, along with all other property initially transferred to it by virtue of subsection (a). All property transferred to my trust after the date of this agreement must be acceptable to my Trustee. My Trustee may refuse to accept any property. My Trustee shall hold, administer and dispose of all trust property accepted by my Trustee for my benefit and the benefit of my beneficiaries in accordance with the terms of this agreement.

Section 1.04 Powers Reserved by Me as Trustmaker

During my lifetime, I shall retain the powers set forth in this Section in addition to any powers that I reserve in other provisions of this agreement.

(a) Action on Behalf of My Trust

During any period that I am serving as a Trustee of my trust, I may act for and conduct business on behalf of my trust without the consent of any other Trustee.

(b) Amendment, Restatement or Revocation

I have the absolute right, at any time and from time to time, to amend, restate, or revoke any term or provision of this agreement in whole or in part. Any amendment, restatement, or revocation must be in a written instrument signed by me.

(c) Addition or Removal of Trust Property

I have the absolute right, at any time and from time to time, to add to the trust property and to remove any property from my trust.

(d) Control of Income and Principal Distributions

I have the absolute right to control the distribution of income and principal from my trust. My Trustee shall distribute to me, or to such persons or entities as I may direct, as much of the net income and principal of the trust property as I deem advisable. My Trustee may distribute trust income and principal to me or for my unrestricted use and benefit, even to the exhaustion of all trust property. Any undistributed income shall be added to the principal of my trust.

(e) Approval of Investment Decisions

I reserve the absolute right to review and change my Trustee's investment decisions; however, my Trustee shall not be required to seek my approval before making investment decisions.

Section 1.05 Grantor Trust Status

By reserving the broad rights and powers set forth in Section 1.04 of this Article, I intend to qualify my trust as a "Grantor Trust" under Sections 671 to 677 of the Internal Revenue Code so that, for federal income tax purposes, I will be treated as the owner during my lifetime of all the assets held in my trust as though I held them in my individual capacity.

During any period that my trust is a Grantor Trust, the taxpayer identification number of my trust shall be my social security number, in accordance with Treasury Regulation Section 301.6109-1(a)(2).

Article Two Family Information

I am unmarried.

I have one child ELEANOR C. HARTMAN AHERN, born on May 13, 1938.

I have also made provision for the following individuals in this agreement:

Name	Relationship
JACQUELINE MARGUERITE MONTOYA	Granddaughter
KATHRYN ANN BOUVIER	Granddaughter

Article Three Trustee Succession Provisions

Section 3.01 Resignation of a Trustee

A Trustee may resign by giving notice to me. If I am deceased, a resigning Trustee shall give notice to the income beneficiaries of the trust and to any other Trustee then serving.

Section 3.02 Trustee Succession During My Lifetime

During my lifetime, this Section shall govern the removal and replacement of my Trustees.

(a) Removal and Replacement by Me

I may remove any Trustee with or without cause at any time. If a Trustee is removed, resigns or cannot continue to serve for any reason, I may serve as sole Trustee, appoint a Trustee to serve with me or appoint a successor Trustee.

(b) During My Incapacity

During any time that I am incapacitated, the following, in the order named, shall replace any then serving Trustee:

First, JACQUELINE MARGUERITE MONTOYA; and
then

Second, KATHRYN ANN BOUVIER

If I am incapacitated, a Trustee may be removed only for cause, which removal must be approved by a court of competent jurisdiction upon the petition of an interested party.

All appointments, removals and revocations shall be by signed written instrument.

Notice of removal shall be delivered to the Trustee being removed and shall be effective in accordance with the provisions of the notice.

Notice of appointment shall be delivered to and accepted by the successor Trustee and shall become effective at that time. A copy of the notice shall be attached to this agreement.

Section 3.03 Trustee Succession After My Death

After my death, this Section shall govern the removal and replacement of my Trustees.

(a) Successor Trustee

Upon my death, the following, in the order named, shall serve as my successor Trustee, replacing any then serving Trustee:

First, JACQUELINE MARGUERITE MONTOYA; and
then

Second, KATHRYN ANN BOUVIER

(b) Trustees of the Separate Trusts

The primary beneficiary of a separate trust created under this agreement may, upon attaining the age of 21, appoint himself or herself as a Cotrustee of his or her separate trust to serve with the then serving successor Trustee. Upon attaining the age of 25, the primary beneficiary may serve as sole trustee.

At any time a beneficiary is serving as a Trustee of his or her trust before attaining the age of 25, there must be at least one other Trustee serving with the beneficiary. If a Trustee vacancy occurs and no designated successor Trustee is available to serve, the vacancy shall be filled as provided in subsection (d) of this Section.

If the interest of a beneficiary will be merged into a life estate or an estate for years because the beneficiary is serving as sole Trustee, the beneficiary shall appoint a Cotrustee to avoid such merger. Similarly, if the interest of a beneficiary becomes, or is likely to become, subject to the claims of any creditor or to legal process as a result of serving as sole Trustee the beneficiary shall appoint an Independent Trustee to serve as Cotrustee.

(c) Removal of a Trustee

A Trustee may be removed only for cause, which removal must be approved by a court of competent jurisdiction upon the petition of any beneficiary.

In no event shall the court petitioned to approve the removal of a Trustee acquire any jurisdiction over the trust except to the extent necessary to approve or disapprove removal of a Trustee.

If a beneficiary is a minor or is incapacitated, the parent or legal representative of the beneficiary may act on behalf of the beneficiary.

(d) Default of Designation

If the office of Trustee of a trust created under this agreement is vacant and no designated successor Trustee is able and willing to act as Trustee, the primary beneficiary of the trust shall appoint an individual or corporate fiduciary as successor Trustee.

Any beneficiary may petition a court of competent jurisdiction to appoint a successor Trustee to fill any vacancy remaining unfilled after a period of 30 days. By making such appointment, the court shall not thereby acquire any jurisdiction over the trust, except to the extent necessary for making the appointment.

If a beneficiary is a minor or is incapacitated, the parent or legal representative of the beneficiary may act on behalf of the beneficiary.

Section 3.04 Notice of Removal and Appointment

Notice of removal shall be in writing and shall be delivered to the Trustee being removed, along with any other Trustees then serving. The notice of removal shall be effective in accordance with its provisions.

Notice of appointment shall be in writing and shall be delivered to the successor Trustee and any other Trustees then serving. The appointment shall become effective at the time of acceptance by the successor Trustee. A copy of the notice shall be attached to this agreement.

Section 3.05 Appointment of a Cotrustee

Any individual Trustee may appoint an individual or a corporate fiduciary as a Cotrustee. A Cotrustee so named shall serve only as long as the Trustee who appointed such Cotrustee serves (or, if such Cotrustee was named by more than one Trustee acting together, by the last to serve of such Trustees), and such Cotrustee shall not become a successor Trustee upon the death, resignation, or incapacity of the Trustee who appointed such Cotrustee, unless so appointed under the terms of this agreement. Although such Cotrustee may exercise all the powers of the appointing Trustee, the combined powers of such Cotrustee and the appointing Trustee shall not exceed the powers of the appointing Trustee alone. The Trustee appointing a Cotrustee may revoke the appointment at any time with or without cause.

Section 3.06 Corporate Fiduciaries

Any corporate fiduciary serving under this agreement as a Trustee must be a bank, trust company, or public charity that is qualified to act as a fiduciary under applicable federal and state law and that is not related or subordinate to any beneficiary within the meaning of Section 672(c) of the Internal Revenue Code.

Such corporate fiduciary shall:

- Have a combined capital and surplus of at least Five Million Dollars; or
- Maintain in force a policy of insurance with policy limits of not less than Five Million Dollars covering the errors and omissions of my Trustee with a solvent insurance carrier licensed to do business in the state in which my Trustee has its corporate headquarters.

Section 3.07 Incapacity of a Trustee

If any individual Trustee becomes incapacitated, it shall not be necessary for the incapacitated Trustee to resign as Trustee. For Trustees other than me, a written declaration of incapacity by the Cotrustee, if any, or, if none, by the party designated to succeed the incapacitated Trustee, if made in good faith and if supported by a written opinion of incapacity by a physician who has examined the incapacitated Trustee, will terminate the trusteeship.

Section 3.08 Appointment of Independent Special Trustee

If for any reason the Trustee of any trust created under this agreement is unwilling or unable to act with respect to any trust property or any provision of this agreement, the Trustee shall appoint, in writing, a corporate fiduciary or an individual to serve as an Independent Special Trustee as to such property or with respect to such provision. The Independent Special Trustee appointed shall not be related or subordinate to any beneficiary of the trust within the meaning of Section 672(c) of the Internal Revenue Code.

An Independent Special Trustee shall exercise all fiduciary powers granted by this agreement unless expressly limited elsewhere in this agreement or by the Trustee in the instrument appointing the Independent Special Trustee. An Independent Special Trustee may resign at any time by delivering written notice of resignation to the Trustee. Notice of resignation shall be effective in accordance with the terms of the notice.

Section 3.09 Rights and Obligations of Successor Trustees

Each successor Trustee serving under this agreement, whether corporate or individual, shall have all of the title, rights, powers and privileges granted to the initial Trustee named under this agreement. In addition, each successor Trustee shall be subject to all of the restrictions imposed upon, as well as all obligations and duties, both discretionary and ministerial, given to the initial Trustee named under this agreement.

Article Four Administration of My Trust During My Incapacity

Section 4.01 Definition of My Incapacity

I shall be considered incapacitated during any time that, because of age, illness, mental disorders, dependence on prescription medications or other substances, or any other cause, I am unable to effectively manage my property or financial affairs.

Section 4.02 Determination of My Incapacity

For purposes of this agreement, I am incapacitated if I am determined to be so under any one of the following subsections.

(a) Determination by Physicians

I shall be deemed incapacitated if in the opinion of two licensed physicians my then existing circumstances fall within the definition of incapacity as provided in Section 4.01.

I shall be deemed restored to capacity if my personal or attending physician signs a written opinion that I can manage my property and financial affairs.

(b) Court Determination

I shall be deemed incapacitated if a court of competent jurisdiction determines that I am legally incapacitated, incompetent, or otherwise unable to effectively manage my property or financial affairs.

(c) Detention or Disappearance

I shall be deemed incapacitated if I cannot effectively manage my property or financial affairs due to my unexplained disappearance or absence for more than 30 days, or if I am detained under duress. My disappearance, absence, or detention under duress may be established by an affidavit of my Trustee, or, if no Trustee is serving under this agreement, by the affidavit of any beneficiary under this agreement. The affidavit shall describe the circumstances of my disappearance, absence, or detention under duress. A third party dealing with my Trustee in good faith may always rely on the representations contained in the affidavit.

Section 4.03 Trust Distributions During My Incapacity

During any period of time that I am incapacitated, my Trustee shall administer my trust and distribute its net income and principal as provided in this Section.

(a) Distributions for My Benefit

My Trustee shall regularly and conscientiously make appropriate distributions of trust income and principal for my general welfare and

comfort under the circumstances existing at the time such distributions are made.

Distributions under this subsection shall include payments for any of my enforceable legal obligations. My Trustee may also make distributions for the payment of insurance premiums for insurance policies owned by me or by my trust, including but not limited to, life, medical, disability, property and casualty, errors and omissions and long-term health care insurance policies.

My Trustee is authorized to honor pledges and continue to make gifts to charitable organizations that I have regularly supported in the amounts I have customarily given.

The examples included in this subsection are for purposes of illustration only and are not intended to limit the authority of my Trustee to make distributions for my benefit that my Trustee determines to be appropriate.

(b) Manner of Making Distributions

My Trustee may make distributions for my benefit in any one or more of the following ways:

To me, but only to the extent I am able to manage such distributions;

To other persons and entities for my use and benefit;

To my agent or attorney-in-fact authorized to act for me under a legally valid durable power of attorney executed by me prior to my incapacity;

To my guardian or conservator who has assumed responsibility for me under any court order, decree or judgment issued by a court of competent jurisdiction.

(c) Distributions for the Benefit of Persons Dependent on Me

My Trustee also may distribute as much of the net income and principal as my Trustee deems necessary for the health, education, maintenance or support of persons that my Trustee determines to be dependent on me for support.

(d) Guidance for My Trustee Regarding Distributions

In making distributions under subsections (a) and (c), my Trustee shall give consideration first to my needs, and then to the needs of those persons dependent on me.

When making distributions under subsections (a) and (c), I request, but do not require, that my Trustee, in its sole and absolute discretion, consider other income and resources available to the beneficiaries. My Trustee

may make unequal distributions, distributions to some but not all beneficiaries or no distributions.

A distribution made to a beneficiary under this Section shall not be considered an advance and shall not be charged against the share of the beneficiary that may be distributable under any other provision of this agreement.

Section 4.04 Appointment of the Trustmaker's "HIPAA" "Personal Representative"

a. Provisions of the Act Regarding Personal Representatives.

Pursuant to 45 CFR 164.502(g)(1), promulgated under the Health Insurance Portability and Accountability Act of 1996 (the Act), any entity covered by the Act must treat the Personal Representative of an individual as follows:

"(g)(1) Standard: Personal representatives. As specified in this paragraph, a covered entity must, except as provided in paragraphs (g)(3) and (g)(5) of this section, treat a personal representative as the individual for purposes of this subchapter." (emphasis supplied) (Neither of paragraphs (g)(3) nor (g)(5) apply in this situation.)

b. Appointment of the Trustmaker's Personal Representative.

For purposes of this Section and the Act, the serving Trustee, or Co-Trustees, if more than one Trustee is serving, of my Trust shall be the Trustmaker's appointed "Personal Representative." As such, the Personal Representative appointed under this Section shall have the same rights as the Trustmaker, whether the Trustmaker is or is not considered disabled pursuant to any standard contained in this agreement or otherwise.

c. Covered Entities Under the Act.

A covered entity includes, but is not limited to, the physician, health care professionals, dentists, a health plan, hospital, laboratory, pharmacy, insurance company, the Medical Information Bureau, Inc., other health care clearinghouses or persons or entities requiring compliance with the Act before releasing protected health care information.

d. Coordination with an Agent or Attorney in Fact under any Health Care Power of Attorney

For the purpose of accessing any health care information covered by the Act, both the Personal Representative appointed under this Section, and the Health Care Agent appointed under my Health Care Power of Attorney shall be

considered as "Personal Representatives" under the Act, and either may request health care information covered by the Act.

e. **Legal Action to Enforce the Terms of this Section**

My Trustee is specifically empowered to take any and all legal action necessary to enforce the intent of this Section as regards accessing the Trustmaker's health care information in compliance with the Act. My Trustee is specifically empowered to seek a recovery of any legal fees and costs incurred as a result of any legal action taken hereunder, or for any damages caused by a covered entity's failure to comply with the Act.

Section 4.05 Special Disability Instructions for MARJORIE T. CONNELL.

I have led an independent life. And through the course of my life I have managed to set aside some savings and assets of value. I am mindful of the fact that nursing home care is very costly and that, even at the rates currently in effect, the costs can be in the neighborhood of \$60,000.00 per year. I request my disability Trustee to investigate the resources and services available through Visiting Nurses Association, Home Hospice Health Care, Meals on Wheels, part-time private nursing care, or any and all other then-available services which might provide for in-home care.

I request that my disability Trustee, make every reasonable effort to see to it that I am taken care of in my own home, at least or in the home of members of my family or loved ones, and not placed in a long-term convalescent health care facility, nursing home, or any similar facility. In my own home I find convenience, comfortable surroundings, and I can maintain my own privacy and my own dignity.

In the event that family members or others are so kind as to care for me under circumstances where that care is necessary to prevent me from being institutionalized in a nursing home, I direct my disability Trustee to pay to them upon their written request, fair compensation for their abilities, talent, and time dedicated on my behalf. I further request that whenever possible, in my Trustee discretion, my disability Trustee would see to it that one or more family members or others may, if they wish, occupy my home together with me, without payment or rent, so that I may receive care in my home to the extent that is medically and physically possible.

I wish to remain in my personal residence unless I am in a coma. I request my Trustee to pay the operating expenses of maintaining my residence, including normal domestic help.

I direct my Trustee to consult with my Health Care Representative regarding the cost of my medical care, and to pay all expenses incurred as a result of the decisions made by my Trustee and Health Care Representative. The decision as to whether to reimburse my Health Care Representative for expenses incurred in fulfilling the duties of the Health Care Representative position shall be in the sole and absolute discretion of my Trustee.

I further specifically prohibit my Trustee from expending any trust funds for medical treatment considered "extraordinary" or "heroic" by my Health Care Representative. The decision as to whether treatment shall be considered "extraordinary" or "heroic" shall be

in the sole and absolute discretion of my Health Care Representative contained in my Health Care Power of Attorney, or appointment of Health Care Representative.

If it should become necessary to sell my residence or for any other reason to dispose of some or all of my tangible personal property from my living quarters, my Trustee shall store or safeguard such tangible personal property (and pay all costs thereof) or, alternatively, transfer custody and possession, but not title, for such storage or safekeeping to the persons named as recipients of such property pursuant to this trust.

I wish to remain mentally and physically active as long as possible. I direct my Trustee to provide opportunities for me to engage in social, recreational, and sports activities, including travel, as my health permits. Such decisions shall be made in consultation with my Health Care Representative. I further direct my Trustee to provide me with books, tapes, and similar materials consistent with my interests.

It is my desire to provide for the presence and involvement of religious clergy or spiritual leaders in my care, provide them access to me at all times, maintain my memberships in religion or spiritual organizations, and enhance my opportunities to derive comfort and spiritual satisfaction from such activities, including religious books, tapes and other materials.

I further direct my Trustee, in cooperation with my Health Care Representative, to provide for companionship for me consistent with my needs and preferences. I consider such continuing interaction to be essential.

Finally, I authorize my Trustee to make advance arrangements for me in accordance with the memorial instructions I have left in my Living Trust Portfolio if I have not previously made such advance arrangements myself. If I have left no memorial instructions, I authorize my Trustee, in consultation with my Health Care Representative, to make advance arrangements considered necessary or appropriate.

Article Five Administration of My Trust Upon My Death

Section 5.01 My Trust Shall Become Irrevocable

Upon my death, my trust shall become irrevocable and my social security number may no longer be used to identify my trust. My Trustee shall apply for a separate taxpayer identification number for my trust.

Section 5.02 Administrative Trust

After my death and prior to the distribution of trust property as provided in the subsequent Articles of this agreement, my trust shall be an administrative trust but may continue to be known as the MTC LIVING TRUST. My administrative trust shall exist for a reasonable period of time necessary to complete the administrative tasks set forth in this Article.

Section 5.03 Payment of My Expenses and Taxes

My Trustee is authorized but not directed to pay from the administrative trust:

- Expenses of my last illness, funeral and burial or cremation, including expenses of memorials and memorial services;
- Legally enforceable claims against me or my estate;
- Expenses of administering my trust and my estate; and
- Court ordered allowances for those dependent upon me.

These authorized payments are discretionary with my Trustee. My Trustee may make decisions on these payments without regard to any limitation on payment of such expenses imposed by law and may make payments without obtaining the approval of any court. No third party may enforce any claim or right to payment against my trust by virtue of this discretionary authority. My Trustee shall not pay any administrative expenses from assets passing to an organization that qualifies for the federal estate tax charitable deduction or to a split-interest charitable trust.

My Trustee shall pay death taxes out of the principal of the trust property as provided in Section 5.05. If, however, a probate estate is opened within six months from the date of my death, my Personal Representative shall pay claims, expenses and death taxes from my probate estate to the extent that the cash and readily marketable assets included in my probate estate are sufficient to pay such items unless my Trustee has already paid them.

Section 5.04 Restrictions on Certain Payments from Qualified Retirement Plans

The "designation date" shall mean September 30 of the calendar year following the calendar year in which my death occurs, or such other date as shall be established by Treasury Regulations or other tax law authority as the final date for determining whether

this trust meets the requirements for treatment of the trust's oldest beneficiary as if he or she had been named directly as beneficiary of any qualified retirement plan payable to this trust.

Notwithstanding any other provision of this agreement or state law to the contrary, my Trustee may not, on or after the "designation date", distribute to or for the benefit of my estate, any charity or any other non-individual beneficiary any qualified retirement benefit payable to a trust created under this agreement. It is my intent that all such qualified retirement benefits held by or payable to this trust on or after the designation date be distributed to or held for only individual beneficiaries, within the meaning of Section 401(a)(9) of the Internal Revenue Code.

Accordingly I direct that qualified retirement benefits not be used or applied on or after the designation date for payment of my debts, taxes, expenses of administration or other claims against my estate or for payment of estate, inheritance or similar transfer taxes due on account of my death (other than those directly attributable to and the legal obligation of a particular Qualified Retirement Plan). This Section shall not apply to any bequest or expense that is specifically directed to be funded with qualified retirement benefits.

Section 5.05 Payment of Death Taxes

For the purposes of this Article, the term "death taxes" shall refer to any taxes imposed by reason of my death by federal, state or local authorities, including but not limited to estate, inheritance, gift, and direct-skip generation-skipping transfer taxes. For purposes of this Section, death taxes shall not include any additional estate tax imposed by Section 2031(c)(5)(C), Section 2032A(c) or Section 2057(f) of the Internal Revenue Code or any other comparable recapture tax imposed by any taxing authority. Nor shall death taxes include any generation-skipping transfer tax, other than a direct skip generation-skipping transfer tax.

Except as otherwise provided in this Section or elsewhere in this agreement, my Trustee shall provide for payment of all death taxes from the administrative trust without apportionment. My Trustee shall not seek contribution toward or recovery of any such payments from any individual.

(a) Protection of Exempt Property

In no event shall death taxes be allocated to or paid from any assets that are not included in my gross estate for federal estate tax purposes.

(b) Protection of the Charitable Deduction

No death taxes shall be allocated to or paid from any assets passing to an organization that qualifies for the federal estate tax charitable deduction, or from any assets passing to a split-interest charitable trust, unless my Trustee has first used all other assets available to my Trustee to pay the taxes.

(c) Property Passing Outside of My Trust

Death taxes imposed with respect to property included in my gross estate for death tax purposes but passing outside of my trust shall be apportioned

among the persons and entities benefited in the proportion that the taxable value of the property or interest bears to the total taxable value of all property and interests included in my gross estate for death tax purposes. The values to be used for the apportionment shall be the values as finally determined under federal, state or local law as the case may be.

Section 5.06 No Apportionment Between Current and Future Interests

No interest in income and no estate for years or for life or other temporary interest in any property or trust are subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder are chargeable against the corpus of the property or trust subject to the temporary interest and remainder.

Section 5.07 Coordination with My Personal Representative

The following provisions are intended to help facilitate the coordination between my Personal Representative, if any, and my Trustee. These provisions apply even if my Personal Representative and my Trustee are the same person or entity.

(a) Reliance on My Personal Representative

My Trustee may rely upon the written request of my Personal Representative for payments authorized under this Article and the amounts included in such payments without computing the sums involved. If a payment is made under this Article to my Personal Representative, my Trustee shall not have any duty to inquire into the application of the payment.

(b) Receipt of Probate Property

My Trustee may accept or decline any distributions of property tendered to my Trustee by my Personal Representative. As to property deemed acceptable by my Trustee, my Trustee may accept the property without audit and without obligation to review the records of my Personal Representative.

(c) Purchase of Assets from and Loans to My Probate Estate

My Trustee is authorized to purchase and retain, as an investment for my trust estate, any property that forms a part of my probate estate. My Trustee may make loans, with or without security, to my probate estate. My Trustee shall not be liable for any loss suffered by my trust as a result of the exercise of the powers granted to my Trustee in this subsection.

(d) Discretionary Distributions to My Personal Representative

My Trustee is authorized to distribute to my probate estate, as a beneficiary of this trust, cash or other trust property, including accrued

income, to whatever extent my Trustee determines it to be in the best interests of the beneficiaries of my trust.

Section 5.08 Authority to Make Tax Elections

Following my death, I authorize my Trustee to make tax elections as provided in this Section. If, however, a Personal Representative is appointed for my probate estate and as my Personal Representative is the recipient of specific statutorily delegated authority relative to any tax election, the discretionary authority granted my Trustee relative to the tax election shall be subordinate to the statutorily delegated authority.

(a) Tax Elections

My Trustee's authority to make tax elections shall include, but shall not be limited to, the right to choose the alternate valuation date, the right to elect whether to take administration expenses as estate tax deductions or income tax deductions, the right to allocate my unused generation-skipping exemption to all or any portion of the trust property, the right to make special use valuation elections, and the right to defer payment of all or any portion of any taxes.

My Trustee may elect to treat my administrative trust as part of my estate for federal or state income tax purposes or both.

My Trustee may elect to have trust property qualify for the "family owned business deduction" authorized under Section 2057 of the Internal Revenue Code. My Trustee may enter into any agreement on behalf of my trust that is necessary to validly make such election under the Internal Revenue Code.

My Trustee may make equitable adjustments between income and principal on account of any tax elections made by my Trustee.

(b) Allocation of GST Exemption

My Trustee may elect to allocate or not allocate any portion of the available GST exemption under Section 2631 of the Internal Revenue Code, or a counterpart exemption under any applicable state law, to any property of which I am the transferor or deemed transferor for generation-skipping transfer tax purposes, including any property transferred by me during my life as to which I did not make an allocation prior to death. The exercise of such discretion shall be based on the transfers, gift tax returns and other information known to my Trustee, with no requirement that allocations benefit the various transferees or beneficiaries equally, proportionally, or in any other particular manner.

(c) Qualified Conservation Easements

My Trustee may create a qualified conservation easement, as defined in Section 2031(c)(8)(A) of the Internal Revenue Code in any land held by my trust and make the necessary election provided by Section 2031(c)(6).

Section 5.09 Payment of Charitable Bequests

I instruct my Trustee to satisfy all of my charitable gifts and bequests, to the extent possible, from property that constitutes income in respect of a decedent.

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

IN THE MATTER OF: THE W.N.
CONNELL AND MARJORIE T.
CONNELL LIVING TRUST, DATED
MAY 18, 1972,

ELEANOR C. AHERN A/K/A
ELEANOR CONNELL HARTMAN
AHERN,

Appellant,

vs.

JACQUELINE M. MONTOYA; AND
KATHRYN A. BOUVIER,

Respondents.

Supreme Court No.: 66231
Consolidated with: 6782, 68046
Electronically Filed
Nov 20 2015 03:56 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

District Court Case No.:
P-09-066425-T

Appeal from the Eighth Judicial
District Court, The Honorable Gloria
Sturman Presiding

APPELLANT'S APPENDIX

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Opposition To Eleanor C. Ahern's Motion To Dismiss Petition For Declaratory Judgment For Failure To State A Claim Upon Which Relief Can Be Granted; And, Countermotion Of Kathryn A. Bouvier And Jacqueline M. Montoya For Summary Judgment On Petition For Declaratory Judgment, For Damages And Assessment Of Penalties, And For Other Relief	12/23/14	8	AA 1757-1849
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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

IN THE MATTER OF: THE W.N.
CONNELL AND MARJORIE T.
CONNELL LIVING TRUST, DATED
MAY 18, 1972,

ELEANOR C. AHERN A/K/A
ELEANOR CONNELL HARTMAN
AHERN,

Appellant,

vs.

JACQUELINE M. MONTOYA; AND
KATHRYN A. BOUVIER,

Respondents.

Supreme Court No.: 66231

Consolidated with: 67782, 68046

District Court Case No.:

P-09-066425-T

Appeal from the Eighth Judicial
District Court, The Honorable Gloria
Sturman Presiding

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and pursuant to NRAP 25(c) and (d), I caused a true and correct copy of the foregoing **APPELLANT'S APPENDIX (Volume 4 of 17) (Pages AA 673-919)** by using the Court's Electronic Filing System on November 20, 2015, upon the following:

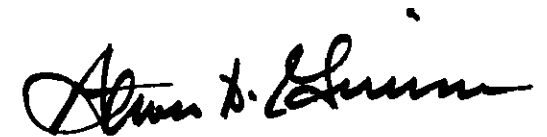
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/s/ Erin Parcels
an employee of Brownstein Hyatt Farber Schreck, LLP



CLERK OF THE COURT

1 **RTRAN**

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA
7

8 MATTER OF THE TRUST OF
9 W.N. CONNELL AND MARJORIE T.
10 CONNELL LIVING TRUST
11 DATED MAY 18, 1972
12
13

CASE NO. P-066425

DEPT. XXVI

14 BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

15 TUESDAY, FEBRUARY 18, 2014

16 **RECORDER'S TRANSCRIPT OF PROCEEDING:**
17 **CIVIL BENCH TRIAL - DAY 1**

18 **APPEARANCES:**

19 For the Plaintiff:

20 JOHN R. MUGAN, ESQ.
21 MICHAEL D. LUM, ESQ.
JEFFREY BURR, LTD.

22 For the Respondent:

23 JOSEPH J. POWELL, ESQ.
THE RUSHFORTH FIRM, PLLC

24
25 RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 TUESDAY, FEBRUARY 18, 2014 AT 10:07 A.M.

2
3 THE COURT: The W.N. Connell, Marjorie T. Connell Trust. It's Case: P-
4 066425. And Counsel, state their appearances for the record and who will be, you
5 know, sitting for the trial.

6 MR. POWELL: Good morning, Your Honor, Joey Powell appearing on behalf
7 of Petitioner, Jacqueline Montoya.

8 THE COURT: Okay.

9 MR. MUGAN: Good morning, Your Honor, John Mugan, 10690, appearing on
10 behalf of Trustee, Eleanor Ahern.

11 MR. LUM: Good morning, Your Honor, Michael Lum, Bar Number: 12997, on
12 behalf of Eleanor Ahern.

13 THE COURT: Okay. Thank you. Mr. Powell, and the first thing, thank you for
14 accommodating us. It's -- flipping the courtroom. We thought that for the access
15 issues that we had discussed last week, it would be easier to have the parties on
16 opposite sides from their normal positions, so we appreciate the accommodation of
17 that. So Mr. Powell, you have a motion you had filed with respect to the
18 counterclaim?

19 MR. POWELL: Correct, Your Honor. We noticed in their answer, what
20 they're titling an answer.

21 THE COURT: Uh-huh.

22 MR. POWELL: I believe, again, to our initial petition.

23 THE COURT: Actually filed on February 10th?

24 MR. POWELL: Yes, Your Honor. That they have basically included
25 counterclaims in that, again, titled answer. They are -- they have sought the

1 enforcement of the "no contest clause" contained in the Trust. They also, as well,
2 have made a counterclaim for, essentially, Tortious Interference with Contract. Our
3 position is, is that those counterclaims must be dismissed and struck, due to the fact
4 that they weren't raised in a timely manner. They followed -- they have filed multiple
5 pleadings in this matter that could easily and were responsive pleadings.

6 They did not ask leave of this Court, after those pleadings were filed,
7 and those pleadings were actually already responded to by the Petitioner; so they're
8 not timely in any way, shape, or form. They should not be within the scope of this
9 hearing, which is a hearing solely on the -- our initial Petition for Declaratory
10 Judgment.

11 THE COURT: Okay, thanks. Mr. Mugan.

12 MR. MUGAN: Thank, Your Honor. Quite frankly, my recollection is that the
13 very first time we were here I did comment to the Court that, that we -- when we
14 were talking about moving this on a fast track, that we, in all likelihood, would have
15 counterclaims. And we had just -- what we were hearing was a motion to send it
16 back to the Probate Commissioner and we hadn't filed an answer at that time
17 because we were concerned with -- we would have been submitted to jurisdiction
18 before Your Honor.

19 Quite frankly, like I said, our concern is Claim Preclusion. It's been
20 broadly expanded in Nevada under the *Five Star Capital* case, which you're
21 certainly aware of. Also, determination is also somewhat subjective as to whether
22 you have compulsory counterclaims or permissive counterclaims. And so we, quite
23 frankly, just, just filed it to protect the record.

24 THE COURT: Okay. Well, I guess my question for today is that if these -- I
25 understand the issue of protecting the record, but how we are -- do you expect to

1 produce evidence and actually argue these? Because, isn't the Petitioner entitled to
2 an opportunity to answer the counterclaims? And would there need to be something
3 done with respect to the counterclaims in this proceeding? I'm just -- I'm not
4 understanding what you anticipate happening.

5 MR. MUGAN: Oh, I kind -- kind of depends how the trial goes, Your Honor.
6 We may seek enforcement of the counterclaims, we may not. And that's --

7 THE COURT: Well --

8 MR. MUGAN: -- not a very good answer, and I apologize.

9 THE COURT: Right. But that -- that's -- that just kind of begs the question, is
10 if you -- if the parties wish to litigate the issue raised in this counterclaim, can we go
11 forward today?

12 MR. MUGAN: I think you're the only one who could answer that, Your Honor.

13 THE COURT: Okay, all right, thanks. So, Mr. Powell.

14 MR. POWELL: Yeah.

15 THE COURT: That's kind of the whole issue is if -- if they're entitled to raise
16 counterclaims, if this is something that has to be all litigated at one time, then are
17 there -- are there matters that are preliminary that we can deal with at this time, in
18 this hearing, and the issues raised in the counterclaims are preserved and can be
19 litigated at a later date?

20 MR. POWELL: I, I believe so, I mean that's always been my understanding of
21 filing a "no contest clause" is, there's no -- there's no requirement that it all be
22 thrown in with the kitchen sink, especially when the petition itself is seeking an
23 enforcement of rights. Depending on what the outcome of this trial is, that's
24 obviously relevant as to even the basis or the opportunity to even bring such claims.
25 But having said that, the scope of this is limited to what the Petitioner has brought

1 before the Court.

2 If they wanted to bring these counterclaims in a timely fashion, they
3 could have done so, or they could have also sought the leave of this Court to amend
4 to do so; they didn't do either one of those. So I'm not obviously going to tell you,
5 legally, whether these claims have to be brought now or they can be brought later,
6 but the fact of the matter is, they go beyond the scope of what we're here today for.
7 And if they were intended to be raised and dealt with in this matter they could have
8 been raised from the outset.

9 Mr. Mugan appears to be telling you that he raised these orally and had
10 a viewpoint of these well, they should have been briefed then. They should have
11 been raised, in writing, at a reasonable time, not on, essentially, the eve of trial.

12 THE COURT: Well the -- the petition that we're here has a, you know,
13 Section E discusses damages:

14 "The -- that Jacque and Kathryn, having incurred substantial
15 attorneys fees and costs and having to seek declaratory judgment,
16 based on the unwarranted actions of Ms. Ahern, hereby request they
17 hold her responsible -- the Court holds her -- Ms. Ahern responsible for
18 damages triggered by her unjustifiable and unwarranted actions."

19 Citing 123.031 to 164.005.

20 They went on to discuss:

21 "Damages will be set forth in an additional early petition that
22 would be filed shortly hereafter."

23 So is there another petition that addresses --

24 MR. POWELL: The damages?

25 THE COURT: Damages?

1 MR. POWELL: No, the -- the point of -- the point of presenting that is,
2 obviously, not knowing how this case was going to go --

3 THE COURT: Uh-huh.

4 MR. POWELL: -- when it was eventually going to end; it's impossible to
5 compute full and complete damages --

6 THE COURT: Okay.

7 MR. POWELL: -- until we're fully done.

8 THE COURT: So it was always anticipated that you were seeking to do this, I
9 guess, in stages?

10 MR. POWELL: Exactly. At least as to damages.

11 THE COURT: And the actual credit for relief is that --

12 MR. POWELL: The declaratory ruling itself.

13 THE COURT: -- "Eleanor C. Ahern, also known as Eleanor Marguerite
14 Connell Hartman, both individually and in her capacity as the
15 Trustee of the W.N. Connell and Marjorie T. Connell Living Trust
16 dated May 18, 1972, is entitled only to 35 percent portion of all
17 real property located in Upton County, Texas, including the
18 income generated from gas, oil, and mineral leases."

19 And paragraph B:

20 "That Jacqueline Montoya, in her capacity as beneficiary
21 and as the Trustee of the MTC Living Trust dated December 6th,
22 1995, and in her capacity as beneficiary of the power of
23 appointment exercised by Marguerite T. Connell over her trust.

24 Number 3, of the W.N. Connell and Marjorie T. Connell
25 Living Trust dated May 18, 1972, and Kathryn Bouvier, in her

1 capacity as beneficiary of the MTC Living Trust, and her capacity
2 as beneficiary of the power of appointment exercised by
3 Marguerite T. Connell.

4 And Trust No. 3, over the W.N. Connell and Marjorie
5 T. Connell Living Trust, entitled to 65 percent proportionate share
6 of all his major lad, and such other and further relief.”

7 So, what the purpose of the hearing was today, was specifically two
8 things: First, to determine if the 65/35 apportionment should be enforced by this
9 Court. So then, if you look at the counterclaims asserted in the answer and the
10 counterclaims, they’re -- they answer certain, you know, affirmative defenses. And
11 in the counterclaim there’s several -- the first is: Intentional Interference with
12 Contractual Relations.

13 Just, in reading that one where it says that Eleanor’s entitled to at least
14 35 percent and there’s some intentional acts interfering with her receiving that. And
15 then the Second Claim for Relief is Enforcement of the No Contest Clause. And
16 then, Declaratory Relief that the Court Deny the Petition for Declaratory Judgment.

17 And, in the alternative, listed are the terms that Eleanor is the sole
18 beneficiary during her life, and then enter a judgment against Petitioner for
19 Intentional Interference with Contractual Relations, Seeking Punitive Damages,
20 Interest, and Attorneys Fees.

21 So, it seems to me that if someone is going to assert a claim against --
22 a counterclaim against the Plaintiff in which they are seeking not only damages, but
23 punitive damages, that that’s something that that party would want to know, in
24 advance, and be able to prepare for --

25 MR. POWELL: Correct.

1 THE COURT: -- in -- before litigation, this was done.

2 MR. POWELL: Okay.

3 THE COURT: So that's where I'm just at a loss as to understand why this
4 came up two weeks before the trial. If that -- one week before the trial. Had this
5 been raised in any previous hearings, Mr. Powell? No? Okay.

6 So, Mr. Mugan, let's discuss this. The original petition seeks this
7 determination of the 65/35, and who was hopefully going to be entitled and they
8 properly exercise this appointment. We had all these problems because we have all
9 these level of trusts, and so -- but I guess it's the -- even if we were to go forward on
10 those issues -- if that's what I thought we were here about.

11 Now, we have raised this whole issue of not only of, you're wrong in
12 your analysis and you shouldn't -- the Petitioner's are not entitled to the road you're
13 seeking, but oh, by the way, there's also been this tort committed, and there should
14 be damages for that tort, and there's a "no contest" clause, and that should be
15 enforced. And oh, by the way, you owe punitive damages.

16 MR. MUGAN: We --

17 THE COURT: Seriously?

18 MR. MUGAN: I'm sorry.

19 THE COURT: On one week's notice?

20 MR. MUGAN: Well, if you -- if you look at the history of this case, quite frankly
21 it's -- the history is somewhat strange. It's very, very -- on the fast track. This case
22 was filed in September.

23 THE COURT: Uh-huh.

24 MR. MUGAN: And I think it got a priority because there was a case back in
25 2009 that was, you know, fully disposed of --

1 THE COURT: Uh-huh.

2 MR. MUGAN: -- back in 2009, and so it -- it was treated as if it'd been filed
3 back in 2009 and that's why we're here. And so, very, very fast track --

4 THE COURT: Uh-huh.

5 MR. MUGAN: -- from September to now. And we -- if you recall, any
6 pleadings that we filed were in responses to motions for, you know, injunctions,
7 release, you know, affirmative injunctions, et cetera --

8 THE COURT: Uh-huh.

9 MR. MUGAN: -- et cetera. And in our pleadings -- responsive pleadings to
10 those things, which are not a true responsive pleading to the petition, we did
11 mention in the bad faith, I believe, section, unclean hands. We did mention
12 Intentional Interference with Contractual Relations. Again, you know, this has just
13 been so, so fast. And I, I know I mentioned -- I don't know if it's the first hearing or
14 the second hearing. I know I, I had -- I clearly remember, although I'm an old dog
15 and I -- my ideas come by freight, not express anymore.

16 But, I clearly remember stating something to the effect -- when we're
17 talking about the February 18th, or the trial stack. I remember specifically
18 mentioning: Well, you know, we may very well be filing counterclaims and, you
19 know, I, again, I practiced 40 years and I've never seen this done in stages. And
20 again I go back to the --

21 THE COURT: Well, that's my whole point is, how would you do that? I mean
22 it, it -- this is -- I'm just at a total loss as to understand how we could be here, literally
23 on the eve of having a trial on this, and all of a sudden there are counterclaims filed.
24 And they're not just counterclaims, because I would assume that if there's a "no
25 contest" clause, it's going to be raised. I mean, I think anybody would.

1 But this Intentional Interference with contract, you know, tort action and
2 alleging punitive damages with respect to that, to me that's just, that's just off the
3 rails. I mean, what -- why -- how could you possibly litigate that on a week's notice?

4 MR. MUGAN: Well, like I said we -- it's been in our responsive pleadings.
5 And I believe I orally raised it the first or second hearing and, you know, as this
6 Court, I believe is -- well, is aware of, since you issued an order directing the oil
7 companies to release the suspended funds.

8 There were letters from Mr. Powell's side, not Mr. Powell himself but,
9 but representatives of his client to the oil companies, not only asking them to
10 suspend the 65 percent that's in dispute, but also the 35 percent that my client is
11 entitled to, of which there is no dispute. And they wouldn't release the funds without
12 this Court's order.

13 And if, in my humble opinion, I believe that's Intentional Interference
14 with a Contractual Relation to -- and cause my client damages. She still hasn't
15 received the funds. The Trust still hasn't received the funds. My client had to
16 borrow money to pay the taxes --

17 THE COURT: Uh-huh.

18 MR. MUGAN: -- on the real estate. So I mean, there are damages that were
19 suffered by the Trust and my client. And again, I come back to the expansion by
20 Nevada of Claims Preclusion. It's not the old *Tarkanian* case, it's now *Five Star*
21 *Capital* where the standard is: Any claim that could have been raised in the
22 litigation, you have to raise, and that scares the death out of me.

23 THE COURT: Sure.

24 MR. MUGAN: And I don't want to not raise these things.

25 THE COURT: Typically it would come up more than a week earlier. I mean,

1 that's my, that's my problem here. I just -- because the Petition for Declaratory
2 Relief -- we -- it was heard on November 12th, set it on a very short time-frame, 90
3 days. The -- because it was -- it was -- as I understood this was just about: How do
4 you interpret this -- these -- you got multiple wills, what was everybody's intention?
5 65/35 or a 100 percent? So that's -- it was kind of one or the other, I thought that's
6 what we were here to talk about. And now, a week before this trial I'm told: No, that
7 in addition, we have these other actions. And oh, by the way, there's "no contest"
8 clause, and really, that should bar this whole thing.

9 I just -- how are we ever supposed to get done on this kind of short
10 notice? I'm just -- I'm sorry if, if I seem amused, but I'm just -- it's not amusing, it's
11 just I -- I'm just sort of -- I should -- I should say I'm more befuddled because it's -- I
12 mean, if this is what this was intended to be, then shouldn't everybody have been on
13 notice of that a long time ago?

14 MR. MUGAN: Like I said, I, I -- it's raised in some of our responsive pleadings
15 to their request for affirmative defense. We specifically state in there. I orally stated
16 it at the first or second hearing. If the Court wants to give Mr. Powell and his client
17 time to respond to this I -- as much as I hate to it will, you know, if you want to --

18 THE COURT: Okay, I will --

19 MR. MUGAN: -- continue it or --

20 THE COURT: I'll tell you what the minutes are. The minutes on the -- and it
21 is the second hearing, it was a hearing in January, January 14th:

22 "Argument by Counsel as to Claim Preclusion and whether the
23 elements had been met since the matter was brought before the
24 Court in 2009 on reformation and clarification as to beneficiary in
25 the event of beneficiary's death. Elements for Claim Preclusion

1 have not been met since there is no way to anticipate that four
2 years later the Trustee would change the distribution for those
3 issues that had been raised in 2009.”

4 That was it. It was a Motion to Dismiss, because there were Claims
5 Preclusion that should have all been done in 2009. And I said: “No, what happened
6 in 2009 has nothing to do with the Trustee changing her mind in 2013.”

7 That was the context in which Claims Preclusion was discussed --

8 MR. MUGAN: No.

9 THE COURT: -- respectfully, sir.

10 MR. MUGAN: Well, that’s what claims -- that was the issue on the Claims
11 Preclusion, but you -- you considered two motions that day if my recollection --

12 THE COURT: Right. We had a Motion to Compel the Trustee --

13 MR. MUGAN: Trustee to Distribute.

14 THE COURT: -- to Distribute Accrued Income and Future Income Proceeds
15 from Oil, Gas, and Mineral Leases, and Declarations for the [indiscernible] of
16 Laches.

17 MR. MUGAN: No.

18 THE COURT: Yes. Okay.

19 MR. MUGAN: And in our pleading one of the issues, of course, on an
20 injunction, under Nevada law, is the likelihood or probability of success at the
21 ultimate case, and we went through --

22 THE COURT: Uh-huh.

23 MR. MUGAN: -- a rather detailed analysis. And one of our points was
24 unclean hands or bad faith, and we pointed out two or three situations, and one of
25 them was this Interference with Existing Contracts, the 35 percent. And if you recall,

1 the very, very first hearing we had the issue came up and Your Honor said, you
2 know, you know, you would issue an order directing the oil companies to release the
3 suspended funds, and 65 percent would be held in trust and the other 35 percent my
4 client could do with as she wants, and that was the very first hearing.

5 And when it got put on a February 18th stack I -- I remember mentioning
6 that, you know, we may have counterclaims here, so it may be a little bit more
7 complicated; maybe a little more time consuming.

8 THE COURT: Okay. I, for one, would have appreciated knowing that
9 sometime before --

10 MR. MUGAN: Well, I apologize I --

11 THE COURT: -- a week before trial.

12 MR. MUGAN: -- I apologize.

13 THE COURT: Because I don't understand how we could possibly do this, this
14 is -- I agree with you, that you have issues here where if -- if these claims are
15 dismissed, which is Mr. Powell's request, then we have issues of Claim Preclusion
16 and Issue Preclusion. On the other hand, I don't understand -- and that's why I said:
17 "Can you go forward in stages on this?" And --

18 MR. MUGAN: I don't think so.

19 THE COURT: -- and I appreciate your position that though you can't, and Mr.
20 Powell's position: Sure, why not. But, didn't we already kind of deal with the going
21 forward in stages by saying: Why doesn't the oil companies just distribute the funds
22 as they've been doing forever? They just -- they don't want to be distributing funds
23 to the wrong people, I understand that. They don't want the liability. Okay, fine.
24 Why can't we just hold these funds and we'll litigate it and figure it out? And I
25 thought that's what we were doing, and that what we were here today was to figure

1 that out.

2 Now I'm told: No, that there were other damages, and oh, by the way,
3 there's also a "no contest" clause that we want to litigate. And it seems like that --
4 they should have had more notice of that. So, on the one hand, if the court were to
5 grant Mr. Powell's motion, then that's prejudicial to the Trustee, so that's a problem
6 there. On the other hand, he's right, this is really late notice of these claims. So I
7 guess my -- I guess maybe our -- we didn't have expectations set properly as to who
8 -- what we were going to actually be doing here today.

9 And so I'm, you know, I'm more than happy to discuss what the parties
10 expectations are of this litigation going forward, because it seems to me that what
11 we were trying to do was to maintain the status quo until we could make a
12 determination as to who's correct in their interpretation of these documents, and
13 that's -- ultimately that's my job. So, more -- I thought that's what we were here to
14 do.

15 So, maybe there are other claims involved, that's what the counterclaim
16 is telling me. So, okay, well then, that's a different case, and so, how can we go
17 forward, or what can we go forward with at this point in time, if anything? Or -- and
18 now Mr. Mugan's telling me that it didn't -- it didn't work to tell the oil and gas
19 companies in Texas: Go ahead and start distributing these funds.

20 And I think that part of that problem is there's -- for some reason,
21 litigation going on in Texas too. So, Mr. Powell, I'm just trying to understand what it
22 is that could be done here, because as it's been pointed out, if these claims arise
23 under this same case -- and my recollection, talking about Claims Preclusion, was
24 only in the context if -- this all started in 2009.

25 MR. POWELL: Correct, Your Honor, and my point of view --

1 THE COURT: And the problem with probate is, it never ends.

2 MR. POWELL: Yes.

3 THE COURT: Cases never end.

4 MR. POWELL: Yeah. We have decedents that pass but their cases still go
5 on.

6 THE COURT: I mean, Charles Dickens wrote a novel 150 years ago, it's still
7 true today.

8 MR. POWELL: Exactly, yeah. Your Honor, the counterclaims and the basis
9 for them -- let's say the Tortious Interference with the Contract, that's a tort. I don't
10 even know how that would actually even be litigated in front of Your Honor as -- as
11 Probate Judge. That's a civil matter.

12 THE COURT: Why? Because I have the jurisdiction to do it.

13 MR. POWELL: Yeah, that's a civil matter. Well --

14 THE COURT: I -- I do also --

15 MR. POWELL: Okay, okay. Well, let's just say that it --

16 THE COURT: It's an "A" case.

17 MR. POWELL: It's an "A" case, exactly. And under here, we're not under an
18 "A" case. So if we were under --

19 THE COURT: So they file an "A" case and it gets consolidated. It happens all
20 the time.

21 MR. POWELL: Okay. Well, at least they would file it and they would make
22 their allegations, and we'd have time to counter and all that.

23 THE COURT: Right.

24 MR. POWELL: My view is: This does go in stages. What we were, as you
25 know, we are the Petitioner. We have asked for Declaratory Judgment. The

1 supposed Interference with the Contract --

2 THE COURT: Uh-huh.

3 MR. POWELL: -- how is that related to the Declaratory Judgment action?

4 That's a separate action, totally and apart. Circumstances are totally separate and
5 apart. Mr. Mugan is claiming that was triggered during the course of this. Well, it
6 wasn't -- it wasn't at the same time that these events have given rise. The "no
7 contest" is something that's only, basically conditional, on what the outcome of this
8 matter is. That also involves, as well, a determination far beyond what we're here
9 today too is, whether or not this action is being brought in good faith. There's many
10 other levels of analysis that there's no possible way that we could expect to get into
11 at this point.

12 So, my point of view is, there's no harm to Mr. Mugan to allow him, after
13 the fact. I've never heard of a situation where you have to, basically, throw the
14 kitchen sink out. It -- already into everything in anticipation that you're going to
15 prevail, and otherwise as well. Again, I can't calculate, for you, as of this moment
16 the amount of damages we're asking for, because we're not yet done. And I don't
17 know where we're going so, I won't know till the full extent, till we're done.

18 Likewise, with Mr. Mugan, if he wants to bring his claim for Enforcement
19 of a "no contest" clause, we won't know if that's even a valid ripe issue or anything
20 until we're even done here. So to litigate this --

21 THE COURT: Why wouldn't -- why wouldn't it be an affirmative defense to
22 your clients?

23 MR. POWELL: I'm not -- I'm not understanding how -- how enforcing one's
24 rights -- seeking enforcement of one's rights under a trust would somehow then,
25 also bring in a violation of a "no contest" clause. That's a separate and apart matter

1 to be litigated and I don't believe, again, there's any reason why that needs to be
2 brought here.

3 But again, if it did, there was ample opportunity. And let -- I -- I'd -- I
4 would like to remind the Court, we were very much liking to get this case on early. It
5 was Mr. Mugan that said, "I need additional time." It was under Mr. Mugan's request
6 that we push this out to the extent we did, because he needed sufficient time to
7 analyze his case, make claims, do whatever he did.

8 THE COURT: Uh-huh.

9 MR. POWELL: He's had that time. As you've pointed out, he's had that time.
10 But for the first time, in this matter, we get an answer that contains counterclaims.
11 Well, he's saying I raised them before in oral argument. I eluded to them before.
12 What was -- what -- was there any prejudice? He could have brought these at any
13 time in a timely manner.

14 In fact, the first case -- the first hearing was saying: I need to do this.
15 I'm going to intend to brief this more and do this. Filing an answer, again, titling
16 something in answer is disingenuous. There's already multiple response of
17 pleadings that went to the merits and substance of this case filed ahead of time.

18 So to say: Well, this is our answer and we're bringing counterclaims on
19 our answer now. Your Honor, I would ask that you look at -- look at -- see what has
20 already previously been filed and look at the substance of what was. Those were
21 direct responses. Those were answers, not titled as answers, but those were
22 answers. Those were responsive pleadings, to which then they were responded to.

23 Mr. Mugan's had ample opportunity to ask this Court for leave to amend
24 if -- if he wanted to, so this is -- this is a distraction to what -- to what we're doing
25 here today. And, in my opinion, there's no reason why we can't separate these

1 things off. Mr. Mugan can bring his --

2 THE COURT: I'm trying to understand how the declaratory relief that you
3 were seeking --

4 MR. POWELL: Uh-huh.

5 THE COURT: -- how it can be affirmative defense to the relief that you're
6 seeking, is that there's a "no contest" provision in the Trust -- how you can not
7 litigate those at the same time? That's what I'm not understanding.

8 MR. POWELL: I -- I don't have a response for you other --

9 THE COURT: I agree with you that the damage -- I agree with you that the
10 damage is, that your client's damages are -- if they're successful, your client's
11 damages versus if the Trustee is successful, her damages and her -- and her tort
12 claim --

13 MR. POWELL: Yeah.

14 THE COURT: -- would be -- have to be resolved at a later date. I don't think
15 those are --

16 MR. POWELL: Yeah. Your -- Your Honor.

17 THE COURT: -- ripe, at this point.

18 MR. POWELL: Yeah.

19 THE COURT: The point -- but I'm not sure that I understand how you could
20 do the "no contest" clause at --

21 MR. POWELL: I --

22 THE COURT: -- any other time than in a determination of, are they entitled to
23 the relief sought in the petition, or does the "no contest" clause bar it?

24 MR. POWELL: And that's, I guess, the question of is, to me, that's not an
25 affirmative defense, that's a remedy. A "no contest" clause is a remedy. I don't

1 know of any "no contest" clause that says, you cannot seek to enforce your rights
2 under a trust. So it --

3 THE COURT: Well, this one says --

4 MR. POWELL: So -- so to me to classify it --

5 THE COURT: -- "The grantor specifically desired that these trusts, created
6 herein, be administered and distributed without litigation or
7 dispute of any kind. If any beneficiary of these trusts or any other
8 person, whether stranger, relatives or heirs, or any legatees or
9 any nemeses, under the last rule and testament of the grantor's
10 and successors interested in such person, including any person
11 who may be entitled to receive any portion of grantor's estate,
12 under the intestate laws of Nevada, seek to establish, to assert,
13 any claim, to assets of these trusts established herein, or attack,
14 oppose, or seek to set aside the administration or distribution of
15 said trusts, or have the same declared null and void, or
16 diminished, or to defeat or change any part of the provisions of
17 the trust established herein. Then, at any and all the above
18 mentioned cases and events, such person or persons shall
19 receive one dollar, and no more, in lieu of any interest in the
20 assets in place."

21 MR. POWELL: Okay, that's a remedy though. That's a remedy if -- if you find
22 that a "no contest" clause is violated; that's not a defense.

23 THE COURT: Okay. Anything further, Mr. Mugan?

24 MR. MUGAN: Yes, Your Honor. You know, again, I'm an old dog and been
25 practicing for 40 years. It doesn't mean it's right or wrong, but I have never ever

1 seen a similar case like this where, you know, the "no contest" clause is not
2 considered. And again, especially in light of Nevada's change in Claims Preclusion,
3 in the much broader scope and applicability of it, I think it's a, you know, it's an
4 affirmative defense, and it's a serious concern.

5 On the amount of damages, you almost never know what your
6 damages are going to Court, that's why you plead your damages will exceed
7 \$10,000s, because that's the job of the jury or the Court. I mean, you can't put a
8 dollar and cents sign on it at that point in time. So, I mean, that -- that's why Nevada
9 Courts allow you to say more than \$10,000s. And this Texas, you know, this
10 litigation, you know, is directly tied to what happened with the oil companies. The
11 three letters which have been --

12 THE COURT: Which litigation? The Texas litigation or this litigation?

13 MR. MUGAN: Well, the Texas -- the Texas litigation is another problem, quite
14 frankly --

15 THE COURT: Uh-huh.

16 MR. MUGAN: -- which I raised before with the Court. The Texas litigation is
17 over the probate of Marjorie Connell's will and whether the probate proceeding is
18 proper, and that action is pending down there. And we all thought it would be done
19 before we ever started and then they had expert witness problems, if you recall,
20 leukemia or something and -- and couldn't testify. And so, that's been my
21 understanding -- indefinitely postponed.

22 And so, that -- the will -- the will has never been determined valid. And
23 again, that's the whole premise or predicate, you know, on their -- on their case.
24 And how this Court can determine 65 per -- you know, worse case scenario, 65
25 percent, based on a will that -- a purported will that exercises a testamentary power

1 of appointment that has not been determined valid yet, and there's pending litigation
2 in Texas; that's hard for me to understand.

3 But they want to go ahead with it, I -- I think they got problems, but
4 that's not my decision. You know, I think -- I don't know if the issue's ripe, I don't,
5 you know, burden of proof, I don't know; that's for the Court to decide. But, two
6 days after the petition was filed in this case, two days after they filed their petition,
7 there are three letters that went to the oil companies and the parties have stipulated
8 to them as admissible.

9 And they're from Mr. Powell's Client's, Texas Attorney, and says:

10 I'm writing on behalf on, of my client, so and so. Plaintiff in
11 cause number P09, et cetera, in the matter of the W.N. Connell and
12 Marjorie T. Connell Living Trust dated May 18, '72. The lawsuit
13 concerns oil and gas royalty and interest payments. I enclose a
14 copy of the file petition and confirmation of filing for your reference. We
15 will follow up with file marked copies of the petition once we receive it.
16 Due to the dispute, et cetera, we request a hold in suspense, all
17 payments, until this lawsuit has been resolved, et cetera.

18 And I paraphrased a little bit.

19 So, it did come up as a result of this lawsuit. And I don't want sometime
20 in the future, after this is over and done -- and I don't know how you do it in stages,
21 you know. How you -- how you have one lawsuit --

22 THE COURT: I think a more effect --

23 MR. MUGAN: -- now and one later.

24 THE COURT: -- I think, Mr. Mugan, respectfully, I think a more effective way
25 to deal with this would have been to have requested a continuance, because this

1 has been a colossal waste of the Court's time, of Counsel's time, of the 20 people
2 sitting in this courtroom's time. If this case is really not appropriate to go forward at
3 this time, I don't understand why a simple request to continue it was not put before
4 this Court.

5 I never received a request to continue this trial. It seems to me that
6 filing an answer in which -- and I would agree with you that they are claims that are
7 related to the underlying action and they're appropriately brought here, whether as
8 Mr. Powell pointed out, it's more appropriate to bring them as an "A" case and we
9 can consolidate into this case, or whether they could just be asserted on their own.
10 I, you know, I think they can, because as quote, "The Probate Judge," and the way
11 our jurisdiction runs in this State, I have jurisdiction to hear those probate matters
12 and civil matters; that is my jurisdiction.

13 That filing a pleading that not only asserts a tort cause of action but
14 seeks -- this is the thing that just blows my mind, punitive damages on a week's
15 notice to somebody is, is -- I don't know how anybody could possibly anticipate that.
16 I don't, you know, any -- I haven't practiced law as long as you have, but I can tell
17 you any time I got a Complaint that alleged punitive damages against my client, the
18 first thing I did, and however longer it took me, was to work on getting those
19 dismissed. Because that's a terrifying thing to us, even an allegation of punitive
20 damages. It is a financial ruin of a family, and I don't take it very lightly to have it
21 asserted against somebody.

22 And it is appalling to me that it would be done on a week's notice. If, in
23 fact, we need to litigate the issue of the import of a "no contest" provision, I agree,
24 that should have been -- that's absolutely part of this whole thing. But the thing that
25 just blows me is this -- is this counterclaim -- this tort, and the allegation of punitive

1 damages. I just think it's a -- it's shocking that it would be done with no prior notice
2 to the parties that that was relief that was going to be sought at this time. I, you
3 know, I don't know what -- what you expect me to do with this.

4 But I would submit that a more appropriate thing to do with this would
5 have been to have requested a continuance because the case is not ripe. And if
6 you're telling me all this now, I don't appreciate being told, today, that this case that I
7 understood, back in November was ready to go, that all we had to do was an issue
8 of interpretation of these pleadings, because the issue in Texas was going to be
9 dealt with.

10 And yes, you did tell me, in January, that there was a problem with the
11 Texas litigation, but I'm not amused by this. I think it is a sneaky trial tactic and
12 entirely inappropriate. And I just don't know what you expect me to do with it other
13 than to give Mr. Powell's clients the opportunity that they deserve to contest -- as I
14 said, the financial ruin of their families. And I would ask Mr. Powell -- I understand
15 you want to go forward today, but respectfully, Mr. Mugan is correct if, in fact, the
16 "no contest" clause is enforceable as -- that all has to be determined.

17 If this is somehow contingent on what's happening in Texas, because
18 nobody's ever told me what's going on in Texas, other than that there's somebody
19 who's sick and they can't decide what's going on in Texas. Then, if somebody
20 would just tell the Court instead of playing hide the ball, there's something going on
21 in Texas but we can't tell you about it, we're just going to tell you what's going on
22 here. This is infuriating and I am -- it seems to me that what is happening here is an
23 attempt to play games with two different court systems.

24 Oh well, we can't figure what's going on in Texas because it doesn't
25 relate to you but we'll litigate our stuff here. And then, oh, by the way, we can't

1 really do anything here because there's this stuff going on in Texas. I know what
2 the Texas judge is being told, probably something pretty similar. And it is shocking
3 to me that a party would use the Courts in this fashion. And I find it appalling. And I
4 would like to know what relief you want, Mr. Powell, for this?

5 Because I'm not going to dismiss their claims. I believe they are
6 compulsory; I'm not dismissing them.

7 MR. POWELL: Okay.

8 THE COURT: I think there's time to litigate them.

9 MR. POWELL: Okay.

10 THE COURT: But, what are your attorneys fees for getting ready for today?
11 Submit an affidavit, they're granted.

12 MR. POWELL: What's that?

13 THE COURT: I said: "Submit an affidavit and I'll grant your attorneys fees."

14 MR. POWELL: Okay.

15 THE COURT: What else do you need?

16 MR. MUGAN: May I respond, Your Honor?

17 THE COURT: No.

18 MR. POWELL: I'm trying to think here. Could we just take maybe a
19 momentary break --

20 THE COURT: Okay.

21 MR. POWELL: -- so I could collect myself?

22 THE COURT: We'll be in recess.

23 COURT MARSHAL: All rise.

24 [Proceeding recessed at 10:48 a.m.]

25 [Proceeding resumed at 11:38 a.m.]

1 MR. POWELL: We have all these issues dealt with at one time. We are -- we
2 won't seek to upset that.

3 THE COURT: Okay. All right. Mr. Mugan, how much time do you think you
4 need to get this thing back on track?

5 MR. POWELL: I'll leave that to Mr. Powell, whatever, you know, I -- we'll
6 certainly cooperate, whatever's reasonable. You know, I -- whatever Mr. Powell
7 thinks, as long as it's reasonable and, and --

8 THE COURT: Okay.

9 MR. MUGAN: -- and if I may, Your Honor, not now, but I would like to make a
10 record and a professional statement. I would -- I would ask the Court the
11 opportunity to do that. I have been accused of certain things this morning and I
12 think I have the right to respond to them.

13 THE COURT: Okay, sure.

14 MR. MUGAN: Thank you.

15 THE COURT: Absolutely. Okay, so Mr. Powell, how much do you think
16 you're going to need to --

17 MR. POWELL: We --

18 THE COURT: -- file a responsive pleading and do whatever discovery's
19 necessary?

20 MR. POWELL: Your Honor, to be candid with you. In terms of the Tortious
21 Interference with Contract Claim, we would certainly need to either totally transfer
22 the defense on that claim to another counsel or at least associate co-counsel --

23 THE COURT: Uh-huh.

24 MR. POWELL: -- on that issue. So, in terms of a ballpark I'm fairly open, but
25 I -- whatever the Court's calendar reflects as being reasonable, I'm fine with.

1 Whatever you think -- we would move expeditiously to try to get this inappropriate
2 answer taken care of. I don't know if we need to reset -- we need to re -- put this
3 obviously on a new stack. Re -- have new trial hearings, new briefs, obviously, that
4 whole thing. So, I don't know if we want to look at this as though we're starting
5 anew or continue basically put shelving -- the issues that have already been briefed
6 and simply briefing only these new issues, or whether we want to scrap everything
7 that's already been submitted and restart completely.

8 Obviously as to exhibits --

9 MR. MUGAN: Right.

10 MR. POWELL: -- obviously those would probably need to be rearranged to
11 some end and, again, we will -- at least as to the Tortious Interference, definitely
12 need to either have that totally transferred to new counsel or co-counsel. So, I don't
13 -- whatever -- whatever the Courts [sic] has in mind. We'll move as efficiently as we
14 possibly can, though.

15 THE COURT: All right. Well, I think that one thing that Mr. Mugan discussed
16 earlier was that, efforts to get the funds going back into the trust apparently are --
17 have not been --

18 MR. POWELL: And I can't respond to that other than it's my understanding,
19 at least on our side, and Mr. Guerrero who is Counsel in Texas, who actually has
20 had -- those are his letters, and he's been conversing with the oil companies. Our
21 impression was -- is that, based on your order, those were restarted again, so it's
22 news to us this morning that those have now -- those have still not yet been
23 honored.

24 MR. MUGAN: Excuse me --

25 MR. POWELL: The order that was signed by Mr. -- was presented by Mr.

1 Mugan, that was consented, by me, and signed without any, any issues. So there
2 was no attempt to block this Court's declaration that those monies were to be
3 starting up again when you made that ruling, Your Honor.

4 MR. MUGAN: My, excuse me, Your Honor, excuse me, Mr. Powell. Maybe I
5 can add to this. My understanding is that the oil companies have agreed to lift the
6 suspension, they just haven't sent the monies yet.

7 THE COURT: Okay. So then, given that, if the effort was to -- I guess not --
8 we weren't -- maintain the status quo, but we were going to sequester some funds.
9 So I guess my question is: How this is -- the problem that we have here is, this is, is
10 delaying getting to that point of where we can make a determination so the parties
11 know, going forward, this is what you can expect. You're either going to get a share
12 or you're not going to get a share.

13 MR. POWELL: Right.

14 THE COURT: I mean, they all need to know that.

15 MR. POWELL: Right.

16 THE COURT: They need to know how to plan their lives going forward.

17 MR. POWELL: And Your Honor, based on that, we'd respectfully ask that the
18 -- and you had previously indicated that on our -- on our Motion to Compel -- go
19 back to the status quo until there was an ultimate determination. You basically
20 decided that -- we're only a month away from trial and determination, but if
21 somehow we didn't get there we would need to revisit that issue. I am here to
22 request that we revisit that issue at this point --

23 THE COURT: Okay.

24 MR. POWELL: -- and ask that you invoke going back to the status quo until
25 such time as we get to trial and have an ultimate determination. Because, it's simply

1 not fair to my client and her sister, who are beneficiaries of the MTC Living Trust, to
2 not have those funds, which are substantial, and they've been relying on those as
3 we've noted, to have those come back in as, as relief, until we have a final
4 determination.

5 And just for the record --

6 THE COURT: Well, I think that we probably would -- I'm assuming that we
7 would need to have that -- I don't -- put on for a specific request to reconsider since
8 we didn't go forward --

9 MR. POWELL: Okay.

10 THE COURT: -- other than the oral request today.

11 MR. POWELL: Okay.

12 THE COURT: That was my request. My inquiry to you was, you know, what
13 are you going to need? How much time are you going to need to do these things?

14 MR. POWELL: And we'd be as expeditious as possible, but I -- I'm just
15 anticipating is if -- if again, discovery is needed, additional discovery of these issues,
16 I don't know what we're talking. We're probably talking at least a couple months,
17 probably minimum, I'm assuming. And so that, again, puts my client and her sister
18 in a severe disadvantage. So I -- I guess what we would need to do is come back
19 in, maybe even on an order shortening time on that previous petition for relief, in the
20 interim.

21 THE COURT: Uh-huh.

22 MR. POWELL: So.

23 THE COURT: Okay. So you'll renotice that request?

24 MR. POWELL: Correct.

25 THE COURT: But again, unless and until the money is flowing into the trust

1 it's kind of a moot point.

2 MR. POWELL: I guess it would be although, again, it's -- and -- and I don't
3 know what else possibly we can do. Again, our assumption was, is that, that money
4 had started flowing when they received that order, so we're just learning that
5 possibly it hasn't been distributed at this point. So, if there's an order -- if we need
6 to do another order, a joint order requesting that that get done ASAP, obviously we'd
7 be willing and able to do that, immediately.

8 THE COURT: Okay.

9 MR. POWELL: So.

10 THE COURT: So you think this is, again, just a matter of a -- of a few
11 months?

12 MR. POWELL: I believe so, although I, I again, and this is not intending to
13 take shots, but Mr. Mugan, at the outset of this case you gave him the opportunity to
14 give you a timeline, in terms of discovery, and he suggested the timeline. I had
15 suggested a much quicker timeline and so, ultimately, you decided to go with his.
16 And yet, even though today, we're still being told that this was fast tracked.

17 So, again, I want a final determination and full resolution, so that's why
18 I'm hesitant to give you a suggested timeframe, because the last time we went with
19 a timeframe, and we're at this point and then now, we're still being accused of sort
20 of fast tracking it and going way too fast, so.

21 THE COURT: Okay, thanks.

22 MR. MUGAN: If I may, Your Honor.

23 THE COURT: Mr. Mugan.

24 MR. MUGAN: Thank you. The reference to "fast track" is that, as I said
25 before, this was filed in September and we're here today in February in trial. We

1 filed a Motion to Dismiss on Claims Preclusion, which we had to do before we filed
2 our Answer in Affirmative Defenses under 12(b)(5) and that was not heard until
3 January 14th. There was not a ruling until January 14th on that. After that then we
4 filed our Answer in Affirmative Defenses, that's what I mean by "fast tracking".

5 Everything has been very, very compressed, very, very quick. I wasn't
6 referring to discovery. I will do -- like I said, our understanding is that the
7 suspension of the funds has been released or lifted -- our clients just haven't
8 received the money yet. I presume it's on its way, and we will represent to the Court
9 that we will re-contact them or have her Texas counsel, I should say, re-contact the
10 oil companies and find out why -- what the delay is and to get the funds moving.

11 Now, if I may, Your Honor, and for the record, this is a professional
12 statement --

13 THE COURT: Sure.

14 MR. MUGAN: -- treated as if I'm under oath. I've never been accused of that
15 type of behavior before. And I will state for the record: We didn't play any games.
16 We didn't hide any ball. We have witnesses here from Texas. We were ready to
17 go. As I said, we -- we had to have the hearing on our -- on our Motion to Dismiss
18 on Claims Preclusion before we could file an Answer and Affirmative Defenses. I
19 can solemnly assure the Court, I do not play those games.

20 And you can check with any judge or any attorney here or back in the
21 Midwest. I have never been accused of that before and I would never do that. And
22 Mr. Powell knows me, and I think he knows I wouldn't do that. We were here ready
23 to go. We have witnesses, we planned on a trial today. It concerns me, quite
24 frankly, your anger at me. And I want to assure --

25 THE COURT: I'm not angry with you.

1 MR. MUGAN: -- the Court that we did not play games, we did not hide the
2 ball. If you recall, the January 14th hearing, I specifically tried to explain to the Court
3 the Texas issue, that there was trying to be a probate of the will there that was being
4 attacked by Texas Counsel. And they had been scheduled to have a hearing long
5 before this date.

6 And Mr. Powell and I both assume that that issue would be over with
7 and this Court -- and presuming that either the Court down there allowed the
8 probate to go ahead or it didn't, you know, then Mr. Powell would have had to make
9 a decision as to whether the issue was ripe. And I raised that with the Court, I
10 believe at our last hearing, and I tried to explain that.

11 And Texas Counsel for Mrs. Ahern and Texas Counsel for Petitioner
12 are both here. And if you want to hear them, their version as to what happened,
13 they're more than -- at least my -- my Client's Counsel down in Texas is more than
14 glad to explain the situation down there. I don't know what goes on down there. I
15 don't have any control over that. I'm just told that an expert witness got ill, very, very
16 ill, and so, it got postponed; that's all I know. And I can't control that.

17 And if this case is premised on the validity of that will -- I can't control
18 what goes on in Texas. I don't know what goes on in Texas except what they tell
19 me, and I want to assure the Court that I don't do that kind of thing.

20 THE COURT: Well, I'm just a simple country lawyer from Las Vegas, and I
21 will just tell you Mr. Mugan, that if I were faced with this situation I would have asked
22 for a continuance.

23 MR. MUGAN: If -- if I'm --

24 THE COURT: So, I wouldn't have filed a pleading in which I allege punitive
25 damages --

1 MR. MUGAN: It -- it --

2 THE COURT: -- 10 days before a trial.

3 MR. MUGAN: Excuse me, Your Honor.

4 THE COURT: I just --

5 MR. MUGAN: If -- if I may, Your Honor.

6 THE COURT: No, I'm not angry about it, I'm just -- it's just, they're all here.

7 There are a lot of people here ready to go and --

8 MR. MUGAN: I --

9 THE COURT: -- it was all for nothing.

10 MR. MUGAN: We -- we've spent a week preparing for this. We have

11 witnesses from Texas here. We planned on --

12 THE COURT: Yeah, and I am sorry that --

13 MR. MUGAN: -- we planned on going ahead.

14 THE COURT: -- they wasted their time.

15 MR. MUGAN: And no, no, you certainly don't owe me an apology, I apologize

16 to you in the way you construe this, but it was never intended that way. We had --

17 we could not file our Answer in Affirmative Counterclaims until the Rule 12(b) Motion

18 was disposed of, otherwise we're opening ourselves to the argument that we've got

19 a true responsive pleading and we've waived those defenses, and we couldn't do

20 that.

21 And I, in my limited intellect, I have a problem. I'm not sure why we

22 should file a continuance. We filed our Answer and Affirmative Defenses and

23 Counterclaims shortly after you ruled, without prejudice, on the Motion to Dismiss for

24 Claims Preclusion. If Mr. Powell thought I was being unfair to him or he didn't have

25 time to prepare to respond to those, I would think he would file the motion to

1 continuance, but maybe I'm wrong.

2 THE COURT: Well, his choice was to file a Motion to Strike. I'm not going to
3 strike the pleadings. We -- that was his request. His request was that I strike these
4 claims, that was the other alternative, is to just strike all of this and go forward today.
5 I'm not going to do that because I think that they are your right.

6 You are right, these are valid affirmative defenses and/or counterclaims
7 and/or arise out of the same transaction we're referring. Probably if they were filed
8 as an "A" case it would have been consolidated. I agree with you, you're absolutely
9 correct, the relief Mr. Powell sought, I'm not going to grant.

10 In other words, your client can go forward with his claims instead of
11 striking it, as Mr. Powell requested that I do; that's all I'm saying. How much time do
12 you need? How much time do you think you need, Mr. Mugan? Because to me, if
13 this is what this case is going to be about -- I appreciate Mr. Powell's belief that this
14 can be done expeditiously, but in my experience, I would be shocked if this can be
15 done in a year.

16 MR. MUGAN: Are you asking my opinion, Your Honor?

17 THE COURT: Yes.

18 MR. MUGAN: I -- I think with cooperation from both sides we can do it
19 quicker than that.

20 THE COURT: Okay. I guess we have a med mal. September, looks like we
21 have two med mals.

22 [Court and Clerk confer]

23 THE COURT: See, the problem is that we -- I have to find a stack that
24 doesn't have a lot of med mals and/or preferential settings based on age. Anyone
25 over 70 is entitled to a preference, so I'm going to try to get you as close as I can to

1 120 days -- try to hear this as quickly as possible, but I can't move the med mals
2 and they have firm settings and --

3 [Service dog is heard lapping in the courtroom]

4 [Court and Clerk confer]

5 THE COURT: That's the five year rule in addition to being a med mal so, you
6 know, I can't move it.

7 [Court and Clerk confer]

8 THE COURT: Okay, we're -- I -- we're going to see if we can make it work for
9 August because September's got two med mals that I don't think are coming off.

10 [Court and Clerk confer]

11 THE COURT: Okay. Okay, well, I mean, if we're going to try to do it I -- I
12 just -- I can't promise anything with these two stacks. Obviously, September, they
13 both have a couple of med mals on them and med mals tend to go away. I just
14 didn't want to go out any, any further than I had to. If we want to put it on a stack to
15 try to -- and if you -- if it doesn't look like you're going to be able to comply with that
16 then that's one thing, but I just have to say that I, you know, I can't make any
17 promises about this, because you've got a med mal, five year rule -- not another
18 med mal.

19 No, I don't know. That's option number one, is August 11th through
20 September 5th. The next option is September 15th to October 10th, and then we've
21 got two med mals. So neither of them looks -- I mean, right now this is pretty far out.
22 As we get a little closer maybe something will fall off but, you know, at this point in
23 time it doesn't look to me like -- I mean that would be the very earliest that it would
24 be possible. And I can't promise you, you know, that it's a stack that has a lot of -- a
25 lot of white space that you can, you know, fill in, I guess, because if we'd, you know,

1 if you were going to do it in the ordinary course you'd be looking at 2016.

2 And, you know, I -- nobody wants to do that, so that's probably the best
3 we can do is put you on that stack, and if August doesn't work, see if things have
4 lightened up for September. But that -- that's really the only -- the only option I can
5 suggest is: We'll put you on the August 11th stack and hope that that -- we have
6 some movement in those med mal cases which I -- you can -- we can actually go
7 forward, because right now, there are other cases already on there that have their
8 own preferences and priorities, such that I can't make you promises that it's going to
9 go.

10 MR. POWELL: Understood, Your Honor.

11 THE COURT: Okay.

12 MR. POWELL: I want to clarify the damages.

13 THE COURT: And that -- and then I guess that's the other question is --

14 MR. POWELL: Yes.

15 THE COURT: -- you need to decide what you're going to do. If you're going
16 to bifurcate, because that's also an option, is to just go forward on certain issues
17 and not go forward on --

18 MR. POWELL: Yeah.

19 THE COURT: -- you know, the Intentional Interference claim of being -- I --
20 Mr. Mugan's right, I think he's got no choice but to bring it. But whether you want to
21 litigate it now or litigate it later is another question.

22 MR. POWELL: Right.

23 THE COURT: So you -- if you can tell us what you're going to do at -- but we
24 -- I think we need to have a plan for how we're going to go forward and what we're
25 going to go forward on, so that we're all on the same page and we don't have

1 something similar.

2 MR. POWELL: Well, as to that, again, because those are his -- Mr. Mugan's
3 counterclaims, I think he's driving the bus on those so, I mean we're -- we're --

4 THE COURT: Well, as you --

5 MR. POWELL: -- willing to be cooperative on -- on expediting anything --

6 THE COURT: Well, if you're going to talk about -- if you're going to talk to
7 additional counsel about --

8 MR. POWELL: Yeah, and that'll happen instant -- I'll work on that --

9 THE COURT: Right.

10 MR. POWELL: -- immediately so --

11 THE COURT: And that person may ask to bifurcate.

12 MR. POWELL: Sure.

13 THE COURT: I mean, it makes sense that it's an -- because I wouldn't see
14 that it have to be tried the same now, I'm just saying I think it arises out of this whole
15 thing.

16 MR. POWELL: Okay.

17 THE COURT: You have no choice but to bring it now.

18 MR. POWELL: Okay.

19 THE COURT: But, you know, it doesn't have to be tried the same. So --

20 MR. POWELL: Okay, understood.

21 THE COURT: -- that may make a difference in how much time you need for
22 your discovery. It's a pretty short time for discovery. So we'll see if you can try to
23 accommodate it but, you know, I -- I apologize if, if I offended anybody, but this is --
24 it's rather frustrating to get here and to have all these people here, ready to go and
25 this is, to me, just -- it seems a strategic choice, I'll put it that way.

1 MR. POWELL: With that said, Your Honor, on damages. You mentioned,
2 obviously, fees for preparing for this --

3 THE COURT: Right.

4 MR. POWELL: -- on my behalf. Would also like to make the request as well,
5 our lone witness and expert in this case, Mr. Daniel Garrity [phonetic] is also here.
6 We'd request that his fees as well.

7 THE COURT: You can submit something requesting that just so that Mr.
8 Mugan has an opportunity to --

9 MR. POWELL: Okay.

10 THE COURT: -- to respond.

11 MR. POWELL: Okay. Are we going to be -- are we setting the full extent of
12 damages then for an additional hearing? Is that it or --

13 THE COURT: What -- what damages?

14 MR. POWELL: Well, basically damages associated with this entire
15 continuance.

16 THE COURT: I would --

17 MR. MUGAN: Whose?

18 THE COURT: -- I was just -- I just said: Preparation for a trial; it's continued
19 because of this late, late filed additional claims. I think, you know, we have to
20 continue this trial. I think you're entitled to your attorneys fees for preparing for
21 today so.

22 MR. POWELL: Okay.

23 THE COURT: What damages?

24 MR. POWELL: Well -- well, also asking, again, for Mr. Garrity's been sitting in
25 -- in the crowd, also preparing as well, for a time when he was intending to give

1 testimony, which now he won't be.

2 THE COURT: Uh-huh.

3 MR. POWELL: So, making the request for the damages to include fees
4 payable to Mr. Garrity as well.

5 THE COURT: It's not damages. I -- I -- I'm not understanding why you're
6 calling it damages?

7 MR. POWELL: Okay.

8 THE COURT: It's fees and costs.

9 MR. POWELL: Okay, fees and costs, correct. But that's part of the fees and
10 costs of preparing --

11 THE COURT: Right. Well, you get --

12 MR. POWELL: -- for today. Then I mis --

13 THE COURT: -- you get your request for fees and costs.

14 MR. POWELL: -- mischaracterizing it.

15 THE COURT: Yeah.

16 MR. POWELL: Okay, that's what I'm asking. Submit this on a separate
17 petition?

18 THE COURT: Uh-huh, yeah.

19 MR. POWELL: Okay, okay. For today, full [indiscernible] got you.

20 THE COURT: And Mr. Mugan has an opportunity to -- oppose.

21 MR. POWELL: I wasn't -- I just wasn't sure if you were ruling on that as of --

22 THE COURT: I'm not, I'm not. I'm just saying I'm going to -- I would grant an
23 award of fees and costs. I don't know what I would grant, I'd have to see your
24 application --

25 MR. POWELL: The extent, yes.

1 THE COURT: -- because we -- I can't make an award of attorneys fees and
2 costs unless it complies with what Nevada Supreme Court says I have to have in
3 order to award fees and costs. Mr. Mugan has an opportunity to oppose it.

4 MR. POWELL: Okay, understood, so we'll do this in another petition?

5 THE COURT: Yeah.

6 MR. POWELL: Okay. And then, just again, to put on the record, we will be
7 coming -- seeking to come back in on an order shortening time as to that petition for
8 injunctive relief --

9 THE COURT: Right.

10 MR. POWELL: -- to get those?

11 THE COURT: Because I -- I can't do anything about that right now.

12 MR. POWELL: Understood, understood. So I just wanted to put that on the
13 record that that's --

14 THE COURT: Yeah.

15 MR. POWELL: -- that will be what will be occurring, so, just so we understand
16 what we will be coming back shortly on that, because it is obviously a huge issue
17 given the fact of when --

18 THE COURT: Right.

19 MR. POWELL: -- we may, next, have a determination so.

20 THE COURT: Exactly.

21 MR. POWELL: Okay.

22 THE COURT: Anything else?

23 MR. MUGAN: No, Your Honor.

24 THE COURT: Okay. Thank you. And again, as I said, I don't take any of this
25 personally, I don't blame anybody personally, I'm just simply saying, to me, this

1 appeared to be a strategic or tactical choice made for purposes of litigation.

2 MR. MUGAN: Well, for the record, like I said, I can solemnly assure the
3 Court, we did not do that.

4 THE COURT: Okay. Then we'll return your exhibits and -- because we don't
5 have any place to keep them --

6 MR. POWELL: Sure.

7 THE COURT: -- in the interim, so --

8 MR. POWELL: Okay.

9 THE COURT: -- I don't know if you want to send the runners down to pick
10 them up or you want to take them now?

11 MR. POWELL: I'll take them now --

12 THE COURT: Okay.

13 MR. POWELL: -- for me.

14 THE COURT: All right.

15 MR. POWELL: Thank you, Your Honor.

16 THE COURT: So we'll see you all in -- in August, hopefully, but otherwise,
17 you get the next thing on.

18 [Court confers with Clerk].

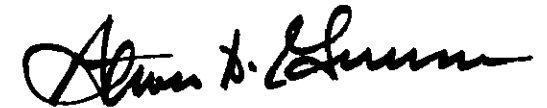
19 THE COURT: Right.

20
21 [Proceeding concluded at 12:06 p.m.]

22 ATTEST: I do hereby certify that I have truly and correctly transcribed the
23 audio/visual recording in the above entitled case to the best of my ability.

24 

25 Kerry Esparza, Court Recorder/Transcriber
District Court, Department XXVI



CLERK OF THE COURT

PETN
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DISTRICT COURT
CLARK COUNTY, NEVADA

In re the Matter of the

THE W.N. CONNELL and MARJORIE
T. CONNELL LIVING TRUST, dated
May 18, 1972

A non-testamentary trust.

Case No.: P-09-066425-T
Department XXVI, RJC

**PETITION TO COMPEL TRUSTEE TO DISTRIBUTE ACCRUED INCOME AND FUTURE
INCOME RECEIVED FROM OIL, GAS, AND MINERAL LEASES AND DECLARATION OF
THE APPLICABILITY OF THE DOCTRINE OF LACHES**

Date of Hearing: March 18, 2014
Time of Hearing: 9:00 a. m.

JACQUELINE M. MONTOYA ("Jacqueline"), as both an individual and also in her capacity as the trustee of the "MTC Living Trust" dated December 6, 1995, by and through her counsel of record, JOSEPH J. POWELL, Esq., of THE RUSHFORTH FIRM, LTD., hereby files this Petition in which she respectfully seeks that this Court compel ELEANOR C. AHERN, also known as Eleanor Marguerite Connell Hartman, in her capacity as the

1 trustee of "The W.N. Connell and Marjorie T. Connell Living Trust" ("Trust"), dated May
2 18, 1972, to distribute 65% of all income generated from gas, oil, and mineral leases, which
3 were received by the Trust from June 2013 through the present, and the same percentage
4 of all future income until further order of this Court to Jacqueline, as trustee of the MTC
5 Living Trust. Additionally, Jacqueline hereby requests that this Court declare that the
6 doctrine of laches, among other equitable remedies, requires that the status quo remain
7 unaffected and prevent Ms. Ahern from making any claim of rights affecting the 65%/35%
8 status quo when such claims could have and should have been raised 33 years ago.
9

10 **A. OVERVIEW**

11
12 Jacqueline has filed a "Petition for Declaratory Judgment regarding Limited Interest
13 of Trust Assets Pursuant to NRS 30.040, NRS 153.031(1)(e), and NRS 164.033(1)(a)"
14 ("Petition for Declaratory Judgment"). The Petition for Declaratory Judgment is currently
15 scheduled for an evidentiary hearing which will occur no sooner than February 17, 2014.
16 Because of the length of time before the hearing, it is imperative that Ms. Ahern, as Trustee
17 of the Trust, be compelled to make distributions of 65% of all income received from oil, gas,
18 and mineral rights leases to Jacqueline, as the trustee of the MTC Living Trust, from this
19 point forward. This is necessary in order to return to the status quo until a determination
20 is made on the Petition for Declaratory Judgment, and to prevent any further damage than
21 has already been caused by Ms. Ahern. Further, Ms. Ahern should be required to make the
22 same distributions to Jacqueline from June, July, August, September, October, and
23 November of 2013.
24

25
26 Ms. Ahern has breached multiple duties in her capacity as trustee, including the duty
27 of loyalty to not act for one's self interest, as well as the duty to follow the express terms of
28

1 the Trust. However, Jacqueline believes that the hearing in February, 2014 is not necessary
2 as this matter can be determined immediately by rightfully barring any changes in the legal
3 rights of Jacqueline and her sister, as beneficiaries of the MTC Living Trust through the
4 application of equitable remedies, including the doctrine of laches. The Clark County,
5 Nevada probate court is a court of equity and this matter requires that equitable remedies
6 be instituted immediately to prevent further, severe financial damage to the innocent
7 parties that are being affected by Ms. Ahern's breaches.
8

9 **B. INJUNCTIVE RELIEF**

10
11 B.1 Jacqueline believed that this matter would have been resolved by this Court
12 on November 12, 2013 after reviewing the evidence and hearing the arguments regarding
13 her Petition for Declaratory Judgment. However, a final determination was not made at
14 that hearing, and will not be made until February 17, 2013 at the earliest. Jacqueline and
15 her sister, KATHRYN A. BOUVIER ("Kathryn"), have already incurred substantial financial
16 damage because of the actions of Ms. Ahern. Waiting until February, if not longer, will only
17 increase the damages of Ms. Ahern's actions. Jacqueline and Kathryn have already been
18 harmed because since June, 2013, they have not received the income distributions that they
19 have been rightfully receiving on a regular basis for approximately the last 4 years.
20

21
22 B.2 Injunctive relief is premised on the concept that during the pendency of
23 litigation, or some other conditions necessitating a delay, an innocent party should not be
24 harmed by the actions of the defendant, especially when the actions of the defendant are
25 based solely for their own self interest and without justification.
26

27 B.3 In the case of a trust matter, it is imperative that a trustee not take action
28 without forewarning that injures a beneficiary, and in turn does not allow the beneficiary

1 to prevent the harm prior to the action being taken. This is especially true when a
2 beneficiary has grown accustomed to regular distributions in accordance with their rights
3 under the terms of the trust instrument
4

5 B.4 A trustee has multiple options under Nevada law that can be taken to prevent
6 surprise, and in turn harm, to a beneficiary when the trustee intends to take action that
7 significantly changes the status of a beneficial interest, such as unilaterally declaring that
8 a beneficiary has no further interest in a trust, as has occurred here.

9 B.5 After 33 years of a 65%/35% split of income from gas, oil, and mineral
10 royalties, the last 4 years of which involved Jacqueline and Kathryn, Ms. Ahern, as trustee,
11 could have sent Jacqueline and Kathryn a notice of proposed action pursuant to NRS
12 164.725 in which she explained that she believed that she, in her individual capacity as a
13 beneficiary of the Trust, was entitled to all 100% of the income proceeds and in turn
14 provided such explanation and evidence which led her to this conclusion. Jacqueline and
15 Kathryn could then have had ample opportunity to express their opposition to this
16 determination and Ms. Ahern could have sought court intervention on the matter, or, in the
17 alternative, could have dropped the issue entirely.
18
19

20 B.6 Another option for Ms. Ahern, in her capacity as trustee, could have been to
21 bring a petition pursuant to NRS 153.031 and ask the court to ratify her action as being
22 justifiable and appropriate. However, Ms. Ahern took neither of these actions, and without
23 warning, simply “pulled the plug” on the required income distributions to the MTC Living
24 Trust, which she had no right nor justification to do.
25
26

27 B.7 The baseless argument, which Ms. Ahern heavily focused on in her “Motion
28 to Refer Contested Probate Matter to Master-Probate Commissioner Per EDCR 4.16”

1 (“Motion”), that somehow this declaration of rights was sought in 2009 via the “Petition to
2 Assume Jurisdiction Over Trust; Confirm Trustee; and Construe and Reform Trust”
3 (“Reformation Petition”) and consented to by Jacqueline and Kathryn, has been well
4 addressed and responded to in Jacqueline’s Response to Ms. Ahern’s Motion.
5

6 B.8 As stated in oral argument for the Petition for Declaratory Judgment, if Ms.
7 Ahern had truly believed that Jacqueline and Kathryn were consenting to allowing her, in
8 her capacity as trustee of the Trust, to change the distribution from 65%/35% split, and that
9 this was what Commissioner Yamashita had determined, then it makes absolutely no sense
10 that she did not make the change immediately following the entry of that Order instead of
11 waiting nearly 4 years before taking such action. In the meantime, over a couple million
12 dollars has been distributed to Jacqueline and Kathryn via the MTC Trust, for which they
13 have paid taxes. Furthermore, if Ms. Ahern is going to make this ridiculous argument that
14 she had the right, but was not enforcing it, then the distributions that were received by
15 Jacqueline and Kathryn would have most certainly constituted gifts from Ms. Ahern, in her
16 capacity as a beneficiary of Trust No. 2, to them, for which she would have been required
17 to file Form 709 gift tax returns.
18
19

20 B.9 Ms. Ahern can only have it one way or the other. Either the distributions to
21 Jacqueline and Kathryn were proper distributions to which they were entitled through their
22 beneficial interest in the MTC Trust, or they were gifts which had to be reported to the IRS
23 via Form 709 on a yearly basis, and which would have had the effect of significantly
24 reducing her federal estate tax exemption.
25

26 ///

27 ///

28 ///

1 B.10 As will be discussed further herein, 33 years of precedent dictates that the
2 status quo of a 65%/35% split must be kept in tact, even if there was an error committed
3 33 years ago, which is certainly not being conceded.
4

5 B.11 The fact of the matter is that the correctness of the allocation between the
6 subtrusts must be presumed correct as this was the allocation reported on the federal estate
7 tax return. Furthermore, without question, the trust instrument is explicit in declaring that
8 the marital deduction should be maximized to reduce estate tax at the first death, which was
9 done. As such, the obligation and burden to show that the status quo is not proper rests
10 on Ms. Ahern, not on Jacqueline and Kathryn. This is why it is infuriating that Ms. Ahern
11 decided to unilaterally change the status quo without warning and first getting the Court
12 to declare her ability to do so. Again, Ms. Ahern, in her capacity as trustee, has breached
13 her duty of loyalty as she has taken an unjustifiable action that benefits solely herself.
14

15 B.12 As stated, for Ms. Ahern to believe that it is somehow up to Jacqueline and
16 Kathryn to establish their entitlement to 65% of the income proceeds from the oil, gas, and
17 mineral rights leases is entirely incorrect and faulty. The presumption is that the status quo
18 is proper and must continue. Ms. Ahern can seek to change the status quo through the
19 proper avenues afforded to her under Nevada trust law, even though each of these avenues
20 should be shut off immediately based on equitable principles, as discussed below. To date,
21 she has not followed any proper administrative procedures and this Court must compel her
22 to return to the status quo and order her to distribute 65% of the proceeds dating back to
23 June of 2013 without any further delay.
24

25
26 ///

27
28 ///

C. LACHES AND DETRIMENTAL RELIANCE

C.1 To date there has been no explanation as to what evidence or authority Ms. Ahern intends to rely on to attempt to prove that she is entitled to 100% interest of the Trust. As has been established, the meritless argument that Commissioner Yamashita made a declaratory ruling as to Ms. Ahern being entitled to 100% of the income and/or that Jacqueline and Kathryn consented to relinquish millions of dollars in future income has been shown to be totally unfounded and absurd.

C.2 Therefore, assuming that Ms. Ahern will attempt to actually produce an argument that has evidentiary support behind it, the only educated guess as to what is likely to be forthcoming is that somehow the 65%/35% split done in 1980 was not properly done and that for the past 33 years, Ms. Ahern should have been receiving 100% of the income as the beneficiary of Trust No. 2 and not just the 35%.

C.3 As discussed in the Petition for Declaratory Judgment, and as was addressed in the Response to Ms. Ahern's Motion, there is nothing to suggest that any error occurred as Marjorie had retained professionals to assist her in her capacity as trustee. Further, Ms. Ahern, as a co-trustee of the Trust, had every ability, opportunity, and, most importantly an obligation to voice an objection to such allocation if she felt that it was incorrectly done in 1980. Instead, 33 years have now come and gone with a 65%/35% split. There has been absolutely no evidence that this split was improperly done, as evidenced by a Federal Estate Tax Return (Form 706), as reflected in the Texas Inheritance Tax Return that has already been accepted for Mr. Connell's estate, as well as a closing letter from the IRS rendered a very long time ago for Mr. Connell's estate.

///

1 C.4 Despite the lack of a shred of evidence to suggest that any error did occur,
2 assuming *arguendo* that an error did actually occur in 1980 when the 65%/35% split began,
3 Ms. Ahern's arguments must still fail. Equitable remedies will prevent Ms. Ahern's claim,
4 as it is now simply too late for Ms. Ahern to make such assertions at this point. The
5 concepts of both laches and estoppel are both firmly in effect some 33 years after the fact.
6 Additionally, detrimental reliance is also applicable, which will be discussed shortly.

7
8 C.5 Simply put, the doctrine of laches should apply when an unreasonable delay
9 in the enforcement of one's rights has occurred which is not justifiable under the
10 circumstances. The doctrine of laches is eloquently explained in the following passages
11 taken from the *Grimes v. Carroll* decision, a 1950 Supreme Court of Arkansas opinion (217
12 Ark. 210)(1950):

13
14 *Laches in a general sense is the neglect, for an unreasonable and*
15 *unexplained length of time, under circumstances permitting diligence, to do*
16 *what in law should have been done. More specifically, it is inexcusable delay*
17 *in asserting a right; an unexcused delay in asserting rights during a period*
18 *of time in which adverse rights have been acquired under circumstances*
19 *that make it inequitable to displace such adverse rights for the benefit of*
20 *those who are bound by the delay; such delay in enforcing one's rights as*
21 *works disadvantage to another; such neglect to assert a right as, taken in*
22 *conjunction, with lapse of time more or less great, and other circumstances*
23 *causing prejudice to an adverse party, operates as a bar in a court of*
24 *equity; an implied waiver arising from knowledge of existing conditions*
25 *and an acquiescence in them; acquiescence in the assertion of adverse rights*
26 *and undue delay on complainant's part in asserting his own, to the*
27 *prejudice of the adverse party.' 30 C.J.S., Equity, § 112, page 520.*

28
29 *The doctrine of laches is founded on the equitable maxims of 'He who seeks*
30 *equity must do equity,' and 'Equity aids the vigilant.' Hence, while there is*
31 *a great variety of cases in which the equitable doctrine is invoked, each case*
32 *must depend upon its own particular circumstances and courts of equity*
33 *have always discouraged laches and delay without cause. It is well settled,*
34 *however, that he who, without adequate excuse, delays asserting his rights*
35 *until the proofs, respecting the transaction out of which he claims his rights*

1 arose, are so uncertain and obscure that it is difficult for the court to
2 determine the matter, has no right to relief.

3 Judge Brewer, who afterwards became an Associate Justice of the Supreme
4 Court of the United States, said while on the circuit: 'No doctrine is so
5 wholesome, when wisely administered, as that of laches. It prevents the
6 resurrection of stale titles, and forbids the spying out from the records of
7 ancient and abandoned rights. It requires of every owner that he take care
8 of his property, and of every claimant that he make known his claims. It
9 gives to the actual and longer possessor security, and induces and justifies
10 him in all efforts to improve and make valuable the property he holds. It is
11 a doctrine received with favor, because its proper application works out
12 justice and equity, and often bars the holder of a mere technical right, which
13 he has abandoned for years, from enforcing it when its enforcement will
14 work large injury to many. (217 Ark. 210, 213-214)

15 C.6 To sleep on one's rights for 33 years, as Ms. Ahern would have done, if
16 assuming *arguendo* that she is able to conclusively prove that there was an error in the
17 allocation, is simply not appropriate and should not be rewarded. Again, even if we are to
18 assume that Ms. Ahern is correct that she should have been receiving all 100% of the
19 income from the oil, gas, and mineral leases, she was obligated to make this assertion
20 approximately 33 years ago, or thereabouts, when she had every opportunity and ability to
21 do so when there would have been no damage to adverse parties.

22 C.7 The Supreme Court of Georgia has barred claims akin to Ms. Ahern's on
23 several analogous situations. Additionally, approximately 88 years ago, the Supreme Court
24 of Nevada has already heard a claim that is analogous to Ms. Ahern's claim and applied the
25 doctrine of laches, in what appears to be the landmark decision in Nevada on the
26 application of laches. The Georgia cases will be discussed first, followed by the Nevada case.

27 C.8 In *Stone v. Williams* (458 S.E.2d 343 (1995)), 35 years after a
28 transfer/purchase of real property, and well after a death of the titled property owner, who
 would be the most material witness, a claim was made that the heirs of the property owner

1 do not rightfully own the real property because the money for the purchase of the property
2 was given to the decedent and included a side agreement. The Supreme Court of Georgia
3 declared that the doctrine of laches was applicable to bar the claim because: 1) the extreme
4 delay of the plaintiff in asserting his rights; and 2) the death of the material witness. That
5 Court stated the following:
6

7 *Courts of equity may "interpose an equitable bar whenever, from the lapse*
8 *of time and laches of the complainant, it would be inequitable to allow a*
9 *party to enforce his legal rights." O.C.G.A. § 9-3-3. It would be inequitable*
10 *to allow Stone to prevail in this case because she waited thirty-five years to*
11 *claim a resulting trust even though Mr. Williams's legal ownership of the*
12 *property was easily discoverable by the slightest diligence. See Hillis v.*
13 *Clark, 222 Ga. 604, 150 S.E.2d 922 (1966). Of course, laches does not arise*
14 *from delay alone. To prevail on a plea of laches, prejudice, too, must be*
15 *shown. Clover Realty Co. v. J.L. Todd Auction Co., 240 Ga. 124, 126(4), 239*
16 *S.E.2d 682 (1977). Mrs. Williams demonstrated that she is prejudiced by*
17 *Stone's delay because Mr. Williams's death rendered ascertainment of the*
18 *truth difficult, if not impossible. OCGA § 23-1-25. (458 S.E. 2d 343)*

19 C.9 In *Cagle v. Cagle* (586 S.E.2d 665 (2003)), the administratrix of her father's
20 estate sought to impose a constructive trust on a farm and another parcel titled in the name
21 of her uncle 36 years after the farm was conveyed by her father to her uncle and three years
22 after her father's death.

23 C.10 In referring back to its prior decision in *Stone v. Williams*, the Supreme Court
24 of Georgia came to the following conclusion:

25 *The present complaint was brought in April 2002, thirty-six years after the*
26 *conveyance of the farm property, and three years after Charles' death. In*
27 *Stone v. Williams, supra, under very similar circumstances, we upheld the*
28 *grant of summary judgment on the basis that laches barred a claim for a*
resulting trust where the claimant waited 35 years to assert her claim, and
the defending party was prejudiced due to the death of essential witnesses
in that period. Likewise, in the case now before the Court, there was an
inordinate delay in bringing suit during which key evidence has been lost.
It follows that the claim was barred by laches, and that summary judgment
was properly granted on that ground.

1 *Based on the foregoing, it is unnecessary for us to address the merits of the*
2 *claim. (586 S.E.2d 665, 667)*

3 C.11 In *Cooney v. Pedroli* (235 P. 637 (1925)), the plaintiffs asserted that they were
4 entitled to a declaration of interest in real property some 22 years after the relevant death.
5 Because the plaintiffs' delayed the enforcement of their purported rights for 22 years,
6 together with the death of the material witness who could not provide testimony and
7 evidence to contradict the plaintiffs' claims, the Nevada Supreme Court concluded that it
8 must accept and apply the doctrine of laches. The following passages from the Nevada
9 Supreme Court decision, although lengthy, are truly necessary to review so as to fully
10 understand the context of the Court's thought process and logic in applying the doctrine of
11 laches:
12

13 *The doctrine of laches has been universally accepted in courts of equity. In an early*
14 *English case Lord Camden declared:*

15 *"A court of equity, which is never active in relief against conscience, or public*
16 *convenience, has always refused its aid to stale demands, where the party has slept*
17 *upon his right, and acquiesced for a great length of time. Nothing can call forth this*
18 *court into activity, but conscience, good faith, and reasonable diligence; when these*
19 *are wanting the court is passive and does nothing. Laches and neglect are always*
20 *discountenanced, and therefore, from the beginning of this jurisdiction, there was*
 always a limitation to suits in this court." *Smith v. Clay* (2 Ambler's Reports, 645;
 3 Browne's Reports, p. 639 in note).

21 *The principle thus announced that mere lapse of time may constitute laches has not*
22 *been recognized generally by modern courts of equity as embracing the only*
23 *element of that defense. It appears from the cases, with few exceptions, that, while*
24 *lapse of time is one of the elements, another and very important one is that the*
25 *delay has worked some disadvantage to the one who interposes the defense of*
26 *laches. A concise and accurate statement of the doctrine of laches, and one which*
27 *has been often quoted with approval, was made in Chase v. Chase, 20 R. I. 202, 37*
28 *A. 804, in which the court said:*

"Laches, in legal significance, is not mere delay, but delay that works a
 disadvantage to another. So long as parties are in the same condition, it matters
 little whether one presses a right promptly or slowly, within limits allowed by law;

1 but when, knowing his rights, he takes no steps to enforce them until the condition
2 of the other party has, in good faith, become so changed that he cannot be restored
3 to his former state, if the right be then enforced, delay becomes inequitable and
4 operates as an estoppel against the assertion of the right. The disadvantage may
5 come from loss of evidence, change of title, intervention of equities and other
causes, but when a court sees negligence on one side and injury therefrom on the
other, it is a ground for denial of relief."

6 It would be difficult, if not impossible, to state the various circumstances which in
7 conjunction with the lapse of time may constitute laches. Every case must depend
8 upon its own circumstances. Whenever the passage of time has brought in its train
anything that works to the disadvantage of a party and makes it doubtful if equity
can be done, relief will be denied.

9 "Several conditions may combine to render a claim or demand stale in equity. If
10 by the laches and delay of the complainant it has become doubtful whether the
11 adverse parties can command the evidence necessary to a fair presentation of the
12 case on their part, as, for instance, where parties interested and the witnesses have
13 died in the interim, or if it appears that they have been deprived of any advantage
14 they might have had if the claim had been seasonably insisted on, or if they be
15 subjected to any hardship that might have been avoided by reasonably prompt
proceedings, a court of equity will not interfere to give relief, but will remain
passive; and this, although the full time may not have elapsed which would be
required to bar a remedy at law." 10 R. C. L. p. 400.

16 Considering the defense of laches in *Miller v. Walser*, 42 Nev. 497, 518, 181 P. 437,
17 444, this court said:

18 "Any circumstances tending to obscure the truth of the matter, as the loss of
19 witnesses through efflux of time, may prompt a court of equity to apply the
20 doctrine of laches. In fact, if it appears that the adverse party has lost any
21 advantage he might have retained if the claim had been asserted with reasonable
22 promptness, or exposed to any injury through inexcusable delay, a court of equity
will not interfere to give relief to the dilatory claimant. Every case must depend
upon its own peculiar circumstances."

23 It is a very material circumstance to be considered in connection with the lapse of
24 time that death of those who could have explained the transaction has intervened
25 before the claim is made. *Hinchman v. Kelley*, 54 F. 63, 4 C. C. A. 189; *Rives v.*
26 *Morris et al.*, 108 Ala. 527, 18 So. 743; *Taylor v. Slater*, 21 R. I. 104, 41 A. 1001;
Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516; *Pomeroy's Eq. Rem.* p. 44. In the last
work cited the author says:

27 "It is settled in this state by the two California cases last cited that the defense of
28 laches may be raised by demurrer, the defense being in substance, as said in one

1 of the cases, that the bill does not show equity, or, in the language of our statute,
2 that the complaint does not state facts sufficient to constitute a cause of action.”

3 An examination of the complaint in view of these principles clearly reveals its lack
4 of equity. The complaint shows a great lapse of time, 22 years, from the creation
5 of the alleged trust. During all of this time Charles Pedroli was in possession of the
6 property openly and notoriously exercising dominion over it as though it were his
7 sole and separate property. He managed, controlled, and disposed of it, and
8 acquired and invested the profits from it in his own name. From the profits he
9 acquired other property to the extent that at the time of his death the original
10 property belonging to the estate of his father had been increased in amount from
11 400 acres of land and 100 head of stock cattle, and 20 tons of hay, to 880 acres;
12 300 head of cattle, 75 head of calves, 200 tons of hay. In addition thereto he
13 acquired 15 bonds of the Lovelock Drainage District; 12 shares of the stock of the
14 Bank of Italy, San Francisco, California; Liberty bonds of the par value of \$3,600;
15 a promissory note with accrued interest thereon; and a life insurance policy on the
16 life of the deceased for the sum of \$5,000 payable to his estate as the beneficiary
17 thereof, and cash in the amount of \$12,000.

18 Beyond the bare statement in the complaint that Charles Pedroli was the trustee
19 of his brother and sister, and that he at all times admitted and recognized their
20 right, there is nothing in the complaint to support the claimed trust relation. All of
21 his acts alleged have a contrary significance. He did everything in his own name
22 and managed the property and the increase as if it were his own. No act of
23 recognition is alleged. He invested the profits in other property and took the same
24 in his own name without consulting the respondents. During the entire period of
25 22 years he paid nothing to the respondents. He rendered no account of his
26 management of the property to them, nor was any accounting demanded of him
27 by either of them. No reason is alleged in the complaint for respondents' long delay
28 in making any claim to the property or asserting any interest as to Charles
Pedroli's management of their share of it or desire to enjoy any of the profits from
it, except that Charles Pedroli was more competent to manage it for the best
interests of himself and them, and that he was honest and upright in all his
business affairs, and that they believed he would account fully and honestly as to
his management and control and disposition of the property to respondents at any
time they made a demand on him.

It seems incredible, however, that in all of these years and when the property was
being managed profitably by Charles Pedroli that respondents should have no
desire to share in any portion of the profits. Any fraud on the part of Charles
Pedroli is entirely negated by the complaint. All of his acts were open and
notorious and consistent with the absolute ownership. These facts, together with
the prolonged silence of the respondents during the lifetime of Charles Pedroli
concerning their alleged interest in the property, present a case of grave doubt as
to the existence of the trust claimed. His death places his administratrix at a

disadvantage so obvious as to call for the application of the doctrine of laches against the respondents, who have slept on their alleged rights for a period of 22 years. Even if the trust relation were admitted the futility of entering on an investigation after such a lapse of time when the trustee is dead, to determine equitably what portion belonged to his estate and what portion belonged to respondents, is apparent. A court of equity would be unable, under the circumstances, to do justice to the parties. The injustice, if any, must fall upon the negligent.

As said in *Kleinclaus v. Dutard*, *supra*:

“The circumstances of this case are such as to make it apparent that a court could not hope to do justice between these parties, were the trust relation clearly shown, and this constitutes another ground for the application of the doctrine of laches, for the difficulty is due entirely to the inexcusable delay.”

The facts in the *Dutard Case* are strikingly parallel to the case at bar. It was held that the merits of a claim of the existence of an express trust under which a son carried on his father's business for the benefit of the family would not be considered after an unexplained lapse of 35 years, when the son was dead, and where the son had conducted the business during the period without recognizing the interest of the alleged beneficiaries, or rendering an account or paying any money to them, except in the support of his mother, and by his personal efforts and diligence had accumulated a large fortune from the small capital invested in the business by his father, and it would be impossible for the court to do justice between the parties, even if the claim should be established. A demurrer on the ground of laches was sustained. The complaint in the instant case shows a stronger case for the application of the defense of laches than the *Dutard Case*. (235 P. 637, 639-641)

C.12 In addition to the length of the delay, major factors the courts considered in determining whether the doctrine of laches should or should not be invoked are: 1) the substantial harm that has occurred to the party, or parties, that have relied on the status quo and the assumption that it would remain in tact; and 2) the inability of the damaged party to defend itself against the allegations due to the death of the material witness.

C.13 Here, both Jacqueline and Kathryn have been relying on receiving and justifiably anticipated that they would continue to receive 65% of the proceeds generated by the royalty income for the remainder of their lives. Each has molded their spending

1 habits based on this anticipation. Before passing away, Marjorie Connell had the same
2 justifiable reliance to the income. Majorie arranged her affairs so that upon her death, this
3 same income belonged to Jacqueline and Kathryn. Consistent with the facts of the above
4 quoted opinions, it was "open and notorious" that Marjorie was claiming entitlement of
5 and actually receiving 65% of the income, as confirmed by the tax returns that were filed.
6 Similarly, the receipt by Jacqueline and Kathryn of 65% of the income for the last 4 years
7 has also been "open and notorious".
8

9
10 C.14 Therefore, in short, Jacqueline and Kathryn have justifiably formed a
11 substantial economic reliance on the income proceeds that they have been receiving since
12 2009, in the exact same manner that Marjorie had been receiving income distributions for
13 the previous 29 years.

14
15 C.15 Again, the death of the most material witness was clearly a substantial factor
16 in the Georgia and Nevada Supreme Court decisions, and should be given the utmost
17 priority in the present case. Due to the death of Marjorie, the most material witness in this
18 matter, Jacqueline and Kathryn are at a severe and substantial disadvantage because they
19 are not able to present any evidence and testimony from Marjorie that could describe and
20 detail the steps that were taken to ensure that the allocation of the assets in the Trust were
21 properly done between Trust No. 2 and Trust No. 3 in 1980.
22

23 C.16 Along this same line, if Marjorie had known Ms. Ahern would be seeking to
24 change 29 years of precedent following her death, and more accurately an additional 4 more
25 years after that, she could have sought a judicial declaration prior to her death to ensure
26 that this problem was settled at a time when she could have presented her evidence and
27 testimony. Furthermore, if Marjorie had intended for Ms. Ahern to become the sole 100%
28

1 beneficiary of the income generated from the leases, she would have failed to exercise the
2 power of appointment that was granted to her under Trust No. 3. Instead, as detailed in
3 the Petition for Declaratory Judgment, Marjorie did exercise the power of appointment with
4 the thought and desire that Jacqueline and Kathryn would effectively step into her shoes
5 and receive 65% of the generated income.
6

7 C.17 The only potentially rationally based claim of Ms Ahern is that the allocation
8 was improperly done in 1980. Because Ms. Ahern has waited 33 years to assert a claim to
9 100% ownership, Jacqueline and Kathryn cannot properly rebut the claims of Ms. Ahern
10 via the testimony of Marjorie Connell, which would be substantial testimony to discredit
11 and rebut any assertions of Ms. Ahern.
12

13 C.18 Additionally, due to this extreme, and unreasonable, passage of time, the
14 Texas accountant who prepared the state estate tax return is no longer capable of providing
15 testimony to combat the assertion of mistake and/or error. Likewise, the Form 706 cannot
16 be located because too much time has lapsed and IRS does not keep returns dating that far
17 back. This unjustified delay has caused the spoliation/loss of evidence that would
18 otherwise be highly relevant to counter Ms. Ahern's claims, which is exactly why the
19 doctrine of laches must apply. Having said this, the existing evidence that does remain is
20 the fact that for the last 33 years, tax returns have been filed showing Ms. Ahern receiving
21 35% of the income, with the other 65% belonging to Marjorie Connell/the MTC Living
22 Trust, and upon her passing solely to the MTC Living Trust.
23
24

25 C.19 There is no justifiable reason as to why Ms. Ahern waited for 33 years to try
26 to attack what was done in 1980, especially given the fact that she was a co-trustee of the
27 Trust since 1980 and had access to all records of the Trust. Claiming ignorance cannot
28

1 work here as she was a co-trustee since the beginning of this relevant time period. This is
2 why statute of limitations are created and other equitable concepts that force one to act
3 expediently if they feel that their rights are being infringed upon.

4
5 C.20 This situation can be closely analogized to real estate situations in which a
6 dwelling or other improvement has been placed on a portion of land that was not rightfully
7 owned by the builder/developer who encroached on another's property. The facts of this
8 case are different as there is no evidence to suggest that the allocation of the assets between
9 trust No. 2 and trust No. 3 were done inappropriately. However, the point remains the
10 same. One cannot sleep on their rights indefinitely when such delay then adversely impacts
11 others who have come to rely on the status quo since there has been no attempt to
12 expeditiously change it.

13
14 C.21 The concept of adverse possession and related real property concepts do not
15 allow someone to change perceived ownership rights substantially after the fact. In the case
16 of adverse possession under Nevada law, one has 5 years in which to enforce their
17 ownership rights or those rights are lost. Trying to change boundary rights after 33 years
18 is simply not permitted.

19
20 C.22 As stated, both Jacqueline and Kathryn have reasonably relied on receiving
21 monthly distributions of the income generated from the leases, which has been substantial
22 in recent years, generally averaging in the range of \$30,000 each per month or \$360,000
23 each on an annual basis.

24
25 C.23 As to Jacqueline, until recently, she has held a high ranking job for the past
26 20 years with Wynn Resorts in Las Vegas. Her compensation for such position resulted in
27 her regularly earning over \$100,000 annually.
28

1 C.24 Jacqueline is the mother of twin sons who are ten years old. When the income
2 from the leases started to increase dramatically over the recent years, Jacqueline specifically
3 asked Ms. Ahern if she thought the oil, gas, and mineral income would continue to remain
4 at high levels. Ms. Ahern assured her it would and specifically encouraged Jacqueline to
5 quit her job and become a stay-at-home mother for her boys. To her detriment, Jacqueline
6 relied on Ms. Ahern's representations and quit her job. Now, Ms. Ahern has taken the
7 position that all the money from the Texas leases belongs entirely to her, reversing a course
8 of performance adopted and followed for 33 years, which as stated above, has caused both
9 Jacqueline and Kathryn to drastically alter their economic habits and the manner in which
10 they live their lives.
11

12 C.25 There was absolutely no indication that could have reasonably led Jacqueline,
13 to believe that Ms. Ahern would take the unwarranted and unjustifiable position that she
14 now has. This again is why it is not appropriate for Ms. Ahern, in her capacity as trustee,
15 to have abruptly decided to retain all 100% of the income proceeds with no previous
16 warning, thus requiring Jacqueline to seek this necessary relief.
17

18 C.26 Jacqueline and Kathryn have both reasonably believed that the status quo
19 would remain in effect for their benefit. As stated, even assuming *arguendo* that Ms. Ahern
20 can establish that she was rightfully entitled to 100% of the proceeds from the leases, she
21 has caused far too much damage to both Jacqueline and Kathryn by creating the
22 expectation of continued distributions, to now be allowed to receive 100% of the funds.
23

24 C.27 No Nevada court would allow a land owner to make the claim that a neighbor
25 has encroached on their property 33 years after the fact, with such possession being open
26 and notorious, or allow a plaintiff to claim ownership in real property or other personal
27
28

1 property belonging to another 33 years after the transfer. Similarly, this Court must refuse
2 to hear any argument from Ms. Ahern that she is entitled to receive to 100% of the income
3 due to a faulty allocation done in 1980, which, again, as a trustee she had every ability to
4 correct at the time. Ms. Ahern has inexcusably waited for far too long to take action, and
5 to allow her to act now would render statutes of limitation worthless and principles of
6 equity toothless.

8 C.28 So that there is absolutely no confusion, as addressed in the Response to Ms.
9 Ahern's Motion, there is no merit whatsoever to Ms. Ahern's assertion that Commissioner
10 Yamashita was asked in 2009 to make a declaration as to the rights of Ms. Ahern in the
11 income proceeds nor was there any willing consent by Jacqueline or Kathryn to suddenly
12 agree to relinquish the 65% income interest that they had inherited from Mrs. Connell. To
13 this end, an e-mail from Jacqueline to Attorney David Strauss establishing her mindset is
14 attached hereto as Exhibit "A" and is hereby incorporated by this reference.

17 C.29 In her e-mail to Attorney Strauss dated July 28, 2009, Jacqueline stated, in
18 relevant part, the following in reference to the effect of the Reformation Petition:

19 *Also, page 16 seems to communicate that my mom will oversee both trusts*
20 *which I know Nanna did not want. I thought the goal was to make sure that*
21 *the 1979 Trust was clear so that my mom could not give away her 1/3*
22 *interest to anyone other than my sister and I.*

23 C.30 At no time has Jacqueline, nor Kathryn, ever been agreeable to relinquishing
24 their interest in 65% of the income that belonged to them through the estate planning done
25 by their grandmother. It cannot be stressed enough that what was done in 2009 did not ask
26 Commissioner Yamashita to make a ruling that changed the 65%/35% split, nor did it have

1 any bearing on changing the split. This discussion is found in Jacqueline's Reply to Ms.
2 Ahern's Motion.

3 4 **D. DAMAGES**

5 The unwarranted actions of Ms. Ahern, have caused Jacqueline and Kathryn to incur
6 substantial attorney's fees and costs in bringing this Petition, the Petition for Declaratory
7 Judgment, and the Reply to Ms. Ahern's Motion, as well as the resulting court appearances.
8 As such, Jacqueline, for herself personally and on behalf of Kathryn, hereby requests that
9 this Court hold Ms. Ahern personally responsible for all of the damages that she has
10 triggered by her unjustifiable and unwarranted actions. This request is made based on the
11 provisions of NRS 153.031(3)(b), via NRS 164.005. However, the final amount of damages
12 is not yet calculable and will be discussed and set forth in an additional related petition that
13 will be filed hereafter. Therefore, for the sake of clarity, the request for damages is hereby
14 made and preserved, but this topic will be addressed in great detail in a related petition.
15
16

17 **E. PRAYER**

18 JACQUELINE M. MONTTOYA hereby prays for an Order of this Court:

19 E.1 Compelling ELEANOR C. AHERN, also known as Eleanor Marguerite Connell
20 Hartman, in her capacity as the trustee of "The W.N. Connell and Marjorie T. Connell
21 Living Trust", dated May 18, 1972, to distribute 65% of all income derived from real
22 property located in Upton County, Texas, specifically the income generated from gas, oil,
23 and mineral leases relating to such Upton County, Texas real property from this point
24 forward and including a distribution representing 65% of all income received related to
25 such interests from June, July, August, September, October, and November of 2013 that
26
27
28

1 has already been received to Jacqueline in her capacity as the trustee of "MTC Living Trust",
2 dated December 6, 1995; and

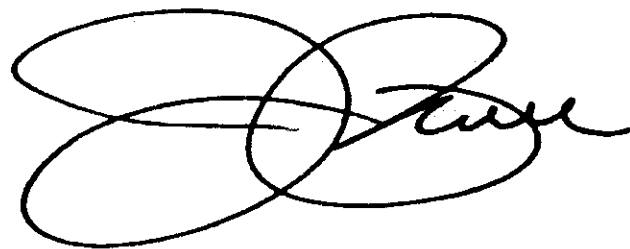
3 E.2 Declaring that the doctrines of laches, estoppel and detrimental reliance
4 prevent ELEANOR C. AHERN, also known as also known as Eleanor Marguerite Connell
5 Hartman, in her individual capacity as a beneficiary of "The W.N. Connell and Marjorie T.
6 Connell Living Trust", dated May 18, 1972, from claiming any interest in the income
7 proceeds and land rights related to the Upton County, Texas property greater than 35%.
8

9 E.3 Awarding legal costs, attorneys fees, and damages against Ms. Ahern,
10 personally, in her capacity as Trustee of "The W.N. Connell and Marjorie T. Connell Living
11 Trust", dated May 18, 1972.
12

13 E.4 Granting such other and further relief as the Court shall deem appropriate.
14

15 Respectfully submitted,

16 THE RUSHFORTH FIRM, LTD.

17 
18

19 _____
20 JOSEPH J. POWELL
21 State Bar No. 8875
22
23
24
25
26
27
28

EXHIBIT A

EXHIBIT A

From: Montoya, Jacquie [<mailto:Jacqueline.Montoya@wynnlasvegas.com>]

Sent: Tuesday, July 28, 2009 11:25 AM

To: David Straus

Cc: Kathy and Mike Bouvier

Subject: Thoughts on Brian's Petition

Hi David,

After reviewing Brian's petition last night, I had a couple of thoughts that I wanted to run by you. First, Kathy's legal name is Kathryn not Katherine. Can you have him update it?

Also, page 16 seems to communicate that my mom will oversee both trusts which I know Nanna did not want. I thought the goal was to make sure that the 1979 Trust was clear so that my mom could not give away her 1/3 interest to anyone other than my sister and I.

Please advise when you have time.

Regards,
Jacquie

jacqueline montoya | executive director of weddings

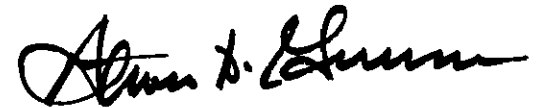
wynn | encore

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jacqueline.montoya@wynnlasvegas.com | toll free 888.320.7115

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CLERK OF THE COURT

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6 Las Vegas, NV 89137-1655
7 Telephone (702) 255-4552
8 fax: (702) 255-4677
9 e-mail: probate@rushforthfirm.com
10 Attorneys for Jacqueline M. Montoya
11

8 **DISTRICT COURT**
9
10 **CLARK COUNTY, NEVADA**
11

12 In re the Matter of the

13 THE W.N. CONNELL and MARJORIE
14 T. CONNELL LIVING TRUST, dated
15 May 18, 1972

16 A non-testamentary trust.

Case No.: P-09-066425-T
Department XXVI, RJC

17
18 **ADDENDUM TO PETITION TO COMPEL TRUSTEE TO DISTRIBUTE ACCRUED INCOME**
19 **AND FUTURE INCOME RECEIVED FROM OIL, GAS, AND MINERAL LEASES AND**
20 **DECLARATION OF THE APPLICABILITY OF THE DOCTRINE OF LACHES**

21 Date of Hearing: March 18, 2014
22 Time of Hearing: 9:00 a. m.

23 JACQUELINE M. MONTTOYA ("Jacqueline"), as both an individual and also in her
24 capacity as the trustee of the "MTC Living Trust" dated December 6, 1995, by and through
25 her counsel of record, JOSEPH J. POWELL, Esq., of THE RUSHFORTH FIRM, LTD.,
26 hereby files this Addendum to her "Petition to Compel Trustee to Distribute Accrued
27 Income and Future Income Received from Oil, Gas, and Mineral Leases and Declaration of
28

1 the Applicability of the Doctrine of Laches” (“Petition to Compel”) which was previously
2 filed on December 3, 2014 and came on for hearing before the Honorable Gloria J. Sturman
3 on January 14, 2014.
4

5 **A. JANUARY 14, 2014 HEARING**

6 A.1 At the hearing on the Petition to Compel which occurred on January 14, 2014,
7 the Honorable Gloria J. Sturman indicated that she did not wish to make a determination
8 on such Petition for the request that the Texas income payments be started up again and
9 retroactive payments be made.
10

11 A.2 Judge Sturman’s rationale, as reflected in part in the minutes for that hearing,
12 was the trial on Jacqueline’s underlying Petition for Declaratory Judgment was set to begin
13 in approximately one month’s time and it was anticipated that the trial would provide
14 finality as to the declaration of interest in the Texas Property. As such, it was Judge
15 Sturman’s preference to defer making a ruling at the January 14, 2014.
16

17 A.3 However, Judge Sturman was crystal clear that in the event that the trial did
18 not go on as planned and if there was a postponement then the issue would most certainly
19 need to be revisited. As the recording of the hearing reflects, Judge Sturman mentioned
20 multiple times that she had very serious concerns about balancing fairness given the
21 circumstances.
22

23 A.4 Due to what has transpired since that January 14, 2014 hearing, and
24 specifically the long delay that will now occur because of the actions and tactics of Ms.
25 Ahern in forcing a postponement and continuance of the trial, it is necessary to immediately
26 revisit the relief that Jacqueline has previously requested.
27
28

B. EVENTS OCCURRING SINCE JANUARY 14, 2014 HEARING

B.1 Trial on Jacqueline's "Petition for Declaratory Judgment regarding Limited Interest of Trust Assets Pursuant to NRS 30.040, NRS 153.031(1)(e), and NRS 164.033(1)(a)" ("Petition for Declaratory Judgment") was scheduled to commence on February 18, 2014 at 10AM. However, due to the tactics of counsel for Eleanor C. Ahern, in her capacity as Trustee of "The W.N. Connell and Marjorie T. Connell Living Trust", dated May 18, 1972, the trial did not occur on February 18, 2014 and instead was continued until an August 11-September 5, 2014 stack, with a great possibility that the trial may wind up getting kicked to the September 5-October 10, 2014 stack.

B.2 For the first time in this matter, and occurring approximately a week before trial was set to commence, counsel for Ms. Ahern decided that it was appropriate and acceptable to raise counterclaims against Jacqueline, consisting of "Intentional Interference with Contractual Relations" and "Enforcement of No Contest Provisions". With her counterclaim of "Intentional Interference with Contractual Relations", Ms. Ahern has sought the imposition of punitive damages.

B.3 Ms. Ahern sought to expand the scope and breadth of the trial essentially on the eve of trial for Jacqueline's Petition and her actions were clearly intended to frustrate the focus of the trial and sneak in additional issues that were not raised on a timely basis. Jacqueline is convinced that these uncalled for tactics were brought to force Jacqueline's counsel to have to refocus attention and energy from the scope of the issues that were set for trial and to ultimately seek to put this Court in the unenviable position of having to postpone trial at the last minute, which is what occurred.

1 B.4 Now that trial will not occur at the earliest until mid August of 2014, with
2 again the possibility and reality that trial may not occur until sometime in October of 2014,
3 Ms. Ahern is likely ecstatic that her plan of delay will, without this Court's intervention,
4 result in the continued "starving out" of Jacqueline and her sister, Kathryn Bouvier. If the
5 status quo is not restored until a final determination in this matter, Jacqueline and Kathryn,
6 via their interests in the MTC Living Trust, will have not received distributions of income
7 from July 2013 until August of 2014, representing a span of 13 months, which could actually
8 extend to 15 months if trial does not begin until October of 2014, with again no assurances
9 that some additional tactics will not be taken by Ms. Ahern to further extend the delay.
10

11
12 B.5 This is not a dispute between a trustee and beneficiaries; it is actually a
13 beneficiary versus beneficiary dispute, with Ms. Ahern using her capacity as a trustee to
14 generate an immense amount of leverage since she can and has unilaterally decided to shut
15 off the income flow. There are many colorful adjectives that can describe what is occurring
16 here, but suffice it to say that Ms. Ahern's conduct is entirely inappropriate for a trustee to
17 be taking.
18

19 B.6 As noted in Jacqueline's underlying Petition, Ms. Ahern had two very viable
20 opportunities to have a determination of rights made as to the Texas Property and income
21 instead of abruptly deciding to turn off the Texas Property income stream that had been in
22 effect for the MTC Living Trust for the previous 4 years, and the previous 29 to Marjorie T.
23 Connell. Instead, Ms. Ahern decided that she did not want and did not have to follow the
24 status quo that had been in effect for 33 years. If a 33 year status quo is sought to be
25 changed with the mindset that it is legally appropriate and permissible to do so, then Ms.
26 Ahern should have used the judicial resources available in Clark County, Nevada, the situs
27
28

1 of the Trust do so, or minimally prepare and send out a Notice of Proposed Action for what
2 she intended to do. Instead, she abruptly decides that she has no obligation to do so and
3 essentially has sent the message to Jacqueline of “come and get me”.

4 **C. RELIANCE, EXPECTATION, FAIRNESS, AND EQUITY**

5
6 C.1 Jacqueline and Kathryn, as beneficiaries of the MTC Living Trust, have been
7 relying on the 65% income stream generated by the Texas Property since 2009 when their
8 grandmother passed. As noted previously, Jacqueline quit her job to become a stay-at-
9 home mother with her sons based on her reliance of receiving the continued income stream
10 from the Texas Property. Kathryn as well is heavily reliant on the receipt of the funds. This
11 income stream can and should be analogized to receiving a lifetime annuity, or other form
12 of scheduled payments. There is expectation that every month these payments will be
13 received. That expectation is justifiable and reasonable given that for 33 years this has been
14 what has occurred on a monthly basis.

15
16
17 C.2 Ms. Ahern decided to unilaterally change this status quo without justifiable
18 reason whatsoever AND without any prior notice and is now playing games to put
19 tremendous financial pressure on Jacqueline and Kathryn in an obvious and blatant
20 attempt to gain significant leverage in this matter. This is patently unfair and inequitable.

21
22 C.3 If Ms. Ahern believed that she was entitled to all of the Texas income, despite
23 the fact that for 33 years she claimed entitlement to only 35%, and if she had clean and pure
24 motivation, then she could and should have continued to keep the status quo in place until
25 such time as there was a judicial determination which either supported or rejected her
26 belief, or granted her the ability to suspend payments/distributions. Instead, she, in
27 essence, decided to place her hands around the necks of Jacqueline and Kathryn and has
28

1 proceeded to squeeze and apply more and more pressure in hopes of starving them out
2 financially, likely with the mindset that this will cause Jacqueline to be forced into a
3 submissive position.

4
5 C.4 As a court of equity, this Court must not allow this behavior to continue and
6 must immediately level the playing field. This Court must effectively pry Ms. Ahern's
7 hands off of the necks of Jacqueline and Kathryn and force her to distribute the 65% of the
8 income from the Texas Property that the MTC Living Trust is rightfully entitled to and has
9 been rightfully entitled to since Marjorie T. Connell exercised her power of appointment
10 over Trust No. 3. To allow a trustee-beneficiary to take action that solely benefits herself
11 as a beneficiary to the detriment of the other beneficiaries is uncalled for and entirely
12 inappropriate on many levels.

13
14 C.5 By leveling the playing field and forcing Ms. Ahern to distribute the 65% of
15 the Texas income dating back to July of 2013, this Court will effectively render and make
16 moot all of Ms. Ahern's previous attempts to stall and delay matters, wasting everyone's
17 time and resources. With this one action of returning to the status quo and requiring all
18 accumulated income to be distributed to Jacqueline in her capacity as the trustee of the
19 MTC Living Trust, Ms. Ahern might then display the same sense of urgency that has been
20 displayed by Jacqueline to have an ultimate determination made as to Ms. Ahern's claim,
21 and Ms. Ahern's burden, that the status quo should be changed after 33 years. However,
22 until such time as that determination is made by this Court, Jacqueline pleads that this
23 Court exercise the numerous equitable principles and remedies available to it to level the
24 playing field until this beneficiary versus beneficiary dispute has resolution.

1 C.6 To fail to level the playing field is to throw away all concepts of equity and
2 fairness. This is not simply about money. Its effect is far more reaching. This is not a
3 dispute between Apple and Samsung about patent violations amongst billion dollar
4 companies. It is about the patently unfair disruption to lives of two innocent people and
5 their dependents. It is about the fact that two families have relied on and adjusted their
6 lifestyles accordingly based on an income stream that Ms. Ahern lived with and accepted
7 for the previous 33 years, but now wants to cut off completely. Furthermore, it is about the
8 clear intent, desire, and want of Jacqueline and Kathryn's grandmother, Marjorie T.
9 Connell, to provide them with this income stream and the Texas land rights. It is precisely
10 why Mrs. Connell took affirmative and calculated action, via her estate planning documents,
11 to ensure would occur. Because of this, it is Jacqueline's fiduciary responsibility as the
12 Trustee of the MTC Living Trust that she ensure that the assets properly belonging to MTC
13 Living Trust are collected and preserved for the current beneficiaries, as well as the future
14 beneficiaries as well.

15
16
17
18 C.7 Ms. Ahern has effectively built a dam and blocked the flow of income from
19 going downstream. This Court has the opportunity and must equitably smash that dam
20 that had no right and business being created in the first place. There are many analogies
21 that can be made, but the fact of the matter is that daily lives of Jacqueline and Kathryn are
22 being severely disrupted and filled with tremendous stress, all the while Ms. Ahern is sitting
23 high atop the dam she has built and is still collecting her 35% that she has been happy with
24 for 33 years. And for good measure she has decided to add further stress to the family of
25 Jacqueline by seeking punitive damages from Jacqueline. This behavior is repulsive and
26 cannot be tolerated by this Court.
27
28

D. WITHHOLDING OF DISTRIBUTIONS FOR AD VALOREM TAXES

D.1 Further dispelling Ms. Ahern's assertion that Jacqueline and Kathryn had no beneficial rights to 65% of the income derived from the Texas Property, via their interest in the MTC Living Trust, is the fact that Ms. Ahern withheld distributions in order to ensure that there were sufficient funds from which to pay the ad valorem taxes associated with the Texas Property to pay the 65% proportionate share.

D.2 If these distributions were supposed "gifts" as characterized by Ms. Ahern to Jacqueline and Kathryn and they were not legally entitled to them as beneficiaries of the MTC Living Trust, then why exactly would Ms. Ahern make it a point to withhold monthly distributions under the logic that she needed to retain sufficient funds from which to pay their share of the ad valorem taxes.

D.3 Furthermore, again if they were merely "gifts", then why was Ms. Ahern concerned with withholding anything to begin with? There is no logic to this type of action if again they were just "gifts".

D.4 It was Marjorie T. Connell and Ms. Ahern's habit to withhold either partially or in full the distribution amount due the month that ad valorem taxes were owing in order to have the sufficient funds to pay the tax. A good example of Ms. Ahern withholding the 65% was in 2012. During this time, when regular monthly payments of 65% of the income were being paid to Jacqueline as Trustee of the MTC Living Trust, Ms. Ahern held back the November 2012 income payment in full. In other words, for that month Jacqueline, as Trustee, did not receive the 65% income distribution, which was approximately \$59,573.41, to the MTC Living Trust.

1 D.5 Jacqueline finally received word from Ms. Ahern's attorney, Jeff Johnston,
2 Esq., that Ms. Ahern was holding the funds to pay the Texas Property ad valorem taxes.

3 D.6 The 65% income distribution began again in December of 2012 for the amount
4 that was expected.
5

6 D.7 As noted, what sense would it make to "withhold" distributions for the
7 payment of taxes if these were merely "gifts" from Ms. Ahern to Jacqueline and Kathryn.
8 This behavior and action is yet a further example of the fact that Ms. Ahern never believed
9 that she was entitled to the other 65% of the Texas Property income.
10

11 E. REASONABLE PROBABILITY OF SUCCESS

12 E.1 It is anticipated that Ms. Ahern will again try to argue against this requested
13 injunction by claiming that Jacqueline does not have a reasonable probability of success in
14 this action. However, the previous pleadings filed in this matter show otherwise; Jacqueline
15 not only has a reasonable probability, she has a great probability of success. The following
16 list contains some of the many arguments previously presented in showing the 35%/65%
17 split was proper and should continue as the status quo:
18

- 19 • The W.N. Connell and Marjorie T. Connell Living Trust states that the
20 allocation between Trust No. 2 and No. 3 would be done as shown on the
21 federal estate tax return, and both the federal and Texas estate tax returns
22 indicate that the Texas Property was split 35%/65% between Trust No. 2 and
23 Trust No. 3 respectively, with the Texas estate tax return reflecting numbers
24 used and taken from the Form 706.
25

26 ///

27 ///

28 ///

- The Texas Property income was distributed 35%/65% to the respective beneficiaries between Trust No. 2 and Trust No. 3 for 29 years with Ms. Ahern acting as a trustee.
- The Texas Property income was distributed 35%/65% to the respective beneficiaries between Trust No. 2 and the MTC Living Trust for the 4 years following Marjorie's death until the commencement of this action, all while Ms. Ahern was acting as a trustee.
- Divorce and estate planning documents reflect that Ms. Ahern was only entitled to 35% of the Texas Property income.
- Ms. Ahern paid income taxes on 35% of the Texas Property income for 33 years, while Marjorie paid income taxes on 65% of the Texas Property income for 29 years, while the MTC Living Trust, Marjorie's Trust, has paid income tax for the last 4 years on 65% of the Texas Property income.
- Marjorie intentionally exercised her power of appointment over Trust No. 3, and in turn the Texas real estate and income generated from it, in favor of the MTC Living Trust
- Ms. Ahern has acknowledged in previous pleadings that she consulted with an attorney and was advised of her purported rights and made a willful decision not to act on those rights for 29 years before Marjorie's death, and a continued 4 years after Marjorie's death, for a total of 33 years of acceptance of 35% of the income from the Texas Property.

///

///

- The 2009 Petition contains no request for a declaratory ruling that Ms. Ahern is entitled to 100% of the Texas Property income, nor does the accompanying Order grant such a right.

E.2 The allocation of the Texas Property between Trust No. 2 and Trust No. 3 was properly done as instructed by the W.N. Connell and Marjorie T. Connell Living Trust. For 33 years, this proper allocation was followed with no complaints or questions by any party. No event has occurred or order given that would change the correct allocation done 34 years ago. Therefore, the presumption is that the allocation between Trust No. 2 and Trust No. 3 of 35%/65% was correct. It is Ms. Ahern that must bear the burden, as a beneficiary and not as a trustee, to show that some other distribution other than 35%/65% is actually correct. Until such a time that Ms. Ahern has met this burden, Jacqueline and Kathryn, as the innocent party, should not be harmed and prejudiced by withholding their right to the income generated by the Texas Property.

F. CONCLUSION

Jacqueline begs this Court to level the playing field and remove the unfair and artificial leverage that Ms. Ahern has created in the process. As such, Jacqueline respectfully requests that this Court return the status quo to the matter and require Ms. Ahern to distribute 65% of the Texas Property income that the Trust has received from July of 2013 through the present. It is believed that the approximate value of the 65% of the income interest for this time period totals \$774,825.30, broken down as follows:

July 2013= \$91,379.55

August 2013= \$54,696.37

September 2013= \$94,977.48

1 October 2013= \$80,811.78

2 November 2013= \$139,879.01

3 December 2013= \$105,175.59

4 January 2014= \$107,764.89

5 February 2014= \$100,140.63

6
7

8 Total \$774,825.30

9 Jacqueline hereby reserves the right to seek interest on such funds in accordance
10 with NRS 99.040(1) and as such intends to supplement her request for relief at an
11 appropriate time.

12 In addition to these figures from July 2013 through the present, Jacqueline also
13 believes, subject to further correction, that there were deficiencies for April 2013 and June
14 2013 in the deficiency of the payments received. In those months, the following is a
15 breakdown of the total income received by the Trust from the Texas Property, with the 65%
16 interest represented in parenthesis:
17
18

19 April 2013= \$79,258.42 (\$51,517.97)

20 June 2013= \$76,843.58 (\$49,948.32)

21 Jacqueline received distributions of the following amounts for April 2013 and June
22 2013 from Ms. Ahern:

23 April 2013= \$46,440.89

24 June 2013= \$37,000

25 ///

26 ///

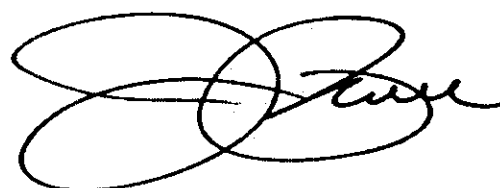
1 Therefore, the approximate deficiency for April 2013 was \$5,077.08. The
2 approximate deficiency for June 2013 was \$12,948.32. As such, the total deficiency for
3 these months was approximately \$18,025.40.

4
5 Jacqueline hereby reserves the right to seek interest on the deficient sums owing for
6 April 2013 and June 2013 in accordance with NRS 99.040(1) and as such intends to
7 supplement her request for relief at an appropriate time, together with any sums which
8 were deficient, but have not yet been discovered.

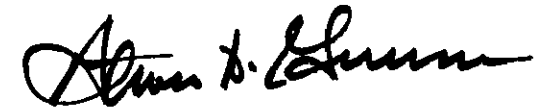
9
10 In summary, between the payments not received from July 2013 through the present
11 and the deficiencies in the payments for April 2013 and June 2013, the approximate total
12 owing to Jacqueline, in her capacity as trustee of the MTC Living Trust, is \$792,850.70.

13
14 Respectfully submitted,

15 THE RUSHFORTH FIRM, LTD.

16
17 

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19 JOSEPH J. POWELL
20 State Bar No. 8875
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CLERK OF THE COURT

CERT
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Attorneys for Jacqueline M. Montoya

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate

of

**THE W. N. CONNELL and MARJORIE
T. CONNELL LIVING TRUST**, dated
May 18, 1972,

A non-testamentary trust.

Case No. P-09-066425-T
Department XXVI, RJC

CERTIFICATE OF MAILING

Date of Hearing: March 18, 2014

Time of Hearing: 9:00 a.m.

I, the undersigned, hereby certify that on March 6, 2014, I sent a copy of the "*Petition to Compel Trustee to Distribute Accrued Income and Future Income Received from Oil, Gas, and Mineral Leases and Declaration of the Applicability of the Doctrine of Laches, Addendum to Petition to Compel Trustee to Distribute Accrued Income and Future Income Received from Oil, Gas, and Mineral Leases and Declaration of the Applicability of the Doctrine of Laches and Notice of Hearing on Petition to Compel Trustee to Distribute Accrued Income and Future Income Received from Oil, Gas, and Mineral Leases and Declaration of the Applicability of the Doctrine of Laches*" that has been filed in this proceeding, to each person named below by first-class mail, addressed as follows:

Certificate of Mailing

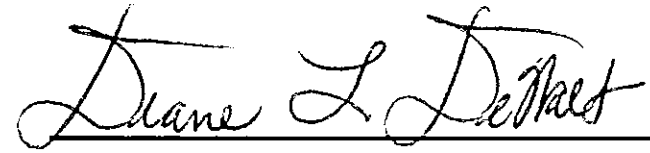
THE RUSHFORTH FIRM, LTD.
Telephone: 702-255-4552 / Fax: 702-255-4677
9505 Hillwood Drive, Suite 100
Las Vegas, Nevada 89134-0514

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Eleanor C. Ahern
c/o John R. Mugan, Esq.
Jeffrey Burr, Ltd.
2600 Paseo Verde Parkway, Suite 200
Henderson, NV 89074

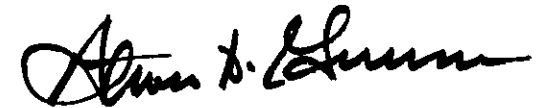
Jacqueline M. Montoya
3385 Maverick Street
Las Vegas, NV 89108

Kathryn A. Bouvier
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Galveston, TX 77554



Diane L. DeWalt, an employee of
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Certificate of Mailing



CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of
THE W. N. CONNELL AND MARJORIE T. CONNELL
LIVING TRUST,
Dated May 18, 1972

Case No. P-09-066425-T

Dept. No. XXVI (26)

Date of Hearing: March 18, 2014

Time of Hearing:

An Inter Vivos Irrevocable Trust.

OBJECTION OF TRUSTEE ELEANOR C. AHERN TO JACQUELINE M. MONTOYA'S
PETITION AND ADDENDUM TO PETITION TO COMPEL TRUSTEE TO DISTRIBUTE
ACCRUED INCOME AND FUTURE INCOME RECEIVED FROM OIL, GAS, AND
MINERAL LEASES AND DECLARATION OF THE APPLICABILITY OF THE
DOCTRINE OF LACHES

COMES NOW ELEANOR C. AHERN, a/k/a ELEANOR CONNELL HARTMAN AHERN
("ELEANOR"), as Trustee of THE W. N. CONNELL AND MARJORIE T. CONNELL LIVING
TRUST dated May 18, 1972 (the "TRUST"), by and through her counsel of record, JOHN R.
MUGAN, Esquire, and MICHAEL D. LUM, Esquire, of the law firm of JEFFREY BURR, LTD.,
and hereby submits this Objection to Jacqueline M. Montoya's Petition And Addendum To Petition
To Compel Trustee To Distribute Accrued Income And Future Income Received From Oil, Gas,
And Mineral Leases And Declaration Of The Applicability Of The Doctrine Of Laches, and in
support thereof states:

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In an effort to persuade this Court that it should release the sixty-five percent (65%) of the Upton County, Texas, Oil right income that this Court previously ordered is to be held in Trust, Petitioner JACQUELINE M. MONTOYA submits the exact same Petition To Compel Trustee To Distribute Accrued Income And Future Income Received From Oil, Gas, And Mineral Lease And Declaration Of The Applicability Of the Doctrine Of Laches accompanied by an Addendum thereto (together these documents are hereinafter referred to as the "PETITION"). In the PETITION, Petitioner JACQUELINE M. MONTOYA seeks "**injunctive relief.**" However, as already stated and argued by ELEANOR and her counsel in ELEANOR's prior pleadings and in open court, Petitioner JACQUELINE M. MONTOYA has failed to satisfy the requirements for injunctive relief, which are again discussed below. **The continuance of the trial herein has no legal effect on whether the Petitioner has met her burden of proof in satisfying the mandatory requirements for the injunctive relief which she is seeking, which burden of proof the Court previously found was not met by Petitioner.** To now grant an identical Petition that the Court previously denied would be directly contradictory and arguably constitute reversible error. Because Petitioner JACQUELINE M. MONTOYA has given no legal basis to support her claim for relief and failed to satisfy such requirements, this Court must deny the relief that she seeks in her PETITION.

II. ARGUMENT

A. Objection To Factual Allegations Made By Petitioner JACQUELINE M. MONTOYA.

In her PETITION, Petitioner JACQUELINE M. MONTOYA makes certain factual allegations that are entirely unfounded and cannot be further from the truth. In particular, Petitioner JACQUELINE M. MONTOYA states, "due to the *tactics* of counsel for Eleanor C. Ahern ... the trial did not occur on February 18, 2014 and instead was continued...." (emphasis added). Petitioner JACQUELINE M. MONTOYA further states, "[f]or the first time in this matter, and occurring approximately a week before trial was set to commence, counsel for Ms. Ahern decided that it was appropriate and acceptable to raise counterclaims against Jacqueline, consisting of 'Intentional Interference with Contractual Relations' and 'Enforcement of No Contest Provisions.'"

1 (emphasis added). Petitioner JACQUELINE M. MONTOYA alleges that Ms. Ahern's "actions
2 were clearly intended to frustrate the focus of the trial and *sneak in additional issues* that were *not*
3 *raised on a timely basis.*" (emphasis added). Moreover, Petitioner JACQUELINE M. MONTOYA
4 accuses Ms. Ahern of "*playing games.*" (emphasis added).

5 A cursory review of the transcript and pleadings in this matter will clearly reveal the
6 untruths espoused by Petitioner JACQUELINE M. MONTOYA. If this Court will note, at the
7 November 12, 2013 hearing, the very first hearing in this matter, attorney John R. Mugan
8 disclosed to the Court and opposing counsel that he would be filing a motion to dismiss, and if such
9 motion to dismiss was not successful, ELEANOR would be filing counterclaims if this case
10 proceeded to an evidentiary hearing. The transcript for the November 12, 2013 hearing contains the
11 following dialogue:

12 "MR. MUGAN: And by way of full disclosure, Your Honor, and I don't know if it will
13 affect the thinking at all, and we can deal with it later if we have to, if in fact this ends up
14 going to an evidentiary hearing and our motion to dismiss is not successful, *there are going*
15 *to be some counterclaims made by my client in this matter* –

16 THE COURT: *Okay.*

17 MR. MUGAN: that are –

18 THE COURT: And I think –

19 MR. MUGAN: -- going to involve some things.

20 ...

21 MR. POWELL: *Okay.*" (emphasis added)

22 A copy of this Transcript is attached hereto as **Exhibit A** and incorporated herein by this
23 reference. See Hearing Transcr. 65:1; 66:1-22 (November 12, 2013).

24 Furthermore, in the Objection Of Trustee Eleanor C. Ahern To Jacqueline M. Montoya's
25 Petition To Compel Trustee To Distribute Accrued Income And Future Income Received From Oil,
26 Gas, And Mineral Leases And Declaration Of The Applicability Of The Doctrine Of Laches filed
27 on January 3, 2014, ELEANOR's counsel stated with specificity that "[t]his action (the sending of
28 demand letters by JACQUELINE M. MONTOYA and her Texas counsel to the surface tenant and
mineral interest lessees demanding them to cease all payment to the TRUST) on the part of
Petitioner JACQUELINE M. MONTOYA gives rise to action against her by ELEANOR for

1 *intentional interference with contractual relations, punitive damages, and enforcement of the no*
2 *contest clause.*" (emphasis added).

3 Additionally, at the Pretrial Conference on February 12, 2014 counsel for ELEANOR made
4 clear to the Court and to counsel for Petitioner JACQUELINE M. MONTTOYA that ELEANOR
5 asserted counterclaims, including enforcement of the no contest clause and intentional inference
6 with contractual relations, in her Answer filed on February 10, 2014. In fact, the Court and
7 counsel for both parties engaged in a fairly extensive discussion regarding these counterclaims. In
8 particular the discussion proceeded as follows:

9 "MR. MUGAN: I would just note to the Court on our proposed findings of fact and
10 conclusions of law and *we have a number of theories on Defense* and so we just threw them
11 all in there. So I presume that's why you want the disk is pick and choose or ignore.

12 THE COURT: Right.

13 ...

14 MR. POWELL: What – you did trigger something for me, Your Honor. In taking a quick
15 look at their brief, they have asked for what I would call I guess additional relief that really
16 hasn't been briefed before.

17 THE COURT: Uh-huh.

18 MR. POWELL: In the aspect of *they've asked for the enforcement of no contest clause.*

19 THE COURT: *Uh-huh.*

20 MR. POWELL: -- in the event that the Petitioner is unsuccessful, *they've also asked for as*
21 *well as a finding that there's been tortuous interference with contract*, if I'm not mistaken,
22 as well. Those are issues that haven't been briefed prior. *These are essentially new*
23 *allegations and new assertions* in which they're seeking a judgment on an in my
24 understanding would be this – *that would be way beyond the scope of what this trial is to*
25 *cover* which is Petitioner's initial petition seeking a declaratory judgment on the rights. So –

26 THE COURT: Well, you know, *like I said*, you know, *you can make an appropriate*
27 *motion at the close of their case* or whatever, I think it's 58 or whatever.

28 MR. POWELL: Okay.

1 THE COURT: You've already done your trial brief. *If you wish to submit anything*
2 *further on it, you can certainly supplement that if you wish as well.*

3 MR. POWELL: Okay. I'm just curious I guess more than anything just to limit the scope of
4 what we're actually, the determinations of what we're – what we're seeing here. Because
5 again it's Petitioner's as far as I'm understanding it, it's Petitioner's petition.

6 THE COURT: Uh-huh.

7 MR. POWELL: -- that's the sole case here that's for determination.

8 THE COURT: Okay. *So and your view is that they had made I guess a counter.*

9 MR. POWELL: *It almost seems like it's a counter within their brief of asking for*
10 *enforcement of no contest clause and again finding of tortuous interference with contract.*

11 But those issues have never been briefed in standalone petitions.

12 THE COURT: Okay. Mr. Mugan.

13 MR. MUGAN: Yeah, you just – I mean *you'll get into the issue of whether you have*
14 *mandatory counterclaims or permissive counterclaims* and of course we've been through
15 claim preclusion and issue preclusion and so you know *we want to protect ourselves in that*
16 *respect.*

17 THE COURT: *Okay.*

18 MR. MUGAN: You of course can make the appropriate rulings at the appropriate time.

19 THE COURT: Okay. *So well if you want to raise that in supplemental briefing, Mr.*
20 *Powell, then just get it on file.* If you feel that they've gone beyond the scope of what we're
21 actually supposed to be hearing is – we've got the petition just to the jurisdiction. The
22 petition for declaratory judgment regarding limited interest of trust assets?

23 MR. POWELL: Yes, Your Honor.

24 THE COURT: Because you were here on.

25 MR. POWELL: Yes.

26 THE COURT: Okay. And they have a – they've got a bunchy (sic) of motions. I'm trying
27 to see if there's – is there a response to that petition, Mr. Mugan, other than just in the –

28 MR. MUGAN: *There should be an answer and affirmative defenses and some*
counterclaims. I think it was filed relatively recently.

1 THE COURT: *Okay, here's a response.* We've got some –

2 MR. POWELL: *I received the answer yesterday.* So is that different from your trial brief?

3 Is there two difference –

4 THE COURT: *Yeah, here's the answer.*

5 ...

6 THE COURT: Okay. So yeah, *so that's the answer filed yesterday at 2:10 of the trustee.*

7 ...

8 THE COURT: All right. Yes, and so that's all that shows up. If there are – I don't see – *I*
9 *just see an answer.*

10 ...

11 THE COURT: Something about deposition transcript or taking depositions. So motion
12 practice. Okay, yeah so I don't see a different brief. I just – it may be in the cue. It just
13 hasn't popped up yet. *But I do see the answer.*" (emphasis added)

14 A copy of this Transcript is attached as **Exhibit B** and incorporated herein by this reference.

15 See Pretrial Hearing Transcr. 17:4 – 21:2 (February 12, 2014).

16 As shown by the foregoing discussion at the Pretrial Conference, both the Court and counsel
17 for Petitioner JACQUELINE M. MONTOYA were well aware of ELEANOR's counterclaims. In
18 fact, these counterclaims were mentioned specifically on several occasions in the discussions at the
19 hearings and in the pleading quoted above. Accordingly, it is disingenuous to claim that counsel for
20 ELEANOR was "playing games" or trying "to sneak in additional issues that were not raised on a
21 timely basis." Notably, counsel for Petitioner JACQUELINE M. MONTOYA admits that he
22 "received the answer" on February 11, 2014. Further, the Court acknowledged at the Pretrial
23 Conference that ELEANOR filed her Answer, which included, among other counterclaims, claims
24 for enforcement of the no contest clause and for tortuous interference with contractual relations. At
25 no point during this Pretrial Conference did the Court object to hearing ELEANOR's counterclaims
26 for her alleged failure to timely assert her counterclaims. And at no point did counsel for Petitioner
27 JACQUELINE M. MONTOYA seek a continuance of the trial.
28

1 As noted above, contrary to Petitioner JACQUELINE M. MONTOYA's claim that
2 ELEANOR raised her counterclaims untimely, ELEANOR notified counsel for Petitioner
3 JACQUELINE M. MONTOYA of these claims at the first hearing on this matter on November 12,
4 2013. Notice could not have been made any sooner. Further, the specifics of such claims were set
5 forth in the Objection Of Trustee Eleanor C. Ahern To Jacqueline M. Montoya's Petition To
6 Compel Trustee To Distribute Accrued Income And Future Income Received From Oil, Gas, And
7 Mineral Leases And Declaration Of The Applicability Of The Doctrine Of Laches filed on January
8 3, 2014 when intentional interference with contractual relations, punitive damages, and enforcement
9 of the no contest clause were specifically identified. And ELEANOR's counterclaims were
10 discussed at length at the Pretrial Conference on February 12, 2014. Thus, not once, not twice, but
11 on at least three occasions, ELEANOR notified counsel for Petitioner JACQUELINE M.
12 MONTOYA and this Court of her counterclaims.

13 It is somewhat ironic for Petitioner JACQUELINE M. MONTOYA to accuse ELEANOR
14 and her legal counsel of such "tactics" when her own behavior herein is examined. For starters, it is
15 undisputed that Petitioner JACQUELINE M. MONTOYA filed a Petition in Texas seeking the
16 probate of the alleged Last Will And Testament of MARJORIE T. CONNELL in which it was
17 falsely stated that "No child was ever born to or adopted by the Decedent" (ELEANOR is the
18 adopted daughter of the Decedent) and "Decedent owned oil, gas and mineral interests located in
19 Upton County, Texas (the interests are owned in trust, not individually).

20 Also Petitioner JACQUELINE M. MONTOYA, through her Texas legal counsel, contacted
21 all of the oil companies and the surface tenant after the filing of this Nevada action and requested
22 that all of the royalties and rent be suspended during the pendency of the Nevada action even
23 though there is no dispute that ELEANOR is entitled to thirty-five percent (35%) of the royalties
24 and rent. This request was honored and the royalties and rent were suspended in total until this
25 Court issued an Order directing the oil companies and tenant to release of such royalties and rent.

26 Also it appears that Petitioner JACQUELINE M. MONTOYA closed a TRUST account and
27 opened a new account in her name as customer via the use of forgeries of the names of ELEANOR
28 and of MARJORIE T. CONNELL on the bank records. (For further details, see below.) Talk about
"tactics", "playing games" and "many colorful adjectives that can describe what is occurring here"!

1 Furthermore, such actions by Petitioner (and additional actions that are just now being uncovered
2 through additional discovery) certainly justify a claim for punitive damages, which in all due
3 respect are not “[i]ntended to destroy family wealth” but are a valid legal remedy under Nevada law
4 and the law of most states law intended to punish outrageous behavior and serve as a deterrent to
5 such behavior.

6 In any event, pursuant to the Nevada Rules of Civil Procedure (“NRCP”), ELEANOR was
7 not required to file her Answer (containing her counterclaims) until a final order was entered on her
8 Motion To Dismiss Petition For Declaratory Judgment Regarding Limited Interest Of Trust Assets
9 Pursuant To NRS 30.040, NRS 153.031(1)(e), And NRS 164.033(1)(a) For Failure To State A
10 Claim Upon Which Relief Can Be Granted Per NRCP 12(b)(5) (the “Motion To Dismiss”), which
11 as of the date of this PETITION has not been entered. NRCP Rule 12(b) specifically provides:

12 **(b) How Presented.** Every defense, in law or fact, to a claim for
13 relief in any pleading, whether a claim, counterclaim, cross-claim, or
14 third-party claim, shall be asserted in the responsive pleading thereto
15 if one is required, *except that the following defenses may at the option*
16 *of the pleader be made by motion:* (1) lack of jurisdiction over the
17 subject matter, (2) lack of jurisdiction over the person, (3)
18 insufficiency of process, (4) insufficiency of service of process, (5)
19 *failure to state a claim upon which relief can be granted*, (6) failure to
20 join a party under Rule 19. ***A motion making any of these defenses***
21 ***shall be made before pleading if a further pleading is permitted.*** No
22 defense or objection is waived by being joined with one or more other
23 defenses or objections in a responsive pleading or motion. If a
24 pleading sets forth a claim for relief to which the adverse party is not
25 required to serve a responsive pleading, the adverse party may assert
26 at the trial any defense in law or fact to that claim for relief. If, on a
27 motion asserting the defense numbered (5) to dismiss for failure of the
28 pleading to state a claim upon which relief can be granted, matters
outside the pleading are presented to and not excluded by the court,
the motion shall be treated as one for summary judgment and
disposed of as provided in Rule 56, and all parties shall be given
reasonable opportunity to present all material made pertinent to such a
motion by Rule 56. (Emphasis added)

1 Thus, according to NRCP Rule 12(b), a motion asserting a defense based on the failure of an
2 adverse party to state a claim upon which relief can be granted must be made first before any
3 further pleading. In this case, ELEANOR's Motion To Dismiss sought to dismiss this case for the
4 Petitioner JACQUELINE M. MONTOYA's failure to state a claim upon which relief can be
5 granted and was captioned as a Rule 12(b)(5) motion. Accordingly, it was required to be filed and
6 decided upon before any other responsive pleading could be filed by ELEANOR. Other pleadings
7 were in fact filed herein on behalf of ELEANOR, but they were Motions or responses to Motions of
8 opposing counsel. The Motion To Dismiss was denied by the Court without prejudice on January
9 14, 2014. A proposed Order was prepared by counsel for ELEANOR and sent to opposing counsel.
10 As of the date of this PETITION and to date, such Order has not been entered as counsel for
11 Petitioner JACQUELINE M. MONTOYA has yet to agree on the language of such Order. As a
12 result, arguably ELEANOR is not yet required or even permitted by NRCP Rule 12(b) to file an
13 Answer, Affirmative Defenses And Counterclaims. Therefore, there can be no argument that
14 ELEANOR failed to timely assert her counterclaims.

15 Contrary to the allegations made by Petitioner JACQUELINE M. MONTOYA, neither
16 ELEANOR nor her counsel have "played games" in this case or sought to delay the trial originally
17 scheduled for February 18, 2014. *See* the Affidavit of attorney John R. Mugan attached hereto as
18 **Exhibit C** and incorporated herein by this reference. In fact, the thought of delaying the February
19 18, 2014 trial "was never considered, discussed or anticipated" by counsel for ELEANOR. *See* the
20 Affidavit of attorney John R. Mugan attached hereto as **Exhibit C** and incorporated herein by this
21 reference. Quite the opposite, ELEANOR's counsel "spent many hours preparing for the February
22 18, 2014 trial and meeting with witnesses, had two (2) witnesses from Texas and a local CPA
23 rebuttal expert witness present on February 18 in the courtroom to testify, and fully expected to
24 proceed with the trial." *See* the Affidavit of attorney John R. Mugan attached hereto as **Exhibit C**
25 and incorporated herein by this reference. "Based on the exhibits and the fact that opposing counsel
26 represented that he planned on calling only one (1) witness, the last thing that [counsel for
27 ELEANOR] wanted was a continuance of the February 18, 2014 trial. *See* the Affidavit of attorney
28 John R. Mugan attached hereto as **Exhibit C** and incorporated herein by this reference. Further, as
shown above, ELEANOR and her counsel gave Petitioner JACQUELINE M. MONTOYA and her

1 counsel ample notice in a timely fashion. And ELEANOR filed her Answer despite the fact that an
2 order has not been entered on her NRCPP Rule 12(b)(5) motion. For these reasons, Petitioner
3 JACQUELINE M. MONTOYA's factual allegations summarized above are entirely lacking in
4 truthfulness.

5 **B. Petitioner Has Failed To Satisfy The Requirements For Injunctive Relief.**

6 An examination of the requirements for an injunction and an application of the facts herein
7 to such requirements clearly show such further injunctive relief requested by Petitioner should be
8 denied. Again, **the continuance of the trial herein has no legal effect on whether the Petitioner**
9 **has met her burden of proof in satisfying the mandatory requirements for the injunctive relief**
10 **which she is seeking.**

11 **Requirements For An Injunction.**

12 Generally speaking, in Nevada, as in most states, there are three, minimum requirements to
13 be satisfied by the Petitioner before an injunction is issued by a Court. "A preliminary injunction is
14 available [only] upon a showing that the party seeking it enjoys a reasonable probability of success
15 on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable harm
16 for which compensatory damages is an inadequate remedy." *Sobel v. Capital Management*
17 *Consultants, Inc.*, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986) citing *Number One Rent-A-Car v.*
18 *Ramada Inns*, 94 Nev. 779, 780, 587 P.2d 1329, 1330. There also is an additional requirement,
19 namely the giving of security by the Petitioner for the payment of costs and damages as may be
20 incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.
NRCPP 65(c).

21 The first three (3) requirements can be summarized as follows:

- 22 1) Proof that irreparable harm will result if an injunction is not issued;
- 23 2) Compensatory damages is not an adequate remedy for such irreparable harm, and
- 24 3) Showing of reasonable probability of success in the action by the party seeking the
25 injunction.

26 An examination of each of these requirements in the context of this matter shows that
27 Petitioner has failed to meet any of the requirements. It should be noted that the failure of Petitioner
28 to meet even one of these requirements necessitates the denial of the request for the issuance of an

1 injunction.

2 **1. No Proof By Petitioner That Irreparable Harm Will Result If An Injunction Is Not**
3 **Issued.**

4 Petitioner JACQUELINE M. MONTOYA makes no allegation as to she and her sister
5 suffering immediate and irreparable injury, loss or damage if an additional, affirmative injunction is
6 not issued now. Numerous times in her pleading Petitioner JACQUELINE M. MONTOYA alleges
7 that the additional injunctive relief is necessary in order to return to the alleged “[s]tatus quo.”
8 Petitioner JACQUELINE M. MONTOYA cites no legal authority for such proposition. This is
9 understandable in that there is no legal authority in support of such proposition. The alleged “status
10 quo” is not the standard; the standard is the three (3) requirements set out above including a
11 showing of immediate and irreparable injury, loss or damage to the Petitioner JACQUELINE M.
12 MONTOYA if the injunction is not issued. Petitioner JACQUELINE M. MONTOYA alleges that
13 an injunction is necessary to “[p]revent further, severe, financial damages ...” However, Petitioner
14 JACQUELINE M. MONTOYA does not set forth what these specific damages are, the necessity for
15 distribution of the disputed funds at this time, and what immediate and irreparable injury, loss or
16 damage she and her sister will suffer if the disputed funds are not distributed at this time.
Accordingly, Petitioner JACQUELINE M. MONTOYA has failed in her burden of proof.

17 Also it is important to note regarding the “status quo” that based on continuing discovery
18 herein, it appears that upon the death of MARJORIE T. CONNELL in 2009 Petitioner
19 JACQUELINE M. MONTOYA assumed complete control of the TRUST and the distributions of
20 the royalties and rent therefrom. ELEANOR was denied access to the records and funds of the
21 TRUST by Petitioner JACQUELINE M. MONTOYA from the date of death of MARJORIE T.
22 CONNELL in 2009 until approximately the Spring of 2012, when ELEANOR finally began to
23 obtain access to the TRUST records and funds and began to piece together what had been occurring.
24 Accordingly, the constant mantra of the “status quo for approximately 33-34 years” by Petitioner
25 JACQUELINE M. MONTOYA does not hold up upon further discovery and examination of the
26 facts.

27 It is further important to note that Petitioner JACQUELINE M. MONTOYA and her sister
28 received a significant inheritance upon the death of MARJORIE T. CONNELL, who died on May

1 9, 2009. Following the death of MARJORIE T. CONNELL, Petitioner JACQUELINE M.
2 MONTOYA, KATHRYN A. BOUVIER and ELEANOR met with David A. Straus, Esquire. Mr.
3 Straus informed them that Petitioner JACQUELINE M. MONTOYA and her sister, KATHRYN A.
4 BOUVIER, would be receiving a bequest of approximately Three Million Five Hundred Thousand
5 Dollars (\$3,500,000) from MARJORIE T. CONNELL via THE MTC LIVING TRUST dated
6 December 6, 1995 as restated on January 7, 2008 ("THE MTC LIVING TRUST"). THE MTC
7 LIVING TRUST consists of an exempt sub-trust and a nonexempt sub-trust, both sub-trusts
8 consisting of one equal share for Petitioner JACQUELINE M. MONTOYA and one equal share for
9 KATHRYN A. BOUVIER. Petitioner JACQUELINE M. MONTOYA became the successor
10 trustee of THE MTC LIVING TRUST immediately upon the death of MARJORIE T. CONNELL.
11 See Article Three, Section 3.02(a) of THE MTC LIVING TRUST attached hereto as **Exhibit D**. As
12 such successor trustee, Petitioner JACQUELINE M. MONTOYA may distribute as much of the
13 income and principal of the shares of the sub-trusts to Petitioner JACQUELINE M. MONTOYA
14 and to KATHRYN A. BOUVIER as Petitioner JACQUELINE M. MONTOYA, in her absolute and
15 sole discretion, deems necessary or advisable for her own or KATHRYN A. BOUVIER's health,
16 education, maintenance and support. See Article Eight, Section 8.02(a) and Article Nine, Section
17 9.02(a) of THE MTC LIVING TRUST attached hereto as **Exhibit D**.

18 Also in Paragraph D.24 of her 2013 DECLARATORY JUDGMENT PETITION, Petitioner
19 states as follows:

20 "As stated above, a significant increase in value derived from the leases, and one in
21 particular, occurred in 2012. In this time frame, a very lucrative lease was entered into with
22 Apache Corporation covering part of the property in Upton County, Texas. The total bonus
23 of this lease totaled in the millions, and Ms. Ahern, Jacqueline and Kathryn together
24 received a total of \$1.7 million. This bonus was divided in the usual 65%/35% ratio."

25 According to this allegation of Petitioner JACQUELINE M. MONTOYA, THE MTC
26 LIVING TRUST in 2012 would have received the sum of One Million One Hundred Five Thousand
27 Dollars (\$1,105,000.00) with Petitioner JACQUELINE M. MONTOYA's share of THE MTC
28 TRUST thereby increasing in the amount of Five Hundred Fifty-two Thousand Five Hundred
Dollars (\$552,500.00) and KATHRYN A. BOUVIER's share of THE MTC TRUST also increasing
Five Hundred Fifty-two Thousand Five Hundred Dollars (\$552,500.00). Accordingly, Petitioner
JACQUELINE M. MONTOYA and her sister as equal beneficiaries of THE MTC LIVING TRUST

1 would have received the total, combined sum of Four Million Six Hundred and Five Thousand
2 Dollars (\$4,605,000.00) since 2009 (Three Million Five Hundred Thousand Dollars (\$3,500,000.00)
3 upon the death of MARJORIE T. CONNELL in 2009 and One Million One Hundred Five
4 Thousand Dollars (\$1,105,000.00) lease bonus in 2012). Petitioner JACQUELINE M.
5 MONTOYA's share and her sister's share as equal beneficiaries of THE MTC LIVING TRUST
6 would be Two Million Three Hundred Two Thousand Five Hundred Dollars (\$2,302,500.00) each.
7 Frankly speaking, one is hard pressed to accept the proposition that Petitioner JACQUELINE M.
8 MONTOYA and her sister will suffer immediate and irreparable injury, loss or damage if the
9 disputed portion of the royalties and rent remains in the TRUST until this matter is decided, in light
10 of their inheritance and the Apache Corporation lease bonus that they each received in the last
11 several years totaling approximately Two Million Three Hundred Two Thousand Five Hundred
12 Dollars (\$2,302,500.00). It is most difficult under these circumstances to see how Petitioner
13 JACQUELINE M. MONTOYA (and her sister) are being "starved out".

14 Of important note is the fact that Petitioner JACQUELINE M. MONTOYA has failed to
15 respond or dispute this allegation in any of her pleadings herein, which allegation was set out in
16 ELEANOR'S previous Objection to Petitioner JACQUELINE M. MONTOYA's first Petition to
17 compel distribution filed herein on January 3, 2014.

18 Further, this same argument by Petitioner JACQUELINE M. MONTOYA for an injunction
19 could be made by ELEANOR in a similar fashion. If ELEANOR is successful in this matter, she
20 will have been wrongfully denied the use and enjoyment of the disputed royalties and rent and
21 suffered "[s]evere financial damages." However, the Court has wisely treated the two (2) sides who
22 claim the disputed portion of the royalties and rent exactly the same, namely such disputed monies
23 will be held in the TRUST and preserved until final resolution of this dispute, at which time the
24 successful party is assured that the funds will be there to claim. In the interim, neither side will
25 have the opportunity to dispose of the disputed funds and potentially deny the successful party of
26 receipt of the same.

26 **2. Compensatory Damages Is An Adequate Remedy.**

27 Even if one presumes that Petitioner JACQUELINE M. MONTOYA will suffer irreparable
28 harm if an injunction is not issued, Petitioner JACQUELINE M. MONTOYA has also failed to

1 meet her burden of proof that there exists no adequate legal remedy for such irreparable harm.
2 Here, the dispute is over compensatory damages, namely dollars representing the income from the
3 disputed portion of the royalties and rent. There exists an adequate remedy at law in the form of
4 compensatory damages, to-wit compensation in dollars. This is not a dispute involving a unique
5 and particular asset such as the sale of certain real estate that cannot be duplicated or replaced, or a
6 proposed action that cannot be reversed such as the implosion of a building. Not only is there an
7 adequate remedy at law in the form of compensatory damages in the form of dollars, the disputed
8 royalties and rent is even being held in the TRUST per Court Order until this matter is resolved.
9 Accordingly, if Petitioner JACQUELINE M. MONTOYA prevails, ELEANOR as Trustee of the
10 TRUST will simply distribute such disputed royalties and rent to Petitioner as recompense. Thus,
11 not only is the legal remedy of compensatory damages adequate in this case, the parties are already
12 assured the disputed monies will be there for the successful party.

13 An examination of the transcript of the January 14, 2014 hearing on Petitioner's first
14 Petition shows that the Court clearly came to the conclusion that there is adequate compensation
15 herein. The following exchange took place at such hearing:

16 "MR. MUGAN: ... **We're talking about dollars here.**

17 THE COURT: **Right.**

18 MR. MUGAN: **That's adequate compensation.** We're not talking about blowing up a
19 building that can't be replaced, or the sale of real estate that's irreplaceable. We're talking
20 about dollars. **That's adequate compensation.**

21 THE COURT: **And since it's not even like an asset that would fluctuate like in the stock**
22 **market. It's oil lease money. It's —**

23 MR. MUGAN: Yeah, it's oil.

24 THE COURT: **It's revenue from oil leases.**

25 MR. MUGAN: Right.

26 THE COURT: **It's cash coming in."** (emphasis added)

27 A copy of this Transcript is attached hereto as **Exhibit F** and incorporated herein by this
28 reference. See Hearing Transcr. 18:7-20 (January 14, 2014).

///

///

1 **3. No Showing By Petitioner JACQUELINE M. MONTOYA Of Reasonable**
2 **Probability Of Success In The Action.**

3 **The Upton County, Texas, Oil Rights Were Never Allocated To Trust No. 3**

4 Petitioner JACQUELINE M. MONTOYA claims that the disputed sixty-five percent (65%)
5 interest in the oil, gas and mineral interests on and under certain real estate and severed oil, gas and
6 mineral interest in other acreage all located in Upton County, Texas, was allocated to Trust No. 3
7 after the death of W. N. CONNELL. It is undisputed that at the time of the death of W. N.
8 CONNELL, the total interest to the royalties and rent was vested in the name of the TRUST.
9 Proper allocation of this disputed sixty-five percent (65%) interest would be accomplished by the
10 execution of a deed by the successor trustee conveying such interest to Trust No. 3, and would be
11 done usually no later than nine (9) to twelve (12) months following the death of W. N. CONNELL.
12 W.N. CONNELL died on November 24, 1979. MARJORIE T. CONNELL was the successor
13 trustee of the TRUST. See Article TWELFTH, SUCCESSOR TRUSTEE, of the TRUST
14 agreement attached hereto as **Exhibit E**. MARJORIE T. CONNELL would be personally aware of
15 the necessity to convey such disputed sixty-five percent (65%) interest as it was necessary for W. N.
16 CONNELL to convey his total interest in the royalties and rent to herself and W. N. CONNELL as
17 trustees of the TRUST when he and MARJORIE T. CONNELL established such TRUST. See
18 copies of deeds attached hereto as **Exhibit F**. This was legally necessary in order for the Upton
19 County, Tex, Oil rights to become assets of the TRUST. MARJORIE T. CONNELL also had legal
20 representation to assist her after the death of her husband, and presumably such legal counsel would
21 have advised her of the necessity to allocate the disputed sixty-five percent (65%) interest to Trust
22 No. 3 via deed. However, it is undisputed that legal title to such disputed sixty-five percent (65%)
23 interest was never allocated to Trust No. 3 via a deed executed by MARJORIE T. CONNELL as
24 successor trustee of the TRUST.

25 MARJORIE T. CONNELL as successor trustee of the TRUST also had certain fiduciary
26 duties. This would include the duty of a trustee to comply with the terms of the trust as is
27 "[n]ecessary or appropriate to accomplish a purpose of the trust." *NRS 163.023*. Section 84 of the
28 Restatement (Third) of Trusts indicates in part "[i]t is ordinarily the duty of the trustee: to earmark
the trust property as property of the trust; to keep the trust property separate from the trustee's own
property; and to keep the trust property separate from property held by the trustee upon other

1 trusts.” If in fact the disputed sixty-five percent (65%) interest was to be allocated to Trust No. 3 as
2 alleged by Petitioner JACQUELINE M. MONTOYA, MARJORIE T. CONNELL as successor
3 trustee was legally required to convey such interest via deed to the trustee of Trust No. 3 and keep it
4 separate from the assets of Trust No. 2. It speaks volumes that MARJORIE T. CONNELL did not
5 do so, and of course she is not here today to explain why this was not done by her. Perhaps
6 MARJORIE T. CONNELL understood that it was the intent of W. N. CONNELL that his only
7 child, ELEANOR, be entitled to the income from his sole and separate property consisting of all of
8 the Upton County, Texas, Oil rights during ELEANOR’s lifetime as expressed in the TRUST
9 agreement, and MARJORIE T. CONNELL agreed.

10 The only document produced by Petitioner JACQUELINE M. MONTOYA that tends to
11 show any semblance of an allocation is the 1980 Texas Inheritance Tax Return purportedly filed on
12 behalf of the W.N. CONNELL Estate. *See* Exhibit “D” to Petitioner’s 2013 DECLARATORY
13 JUDGMENT PETITION filed herein on September 27, 2013. Upon closer review, however,
14 nowhere in the document can a distribution be linked to Trust No. 3 and in fact there are no
15 references whatsoever to Trust No. 3 contained in the document. When referring to the alleged
16 distribution that Petitioner relies on to claim the disputed interest in the royalties and rent, the Texas
17 Inheritance Tax Return states that the distributions were to “Marjorie Connell” and to “Eleanor M.
18 Connell Hartman”. This is obviously wrong and contrary to any possible construction of the terms
19 of the TRUST. Accordingly, the document upon which Petitioner bases her claim is false on its
20 face. In any event, based on this description to “Marjorie Connell” and to “Eleanor M. Connell
21 Hartman”, it takes quite the leap to deduce that sixty-five percent (65%) of the Upton County,
22 Texas, Oil rights were allocated to Trust No. 3. Clearly this is inaccurate as no such distribution
23 was ever made and there has been no allegation in any proceeding that this was in fact the case.
24 Relying on the purported Texas Inheritance Tax Return would lead to the conclusion that the Upton
25 County, Texas, Oil rights are not held in trust at all; rather these rights were distributed to
26 ELEANOR and MARJORIE T. CONNELL individually. This is contrary to Petitioner
JACQUELINE M. MONTOYA’s own stated position as set forth in her pleadings.

27 Also Article Third, Marital Deduction, of the TRUST agreement states in part:

28 “In making the computations and allocations of the said property to Trust No. 3 as herein

1 required, the determination of the character and ownership of the said property and the value
thereof **shall be as finally established for federal estate tax purposes.**" (emphasis added)

2 Petitioner JACQUELINE M. MONTOYA has failed to produce a copy of the Form 706, the
3 federal estate tax return, filed on behalf of the W. C. CONNELL Estate and the TRUST in support
4 of her DECLARATORY JUDGMENT PETITION filed herein on September 27, 2013, and has
5 stated that she is unable to obtain a copy.

6 Furthermore, the purported Texas Inheritance Tax Return is incorrect on its face as it fails to
7 take into consideration the legal effect of Article *FOURTH, TRUST NO. 2*, Paragraph B, *Income*, of
8 the TRUST agreement, which states:

9 "All income received by this Trust from the separate property of the Decedent [W. N.
10 CONNELL] shall be paid to the Residual Beneficiary [ELEANOR]. In the event any of the
11 real property located in Upton County, Texas, as listed on the original Schedule "A"
12 attached hereto, forms a part of the corpus of this Trust, **the Residual Beneficiary**
13 **[ELEANOR] shall be paid an additional payment from the income received from the**
14 **Decedent's [W. N. CONNELL] half of the community property, which forms a part of**
15 **the corpus of this Trust, equal to all of the income received by this Trust from the real**
16 **property located in Upton County, Texas."** (emphasis added)

17 Schedule "A" attached to the TRUST agreement sets out the detailed legal descriptions of
18 the Upton County, Texas, real property as the "[s]eparate property of W. N. CONNELL." See
19 Schedule "A" of the TRUST agreement attached hereto as **Exhibit E**. It is obvious that the intent of
20 Decedent W. N. CONNELL was that his only child, ELEANOR, should have the right to receive an
21 amount equal to all of the income generated from the Upton County, Texas, Oil rights as long as
22 ELEANOR lived. This makes perfect sense from an estate-planning point of view in that the Upton
23 County, Texas, Oil rights were the sole and separate property of W. N. CONNELL that he brought
24 into his second marriage with MARJORIE T. CONNELL, ELEANOR was his only child, and
25 ELEANOR was his child from a previous marriage.

26 If no allocation was made to Trust No. 3, then pursuant to Subparagraph 4 of Paragraph C of
27 the TRUST agreement (see Exhibit "G" attached hereto), **"[t]he Trustee shall allocate to Trust**
28 **No. 2 all the remaining protion (sic) of the trust estate not allocated to Trust No. 3..."**
(emphasis added). And Article *FOURTH, TRUST NO. 2*, Paragraph B, *Income*, of the TRUST
agreement (see Exhibit "G" attached hereto) sets forth that, **"[a]ll income received by this Trust**
from the separate property of the Decedent [W.N. CONNELL] shall be paid to the Residual
Beneficiary [ELEANOR]." (emphasis added). Because no allocation of the Upton County, Texas,

1 Oil rights was ever made to Trust No. 3, by default these rights were allocated to Trust No. 2 and
2 ELEANOR is the sole beneficiary of the income paid from these rights, as they were W.N.
3 CONNELL's separate property.

4 Also Petitioner JACQUELINE M. MONTOYA claims that there was an exercise of a
5 testamentary power of appointment of Trust No. 3 to THE MTC LIVING TRUST under the terms
6 of the Last Will and Testament of MARJORIE T. CONNELL when she died on May 1, 2009.
7 Article FIFTH, *TRUST NO. 3*, Paragraph B, Powers of appointment over income and principal, of
8 the TRUST agreement grants a lifetime (not exercised) and a testamentary general power of
9 appointment over Trust No. 3 to the Survivor [MARJORIE T. CONNELL], and in relevant part
10 states:

11 "2. Upon the death of the Survivor, he or she shall have the absolute power to appoint
12 the entire principal and the undistributed income, if any, of the estate of Trust No. 3, or any
13 part thereof, to his or her estate or to any person or persons. Such power of appointment
shall be exercised only by a provision in the Last Will of the Survivor expressly exercising
such power."

14 However, the alleged probate proceeding of the Last Will And Testament of MARJORIE T.
15 CONNELL in Texas is being challenged. Accordingly, the validity of the Last Will And Testament
16 of MARJORIE T. CONNELL under which the testamentary power of appointment was allegedly
17 exercised has not even been established to date.

18 Even if for discussion purposes MARJORIE T. CONNELL did exercise her testamentary
19 power of appointment of Trust No. 3 to THE MTC LIVING TRUST pursuant to her Last Will And
20 Testament, there had never been an allocation of the sixty-five percent (65%) interest in the Upton
21 County, Texas, Oil rights to Trust No. 3 back in 1980. Such disputed interest was not an asset of
22 Trust No. 3 so the purported exercise of the testamentary power of appointment of Trust No. 3 to
23 THE MTC LIVING TRUST pursuant to her Last Will And Testament of MARJORIE T.
24 CONNELL had no effect on such disputed interest. More importantly, upon MARJORIE T.
25 CONNELL's death in 2009, the sixty-five percent (65%) interest in the Upton County, Texas, Oil
26 rights should have been distributed to Petitioner JACQUELINE M. MONTOYA as successor
27 trustee of THE MTC LIVING TRUST. However, this was never done and Petitioner
28 JACQUELINE M. MONTOYA did not insist that it be done. Why? The answer is that it was not
considered an asset of Trust No. 3, which is completely consistent with the actions of Petitioner

1 JACQUELINE M. MONTOYA and her sister and the documents they signed in the 2009
2 proceeding shortly after the death of MARJORIE T. CONNELL as set out below. Accordingly, the
3 disputed royalties and rent interest was not only never allocated to Trust No. 3 when W. N.
4 CONNELL died in 1979, it was never allocated to THE MTC LIVING TRUST in 2009 when
5 MARJORIE T. CONNELL died.

6 **Petitioner JACQUELINE M. MONTOYA Fails To Assert A Claim To 65% Of the Upton**
7 **County, Texas, Oil Rights.**

8 In April of 2012, approximately thirty-two years (32) years after the date the purported
9 Texas Inheritance Tax Return was filed and the date of the supposed allocation to Trust No. 3, and
10 approximately three (3) years after MARJORIE T. CONNELL's death and the purported exercise
11 of her power of appointment over Trust No. 3 to THE MTC LIVING TRUST, two (2) new Oil and
12 Gas Lease contracts with Apache Corporation were executed. Copies of these Oil and Gas Lease
13 contracts are attached hereto as **Exhibit G** and by this reference incorporated herein. During this
14 time, ELEANOR was ill and was unable to attend the negotiations and as a result, Petitioner
15 JACQUELINE M. MONTOYA was primarily involved in negotiating these new Oil and Gas Lease
16 contracts. Paragraph D.20 of Petitioner's 2013 DECLARATORY JUDGMENT PETITION states
in part:

17 "In recent times, Jacqueline, with the assistance of other professionals, has put in a
18 tremendous amount of time and energy in negotiating new leases for the Texas properties,
19 which, as noted above, was a task that had been previously done by Marjorie. Once the
20 terms of a new lease, or the renewal of a previous lease, had been agreed upon and reviewed
21 by professionals specializing in the field, Jacqueline gave Ms. Ahern the original documents
so Ms. Ahern would sign them in the presence of a notary, and return the originals and
copies to Jacqueline."

22 As stated by Petitioner JACQUELINE M. MONTOYA, after the Oil and Gas Lease
23 contracts were formulated and reviewed by professionals, Petitioner JACQUELINE M.
24 MONTOYA presented the same to ELEANOR for her approval and signature. ELEANOR signed
25 both Oil and Gas Lease contracts "individually and as Trustee of the W.N. Connell and
26 Marjorie T. Connell Living Trust under Trust Agreement dated May 18, 1972" and as sole
27 lessor (emphasis added). If in fact, as alleged by Petitioner, THE MTC LIVING TRUST was the
28 owner of the disputed sixty-five percent (65%) interest through an implied allocation in 1980 and
the exercise of a testamentary power of appointment to THE MTC LIVING TRUST under the terms

1 of the Last Will and Testament of MARJORIE T. CONNELL when she died on May 1, 2009,
2 Petitioner should have also signed the new Oil and Gas Lease contracts as Trustee of THE MTC
3 LIVING TRUST. In fact, if there had been an allocation of the Upton County, Texas, Oil rights to
4 Trust No. 3, Petitioner JACQUELINE M. MONTOYA would have been legally required to also
5 sign the Oil and Gas Lease contracts in her capacity as the sole Successor Trustee of THE MTC
6 LIVING TRUST. But, she did not do so. Instead, she had her mother (ELEANOR) sign the
7 Apache Corporation Oil and Gas Lease contracts executed in 2012 as Trustee of the TRUST and
8 sole lessor. Apparently Petitioner JACQUELINE M. MONTOYA and the "[p]rofessionals
9 specializing in the field" who reviewed the matter and advised Petitioner JACQUELINE M.
10 MONTOYA believed that ELEANOR individually and as Trustee of the TRUST was the sole
11 person to sign the leases or renewals, and not Petitioner JACQUELINE M. MONTOYA as trustee
12 of THE MTC LIVING TRUST. Given Petitioner JACQUELINE M. MONTOYA's extensive
13 involvement in the negotiation of these lease contracts, the claims that Petitioner JACQUELINE M.
14 MONTOYA now asserts, over one (1) year later, are directly contradictory to her actions regarding
15 the leases and renewal.

16 **The Manner In Which The TRUST Received Its Royalty Payments Attendant To The Upton**
17 **County, Texas, Oil Rights Is Further Proof That There Was Never An Allocation Of Such**
18 **Rights To Trust No. 3.**

19 Upon reviewing the Division Orders provided by the various oil lessees relating to the
20 Upton County, Texas, Oil rights, from approximately 1986 through the present, the oil companies
21 have remitted payment of the royalties to the tax identification number for Trust No. 2. The tax
22 identification number for Trust No. 2 was provided to the oil companies by MARJORIE T.
23 CONNELL and ELEANOR. Trust No. 3 had a separate tax identification number that was not
24 furnished to, nor used by, the oil companies for such royalty payments. Notably, this has been the
25 practice since the death of W.N. CONNELL and even after the death of MARJORIE T. CONNELL.
26 And as discussed above, Petitioner JACQUELINE M. MONTOYA was extensively involved in
27 dealing with the Upton County, Texas, Oil rights, including dealing with the accountant, Corey
28 Haina, in accounting for the Upton County, Texas, Oil right income. Therefore, she was fully
aware that the royalty income from such rights was paid, in full, to Trust No. 2. Again, if an
allocation was made to Trust No. 3 in 1980, then MARJORIE T. CONNELL would have certainly

1 sought to have the income payments applied correctly back then. And even if MARJORIE T.
2 CONNELL did not take such action in 1980 or during the next twenty-nine (29) years preceding her
3 death, Petitioner JACQUELINE M. MONTOYA should have sought to change the payment of the
4 Upton County, Texas, Oil right income in 2009, when MARJORIE T. CONNELL passed away and
5 the Probate Court obtained jurisdiction over the TRUST, and in 2012 when the Apache Corporation
6 Oil and Lease contracts were negotiated. Petitioner JACQUELINE M. MONTOYA failed to do so.

7 **2009 TRUST Proceeding.**

8 Subsequent to the death of MARJORIE T. CONNELL, a Petition To Assume Jurisdiction
9 Over Trust; Confirm Trustee; And Construe And Reform Trust (the "2009 PETITION") was filed
10 by MARK A. SOLOMON, Esquire, and BRIAN K. STEADMAN, Esquire, as purported attorneys
11 for ELEANOR as Petitioner. This is the first case dealing with the TRUST, Trust No. 2, its assets,
12 the income therefrom, the remainder interest, and the construction and reformation of the TRUST
13 agreement. The 2009 PETITION was filed with this Court on August 17, 2009. In essence, the
14 action was initiated and driven by Petitioner JACQUELINE M. MONTOYA and her attorney, Mr.
15 Straus, Esquire, and primarily was for the benefit of JACQUELINE M MONTOYA and her sister,
16 KATHRYN A. BOUVIER. A copy of such 2009 PETITION without exhibits is attached hereto as
17 **Exhibit H** and by this reference incorporated herein. In particular, the Court assumed jurisdiction
18 of the TRUST, the Court confirmed the Trustee thereof, and the Court construed and reformed the
19 TRUST agreement in part by declaring that Petitioner JACQUELINE M. MONTOYA and
20 KATHRYN A. BOUVIER were beneficiaries of Trust No. 2 upon the death of their mother,
21 ELEANOR. The second case, the 2013 DECLARATORY JUDGMENT PETITION, also involves
22 the TRUST, Trust No. 2, its assets, the income therefrom, the remainder interest, and the
construction and reformation of the TRUST agreement.

23 Paragraphs 18-20, inclusive, of the 2009 PETITION provide in relevant part as follows:

24 "18. As of the death of MARJORIE, Trust No. 2 owned land and oil and gas shares in
25 reserves and income located in Upton County, Texas (the 'Oil Assets'). The Oil Assets
26 have not been valued for some time, but are estimated to be worth approximately \$700,000."
(emphasis added)

27 "19. Pursuant to Article Fourth, which Article governs the administration of Trust No. 2,
28 all income from the Oil Assets is to be paid to the Petitioner [ELEANOR] as the

1 **‘Residual Beneficiary’ during her lifetime.**” (emphasis added)

2 “20. Section B of Article Fourth, governing Trust No. 2, provides as follows:

3 B. Income.... In the Event that the [Petitioner] (ELEANOR) predeceases [MARJORIE],
4 the [Petitioner’s] right to receive income hereunder shall be paid to or for the benefit of her
5 living children and the issue of any deceased child by right of representation; or in the event
6 she dies without leaving issue, her income rights hereunder shall become those of
7 [MARJORIE].”

8 Attached as Exhibit 6 to the 2009 PETITION is the Consent To Petition To Assume
9 Jurisdiction Over Trust; Confirm Trustee; And Construe And Reform Trust And Waiver Of Notice
10 of JACQUELINE M. MONTOYA dated August 8, 2009. A copy of such Consent is attached
11 hereto as **Exhibit I** and by this reference incorporated herein. Paragraphs 1-3, inclusive, of the
12 Consent provide in relevant part as follows:

13 “1. I am a **contingent income beneficiary** of the W. N. CONNELL AND MARJORIE
14 T. CONNELL LIVING TRUST, dated May 18, 1972 (the ‘Trust’).” (emphasis added)

15 “2. **I have read the Petition** To Assume Jurisdiction Over Trust; Confirm Trustee; And
16 Construe And Reform Trust (the ‘Petition’) and **believe it to be true and correct** to the best
17 of my knowledge.” (emphasis added)

18 “3. I hereby **consent to the Petition** and request that the Court enter an Order approving
19 the Petition **in its entirety.**” (emphasis added)

20 The allegations in the 2009 PETITION in the first case were directly on point regarding the
21 dispute contained in the second case. In fact the dispute raised in the 2013 DECLARATORY
22 JUDGMENT PETITION case, ownership of the Oil assets and the corresponding entitlement to the
23 income therefrom, was addressed in the 2009 PETITION and Consents. The 2009 PETITION
24 specifically states that that: (1) as of the death of MARJORIE, **Trust No. 2 owned land and oil**
25 **and gas shares in reserves and income located in Upton County, Texas (the “Oil Assets”)**; and
26 (2) pursuant to Article Fourth, which Article governs the administration of Trust No. 2, **all income**
27 **from the Oil Assets is to be paid to ELEANOR as the “Residual Beneficiary” during her**
28 **lifetime.** The Consents of JACQUELINE M. MONTOYA (and KATHRYN A. BOUVIER) filed in
the 2009 case specifically state: (1) **JACQUELINE M. MONTOYA has read the Petition** To
Assume Jurisdiction Over Trust; Confirm Trustee; And Construe And Reform Trust **and believes it**

1 to be true and correct to the best of her knowledge; and (2) JACQUELINE M. MONTOYA
2 consents to the Petition and requests that the Court enter an Order approving the Petition in its
3 entirety. Furthermore and most noteworthy, the Consents contain an affirmative representation by
4 JACQUELINE M. MONTOYA (and KATHRYN A. BOUVIER) that she is only a contingent
5 income beneficiary of the TRUST. Now the 2013 DECLARATORY JUDGMENT PETITION
6 seeks in part a determination that ELEANOR, both individually and as Trustee of the TRUST, “[i]s
7 only entitled to a 35% proportion of all real property located in Upton County, Texas,
8 including the income generated from gas, oil, and mineral leases relating to such Upton
9 County, Texas real property...” The 2013 DECLARATORY JUDGMENT PETITION further
10 seeks in part a determination that Petitioner JACQUELINE M. MONTOYA and KATHRYN A.
11 BOUVIER or a Trust that they are beneficiaries of are entitled to 65% proportion of all real
12 property located in Upton County, Texas, including the income generated from gas, oil, and mineral
13 leases relating to such Upton County, Texas real property. This is completely contrary to and
14 contradictory of the statements and representations contained in the 2009 PETITION and the
15 Consents of Petitioner JACQUELINE M. MONTOYA and KATHRYN A. BOUVIER. For
16 example, how could Petitioner JACQUELINE M. MONTOYA only be a contingent income
17 beneficiary and ELEANOR be entitled to all of the income for her life as Petitioner JACQUELINE
18 M. MONTOYA consented to and affirmatively asserted in the 2009 PETITION, but now in the
19 2013 DECLARATORY JUDGMENT PETITION claim ELEANOR is only entitled to thirty-five
20 percent (35%) of the income? It is important to note that the claim of Petitioner JACQUELINE M.
21 MONTOYA in the 2013 DECLARATORY JUDGMENT PETITION, that ELEANOR is only
22 entitled to thirty-five percent (35%) of the income and Petitioner JACQUELINE M. MONTOYA
23 and her sister (or a trust of which they are beneficiaries thereof) are entitled to the sixty-five percent
24 (65%) interest in the Oil Assets, is based on her allegation that such right of Petitioner
25 JACQUELINE M. MONTOYA and her sister (or a trust of which they are beneficiaries thereof) is
26 the result of a power of appointment exercised in the Last Will and Testament of MARJORIE T.
27 CONNELL. The date of death of MARJORIE T. CONNELL was May 1, 2009. A copy of the
28 Death Certificate of MARJORIE T. CONNELL is attached hereto as **Exhibit J** and by this
reference incorporated herein. The first case (2009 PETITION) was not filed until August 17,

1 2009, subsequent to the death of MARJORIE T. CONNELL. Petitioner JACQUELINE M.
2 MONTOYA became the successor trustee of THE MTC LIVING TRUST immediately upon the
3 death of MARJORIE T. CONNELL. Therefore, this claim of Petitioner JACQUELINE M.
4 MONTOYA, individually and as Trustee of THE MTC LIVING TRUST, as set forth in the 2013
5 case was fully vested and in existence at the time of the 2009 case.

6 Also as noted above, Paragraph 18 of the 2009 PETITION stated:

7 “18. As of the death of MARJORIE, Trust No. 2 owned land and oil and gas shares in
8 reserves and income located in Upton County, Texas (the ‘Oil Assets’). **The Oil Assets**
9 **have not been valued for some time, but are estimated to be worth approximately**
10 **\$700,000.**”

11 In fact Petitioner JACQUELINE M. MONTOYA had an appraisal done of such “oil assets”
12 in 2009. This appraisal included all of the Texas oil rights, not just a thirty-five percent (35%)
13 interest. The appraisal set a valuation of \$716,190.00.

14 **C. Petitioner JACQUELINE M. MONTOYA’s PETITION Must Be Denied Because Her**
15 **Petition Fails To Make A Provision For A Bond.**

16 According to Rule 65(c) of the Nevada Rules of Civil Procedure, Petitioner JACQUELINE
17 M. MONTOYA must provide a bond in order to obtain a preliminary injunction. In particular,
18 NRCF 65(c) states:

19 “(c) **Security.** No restraining order or preliminary injunction shall issue except upon the
20 giving of security by the applicant, in such sum as the court deems proper, for the payment
21 of such costs and damages as may be incurred or suffered by any party who is found to have
22 been wrongfully enjoined or restrained. No such security shall be required of the State or of
23 an officer or agency thereof.”

24 Nowhere in her pleadings does Petitioner JACQUELINE M. MONTOYA mention the
25 provision of a bond. A bond is especially important in this case where it is possible, in all
26 likelihood, that any distribution to Petitioner JACQUELINE M. MONTOYA and her sister will be
27 spent and become irrecoverable. Given her statements in her PETITION that she detrimentally
28 relied on ELEANOR’s purported promise to pay her sixty-five percent (65%) of the Upton County,
Texas, Oil right income and her changed spending habits, it is very likely that Petitioner
JACQUELINE M. MONTOYA has somehow spent her entire inheritance from MARJORIE T.

1 CONNELL and the 2012 lease bonus received from Apache Corporation. Thus, in only four (4)
2 years Petitioner JACQUELINE M. MONTOYA has spent approximately Two Million Three
3 Hundred Two Thousand Five Hundred Dollars (\$2,302,500.00). These excessive spending habits
4 will likely result in the immediate consumption of any distribution made to Petitioner
5 JACQUELINE M. MONTOYA; therefore, a bond in a significant amount is necessary for the
6 payment of costs and damages as may be incurred or suffered by ELEANOR in the event she is
7 successful in the pending lawsuit. Without a significant bond being required, there is very little, if
8 any, chance of ELEANOR being able to "clawback" the funds distributed to Petitioner
9 JACQUELINE M. MONTOYA and her sister during the pendency of this action.

10 It should also be noted that Petitioner's Addendum goes back to July of 2013 in seeking
11 release of sixty-five percent (65%) of the royalties. The original Petition to compel distribution of
12 Petitioner was not filed until December 3, 2013. Also the hearing in which the Court directed that
13 ELEANOR as Trustee of the TRUST retain sixty-five percent (65%) of the royalties and rent did
14 not take place until November 12, 2013. The Order was dated December 20, 2013 and was filed
15 January 6, 2014. The Order provided in relevant part:

16 "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that ELEANOR C. AHERN
17 as beneficiary shall be entitled to thirty-five percent (35%) of such oil, gas, mineral and
18 interest royalties and surface rent and the remaining sixty-five percent (65%) of such oil,
19 gas, mineral and interest royalties and surface rent shall be held in the Trust by ELEANOR
20 C. HARTMAN, also known as ELEANOR C. AHERN, as Trustee, until final resolution of
21 this matter."

22 A copy of the Order Denying Motion To Refer Contested Probate Matter To Master-Probate
23 Commissioner Per EDCR 4.16; Directing Payment Of All Oil, Gas, Mineral And Interest Royalties
24 And Rent To Eleanor C. Hartman, Also Known As Eleanor C. Ahern, As Trustee Of Trust No. 2 Of
25 The W.N. Connell And Marjorie T. Connell Living Trust Dated May 18, 1972; And Setting
26 Calendar Call And Hearing is attached hereto as **Exhibit K** and incorporated herein by this
27 reference. Accordingly, the only applicable funds per the prior Order would be those occurring after
28 the date of the hearing on November 12, 2013. In reality, there was no distribution of royalties from
the date of the filing of this action by Petitioner on September 27, 2013 until shortly after February
18, 2014 as a result of the actions of Petitioner JACQUELINE M. MONTOYA in contacting the oil

1 companies and surface tenant via letters dated September 30, 2013 noted herein. The amount of
2 royalties received in February of 2014 was six hundred sixty-four thousand five hundred twenty
3 four and 20/100 dollars (\$664,524.20), of which sixty-five percent (65%) thereof or four hundred
4 thirty-one thousand nine hundred forty and 73/100 dollars (\$431,940.73) has been retained in a
5 Trust savings account per the Order.

6 Further, the TRUST has on-going administrative expenses, taxes and debt, including but not
7 limited to Texas ad valorem and property taxes, assessments, insurance, income taxes, and
8 professional fees including accountant and attorney fees. Due to the actions of Petitioner
9 JACQUELINE M. MONTOYA in contacting the oil companies and obtaining the suspension of the
10 royalties, it was necessary for the TRUST to borrow monies to pay the Texas ad valorem taxes due
11 in January. Petitioner JACQUELINE M. MONTOYA has failed to mention such TRUST
12 administrative expenses, taxes and debt in her pleadings despite the same being raised with her legal
13 counsel, and presumably takes the position that there should be no holdback or retention for the
14 share of such administrative expenses, taxes and debt.

15 **D. Petitioner JACQUELINE M. MONTOYA's PETITION Must Be Denied Due To The**
16 **Fact That She Makes Her Claim With Unclean Hands.**

17 The unclean hands doctrine "bars a party from receiving equitable relief because of that
18 party's own inequitable conduct." *Las Vegas Fetish & Fantasy Halloween Ball, Inc., v. Ahern*
19 *Rentals, Inc.*, 124 Nev. 272, 275 (2008) (citing to *Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*,
20 2002 F.3d 223, 228 (4th Cir. 2000). "The unclean hands doctrine precludes a party from attaining
21 an equitable remedy when that party's 'connection with the subject-matter or transaction in
22 litigation has been unconscientious, unjust, or marked by the want of good faith.'" *Id.* (citing to
23 *Income Investors v. Shelton*, 3 Wash.2d 599, 101 P.2d 973, 974 (1940)). An intentional tortfeasor
24 cannot obtain equitable relief because she, by definition, request such relief with unclean hands. *Id.*
25 (citing to *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 610 (2000)). Equitable relief will be
26 barred under the doctrine of unclean hands when "(1) the egregiousness of the misconduct at issue
27 and (2) the seriousness of the harm caused by the conduct" weigh against granting such equitable
28 relief. *Id.* at 276.

Here, Petitioner JACQUELINE M. MONTOYA has unclean hands in light of the following.

1 First, she, through her Texas legal counsel, sent demand letters and subsequent emails to the surface
2 tenant and oil companies concerning the Upton County, Texas, Oil rights, and demanded that they
3 withhold all royalty and rent payments to the TRUST notwithstanding the fact that the ownership of
4 only sixty-five percent (65%) of such rights are in dispute. Second, JACQUELINE M. MONTOYA
5 forged, or caused to be forged, ELEANOR's signature of on signature cards relating to
6 ELEANOR's personal bank accounts. Third, JACQUELINE M. MONTOYA attempted to probate
7 MARJORIE T. CONNELL's Last Will and Testament in Texas, without giving ELEANOR notice
8 of the same, and in doing so, JACQUELINE M. MONTOYA knowingly made blatant
9 misrepresentations to the Texas Probate Court.

10 **Demand Letters and Subsequent Emails of Texas Legal Counsel of Petitioner JACQUELINE
M. MONTOYA**

11 As discussed at length during the November 12, 2013 hearing in this matter, Texas legal
12 counsel for Petitioner JACQUELINE M. MONTOYA sent demand letters and emails to the surface
13 tenant and the oil companies informing them of this Nevada case and demanding that not only the
14 disputed sixty-five percent (65%) of royalties and rent be withheld, but all of the royalties and rent
15 be withheld including the thirty-five percent (35%) to which there is no dispute that ELEANOR is
16 entitled to. Petitioner JACQUELINE M. MONTOYA's Nevada legal counsel attempted to classify
17 these letters and emails as mere notices, not demands, at the November 12, 2013 hearing. An
18 examination of these correspondences reveals without question these were demands, not notices.

19 On September 30, 2013, only three (3) days after Petitioner JACQUELINE M. MONTOYA
20 filed her 2013 DECLARATORY JUDGMENT PETITION herein, Sean Guerrero, attorney at law,
21 of the Stubbeman, McRae, Sealy, Laughlin & Browder, Inc. Law Firm in Midland, Texas identified
22 himself as writing on behalf of his client, Petitioner JACQUELINE M. MONTOYA, and wrote:

23 **"I write on behalf of our client, Jacqueline M. Montoya,** individually and in her capacity
24 as trustee of the MCT (sic) Living Trust, Plaintiff in *Cause No. P-09-066425-T; In the*
25 *Matter of the W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972.* The
26 lawsuit referenced concerns oil and gas royalty and interest payments in the W. N. Connell
27 and Marjorie T. Connell Living Trust, Eleanor Ahern, Trustee. I enclose a copy of the filed
petition and confirmation of filing for your reference. We will follow up with a file-marked
copy of the petition once we have received it.

28 Due to the dispute regarding the distribution of payments, a portion of which had been made

1 by your company, we request that [Apache Corporation] [Plains Marketing, L.P.] [Drag
2 A Cattle Company] hold in suspense all payment to the W. N. Connell and Marjorie T.
3 Connell Living Trust until this lawsuit has been resolved. We request that you take
4 action immediately so that no further payments are distributed until this suit is
5 resolved. Please let me know if you have any question. We appreciate your cooperation
6 and look forward to working with you.”

7 Also, on October 10, 2013, Sean Guerrero wrote to Apache and stated, “[i]f you will
8 confirm when Apache places the royalty payments in to suspense, I would appreciate it.”

9 Again on November 14, 2013, Sean Guerrero wrote to Andy Taylor of Apache and said the
10 following:

11 “We have undertaken the lawsuit in Nevada to re-establish our client’s rights to 65%
12 distribution of the Trust and ultimately force Ms. Ahern out as Trustee...

13 ...Short of a court order, I do not see who (sic) you can legally and arbitrarily allocate 35%
14 of royalty payments to the Trustee of a trust and withhold 65% from the beneficiaries.
15 Apache would be wise to await a court order on the subject rather than taking the
16 word of Ms. Ahern’s attorney....

17 We have a complicated suit regarding the Trust distribution pending, and we will have a
18 second suit regarding Ms. Ahern’s misappropriation of Trust assets filed in short order. As a
19 result, we renew our request that Apache continue to hold all interest payments to the
20 Trust in suspense....” (emphasis added)

21 Clearly, these correspondences demand that all payments to the TRUST cease. These
22 correspondences are outrageous. They were intended by Petitioner JACQUELINE M. MONTOYA
23 to unnecessarily harm ELEANOR by preventing her from receiving her undisputed thirty-five
24 percent (35%) of the royalties and rent. This action on the part of Petitioner JACQUELINE M.
25 MONTOYA gives rise to actions against her by ELEANOR for, among other causes of action,
26 intentional interference with contractual relations – a tort. Accordingly, Petitioner JACQUELINE
27 M. MONTOYA is an “intentional tortfeasor” and by definition has unclean hands.

28 **Closing of Trust Bank Account and Forged Signatures on Replacement Account**

Without ELEANOR’s consent, Petitioner JACQUELINE M. MONTOYA closed the bank
account for the TRUST, which was established by MARJORIE T. CONNELL and ELEANOR to
receive the royalty payments from the Upton County, Texas, Oil rights. In its place, Petitioner
JACQUELINE M. MONTOYA opened an account on which Petitioner JACQUELINE M.
MONTOYA was the Customer. And upon looking into this matter further and hiring a handwriting

1 expert, ELEANOR discovered that Petitioner JACQUELINE M. MONTOYA forged, or caused to
2 be forged, ELEANOR's signature for this account. These actions on the part of Petitioner
3 JACQUELINE M. MONTOYA constitute inequitable conduct and bar her present claim.

4 **Texas Probate of the Marjorie T. Connell Estate**

5 On July 12, 2012, Petitioner JACQUELINE M. MONTOYA as Applicant filed an
6 Application for Original Probate of Foreign Will and Issuance of Letters of Independent
7 Administration (the "Texas Application") in the Estate Of MARJORIE T. CONNELL, Deceased, in
8 the County Court of Upton County, Texas, No. 1207-U1836-PRO. Petitioner JACQUELINE M.
9 MONTOYA's Nevada legal counsel attempted to classify this proceeding as a necessary ancillary
10 administration because of the Upton County, Texas, Oil rights at the November 12, 2013 hearing. It
11 is undisputed that at the time of her death, the Upton County, Texas, Oil rights were not titled in the
12 name of MARJORIE T. CONNELL but were titled in the name of the TRUST and that MARJORIE
13 T. CONNELL was a resident of Clark County, Nevada. Further, the TRUST is governed by
14 Nevada law. Accordingly, no ancillary Texas probate administration of the MARJORIE T.
15 CONNELL Estate was necessary. However, Petitioner JACQUELINE M. MONTOYA claims that
16 MARJORIE T. CONNELL exercised a testamentary power of appointment in her Last Will And
17 Testament appointing Trust No. 3 to THE MTC LIVING TRUST, of which Petitioner
18 JACQUELINE M. MONTOYA is the sole trustee and of which Petitioner JACQUELINE M.
19 MONTOYA and her sister are the sole beneficiaries. The Texas probate proceeding was in fact an
20 effort by Petitioner JACQUELINE M. MONTOYA to have the Last Will And Testament admitted
21 to probate and the time pass for challenging the validity of the terms of the Will, all unbeknownst to
22 ELEANOR. This is evidenced by the fact that the Texas Application of Petitioner JACQUELINE
M. MONTOYA contains several falsehoods, including but not limited to the following:

23 "3. **Decedent** [MARJORIE T. CONNELL] **owned oil, gas and mineral interests located**
24 **in Upton County, Texas**, of a probable value in excess of \$100,000.00."

25 "5. To Applicant's [JACQUELINE M. MONTOYA] knowledge, Decedent was married
26 one time only, such marriage being to W. N. Connell, who predeceased her. She was not
27 divorced after the making of her Will. **No child was ever** born to or **adopted by the**
28 **Decedent** [MARJORIE T. CONNELL]."

1 Applicant-Petitioner JACQUELINE M. MONTOYA has personal knowledge of, and has
2 known for years, that her mother, ELEANOR, was the adopted child of Decedent MARJORIE T.
3 CONNELL. In fact Petitioner JACQUELINE M. MONTOYA in Paragraph 1 of the Application
4 states she [JACQUELINE M. MONTOYA] “[is] a granddaughter of the Decedent ...” The only
5 way that Petitioner JACQUELINE M. MONTOYA could be the granddaughter of Decedent
6 MARJORIE T. CONNELL is if ELEANOR is the child of the Decedent MARJORIE T.
7 CONNELL.

8 Petitioner JACQUELINE M. MONTOYA also references THE MTC LIVING TRUST in
9 Paragraphs 11, 12 and 13 of the Texas Application. In particular, JACQUELINE M. MONTOYA
10 states in relevant part in Paragraph 13 of the Texas Application as follows:

11 “JACQUELINE M. MONTOYA is the current trustee of THE MTC LIVING TRUST, and
12 Kathryn Anne Bouvier is the successor trustee.”

13 Article Two, *Family Information*, of THE MTC LIVING TRUST states as follows:

14 **“I have one child ELEANOR C. HARTMAN AHERN, born on May 13, 1938.”**
15 (emphasis added)

16 Petitioner JACQUELINE M. MONTOYA as trustee of THE MTC LIVING TRUST
17 obviously knows the terms and provisions of THE MTC LIVING TRUST, including the fact that
18 ELEANOR is the child of Decedent MARJORIE T. CONNELL as stated and set forth therein. It is
19 self-evident that this blatantly false allegation that no child was ever adopted by Decedent
20 MARJORIE T. CONNELL contained in her Texas Application was an attempt by Petitioner
21 JACQUELINE M. MONTOYA to avoid having to give ELEANOR notice of the Texas
22 MARJORIE T. CONNELL Estate proceedings and an opportunity to object to the Last Will And
23 Testament of MARJORIE T. CONNELL under which the testamentary power of appointment of
24 Trust No. 3 to THE MTC LIVING TRUST was purportedly exercised, all as part of the plan of
25 Petitioner JACQUELINE M. MONTOYA to deprive ELEANOR of sixty-five percent (65%) of the
26 income from the Upton County, Texas Oil interests to the benefit of Petitioner JACQUELINE M.
27 MONTOYA and her sister. Again, this action on the part of Petitioner JACQUELINE M.
28

1 MONTOYA constitutes "inequitable conduct," "marked by want of good faith," and result in
2 Petitioner JACQUELINE M. MONTOYA having unclean hands.

3 **Balancing Test**

4 As noted above, when determining whether a claim should be barred by the doctrine of
5 unclean hands, the egregiousness of the misconduct and the seriousness of the harm must weigh
6 against granting the equitable relief sought. In this case, the egregiousness of Petitioner
7 JACQUELINE M. MONOTOYA's misconduct and the seriousness of the harm caused thereby are
8 self-evident. In terms of the egregiousness of her misconduct, what can be more egregious than
9 making outright misrepresentations to the surface tenant, the oil companies and the Texas probate
10 court? And what can be more egregious than committing forgery or causing a forgery to be
11 committed?

12 In terms of the seriousness of the harm caused to ELEANOR by Petitioner JACQUELINE
13 M. MONOTOYA's actions, ELEANOR was required to employ legal counsel in both Texas and
14 Nevada to defend herself against JACQUELINE M. MONTOYA's actions. Further, as a result of
15 JACQUELINE M. MONTOYA's misrepresentations to the surface tenant and oil companies in
16 Upton County, Texas, the oil companies continue to withhold royalty payments otherwise payable
17 to ELEANOR as trustee of the TRUST. Such royalty payments were held in suspense and when
18 they were finally paid to ELEANOR's, the payments did not include interest for the period the
19 funds are withheld. Accordingly, not only has the TRUST suffered monetary damages as a result of
20 not receiving its scheduled Upton County, Texas, Oil right payments, it will never be made whole.
21 The legal fees incurred by ELEANOR as trustee of the TRUST and the opportunity costs incurred
22 by the TRUST amount to a serious harm.

23 The tortuous and likely criminal conduct engaged in by Petitioner JACQUELINE M.
24 MONTOYA and the harm caused thereby, weigh against granting any equitable relief sought by
25 JACQUELINE M. MONTOYA. This Court of equity should not reward Petitioner JACQUELINE
26 M. MONTOYA's unconscientious, unjust, and inequitable conduct.

27 **E. Detrimental Reliance/Promissory Estoppel Is Not Applicable To ELEANOR.**

28 Petitioner JACQUELINE M. MONTOYA claims to have detrimentally relied on
ELEANOR's purported "promise" to pay Petitioner JACQUELINE M. MONTOYA approximately

1 one-third (1/3rd) of the income from the Upton County, Texas, Oil rights. Petitioner
2 JACQUELINE M. MONTOYA claims to have quit her job, a job in which she was earning “over
3 \$100,000 annually,” and “drastically altered [her] economic habits” in reliance on ELEANOR’s
4 supposed promise. ELEANOR categorically denies that she ever promised to pay Petitioner
5 JACQUELINE M. MONTOYA (or her sister) approximately one-third (1/3rd) of the income from
6 the Upton County, Texas, Oil rights in perpetuity or that she discussed with Petitioner
7 JACQUELINE M. MONTOYA her quitting her job.

8 “The doctrine of promissory estoppel, which embraces the concept of detrimental reliance,
9 is intended as a substitute for consideration, and not as a substitute for an agreement between the
10 parties.” *Vancheri v. GNLV Corp.*, 105 Nev. 417, 421 (1989) (citing *Kruse v. Bank of America*, 202
11 Cal.App.3d 38, 248 Cal.Rptr. 217 (1988). “Accordingly, the first prerequisite of the agreement is a
12 promise.” *Id.* (citing *Irwin Concrete, Inc. v. Sun Coast Properties, Inc.*, 33 Wash.App. 190, 653,
13 653 P.2d 1331, 1337 (1982). Under section 90 of the Second Restatement of Contracts, [a] promise
14 which the promisor should reasonably expect to induce action or forbearance on the part of the
15 promisee or a third person and which does induce such action or forbearance is binding if injustice
16 can be avoided only by enforcement of the promise.”

17 Detrimental reliance and promissory estoppel are contract related terms used only to
18 overcome the lack of a valid contract for want of consideration, but consideration is only one
19 element of contract formation. For a valid contract, there must also be a promise or an offer and
20 acceptance. JACQUELINE M. MONTOYA claims that “[w]hen the income from the leases started
21 to increase dramatically over the recent years, Jacqueline specifically asked Ms. Ahern if she
22 thought the oil, gas, and mineral income would continue to remain at high levels. Ms. Ahern
23 assured her it would and specifically encouraged Jacqueline to quit her job and become a stay-at-
24 home mother for her boys. To her detriment, Jacqueline relied on Ms. Ahern’s representations and
25 quit her job.” Even for the sake of argument, if this could be construed as an offer and acceptance,
26 the statute of frauds would surely prevent enforcement of this purported “agreement.” The statute
27 of frauds requires certain contracts to be in writing and these contracts include those for a
28 conveyance of an interest in land (See NRS 111.210(1)) and those that cannot be performed within
one year (See NRS 111.220(1)). Accordingly, payment of the royalties and rent to Petitioner

1 JACQUELINE M. MONTOYA, KATHRYN A. BOUVIER and/or THE MTC LIVING TRUST in
2 perpetuity would violate the statute of frauds. Note, JACQUELINE M. MONTOYA's
3 representation of ELEANOR's so-called "promise", as quoted above, is unlikely to be considered a
4 promise or offer in any event. Within this quote, there is no communication on the part of
5 ELEANOR of an offer and there were no definite and/or certain terms.

6 Petitioner JACQUELINE M. MONTOYA also argues that she should be entitled to a sixty-
7 five percent (65%) distribution of the royalties and rent because this has been the "course of
8 performance." Essentially, Petitioner JACQUELINE M. MONTOYA contends that the course of
9 dealing has created a contractual obligation on the part of ELEANOR. However, this position is
10 contrary to the law governing contracts. Quite simply "[c]ourse of dealing does not create a
11 contract." *Keith Equip. Co. v. Casa Grande Cotton Fin. Co.*, 928 P.2d 683, 686 (Ariz. App. 2d Div.
12 1996). As noted above, based on continuing discovery herein it appears that upon the death of
13 MARJORIE T. CONNELL in 2009, Petitioner JACQUELINE M. MONTOYA assumed complete
14 control of the TRUST and the distributions of the royalties and rent therefrom. ELEANOR was
15 denied access to the records and funds of the TRUST by Petitioner JACQUELINE M. MONTOYA
16 from the date of death of MARJORIE T. CONNELL in 2009 until approximately the Spring of
17 2012, when ELEANOR finally began to obtain access to the TRUST records and funds and began
18 to piece together what had been occurring. Accordingly, the constant mantra of a "course of
19 dealing for approximately 33-34 years" by Petitioner JACQUELINE M. MONTOYA does not hold
up upon further discovery and examination of the facts.

20 Additionally, Petitioner JACQUELINE M. MONTOYA fails to point out that she and her
21 sister, KATHRYN A. BOUVIER, as equal beneficiaries of THE MTC LIVING TRUST have
22 received the total, combined sum of Four Million Six Hundred and Five Thousand Dollars
23 (\$4,605,000.00) since 2009 (Three Million Five Hundred Thousand Dollars (\$3,500,000.00) upon
24 the death of MARJORIE T. CONNELL in 2009 and One Million One Hundred Five Thousand
25 Dollars (\$1,105,000.00) lease bonus in 2012). Petitioner JACQUELINE M. MONTOYA's share
26 and her sister's share as equal beneficiaries of THE MTC LIVING TRUST would be Two Million
27 Three Hundred Two Thousand Five Hundred Dollars (\$2,302,500.00) each. Thus, it is hard to
28 believe that they have suffered any detriment.

1 **F. The Doctrine Of Laches Cannot Be Applied Against ELEANOR; However, The**
2 **Doctrine Of Laches Can Be Applied Against JACQUELINE M. MONTOYA.**

3 “Laches is an equitable doctrine invoked when delay by one party works to the disadvantage
4 of the other, causing a change of circumstances which would make the grant of relief to the
5 delaying party inequitable.” *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610-11,
6 836 P.2d 633,636-37 (1992). “Laches is more than a mere delay in seeking to enforce one’s rights;
7 it is a delay that works to the disadvantage of another.” *Carson City v. Price*, 113 Nev. 409, 412,
8 934 P.2d 1042, 1043 (1997) citing *Home Savings v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85, 86
9 (1989). “The condition of the party asserting laches must become so changed that the party cannot
be restored to its former state.” *Id.*, 779 P.2d at 86.

10 In her pleadings, Petitioner JACQUELINE M. MONTOYA asserts that even if “there was
11 an error in the allocation,” “[Ms. Ahern] was obligated to make this assertion approximately 33
12 years ago.” This argument misses the point. There was no allocation and ELEANOR is entitled to
13 all of the Upton County, Texas Oil right income and therefore, there was no “assertion” for her to
14 make. To the contrary, because there was no allocation and because ELEANOR is entitled to all of
15 the Upton County, Texas, Oil right income, it was MARJORIE T. CONNELL and thereafter
16 Petitioner JACQUELINE M. MONTOYA who were required to assert a right to sixty-five percent
17 (65%) of the Upton County, Texas, Oil right income.

18 Following the death of W.N. CONNELL and the alleged allocation of sixty-five percent
19 (65%) of the Upton County, Texas, Oil rights to Trust No. 3, MARJORIE T. CONNELL was a
20 Trustee of the TRUST; therefore, she was aware that there had been no deed or other document of
21 conveyance created and/or recorded to transfer sixty-five percent (65%) of the Upton County,
22 Texas, Oil rights to Trust No. 3. Furthermore, until her death, MARJORIE T. CONNELL
23 acquiesced to the oil companies paying all of the Upton County, Texas, Oil right income to Trust
24 No. 2, and never made a claim to reallocate such payments so that sixty-five percent (65%) would
be remitted to Trust No. 3.

25 Moreover, despite her knowledge of there being two trusts and her belief that she, as Trustee
26 of THE MTC LIVING TRUST, was entitled to sixty-five percent (65%) of the Upton County,
27 Texas, Oil rights, Petitioner JACQUELINE M. MONTOYA failed to assert a timely claim to such
28 rights. It is clear from the 2009 Petition and Consent of Petitioner JACQUELINE M. MONTOYA

1 that Petitioner JACQUELINE M. MONTOYA was aware that there are two trusts, to-wit: Trust No.
2 2 and Trust No. 3. Despite this, however, Petitioner JACQUELINE M. MONTOYA failed to bring
3 a claim back in 2009 to the disputed interest when the Probate Court took jurisdiction over the
4 TRUST and reformed the same.

5 Again, in April 2012, Petitioner JACQUELINE M. MONTOYA negotiated new Oil and Gas
6 Lease contracts with Apache Corporation relative to the Upton County, Texas, Oil rights and never
7 made a claim to the Upton County, Texas, Oil rights. In fact, once these Oil and Gas Lease
8 contracts were prepared, JACQUELINE M. MONTOYA presented the same to ELEANOR for her
9 approval and signature. ELEANOR signed both Oil and Gas Lease contracts “[i]**ndividually and**
10 **as Trustee of the W.N. Connell and Marjorie T. Connell Living Trust under Trust Agreement**
11 **dated May 18, 1972**” (emphasis added) and as sole lessor. Because these Oil and Gas Lease
12 contracts were executed approximately three (3) years after MARJORIE T. CONNELL’s death and
13 the exercise of her power of appointment over Trust No. 3, JACQUELINE M. MONTOYA would
14 have been *required* to sign the Oil and Gas Lease contracts as sole Successor Trustee of THE MTC
15 LIVING TRUST and co-lessor (assuming there had been an allocation of sixty-five percent (65%)
16 of the Upton County, Texas, Oil rights to Trust No. 3). This never happened and Petitioner
17 JACQUELINE M. MONTOYA failed to make a claim to such rights in 2012.

18 Now, approximately thirty-four (34) years after the death of W.N. CONNELL and nearly
19 four (4) years after the death of MARJORIE T. CONNELL, JACQUELINE M. MONTOYA seeks
20 to change the manner in which title is held to the Upton County, Texas, Oil rights. Given Petitioner
21 JACQUELINE M. MONTOYA’s extensive involvement with the Upton County, Texas, Oil rights
22 dating back before MARJORIE T. CONNELL’s death, JACQUELINE M. MONTOYA could have
23 and should have brought her claim much earlier – specifically, before MARJORIE T. CONNELL’s
24 death and thereafter in the 2009 case.

25 As Petitioner JACQUELINE M. MONTOYA has aptly pointed out in her pleadings,
26 MARJORIE T. CONNELL was a material witness, as she was the surviving Trustor and a Co-
27 Trustee; however, she is now deceased. If MARJORIE T. CONNELL was available, she could
28 testify to the fact that there was never an allocation of the Upton County, Texas, Oil rights to Trust
No. 3, and this was done intentionally to preserve W.N. CONNELL’s sole and separate property for

1 his only daughter (ELEANOR). However, because Petitioner JACQUELINE M. MONTOYA
2 delayed the assertion of her claim for so long, ELEANOR is now disadvantaged. The only person
3 alive who could have testified in ELEANOR's favor is now gone. For these reasons, this Court
4 should apply the doctrine of laches against Petitioner JACQUELINE M. MONTOYA.

5 III. CONCLUSION

6 In summary, this Court should again deny JACQUELINE M. MONTOYA's request for a
7 preliminary injunction because she has failed to carry her burden of satisfy the standard for a
8 preliminary injunction. Petitioner JACQUELINE M. MONTOYA has failed to show that
9 irreparable harm will result if an injunction is not issued; Petitioner JACQUELINE M. MONTOYA
10 has failed to show that compensatory damages are not an adequate remedy even if there was such
11 irreparable harm; Petitioner JACQUELINE M. MONTOYA has failed to show reasonable
12 probability of success in the action, and Petitioner JACQUELINE M. MONTOYA has unclean
13 hands. Also, Petitioner JACQUELINE M. MONTOYA has failed to justify the lack of necessity
14 for a bond, which Rule 65(c) of the Nevada Rules of Civil Procedure requires for preliminary
15 injunctions. In particular, Petitioner JACQUELINE M. MONTOYA is unable to prove that there
16 was ever an allocation of sixty-five percent (65%) of the Upton County, Texas, Oil rights to Trust
17 No. 3. This can be proved by simply providing a deed or other document of conveyance; however,
18 JACQUELINE M. MONTOYA is unable to do so. Furthermore, detrimental reliance-promissory
19 estoppel is not applicable in this case. Also this Court should apply the doctrine of laches against
20 Petitioner JACQUELINE M. MONTOYA as a result of her undue delay in asserting her claim to
21 sixty-five percent (65%) of the Upton County, Texas, Oil rights.

22 In essence, a comparison of the pleadings of Petitioner herein reveals that the only fact that
23 has changed since the denial of Petitioner's first Petition is the continuance of the trial. Again, **the**
24 **continuance of the trial herein has no legal effect on whether the Petitioner has met her**
25 **burden of proof in satisfying the mandatory requirements for the injunctive relief which she is**
26 **seeking.** This Court previously denied the Petition, and in particular found that compensatory
27 damages is an adequate remedy herein as noted above. Accordingly, the granting of the renewed
28 Petition of Petitioner would be directly contradictory to the prior Order of this Court and arguably
constitute reversible error.

1 WHEREFORE, ELEANOR C. AHERN, a/k/a ELEANOR CONNELL HARTMAN
2 AHERN, as Trustee of THE W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST
3 dated May 18, 1972, prays as follows:

- 4 1. For this Court to deny Petitioner JACQUELINE M. MONTOYA's Petition And
5 Addendum To Petition To Compel Trustee To Distribute Accrued Income And Future
6 Income Received From Oil, Gas, And Mineral Leases, which Petition in reality is a
7 request for preliminary injunction;
8 2. For this Court to deny Petitioner JACQUELINE M. MONTOYA's request to apply the
9 doctrine of laches against ELEANOR;
10 3. For this Court to apply the doctrine of laches against Petitioner JACQUELINE M.
11 MONTOYA, and
12 4. For any other relief as this Court deems appropriate.

13 DATED: March____, 2014.

14 JEFFREY BURR, LTD.

15 
16 By: _____

17 JOHN R. MUGAN, ESQUIRE

18 Nevada Bar No. 10690

19 MICHAEL D. LUM, ESQUIRE

20 Nevada Bar No. 12997

21 2600 Paseo Verde Parkway, Suite 200

22 Henderson, Nevada 89074

23 Attorneys for Trustee ELEANOR CONNELL
24 HARTMAN AHERN
25
26
27
28

VERIFICATION

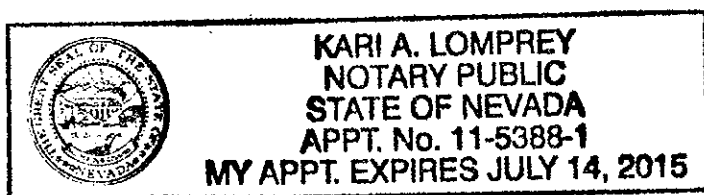
1 STATE OF NEVADA)
2 COUNTY OF CLARK): ss
)

3 ELEANOR CONNELL HARTMAN AHERN, as Trustee of THE W. N. CONNELL AND
4 MARJORIE T. CONNELL LIVING TRUST dated May 18, 1972, being first duly sworn, deposes
5 and says: That I am the Defendant herein; that I have read the above and foregoing Objection to
6 Jacqueline M. Montoya's Petition and Addendum to Petition to Compel Trustee To Distribute
7 Accrued Income and Future Income Received From Oil, Gas, and Mineral Leases and Declaration
8 of the Applicability of the Doctrine of Laches, that the same is true of my own knowledge, except
9 for matters therein stated on information and belief, and as for those matters, I believe it to be true.

10
11 
ELEANOR CONNELL HARTMAN AHERN
12 

12 SUBSCRIBED and SWORN to before me
13 this 13 day of March, 2014.

14 
15 NOTARY PUBLIC



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